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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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. N11C07149 JOH

CONSOLIDATED
WITHIN
THE SUPREME COURT OF THE STATE OF DELAWARE

DOLE FOOD COMPANY, INC., DOLE FRESH FRUIT COMPANY, STANDARD FRUIT COMPANY, AND STANDARD FRUIT & STEAMSHIP COMPANY,
Defendants Below,
Appellants,
v.

JOSE RUFINO CANALES BLANCO,
Plaintiff Below,
Appellee.

No. 493,2012

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE AND AUTHORITY TO FILE

The Delaware Trial Lawyers Association ("DTLA") is a statewide, non-profit organization of trial attorneys whose members frequently represent individuals seeking redress under law, including persons injured by the negligence of others in class actions.

The Board of Governors of DTLA authorized the Amicus Curiae Committee to move for leave to participate in this appeal, and to prepare this brief.

DTLA has moved, pursuant to Rule 28 of the Supreme Court Rules, for leave to file this amicus curiae brief.

SUMMARY OF THE CASE

This Court granted an interlocutory appeal to address what it presumably deems to be an important threshold issue--namely, should Delaware recognize cross-jurisdictional class action tolling? Questions involving the application of such rule to the facts and circumstances of this case should be beyond the scope of that issue and, thus, this appeal. Such matters would seem to include arguments as to when the class-action tolling period ended here. Defendant-Appellants Dow Chemical and the Dole entities have, nevertheless, emphasized such argument, which is more properly addressed to the application of a cross-jurisdictional tolling rule, than to whether or not Delaware should recognize the rule in the first instance. This Court decided to take-up the legal issue of whether to recognize the rule as a threshold, interlocutory matter. Defendant-Appellants' attempts to treat fact-laden questions involving the application of such rule as the threshold issue should, respectfully, be rejected.

Amicus' interest lies with the legal issue of why Delaware should, indeed, recognize the rule of cross-jurisdictional class action tolling. Such interest includes not having a decision on that important issue becoming confused or diluted by comingling it with questions of application that are more properly resolved on a regular post-judgment appeal. The unusually complex procedural history of this case certainly give rise to a number of application questions, although they are not as one-sided as Defendant-Appellants' briefs suggest. As the Superior Court aptly observed in its decision here, most of Defendant-Appellants' complaints are the result of their

attempt "to tranquilize these claims through repeated forum shopping removals and technical dismissals, playing for time and delay and striving to prevent, or arguably frustrate, the claims from ever being heard on the merits in any court." *August 8, 2012 Memo. and Order*, pp. 29-30.

Delaware courts have not allowed predictions of a flood of litigation to deter them from providing a forum in which injured parties can present their claims in cases involving Delaware corporations, even where doing so means likely accepting a disproportionate share of the workload compared to other jurisdictions. Delaware has also refused to allow such considerations to unduly influence the logical progression of its laws. Here, Delaware law already allows for the tolling of the statute of limitations during the pendency of Delaware class actions and of individual suits regardless of where they are filed. Recognizing cross-jurisdictional class action tolling is the next logical step.

ARGUMENT

(A)
Delaware Courts Have Consistently Rejected 'Flood Of Litigation' Arguments

Ironically, after having engaged in their own version of forum shopping and having thwarted plaintiffs' attempts to have their claims decided on the merits elsewhere, Defendant-Appellants now accuse plaintiffs of forum shopping and argue that a 'flood of litigation' will follow if Delaware recognizes cross-jurisdictional class action tolling. Such arguments in many respects involve a covert attack on Delaware's 'overwhelming hardship' standard for *forum non conveniens*. Defendant-Appellants' thinly veiled suggestion is that Delaware should decline to recognize cross-jurisdictional class action tolling in order to spare its courts from having to entertain certain types of cases which, according to Dow and Dole, would be inherently inconvenient and burdensome. Such a position is contrary to well-established Delaware jurisprudence.

Although Amicus by no means concedes that allowing cross-jurisdictional tolling for class actions would precipitate an unmanageable increase in filings here, Delaware has long refused to be swayed by exaggerated concerns over a so-called "flood of litigation." Moreover, it cannot be ignored that underlying almost every asserted 'flood of litigation' is a pattern of conduct that apparently injured a large number of people. In such circumstances, defendants should not be allowed to avoid responsibility by arguing that dealing with the consequences of *their* conduct would be a burden on the courts. Delaware philosophy, as reflected in its *forum non convenience*

jurisprudence, has been to provide an open forum for the resolution of personal injury claims in cases involving Delaware corporations, even where a disproportionate share of such claims might be filed here. In the case at bar, Defendant-Appellants' position—that recognizing cross-jurisdictional class action tolling might burden Delaware with a disproportionate volume of litigation—runs contrary to that philosophy and, respectfully, should be rejected.

Since at least the mid-1960's, Delaware has required defendants seeking a dismissal on grounds of *forum non conveniens* to prove "overwhelming hardship" notwithstanding, the obvious tendency of such a standard to attract some additional litigation to Delaware. *See General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964). In this same time frame, in *Robb v. Pennsylvania R. Co.*, 210 A.2d 709 (Del. 1965), this Court abandoned the "impact rule" as a prerequisite to recovering damages for negligently inflicted emotional distress, and expressly rejected the defendant's argument that doing so would result in a flood of similar claims:

> It is the duty of the courts to afford a remedy and redress for every substantial wrong. Part of our basic law is the mandate that 'every man for an injury done him in his...person...shall have remedy by the due course of law....Neither volume of cases, nor danger of fraudulent claims, nor difficulty of proof, will relieve the courts of their obligation in this regard. None of these problems are insuperable. Statistics fail to show that there has been a 'flood' of such cases in those jurisdictions in which recovery is allowed; *but if there be increased litigation, the courts must willingly cope with the task.*

Robb, 210 A.2d at 714 (*emphasis added*).

Delaware Courts have a history of willingly coping with the task of handling increased litigation, and there is no reason to deviate

from such philosophy here. As the Superior Court correctly observed here, Delaware courts have traditionally been "open to plaintiffs seeking redress, especially where Delaware corporations are potentially involved." *August 8, 2012 Memo. And Order*, p. 23. Delaware courts also have a well-established record of refusing attempts to dilute this philosophy or the 'overwhelming hardship' standard based upon the number or citizenship of the plaintiffs or the nature of the litigation. *See e.g. Ison v. E.I. DuPont de Nemours and Company, Inc.*, 729 A.2d 832 (Del. 1999); *In re Asbestos Litig. (Abou-Antoun et al.)*, 929 A.2d 373 (Del. Super. Ct. 2006).

In *Ison*, a number of plaintiffs from England, Scotland, Wales and New Zealand brought suit against DuPont in Delaware for latent injuries allegedly caused by exposure to Benlate. This Court reversed the Superior Court's decision to dismiss for *forum non conveniens* and, in so doing, refused to depart from traditional jurisprudence in order to avoid having a number of claims by foreign nationals filed in Delaware. *See* 729 A.2d at 835 ("[t]he fact that the plaintiffs are foreign nationals does not deprive them of the presumption that there choice of forum should be respected"). Although the claims in *Ison* were originally filed in Delaware, their impact upon the Delaware court system would not differ greatly from those brought by individuals after the denial of class certification. As a practical matter, latent disease claims already deal with events and evidence from many years or decades prior to filing.

In *In re Asbestos Litig.*, the Superior Court expressly rejected a number of arguments that mirror those advanced by Defendant-Appellants

in the case at bar. There, as here, the defendants argued that "the number of cases that [were] filed here in a relatively short time span involving out-of-state plaintiffs…should lead the Court to the inescapable conclusion that these plaintiffs are engaged in blatant forum shopping." 929 A.2d at 379. Defendants argued that the inevitable flood of such cases would "affect the Court's ability properly to attend to its other business," thus (according to defendants) justifying a departure from traditional jurisprudence. *Id.* The Superior Court, relying upon *Ison* and a long line of similar precedent, rejected these arguments and stated:

> [Defendants] have offered no meaningful distinction between the cases at issue here and the legion of Delaware forum non conveniens authority upon which the Court justifiably could depart from the clear directives of the Delaware Supreme Court. Plaintiffs in tort cases are entitled to the same respect for their choice of forum as plaintiffs in corporate and commercial litigation cases receive as a matter of course in Delaware. That several plaintiffs in separate actions are represented by the same law firm and claim the same injury does not justify rewriting or even refining now settled principles of Delaware law.

In re Asbestos Litig., 929 A.2d at 382 ("[e]qually unavailing is defendants' argument that a lower threshold for dismissal applies here because the plaintiffs purportedly have engaged in 'forum shopping'").

The Court, in *In re Asbestos Litigation*, acknowledged the possibility that increased filings might in the future "have a deleterious impact on the efficiency of [that] Court and cause unmanageable congestion." 929 A.2d at 389. The Court, however, refused to speculate as to such possibilities or their potential impact and instead indicated that the Court would "revisit" the matter if the volume of litigation became unmanageable. Likewise, in the case at

bar, the Delaware Courts can always revisit the matter if cross-jurisdictional class action tolling proves to precipitate not merely an increase in the filing of certain claims, but an increase that is also demonstrably unmanageable.

Indeed, such is a fundamental flaw in the arguments advanced here by Defendant-Appellants for declining to adopt cross-jurisdictional tolling. Although it is not unreasonable to predict that recognizing that rule will lead to some increase in claims being filed in Delaware, it does not inevitably follow that such increase would be overwhelming or unmanageable. Delaware courts have traditionally accepted the risks associated with a possible increase in claims being filed here and reserved the ability to cope with the situation as it develops, rather than preemptively shutting the courthouse doors to an entire class or category of cases. In this regard, nothing prevents the Delaware courts from subsequently determining that they should not *apply* cross-jurisdictional tolling in particular problematic situations such as where the class action in question was pending for a very long time.[1] Such considerations should have little or no bearing on whether Delaware recognizes the principle in the first instance. That is precisely what the Montana Supreme Court decided in *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244 (Mont. 2010)—that the length of tolling might affect the application of the rule in a particular case, but would not dissuade recognizing the rule in the first place.

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[1] As noted above, questions involving the application of the cross-jurisdictional tolling to the facts of this particular case are apparently beyond the scope of this appeal and should be left for consideration after a final decision on the merits. Thus, Amicus takes no position on this issue.

It is noteworthy that, almost seven years later, and despite a few attempts by defendants to raise the issue, the Superior Court has not found it necessary to revise or dilute the standard for *forum non conveniens* in asbestos cases in order to control their volume. In *Lluerma v. Owens Illinois Inc.*, 2009 WL 1638629 (Del. Super. Ct. June 11, 2009), for example, the Superior Court denied a *forum non conveniens* challenge to cases brought by Spanish nationals alleging injuries as a result of exposure to asbestos at shipyards that had serviced American vessels. Defendant asserted, among other things, "that allowing [that] litigation to move forward in Delaware would open the 'flood-gates' to foreign asbestos plaintiffs seeking United States jurisdiction." *Lluerma* at*11. The Superior Court rejected this position and stated:

> Defendant's position that litigating this matter in Delaware would be a hardship to Delaware is irrelevant to the *Cryo-Maid* analysis. The inquiry under *Cryo-Maid* is whether the *defendant* will suffer overwhelming hardship, not whether *the Court* will suffer hardship. Further, this Court has ruled that the "asbestos litigation in Delaware neither encumbers nor overwhelms the Court's judicial or administrative faculties in a manner that would adversely affect the Court's ability to administer justice efficiently and effectively.

Id. at *12.

The Superior Court has also declined to dismiss cases that were first brought elsewhere, dismissed, and then re-filed in Delaware. Recently, in *Williams v. PACCAR, Inc.*, 2012 WL 4831658 (Del. Super. Ct. Oct. 8, 2012), the plaintiff originally filed suit in California. The court there dismissed the case on grounds of forum non conveniens with directions to re-file the matter in Texas. Instead, the plaintiff refilled the case in Delaware. The Superior Court denied defendants'

motion to dismiss, relying upon Delaware's long-standing policy of respecting plaintiffs' choice of forums. *In In re Asbestos Litig. (Greier)*, 2012 WL 1980414 (Del. Super. Ct. May 16, 2012) the case had been filed and dismissed in North Dakota then Pennsylvania before ultimately coming to Delaware. The Court denied defendants' motion to dismiss and held that, although a still-pending action elsewhere would call for a relaxed analysis, even multiple prior dismissals did not. *Id.* at *2. The Court in *Greier* also addressed and rejected defendants' arguments based upon accusations of forum shopping, as follows:

> Defendants argue this is blatant forum shopping. "[T]his Court cannot concern itself with the plaintiffs' subjective motivation in bringing their claims to Delaware," instead the court must focus on whether Defendant will suffer overwhelming hardship.

Id. at *3 (quoting In re Asbestos Litig., 929 A.2d at 388).

In other words, although Delaware does not condone forum shopping, neither does it base decisions on speculation as to the subjective motivations of particular plaintiffs. Nor does Delaware completely refuse to accept cases that were previously filed in another jurisdiction, but dismissed before coming to Delaware.

(B)

Recognizing Cross-Jurisdictional Class Action Tolling Is Consistent With The Development Of Delaware Law

Delaware has already recognized intra-jurisdictional class action tolling in the context of a derivative suit. *See Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175 (Del. Ch. Oct. 28, 2011). It has recognized what amounts to cross-jurisdictional tolling for previously-filed individual cases by applying the saving statute, 10 Del. C. § 8117(a), to cases dismissed from another state's courts. *See Leavy v. Saunders*, 319 A.2d 44 (Del. Super. Ct. 1974). It has extended such tolling to cases involving a derivative suit that was previously filed and dismissed in another state. *See Reid v. Spazio*, 970 A.2d 176 (Del. 2009). Recognizing the principle of cross-jurisdictional class action tolling in Delaware is the logical next step in this progression and, thus, perfectly consistent with the prior development of Delaware law.

The Superior Court held, over forty years ago, that "it light of [its] remedial purpose" and traditional "liberal construction," the savings statute would apply to a suit dismissed from federal court for the District of Delaware for lack of maritime jurisdiction. *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 427 (Del. Super. Ct. 1971). There, the Court observed:

> The (savings) statute is designed to insure to the diligent suitor the right to hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction….[B]y invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.

285 A.2d at 426-27.

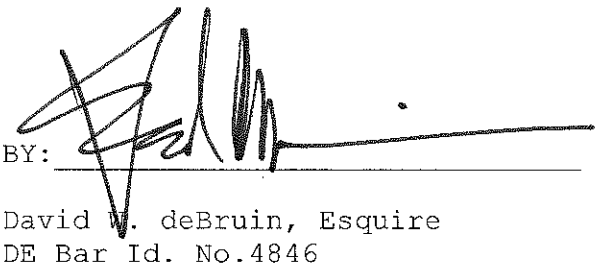
In *Leavy*, the Court expressly rejected an earlier prediction by the federal court that Delaware would decline to apply its savings statute to cases re-filed from another state. *See* 319 A.2d at 46 (declining to follow *Sorensen v. The Overland Corp.*, 142 F.Supp. 354 (D. Del. 1956). It is difficult to understand any principled distinction between the re-filing of an individual suit and the filing of individual suits after the denial of class action certification. In both instances, the running of the statute of limitations is at the mercy of proceedings occurring elsewhere. A class action may lead to a larger number of re-filed claims, but they are no more or less likely to be extremely stale than an individual claim.

Although it involved the application of the saving statute, *Reid* is otherwise remarkably similar to the case at bar, and arguably foreshadows recognizing cross-jurisdictional class action tolling. *Reid* involved a previously filed derivative suit, as opposed to purely individual claims. In *Reid*, this Court held that tolling under the saving statute continued through all discretionary appeals prior to dismissal in the other jurisdiction, which clearly allowed for older claims to eventually be filed in Delaware. 970 A.2d 181-82. The claim in Reid was filed almost a decade before being refilled in Delaware. Most important, this Court relied upon the same principles that support cross-jurisdictional tolling in extending tolling under the savings statute—namely, (a) a preference for resolving cases on their merits; (b)discouraging placeholder suits; (c) overall judicial economy; and (d) defendant's awareness of the plaintiff's intent to press the claim somewhere. *Id.*

CONCLUSION

In many respects, the issue before this Court can be reduced to a single, simple question--will Delaware adhere to the longstanding philosophy of making its courts open to those seeking a just resolution of their disputes on the merits, or will Delaware retreat to a more provincial position that selfishly sacrifices justice to expediency? The clear theme of Defendant-Appellants' arguments here is that states which allow cross-jurisdictional class action tolling risk accepting a burden, while most of the benefits are realized by another state. They do not deny that class-action tolling is a beneficial and effective means to promote overall judicial economy because it makes protective filings during the pendency of a putative class action unnecessary. Defendant-Appellants do not deny that the American judicial system as a whole and on balance benefits from such a rule. Rather, they argue that Delaware should have no interest in assisting or promoting efficiency in another state, especially when doing so might involve shouldering some additional burden. Such a view is contrary to traditional Delaware jurisprudence and philosophy, under which this State has not merely been willing to accept a somewhat disproportionate responsibility for hearing and resolving complex or mass litigation, but has welcomed doing so.

For the reasons set forth herein and in the briefing submitted by plaintiff, Amicus respectfully submits that the decision below should be affirmed.

BY: 

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