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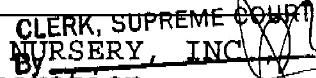

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IN THE SUPREME COURT OF FLORIDA
CASE NO. 95,411

FOLIAGE FOREST, INC., a Florida corporation,
Plaintiff/Appellant,
v.
E.I. DU PONT DE NEMOURS AND CO., a Delaware corporation, and CRAWFORD & COMPANY, a Georgia corporation,
Defendants/Appellees.

COUNTRY JOE'S NURSERY, INC., a Florida corporation,
Plaintiff/Appellant,
v.
E.I. DU PONT DE NEMOURS AND CO., a Delaware corporation, and CRAWFORD & COMPANY, a Georgia corporation,
Defendants/Appellees.

CASTLETON GARDENS, INC., a Florida corporation,
Plaintiff/Appellant,
v.
E.I. DU PONT DE NEMOURS AND CO., a Delaware corporation, and CRAWFORD & COMPANY, a Georgia corporation,
Defendants/Appellees.

PALM BEACH GREENERY, INC., a Florida corporation,
Plaintiff/Appellant,
v.
E.I. DU PONT DE NEMOURS AND CO., a Delaware corporation, and CRAWFORD & COMPANY, a Georgia corporation,
Defendants/Appellees.

MORNINGSTAR NURSERY, INC., a Florida corporation,
Plaintiff/Appellant,
v.
E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation, and CRAWFORD & COMPANY, a Georgia corporation,
Defendants/Appellees.

On Certified Questions from the United States Court of Appeals for the Eleventh Circuit

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CERTIFICATE OF TYPE SIZE AND STYLE

In compliance with Fla. R. App. P. 9.210(a)(2), this brief has been typed in twelve (12) point Courier, a font that is not proportionally spaced.

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STATEMENT OF THE CASE AND OF THE FACTS

I. Introduction

In the early 1990s, plaintiffs settled claims relating to Benlate, a DuPont fungicide, giving defendant DuPont comprehensive general releases in consideration for DuPont's payment of substantial sums to plaintiffs. Years later, having affirmed the settlements, having elected not to rescind, and having failed to tender back the settlement money, plaintiffs sued seeking damages for alleged fraudulent inducement to enter the settlements.

In these diversity cases, the United States District Court for the Southern District of Florida dismissed plaintiffs' complaints with prejudice, finding the damages claims barred by the unambiguous and comprehensive terms of the release in the affirmed settlement contracts. The district court also denied plaintiffs leave to amend to attempt to claim rescission, because plaintiffs already had elected to affirm the agreements and had not offered and still were not offering to return the settlement money.

On appeal, the United States Eleventh Circuit Court of Appeals certified the following questions to this Court:

> Does a choice-of-law provision in a settlement agreement control the disposition of a claim that the agreement was fraudulently procured, even if there is no allegation that the choice-of-law provision itself was fraudulently procured?
>
> Under Florida law, does the release in these settlement agreements bar plaintiffs' fraudulent inducement claims?

Foliage Forest, Inc. v. E.I. du Pont de Nemours and Co., 172 F.3d 1284, 1287 (11th Cir. 1999).

As demonstrated below, the answer to both of these questions is "yes." Florida regularly enforces choice-of-law clauses, and there is no Florida public policy justifying a disregard of this well-established rule here. Moreover, applying Florida law, the district court properly determined that plaintiffs' claims are barred by the releases, so the answer to the second question is also "yes."

II. Statement of Facts

A. Plaintiffs' initial Benlate claims

Plaintiffs (appellants) are commercial plant nurseries. (Complaints ¶ 2.[1]) Defendant E.I. du Pont de Nemours and Company ("DuPont") manufactures and sells fungicides utilized by commercial plant nurseries, and Defendant Crawford & Company investigated claims on DuPont's behalf related to Benlate 50 DF, a DuPont fungicide. (Id. ¶¶ 3-4.)

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[1] FF R1-1 Ex. A; CJN R2-1 Ex. A; CG R3-1 Ex. A; PBG R4-1 Ex. A; MN R5-1 Ex. A. The Complaints are Exhibit A to the Removal Petitions, which are found at Index Number 1. The underlined letters refer to the district court case: FF = Foliage Forest, Inc.; CJN = Country Joe's Nursery, Inc.; CG = Castleton Gardens, Inc.; PBG = Palm Beach Greenery, Inc.; MN = Morningstar Nursery, Inc.

The number after "R" refers to the volume number in the record on appeal. There is a separate volume for each district court case. The number after the hyphen refers to the index number for a document within the specified volume. Thus, the form of citation to the record is: [Case] R[Volume Number]-[Index Number]. In many instances, this is followed with a pinpoint cite within a document.

In the early 1990's, plaintiffs claimed that DuPont's Benlate had caused damage to their plants. (Id. ¶¶ 28-30.) Without any suit being brought, DuPont and plaintiffs entered into comprehensive settlements, described in the Complaints as a "full and complete settlement of [their] claim[s] against DuPont." (Id. ¶¶ 32-33.)

B. The settlements and plaintiffs' general releases

1. Country Joe's, Palm Beach and Morningstar

In late 1991 and early 1992, Plaintiffs Country Joe's Nursery, Inc. ("Country Joe's"), Palm Beach Greenery, Inc. ("Palm Beach") and Morningstar Farms, Inc. ("Morningstar") each executed a "General Release of All Claims." (Complaints ¶ 33: CJN R2-1 Ex. A; PBG R4-1 Ex. A; MN R5-1 Ex. A.) These releases provided that, in exchange for DuPont's payment of the settlement amount, plaintiffs agreed

> to release, acquit and forever discharge ... DuPont ... and all of its agents ... from any and all claims, actions, causes of action, including consequential damages, demands, rights, damages, costs, losses, and any other liability or expense of whatsoever kind, which the undersigned now has or may or shall have by reason of the use of or application of [Benlate] ....

(CJN R2-13 Ex. 1 at 1; PBG R4-1 Ex. A, Ex. A at 1; MN R5-1 Ex. A, Ex. A at 1.)[2] These releases do not contain choice-of-law provisions. (Id.)

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[2] These three releases contain limited exceptions not at issue in these appeals, for crops that had not been harvested at the time of settlement and for alleged damages caused by the residual presence of Benlate.

The settlement amounts received and retained by Country Joe's, Palm Beach, and Morningstar are, respectively, $30,104, $78,500, and $11,182,665. (Id. at 1.)

2. Foliage Forest and Castleton Gardens

On May 25, 1994, Plaintiffs Foliage Forest, Inc. ("Foliage Forest") and Castleton Gardens, Inc. ("Castleton Gardens") each settled with DuPont and executed a "Release, Indemnity and Assignment." (Complaints ¶ 33 & Ex. A to Complaints: FF R1-1 Ex. A; CG R3-1 Ex. A.) These releases provided that, in exchange for DuPont's payment of the settlement amount, each plaintiff released DuPont and its agents from

> any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Grower ever had, now has, or may hereafter have against DuPont, et al., by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed, including the claim presently being asserted.

(Id. Ex. A ¶ 1.) In further consideration of the settlement amount, these plaintiffs also promised, inter alia, not to commence any action against defendants "based upon or in any way related to" the released claims. (Id. ¶ 3.) The amounts paid by DuPont for these settlements are not in the record.

These releases contain the following choice-of-law clause:

> This Release shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof.

(Id. ¶ 14.)

C. <u>Plaintiffs did not elect to rescind or tender back the settlement money</u>

In other proceedings in the 1994-1996 period, subsequent to the settlements at issue here, other parties alleged that DuPont had fraudulently withheld evidence of certain scientific and testing information relating to Benlate. <u>See</u>, <u>e.g.</u>, <u>E.I. du Pont de Nemours and Co. v. Native Hammock Nursery, Inc.</u>, 698 So. 2d 267, 268 (Fla. 3d DCA 1997), <u>review denied</u>, 707 So. 2d 1126 (Fla. 1998). The plaintiffs in the instant cases decided to pursue damages claims on similar theories, notwithstanding their comprehensive settlement agreements. Plaintiffs did not, however, elect or in any way announce a purpose to rescind the settlements or deny the contract as binding upon learning the facts they allege. Nor did they tender back the settlement proceeds. Instead, they affirmed their settlements and sued DuPont and its alleged agent for fraud, claiming that if they had known certain facts, they would have recovered damages in excess of the amounts they received in settlement. (Complaints: <u>FF</u> R1-1 Ex. A; <u>CJN</u> R2-1 Ex. A; <u>CG</u> R3-1 Ex. A; <u>PBG</u> R4-1 Ex. A; <u>MN</u> R5-1 Ex. A.)

III. <u>Course of the Proceedings</u>

On December 31, 1996, in Florida state court, plaintiffs commenced their current actions for damages, based upon alleged fraudulent inducement of the settlements of their Benlate claims. In their Complaints, plaintiffs again assert that Benlate damaged their plants. (<u>Id.</u> ¶ 14.) The Complaints allege that, when plaintiffs previously asserted Benlate claims,

defendants fraudulently induced plaintiffs into settling their claims by stating that plaintiffs' damages were not caused by Benlate and by stating that testing showed that Benlate could not cause the problems plaintiffs were experiencing.[3] (Id. ¶¶ 30-40.) Based on these allegations, plaintiffs seek compensatory damages for the loss of plants and trees, for the increased cost of production, for costs of disposal and decontamination, and for goodwill. (Id. ¶ 41.) These are the same damages plaintiffs previously had claimed and settled. (Id. ¶ 28.)

The cases were removed to the United States District Court for the Southern District of Florida. (Removal petitions: FF R1-1; CJN R2-1; CG R3-1; PBG R4-1; MN R5-1.)

Defendants moved to dismiss the Complaints, based upon, among other things, the broad general releases in favor of defendants contained within the settlement agreements. (Motions to Dismiss and Supporting Briefs: FF R1-8, 9; CJN R2-11, 12; CG R3-7, 8; PBG R4-8, 9; MN R5-8, 9.)

On July 25, 1997, the District Court granted defendants' motions to dismiss the Complaints, finding that plaintiffs' damages claims were barred by their affirmed general releases. These orders, hereinafter "Orders of Dismissal," are at FF R1-30; CJN R2-33; CG R3-29; PBG R4-30; and MN R5-30. Judge Lenard found that plaintiffs had elected to stand on the settlement agreements. (Id. at 5-6.) Because plaintiffs had

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[3] Although defendants deny plaintiffs' allegations of wrongdoing, such assertions are accepted as true for purposes of this Court's resolution of the certified questions.

chosen to affirm the settlements, their damages claims remained subject to the broad general releases:

> [G]iven the Court's finding that the Plaintiff[s] elect[] to stand on the contract and to sue for damages sustained by virtue of Defendants' alleged tortious activity, Plaintiff[s] must also abide by the provisions of the agreement which release DuPont from [Plaintiffs'] claims against it, past and future. Simply stated, Plaintiff[s] ha[ve] taken two distinct remedies and attempted to obtain the benefits of both.

(Id. at 6.) Accordingly, plaintiffs' Complaints were dismissed. (Id.[4])

Plaintiffs moved for clarification and reconsideration of the orders of dismissal, and requested leave to file amended complaints. (Motions and Supporting Memoranda: FF R1-31; CJN R2-34; CG R3-30; PBG R4-31; MN R5-31.) Among other changes, the proposed amended complaints sought to add, for the first time, alternative claims for rescission of the general releases. (Id.) On September 19, 1997, the District Court granted plaintiffs' motions for clarification, denied the motions for reconsideration, and denied the motions to file amended complaints ("Orders Denying Reconsideration"). These orders are at FF R1-36; CJN R2-38; CG R3-36; PBG R4-36; and MN R5-36.

In these orders, the District Court reiterated its holding that plaintiffs "could not state a claim in tort" for fraudulent inducement, because "the settlement agreement[s]

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[4] The District Court did not address defendants' alternative arguments that plaintiffs could not show justifiable reliance upon Defendants' representations or that plaintiffs' fraud claims were barred by the economic loss rule. Defendants similarly do not address these arguments in this appeal, but without prejudice to their right to seek a ruling on these issues upon any remand to the federal District Court.

contain[] a broad release," and clarified that the Orders of Dismissal were intended to dismiss plaintiffs' Complaints "with prejudice." (Orders Denying Reconsideration, at 1-2.)

The court denied plaintiffs' motions for leave to file amended complaints, finding that none of the proposed claims could withstand a motion to dismiss. (Id. at 3-6.) Plaintiffs' proposed changes were "futile" in light of the broad terms of the general releases and because plaintiffs still did not allege a claim upon which rescission could be granted. (Id. at 5-6.)

Plaintiffs appealed to the Eleventh Circuit. The Eleventh Circuit issued its certification order in this case on April 19, 1999. Foliage Forest, Inc. v. E.I. du Pont de Nemours and Co., 172 F.3d 1284 (11th Cir. 1999).

Two related cases previously appealed to the Eleventh Circuit resulted in a similar certification of questions to this Court. Mazzoni Farms, Inc. v. E.I. du Pont de Nemours and Co., 166 F.3d 1162 (11th Cir. 1999). The certified questions in those two related cases are now pending in this Court as Case Number 94,846. The Mazzoni Farms case was consolidated with the instant cases by order of this Court entered June 17, 1999.[5]

The two questions certified here are virtually identical to the questions certified in Mazzoni Farms, except that three of the settlement agreements at issue here do not contain a Delaware choice-of-law clause. The first certified question (as to what law governs) is applicable only as to the

[5] Moreover, all the cases are now consolidated in the Eleventh Circuit Court of Appeals. 172 F.3d at 1285-86.

two plaintiffs (Foliage Forest and Castleton Gardens) who agreed to be governed by Delaware law. If the first question is answered in the affirmative with respect to these two plaintiffs, the Court need not address the effect of their releases under Florida law.

The second question concerning the effect of the release under Florida law is the only question for the three plaintiffs (Country Joe's, Palm Beach, and Moningstar) who did not agree that Delaware law would govern. The certification order in this case therefore does not ask the second question in the alternative, 172 F.3d at 1287, as it did in Mazzoni Farms.[6] Thus, while the Mazzoni Farms case did not call upon this Court to answer the second question if the answer to the first was that Delaware law governed, now both questions must be answered even if the Delaware choice-of-law provision is enforced with respect to plaintiffs Foliage Forest and Castleton Gardens.

[6] In Mazzoni Farms, all the settlement agreements contained Delaware law clauses, so the certification order there stated that the second question about the effect of the releases was applicable only "[i]f Florida law applies." 166 F.3d at 1165. For the two plaintiffs here who agreed to Delaware law, the second certified question about the effect of the releases under Florida law would control only if Florida law were to govern their agreements.

SUMMARY OF ARGUMENT

I. Certified Question I

The choice-of-law provision in the settlement agreements executed by Foliage Forest and Castleton Gardens controls the disposition of the claim that these agreements were fraudulently induced. Florida enforces choice-of-law clauses absent a fundamental countervailing public policy of the State. Plaintiffs have not shown and cannot show that Delaware release law contravenes any countervailing fundamental public policy of Florida.

II. Certified Question II

Plaintiffs executed general releases of any and all claims whatsoever, with no exceptions and with no representations or warranties from DuPont. These releases cover plaintiffs' fraudulent inducement claims. Florida favors the enforcement of settlement agreements. When parties agree to general releases of all claims, Florida enforces those releases.

A plaintiff who has agreed generally to a release of all claims, which includes fraudulent-inducement claims, is not without a fair remedy. Such a plaintiff can still rescind the agreement and pursue the claims, including additional fraud-based damages. But in order to pursue the released claims, rescission is required. A party is not permitted to accept the benefits of a contract without being subject to its burdens. Accordingly, in Florida and generally, the firmly-established law of rescission imposes two requirements on a plaintiff who seeks to avoid a

release on the basis of allegations that the settlement was fraudulently induced: (1) the plaintiff must unequivocally elect to rescind the settlement in a timely manner; and (2) the plaintiff must restore the benefits received, by tendering back the settlement money received in exchange for the very release the plaintiff is seeking to avoid.

Plaintiffs here did not elect rescission. Plaintiffs have never tendered back the settlement proceeds or even alleged an attempt or inability to do so. Instead, plaintiffs seek to disregard entirely the well-established balances embodied in the rescission requirements and create a rule with no balance at all, allowing them to keep the money paid by DuPont for the general releases while suing DuPont in violation of those releases. Such a result would undermine Florida's policies favoring the finality of settlements and destroy the fair balance reflected by the rules for rescission.

Thus, plaintiffs' arguments should be rejected. The plain and unambiguous terms of the releases in dispute discharge the fraudulent inducement claims at issue. Accordingly, Certified Question II should be answered "Yes, under Florida law, the release in these settlement agreements bars plaintiffs' fraudulent inducement claims."

ARGUMENT

I. Certified Question I: The Choice-of-law Provision Controls the Disposition of the Claim that the Agreement Was Fraudulently Induced

Plaintiffs' argument concerning the answer to the first certified question in this case is substantially the same as the argument presented in the Initial Brief in the consolidated Mazzoni Farms case (Case No. 94,846). Appellees therefore rely on and will not repeat here the arguments regarding Certified Question I at pages 13-30 of the Mazzoni Farms Answer Brief of Appellees, served May 4, 1999. The points made there are all applicable and controlling here: because Florida has a strong policy in favor of protecting the expectations of contracting parties, Florida's courts regularly enforce choice-of-law clauses, unless enforcement would violate a fundamental countervailing public policy of the State. Plaintiffs have shown no such countervailing fundamental public policy. Accordingly, Plaintiffs Foliage Forest and Castleton Gardens are bound by the Delaware choice-of-law clauses contained in their affirmed settlement agreements.

Plaintiffs' Initial Brief in this case raises an additional issue, by asserting that "DuPont has never identified any Delaware law upon which it relies other than the Matsuura decision."[7] Initial Brief of Appellants at 14. This assertion

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[7] In Matsuura, the United States District Court for the District of Hawaii granted DuPont's motion for judgment on the pleadings based upon a release substantially similar to the release executed by Foliage Forest and Castleton Gardens. On February 4, 1999, a panel of the Ninth Circuit reversed the

is false: in those cases involving Delaware releases, DuPont set forth the controlling principles of Delaware law in its briefs to the federal district court and to the Eleventh Circuit Court of Appeals.[8]

Plaintiffs apparently suggest that, unless DuPont demonstrates a true "conflict" between Florida and Delaware law, the choice-of-law provisions should not be enforced.[9] This is not the law in Florida. In Continental Mortgage Investors v. Sailboat Key, Inc., this Court enforced a choice-of-law provision despite the fact that the law of the chosen forum had not been briefed. 395 So. 2d 507, 513-14 (Fla. 1981). And in Burroughs Corp. v. Suntogs of Miami, Inc., this Court expressly recognized that parties should be able to utilize choice-of-law clauses to provide "quicker, easier resolution" to conflict of laws issues. 472 So. 2d 1166, 1168-19 (Fla. 1985). Requiring a full-blown examination of the merits of a party's claims under the law of two different states as a predicate to enforcement of a choice-

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district court. Matsuura v. Alston & Bird, 166 F.3d 1006 (9th Cir. 1999), modified on denial of reh'g, Nos. 97-16400 & 97-17033, 1999 WL 426223 (9th Cir. June 25, 1999).

[8] Memoranda in support of motions to dismiss and reply memoranda: FF R1-9, 26; CG R3-8, 26. Brief of Appellees in Eleventh Circuit Court of Appeals: Argument § II, pages 26-34. DuPont similarly briefed Delaware law before the federal courts in the consolidated Mazzoni Farms cases.

[9] The plaintiffs in the consolidated Mazzoni Farms cases made such an argument for the first time in their Reply Brief, in violation of Florida Rule of Appellate Procedure 9.210(d), which requires that "[t]he reply brief shall contain argument in response and rebuttal to arguments presented in the answer brief." None of the cases plaintiffs cited in support of that argument involved choice-of-law provisions.

of-law provision is not a "quicker, easier" resolution of conflict of laws issues.

The courts that have considered the appropriate burdens on the parties in connection with a choice-of-law clause have ruled that it is the party seeking to avoid enforcement of the provision who must show the violation of a fundamental public policy. As the United States Court of Appeals for the Fifth Circuit explained in construing Louisiana law:

> A choice of law provision in a contract is presumed valid until it is proved invalid. The party who seeks to prove such a provision invalid bears the burden of proof. Courts are reluctant to declare such provisions void as against public policy. .... One state's law does not violate another state's public policy merely because the laws of the two states differ. Courts favor, and tend to uphold, choice of law provisions in contract, particularly when such provisions are used in interstate transactions.

Delhomme Indus., Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049, 1058 (5th Cir. 1982) (citations, internal quotations, and footnotes omitted). Delhomme fully accords with this Court's restrictive treatment of the "public policy" exception to enforcement of choice-of-law clauses, see supra, and with Section 187 of the Restatement (Second) of Conflicts of Laws (1971), which requires the application of the law chosen by the parties "unless" that law is contrary to a fundamental policy of a state with a materially greater interest in the determination of the particular issue. See also Mitsui & Co. (USA), Inc. v. Mira M/V, 111 F.3d 33, 35 (5th Cir. 1997) (in international contracts, the United States Supreme Court "has consistently held that forum-selection and choice-of-law clauses are presumptively valid") (collecting authority); Lipcon v. Underwriters at Lloyd's,

London, 148 F.3d 1285, 1295 (11th Cir. 1998), cert. denied, 119 S. Ct. 851 (1999).

Plaintiffs here clearly have not carried their burden of demonstrating that enforcement of Delaware law in these circumstances would violate a fundamental Florida public policy. When a plaintiff has unambiguously agreed, for substantial consideration, to release claims of fraudulent inducement, Florida public policy will not be offended if Delaware law construes the contract to mean what it says and requires; or if Delaware provides that, in order to avoid the release, the plaintiff must meet the requirements for rescission. In fact, as demonstrated below, Florida similarly will enforce the unambiguous terms of a release contract and will not allow a party to avoid the terms absent a valid rescission; but, even were the law of Florida to depart from those well-established principles, no fundamental Florida policy would be violated by an adherence to those principles under the law of another state. Cf. Restatement (Second) of Conflict of Laws § 90, cmt. b (1971) ("A mere difference between the local law rules of the two states will not render the enforcement of a claim created in one state contrary to the public policy of the other."). The choice-of-law provisions in the settlement agreements executed by Foliage Forest and Castleton Gardens should be enforced, and the first Certified Question should be answered "Yes, the choice-of-law provision in these settlement agreements controls the disposition of the claim that the agreement was fraudulently procured."

II. Certified Question II: Under Florida Law, the Release in These Settlement Agreements Bars Plaintiffs' Fraudulent Inducement Claims

The general releases plaintiffs executed cover their fraudulent inducement claims. Without rescission, the claims are barred by the release contracts.

A. The releases cover the claims

1. The releases are general releases of any and all claims whatsoever, with no exceptions, and Florida enforces such releases

The releases executed by Country Joe's, Palm Beach, and Morningstar were entitled "General Release of All Claims" and provided that the plaintiff signing the release agreed:

> to release, acquit and forever discharge ... DuPont ... and all of its agents [and many others listed] from any and all claims, actions, causes of action, including consequential damages, demands, rights, damages, costs, losses, and any other liability or expense of whatsoever kind, which the undersigned ... now has or may or shall have by reason of the use of or application of DU PONT BENOMYL products ....

(CJN R2-13 Ex. 1 at 1; PBG R4-1 Ex. A, Ex. A at 1; MN R5-1 Ex. A, Ex. A at 1.) This release comprehensively and unambiguously covers every claim a plaintiff "now has or may or shall have by reason of the use of or application of [Benlate]." (Id.)

Plaintiffs allege that they possess their instant claims by reason of their use and application of Benlate. (Id. Complaints ¶¶ 24 & 26.) Their claims are completely dependent upon their having used and applied Benlate; but for such use and application, a plaintiff would have no claim. The very misrepresentation on which each plaintiff alleges reliance concerns the value of plaintiff's original claim -- a claim

plaintiff had by reason of its use and application of Benlate. (Id. ¶¶ 32-35.) All of the damages alleged in this suit -- damages for the destruction of plants and trees, for example -- are necessarily dependent on and must arise by reason of a plaintiff's use and application of Benlate, as did the damages alleged by Plaintiffs in their initial claims. (Id. ¶ 41.)

The releases executed by Foliage Forest and Castleton Gardens provide in Paragraph 1:

> In consideration of Du Pont's payment of the amount set forth in the Authorization previously signed by Grower, Grower hereby releases Du Pont, et al.[[10]], from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Grower ever had, now has, or may hereafter have against Du Pont, et al., by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed, including the claim presently being asserted.

(FF R1-1 Ex. A ¶ 1; CG R3-1 Ex. A ¶ 1.) This release language is as general as can be conceived, clearly covering any and all claims, obligations, and liability by reason of any fact occurring up to and including the date the release is signed. These plaintiffs also promised not to commence any action against defendants "based upon or in any way related to any causes of action, claims, demands, actions, obligations, damages or liabilities which are the subject of this Release." (Id. ¶ 3.)

The releases contain no exceptions for matters misrepresented or not disclosed by DuPont. There are no representations or warranties by DuPont as to any fact or as to

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[10] On page 1 "Du Pont" is defined to include DuPont's agents, among many others.

the accuracy or completeness of any past statements or any disclosure. The releases therefore cover any claims by plaintiffs that DuPont had wrongfully withheld, concealed, or misrepresented any facts relating to Benlate, including any claims that plaintiffs were being fraudulently induced to enter the settlement as a result of such alleged misconduct. Plaintiffs have never seriously contended otherwise, arguing instead that the release should be ignored because they have alleged fraudulent inducement. See infra Section III.B.2.

Under Florida law, "settlements are highly favored and will be enforced whenever possible." Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985); De Cespedes v. Bolanos, 711 So. 2d 216, 218 (Fla. 3d DCA 1998).[11] In furtherance of that interest, Florida courts enforce "general releases," which extend to all claims between the parties, and not just specific claims at issue in a particular dispute. Cerniglia v. Cerniglia, 679 So. 2d 1160, 1164 (Fla. 1996).[12]

In Cerniglia, this Court held that a general release of "all claims whatsoever" barred all claims for damages based upon pre-settlement conduct, including a claim for damages for "common law fraud" based upon alleged fraudulent inducement of the release contract. Id., aff'g 655 So. 2d 172, 174 (Fla. 3d DCA

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[11] Delaware accord: Rome v. Archer, 197 A.2d 49, 53 (Del. 1964); Nationwide Mut. Ins. Co. v. Nacchia, 628 A.2d 48, 53 n.5 (Del. 1993).

[12] Delaware accord: Chakov v. Outboard Marine Corp., 429 A.2d 984, 985 (Del. 1981); Hob Tea Room, Inc. v. Miller, 89 A.2d 851, 856 (Del. 1952) ("general release" bars even claims that the parties "do not have in mind").

1995).[13] Numerous Florida and other cases that similarly hold that general releases cover unknown claims and claims for fraud are cited on pages 34-35 of the Mazzoni Farms Answer Brief.

Here, as in Cerniglia, the releases cover "any and all claims . . . of whatsoever kind" (Country Joe, Palm Beach, Morningstar) or "any and all ... claims ... by reason of any fact or matter whatsoever" (Foliage Forest, Castleton Gardens). Accordingly, the District Court properly concluded that the terms of the settlement agreements discharge plaintiffs' claims.

2. The discussion of a "clear statement" requirement contained in Matsuura does not reflect Florida (or Delaware) law applicable to these settlement agreements

Plaintiffs never challenged the scope of the release language in the federal district court or in the Eleventh Circuit Court of Appeals. In footnote 13 to the Initial Brief of Appellants to this Court, however, plaintiffs for the first time claim that the release terms do not cover fraudulent inducement claims.

While arguing at times that Delaware law cannot be applied in Florida even pursuant to a choice-of-law clause, plaintiffs suggest that this Court's determination of Florida law

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[13] Delaware accord: Hob Tea Room v. Miller, 89 A.2d 851, 857 (Del. 1952) (reversing trial court's "view the scope of a general release as being limited to the sum of all the individual items which the parties specifically and affirmatively intended to include within it. We, on the other hand, consider a release to derive generality from a mere contract to make it general.); Shuttleworth v. Abramo, Civ. A. No. 11650, 1997 WL 349131 (Del. Ch. June 13, 1997) (dismissing plaintiff's claim because there was "no express exclusion" of the claim from the terms of the general release).

should be influenced by the faulty prediction of Delaware law by a panel of the Ninth Circuit in Matsuura v. Alston & Bird, 166 F.3d 1006 (9th Cir. 1999), modified on denial of reh'g, Nos. 97-16400 & 97-17033, 1999 WL 426223 (9th Cir. June 25, 1999). The Matsuura court did not predict Delaware law correctly and inexplicably refused to await the Delaware Supreme Court's response to a certified question in a similar case that presented the same issue, even after being notified that the Delaware Supreme Court had accepted the certification.[14] The Ninth Circuit has, however, stayed the mandate in Matsuura pending DuPont's petition for a writ of certiorari to the United States Supreme Court.[15] Matsuura, et al. v. Alston & Bird, et al., Nos. 97-16400 & 97-17033 (9th Cir. July 12, 1999).

Matsuura predicted that Delaware would "likely ... impose a clear statement requirement for release of fraudulent inducement claims" in a settlement release, based on a misguided analogy between releases entered to settle claims for past conduct, on the one hand, and, on the other hand, exculpatory clauses that limit a party's liability for future negligence or wrongful conduct. 166 F.3d at 1010-11. The analogy is inappropriate because the contractual settings differ entirely.

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[14] Copies of the unpublished order of the Supreme Court of Delaware accepting certification and of the unpublished order of the Southern District of Florida certifying the question were submitted to this Court in the consolidated Mazzoni Farms case.

[15] In similar circumstances, the United States Supreme Court criticized the Ninth Circuit for failing to certify a question to a state Supreme Court or to await the disposition of a related state case. Arizonans for Official English v. Arizona, 520 U.S. 43, 75-80 (1997).

Exculpatory clauses immunizing future conduct essentially create a license to injure and are disfavored by the law. Settlements of past conduct seek to resolve disputes concerning injuries that have already occurred, and are favored by the law.

In the settlement context, parties are already adverse, even hostile to one another. The potential defendant is trying to settle its potential liability for disputed misconduct. Disagreements as to how the parties view the situation, about who is right and wrong, and whether the parties are telling the truth arise with predictable frequency. Against this backdrop, parties are trying to terminate all of their disputes. The policies favoring final settlement call for a construction of releases that facilitates this intent.[16]

The setting is entirely different when parties execute exculpatory contractual clauses relative to the conduct of their future relationship. There, the parties are entering into a cooperative and forward-looking relationship. There are no adversarial disputes over past conduct. It is under these circumstances, when a party is seeking a release from its future wrongdoing, as opposed to settling potential liability for past

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[16] This is especially so where, as here, the allegedly fraudulent statements are essentially denials of liability regarding the prior claim. See TANO Automation, Inc. v. United States, 939 F. Supp. 483, 489 (E.D. La. 1996) (rejecting settlement fraud claim based upon a denial of liability: "This is a radical statement of the law that finds no legal support in the caselaw .... This Court is unable and unwilling to be the first to endorse such a rule that could be used so freely to undermine the finality of any release not based on a specific finding of fault.").

conduct, that courts sometimes impose a "clear statement requirement."

Florida has never imposed a "clear statement requirement" for the release of prior and contemporaneous claims. Florida's "clear and unequivocal" rule has always been limited to exculpatory or indemnification clauses regarding future acts. See, e.g., University Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507 (Fla. 1973); Goyings v. Jack and Ruth Eckerd Foundation, 403 So. 2d 1144 (Fla. 2d DCA 1981); see also Witt v. Dolphin Research Ctr., Inc., 582 So. 2d 27, 28 n.1 (Fla. 3d DCA 1991) (releases and exculpatory clauses are "completely different").[17] As shown in Section (1), Florida law does not require that a general release specifically identify each claim that is released; the rule is that unless a claim is specifically excepted from a general release, the claim is extinguished. The burden is on the party seeking to preserve a claim to exclude the claim from the general release by explicit description. No different or exceptional treatment for fraudulent inducement claims has ever been recognized or encouraged by the Florida courts, and this Court should not undermine Florida's rule of literally enforcing general releases by creating any such exception.

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[17] This is similarly the case in Delaware. See FINA, Inc. v. ARCO, 16 F. Supp. 2d 716, 724-25 & n.17 (E.D. Tex. 1998) (reviewing Delaware authority and concluding, "No Delaware case involving the clear and unequivocal rule has concerned anything other than future (i.e., post-contract) conduct by the indemnitee.").

A requirement of specific identification of "fraudulent inducement" and similar claims in a release would swallow the general rule and create a negotiating and drafting quagmire, profoundly impeding settlement. Not even a detailed itemization of every conceivable fraud-like claim would successfully anticipate the imaginative development of new names for released causes of action. Spoliation, state and federal RICO actions, and intentional and negligent misrepresentation are but a few examples of repackaged claims that would, under existing law, be extinguished by a general release; but, under the exception plaintiffs urge, would require specific itemization in the release. The utility of general release, valuable precisely because it is general, would be destroyed. See National Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986, 989-90 (5th Cir. 1990) ("If we were to accept the premises that each contract and each occurrence must be named in a mutual release, we would put the draftsman in an untenable position: draft too broadly, and risk missing unnamed matters; draft too narrowly . . . and risk missing inadvertently omitted item under the maxim inclusio unius est exclusio alterius.").

Courts do not and should not impose heightened rules of construction on general releases that would imply exceptions and impede and frustrate the settling parties' ability to understand what they are doing and to free themselves from an ongoing dispute. Instead, courts should facilitate the finality of settlements by fully enforcing clear and unambiguous releases of all claims, obligations, and liabilities.

3. <u>The recitals to the Foliage Forest and Castleton Gardens settlement agreements expressly confirm that plaintiffs desired to release and dispose of all claims against DuPont; and the recitals cannot, under the circumstances, properly be used to limit the release</u>

<u>Matsuura</u> also misconstrued preliminary recitals in agreements similar to the releases executed by Foliage Forest and Castleton Gardens[18] to conclude that

> the broad release language relied on by DuPont is restricted by this specific recital -- only claims related to the purchase or use of Benlate or incident to the underlying litigation are released.

166 F.3d at 1010. This was clear error for several reasons:

First, it is well-settled, in Delaware, Florida, and elsewhere, that "whereas" recitals are nonbinding and cannot be used to change the unambiguous operative provisions of a contract. As the Third District Court of Appeal recently explained:

> [A] "whereas" clause of a contract is but an introductory or prefatory statement meaning "considering that" or "that being the case," and is not an essential part of the operating portions of the contract. Consistent with this definition, courts in other jurisdictions have routinely found a "whereas" clause to be nonbinding on the parties to a contract, and not an operative provision of an otherwise unambiguous agreement. Under Florida law, an operative clause of an agreement prevails over the recitals clause when there is a discrepancy between the two.

<u>Johnson v. Johnson</u>, 725 So. 2d 1209, 1212-13 (Fla. 3d DCA) (internal quotations and numerous citations omitted), <u>review</u>

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[18] The <u>Matsuura</u> discussion of recitals has no bearing on the settlements executed by Country Joe's, Palm Beach, or Moningstar, which contain no recitals. Thus, this section of this brief is relevant only in the event this Court determines that Florida law applies to the releases executed by Foliage Forest and Castleton Gardens.

denied, No. 95,324 (Fla. June 23, 1999).[19] The operative language of paragraphs one and three (among other sections) unambiguously releases all claims, "including" the original products liability claims. The recitals cannot be used to change the unequivocal meaning of these provisions.[20]

Second, Matsuura's holding that "the broad release language relied on by DuPont" was limited by the recitals to "claims related to the purchase or use of Benlate or incident to the underlying litigation" (166 F.3d at 1010) does violence to the recitals' plain language and meaning. The Whereas clauses here, which are similar to those in Matsuura, read:

> WHEREAS, Grower has asserted a claim against Du Pont in connection with various claims related to Grower's purchase and/or use of Benlate fungicide.
>
> WHEREAS, Du Pont has denied the aforementioned claims;

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[19] Delaware accord: New Castle County v. Crescenzo, C.A. No. 7082, 1985 WL 21130 at *3 (Del. Ch. Feb. 11, 1985) (recitals are "not a necessary part of the contract," and where such recitals "are inconsistent with the operative or granting part [of a contract], the latter controls"), aff'd, 505 A.2d 454 (Del. 1985); Mercantile-Safe Deposit and Trust Co. v. Inproject Corp., C.A. No. 6910, 1984 WL 19483, at *2 (Del. Ch. Oct. 12, 1984) (recitals "cannot be used to add to or contradict the operative language absent doubt as to its meaning").

[20] Adams v. Jankouskas, 452 A.2d 148 (Del. 1982), cited by Matsuura, did not involve the unambiguous operative release language at issue here, but instead construed a "receipt and release" which contained a patent ambiguity in the operative language itself. In Adams, an executrix sued by a recently-widowed husband offered a "receipt and release" executed at the time of the husband's receipt of certain property -- which described the particular property and then released claims "for or concerning the said bequest or for, or concerning the estate" -- as a defense to any further liability of the estate to the husband. Id. at 155 n.7 (emphasis added). Stating that the operative language of the release was "confusing," and not construing any recitals, the Adams court upheld the decision to limit the general release terms to the specific subject matter of the bequest. Id. at 155-56.

> WHEREAS, Grower desires to release and dispose of all claims against Du Pont, et al., and all claims incident thereto against Du Pont, et al., thereby finally disposing of the same, and to give assurance that Grower will not hereafter prosecute such claims or cause them to be prosecuted.

(FF R1-1 Ex. A, at Ex. 1 pp.1-2; CG R1-1 Ex. A, at Ex. A p.1.)

It is evident that the third Whereas clause here, as in Matsuura, is devoted to a description of the intent of the agreement; while the first two Whereas clauses simply describe history. Matsuura distorted the statement of intent, also clear in that case, by (i) paraphrasing the beginning of the third Whereas (which in fact recites that a plaintiff "desires to release and dispose of all claims") and then (ii) engrafting as purported limiting language a portion of the first Whereas (describing the claims asserted, not the claims the plaintiff intended to release) and, finally, (iii) eliding out the language of the third Whereas stating that plaintiff "desires to release and dispose of all claims" against DuPont.

Third, even if the Matsuura construction of the release, as limited by the recitals, were accepted, plaintiffs' claims of fraudulent inducement would nevertheless be barred because, as the Matsuura panel acknowledged, claims "likely to arise or naturally arising from the product liability claims" are released. 166 F.3d at 1010. The Matsuura opinion jumped to the erroneous conclusion that this would not include fraudulent inducement claims. In doing so, the court ignored the fact that the Matsuura plaintiffs' claims of fraudulent inducement (like the claims at issue here) concern allegedly fraudulent denials of

liability or failures to disclose in connection with the underlying claims. Such claims necessarily "arise out of" the products liability claims.

Matsuura also failed to consider the even clearer Paragraph 3 of the settlement agreement, where plaintiffs covenant not to

> prosecute . . . against Defendant any action . . . based upon or in any way related to any causes of action, claims, . . . obligations, . . . or liabilities which are the subject of this Release.

This clause is unambiguously broader that the release clauses. Plaintiffs' present action is certainly "in any way related" to their former claims, which renders their present action violative of the covenant not to sue and therefore barred, even under the Matsuura rationale.

In sum, Matsuura's analysis is wrong, and does not provide a sound basis for construing the release. Instead, the decision violates basic precepts of contractual construction, plain meaning, logic, and grammar to force a result at odds with the unambiguous release language. The releases are general releases that discharge plaintiffs' fraudulent inducement claims.

As discussed in the next section, plaintiffs who seek to avoid such releases have rescission as an available remedy. There is no need to change or violate the principles of contract construction by misconstruing the releases, torturing their meaning, or engrafting new requirements for settlement agreements. Florida should not move away from its historical status as a jurisdiction where words mean what they say.

Settlements should not become ripe opportunities for further litigation over terms implied or negated by judicial construction in contradiction of the parties' expressed intent.

Instead, the releases should be construed consistent with the following principles as expressed by another Ninth Circuit panel:

> At root, this case is about the respect the law ought to accord agreements between private parties. Despite recent cynicism, sanctity of contract remains an important civilizing concept. See, e.g., C. Fried, Contract as Promise 1, 132 (1981) ("[t]hese are indeed the laws of freedom"). It embodies some very important ideas about the nature of human existence and about personal rights and responsibilities: that people have the right, within the scope of what is lawful, to fix their legal relationships by private agreement; that the future is inherently unknowable and that individuals have different visions of what it may bring; that people find it useful to resolve uncertainty by "mak[ing] their own agreement and thus designat[ing] the extent of the peace being purchased," Bernstein [v. Kapneck, 430 A.2d 602 (Md. 1981)], at 606; that courts will respect the agreements people reach and resolve disputes thereunder according to objective principles that do not favor one class of litigant over another; and that enforcement of these agreements will not be held hostage to delay, uncertainty, the cost of litigation or the generosity of juries. As Professor Fried notes,
>
> > [t]he regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. And the will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism.
>
> C. Fried, Contract as Promise 2 (footnotes omitted).

Morta v. Korea Ins. Corp., 840 F.2d 1452, 1460 (9th Cir. 1988).

B. Plaintiffs' unrescinded releases are binding

The principal thrust of plaintiffs' arguments is that plaintiffs' prior releases can be ignored -- not rescinded but simply disregarded. Plaintiffs say a release can be avoided and violated at will by any plaintiff who merely alleges fraud in the inducement, even while the plaintiff retains the option to stand on the contract and keeps the money paid for the release. No case so holds. Plaintiffs' position renders meaningless the entire body of law providing for rescission for fraudulent inducement.

Rescission allows a party to avoid a fraudulently-induced contract and release, but only if the defrauded party promptly and unequivocally elects to rescind the contract upon learning of the fraud and tenders the settlement proceeds back to the other party. Rescission is thus a balanced remedy. In Florida (and elsewhere), the two requirements -- election and tender -- operate to maintain the fair balance between, on the one hand, allowing the plaintiff an opportunity for relief from fraud even when otherwise barred by the release and, on the other hand, enforcing the finality of a settlement that, as written, grants the defendant peace from the claims asserted -- claims that have never been proven.

1. A plaintiff who has agreed to release fraudulent-inducement claims must rescind the agreement in order to pursue fraudulent-inducement claims

Fraudulent inducement does not automatically render a contract void and inoperable but only renders it voidable. Columbus Hotel Corp. v. Hotel Management Co., 116 Fla. 464, 478,

156 So. 893, 898 (1934) (fraudulently-induced contracts are not "illegal per se"); Vic Potamkin Chevrolet, Inc. v. Bloom, 386 So. 2d 286, 288 (Fla. 3d DCA 1980) ("'Of course a contract which has been fraudulently induced is not void but merely voidable ....'"); National Union Fire Ins. Co. v. Carib Aviation, Inc., 759 F.2d 873, 877 n.2 (11th Cir. 1985) (under Florida law, fraudulently-induced contract is "voidable" and can be "ratified" by defrauded party); see generally Restatement (Second) of Contracts § 164(1) (1981); 1 E. Allan Farnsworth, Contracts § 4.15 (1990).[21] To set aside a "voidable" contract for fraudulent inducement, the allegedly defrauded party must comply with the requirements for rescission, which are fully discussed in Sections (2) and (3) below.

On pages 18-20 of the Initial Brief of Appellants, plaintiffs cite a number of cases for the proposition that a release procured through fraud is void and that pursuit of the released claims is therefore permissible without rescission. Most of the cases plaintiffs cite for this proposition, however, are not fraudulent inducement cases but "fraud in the factum" cases.[22] The distinction is explained on pages 38-39 of the Answer Brief of Appellees in the consolidated Mazzoni Farms case.

Fraud in the factum, in contrast to fraud in the inducement, arises when, as a result of fraud, one of the parties

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[21] Delaware accord: Hegarty v. American Commonwealth Power Corp., 163 A. 616, 619 (Del. Ch. 1932) (a fraudulently-induced "contract is not void. It is only voidable.").

[22] The reasons the other cases are inapplicable are detailed on pages 41-44 of Appellees' Brief in Mazzoni Farms.

actually has not agreed to the terms contained in the contract. Paradigm examples are a false page being surreptitiously inserted into a contract as a party is signing it; a party who cannot see or cannot read being improperly pressured into executing a contract without understanding what he or she is signing; or a party laboring under disability or stress being misled about the contents of a contract by someone in a position of influence or trust. As shown on pages 40-41 of Appellees' Brief in Mazzoni Farms, most of the cases cited by plaintiffs are similar examples of fraud in the factum.

In cases of fraud in the factum, the contract is void, not merely voidable. See Restatement (Second) of Contracts § 163, cmts. a and c (1981) ("there is no effective manifestation of assent, and no contract at all. ... the recipient of a misrepresentation may be held to have ratified the contract if it is voidable but not if it is 'void'"); John N. Pomeroy, Equity Jurisprudence § 899, at 543 (1941) (describing distinction). No rescission of a void contract is needed. Under a void contract, even the party who perpetrated the fraud can bring an equitable action for restitution to recover the money paid. See generally 66 Am. Jur. 2d, Restitution and Implied Contracts § 7 (1973).

Page 18 of the Initial Brief of Appellants cites language out-of-context for the proposition that a contract procured by fraud is void and that a plaintiff is not bound by a release in such a contract. However, the language is from Florida East Coast Railway Co. v. Thompson, where

> Plaintiff's claim of fraud is based solely on his asserted illiteracy and his inability to read or write,

> coupled with the further claim ... that ... the releasee ... did not fairly and fully disclose to him the contents and legal effect of the instrument signed by him, but, on the contrary, represented to him that it was a receipt.....

93 Fla. 30, 40-41, 111 So. 525, 529 (1927). This, "it is contended by the plaintiff, constituted fraud in the factum." Id. at 34, 111 So. at 527 (emphasis added).[23]

Plaintiffs do not allege fraud in the factum. They do not deny understanding the settlement agreements. They have not alleged that their signatures on the settlement agreements were fraudulently procured by anything that prevented them from knowingly assenting to the terms of the contract as written. Instead, plaintiffs allege that they agreed to the terms of the settlement agreement based upon a misperception of the relevant circumstances resulting from defendants' alleged fraud. These are classic allegations of fraudulent inducement. See, e.g., Haller v. Borror Corp., 552 N.E.2d 207, 210-11 (Ohio 1990).

No cases have been located anywhere in the nation holding that a party to a settlement contract containing a general release discharging fraudulent inducement claims can sue for damages for fraudulent inducement without rescinding the contract. On the other hand, Kobatake v. E.I. du Pont de Nemours and Co., 162 F.3d 619 (11th Cir. 1998), applying Georgia law, decided precisely this issue and expressly held that, unless rescinded, a release such as the one plaintiffs gave here covers

[23] In Florida East Coast Railway, a judgment for plaintiff on a jury verdict was reversed, on the basis of insufficient evidence of fraud in the factum. Id. at 529-31.

and bars a suit for damages for fraudulent inducement. Kobatake is in accord with the Florida authorities cited above.

The cases cited by plaintiffs do not challenge this rule. This Court in HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238 (Fla. 1996), recognized that certain fraudulent inducement claims are torts independent of any breach of the fraudulently-induced contract, and thus are not barred by Florida's economic loss rule. Although HTP involved a settlement agreement, the opinion did not consider whether, and contains no indication that, the settlement at issue there contained a broad general release of "any and all" claims "whatsoever" that covered and barred a claim for damages for fraudulent inducement.[24] All HTP decided was that such a claim was not barred by the economic loss rule.

When a party to a settlement agreement refuses to execute a general release, or insists upon representations or warranties in the settlement agreement, that party can "stand on" the contract and sue for damages if the other party's representations are false. Slotkin v. Citizens Casualty Co., 614 F.2d 301 (2d Cir. 1979) (New York law), cited on page 23 of the Initial Brief of Appellants, is an example of such a case. There, the settlement agreement itself expressly provided:

> It is further stipulated that the attorney for the defendant represents that the total insurance coverage of the defendants is the sum of $200,000, under a policy with Citizens Casualty, and to the best of his

[24] Just one month before HTP, this Court unanimously ruled in Cerniglia v. Cerniglia, 679 So. 2d 1160, 1164 (Fla. 1996), that such terms barred claims for fraudulent inducement of settlement. See supra Argument § II.A.1.

knowledge there are no other policies covering this event.

Id. at 307. Shortly after the settlement, plaintiffs learned that, in fact, there was $1 million in excess coverage available. Id. at 308. The Second Circuit held that plaintiffs could sue based upon "the settlement stipulation entered into before plaintiffs knew of the excess coverage." Id. at 312 (emphasis added). Thus, Slotkin involved a claim based on a representation expressly set forth in the terms of the affirmed contract.

Plaintiffs here, however, do not and cannot point to any alleged false representation or warranty within their settlement agreements. Slotkin thus highlights an aspect of the plaintiffs' false logic: If a contract contains a false representation or a term breached by the defendant, then a plaintiff can stand on the contract, sue for damages, and thereby enforce the representations or terms set forth in the contract. However, if a contract gives the plaintiff no rights that have been breached, but instead contains a general release of all claims,[25] then a plaintiff who stands on the contract must accept all of its terms, including the general release. The only means of setting aside the general release is rescission.

Other non-Florida authorities plaintiffs cite are similarly inapposite. DiSabatino v. United States Fidelity and Guaranty Co., 635 F. Supp. 350 (D. Del. 1986), a diversity case attempting to predict Delaware law, never analyzed whether the

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[25] In Slotkin, the settlement agreement included no general release.

terms of the release in that case discharged claims of fraudulent inducement. Therefore, DiSabatino did not resolve the issue presented here: whether a claim for damages for fraudulent inducement can be maintained in the face of an unconditional general release that covers fraudulent inducement claims.

Similarly, Phipps v. Winneshiek County, 593 N.W.2d 143 (Iowa 1999), a decision of the Iowa Supreme Court, does not consider whether the settlement at issue included a general release that covered the fraudulent inducement claim and thus would bar the claim unless rescinded. Phipps, moreover, is fundamentally incompatible with Florida law, because it allowed a cause of action based on false deposition testimony. Id. at 144. This Court rejected any such claims in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606 (Fla. 1994). Permitting successive suits to be predicated upon prior litigation fosters endless litigation and would "render our adversarial system impotent." Regal Marble, Inc. v. Drexel Inv., Inc., 568 So. 2d 1281, 1282-83 (Fla. 4th DCA 1990), review denied, 583 So. 2d 1036 (Fla. 1991). Similar deleterious effects ensue from permitting successive suits to be predicated on prior settlements rather than requiring rescission so that the underlying cause of action can be the core of the suit.[26]

[26] Phipps also allowed a collateral attack upon a final judgment based on "intrinsic fraud." 593 N.W.2d at 147. This Court repeatedly has rejected attacks upon final judgments based upon false testimony or other "intrinsic fraud." Cerniglia v. Cerniglia, 679 So. 2d 1160, 1163-64 (Fla. 1996); DeClaire v. Yohanon, 453 So. 2d 375 (Fla. 1984).

Plaintiffs here do not and cannot claim fraud in the factum. Nor can they point to any representations or warranties in the settlement agreements that have been violated. Instead, plaintiffs allege that defendants fraudulently induced the execution of settlements containing broad general releases. Because the general releases in plaintiffs' settlement agreements cover fraudulent inducement, the substantive requirements for rescission -- prompt election and tender -- must be met to avoid the releases and pursue the claims.

2. Rescission requires a timely and unequivocal election to rescind

After the claim of fraud is known, it is unfair for a plaintiff to avoid the election between relying upon or avoiding the contract. In particular, in the case of a contract containing a release paid for in order to buy peace, it is unfair for a plaintiff to threaten or carry on litigation that is barred by the release (thus destroying the peace for which the defendant has paid) while maintaining at the same time a right to stand on the contract and keep the settlement money.

Therefore, a party claiming fraudulent inducement must promptly and unequivocally elect rescission -- "repudiate" the contract -- or the contract is "ratified." Bardwell v. Anderson, 162 So. 321, 322 (Fla. 1935) (party who does not promptly seek rescission will be "bound by the contract"). Columbus Hotel Corp. v. Hotel Management Co., holds as follows:

> [I]t is uniformly required that, where a party desires to rescind a contract ..., the injured party must, upon discovery of the true facts, promptly announce his purpose to rescind, adhere to it, and be guilty of no undue delay nor vacillation in moving speedily to have

his rights formally asserted by way of rescission as a remedy.

116 Fla. 464, 477-78, 156 So. 893, 898 (Fla. 1934)(emphasis added). See also Rood Co., Inc. v. Board of Public Instruction, 102 So. 2d 139, 141 (Fla. 1958) (to obtain rescission, plaintiff "must allege facts which show that upon discovery of the mistake he, with reasonable promptness, denied the contract as binding upon him and that thereafter he was consistent in his course of disavowal of it"). Accord Kobatake v. E.I. du Pont de Nemours and Co., 162 F.3d 619, 627 n.10 (11th Cir. 1998) ("Georgia law requires that rescission be timely. Plaintiffs learned of the alleged fraud in 1994, nearly two years prior to commencing these actions. This delay is, as a matter of law, determinative."); Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1520 (11th Cir. 1994) (if a party does not promptly seek rescission of fraudulently-induced contract, "the rights of the parties will be fixed by the agreement") (quoting 12 Samuel Williston & Walter H.E. Jaeger, A Treatise on the Law of Contracts § 1526 (3d ed. 1970)).[27]

Neither the Complaint nor the proffered "Amended Complaint for Damages" allege that any of the plaintiffs ever elected to rescind by announcing plaintiff's purpose to rescind,

[27] Delaware accord: Craft v. Bariglio, No. 6050, 1984 WL 8207, at *11 (Del. Ch. Mar. 1, 1984) (even a four-month delay is fatal to rescission remedy); Hegarty v. American Commonwealth Power Corp., 163 A. 616, 619 (Del. Ch. 1932) ("defrauded party is put to an election of which of the courses open to him he chooses to follow"); Leech v. Husbands, 152 A. 729, 732 (Del. Super. 1930) ("[T]he right to rescind a contract for the concealment of material facts must . . . be exercised in a reasonable length of time after the discovery of the fraud.").

as required by Columbus Hotel and Rood. Even in the proposed amended complaints for "Damages" -- filed after judgment had been rendered against plaintiffs on their original claims[28] -- plaintiffs neither alleged that any such election had occurred nor made an election. Instead, Paragraph 49 of the proposed amended complaints affirmatively demonstrated that plaintiffs were not so electing: "Plaintiff accordingly seeks rescission of the settlement agreement as an alternative to the damages sought in Count I."[29] (FF R1-31; CJN R2-34 ; CG R3-30; PBG R4-31; MN R5-31.) This attempt to explore the contract affirmance route first, obviously to avoid returning the settlement proceeds, does not conform to Columbus Hotel's requirement that a plaintiff not only "announce his purpose to rescind" but then "adhere to it, and be guilty of no ... vacillation in moving speedily to have his rights formally asserted by way of rescission as a remedy." 116 Fla. 464, 477-78, 156 So. at 898. A plaintiff who has not elected to rescind and has kept the benefits of his agreement is not entitled to rescission.

[28] Under the governing federal procedural standards, plaintiffs' assertion of a new legal theory in their motions for reconsideration -- especially after their original claims had been dismissed -- was plainly improper. O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992); Lussier v. Dugger, 904 F.2d 661, 667 (11th Cir. 1990). Moreover, the denials of the motions for reconsideration, and the denials of the motions for leave to file amended complaints, are reviewed for an abuse of discretion. Gonzalez v. Garner Food Servs., Inc., 89 F.3d 1523, 1530 (11th Cir. 1996); Jameson v. Arrow Co., 75 F.3d 1528, 1534 (11th Cir. 1996). The district court certainly did not abuse its discretion in refusing to allow an amendment of the claims after judgment.

[29] Rescission cannot be an alternative to the damages sought in Count I; rescission was required in order for plaintiffs to seek the damages sought in Count I.

Thus, even if plaintiffs had in their proposed amendment unequivocally elected rescission and tendered the settlement proceeds (which they did not do), it would have been too late. They had already ratified the contracts by not electing rescission promptly after learning the facts allegedly giving rise to fraud. Even if the proposed amendment had been plaintiffs' original pleading, it would not have stated a claim on which rescission could be granted, because it did not comply with the requirements for a rescission claim.

3. Rescission of a settlement contract by a plaintiff requires restoration by tender back of the settlement money the plaintiff received

In addition to prompt, unequivocal election, a party who seeks rescission of an agreement generally "must place the opposite party in status quo." Lang v. Horne, 156 Fla. 605, 615, 23 So. 2d 848, 853 (1945); Royal v. Parado, 462 So. 2d 849, 856 (Fla. 1st DCA 1985) (restoration of status quo is a "condition precedent" to rescission).[30] This "tender" requirement is fundamental because "the very idea of rescinding a contract implies that what has been parted with shall be restored on both sides." McDonald v. Sanders, 103 Fla. 93, 101, 137 So. 122, 126

[30] Delaware accord: Hegarty v. American Commonwealth Power Corp., 163 A. 616, 619 (Del. Ch. 1932) ("there must be a restoration of the status quo ante, not only of the complainant but as well of the defendant. It is therefore necessary that the rescinding party should offer or tender such a restoration to the other. . . . This is the settled law."); Eastern States Petroleum Co. v. Universal Oil Prods. Co., 49 A.2d 612, 616, 617 (Del. Ch. 1946); Hessler, Inc. v. Ellis, 167 A.2d 848, 851 (Del. Ch. 1961) ("Courts of equity have imposed certain limitations upon the right to rescission. . . . One of these restrictions is that the plaintiff must offer or tender restoration of the defendant's former status quo," quoting Hegarty and Eastern States).

(1931); Billian v. Mobil Corp., 710 So. 2d 984, 990 (Fla. 4th DCA) (restoration of both parties is "prime object" of rescission), review denied, 725 So. 2d 1109 (Fla. 1998). A party who "accepts the benefits" of a contract after learning of the basis for rescission "will be held to have waived his right to rescind." Rood Co. v. Board of Public Instruction, 102 So. 2d 139, 141-42 (Fla. 1958); Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So. 2d 1089 (Fla. 3d DCA 1979).

The critical concept recognized in these authorities is that a plaintiff cannot accept the proceeds and benefits of a contract without being subject to its burdens. Otherwise, the court would be allowing the plaintiff unilaterally to rewrite the contract to change or delete a material, bargained-for provision of crucial value to the defendant, while at the same time holding the defendant to the contract. See Lowy v. Kessler, 522 So. 2d 917, 919 (Fla. 3d DCA 1988) (a contract cannot be "partially' rescinded").[31]

> One who seeks rescission of a contract is not permitted to play fast and loose. Nor may he remain silent and continue to treat the benefits of the contract as his own without losing his right to rescind and thereby becoming conclusively bound by the contract ... involved, as if no mistake, fraud or misrepresentation had occurred in its procurement or inducement.

Columbus Hotel Corp. v. Hotel Management Co., 116 Fla. 464, 477-78, 156 So. 893, 898 (1934). A party who "accepts the proceeds

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[31] Delaware accord: Eastern States Petroleum Co. v. Universal Oil Prods. Co., 49 A.2d 612, 616, 617 (Del. Ch. 1946) (A plaintiff "cannot cause the rescission of a contract in part and its approval in part, as self interest may dictate." "When the parties intend a contract to be entire, it cannot be enforced in part, but must stand or fall as an entirety.")

and benefits of a contract" must remain subject to "the burdens the contract places upon him." Fineberg v. Kline, 542 So. 2d 1002, 1004 (Fla. 3d DCA 1988), review denied, 553 So. 2d 1165 (Fla. 1989). See also Jones v. Watkins, 105 Fla. 25, 26-27, 140 So. 920, 920 (1932) ("where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both"); Head v. Lane, 495 So. 2d 821, 824 (Fla. 4th DCA 1986) (party who "accepts the benefits" of a transaction is "estopped" from "repudiating the accompanying or resulting obligation").[32]

Bass v. Farish, 616 So. 2d 1146, 1148 (Fla. 4th DCA 1993), holds a rescission claim insufficient even where the parties attempting to rescind "asserted that they had spent the money" received pursuant to the fraudulently-induced contract.[33] This is in accord with law from other jurisdictions. In Kobatake v. E.I. du Pont de Nemours and Co., 162 F.3d 619 (11th Cir. 1998), for example, some of the plaintiffs sought rescission and claimed that they should be excused from the tender requirement because, inter alia, DuPont had made tender "impossible" by

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[32] Delaware accord: Eastern States Petroleum Co. v. Universal Oil Prods. Co., 49 A.2d 612, 617 (Del. Ch. 1946) ("Even a defrauded complainant cannot accept the benefits received under a contract on the one hand and shirk its disadvantages on the other."); Graham v. State Farm Mut. Auto Ins. Co., 565 A.2d 908, 913 (Del. 1989) ("party to a contract cannot silently accept its benefits and then object to its perceived disadvantages").

[33] Delaware excuses compliance with the tender requirement only when (1) the defrauded party "received nothing under the contract which it was not entitled, in any event, to retain"; or (2) the benefits received under the agreement are "utterly worthless, and of no possible use or benefit to the defendant." Eastern States, 49 A.2d at 616.

concealing the alleged fraud until after the plaintiffs had spent the money. The Kobatake decision rejected this contention, ruling that "it is not defendants who have made restoration impossible":

> Although plaintiffs are not in a position to restore the money received in settlement, the position in which plaintiffs find themselves is purely a result of discretionary decisions taken by them upon receipt of their settlement amounts.

Id. at 627 (footnote omitted).

Plaintiffs here have not made allegations that permit them to even raise this issue. The proposed amendment does not allege an inability to tender or acknowledge that, if plaintiffs lose their present suits, they will be liable to DuPont for the settlement money. Plaintiffs' proposed amendment alleged only that they had not restored the settlement money "because to do so would be a vain and useless act in that DuPont should not be allowed to profit from its fraud and the equities in this case can be balanced by a set-off." (¶ 50 of attachments to FF R1-31; CJN R2-34 ; CG R3-30; PBG R4-31; MN R5-31.) If plaintiffs pursue but lose their case on the merits, DuPont will have lost the peace for which it paid and no "set-off" will exist. Plaintiffs' claim blatantly flies directly into the teeth of established rescission law, asking the court to disregard all balance and fairness. By retaining the benefits of the settlement agreement despite learning of facts allegedly demonstrating DuPont's fraudulent inducement, by later suing without an election to rescind, and by remaining equivocal even in amending, plaintiffs

have waived any rescission remedy as a matter of law. They are bound by the releases.

4. Procedural rules allowing the pursuit of inconsistent remedies do not change the substantive law that election and tender are essential elements of rescission

The choice between standing on a contract or rescinding it is not a choice that can be made during the pendency of litigation (such as an election between specific performance or damages). In order to rescind, the plaintiff must promptly elect to rescind. A judicial decree is the vehicle for a plaintiff to "have his rights formally asserted by way of rescission as a remedy," but a court cannot award rescission if the plaintiff did not timely and unequivocally elect it -- the plaintiff must "promptly announce his purpose to rescind, [and] adhere to it," as required by Columbus Hotel Corp. v. Hotel Management Co., 116 Fla. 464, 477, 156 So. 893, 898 (1934).

There is nothing wrong with a plaintiff initially pleading that he has elected and seeks rescission but alternatively seeking, if the court finds that he is not entitled to rescission, damages under the contract (assuming that the contract does not contain a general release or other substantive bar to the damages claim). Electing rescission, rightfully or erroneously, does not waive an action on the contract if the defendant rejects rescission and the plaintiff then turns out not to be entitled to rescind. In such an instance, the defendant would have had the opportunity to accept the rescission and restoration.

On the other hand, standing on a contract and not electing rescission -- and not giving the defendant the opportunity to accept rescission -- does waive an action for rescission. In that event, the substantive law of rescission (not any procedural rule) dictates that a plaintiff who has not elected rescission and tendered is not entitled to rescission. See generally United States v. Oregon Lumber Co., 260 U.S. 290, 306 (1922).[34]

Here, however, when plaintiffs did not promptly announce their purpose to rescind and tender back the settlement money on learning the facts on which they base their fraud claims, plaintiffs lost the substantive right to rescind. Plaintiffs compounded their affirmance of the settlement agreements when they sued without offering any restoration and without seeking rescission. The bar to plaintiffs' rescission claim is not procedural but arises from plaintiffs' failure to meet the substantive requirements of election and tender.

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[34] In the Eleventh Circuit Court of Appeals, the plaintiffs cited several cases for the proposition that a party could pursue both rescission and damages alternatively. See, e.g., First National Bank of Lake Park v. Gay, 694 So. 2d 784 (Fla. 4th DCA 1997); Goldstein v. Serio, 566 So. 2d 1338 (Fla. 4th DCA 1990). These cases (none of which involved a general release) held that plaintiffs who had initially pled rescission (unlike plaintiffs here) and also had sought an alternative contract remedy should not have been precluded from pursuing rescission and damages alternatively. Other than a statement in First National that the plaintiff had "repudiated the lease," there is no discussion about whether the plaintiffs had complied with the substantive election and tender requirements for a rescission claim in those cases.

5. Plaintiffs' proposal would upset the balance embodied in the rule that allows a party to escape a fraudulently-induced contract by rescission but that binds a party who fails to invoke rescission

Florida provides ample remedies for fraudulent inducement to a plaintiff who executes a general release but promptly elects to rescind.[35] A plaintiff who rescinds has the opportunity to prove the underlying case (utilizing the allegedly concealed evidence), to seek damages based upon the fraud,[36] and to benefit from the significant enhancements to the case that will accrue if allegations of fraud are sustained. Presumptions and inferences will apply to accommodate for any evidence unavailable as a result of the fraud.[37] Punitive damages may also be available.[38]

These existing remedies compensate a plaintiff for any harm resulting from the alleged fraud and deter parties from

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[35] A plaintiff also, of course, has the option of negotiating for a limited instead of a general release.

[36] Blitstein v. Intervisa Corp., 545 So. 2d 308 (Fla. 3d DCA 1989); Hauser v. Van Zile, 269 So. 2d 396, 398 (Fla. 4th DCA 1972) (decree of rescission "may provide an award of such incidental damages as are necessary to effect complete relief").

[37] See, e.g., Metropolitan Dade Cty v. Bermudez, 648 So. 2d 197, 200-201 (Fla. 1st DCA 1994).

[38] Ault v. Lohr, 538 So. 2d 454, 455 (Fla. 1989) ("a jury finding of liability is the equivalent of finding nominal damages and, consequently, the jury may assess punitive damages").

engaging in fraudulent conduct during the settlement process.[39] At the same time, the prompt election and tender requirements for a rescission claim protect the countervailing interests in finality of settlements, by requiring a settlement fraud plaintiff to give up the settlement money and to accept the responsibility of proving the unproven underlying claim.

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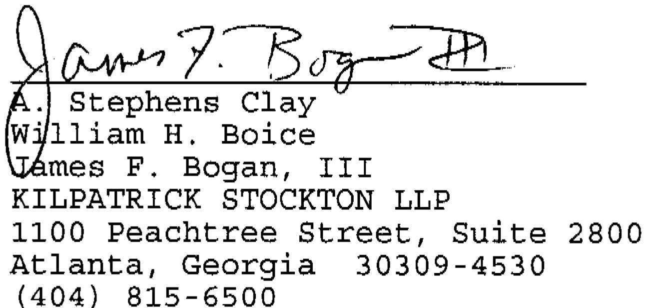
[39] Of course, if the alleged fraud occurs during judicial proceedings (as alleged in the consolidated Mazzoni Farms cases), the allegedly defrauding party also is subject to the "'discipline of the courts, the bar association, and the state.'" Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994).

CONCLUSION

For the foregoing reasons, both Certified Questions should be answered "Yes." The choice-of-law provision in the Foliage Farm and Castleton Gardens settlement agreements controls the disposition of the claim that the agreement was fraudulently induced. Under Florida law, the release in each of the types of these settlement agreements bars plaintiffs' fraudulent inducement claims.

Respectfully submitted,



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August 4, 1999

CERTIFICATE OF SERVICE

This is to certify that I have this date served a true and correct copy of the foregoing "ANSWER BRIEF OF APPELLEES" upon counsel of record for Plaintiffs/Appellants, by depositing same in the United States mail, postage prepaid, addressed to:

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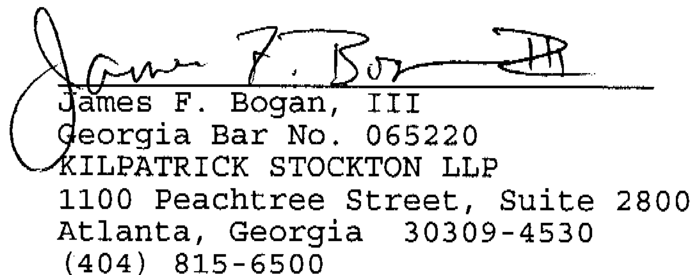

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