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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF

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POTTER ANDERSON & CORROON LLP

Somers S. Price, Jr.
DSBA #279
1313 North Market Street, 6th Floor
Wilmington, Delaware 19899
Telephone: (302) 984-6000

ATTORNEYS FOR APPELLEES

Andrea E. Neuman
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-3883

William E. Thomson
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000

OF COUNSEL FOR APPELLEES

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NATURE OF PROCEEDINGS

This is the Answering Brief of Defendants-Appellees Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit & Steamship Company (collectively, "Dole") in response to Plaintiffs' appeal of the Order of the Superior Court of the State of Delaware in and for New Castle County ("Superior Court") dated November 8, 2013 granting Dole's Motion to Dismiss.

On May 31, 2011, Plaintiffs filed suit against Dole and others in the United States District Court for the Eastern District of Louisiana (the "Louisiana Action"), alleging injuries from exposure to 1, 2, dibromo 3, chloropropane ("DBCP") while working on banana growing plantations in Costa Rica, Ecuador, and Panama. *Chaverri v. Dole Food Co.*, 2013 WL 5977413, at *1 (Del. Super. Nov. 8, 2013).

On June 1, 2012, Plaintiffs filed the instant action in the Superior Court, alleging identical claims against identical defendants (the "Delaware Action"). *Id.*

On August 2, 2012, Dole filed a Rule 12(b) Motion to Dismiss the Delaware Action. *Id.* Dole argued that the Delaware Action should be dismissed on the basis of *forum non conveniens* because the Delaware Action was identical to the Louisiana Action, "which was filed first, vigorously pursued, and litigated to conclusion by Plaintiffs." *Id.* Plaintiffs opposed the Motion. *Id.* Before the Superior Court could rule, the Delaware Action was temporarily stayed. *Id.* By the time the stay was lifted, the Louisiana Action had been dismissed with prejudice by the

Louisiana District Court, and the dismissal had been affirmed by the United States Court of Appeals for the Fifth Circuit. *Id.*

On November 8, 2013, the Superior Court issued an Order granting Dole's Motion to Dismiss. *Id.* In sum, the Superior Court held that the case should be dismissed under the *forum non conveniens* doctrine embodied in *McWane v. McDowell*, 263 A.2d 281 (Del. 1970) ("the *McWane* doctrine"). *See id.* The Superior Court explained that "Plaintiffs' allegations were vigorously pursued and litigated to conclusion in the Louisiana District Court, even [though] Plaintiffs filed the Delaware Action. Should the matter be allowed to proceed in Delaware, there is the 'possibility of inconsistent and conflicting rulings and judgments.'" *Id.* at *2. Further, the court concluded that "allowing the Delaware Action to proceed under the circumstances presented here would result in wasteful duplication of time, effort and expense." *Id.* Plaintiffs appealed.

SUMMARY OF ARGUMENT

1, 3, 11. The Superior Court's Order dismissing Plaintiffs' action should be affirmed. The Superior Court acted well within its discretion when it dismissed the instant action under the *McWane* doctrine.[1] Under *McWane*, trial-level courts have discretion to stay or dismiss later-filed, duplicative actions involving the same parties and the same issues. 263 A.2d at 283. Here, the Superior Court correctly applied the *McWane* doctrine to the undisputed facts of record. There is no dispute that Plaintiffs filed identical claims against the same defendants in the Louisiana Action one year before filing the Delaware Action. Br. at 2. There is also no dispute that after Plaintiffs filed suit here, the Louisiana District Court dismissed Plaintiffs' claims as time-barred and entered final judgment, which judgment was affirmed on appeal. *Chaverri v. Dole Food Co.*, 896 F. Supp. 2d 556 (E.D. La. 2012), *aff'd* 2013 WL 5274446 (5th Cir. Sept. 19, 2013). Thus, the "first-filed comity doctrine embodied" in *McWane* squarely applied, and "[t]he policies of judicial economy and the avoidance of conflicting judgments [that] constitute the pillars of this comity principle" warranted dismissal of Plaintiffs' duplicative claims. *Kaufman v. Kumar,* 2007 WL 1765617, at *1-2 (Del. Ch. June 8, 2007).

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[1] For the Court's convenience and to avoid unnecessary duplication, Dole has grouped together related paragraphs of Plaintiffs-Appellants' Summary of Argument.

2, 5, 6. Plaintiffs have failed to identify any factual or legal error that would justify reversal for abuse of discretion. Plaintiffs argue that *McWane* does not apply where both actions are not simultaneously pending, but this Court has expressly held otherwise. *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1048 (Del. 2010). Plaintiffs also argue that *McWane* should not apply where both actions are filed by the same plaintiff, but they fail to identify a single case articulating such limitation. If anything, the justification for invoking the *McWane* doctrine applies is even greater where the same party files a duplicative second action. Moreover, the *McWane* doctrine "favors strong deference to a plaintiff's *initial choice* of forum." *Id.* at 1047 (emphasis added). Here, the Superior Court deferred to Plaintiffs' initial choice of forum: Louisiana. Finally, Plaintiffs argue that the Superior Court should have considered whether Delaware is a more "appropriate" forum, but the filing of a duplicative action in a second forum to evade an unfavorable judgment in the first forum is not "appropriate." Plaintiffs made the decision to file the Louisiana Action first and to continue actively litigating the Louisiana Action to conclusion even after filing the Delaware Action. It is far too late in the day for Plaintiffs to claim that litigating their claims in Delaware would have been more "appropriate."

4. The Superior Court did not abuse its discretion in deciding to dismiss the action below. This Court has repeatedly held that "where the Delaware action is

not the first filed," the *McWane* doctrine requires a court "freely to exercise its discretion in favor of staying *or dismissing* the Delaware Action." *E.g.*, *Lisa*, 993 A.2d at 1047 (emphases in original). Here, the Superior Court concluded that dismissal would best serve the purposes of *McWane*. That conclusion was reasonable. Because the Louisiana Action was no longer pending, there was no practical reason to stay the Delaware Action. Moreover, allowing the Delaware Action to proceed would result in "the 'possibility of inconsistent and conflicting rulings and judgments'" and "a wasteful duplication of time, effort and expense" which are the very outcomes the *McWane* doctrine seeks to prevent. *Id.* (quoting *McWane*, 263 A.2d at 283).

8, 9. The Superior Court did not misinterpret *Lisa*. In *Lisa*, this Court affirmed the Court of Chancery's dismissal of the plaintiff's complaint under the *McWane* doctrine *even though no action was pending at the time*: "To allow *Lisa* to proceed with this Delaware action after the dismissal with prejudice of the predicate Florida action, would ignore the binding effect of the Florida adjudication, and create the possibility of inconsistent and conflicting rulings. That is precisely the outcome *McWane*'s doctrine of comity seeks to prevent." *Id.* at 1048. This Court applied the *McWane* doctrine even though the first-filed action did not involve identical parties or identical claims, because, like here, "[b]oth actions arose out of a 'common nucleus of operative facts.'" *See id.* Once the first-filed case

was dismissed, there was no basis to allow the duplicative Delaware suit to proceed. *Id.* at 1048. Here, the actions are identical—there is no question that *McWane* applies. As the Superior Court explained, "the two cases not only arise from the same nucleus of facts, but they have identical parties and allegations." *Chaverri*, 2013 WL 5977413, at *2.

7. Because the Louisiana Action was dismissed with prejudice, *Chaverri*, 896 F. Supp. 2d 556, *aff'd* 2013 WL 5274446, the action below is now barred by *res judicata*. *E.g.*, *Pyott v. Louisiana Mun. Police Employees' Retirement System*, 74 A.3d 612, 616 (Del. 2013) (Delaware courts are "required to give a judgment [from another jurisdiction] the same force and effect that it would be given by the rendering court") (internal quotations omitted); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1046 (5th Cir. 1989) (finding that a "dismissal with prejudice of [the plaintiff's] diversity action by the Louisiana federal district court has res judicata effect on [the plaintiff's] duplicative diversity action in Mississippi federal district court"); *Bernard v. Parish*, 2008 WL 2859243, at *5 (E.D. La. July 22, 2008) ("Both the Fifth Circuit and Louisiana courts have held that 'dismissal based on a plea of prescription is a final judgment [on the merits] for purposes of *res judicata*.'"). Therefore, this Court may affirm the decision below on the alternative ground that Plaintiffs' claims are barred by *res judicata*.

10. This Court's decision in *Dow Chem. Corp. v. Blanco*, 67 A.3d 392 (Del. 2013) is irrelevant, because in *Blanco* this Court merely held that Delaware "recognize[s] the concept of cross-jurisdictional tolling," which is not at issue here. *Id.* at 399; *see also Chaverri*, 2013 WL 5977413, at *2. This Court did not "affirm[] the Superior Court's denial of a motion to dismiss Blanco's claim," and did not "stress[] that state policy favors resolution of claims on the merits." Br. at 5. Moreover, while Blanco may have "participated in numerous lawsuits before coming to Delaware," unlike Plaintiffs, no case was pending when he filed suit in Delaware, and no final judgment with prejudice had ever been entered against him.

STATEMENT OF FACTS

Plaintiffs are 30 Central American agricultural workers. *Chaverri*, 2013 5977413, at *1. They allege that they were injured as a result of exposure to DBCP while working on banana farms in their respective home countries. *Id.* Defendants are Plaintiffs' alleged former employers.[2] Plaintiffs' alleged exposure began as early as the 1960s and ended no later than the early 1990s. B-40-B-49. More than 20 years have passed between Plaintiffs' last alleged exposure to DBCP and the filing of their duplicative action below.[3] *See id.*

I. 2011: The Louisiana Action

On May 31-June 2, 2011, seven actions were filed in the Eastern District of Louisiana on behalf of 260 DBCP plaintiffs—including the 30 Plaintiffs here. A-050. The seven actions were later consolidated (the "Louisiana Action"). Plaintiffs alleged causes of action for Negligence, Strict Liability, Breach of Implied Warranty, Conspiracy, Participation and Assistance, and Medical Monitoring. *Chaverri*, 2013 WL 5977413, at *1. Even though Plaintiffs conceded their purported exposure ended decades earlier, Plaintiffs alleged that the statute of limita-

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[2] The other defendants named in the case below along with Dole—Amvac Chemical Corp.; Del Monte Fresh Produce N.A., Inc.; Chiquita Brands International, Inc.; Chiquita Brands, Inc.; Maritrop Trading Corporation; The Dow Chemical Company; Occidental Chemical Corporation; and Shell Oil Company—are not named in this appeal.

[3] Plaintiffs were members of a putative class action that was filed in 1993. *Chaverri*, 896 F. Supp. 2d at 560. However, class certification was denied, and that action was dismissed, in 1995. *Id.* at 561.

tions was tolled from 1993, when the putative Texas class action was filed, until June 3, 2010, when the Texas state court denied class certification, rendering their June 1 and 2, 2011 claims timely. *See Chaverri*, 896 F. Supp. at 561-562 (detailing procedural history of Texas putative class action).

On April 6, 2012, Dole filed a Motion for Summary Judgment, in which all defendants joined. A-050. In the motion, Dole argued that Plaintiffs' claims were time-barred on the face of the complaint pursuant to Louisiana's one-year statute of limitations. B-82. Dole disputed Plaintiffs' 17-year tolling theory on several separate and independent grounds, including that any tolling ended when the first class certification motion was denied in 1995 and that the post-1995 appellate proceedings did not extend class action tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). B-82-B-84.

On September 17, 2012, after full briefing and oral argument, the Louisiana district court granted Dole's motion. *Chaverri*, 896 F. Supp. 2d at 558-59. The district court first found that "all Plaintiffs' claims are clearly beyond the one-year prescriptive period . . . and, therefore, are prescribed on their face. Thus, Plaintiffs must demonstrate that the prescriptive period was either interrupted or suspended in order to survive summary judgment." *Id.* at 567-68. The district court assumed, for purposes of argument, that Louisiana would recognize the interruption of prescription by a class action filed in another jurisdiction (Texas state court), but con-

cluded that, under applicable Louisiana law, prescription begins to run again when class certification is denied or final judgment is entered.[4] *Id.* at 568-69. Thus, the district court held that the prescriptive period resumed in 1995 when the Texas court denied class certification and entered final judgment, making Plaintiffs' claims "approximately fifteen years too late." *Id.* at 569. Further, the district court noted that even if interruption had continued through the appellate process, which it did not, Plaintiffs' claims were still time-barred because the Supreme Court denied certiorari in 2001. *Id.* at 572. As a result, the district court entered final judgment dismissing Plaintiffs' claims against all defendants with prejudice. *Id.* at 574.

On October 5, 2012, Plaintiffs filed a Notice of Appeal to the Fifth Circuit. Plaintiffs then actively pursued their appeal. On January 7, 2013, Plaintiffs filed their opening brief. Plaintiffs reiterated their failed timeliness argument and added new arguments that the judgment below was barred by issue preclusion and the *Rooker-Feldman* doctrine. *Chaverri*, 2013 WL 5274446, at *2. After full briefing, oral argument took place on September 4, 2013.

On September 19, 2013, the Fifth Circuit issued a per curium opinion affirming the district court's "well-reasoned opinion." *Id.* at *1. The Fifth Circuit

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[4] The Louisiana Supreme Court later confirmed that Louisiana does not recognize cross-jurisdictional interruption of prescription. *Quinn v. Louisiana Citizens Property Ins. Corp.*, 118 So. 3d 1011 (La. 2012).

held that Plaintiffs "presented no facts relevant to any statute or case law to support that prescription was interrupted for a sufficient period of time," (*i.e.*, through June 2010) and that neither issue preclusion nor the *Rooker-Feldman* doctrine applied. *Id.* at *1-*2. Plaintiffs did not petition for writ of certiorari with the Supreme Court, and the time to do so has now lapsed. Therefore, the Louisiana district court's summary judgment is, in every sense, final.

II. 2012: The Delaware Actions

Between May 31 and June 1, 2012, while Dole's Motion for Summary Judgment was pending in the Louisiana Action, Plaintiffs' counsel filed nine actions in Delaware—eight actions in the United States District Court for the District of Delaware, and the instant action—on behalf of 2,960 plaintiffs alleging injuries from exposure to DBCP. A-017-A-018.

A. The Instant Action

On June 1, 2012, the 30 Plaintiffs here—who had previously filed in the Louisiana Action—filed the action below. *Chaverri*, 2013 WL 5977413, at *1. Plaintiffs do not dispute that the action below is identical to the Louisiana Action. Br. at 1. Three days later, on June 4, 2012, Plaintiffs' counsel sent a letter to the Honorable Carl Barbier, the United States District Judge to which the Louisiana Action was assigned, recognizing the bar against pursuing "duplicate cases in different federal judicial districts," but requesting the court's "indulgence over the

next several months." B-77. Plaintiffs did not request a stay or dismissal of the Louisiana Action. *See id.* Plaintiffs' counsel explained that in another DBCP case pending in Delaware state court (*Jose Rufino Canales Blanco v. AMVAC Chemical Corp., et al.,* Del. Super., Case No. N11C-07-149 ALR) filed on behalf of a single Costa Rican plaintiff with a DBCP exposure claim, the defendants in that action (also defendants here) filed a motion for judgment on the pleadings that raised the same statute of limitations issues under Delaware law as Dole's motion for summary judgment on prescription, and that on May 31, 2012, the judge in that action issued a letter notifying the parties of the court's intention to deny the motion based on its finding that the plaintiff's case was not barred by Delaware's statute of limitations. B-79. Plaintiffs' counsel further explained that "Plaintiffs . . . believed it was imperative to take steps to protect and preserve their claims that are subject to Dole's summary judgment on Prescription in Louisiana by also filing their cases in Delaware." B-76.

Plaintiffs' counsel made clear his strategy of filing the Delaware Actions to backstop a potential loss in the Louisiana Action:

> If the La. Supreme Court rules that the Plaintiffs cases are not Prescribed, the Plaintiffs would elect to proceed in Louisiana because the Prescription issue would have been conclusively determined. **But if this Court and the Louisiana Supreme Court determine that the**

cases are in fact Prescribed, then Plaintiffs can continue to pursue the merits of their claims in Delaware.

Id. (emphasis added).

On August 2, 2012, Dole moved to dismiss the instant action based on the *McWane* doctrine, which motion the other defendants joined. *Chaverri*, 2013 5977413, at *1. Dole argued that the *McWane* doctrine applied because "the instant complaint [was] identical to the Louisiana Action, which was filed first, vigorously pursued, and litigated to conclusion by Plaintiffs." *Id.* at 2. Plaintiffs opposed the motion. *Id.* Before the Superior Court heard the Motion to Dismiss, it stayed the Delaware Action while an interlocutory appeal was presented to this Court in *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013). *Chaverri*, 2013 5977413, at *1. While *Dow Chemical Corp. v. Blanco* was pending before this Court, the Louisiana federal court dismissed the Louisiana Action with prejudice based on prescription. *Id.* After this Court answered the certified question in *Dow Chemical Corp. v. Blanco*, the Superior Court lifted the stay in the instant action, and a hearing was scheduled on the pending motion to dismiss. *Id.* At that point, the United States Court of Appeals for the Fifth Circuit affirmed the dismissal of the Louisiana Action. *Id.*

On November 8, 2013, after full briefing and a lengthy oral argument by the parties, the Superior Court granted Dole's motion to dismiss. *Chaverri*, 2013

5977413, at *2. The Superior Court explained that "Plaintiffs' allegations were vigorously pursued and litigated to conclusion in the Louisiana District Court, even [though] Plaintiffs filed the Delaware Action. Should the matter be allowed to proceed in Delaware, there is the 'possibility of inconsistent and conflicting rulings and judgments."' *Id.* Further, the Superior Court concluded that "allowing the Delaware Action to proceed under the circumstances . . . would result in wasteful duplication of time, effort and expense." *Id.*

B. The Duplicative Delaware Federal Court Actions

The same day Plaintiffs filed the action below, Plaintiffs' counsel filed six actions in the District of Delaware on behalf of the other 230 plaintiffs who had previously filed in the Louisiana Action (the "Delaware Federal Actions"). A-051.

On June 21, 2012, Dole filed a motion to dismiss the actions based on the federal first-filed rule, which defendant AMVAC joined. *Chavez v. Dole Food Co., Inc.*, 2012 WL 3600307, at *1 (D. Del. Aug. 21, 2012). On August 21, 2012, while the motion for summary judgment was still pending in the Louisiana Action, the District Court granted Dole's motion to dismiss the later-filed Delaware Federal Actions based on the first-filed rule. *Id.* The District Court held the first-filed rule clearly applied, and "[t]hus, the issue [wa]s whether to stay or to dismiss." *Id.* at *2. The District Court explained that "[u]nlike the usual case in which the first-filed rule is an issue, it is an issue in this case entirely because of the Plaintiffs'

choices," and that "there [was] no allegation that the Plaintiffs [would] not get an entirely fair hearing in the venue they chose." *Id.* Thus, the District Court held that dismissal was the appropriate remedy, explaining: "Plaintiffs filed in Delaware notwithstanding their choice to file first in Louisiana. Decisions have consequences; one fair bite at the apple is sufficient." *Id.* The District Court later granted motions to dismiss based on the first-filed rule by the remaining defendants. *Chavez v. Dole Food Co.*, 2013 WL 5288165, at *2 (D. Del. Sept. 19, 2013). Although final judgment had been entered in the Louisiana Action by that time, the district court noted that "the case [was] on appeal" and "the litigation remain[ed] pending so long as the appellate process continue[d]." *Id.*

C. The Non-Duplicative Delaware Federal Court Actions

Plaintiffs' counsel also filed two actions in the District of Delaware on behalf of 2,700 individuals who had not previously filed in the Louisiana Action. *See Marquinez v. Dole Food Co.*, 2014 WL 2197621, at *1 (D. Del. May 27, 2014). The plaintiffs asserted their claims were timely under Delaware's two-year statute of limitations based on the same tolling theory that was rejected in the Louisiana Action—that the statute of limitations was tolled from 1993, when a putative Texas class action was filed, until June 3, 2010, when the Texas state court denied class certification. *Id.* at *1-*2.

Dole moved for summary judgment on the basis that any tolling ended when the first class certification motion in the putative Texas class action was denied in 1995, and that in any event plaintiffs had not pleaded sufficient facts to show they could not have discovered their injuries between the time of their exposure and the filing of the putative class action in 1993. *Id.* at *2-*5. On May 27, 2014, the Delaware District Court granted Dole's motion for summary judgment, finding any tolling based on the Texas putative class action ended in 1995, and thus the plaintiffs' claims were time-barred. *Id.* at *4.

ARGUMENT

The Superior Court's Order dismissing the action below should be affirmed. There is no dispute that Plaintiffs filed identical claims against the same defendants in the Louisiana Action one year before filing the Delaware Action. Br. at 2. There is also no dispute that after Plaintiffs filed suit here, the Louisiana District Court dismissed Plaintiffs' claims as time-barred and entered final judgment, which judgment was affirmed on appeal. *Chaverri*, 896 F. Supp. 2d 556, *aff'd* 2013 WL 5274446. Thus, the "first-filed comity doctrine embodied" in *McWane* squarely applied, and "[t]he policies of judicial economy and the avoidance of conflicting judgments [that] constitute the pillars of this comity principle" warranted dismissal of the action below. *Kaufman,* 2007 WL 1765617, at *1-2.

Alternatively, dismissal was warranted because the action below is now barred by *res judicata*. The Louisiana District Court dismissed the Louisiana Action with prejudice, and the Fifth Circuit affirmed on appeal. *Chaverri*, 896 F. Supp. 2d 556, *aff'd* 2013 WL 5274446. Delaware courts are required to give that judgment "the same force and effect that it would be given by the rendering court," *Pyott v. Louisiana Mun. Police Employees' Retirement System*, 74 A.3d 612, 616 (Del. 2013), and under both Louisiana and federal law, Plaintiffs are bound by that judgment, *e.g.*, *Steve D. Thompson Trucking, Inc.* v. *Dorsey Trailers, Inc.*, 870 F.2d 1044, 1046 (5th Cir. 1989) (finding that a "dismissal with prejudice of [the

plaintiff's] diversity action by the Louisiana federal district court has res judicata effect on [the plaintiff's] duplicative diversity action in Mississippi federal district court"); *Bernard v. Parish*, 2008 WL 2859243, at *5 (E.D. La. July 22, 2008) ("Both the Fifth Circuit and Louisiana courts have held that 'dismissal based on a plea of prescription is a final judgment [on the merits] for purposes of *res judicata*.'"). Therefore, this Court may affirm the decision below on the separate and alternative ground that Plaintiffs' claims are barred by *res judicata*.

I. The Superior Court Did Not Abuse Its Discretion In Dismissing Plaintiffs' Action Based On The *McWane* Doctrine

A. Question Presented

Whether the Superior Court abused its broad discretion in dismissing Plaintiffs' duplicative, later-filed actions based on Delaware's first-filed rule as embodied in the *McWane* doctrine.

B. Standard And Scope Of Review

Orders staying or dismissing an action based on the *McWane* doctrine are reviewed for abuse of discretion. *McWane*, 263 A.2d at 283. "Where a court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused; for the question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind . . . could reasonably have reached the conclusion of which complaint is made." *Pitts v. White*, 109 A.2d 786, 788 (Del. 1956).

C. Merits Of Argument

The Superior Court did not abuse its discretion in dismissing the action below based on the *McWane* doctrine. Under the *McWane* doctrine, Delaware courts may dismiss or stay a later-filed action where (1) there is a prior action, (2) involving the same parties and issues, and (3) the court in that action is capable of doing prompt and complete justice. 263 A.2d at 283; *see also Lisa, S.A. v.*

Mayorga, 993 A.2d 1042, 1047 (Del. 2010) ("[W]here the Delaware action is not the first filed, the policy that favors strong deference to a plaintiff's initial choice of forum requires the court freely to exercise its discretion in favor of staying or dismissing the Delaware action (the '*McWane* doctrine')."). Each of these conditions was present here. Indeed, Plaintiffs concede they filed the duplicative action below even while the Louisiana Action was pending. Br. at 1. While Plaintiffs argue that the Superior Court should have stayed the action below, rather than dismiss it, Plaintiffs have failed to identify any factual or legal error that would justify reversing the Superior Court's decision for abuse of discretion.

The Superior Court's decision was not only right on the law, but was the only result consistent with the policies behind the *McWane* doctrine. The doctrine exists to avoid "wasteful duplication of time, effort, and expense," and to "avoid[] the possibility of inconsistent and conflicting rulings and judgments." *McWane*, 263 A.2d at 283; *see also Lisa*, 933 A.2d at 1048 ("[T]he possibility of inconsistent and conflicting rulings . . . is precisely the outcome *McWane*'s doctrine of comity seeks to prevent."); *Ison v. E.I. DuPont de Nemours & Co.*, 729 A.2d 832, 845 (Del. 1999) ("As in *McWane Cast Iron Pipe*, courts are more likely to dismiss a cause of action based on FNC if other jurisdictions are hearing a similar case, because it would be a waste of judicial resources to prosecute the same action multiple times."). Allowing Plaintiffs to pursue and actively litigate identical claims in

Delaware after having had the opportunity to fully litigate their claims in the Louisiana Action would defeat these goals and unfairly expose Dole to the costs and burden of defending against these stale claims a second time.

1. The *McWane* Doctrine Clearly Applied

The *McWane* doctrine squarely applied here. Plaintiffs cannot—and do not—dispute that: (1) they filed the Louisiana Action first; (2) the Louisiana Action involved the same parties and issues; and (3) the Louisiana federal court was capable of doing prompt and complete justice and, in fact, rendered prompt and complete justice by entering a final judgment that was affirmed on appeal. *Chaverri*, 896 F. Supp. 2d 556, *aff'd* 2013 WL 5274446. Instead, Plaintiffs argue that the Superior Court erred by applying *McWane* because the duplicative Louisiana Action was no longer pending (Br. at 12), the Superior Court did not consider whether litigation was appropriate in Delaware (*id.* at 16-17), and applying *McWane* defeated Plaintiffs' choice of forum (*id.* at 17-18). None of these arguments has any support in Delaware law.

(i) The *McWane* Doctrine Applies Even When The Duplicative Actions Are No Longer Simultaneously Pending

Plaintiffs' argument that the *McWane* doctrine did not apply because the two actions were no longer simultaneously pending is meritless. Br. at 12. As the Superior Court correctly held, dismissal was still appropriate because allowing Plain-

tiffs' duplicative Delaware Action to proceed would create "the 'possibility of inconsistent and conflicting rulings and judgments[]'" and "would result in wasteful duplication of time, effort and expense." *Chaverri*, 2013 5977413, at *2. Indeed, this Court has expressly held that the *McWane* doctrine applies even where the prior action is no longer pending. *Lisa*, 993 A.2d at 1048 ("That the 1998 Florida Action is no longer pending does not change the outcome, even though language in *McWane* speaks in terms of a 'prior action pending in another jurisdiction.'"). As this Court made clear in *Lisa*: "Allowing [Plaintiffs] to proceed with this Delaware action after the dismissal with prejudice of the [prior duplicative] action, would ignore the binding effect of the [prior] adjudication, and create the possibility of inconsistent and conflicting rulings. That is precisely the outcome *McWane*'s doctrine of comity seeks to prevent." *Id.*[5]

(ii) Whether A First-Filed Case In Delaware Would Be "Appropriate" Is Irrelevant

It is irrelevant under *McWane* whether, as Plaintiffs claim, "litigation is appropriate in Delaware." Br. at 16. Plaintiffs could have filed first in Delaware if they thought litigating here was more "appropriate." Instead, they filed first in

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[5] *Ison v. E.I. DuPont de Nemours & Co.*, 729 A.2d 832 (Del. 1999) is inapposite. Br. at 13. Unlike here, the plaintiffs in *Ison* had not filed and actively litigated a prior duplicative action that was still pending when they filed in Delaware, and they were not bound by a final judgment on the same claims. *See id.* at 845. Indeed, *Ison* cuts against Plaintiffs. There, this Court explained "courts are more likely to dismiss a cause of action" under *McWane* "because it would be a waste of judicial resources to prosecute the same action multiple times." *Id.*

Louisiana. And when Plaintiffs filed the duplicative Delaware Action, they did not inform the Louisiana federal court that they were dismissing or even seeking to stay the Louisiana Action because it was more "appropriate" to litigate their claims in Delaware. Rather, Plaintiffs informed the Louisiana District Court that they intended to continue prosecuting the Louisiana Action, even as they pursued duplicative claims in the Delaware Action, but admitted that if the Louisiana District Court denied Dole's motion for summary judgment, they would elect to proceed in Louisiana rather than Delaware. B-76. Indeed, even after the Louisiana District Court granted Dole's motion for summary judgment and entered final judgment, Plaintiffs filed a notice of appeal and actively litigated that appeal, rather than abandon their claims in a forum they now claim was inappropriate. Plaintiffs' transparent forum shopping is not a reason to depart from the *McWane* doctrine but to apply it. *See Lisa*, 993 A.2d at 1047. Filing a duplicative claim in a second forum solely to evade an unfavorable judgment in the first forum is never "appropriate." *Id.*

(iii) *McWane* Applies Even When Both Actions Are Filed By The Same Party

Finally, Plaintiffs' argument that the Superior Court's decision "turned the purposes of the *McWane* doctrine on their head" by "defeat[ing] Plaintiffs' choice of forum" is unavailing. Br. at 17-18. As this Court has explained, the *McWane* doctrine "favors strong deference to a plaintiff's *initial choice of forum*." *Lisa*, 993

A.2d at 1047 (emphasis added). Plaintiffs chose to file first in Louisiana. That decision was theirs and theirs alone. When they made that decision, they chose their forum. The Superior Court did not defeat Plaintiffs' choice of forum; it honored it.

Declining to apply *McWane* would not honor Plaintiffs' choice of forum, but reward admitted forum shopping. Plaintiffs fail to cite a single case that permitted the plaintiff to file duplicative suits in multiple jurisdictions just because the plaintiff feared an adverse outcome in the initial forum of their choice. Indeed, permitting such duplicative filings would be inconsistent with the purposes of *McWane*. Duplicative litigation does not become any less wasteful or any less likely to result in conflicting judgments when the same party elects to file the duplicative action.

Plaintiffs chose to file first in Louisiana, and then chose to continue prosecuting their claims in Louisiana notwithstanding their choice to file identical claims in Delaware. The Superior Court correctly held that under *McWane*, Plaintiffs were stuck with their choice. *See Chaverri*, 2013 5977413, at *2.

2. The Superior Court Properly Exercised Its Discretion To Dismiss The Later-Filed, Duplicative Action Below

The Superior Court did not abuse its discretion in deciding to dismiss the action below. This Court has repeatedly held that "where the Delaware action is *not* the first filed," the *McWane* doctrine requires a court "freely to exercise its discretion in favor of staying *or dismissing* the Delaware Action." *Lisa*, 993 A.2d at 1047 (emphases in original); *Chadwick v. Metro Corp.*, 856 A.2d 1066 (Table),

2004 WL 1874652, at *2 (Del. Aug. 12, 2004) ("The *McWane* Doctrine permits a Delaware judge to *dismiss or stay* an action in favor of a first-filed action pending in another jurisdiction.") (emphasis in original). Here, the Superior Court reasonably concluded that dismissal was the only remedy that would serve the purposes of *McWane*. Because there was a final judgment in the Louisiana Action that had been affirmed on appeal, there was no reason to stay the Delaware Action, and allowing the Delaware Action to proceed would result in "the 'possibility of inconsistent and conflicting rulings and judgments'" and "a wasteful duplication of time, effort and expense," which are the very outcomes the *McWane* doctrine seeks to prevent. *Id.* (quoting *McWane*, 263 A.2d at 283).

Moreover, dismissing the duplicative Delaware Action did not "extinguish Plaintiffs' claims altogether," and Plaintiffs' right to recovery was not "uncertain." Br. at 14-15. The Louisiana District Court had already determined that Plaintiffs did not have a right to recover because their claims were time-barred, and that decision was affirmed on appeal. *Chaverri*, 2013 5977413, at *1. If Plaintiffs believed the Fifth Circuit's opinion was in error, their remedy was to petition for a writ of certiorari to the United States Supreme Court, which they declined to do.

Plaintiffs cannot establish that the Superior Court's decision was an abuse of discretion, because they cannot show that no reasonable mind would have reached the same conclusion. When faced with the same facts, the United States District

Court for the District of Delaware granted the defendants' motions to dismiss the duplicative Delaware Federal Actions. *Chavez*, 2013 WL 5288165, at *2. And in *Lisa*, this Court reached the same conclusion on similar facts. 993 A.2d at 1048.

Plaintiffs' attempt to distinguish *Lisa* fails. Br. at 23. In *Lisa*, this Court held that the first-filed action in that case "squarely implicated the *McWane* doctrine, because," like here, "it was filed in a jurisdictionally competent court and was 'functionally identical' to the later-filed Delaware action." 993 A.2d at 1048. This Court explained that the *McWane* doctrine applied, even though the prior action did not involve identical parties or identical claims, because "[b]oth actions arose out of a 'common nucleus of operative facts.'" *See id.* Once the first-filed case was dismissed with prejudice, there was no basis to allow the duplicative Delaware suit to proceed. *Id.* at 1048. Here, the reasons for dismissing the action below are even stronger than in *Lisa* because, as the Superior Court explained, "the two cases not only arise from the same nucleus of facts, but they have identical parties and allegations." *Chaverri*, 2013 5977413, at *1.[6]

Accordingly, the Superior Court acted well within its discretion to dismiss the instant action based on the *McWane* doctrine.

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[6] Plaintiffs' reliance on this Court's language in *Lisa* that the prior action was a "predicate" action is misplaced. Br. at 23. There, the two actions were not identical. Here, the two actions are identical.

3. The Delaware Supreme Court's Decision In *Blanco* Does Not Save Plaintiffs' Claims

Although this case was stayed pending the Delaware Supreme Court's decision in *Blanco,* that decision has no bearing on the outcome of Dole's motion to dismiss based on the *McWane* doctrine. *See Chaverri*, 2013 5977413, at *2. In *Blanco*, this Court held that Delaware "recognize[s] the concept of cross-jurisdictional tolling."[7] *Blanco,* 67 A.3d at 399. But Delaware's tolling rules are irrelevant here, and this Court need not reach the merits of whether Plaintiffs' claims are timely. The only issue before this Court is whether Plaintiffs should be allowed to pursue claims in Delaware that they first asserted in Louisiana, which have now been dismissed with prejudice and affirmed on appeal. As explained above, "if Plaintiffs 'had elected to do so, [they] could have filed suit in [Delaware] to begin with and thereby availed [themselves] of that state's longer prescription period'" like Blanco. *See Thompson Trucking, Inc.*, 870 F.2d at 1046. But Plaintiffs chose to file first in the Eastern District of Louisiana, where they pursued their claims to judgment, being dismissed with prejudice. Plaintiffs are

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[7] In limiting its decision to the certified legal issue, this Court declined to consider whether, on the facts before it, class action tolling saved the claims of the only plaintiff at issue in that case. *Blanco*, 67 A.3d at 393, 399. Moreover, the instant action involves 30 different plaintiffs with distinct procedural histories involving prior individual and duplicative DBCP actions filed in other jurisdictions and who never participated as named plaintiffs or otherwise in the putative Texas class action upon which they rely for tolling. A-047. Plaintiffs, therefore, have procedural histories that were never at issue in *Blanco*.

bound by that decision. *Id.* at 1046; *Lisa*, 993 A.2d at 1048 (finding plaintiff was bound by adjudication of first-filed case in Florida).

II. Alternatively, This Court Should Affirm The Superior Court's Dismissal Based On *Res Judicata*

A. Question Presented

Whether, in the alternative, this Court should affirm the Superior Court's dismissal of Plaintiffs' duplicative, later-filed actions based on *res judicata*.

B. Standard And Scope Of Review

Although the Superior Court dismissed Plaintiffs' claims based on the *McWane* doctrine, "this Court may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

C. Merits Of Argument

The doctrine of *res judicata* is a separate and independent ground that "bars a suit involving the same parties based on the same cause of action." *MG Bancorporation, Inc. v. Le Beau*, 737 A. 2d 513, 520 (Del. 2000). Here, it is clear that the doctrine of *res judicata* also would bar Plaintiffs' claims, and thus this Court may affirm the Superior Court's decision on that independent basis as well. *See, e.g.*, *Windom v. Ungerer*, 903 A.2d 276, 281 n.18 (Del. 2006) (affirming motion for summary judgment on different rationale than Superior Court).

1. A Dismissal Based On Prescription By The Louisiana District Court Has *Res Judicata* Effect In Delaware

Delaware courts are required to give foreign judgments "the same force and effect that [they] would be given by the rendering court." *Pyott v. Louisiana Mun. Police Employees' Retirement System*, 74 A.3d 612, 616 (Del. 2013). Here, a federal court sitting in diversity rendered the judgment. In *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the Supreme Court held that the preclusive effect of a judgment entered by a federal court sitting in diversity is governed by "the law that would be applied by state courts in the State in which the federal diversity court sits." *Id.* at 508. Thus, to determine the preclusive effect of the judgment in the Louisiana Action, this Court must look to Louisiana's rules of preclusion.

Louisiana's rules of preclusion incorporate federal law. "Louisiana courts 'have repeatedly confirmed that *federal law* is applicable to the consideration of whether a federal court judgment has *res judicata* effect.'" *Frank C. Minvielle LLC v. Atl. Ref. Co.*, 337 F. App'x 429, 434 (5th Cir. 2009) (emphasis added) (quoting *Jones v. GEO Grp., Inc.*, 6 So. 3d 1021, 1025 (La. Ct. App. 2009)(same)). *See also Fogleman v. Meaux Surface Prot., Inc.*, 58 So. 3d 1057, 1060 (La. Ct. App. 2011) ("Federal law is applicable when a determination is made of what *res judicata* effect, if any, a federal judgment has on a subsequent litigation."). Thus, regardless of whether this Court looks to "Louisiana law or federal law to provide

the rule of decision, the result is the same: federal *res judicata* law applies." *Frank C. Minvielle LLC*, 337 F. App'x at 434.

Under federal law, a dismissal on statute of limitations grounds is a decision on the merits that has *res judicata* effect. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995); *Elkadrawy v. Vanguard Grp., Inc.*, 584 F.3d 169, 173 (3d Cir. 2009); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003); *Wakefield v. Cordis Corp.*, 304 F. App'x 804, 806 (11th Cir. 2008); *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006); *Thompson Trucking*, 870 F.2d at 1046. Thus, the Louisiana District Court's dismissal of Plaintiffs' claims on prescription grounds is a decision on the merits that has *res judicata* effect on Plaintiffs' identical claims here.

Thompson Trucking is directly on point. There, after filing an action in federal district court in Louisiana, the plaintiff filed a duplicative action in federal district court in Mississippi. *Id.* at 1044. The defendants filed a motion for summary judgment in Louisiana based on Louisiana's prescription statute, which the Louisiana court granted and the Fifth Circuit affirmed. *Id.* at 1045. Defendants then moved to dismiss the later-filed Mississippi action based on the doctrine of *res judicata*. *Id.* Although the Mississippi district court denied the motion, the Fifth Circuit overturned, holding that the "dismissal with prejudice of [plaintiff's] diversity action by the Louisiana federal district court [on prescription grounds] has *res*

judicata effect on [plaintiff's] duplicative diversity action in Mississippi federal district court." 870 F.2d at 1045. This holding squarely applies here, and for good reason. As the Fifth Circuit put it, "[a]llowing plaintiffs who fail to comply with applicable statutes of limitations to move to the next state over would have the undesirable effect of encouraging forum shopping and rewarding dilatory conduct." *Id.* Having chosen to file and litigate first in Louisiana, Plaintiffs cannot evade the judgment in the Louisiana Action by seeking refuge in Delaware.

Accordingly, for this alternative reason, dismissal was appropriate.

2. Even If Louisiana Law Applied, Louisiana Law Also Affords *Res Judicata* Effect To A Final Judgment Based on Prescription

As shown above, Louisiana courts look to federal preclusion rules to determine the preclusive effect of a judgment by a Louisiana federal court. Even if Louisiana state law applied, however, Plaintiff's claims below would be precluded. *Bernard v. Parish*, 2008 WL 2859243, at *5 (E.D. La. July 22, 2008) ("Both the Fifth Circuit and Louisiana courts have held that 'dismissal based on a plea of prescription is a final judgment [on the merits] for purposes of *res judicata*.'").

Louisiana state law is clear that after a "valid and final judgment . . . in favor of the defendant . . . all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action of those causes of ac-

tion." LSA-R.S. 13:4231. Louisiana, in turn, considers dismissals based on prescription to be valid and final judgments that have *res judicata* effect. *Sours v. Kneipp*, 923 So. 2d 981, 983-84 (La. Ct. App. 2006) ("[A] judgment sustaining an exception of prescription is . . . a final judgment on the merits that terminates the action with prejudice."); *see also Denoux v. Vessel Management Serv., Inc.*, 983 So. 2d 84, 89 (La. 2008) (holding, under Louisiana law, that "once a cause of action is extinguished by prescription," a subsequent suit regarding that cause of action is barred); *Dantzler v. Pope*, 2009 WL 959505 (E.D. La. Apr. 3, 2009) ("By dismissing [Plaintiff's] claims for prescription, the state court entered a valid, final judgment with respect to these claims and, accordingly, such claims cannot be relitigated in this Court."). Therefore, even under Louisiana state law, *res judicata* bars Plaintiffs' duplicative claims.[8]

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[8] Plaintiffs fail to cite a single post-*Semtek* case applying Louisiana law or interpreting the effect of a decision of a federal district court in Louisiana. *See, e.g., Hartmann v. Time, Inc.* 166 F.2d 127 (3d Cir.1947), *cert. denied*, 334 U.S. 838 (1948) (Pennsylvania); *Bank of the United States v. Donnally*, 33 U.S. 361, 370 (1834) (Kentucky); *Reinke v. Boden*, 45 F.3d 166, 169-70 (7th Cir. 1995) (Minnesota); *Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 324–25 (5th Cir.), *reh'g denied*, 664 F.2d 291 (5th Cir.1981) (Georgia); *Hernandez Jimenez v. Calero Toledo*, 576 F.2d 402, 404 (1st Cir.1978) (Puerto Rico); *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 541 (2d Cir.1933), *cert. denied*, 291 U.S. 678 (1934) (Ohio). Moreover, while Plaintiffs note the traditional rule that judgments based on statutes of limitations are not ordinarily afforded *res judicata* effect (Br. at 20-21), Plaintiffs ignore that neither federal nor Louisiana law recognizes this rule.

CONCLUSION

For the foregoing reasons, Dole respectfully requests that this Court affirm the Superior Court's order dismissing Plaintiffs' claims.

Respectfully submitted,

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By: 

SOMERS S. PRICE, JR. (#279)
POTTER ANDERSON & CORROON LLP
1313 North Market Street, 6th Floor
Wilmington, Delaware 19899
Telephone: (302) 984-6000

Attorneys for Appellees Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit & Steamship Company

Andrea E. Neuman
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-3883

William E. Thomson
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000

Of Counsel for Appellees

101740386.9