IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE DOW CHEMICAL CORPORATION,	§	No. 492,2012
	§	**CD-Rom Version To Be Filed**
Defendant Below, Appellant	§	Court Below-Superior Court of the State of Delaware, in and for New Castle County C.A. No. N11C-07-149-JOH
v.	§	
JOSE RUFINO CANALES BLANCO,	§	
Plaintiff Below, Appellee.	§	

CONSOLIDATED WITH

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DOLE FOOD COMPANY, INC., DOLE FRESH FRUIT COMPANY, STANDARD FRUIT COMPANY, AND STANDARD FRUIT & STEAMSHIP COMPANY,	§	No. 493,2012
	§	**CD-Rom Version To Be Filed**
Defendant Below, Appellant	§	Court Below-Superior Court of the State of Delaware, in and for New Castle County C.A. No. N11C-07-149-JOH
v.	§	
JOSE RUFINO CANALES BLANCO,	§	
Plaintiff Below, Appellee.	§	

APPELLANT THE DOW CHEMICAL COMPANY'S CORRECTED OPENING BRIEF ON INTERLOCUTORY APPEAL

Donald E. Reid (#1058)
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 North Market Street
Wilmington, Delaware 19899-1347
(302) 658-9200
Attorneys for Appellant
The Dow Chemical Company

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NATURE OF PROCEEDINGS

This is defendant-appellant The Dow Chemical Company's ("TDCC") Opening Brief in Support of its Interlocutory Appeal from the Superior Court's August 8, 2012 decision, denying TDCC's Motion for Judgment on the Pleadings. Plaintiff-appellee ("Plaintiff or Blanco") filed his lawsuit in Superior Court on July 21, 2011, alleging personal injury from exposure to a chemical called 1,2-dibromo-3-chloropropane ("DBCP"), when he worked on a banana plantation from 1979-1980 in Costa Rica. On September 30, 2011, TDCC and the rest of the defendants filed a Motion for Judgment on the Pleadings ("Motion"), arguing that Plaintiff's action was hopelessly barred by limitations. The argument was based, in part, on the fact that sixteen years prior to filing his Delaware lawsuit, Plaintiff filed another action making the exact same allegations in Florida state court. Although Plaintiff dismissed that action shortly thereafter, the filing of the Florida action proved that he was on notice of his claims at that time. Under Delaware law, Plaintiff had to bring his Delaware lawsuit within two years, 10 Del. C. § 8119, but he did not do so for sixteen years. However, the Superior Court denied the Motion because it accepted Plaintiff's argument that he was a member of a putative class action in Texas state court that tolled his claims from 1993 until June 2010, thus making his July 21, 2011 Delaware lawsuit timely.

On August 8, 2012, the Superior Court issued its order and memorandum denying defendants' Motion. Defendants moved to certify the opinion for interlocutory appeal, which Plaintiff opposed. On

September 6, 2012, the Superior Court denied, in part, and granted, in part, TDCC's application, agreeing to certify the question of whether Delaware law recognizes cross-jurisdictional class action tolling. On September 20, 2012, this Court accepted the interlocutory appeal.

SUMMARY OF ARGUMENT

1. The Superior Court's decision recognizing cross-jurisdictional class action tolling should be reversed for the threshold reason that there was no pending class action on which Plaintiff could properly rely for tolling. In the putative Texas class action cited by the Plaintiff and the Superior Court: (a) certification had been denied, (b) the case had been dismissed, and (c) final judgment had been entered - all during 1995 - sixteen years before this Delaware action was filed.

2. The Superior Court's decision recognizing cross-jurisdictional tolling should be reversed because of the problems and dangers it permits including forum shopping, unreasonable delay and the evisceration of statutes of limitations. Some of the potential abuses of cross-jurisdictional tolling are presented in stark relief in this case, including Plaintiff's claim of a tolling period of eighteen years from the filing of a Texas action in 1993 until the filing of this Delaware action in 2011 and the filing of almost three thousand additional plaintiffs' claims within days of the Superior Court's announcement of its intended decision.

3. The Superior Court's decision should be reversed because any decision adopting cross-jurisdictional class action tolling should be made by the General Assembly and not by the courts. If the Superior Court's decision is not reversed, then any class action allegations in a complaint filed in any court in the country would suspend indefinitely the running of any Delaware statute of

limitations. Such a watershed change in Delaware limitations law should be made, if at all, by the General Assembly and not by the courts.

STATEMENT OF FACTS

I. THE TEXAS CLASS ACTION WAS DISMISSED IN 1995.

A. The Texas Delgado Putative Class Action.

In the briefing below, Plaintiff purports to rely on a class action originally brought in Texas state court in 1993, styled as *Jorge Carcamo*[1] *v. Shell Oil Co.*, 93-c-2290 (Brazoria County, Texas). The *Carcamo* complaint was amended on March 16, 1994 to allege a class comprised of "all persons exposed to DBCP or DBCP-containing products designed, manufactured, marketed, distributed, or used by [Defendants] between 1965 and 1990" in 25 countries. *See* Appendix (hereinafter "App") at A-258, ¶ 12.

In *Carcamo*, defendants filed a third party petition impleading Dead Sea Bromine Co., Ltd., a company indirectly owned by the state of Israel. In April 1994, *Carcamo* (along with several other lawsuits including one styled *Delgado*) was removed to the United States District Court for the Southern District of Texas under 28 U.S.C. § 1330, on the grounds that the Dead Sea Bromine Co., Ltd. was a "foreign state" under the Foreign Sovereign Immunities Act ("FSIA").

Once these cases were removed to federal court, they were consolidated under *Delgado v. Shell Oil Co.*, Civ. A. No. H-94-1337 (Lake, J.) in June 1994. (hereinafter referred to as "*Delgado.*") The

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[1] Although the state court suit became styled as *Carcamo* prior to removal, the case was originally filed as a single plaintiff case called *Armando Bermudez v. Shell Oil Co.*; the petition was amended to add class allegations on the Second Amended Petition, *See* App. at A-278. Plaintiffs further amended the case to add *Carcamo* as the lead plaintiff in the Fourth Amended Petition. *See* App. at A-496.

federal district court issued an order on November 17, 1994, setting a scheduling conference for a month later and requesting briefing on several issues, including *inter alia*, "[w]hether class certification is appropriate." *See* Docket Entry 188 in No. 94-1337, *Delgado v. Shell Oil Co.*; App. at A-773. The parties completed the briefing of the class certification issue, with the plaintiffs requesting that "this motion for certification be granted," and defendants opposing certification. Docket Entries 197, 198, 232; App. at A-774-775.

In April 1995, the *Delgado* defendants filed a motion to dismiss the consolidated actions for *forum non conveniens*. Docket Entry 244; App. at A-778. On June 19, 1995, Judge Lake entered a preliminary injunction enjoining the *Delgado* plaintiffs and their attorneys from "commencing or causing to be commenced in the United States, other than in this Court, any action involving DBCP-related claims until this Court rules on Defendants' Motion to Dismiss for *Forum Non Conveniens*." Docket Entry 280, App. at A-782.

On July 11, 1995, Judge Lake issued his memorandum opinion granting the motion to dismiss the consolidated *Delgado* case for *forum non conveniens*, and also denying "all pending motions" in the cases, including the class certification motion. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). On October 27, 1995, the court entered a final judgment and permanent injunction, enjoining plaintiffs (and their law firms) from "commencing or causing to be commenced any action involving a DBCP-related claim in any court in the United States." App. at A-251-253. The *Delgado* plaintiffs

appealed this order on November 27, 1995, to the Fifth Circuit. Docket Entry 411; App. at A-792.[2] The Fifth Circuit affirmed Judge Lake's opinion on October 19, 2000, upholding the district court's subject matter jurisdiction under the FSIA. *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000). The United States Supreme Court denied *certiorari* on April 16, 2001. *Delgado v. Shell Oil Co.*, 532 U.S. 972 (2001).

Although discussed further *infra*, at this point the 1995 *Delgado* dismissal was indisputably final no later than the 2001 denial of *certiorari* by the Supreme Court and not "reinstated" until four years after.

B. The Florida *Abarca* Action Filed June 9, 1995.

Blanco was among the roughly 3,000 plaintiffs that filed the *Abarca* complaint, No. 95-3763, in Florida state court on June 9,

[2] At this point, some plaintiffs did re-file their claims in Costa Rica. On April 1, 1996, after the case was appealed but before the Fifth Circuit issued its opinion, the *Delgado* plaintiffs filed the first motion for reinstatement pursuant to a "return jurisdiction" clause contained in the Court's *forum non conveniens* opinion. 890 F. Supp. at 1375 ("Notwithstanding the dismissals that may result from this Memorandum and Order, in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in these actions in his home country or the country in which he was injured, that plaintiff may return to this court and, upon proper motion, the court will resume jurisdiction over the action as if the case has never been dismissed for *f.n.c.*"). When Judge Lake issued his *forum non conveniens* opinion in July 1995, the Fifth Circuit required these clauses. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991). On February 20, 1997, Judge Lake denied this motion without prejudice because of the pending Fifth Circuit appeal. Docket Entry 472, App. at A-797.

1995, making the same allegations as in this case. That action was removed to the United States District Court for the Middle District of Florida, No. 95-1096-CV on July 7, 1995. *See* App. at A-803-915. The *Abarca* plaintiffs voluntarily dismissed their lawsuit five days later on July 12, 1995.

The timeline between the *Abarca* Florida action and the Texas *Delgado* action is important. On July 11, 1995, Judge Lake indicated his intent to dismiss the *Delgado* case[3] on the basis of forum *non conveniens* and denied, *inter alia*, the class certification motion. This is the day before *Abarca* was dismissed. Thus, at the moment when Blanco dismissed the *Abarca* lawsuit, he was aware there was no longer a pending class action on which to rely to toll limitations.

C. The October 3, 1997 Hawai'i *Patrickson* Action.

Almost two years after Judge Lake's final judgment in *Delgado*, other DBCP plaintiffs (also represented by Mr. Hendler, Blanco's lead counsel) filed another lawsuit on October 3, 1997 in Hawai'i state court. That case was removed to the U.S. District Court for the District of Hawai'i, where the plaintiffs filed an Amended Complaint. The district court dismissed the case under *forum non conveniens*, but the Ninth Circuit reversed that judgment, holding that there was no subject matter jurisdiction under the FSIA, despite the

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[3] Although Judge Lake's memorandum and opinion granted defendants' motion to dismiss on the basis of *forum non conveniens*, because he found that plaintiffs "have demonstrated a need to discover evidence in the United States," he decided to postpone the final dismissal for 90 days, to allow plaintiffs an opportunity to conduct that discovery. *Delgado*, 890 F. Supp. at 1369.

contrary Fifth Circuit *Delgado* authority. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 809 (9th Cir. 2001). The United States Supreme Court affirmed that decision two years later. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003). Because those plaintiffs had also been parties to the 1995 *Abarca* action in Florida, following remand of the *Patrickson* case, defendants filed a motion for summary judgment based on limitations. Although plaintiffs also argued "class action tolling" there, the trial court granted the motion on July 30, 2009.[4]

D. *Delgado* Redux: Lazarus Rising.

Armed with the Supreme Court's *Patrickson* opinion, the *Delgado* plaintiffs moved to remand and to reinstate their case on May 13, 2003. (By this point, *Delgado* had been dismissed for over seven years.) Judge Lake first considered his subject matter jurisdiction to rule on the motion to reinstate, reasoning that "[a]lthough a judgment entered by a federal court was once open to both direct and collateral attack on grounds that the court entering the judgment lacked subject matter jurisdiction, a court's determination that it has subject matter jurisdiction is now generally held to be a final decision not subject to collateral attack if the issue of jurisdiction was actually litigated and *expressly* decided, even if incorrectly." *Id.* at 805. (emphasis in original) (citing *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 137-138 (1938)). Nonetheless, holding that

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[4] The *Patrickson* limitations opinion is currently on appeal in the Intermediate Court of Appeals of the State of Hawai'i, Civil No. 07-01-0047.

Patrickson did terminate "whatever ancillary jurisdiction existed," Judge Lake remanded the case to state court for consideration only of any plaintiff's rights under the "right to return" provisions of his 1995 Order.[5] *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 817 (S.D. Tex. 2004). At that point, there had been a nine-year gap between the October 1995 dismissal and the 2004 remand; during that time, no Texas class allegations were pending upon which any plaintiff anywhere might have relied.

On December 30, 2004, back in state court in both *Delgado* and *Carcamo*, the Costa Rican plaintiffs moved to reinstate their claims under the "right of return" provisions in Judge Lake's July 11, 1995 opinion. *Delgado*, 890 F. Supp. at 1375. Both Texas state courts granted these motions; the *Carcamo* court on April 26, 2005 and the *Delgado* court on June 16, 2005. By this point, the defendants (other than the "Dole Defendants") had settled with all of the *Delgado* and *Carcamo* plaintiffs. The Dole Defendants sought a writ of mandamus to

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[5] This clause allowed actual named plaintiffs and intervenors the right to return to the Texas District Court and move to have the case reopened. *See Delgado*, 890 F. Supp. at 1375 ("[Upon] the dismissal for lack of jurisdiction of any action commenced by a plaintiff in these actions in his home country or the country in which he was injured, that plaintiff may return to this court and, upon proper motion, the court will resume jurisdiction over the action.") As the Eastern District of Louisiana recently found, however, a return jurisdiction clause "does not indicate that the right to return extended to putative class members, that the case would necessarily be reopened, much less reopened as a class action, or even that other plaintiffs, aside from the plaintiff making the motion, would be allowed to rejoin the case in Texas." *Chaverri v. Dole Food Co.*, 2012 WL 4097216, at *11 (E.D. La. 2012); App. at A-1004.

a Texas court of appeals, arguing that the plaintiffs failed to prove they complied with the "return jurisdiction" clause, a condition precedent to reinstatement. The court of appeals disagreed, finding that the entire dismissal—including the "return jurisdiction" requirement, was void for lack of subject matter jurisdiction in federal court. *In re Standard Fruit Co.*, 2005 WL 2230246, *1 (Tex. App.-Houston [14th Dist.] 2005, orig. proceeding). Plaintiffs then filed an Eighth Amended Petition on February 1, 2006, reasserting class allegations. *See* App. at A-921. Later that year, the Dole Defendants also reached a settlement with all the *Delgado* and *Carcamo* plaintiffs (and others), leaving only two intervenors represented by Mr. Hendler in the *Carcamo* action. On September 28, 2009, although their own pleading had not adopted the class action allegations, the two *Carcamo* intervenors moved for class certification, which the Texas state district court denied on June 3, 2010. *See* App. at A-1008-1017; A-942.

E. Delaware and Louisiana: Race to the Next Forum.

With the *Carcamo/Delgado* case finally dead and buried, on May 31, June 1, and June 2, 2011, Mr. Hendler filed seven lawsuits in Louisiana federal court, the lowest-numbered case of which was styled *Alvarado Chaverri v. Dole Food Co.*, No. 2:11-CV-1289-CJB-KWR (E.D. La.) (Barbier, J.). On September 17, 2012, Judge Barbier granted defendants' motion for summary judgment based on limitations. *See* App. at A-967-1007. In that action, plaintiffs had also attempted to avoid limitations with "class action tolling."

Meanwhile, on July 21, 2011, this action had been filed by Blanco in the Superior Court. Defendants moved for judgment on the pleadings, and the Court heard the Motion on March 9, 2012. On May 31, 2012, the Superior Court issued its letter announcing its intent to deny the Motion. The letter explained that "[b]ecause the applicable statute of limitations to file an action alleging personal injury may run before the Court issues its opinion on the issues raised, this letter serves as notice [of its intent.]" App. at A-964. Then on August 8, 2012, the Superior Court issued its memorandum and order denying the motions, but noting the issue as one of first impression under Delaware law.[6] Defendants moved to certify the opinion for interlocutory appeal, which Plaintiff opposed. On September 6, 2012, the Superior Court denied, in part, and granted, in part, TDCC's application, agreeing to certify the question of whether Delaware law recognized cross-jurisdictional tolling. On September 20, 2012, this Court accepted the appeal on interlocutory review and issued its briefing schedule.

Although the seven Louisiana actions were filed first, when the Superior Court, on May 31, 2012, announced its intent to deny defendants' Motion in this case, Mr. Hendler wrote a letter to the Louisiana court, stating that he intended to "take steps to protect and preserve their claims" by re-filing complaints for all the

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[6] Pursuant to Rule 14(b)(vii) the Superior Court's decision is attached to this brief as Exhibit A. The reference to this issue as one of first impression under Delaware law is on pages 1 and 17.

Louisiana plaintiffs in Delaware. App. at A-965. He explained that "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.*). Over the next two days, he then filed eight actions in the United States District Court for the District of Delaware and one more in the Superior Court on behalf of 2,960 plaintiffs.

ARGUMENT

QUESTION PRESENTED

Whether the Superior Court erred as a matter of law by holding that Delaware law allows cross-jurisdictional class action tolling.

This question was raised in the Superior Court. (See App. at A-032-047).

STANDARD AND SCOPE OF REVIEW

In reviewing the Superior Court's denial of a motion for judgment on the pleadings, the scope of review is *de novo*. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1119, 1204 (Del. 1993).

MERITS OF ARGUMENT

I. THIS COURT SHOULD NOT ADOPT CROSS-JURISDICTIONAL CLASS ACTION TOLLING.

A. The *American Pipe* tolling rule.

Blanco claims that the *Carcamo* putative class action filed in 1993 in Texas state district court tolled his claims under the "class action tolling" doctrine announced by the United States Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, the Supreme Court held that a limitations period was tolled during the pendency of a class action for putative class members who intervened in that case after class certification was denied. 414 U.S. at 552-53. The rationale underlying *American Pipe* was that tolling the statute of limitations for all purported class members upon the filing of a class action complaint would

promote both efficiency and economy of litigation, which are the primary purposes of the class action device. *American Pipe*, 414 U.S. at 553-54. Without such a tolling benefit, putative class members would feel compelled to file motions to intervene in the action before limitations ran in order to preserve their claims, and these "protective" filings would be contrary to efficiency goals. Subsequently, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Supreme Court extended the *American Pipe* rule to putative class members who filed individual actions (rather than simply intervening) in the same federal court after class certification was denied. *Id.* at 350. Delaware, along with a majority of the states, has adopted the *American Pipe* class action tolling rule for intra-jurisdictional tolling. *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175, at *13 (Del. Ch. Ct. 2011).

Blanco seeks to greatly expand the *American Pipe* rule by arguing that a Texas class action tolled the Delaware statute of limitations for claims he filed half-way across the country here in Delaware decades later. *American Pipe*, *Crown Cork*, and *Dubroff* all involved either motions to intervene or individual suits that were filed after the denial of class certification, where the original class action and the later intervention or individual suit were brought *in the same jurisdiction*. *American Pipe*, 414 U.S. at 553 (intervention timely in same lawsuit in which class certification denied); *Crown, Cork*, 462 U.S. at 347 (individual and class lawsuits both filed in federal district court in Maryland); *Dubroff*, 2011 WL 5137175, at *13 (motions to intervene brought in Delaware's Court of

Chancery where class certification was denied). The Superior Court correctly noted that the *American Pipe* tolling rule was an *intra*-jurisdictional one, and that this appeal presented the question of whether the same tolling rule should apply in the *cross*-jurisdictional context. *Blanco v. Amvac Chemical Corp.*, 2012 WL 3194412, at *7 (Super. Ct. Del. 2012).

B. There Was No Putative Class Action on Which Plaintiff-Appellee Could Rely.

Before discussing any of the important policy reasons discussed *infra* that augur against adopting cross-jurisdictional tolling, TDCC respectfully submits that the Superior Court erred as a matter of law by ignoring the threshold question that precedes any *American Pipe* tolling—whether there exists a putative class action on which the plaintiff may rely for tolling. It is precisely on this basis that Judge Barbier in the Eastern District of Louisiana recently ruled that Mr. Hendler's clients' claims were time-barred in the Louisiana cases. *Chaverri v. Dole Food Co.*, 2012 WL 4097216, at *12 (E.D. La. 2012); App. at A-984-1024. Judge Barbier held that any *American Pipe* tolling ceased on July 11, 1995, the moment class certification was denied. *Id.* at *8. Addressing plaintiffs' argument that the class certification denial was not a denial on the merits, the court then reasoned that, at the very latest, the final judgment entered on October 27, 1995, clearly halted any tolling. *Id.*

Importantly, Judge Barbier relied on the very language of *American Pipe* itself in finding that the denial of class certification ended tolling. He noted the language from the opinion that "the

commencement of the class action suspend[s] the running of the limitations period *only during the pendency of the motion to strip the suit of its class action character*. *Id.* (citing *American Pipe*, 414 U.S. at 561) (emph. added). In addition, in *Crown, Cork & Seal Co.*, the Court held: "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class *until class certification is denied. At that point*, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." 462 U.S. at 354 (emph. added). Judge Barbier also cited the reasoning of the seminal case *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998).

In *Armstrong*, the Eleventh Circuit considered whether *American Pipe* tolling ceased when class certification was denied, or whether tolling continued until after an appeal from an order denying class certification. *Id.* at 1379. The *Armstrong* court decided that class certification denial, rather than the conclusion of appeal, was the logical point to end *American Pipe* tolling, for several reasons. First, once certification has been denied, "no reasonable person" would rely on the hope that at some point in the future the suit would proceed as a class action, as few such appeals are successful. Second, tolling throughout the appeals process would "seriously contravene the policies underlying statutes of limitations," for an appeal could languish for several years. *Id.* at 1388. This lengthy delay would "leave cases in limbo for years at a time" and "increase[]

the possibility that evidence will be lost, memories will fade, and witnesses will disappear." *Id.*[7]

The Superior Court erred as a matter of law by holding that the July 11, 1995 *forum non conveniens* dismissal "while final for purposes of appealability, was not on the merits, and therefore lacks the *res judicata* or *collateral estoppel* effect for which [defendants] try to invoke it." *Blanco v. Amvac Chemical Corp.*, 2012 WL 3194412, at *12. The Court's holding missed the point. It is not a question of res judicata or collateral estoppel effect. It is a question of whether an action is pending for purposes of tolling a statute of limitations. Moreover, even assuming, as the Eastern District of Louisiana did, that the class certification denial was not on the merits, final judgment was entered in the *Delgado* case on October 27, 1995. "While the denial of class certification may not have been on the merits, coupled with the dismissal of the action, it was nonetheless sufficient to alert putative class members that they could not reasonably expect their rights to be protected by the class

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[7] This comports with most circuit courts of appeal addressing this question. *Bridges v. Department of Maryland State Police*, 441 F.3d 197, 213 (4th Cir. 2006); *Stone Container Corp. v. U.S.*, 229 F.3d 1345, 1356 (Fed. Cir. 2000) ("[W]e hold that tolling ends when class certification is denied in the trial court."); *Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 (3d Cir. 1995); *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir. 1989); *Andrews v. Orr*, 851 F.2d 146, 149-51 (6th Cir. 1988); *Fernandez v. Chardon*, 681 F.2d 42, 48 (1st Cir. 1982); *but see Monahan v. City of Wilmington*, 2004 WL 758342, *2 (D. Del. 2004) (allowing tolling during interlocutory appeal of class action certification decision, relying on enactment of Rule 23(f) of the Federal Rules of Civil Procedure).

action." *Chaverri v. Dole Food Co.*, 2012 WL 4097216, at *9 (E.D. La. 2012). After (1) class certification was denied and (2) final judgment was entered, no reasonable plaintiff could have relied on the *Delgado* class action, and by allowing *American Pipe* tolling to continue despite these facts, the Superior Court erred.

In fact, even *American Pipe* intra-jurisdictional tolling stops not only upon a class certification decision on the merits, but also whenever it otherwise becomes clear, for any reason, that the class action will not proceed as a class. For example, although a class certification denial stops tolling, tolling also ceases once a class certification deadline passes, *see Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1019 (9th Cir. 2000), and tolling certainly stops once a final judgment is entered. *Giovanniello v. ALM Media, LLC*, 2010 WL 3528649, at *6 (D. Conn. 2010) (holding that the dismissal of a putative class action for lack of subject matter jurisdiction stops *American Pipe* tolling), *vacated on other grounds by Giovanniello v. ALM Media*, 2012 WL 1884741 (U.S. 2012).

C. Cross-Jurisdictional Tolling Should Not Be Allowed in Delaware.

The Superior Court, while properly recognizing the question of cross-jurisdictional tolling as one of first impression in Delaware, completely ignored the problems inherent in applying *American Pipe* tolling in the cross-jurisdictional context. The *American Pipe* rationale "is sound policy when both actions are brought in the same court system," because otherwise that system would be burdened with the protective filings the Court feared. *Portwood v.*

Ford Motor Co., 183 Ill.2d 459, 464 (1998). "Tolling the statute of limitations for purported class members who file individual suits within the same court system after class status is denied therefore serves to reduce the total number of filings within that system." *Id.* at 465. States, in adopting the *American Pipe* rule for intra-jurisdictional tolling, have the same interest in tolling during the pendency of a class action, because it furthers the purpose of the state's class action rules (many of which, like Delaware's, are identical to Federal Rule 23). However, the Superior Court completely missed the fact that there is "no comparable benefit from cross-jurisdictional tolling." *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000).

The State of Delaware has no interest in furthering the class action procedures of another jurisdiction, whether it is the federal courts or the courts of another state. *Wade v. Danek Medical, Inc.*, 182 F.3d 281, 286 (4th Cir. 1999) ("[T]he Commonwealth of Virginia simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction."). In addition, if Delaware were to adopt such a rule, it would be faced with an avalanche of filings, because as this case aptly demonstrates, many defendants are subject to personal jurisdiction and venue here. In fact, Plaintiff's counsel's actions here graphically illustrate one of the problems of cross-jurisdictional tolling. Within two days of the Superior Court's announcement that it intended to deny defendants' Motion, Plaintiffs' counsel filed nine actions with almost 3,000 new plaintiffs, all of

whom are seeking to revive their stale claims here in Delaware. "Unless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run." *Portwood*, 183 Ill. at 465. Allowing cross-jurisdictional tolling also makes Delaware's limitations periods wholly dependent on the resolution of class actions in other jurisdictions. *Wade*, 182 F.3d at 288; *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008) (noting the "unwieldy" prospect of tying a state statute of limitations to the "resolution of claims in other jurisdictions"). Cross-jurisdictional tolling can also, as it did in this case, effectively eviscerate the state's limitations laws. *Maestas*, 33 S.W.3d at 809 (cross-jurisdictional tolling is "contrary to [the state] legislature's power to adopt statutes of limitations").

But putting all of these policy arguments aside, even if this Court were prepared to adopt cross-jurisdictional tolling, it should not do so on these facts, for two reasons. First, the Superior Court below erred as a matter of law when it found that Blanco's claims were tolled based on a class action in which class certification was denied in July 11, 1995, final judgment entered in October 27, 1995, and where that judgment was affirmed by the Fifth Circuit on October 19, 2000 and the Supreme Court denied *certiorari* on April 16, 2001. If the entry of final judgment in 1995 did not terminate the ability of the *Delgado* case to toll a statute of

limitations, certainly the denial of certiorari on April 16, 2001 must have done so. Second, allowing an eighteen-year tolling period has not been countenanced by any court, and it is not a result even remotely fathomed by the Supreme Court in *American Pipe*.

D. The Cases Allowing Cross-Jurisdictional Tolling Have Express Limitations.

The courts that have allowed cross-jurisdictional tolling have done so with express limitations and unique facts not present here. *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244 (Mont. 2010); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 161-62 (Ohio 2002); *Staub v. Eastman Kodak Co.*, 320 N.J. Super. 34 (1999); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 389 (Mo. Ct. App. 1990); *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986).[8] In *Stevens*, the Montana Supreme Court noted that by adopting cross-jurisdictional tolling, "we may well create the incentive complained of in *Portwood* and *Maestas*, for out-of-state plaintiffs to file suit in Montana courts when their claims

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[8] In contrast, the courts that have rejected cross-jurisdictional tolling are legion. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008); *Wade v. Danek Med. Inc.*, 182 F.3d 281, 287 (4th Cir. 1999); *In re Aredia & Zometa Prods. Liab. Litig.*, 2010 WL 4977066, *2 (M.D. Tenn. 2010); *In re Urethane Antitrust Litig.*, 663 F.Supp.2d 1067, 1082 (D. Kan. 2009); *Love v. Wyeth*, 569 F.Supp.2d 1228, 1236 (N.D. Ala. 2008); *In re Vioxx Prods. Liab. Litig.*, 2007 WL 3334339, *3 (E.D. La. 2007); *Thelen v. Mass. Mut. Life Ins. Co.*, 111 F.Supp.2d 688, 695 (D. Md. 2000); *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 945 (Penn. 2002); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000); *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1105 (Ill. 1998); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 758 (Tex. App.-Amarillo 1995, writ denied).

are time-barred in other jurisdictions." 247 P.3d at 256. However, *Stevens* limited its ruling by adopting a sliding scale "to ensure that defendants are not unfairly prejudiced" finding that if, for example, "the class action suit was alleged to have tolled the statute of limitations for over a decade—we might find the principles of notice and fairness to defendants not met and the doctrine inapplicable." *Id.* at 257 (emphasis in original). In addition, Montana is not Delaware, and if Delaware were to apply the same rule, that rule's impact would be remarkably larger simply because so many more defendants are subject to personal jurisdiction and venue here.

A sharply divided Ohio Supreme Court extended cross-jurisdictional tolling benefits to putative class members of class actions filed in that state or the federal court system. *Vaccariello*, 763 N.E.2d at 163. Ohio courts have noted that *Vaccariello* therefore limited its holding to a class action filed "in Ohio or the federal court system." *Arandell Corp. v. American Elec. Power Co.*, 2010 WL 3667004, at *10 (S.D. Ohio 2010). And similarly, courts in New Jersey, Michigan, and Missouri have recognized tolling based on class actions filed in federal courts located in the same state. *Staub*, 726 A.2d at 967 (New Jersey federal court class action tolled statute of limitations until denial of the motion for class certification); *Lee*, 384 N.W.2d at 168 (Michigan federal court class action tolled statute of limitations); and *Hyatt*, 801 S.W.2d at 389 (Missouri federal court class action tolled statute of limitations). None of these authorities support extending cross-jurisdictional tolling to the facts of this case.

E. The Legislature, Not the Courts, Should Expand Limitations.

Since 1907, this Court has recognized that any changes to the statutes of limitation should come from the General Assembly, not the judiciary. *Lewis v. Pawnee Bill's Wild West Co.*, 22 Del. 316, 316 (Del. 1907) ("Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of the court to do so."). The public policy rationale underlying the enactment of statutes of limitations is that eventually the "right to be free of stale claims in time comes to prevail over the right to prosecute them." *State ex rel. Brady v. Pettinaro Enterprises*, 870 A.2d 513, 530 (Del. Ch. 2005). Currently, the Delaware legislature's judgment is that personal injury actions should be brought within two years. 10 Del. C. § 8119. To apply tolling as Blanco would here, over a period of eighteen years, would involve a watershed change in the law, which should be enacted by the legislature, not the courts. *Ames v. Wilmington Housing Authority*, 233 A.2d 453, 456 (Del. 1967) (the Legislature "and not the Judiciary is the declarer of the public policy of this State.").

In *Ewing v. Beck*, 520 A.2d 653, 659 (Del. 1987), the Supreme Court considered whether the courts should adopt a continuing treatment doctrine exception to the statute of limitations for medical malpractice actions. Such an exception would provide that while a physician continued medical treatment of a patient, the limitations period would not run, so that a patient would not be forced to

terminate his relationship with his physician. The *Ewing* Court rejected the doctrine precisely because it was the legislature's job, not the courts, to enact limitations laws; therefore, the beginning and end of the analysis was the fact that the continuing treatment doctrine exception was simply not the law in Delaware. *See id.* at 660 ("It is reasonable to assume that the Delaware legislature was aware of these alternative approaches to the limitations problems in medical malpractice cases and decided, in its wisdom, not to include such provisions in the Delaware law."). Similarly, Delaware has chosen to codify its statutes of limitations, and *it has not chosen to adopt cross-jurisdictional tolling rules.* The Superior Court does not sit "as a super legislature to eviscerate proper legislative enactments….only the elected representative of the people may amend or repeal it." *Reyes v. Kent General Hospital Inc.*, 487 A.2d 1142 (Del. 1984). If cross-jurisdictional tolling is to be allowed under Delaware law, then the General Assembly must enact it. The Superior Court erred as a matter of law when it announced a watershed rule, a tolling principle that would radically expand Delaware's statutes of limitations, without recognizing that such changes should come, if at all, from the General Assembly and not the Courts.

CONCLUSION

For the foregoing reasons, TDCC[9] respectfully requests that this Court reverse the denial below and grant TDCC's Motion for Judgment on the Pleadings.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

Donald E. Reid (#1058)
Karl G. Randall (#5054)
1201 North Market Street, 18th Floor
P.O. Box 1347
Wilmington, Delaware 19899-1347
Telephone: (302) 658-9200
Attorneys for Defendant-Below, Appellant The Dow Chemical Company

OF COUNSEL:
Michael L. Brem
Texas State Bar No. 02952020
SCHIRRMEISTER DIAZ-ARRASTIA BREM LLP
Pennzoil Place - North Tower
700 Milam Street, 10th Floor
Houston, Texas 77002
Telephone: (713) 221-2500

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[9] TDCC has been asked by defendant-appellant Occidental Chemical Corporation ("Occidental") to inform the Court that it joins in and adopts the arguments set forth in this Opening Brief.

CERTIFICATE OF SERVICE

I, Donald E. Reid, hereby certify that on the 5th day of November, 2012, a copy of Appellant The Dow Chemical Company's Corrected Opening Brief On Interlocutory Appeal was served via Lexis/Nexis File and Serve upon the following counsel of record:

Michael L Sensor, Esquire
Perry & Sensor
704 North King Street, Suite 560
Wilmington, DE 19801
msensor@perry-sensor.com

Timothy J. Houseal, Esquire
Young Conaway Stargatt & Taylor LLP
1000 West Street, 17th Floor
Wilmington, DE 19801
thouseal@ycst.com

Somers S. Price, Jr., Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
Wilmington, DE 19801
sprice@potteranderson.com

John C. Phillips, Jr.
Phillips, Goldman & Spence, P.A.
1200 North Broom Street
Wilmington, DE 19806
jcp@pgslaw.com

Donald E. Reid

Donald E. Reid (#1058)