THE SUPREME COURT OF THE STATE OF DELAWARE

DOLE FOOD COMPANY, INC., DOLE FRESH FRUIT COMPANY, STANDARD FRUIT COMPANY, and STANDARD FRUIT & STEAMSHIP COMPANY Appellants, v. JOSE RUFINO CANALES BLANCO, Appellee.	:	No. 493, 2012 Court Below: Superior Court of the State of Delaware in and for New Castle County C. A. No. N11C-07-149 JOH

CONSOLIDATED WITH

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

APPELLANTS' OPENING BRIEF ON INTERLOCUTORY APPEAL

Dated: November 5, 2012

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NATURE OF PROCEEDINGS

This is the Opening Brief of Defendants-Appellants Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit & Steamship Company ("Dole") in Support of their Interlocutory Appeal from the Superior Court's Order of August 8, 2012.

On July 21, 2011, Plaintiff Jose Rufino Canales Blanco filed the action below. Plaintiff alleges that he became sterile as a result of exposure to an agricultural chemical known as 1,2-dibromo-3-chloropropane ("DBCP") while working at a Costa Rican banana farm in 1979-1980. Appendix ("App.") at A-1046, ¶ 2; A-1048, ¶ 12.[1] Plaintiff made these same allegations in a Florida action that he filed in 1995, more than 16 years ago. App. at A-1024-1025, ¶¶ 13, 15.

On September 30, 2011, Defendant-Appellant Dow Chemical Company ("Dow") filed a motion for judgment on the pleadings based on Delaware's two-year personal injury statute of limitations, 10 Del. C. § 8119, and the inapplicability of any form of tolling. App. at A-22-25. On October 11, 2011, Dole filed a joinder in Dow's motion or, in the alternative, its own motion to dismiss. App. at A-1046.

On December 9, 2011, Plaintiff filed his opposition. App. at A-1071. Plaintiff argued that the 1993 filing of a putative class action in Texas tolled the statute of limitations on his Delaware claims until 2010 and that neither the dismissal of the putative Texas class action in 1995 nor Plaintiff's filing of the Florida action affected

[1] Citations to Appendix pages 1-1017 are to Dow's Appendix. Citations to Appendix pages 1018-1142 are to Dole's Appendix.

such tolling. App. at A-1083-1084. On December 30, 2011, Dole and Dow replied. App. at A-27, A-1100. Argument was held on March 9, 2012. App. at A-994. At the hearing, the Superior Court requested further briefing. App. at A-961-962. On March 30, 2012, Dole, Dow and Plaintiff filed supplemental briefs. App. at A-14, A-15, A-16.

On August 8, 2012, the Superior Court issued an Order denying defendants' motions (the "August 8 Order"). Dow's Opening Br., Ex. A. In sum, the Superior Court held that Plaintiff's claims were not time-barred because it concluded that Delaware should recognize the general notion of cross-jurisdictional class action tolling, which it interpreted to continue to June 2010 despite the Texas federal court's order dismissing the putative Texas class action in 1995. Id., Ex. A at 35. The Superior Court reasoned that the 1995 dismissal for forum non conveniens was not a final decision on the merits and thus did not terminate any putative class member's ability to reasonably rely on the "pendency" of the Texas class action. Id., Ex. A at 30-31. Similarly, the Superior Court interpreted the cross-jurisdictional class action tolling to continue despite the fact that Plaintiff had filed and then dismissed the Florida action more than 16 years earlier. Id., Ex. A at 17-35.

On August 20, 2012, Dole filed its Application for Certification of Interlocutory Appeal. Dole's Notice of Appeal from Interlocutory Order ("Notice"), Ex. B. On August 29, 2012, Plaintiff responded. Id., Ex. C. On September 6, 2012, the Superior Court granted in part and denied in part Dole's Application, certifying for interlocutory

appeal the question of whether Delaware recognizes cross-jurisdictional class action tolling. Id., Ex. D. On September 6, 2012, Dole filed its Notice of Appeal. Id. On September 20, 2012, this Court certified the August 8 Order for interlocutory appeal "as to that portion of the appellants' application that was granted by the Superior Court." September 20, 2012 Order at 2.

SUMMARY OF ARGUMENT

1. The Superior Court's August 8 Order establishing cross-jurisdictional class action tolling should be reversed. Delaware has never recognized such tolling, and it should not do so in the extraordinary circumstances of this case, where Plaintiff asserted identical claims in Florida more than 16 years earlier, and where the motion for class certification was denied and the putative Texas class action was dismissed more than 16 years ago. The facts of this case have nothing to do with Delaware, beyond the happenstance that some defendants are incorporated, and thus subject to personal jurisdiction, here. For the reasons below, adopting such a rule, especially in the expansive way set forth by the Superior Court, would undermine important state interests and public policies. This Court should decline to do so.

2. Most jurisdictions have declined to recognize cross-jurisdictional class action tolling for three reasons: (1) it renders the forum's limitations periods dependent on the vagaries of proceedings in foreign jurisdictions; (2) it encourages forum shopping; and (3) any interest in furthering the efficiency and economy of the class action procedures of other jurisdictions is outweighed by the significant disadvantages of such tolling for the forum. These reasons have particular force here, where the putative class action was initiated under another state's laws and dismissed more than 16 years ago. The few jurisdictions that recognize cross-jurisdictional class action tolling limit its scope in ways that would render it inapplicable here. In fact, no court has recognized cross-jurisdictional class ac-

tion tolling in circumstances like those present here. Given the number of companies that are incorporated in Delaware, this Court's adoption of such a rule would have especially adverse consequences.

3. The Court should also decline to adopt cross-jurisdictional class action tolling because Delaware courts "will not engage in judicial legislation by creating exceptions to a statute of limitations." Layton v. Allen, 246 A.2d 794, 798 (Del. 1968). In those cases where Delaware courts have crafted exceptions, events beyond the plaintiff's control prevented a timely suit. Here, Plaintiff sued on the same claims in 1995, but voluntarily dismissed that suit. He should not be allowed to revisit his choice 16 years later.

4. Plaintiff should not be allowed to use cross-jurisdictional class action tolling to circumvent the tolling rules that would apply in the jurisdiction where the putative class action was pending. Consistent with American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), and Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983), the great weight of authority holds that class action tolling ends with the denial of class certification or dismissal of the putative class action. Indeed, the Fifth Circuit--the jurisdiction in which the putative Texas class action was pending--has held that tolling ends with denial of class certification. Calderon v. Presidio Valley Farmers Ass'n, 863 F.2d 384, 390 (5th Cir. 1989).

5. Similarly, this Court should reject the Superior Court's interpretation of cross-jurisdictional class action tolling as continuing despite dismissal of the putative class action on forum non

conveniens grounds. Two separate federal courts have found that the 1995 order dismissing the putative Texas class action was a valid final judgment. See Delgado v. Shell Oil Co., Civ. Action No. H-94-1337, slip op. at 7-19 (S.D. Tex. Mar. 15, 2004); Delgado v. Shell Oil Co., 322 F. Supp. 2d 798, 803, 805, 808-09 (S.D. Tex. 2004); Chaverri v. Dole Food Co., 2012 WL 4097216, at *4 (E.D. La.). And under federal law, a dismissal for forum non conveniens is not analogous to a stay. Because the August 8 Order conflicts with federal authorities on these questions of federal law, it should be reversed.

STATEMENT OF FACTS

I. The Putative Texas Class Action.

A. The Texas State Court Proceedings.

On August 31, 1993, a putative class action was filed in Texas state court, Jorge Carcamo v. Shell Oil Co., No. 93-C-2290 ("Carcamo"). On March 16, 1994, after several prior amendments, the plaintiffs filed a Seventh Amended Petition ("SAP"). App. at A-258, ¶ 12. The SAP purported to allege claims for personal injury on behalf of "[a]ll persons exposed to DBCP, or DBCP-containing products, designed, manufactured, marketed, distributed or used by [defendants]" in 25 countries over a 25-year time period (1965 to 1990).[2] Id. The SAP was the operative pleading when the plaintiffs moved for class certification on March 29, 1994.[3]

B. The Texas Federal Court Proceedings.

On April 5, 1994, Carcamo was removed to Texas federal court based on the Foreign Sovereign Immunity Act ("FSIA"), and on June 30, 1994, the case was consolidated with several other cases under the caption Delgado v. Shell Oil Co., Civ. A. No. H-94-1337 ("Delgado"). The parties subsequently briefed several issues, including "[w]hether class certification is appropriate." App. at A-774-775 (Docket Nos. 188, 197, 198, and 232).

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[2] The Superior Court identified Plaintiff as "one of [the] plaintiffs" in the Carcamo class action. Notice, Ex. A at 1. In fact, Plaintiff was not named in any of the operative pleadings.

[3] For more details, the Court may consult the timeline attached as Exhibit A to Dole's Supplemental Brief, summarizing the Texas and Florida actions. App. at A-1132.

The Delgado defendants moved to dismiss for forum non conveniens ("f.n.c.") in April 1995. App. at A-778 (Docket No. 244). On July 11, 1995, the Texas federal court granted the motion to dismiss for f.n.c., and denied as moot "all pending motions," which included the class certification motion. Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1372-75 (S.D. Tex. 1995). On October 27, 1995, the court entered a final judgment dismissing the action. App. at A-251.

The plaintiffs appealed. App. at A-792 (Docket No. 411). On October 19, 2000, the Fifth Circuit affirmed, Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000), and on April 16, 2001, the United States Supreme Court denied review, Delgado v. Shell Oil Co., 532 U.S. 972 (2001).

II. The Florida Action.

On June 9, 1995, while the Delgado motion for class certification was pending, Plaintiff filed an action on behalf of himself and 2,999 other banana workers in Florida state court, Carlos Luis Abarca-Abarca v. CNK Disposition Corp., No. 95-3765 ("Abarca"). The plaintiffs alleged that they were exposed to DBCP "between 1965 and 1990," and suffered injuries to their "reproductive capacities." App. at A-1024-1025, ¶ 15.) On July 7, 1995, Abarca was removed to federal court. App. at A-803-915. Plaintiffs dismissed the action without prejudice on July 12, 1995, the day after the Texas federal court granted dismissal. App. at A-1132.

III. The Unrelated Patrickson Action In Hawaii.

In 1997, a separate putative class action involving alleged DBCP exposure was filed in Hawaii state court, Patrickson v. Dole Food Co., No. 97-4062-09.[4] That case was also removed to federal court based on the FSIA, but the Ninth Circuit reversed the Hawaii federal court's denial of remand, Patrickson v. Dole Food Co., 251 F.3d 795, 805-08 (9th Cir. 2001), and the Supreme Court affirmed remand, Dole Food Co. v. Patrickson, 538 U.S. 468, 473-80 (2003). While Patrickson was pending before the Supreme Court, the Delgado plaintiffs moved for leave to file a petition for rehearing, which the Supreme Court denied. Delgado v. Shell Oil Co., 537 U.S. 1229 (2003).

IV. The Putative Texas Class Action Is Reinstated.

On May 13, 2003, based on the Supreme Court's decision in Patrickson, the Delgado plaintiffs moved to vacate the Texas federal court's order of dismissal for f.n.c. as void for lack of subject matter jurisdiction, and to remand the consolidated actions to their respective Texas state courts. App. at A-798 (Docket No. 483). While the court granted remand, it rejected the argument that its order of dismissal for f.n.c. was void for lack of jurisdiction. See Delgado v. Shell Oil Co., Civ. Action No. H-94-1337, slip op. at 7-19 (S.D. Tex. Mar. 15, 2004); Delgado v. Shell Oil Co., 322 F. Supp. 2d 798, 803, 805, 808-09 (S.D. Tex. 2004). The court reasoned that "the f.n.c. dismissal and the return jurisdiction clause on which it was

[4] Following Delgado's dismissal, DBCP actions were also filed in Mississippi and Louisiana. See Chaverri, 2012 WL 4097216, at *3.

premised remain valid," because "the Supreme Court's decision in Patrickson was issued after this court's assertion of subject matter jurisdiction was fully litigated and after the f.n.c. dismissal became operative." Id. at 809 (emphasis added); see also id. at 805, 812-13.

Carcamo and Delgado were reinstated by their respective Texas state courts on April 26 and June 16, 2005. App. at A-975. Following reinstatement, Dole sought a writ of mandamus. The Texas appellate court denied the writ in an unpublished decision that, without analysis, characterized the Texas federal court's dismissal order as "void" for lack of jurisdiction. In re Standard Fruit Co., 2005 WL 2230246, at *1 (Tex. App. Ct.).

On February 1, 2006, the Carcamo plaintiffs filed an Eighth Amended Petition, reasserting class allegations. App. at A-921-923. Later that year, Dole settled with the plaintiffs, including those named in Carcamo, represented by the Misko Law Firm, leaving only two intervenors in the Carcamo action, who were represented by Plaintiff's Texas counsel. On September 24, 2007, Dole and other defendants were dismissed. On September 29, 2009, the two intervenors moved for class certification, which the Texas state court denied on June 3, 2010. See App. at A-976, A-1008-1017.

V. The Action Below.

Plaintiff filed this action on July 21, 2011. App. at A-1046. Notably, Plaintiff is asserting the same causes of action that he and the individually named plaintiffs asserted in the Florida Abarca action. Cf. App. at A-1024-1025, ¶¶ 13-15 with App. at 1049-1051,

¶¶ 14-22. As set forth above, Dole moved to dismiss Plaintiff's claims as time-barred, but the Superior Court denied Dole's motion. On September 6, 2012, the Superior Court certified for interlocutory appeal the question of whether Delaware recognizes cross-jurisdictional class action tolling. This Court granted review.

VI. The Louisiana Federal Court Actions.

Between May and June 2011, Plaintiff's Texas counsel filed seven DBCP actions in Louisiana federal court. Chaverri, 2012 WL 4097216, at *4. Those actions were later consolidated under the caption Chaverri v. Dole Food Co. Id. On April 6, 2012, Dole and the other defendants moved for summary judgment based on the statute of limitations. Id. Like Plaintiff here, the Louisiana plaintiffs claimed the putative Texas class action saved their claims. On September 17, 2012, the Louisiana federal court granted summary judgment, holding that the 1995 Delgado order denying class certification was final and appealable under federal law and ended tolling under Louisiana law, which follows federal law on class action tolling. Id. at *8-12.

ARGUMENT

QUESTION PRESENTED

Whether the Superior Court erred as a matter of law by holding that Delaware would recognize cross-jurisdictional class action tolling where the putative class action on which the plaintiff purports to rely was dismissed over 16 years earlier and where the plaintiff himself filed--and then dismissed--a prior lawsuit alleging identical claims more than 16 years ago.

STANDARD AND SCOPE OF REVIEW

Where the facts are undisputed, the application of the statute of limitations is a question of law. Scharf v. Edgcomb Corp., 864 A.2d 909, 916 (Del. 2004). An order denying or granting a motion to dismiss or motion for judgment on the pleadings is reviewed de novo. Taylor v. Pontell, 3 A.3d 1099, 2010 WL 3432605, at *2 (Del.); Parker v. Gadow, 893 A.2d 964, 966 (Del. 2006).

MERITS OF ARGUMENT

I. The Court Should Decline To Adopt The Superior Court's Expansive Interpretation of Cross-Jurisdictional Class Action Tolling.

This Interlocutory Appeal turns on the issue of whether Delaware should recognize cross-jurisdictional class action tolling--that is, tolling a forum's statute of limitations during the pendency of a putative class action in a foreign jurisdiction--in the extraordinary circumstances of this case and, if so, whether such tolling would save Plaintiff's claims.

In 1995, Plaintiff sued Dole in Florida, alleging the same personal injury claims he asserts here. Thus, the statute of limitations

on Plaintiff's claims expired no later than 1997, absent application of some form of tolling. The Superior Court held, however, that Plaintiff's claims were timely because the 1993 filing of the putative Texas class action tolled the statute of limitations on his claims until June 2010, when the Texas state court, following Carcamo's reinstatement, denied class certification. But in 1995, more than 15 years earlier, the Texas federal court hearing the Delgado action had denied class certification and entered final judgment dismissing the putative Texas class action for f.n.c. Thus, while Carcamo was reinstated a decade later, no putative Texas class action was pending for ten years. Despite that fact, Plaintiff sat on his claims until 2011.

These extraordinary circumstances do not warrant the judicial creation of an exception to the legislatively prescribed statute of limitations. No court has recognized cross-jurisdictional class action tolling in such circumstances, and this Court should decline to do so here. Creating such an exception here would "thwart[] the basic objective of repose underlying the very notion of a limitations period," Rotella v. Wood, 528 U.S. 549, 554 (2000), and place Delaware outside the mainstream of American jurisprudence on this issue.

A. American Pipe Does Not Mandate That States Recognize Cross-Jurisdictional Class Action Tolling.

To avoid Delaware's two-year statute of limitations, Plaintiff invokes the class action tolling doctrine articulated by the United States Supreme Court in American Pipe and Crown, Cork. But neither case involved cross-jurisdictional tolling, and neither case mandates that states adopt cross-jurisdictional tolling.

In American Pipe, with only 11 days to spare, the state of Utah filed a putative class action in federal court, alleging violations of the Sherman Antitrust Act. 414 U.S. at 541-42. The district court subsequently denied class certification. Id. at 542-43. Eight days later, more than 60 towns, municipalities and water districts in Utah moved to intervene. Id. at 544. The district court denied intervention, holding that the filing of the putative class action did not toll the statute of limitations. Id. On review, the Supreme Court disagreed: "[T]he commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." Id. at 553 (emphasis added).

In Crown, Cork, the Supreme Court extended American Pipe tolling to putative class members who file independent actions after denial of class certification. There, a putative class action was filed in federal court alleging violations of the Civil Rights Act of 1964. 462 U.S. at 347. Separately, plaintiff filed a complaint with the EEOC alleging racial discrimination. Id. at 347. After the putative class action was filed but before class certification was decided, the EEOC sent plaintiff a Notice of Right to Sue, triggering a 90-day period for plaintiff to file suit. Id. at 347-48. Thereafter, the district court denied class certification. Id. Within 90 days (but almost two years after receiving the EEOC notice), plaintiff filed suit in federal court. Id. at 348. The district court granted summary judgment on statute of limitations grounds. Id. On review, the Supreme Court

held that American Pipe tolled the statute of limitations even though the plaintiff filed a separate action instead of moving to intervene. Id. at 353-54. The Court reasoned that the inefficiencies the American Pipe Court sought to avoid would ensue if tolling were limited to putative class members who later intervene because putative class members "would not be able to rely on the existence of the suit to protect their rights." Id. at 350.

Neither American Pipe nor Crown, Cork involved cross-jurisdictional tolling. In both cases, the putative class action--involving federal claims for which federal law defined the limitations period--was filed in the same court system as the second action. As such, neither the holding nor the reasoning of American Pipe and Crown, Cork requires or supports cross-jurisdictional tolling. See Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008); In re Copper Antitrust Litig., 436 F.3d 782, 793-94 (7th Cir. 2006).

B. A Majority Of Courts Have Rejected Cross-Jurisdictional Class Action Tolling For Persuasive Reasons.

While courts are divided, the majority of jurisdictions have rejected cross-jurisdictional class action tolling. See, e.g., Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008) (California law); In re Copper Antitrust Litig., 436 F.3d 782, 793-97 (7th Cir. 2006) (federal law); Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999) (Virginia law); Casey v. Merck & Co., 722 S.E.2d 842, 846 (Va. 2012) (Virginia law); One Star v. Sisters of St. Francis, 752 N.W.2d 668, 680-81 (S.D. 2008) (South Dakota law); Maestas v. Sofamor Danek Grp., Inc., 33 S.W.3d 805, 809 (Tenn. 2000) (Tennessee law);

Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1105 (Ill. 1998) (Illinois law); Vaught v. Show Denko K.K., 107 F.3d 1137, 1141-47 (5th Cir. 1997) (Texas law); Bell v. Showa Denko K.K., 899 S.W.2d 749, 758 (Tex. Ct. App. 1995) (Texas law); Ravitch v. Pricewaterhouse, 793 A.2d 939, 945 (Pa. Super. Ct. 2002) (Pennsylvania law).[5] But see Stevens v. Novartis Pharm. Corp., 247 P.3d 244, 253-57 (Mont. 2010) (Montana law); Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, 163 (Ohio 2002) (Ohio law); Staub v. Eastman Kodak Co., 726 A.2d 955, 967 n.4 (N.J. Super. Ct. App. Div. 1999) (New Jersey law); Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C., 801 S.W.2d 382, 389 (Mo. Ct. App. 1990) (Missouri law); Lee v. Grand Rapids Bd. of Educ., 384 N.W.2d 165, 168 (Mich. Ct. App. 1986) (Michigan law).[6]

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[5] See also Soward v. Deutsche Bank AG, 814 F. Supp. 2d 272, 282 (S.D.N.Y. 2011) (New York law); In re Urethane Antitrust Litig., 663 F. Supp. 2d 1067, 1081-83 (D. Kan. 2009) (Tennessee and Indiana law); Newport v. Dell, Inc., 2008 WL 4347311, at *5 (D. Ariz.) (Arizona law); Love v. Wyeth, 569 F. Supp. 2d 1228, 1235-36 (N.D. Ala. 2008) (Alabama law); In re Vioxx Prods. Liab. Litig., 2007 WL 3334339, at *2-6 (E.D. La.) (Texas, California and Indiana law); In re Vioxx Prods. Liab. Litig., 2007 WL 3353404, at *2-5 (E.D. La.) (Kentucky and Tennessee law); In re Vioxx Prods. Liab. Litig., 522 F. Supp. 2d 799, 807-15 (E.D. La. 2007) (Pennsylvania, Puerto Rico, and Illinois law); Bozeman v. Lucent Techs., Inc., 2005 WL 2145911, at *2-3 (M.D. Ala.) (Alabama law); Thelen v. Mass. Mut. Life Ins. Co., 111 F. Supp. 2d 688, 694-95 (D. Md. 2000) (Maryland law); Barela v. Showa Denko K.K., 1996 WL 316544, at *4 (D.N.M.) (New Mexico law).

[6] See also City Select Auto Sales, Inc. v. David Randall Assocs., Inc., 2012 WL 426267, at *3-5 (D.N.J.) (applying American Pipe where the earlier New Jersey state court action asserted federal claims); In re Linerboard Antitrust Litig., 223 F.R.D. 335, 348-51 (E.D. Pa. 2004) (holding that Colorado, Indiana, Kansas, South Carolina and Tennessee would adopt cross-jurisdictional class action tolling with respect to an earlier federal antitrust class action in which classes were certified). Cf. Seaboard Corp. v. Marsh Inc., 284 P.3d

The courts that have declined to recognize cross-jurisdictional class action tolling have done so for three fundamental reasons: (1) it renders the forum's limitations periods effectively dependent on the resolution of claims in other jurisdictions; (2) it encourages forum shopping; and (3) the forum has no interest in furthering the efficiency and economy of the class action procedures of other jurisdictions given the significant disadvantages that such tolling imposes on the forum. These reasons have particular force here.

i. Recognizing Cross-Jurisdictional Class Action Tolling Would Subject Delaware's Limitations Periods To The Vagaries Of Foreign Proceedings.

Delaware courts have long recognized the publicly beneficial effects of precluding stale suits. See, e.g., Bovay v. H.M. Byllesby & Co., 29 A.2d 801, 804 (Del. Ch. 1943); Boston v. Bradley's Ex'r, 4 Harr. 524, 1847 WL 655, at *3 (Del. Super.). Recognizing cross-jurisdictional class action tolling would potentially undermine these beneficial effects by subordinating the choices of the General Assembly to the vagaries of judicial proceedings governed by different law in other jurisdictions--here, for example, extending the applicable statute for more than a decade and a half beyond what Delaware law would otherwise provide. In effect, such tolling would create an open-ended, arbitrary, and potentially indefinite exception to the limitations periods, over which Delaware courts would have no control.

314, 328 (Kan. 2012) (applying Kansas's Savings Statute to an extra-jurisdictional class action).

Many courts have rejected cross-jurisdictional class action tolling for this reason. For instance, in Wade, the Fourth Circuit observed that "if Virginia were to allow cross-jurisdictional tolling, it would render the Virginia limitations period effectively dependent on the resolution of claims in other jurisdictions, with the length of the limitations period varying depending on the efficiency (or inefficiency) of courts in those jurisdictions." 182 F.3d at 288. Likewise, in Portwood, the Supreme Court of Illinois concluded that "[s]tate courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action." 701 N.E.2d at 1104.

These concerns are particularly compelling here. In 1995, Plaintiff filed a nearly identical complaint in Florida. Therefore, absent some tolling rule, the statute of limitations ran no later than 1997. Recognizing cross-jurisdictional class action tolling in these circumstances would extend Delaware's statute of limitations on personal injury claims by 14 years, effectively nullifying it.

In its August 8 Order, the Superior Court discounted such concerns, stating that uncertainty "is a risk when any limitations period is tolled." Blanco v. AMVAC Chemical Corp., 2012 WL 3194412, at *9 (Del. Super.). But cross-jurisdictional class action tolling poses a greater risk of uncertainty than other tolling doctrines, such as the discovery rule. The application of the discovery rule does not depend on developments in judicial proceedings in other jurisdictions; by its

very nature, cross-jurisdictional class action tolling does. For this reason, it poses unique problems for "the orderly and efficient administration of justice." McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970).

ii. Recognizing Cross-Jurisdictional Class Action Tolling Would Encourage Forum Shopping.

As numerous courts have recognized, adopting cross-jurisdictional class action tolling would encourage forum shopping by plaintiffs who have no connection to the forum, a prospect rejected by the General Assembly, as evidenced by its adoption of 10 Del. C. § 8121, Delaware's Borrowing Statute. See Pack v. Beech Aircraft Corp., 132 A.2d 54, 58 (Del. 1957) (explaining that the Borrowing Statute evidences a strong policy to "prevent shopping for the most favorable forum"). See also Pallano v. AES Corp., 2011 WL 2803365, at *3 (Del. Super.). In Wade, the Fourth Circuit warned that "if Virginia were to adopt a cross-jurisdictional tolling rule, Virginia would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as forum-shopping plaintiffs from across the country rush into the Virginia courts to take advantage of its cross-jurisdictional tolling rule." 182 F.3d at 287. Similarly, in Maestas, the Tennessee Supreme Court stated:

> Adoption of the doctrine would run the risk that Tennessee courts would become a clearinghouse for cases that are barred in the jurisdictions in which they otherwise would have been brought. Litigants who ordinarily would have filed in other states' courts would file in Tennessee solely because our cross-jurisdictional tolling doctrine would have effectively created an overly generous statute of limitations. We cannot sanction such forum shopping.

33 S.W.3d at 808 (internal citations omitted). See also Portwood, 701 N.E.2d at 1104 ("[A]doption of cross-jurisdictional class tolling . . . would encourage plaintiffs from across the country to bring suit here following dismissal of their class actions in federal court. We refuse to expose the Illinois court system to such forum shopping.").

Concerns about forum shopping are particularly appropriate here, where Plaintiff asserted identical claims in Florida more than a decade and a half ago. Delaware courts long have recognized that "forum shopping is contrary to public policy" in this state. Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co., 1994 WL 721651, at *1 (Del. Super.). See also Burlington N. R.R. Co. v. Allianz Underwriters Ins. Co., 1994 WL 637011, at *4 (Del. Super.). If Delaware in particular were to become one of the few states that allows cross-jurisdictional class action tolling, it would impose a substantial and very real burden on the State vis-à-vis all other states because a majority of publicly traded corporations are incorporated, and potentially subject to personal jurisdiction, here. See Sprint Nextel Corp. v. iPCS, Inc., 2008 WL 2737409, at *14 (Del. Ch.). Thus, Delaware would be at an even greater risk than other states of a "flood of subsequent filings once a class action in another forum is dismissed." Wade, 182 F.3d at 287. It also would serve to make Delaware less attractive as a state of incorporation.

The August 8 Order effectively invites such filings. Despite Plaintiff's lack of connection to Delaware, the Superior Court justified Plaintiff's choice of forum on the ground that Dole and Dow are

incorporated here, and even suggested that Delaware public policy favors "making our courts available for resolving disputes involving Delaware corporations." Blanco, 2012 WL 3194412, at *10 & n.84. The Superior Court discounted concerns about forum shopping, stating that it is "only a risk if but few jurisdictions welcome such plaintiffs." Id. at *9. But currently only a few jurisdictions recognize cross-jurisdictional class action tolling, and none applies it as broadly as the August 8 Order. As such, unless this Court reverses the August 8 Order, litigants, like Plaintiff, will find Delaware the most favorable jurisdiction in which to assert otherwise stale claims.

In fact, upon learning that the Superior Court would deny Dole's motion, Plaintiff's counsel filed eight DBCP actions on behalf of thousands of plaintiffs in Delaware federal court and an additional DBCP action in Delaware state court alleging that the putative Texas class action tolled their claims. The Delaware federal court quickly dismissed six of the actions because they were duplicative of identical claims pending in Louisiana federal court, finding that: "Decisions have consequences; one fair bite at the apple is sufficient." Notice, Ex. D at 11. And, upon learning of the additional Delaware federal court filings, the Superior Court opined that Plaintiff's counsel's conduct "smells strongly of forum shopping." App. at A-1141.[7]

[7] The Superior Court also concluded that concerns about forum shopping are outweighed by Delaware's "expansive understanding of forum non conveniens," as reflected in the McWane or first-filed doctrine. Id. (citing McWane, 263 A.2d 281). But the McWane or "first-filed"

iii. Any Interest In Furthering The Efficiency Of The Class Action Procedures Of Other Jurisdictions Is Outweighed By The Associated Burdens.

The jurisdictions that have declined to recognize cross-jurisdictional class action tolling have concluded that any interest they might have in furthering the efficiency and economy of the class action procedures of other jurisdictions is outweighed by the disadvantages accompanying such tolling. While intra-jurisdictional tolling "makes sense" for the jurisdiction in which the putative class action is pending because it eliminates the need for protective filings by putative class members, see Dubroff v. Wren Holdings, LLC, 2011 WL 5137175, at *13 (Del. Ch.), cross-jurisdictional class action tolling does not necessarily reduce the number of filings in the second jurisdiction. To the contrary, if class certification is denied, former putative class members are likely to file in the second jurisdiction because it recognizes cross-jurisdictional class action tolling. As the Illinois Supreme Court observed in Portwood:

> Tolling a state statute of limitations during the pendency of a federal class action . . . may actually increase the burden on that state's court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule. 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.

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doctrine is irrelevant here. Plaintiff filed first in Florida, not Delaware, and Dole is not challenging Plaintiff's choice of forum.

701 N.E.2d at 1104. See also Wade, 182 F.3d at 287-88; Maestas, 33 S.W.3d at 808-09; David Bober, Cross-Jurisdictional Tolling: When and Whether a State Court Should Toll Its Statute of Limitations Based on the Filing of a Class Action in Another Jurisdiction, 32 Seton Hall L. Rev. 617, 642 (2002). The instant class action illustrates this dynamic. While the putative class action was filed in Texas state court, none of the subsequent actions has been filed in Texas state court. Thus, any benefit to cross-jurisdictional class action tolling would redound solely to the benefit of Texas.[8]

Moreover, as the Seventh Circuit has recognized, "the policies underlying American Pipe . . . simply do not apply in the cross-jurisdictional context." In re Copper Antitrust Litig., 436 F.3d at 793-94. In intra-jurisdictional cases like American Pipe and Crown, Cork involving federal claims, the same body of law would apply regardless of where putative class members filed suit. Therefore, any filings by putative class members would truly be "needless" in that they could obtain complete relief if a class were certified. But in cross-jurisdictional class action cases involving state law claims, if a putative class member wants to obtain relief under the second jurisdiction's laws, he cannot avoid the practical necessity of filing a timely action in that jurisdiction. Id.

[8] While the absence of cross-jurisdictional class action tolling may encourage some putative class members to file protective suits in the second jurisdiction, such actions can be stayed until class certification is decided. See Maestas, 33 S.W.2d at 808-09.

C. Even The Courts That Recognize Cross-Jurisdictional Class Action Tolling Impose Significant Limits, And No Court Has Recognized Such Tolling In Circumstances Like These.

Among the states that have recognized cross-jurisdictional class action tolling, only Montana has recognized such tolling for class actions filed in different states. Lee, Hyatt, and Staub all involved class actions filed in a federal court of the same state. See, e.g., Lee, 384 N.W.2d at 365-67; Hyatt, 801 S.W.2d at 383-84; Staub, 726 A.2d at 957-59. And in Vaccariello, the Ohio Supreme Court expressly limited such tolling to class actions filed in Ohio or the federal courts. 763 N.E.2d at 163. As such, courts applying Ohio law have declined to apply Vaccariello where the class action was filed in another state's court--even if the action was later removed to federal court. See, e.g., Arandell Corp. v. Am. Elec. Power Co., 2010 WL 367004, at *10 (S.D. Ohio); see also In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 2012 WL 1097244, at *8 (C.D. Cal.); Thornton v. State Farm Mut. Auto. Ins. Co., 2006 WL 3359448, at *8 (N.D. Ohio).

Moreover, in recognition of the risks of cross-jurisdictional class action tolling, Montana and Ohio have imposed significant limits on such tolling. In Stevens, the Montana Supreme Court limited cross-jurisdictional class action tolling to cases in which "defendants are fairly put on notice of the substantive claims against them," 247 P.3d at 256, and cautioned that if it were to confront a situation "where the class action suit was alleged to have tolled the statute of limitations for over a decade," it would be inclined to "find the princi-

ples of notice and fairness to defendants not met and the doctrine inapplicable." Id. at 257 (emphases added). Likewise, in Vaccariello, the Ohio Supreme Court limited such tolling to plaintiffs who have a relationship to Ohio, 763 N.E.2d at 163, and expressly held that tolling ceases upon the denial of class certification, id.

Finally, this case presents extraordinary circumstances that are unlike those in any other case in which a court has adopted cross-jurisdictional class action tolling. Here, it is undisputed that Plaintiff filed a separate action in a separate forum asserting the identical claims more than 16 years ago. It is also undisputed that over 16 years ago the motion for class certification was denied and the putative Texas class action was dismissed. These unique circumstances simply have no parallel in the other cases in which courts have adopted cross-jurisdictional class action tolling.

For instance, in Stevens, the plaintiff was a putative member of a class action in Tennessee federal court. 247 P.3d at 249. The plaintiff filed suit in Montana state court only two months after the Tennessee federal court denied class certification. Id. at 250. And even if the Tennessee action had not tolled the statute of limitations, the plaintiff filed suit in Montana only ten months after the statute of limitations would have expired. Id. at 255.

Moreover, in Vaccariello, the plaintiff was a putative member of a class action in Pennsylvania federal court. 763 N.E.2d at 161-62. The plaintiff filed suit in Ohio state court only ten months after the

Pennsylvania federal court denied class certification, and only became aware of her injuries approximately two years before suing. Id.

Further, in Staub, the plaintiffs were putative members of a class action in New Jersey federal court. 726 A.2d at 958. The plaintiffs filed suit in New Jersey state court less than two years after the New Jersey federal court denied class certification. Id.

Finally, in Lee, the plaintiffs were putative members of a class action in Michigan federal court. 384 N.W.2d at 166. The plaintiffs filed suit in Michigan state court only a year and four months after the Sixth Circuit reversed the Michigan federal court's order granting class certification. Id. at 166-67; Thompson v. Bd. of Educ. of the Romeo Cmty. Sch., 709 F.2d 1200 (6th Cir. 1983).

In short, none of these cases involved a plaintiff who delayed filing suit for over a decade and a half, and thus none supports the application of cross-jurisdictional class action tolling here.

D. The Circumstances Here Do Not Warrant A Judicially Created Exception To The Statute Of Limitations.

Delaware courts "have consistently taken the position that they will not engage in judicial legislation by creating exceptions to a statute of limitations when the provisions of the statute are clear and unambiguous." Layton v. Allen, 246 A.2d 794, 798 (Del. 1968). As this Court explained in Leatherbury: "[T]he plain terms of the statute must be enforced, even if they produce a 'somewhat unfortunate result.' . . . '[this Court does not] sit as a super legislature to eviscerate proper legislative enactments.'" Leatherbury v. Greenspun,

939 A.2d 1284, 1292 (Del. 2007) (quoting Ewing v. Beck, 520 A.2d 653, 660 (Del. 1987)).

In extraordinary circumstances, Delaware courts have created exceptions to the statute of limitations. But in those cases, the plaintiffs were prevented from timely asserting their claims through no fault or choice of their own--either by court action, an unknown injury, or fraudulent concealment. Here, nothing prevented Plaintiff from filing suit earlier. In fact, Plaintiff sued in 1995, but dismissed that action. Thus, none of the cases relied upon by the Superior Court is applicable here. See Blanco, 2012 WL 3194412, at *8-9.[9]

E. Regardless, The Court Should Clarify That Any Tolling Ceased In 1995 When Class Certification Was Denied And The Putative Texas Class Action Was Dismissed.

Even if the Court adopts cross-jurisdictional class action tolling, it should clarify that, consistent with American Pipe and Crown,

[9] For example, in Mergenthaler v. Asbestos Corp. of America, 500 A.2d 1357, 1365 (Del. Super. Ct. 1985), the court tolled the statute of limitations because a court-imposed stay "prevent[ed] the plaintiff from discovering the identity of an otherwise unknowable defendant." Here, no court order prevented Plaintiff from suing Dole. Moreover, in Wal-Mart Stores, Inc. v. AIG Life Insurance Co., 860 A.2d 312, 319-20 (Del. 2004), this Court denied summary judgment because a factual dispute existed as to when the plaintiff had notice of its injuries. Likewise, in Layton v. Allen, 246 A.2d 794, 796 (Del. 1968), the plaintiff did not know that a doctor had left an instrument inside her during surgery until she began to feel pain years later. Here, Plaintiff was aware of his injuries no later than 1995, when he filed the Florida action. In Walls v. Abdel-Malik, 440 A.2d 992, 996 (Del. 1982), the defendant falsely claimed to be an out-of-state resident, and as a result the statute of limitations had run on plaintiff's claims before he had properly served the defendant. On review, this Court held that fraudulent concealment tolled the statute of limitations. Id. at 996. Here, there is no allegation that Dole fraudulently concealed its place of incorporation. The trial court also cites to In re MAXXAM Inc./Federated Dev., 698 A.2d 949 (Del. Ch. 1996), but that is a non-tolling derivative action.

Cork, tolling ceased upon entry of the 1995 order denying class certification and dismissing the putative class action. If Plaintiff had filed this action in the jurisdiction in which the putative class action was pending at the time of dismissal--Texas federal court--his claims would be barred under Fifth Circuit precedent, which is consistent with the great weight of federal authority. Plaintiff should not be allowed to use cross-jurisdictional class action tolling as a means of avoiding the tolling rules that would apply if he had filed suit in the jurisdiction of the putative class action.[10]

i. Consistent With The Weight Of Authority, The Fifth Circuit Holds That Tolling Ends With Denial Of Class Certification.

The Fifth Circuit holds that class tolling under American Pipe ends when class certification is denied. In Calderon, farm workers sued a farmers' association for breach of an employment agreement and violations of a federal statute. 863 F.2d at 386. The district court denied class certification but entered judgment in favor of the workers; both sides appealed. Id. The Fifth Circuit reversed in part and remanded. Id. On remand, the district court certified a class of workers that included members of the putative class that the court previously declined to certify. Id. See also id. at 390. On appeal, the Fifth Circuit held that class tolling ended once the district court denied class certification, even though the district court re-

[10] In analogous circumstances, when Delaware courts apply the statute of limitations of a foreign jurisdiction, "[t]he borrowed statute is accepted with all its accoutrements." Frombach v. Gilbert Assoc., 236 A.2d 363, 366 (Del. 1967).

versed itself on remand. Id. The Fifth Circuit reasoned that "[t]he two-year statute of limitations had run during the time between the original denial and the district court's reversal," and the court's reversal of its earlier order could not revive the former putative class members' claims. Id. See also Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 519 (5th Cir. 2008) ("[I]f the district court denies class certification under Rule 23, tolling of the statute of limitations ends. . . . [A]n appeal of the denial of class certification does not extend the tolling period.").

The Fifth Circuit's rule is consistent with the great weight of authority, including American Pipe and Crown, Cork. See, e.g., American Pipe, 414 U.S. at 561 (holding that the intervenors had 11 days "after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene") (emphasis added); Crown, Cork, 462 U.S. at 354 (holding that the plaintiff had the "full 90 days in which to bring suit after class certification was denied") (emphasis added). Over the last 30 years, the First, Third, Fourth, Fifth, Seventh, Eleventh, and Federal Circuits have held that tolling ends with denial of class certification or dismissal of the class action. See, e.g., Bridges v. Dep't of Md. State Police, 441 F.3d 197, 211 (4th Cir. 2006); Culver v. City of Milwaukee, 277 F.3d 908, 914 (7th Cir. 2002); Stone Container Corp. v. United States, 229 F.3d 1345, 1355 (Fed. Cir. 2000); Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1013 (3d Cir. 1995); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995); Armstrong v. Martin

Marietta Corp., 138 F.3d 1374, 1378, 1380 (11th Cir. 1998); Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 627 (7th Cir. 1986); Andrews v. Orr, 851 F.2d 146, 150 (6th Cir. 1988), rev'd on other grounds by Holland v. Florida, --- U.S. ----, 130 S. Ct. 2549 (2010); Fernandez v. Chardon, 681 F.2d 42, 48 (1st Cir. 1982).[11] Indeed, the Second Circuit recently observed that "every circuit to have addressed the scope of this doctrine has concluded . . . that American Pipe tolling ceases upon denial of class certification." Giovanniello v. ALM Media, LLC, 660 F.3d 587, 589 n.1 (2d Cir. 2011) (emphasis added). The rationale for this rule is that "[o]nce the district court enters the order denying class certification . . . reliance on the named plaintiffs' prosecution of the matter ceases to be reasonable." Armstrong, 138 F.3d at 1380.

Here, the Texas federal court denied class certification and granted the motion for dismissal for f.n.c. in July 1995, and entered final judgment in October 1995. Under Calderon, tolling ended in July 1995. At that point, Plaintiff had no reasonable basis for continuing to rely on a non-existent putative class action for tolling purposes. Certainly, by the time final judgment was entered, no absent class member could reasonably have relied on Delgado to protect his claims.

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[11] Many district courts have reached the same result. See, e.g., Barkley v. Woodbury Cnty., Iowa, 2012 WL 1889787, at *16 (N.D. Iowa); In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 2012 WL 1097244, at *4 (C.D. Cal.); Wells v. FedEx Ground Package Sys., Inc., 2011 WL 1769665, at *4 (E.D. Mo.); Giovanniello v. ALM Media, LLC, 2010 WL 3528649, at *6 (D. Conn.). But see Monahan v. City of Wilmington, 2004 WL 758342, at *2 (D. Del.) (holding, based on Rule 23(f), that tolling continues during the pendency of an appeal of an order denying class certification).

Indeed, the fact that other DBCP plaintiffs filed suit after the dismissal of Delgado confirms that continued reliance was unreasonable. Chaverri, 2012 WL 4097216, at *3. But even assuming that tolling continued through the pendency of the Delgado plaintiffs' appeal, tolling ceased when the Supreme Court denied review in 2001. At that point, Plaintiff had no reasonable basis to continue to rely on a putative class action that no longer existed. Yet, Plaintiff did not file suit for another decade.[12] If Plaintiff had filed this suit in Texas federal court, Calderon would bar his claim. Thus, even if this Court were to adopt cross-jurisdictional class action tolling, it should not interpret such tolling in a manner that would permit Plaintiff to assert an action in Delaware that would be barred if he had filed it in the jurisdiction in which the putative class action was pending.

ii. A Contrary Rule Would Undermine The Policies Underlying Statutes Of Limitations.

As the Eighth Circuit recognized in Armstrong, tolling the limitations period during the pendency of any appeal would "seriously contravene the policies underlying statutes of limitations." 138 F.3d at 1388. Among other important goals, "[s]tatutes of limitation are designed to avoid the undue prejudice that could befall defendants, after the passage of an unreasonable amount of time, due to the loss of evidence, disappearance of witnesses, or fading memories." Chaplake Holdings, Ltd. v. Chrysler Corp., 766 A.2d 1, 6 (Del. 2001) (internal

[12] Plaintiff's delay is particularly inexplicable given the settlement in 2006. Plaintiff cannot reasonably claim reliance on the Carcamo complaint once the named plaintiffs settled with Dole. Bridges, 441 F.3d at 213.

citations omitted). Tolling the limitations period during the pendency of any appeal from an order denying class certification and/or dismissing the putative class action would "leave cases in limbo for years at a time," thereby "creat[ing] far greater uncertainty as to when the limitations period will resume running." Armstrong, 138 F.3d at 1388-89. Here, for instance, the appeal of Delgado took six years (from 1995 until 2001), and Plaintiff did not file suit for another decade. "During [such] long delays, evidence could be lost, memories could fade, and witnesses could disappear." Stone, 229 F.3d at 1355.

F. At A Minimum, The August 8 Order Should Be Reversed Because It Erroneously Held That The 1995 Dismissal Order Was Not A Valid, Final Order But Was Instead Analogous To A Stay.

In its August 8 Order, the Superior Court's application of cross-jurisdictional class action tolling turned on its holding that the 1995 order of dismissal for f.n.c. did not end tolling, because it was not a valid, final judgment on the merits, Blanco, 2012 WL 3194412, at *12, and because it was "logically equivalent" to a stay, id. Both holdings are contrary to federal law, and for this reason, the Superior Court's application of cross-jurisdictional class action tolling should be reversed.

i. The Delgado Court's 1995 Order Was A Final Judgment That Was Not Void For Lack Of Jurisdiction.

As set forth above, the Texas federal court expressly held that its order was a valid final judgment that was not void for lack of jurisdiction. See Delgado, Civ. Action No. H-94-1337, slip op. at 7-19; Delgado, 322 F. Supp. 2d at 803, 805, 808-09. Likewise, in Chaverri, when analyzing the validity of the same order, the Louisiana federal

court held that "under federal law a final judgment on a f.n.c. dismissal 'puts an end to a case,' and, thus, is final and appealable." 2012 WL 4097216, at *8 n.33. Thus, two federal courts have now held that the 1995 order of dismissal for f.n.c. was a valid final judgment that was not void for lack of jurisdiction. To the extent that the Texas appellate court held otherwise, it should be disregarded, and to the extent that the August 8 Order purports to hold otherwise, it should be reversed.[13]

The Superior Court also placed great weight on the fact that a dismissal on f.n.c. grounds is not a judgment "on the merits" in the Fifth Circuit. Blanco, 2012 WL 3194412, at *12. But that distinction is irrelevant. When a putative class action is dismissed, it is no longer reasonable for a putative class member to continue to rely on it for tolling purposes, regardless of whether dismissal was on the merits. As the Chaverri court observed regarding the 1995 order: "While the denial of class certification may not have been on the merits, coupled with the dismissal of the action, it was nonetheless suf-

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[13] Under federal law, even a conditional dismissal on f.n.c. grounds is an appealable final order. See, e.g., King v. Cessna Aircraft Co., 562 F.3d 1374, 1378 (11th Cir. 2009); Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund, 589 F.3d 417, 421 (7th Cir. 2009); Koke v. Phillips Petroleum Co., 730 F.2d 211, 214-18 (5th Cir. 1984), overruled on other grounds by Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. (In re Air Crash Disaster near New Orleans), 821 F.2d 1147 (5th Cir. 1987). See also Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955) (quoting Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F.2d 360, 362 (4th Cir. 1949)). Thus, the Texas federal court's order dismissing the putative class action for f.n.c. was a final order, any appeals from which were exhausted in 2001 when the Supreme Court denied review. Indeed, the Delgado plaintiffs conceded as much by filing a Motion for Relief from Final Judgment. Delgado, 231 F.3d at 181.

ficient to alert putative class members that they could not reasonably expect their rights to be protected by the class action." 2012 WL 4097216, at *9. Indeed, the Seventh Circuit has held that even a voluntary dismissal of a putative class action without prejudice will end tolling. See, e.g., Culver, 277 F.3d at 914; Glidden, 808 F.2d at 627.[14] A rule making tolling dependent on whether the order dismissing the putative class action was "on the merits" would serve no policy purpose, but only create confusion as to when tolling ceases, which is the very reason courts have adopted the bright-line rule that tolling ceases upon dismissal or denial of class certification. See Armstrong, 138 F.3d at 1378 n.3 ("[W]e prefer a clear rule that operates early in the litigation, and that settles the tolling question with regard to all parties, as opposed to a complex of vague rules under which the tolling period will be indeterminate and almost certainly very long."). There is simply no reason why a final dismissal on the merits should end class tolling, but not a final dismissal on procedural grounds. In either case, the putative class action has been terminated, making continued reliance on it manifestly unreasonable.

ii. Dismissal For F.N.C. Is Not Equivalent To A Stay.

Under federal law, a dismissal for f.n.c. is not analogous to a stay. A dismissal on f.n.c. grounds is an appealable final order. Koke, 730 F.2d at 214-18. In contrast, stays are not ordinarily ap-

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[14] Likewise, the Fourth Circuit has held that even an administrative order denying class certification ends class tolling, because such an order is "notice to objectively reasonable class members to seek clarification or to take action." Bridges, 441 F.3d at 213.

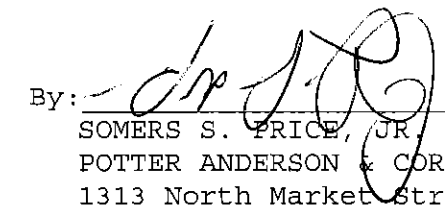
pealable because they are not final. See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 87 n.2 (2000); Apache Bohai Corp., LDC v. Texaco China, B.V., 330 F.3d 307, 309 (5th Cir. 2003). Moreover, courts in the Fifth Circuit expressly have held that a dismissal on f.n.c. grounds does not toll the statute of limitations. Castanho v. Jackson Marine, Inc., 484 F. Supp. 201, 206 (E.D. Tex. 1980) ("[U]nlike a stay, [a dismissal on f.n.c. grounds] does not toll the running of the statute of limitations[.]"). Thus, the Superior Court's application of cross-jurisdictional class action tolling was based on a misreading of federal law. To avoid any conflict with federal law, the Court should reverse the August 8 Order and clarify that the 1995 order was a valid, final order that ended any applicable tolling.

CONCLUSION

For the foregoing reasons, Dole respectfully requests that this Court reverse the August 8 Order, and direct the Superior Court to enter an order dismissing Plaintiff's claims in the action below.

Respectfully submitted,

Dated: November 5, 2012

By: 

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