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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. N11C-07-149 JOH

-CONSOLIDATED WITH-

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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 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. N11C-07-149 JOH

APPELLEE'S CORRECTED ANSWERING BRIEF ON INTERLOCUTORY APPEAL

Dated: December 17, 2012

PERRY & SENSOR
Michael L. Sensor, Esquire
Delaware Bar ID No. 3541
One Customs House, Suite 560
P.O. Box 1568
Wilmington, DE 19899-1568
Telephone: (302) 655-4482
Attorney for Plaintiff Below-Appellee

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NATURE OF THE PROCEEDINGS

Plaintiff-Appellee Jose Rufino Canales Blanco ("Plaintiff") was a member of an earlier putative class action in Texas state court, known as *Jorge Carcamo*, which remained pending until the District Court of Brazoria County, Texas denied class certification on June 3, 2010. *Carcamo, et al. v. Shell Oil Comp., et al.* Tex. Dist. Ct., No. 93-C-2290, Hardin, J. (June 3, 2010) (Tab C), *also available at* App. at A-942. On July 21, 2011, Plaintiff filed a complaint in this matter in the Superior Court. Defendants moved for judgment on the pleadings, arguing that Plaintiff's claim was untimely under the two-year statute of limitations. *Cf.* 10 *Del. C.* § 8119. Plaintiff responded that the *Carcamo* putative class action tolled limitations, under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175 (Del.Ch. Oct. 28, 2011). On August 8, 2012, the Superior Court denied Defendants' motions. *Canales Blanco v. AMVAC, et al.*, 2012 WL 3194412 (Del. Super. Ct. Aug. 8, 2012) (Tab F). By Order of September 6, 2012 (as corrected September 18, 2012), the Superior Court certified for interlocutory appeal a single question: "Does Delaware recognize the concept of cross-jurisdictional tolling?" *Canales Blanco v. Amvac Chem. Corp., et al.*, Del. Super. Ct., No. N11C-07-149-JOH, Herlihy, J. (Sept. 18, 2012) (Tab D).

SUMMARY OF ARGUMENT

1. Plaintiff ADMITS the question presented is whether Delaware should recognize the concept of cross-jurisdictional tolling. Plaintiff DENIES that the Superior Court's ruling was incorrect or unduly expansive. Under *American Pipe* and *Dubroff*, a pending class action tolls the applicable statute of limitations as to all asserted members of the putative class, regardless of whether the action is pending in Delaware state court or in another jurisdiction. There is no principled basis for restricting the tolling effect to actions filed in Delaware courts. Defendants' proposed distinction would discriminate against cases pending in federal court and the courts of sister states. It would also risk triggering additional litigation in Delaware, because it would force class members seeking a Delaware forum against Delaware-incorporated businesses to file preemptive actions in Delaware court, without waiting to see if an out-of-state class action is certified or not. Thus, failure to recognize cross-jurisdictional tolling would violate the purposes of *American Pipe* and principles of Delaware law.

2. Plaintiff DENIES that "[m]ost jurisdictions have declined to recognize cross-jurisdictional class action tolling" (Dole Br. 4) or that cross-jurisdictional tolling would leave to "forum shopping, unreasonable delay and the evisceration of statutes of limitations." (Dow Br. 3). To the contrary, failure

to recognize cross-jurisdictional tolling would thwart important interests in judicial economy and fairness. It is ironic for Defendants to cite the issues of forum shopping and delay, because (as the Superior Court found) they were guilty of nearly a decade-long exercise of forum shopping and thus are primarily responsible for any delay. Moreover, they have long been on notice of the claims against them and therefore cannot complain of any prejudice from delay.

3. Plaintiff ADMITS that this Court should respect the decisions of the General Assembly. However, in this case failure to recognize cross-jurisdictional tolling would amount to judicial legislation, because it would impose a distinction in Delaware law that the General Assembly has not drawn.

4. Plaintiff ADMITS that class action tolling ends with an order denying class certification or a final judgment terminating an action. However, the Superior Court correctly held that the 1995 orders of the Texas federal court did not end tolling. Further, the Superior Court did ***not*** certify its interpretation of those orders for interlocutory review, and this Court did not accept it for certification. This Court should not review the additional questions Defendants raise.

5. Plaintiff DENIES that the Superior Court improperly interpreted the 1995 orders of the Texas federal court. Its interpretation of those orders was correct.

STATEMENT OF FACTS

Plaintiff was a member of an earlier putative class action, known as *Jorge Carcamo*, which consolidated actions originally filed in various Texas state courts beginning in 1993.[1] The cases were brought by foreign agricultural workers alleging cancer, sterility, and other harms from a banned pesticide known as DBCP. *Canales Blanco,* 2012 WL 3194412, at *1. Defendants removed the cases to the U.S. District Court for the Southern District of Texas (Hon. Sim Lake) and sought an injunction to prevent any further DBCP litigation in the United States. *Id.*, at *2. On June 9, 1995, Plaintiff and a group of other litigants filed a complaint in Hillsborough County, Florida seeking to protect their rights (the "*Abarca* action"). *Id.*, at *2. However, they voluntarily dismissed it on July 12, 1995, without ever serving it on any defendant, when Judge Lake made clear that he would not enter the injunction the Defendants sought. *Id.*

In 1995, Judge Lake conditionally dismissed the *Carcamo* suit on the ground of *forum non conveniens* "without deciding the request for class certification." *Id.*, at *1. The court included a "return jurisdiction" clause providing that, if a foreign

[1] *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1337 (S.D. Tex. 1995), 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001), *abrogated*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003).

forum did not prove adequate, the class action would be reinstated "***as if the case had never been dismissed***." *Delgado*, 890 F. Supp. at 1375 (emphasis added). The U.S. Supreme Court later held in a companion case that federal subject-matter jurisdiction was absent, and Judge Lake remanded the *Carcamo* case to state court. *Canales Blanco,* 2012 WL 3194412, at *4. A Texas state court denied class certification on June 3, 2010. App. at A-942.

Plaintiff filed the instant action on July 21, 2011, on the ground that the *Carcamo* class action tolled the statute of limitations until June 3, 2010. The Superior Court agreed. It examined the pattern of legislation governing statutes of limitations in Delaware, judicially developed tolling principles, and decisions regarding cross-jurisdictional tolling in other states. *Canales Blanco,* 2012 WL 3194412, at *8-10. The court found that other states "that have adopted cross-jurisdictional tolling have provided compelling policy reasons for doing so." *Id.,* at *9. "Further, the reasons for rejecting it are not persuasive in light of Delaware precedent, particularly a policy making our courts available for disputes involving Delaware corporations." *Id.*, at *10. The court dismissed Defendants' predictions of a "flood of plaintiffs" and "forum shopping." *Id.*, at *9. Instead, the court reasoned that a flood would ensue *without* cross-jurisdictional tolling.

"Defendants' approach would immediately precipitate the concerns that motivated *American Pipe*: potential plaintiffs would disregard all pending putative personal injury class actions (since they could be presumed unlikely to be certified) and file defensive individual claims." *Id.*, at *11.

The court rejected Defendants' claim that they would be prejudiced by delay. "Any prejudice defendants suffer due to lapse of time was due, in part, to their own decision to wage the extended procedural war delaying the prior action as reflected in the procedural history." *Id.*, at *12.

The court also rejected Defendants' arguments that Judge Lake's 1995 *forum non conveniens* dismissal triggered Delaware's statute of limitations, *id.*, at *12, and that the 1995 *Abarca* complaint, which was filed but never served, amounted to an "opt out" that barred tolling. *Id.*, at *13-14. The Superior Court refused to certify these questions for interlocutory review. *Canales Blanco v. Amvac Chem. Corp., et al.*, Del. Super. Ct., No. N11C-07-149-JOH, Herlihy, J. (Sept. 18, 2012) (Tab D).

ARGUMENT

QUESTION PRESENTED

The question certified by the Superior Court is: "Does Delaware recognize the concept of cross-jurisdictional tolling" under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

STANDARD AND SCOPE OF REVIEW

The standard of review of the legal issues considered by this Court is *de novo*. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993).

MERITS OF ARGUMENT

I. DELAWARE SHOULD RECOGNIZE THE CONCEPT OF CROSS-JURISDICTIONAL TOLLING.

A. This Court Should Not Adopt Arbitrary Limitations On *American Pipe* Tolling Principles.

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the U.S. Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. The Court explained that it looked to two factors in deciding the scope of the tolling effect: the purpose of class actions, which is to promote "efficiency and economy of litigation" by consolidating numerous individual suits into a single suit, and the interest behind statutes of limitations,

which is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost memories faded and witnesses disappeared." *Id.* at 553, 554. In *American Pipe*, the Court accommodated these interests by allowing unnamed members of a class to intervene as individual plaintiffs in an action that continued after denial of class certification.

In *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345 (1983), the Court extended *American Pipe* to allow tolling not only where plaintiffs sought to intervene in a continuing action, but also where they sought to file an entirely new action. According to the Court, "[t]he filing of a class action tolls the statute of limitations as to all asserted members of the class ... not just as to interveners." *Id.* at 350 (internal quotations omitted). Again, the Court relied upon the dual purposes of class actions and statutes of limitations: to avoid "needless multiplicity of actions" and "to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Id.* at 351–52. The Court held that tolling was appropriate means of balancing these dual purposes: "[T]olling the statute of limitations ... creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification." *Id.* at 353; *see also Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002).

Delaware law follows the same principle. In *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175 (Del.Ch. Oct. 28, 2011) (Tab I), the Chancery Court explained that "[t]he United States Supreme Court has interpreted Rule 23 of the Federal Rules of Civil Procedure to mean that class members' individual claims are tolled while a putative class action is pending. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Dubroff,* 2011 WL 5137175, at *13 (citation and internal quotation marks omitted). "A class action tolling rule makes sense. Without one, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation — to simplify litigation involving a large number of class members with similar claims — would be defeated. Thus, the Court acknowledges a class action tolling rule." *Dubroff,* 2011 WL 5137175, at *13 (citation and internal quotation marks omitted). "[T]he federal rule, which the Court views as persuasive, is that [o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Dubroff,* 2011 WL 5137175, at *13 n.82 (citation and internal quotation marks omitted). Defendants seek to create a legal fiction by drawing a distinction between what they call "*intra*-jurisdictional tolling" and "*cross*-jurisdictional tolling." But

neither *American Pipe* nor Delaware precedent distinguishes between intra-jurisdictional and cross-jurisdictional tolling. Rather, the decisions speak of tolling principles in broad terms and do not suggest that class members' individual claims are tolled only when a putative class action is pending in the same jurisdiction. For example, in *In re MAXXAM, Inc./Federated Development Shareholders Litig.*, 698 A.2d 949 (Del.Ch. 1996), the Court opined that, "[i]n general, filing of a class action tolls the statute of limitations for class members." *Id.* at 958 n.8 (citing *American Pipe*); *see also Marian Bank v. Electronic Payment Services, Inc.*, 1999 WL 151872, at *3 n.3 (D. Del. Mar. 12, 1999) (Tab L) ("commencement of the original class suit tolls the statute of limitations period for ***all putative class members*** who move to intervene following denial of class certification.") (emphasis added).

Neither *American Pipe* nor Delaware decisions restrict tolling to the "intra-jurisdictional" context. As the U.S. Court of Appeals for the Seventh Circuit opined in *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), "it does not follow that any rule or policy prohibits what [defendant] Atlas Heating calls 'cross-jurisdictional tolling.'" *Id.* at 562. Similarly, the Chief Judge of the U.S. District Court for the District of New Jersey recently noted that "it does not appear to the Court that the

fact that the prior class action suit was filed in State court is relevant to the application of *American Pipe*. No rule or policy prohibits cross-jurisdictional tolling." *City Select Auto Sales, Inc. v. David Randall Associates, Inc.*, 2012 WL 426267, at *2 n.2 (D.N.J. Feb. 7, 2012) (Tab H) (holding that a putative State-court class action tolled the statute of limitations in federal court, even though no motion for class certification was ever filed in the state-court action).

Moreover, Defendants' proposed distinction would require this Court to prefer class actions in Delaware courts over those in federal court or the courts of sister states. Yet this Court has recognized that it is appropriate to give "respect and deference" to the judicial proceedings of sister states, *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1218 (Del. 1991), and state courts may not discriminate against federal law. *Howlett v. Rose*, 496 U.S. 356, 381 (1990).

Thus, in *Reid v. Spazio*, 970 A.2d 176 (Del. 2009), this Court held that a plaintiff's prior lawsuits in Texas state and federal courts preserved his claim, for limitations purposes, under the Delaware Savings Statute, 10 *Del. C.* § 8118(a). This Court cited the "public policy preference for deciding cases on their merits," *id.* at 180, and did not discriminate against the prior Texas state and federal suits:

> [A]llowing a plaintiff to bring his case to a full

> resolution in one forum before starting the clock on his time to file in this State will discourage placeholder suits, thereby furthering judicial economy. Prosecuting separate, concurrent lawsuits in two jurisdictions is wasteful and inefficient. [Finally], the prejudice to defendants is slight because in most cases, a defendant will be on notice that the plaintiff intends to press his claims.

Id. at 181-82.

Similarly, in *Mergenthaler v. Asbestos Corp. of America*, 500 A.2d 1357 (Del.Super.1985), the Superior Court accorded tolling effect to a judicial order rendered by a court of another jurisdiction (there, a federal court). In *Mergenthaler*, personal injury plaintiffs were delayed in discovering the identity of a defendant due to a stay issued pursuant to a pending bankruptcy proceeding in the U.S. Bankruptcy Court in Delaware. The Superior Court reviewed a "line of cases [that] recognized that where a paramount authority prevents the exercise of a legal remedy, the statute of limitations is tolled." *Id*. at 1363. The court noted precedent tolling a limitations period while administrative remedies were exhausted and "cases in which the statute of limitations was tolled by the pendency of other legal proceedings which prevented a plaintiff from exercising his legal rights," *id.*, ultimately allowing a defendant to be joined who had otherwise not been named and served within the limitations period. The Superior Court opined that it was "satisfied that, given the inherent power of the

Court to engraft implied exceptions upon the statute of limitations where the legislative purpose of the statute of limitations is not contravened," "a court-imposed stay will result in a tolling of the statute of limitations where it prevents plaintiff from discovering the identity of an otherwise unknowable defendant," *id.* at 1364-65 (citations omitted) – ***even where the order triggering tolling was not issued by a Delaware state court***.

Hence, while Defendants urge this Court to refrain from "judicial legislation," Dole Br. at 5, the shoe is on the other foot. Drawing the distinction Defendants propose between "cross-" and "intra-jurisdictional" tolling would constitute impermissible judicial legislation. If such a distinction is to be drawn, it should be drawn by the General Assembly.

B. Failure To Recognize Cross-Jurisdictional Tolling Would Violate The Purposes Of *American Pipe*.

The principles behind the *American Pipe* tolling rule are not restricted to the intra-jurisdictional context and in fact are even stronger where cross-jurisdictional considerations are at issue, especially for a State in Delaware's position. As Defendants acknowledge, "[t]he 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." Dow Br. at 14–15.

Without cross-jurisdictional tolling, *American Pipe* will not serve its function of discouraging duplicative litigation in the form of protective filings by purported class members during the pendency of the putative class action. In the absence of cross-jurisdictional tolling, class members like Plaintiff in class actions outside Delaware would not be able to rely on those actions to protect their interests with respect to the Delaware statute of limitations. As a result, class members who desire a Delaware forum would be forced to preemptively file an action in Delaware while the out-of-state class action was still pending, long before the out-of-state court ruled on class certification.

Further, the absence of cross-jurisdictional tolling "would encourage defendants to delay the ruling on a motion for class certification, in turn compelling potential plaintiffs to file individual suits to avoid expiration of the statute of limitations." *Canales Blanco,* 2012 WL 3194412, at *9. In short, under Defendants' proposal, the Delaware courts risk being inundated with additional litigation, while class action proceedings are pending in other jurisdictions, irrespective of whether the other jurisdiction ultimately grants or denies class certification.

In *Stevens v. Novartis Pharmaceuticals Corp.*, 247 P.3d 244 (Mont. 2010), for example, the Montana Supreme Court adopted cross-jurisdictional tolling, explaining that "[w]e are convinced that the decisions adopting cross-jurisdictional tolling more effectively balance the considerations at issue." *Id.* at 255. The Montana court explained that Defendants' approach would increase the burdens of litigation and violate the principle of *American Pipe*:

> [A]lthough avoiding the possibility of a rush of out-of-State plaintiffs filing in our court system is concededly a valid policy objective, we consider this objective less compelling than competing considerations. We suspect that a greater burden on the court system will be imposed by not adopting the rule, as plaintiffs would be required to file protective individual suits in Montana courts to avoid limitations defenses, while otherwise relying on a pending class action suit filed elsewhere. This directly conflicts with the rationale underlying the class action tolling rule: to promote judicial economy by encouraging individual plaintiffs to defer to class action suits to protect their claims. We see no reason why jurisdictional boundaries should operate as a bar to the application of this policy. Where, as here, the defendants are already on fair notice of the claims against them through a timely class action suit, the policies underlying the limitations period are not subverted.

247 P.3d at 256. Similarly, in *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 161-62 (Ohio 2002), the Ohio Supreme Court held that a federal class action filed in Eastern District of Pennsylvania tolled limitations for a subsequent Ohio State court action involving the claims of a plaintiff

injured by a medical device. Noting that Ohio's own class action rule was virtually identical to the federal rule, the court concluded that "a class action filed in federal court serves the same purpose as a class action filed in Ohio," and "[w]hether a class action is filed in Ohio or in the federal court system, the defendant is put on notice of the substance and nature of the claims against it." *Id.* at 162–63. The Ohio court criticized *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102 (Ill. 1998), on which Dole and Dow rely, explaining that the prediction that cross-jurisdictional tolling would lead to a flood of time-barred suits was not "a realistic potential problem." 763 N.E.2d at 163. The Ohio court added:

> Our holding today merely allows a plaintiff who could have filed suit in Ohio irrespective of the class action filed in federal court in Pennsylvania to rely on that class action to protect her rights in Ohio. To do otherwise would encourage all potential plaintiffs in Ohio who might be part of a class that is seeking certification in a federal class action to file suit individually in Ohio courts to preserve their Ohio claims should the class certification be denied. The resulting multiplicity of filings would defeat the purpose of class actions. Our holding does not invite plaintiffs who have no relationship to Ohio to file suit in our courts. Instead, only those plaintiffs who could have otherwise filed suit in Ohio will be able to file suit pursuant to the tolling rule we espouse today.

Id. *See also In re Linerboard Antitrust Litigation*, 223 F.R.D.

335, 347 (E.D. Pa. 2004) (also criticizing *Portwood*).[2]

In fact, numerous states have adopted cross-jurisdictional tolling,[3] and yet Dole and Dow cannot identify a single one that

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[2] Defendants have submitted a recent Louisiana decision, *Quinn v. Louisiana Citizens Property Ins. Corp.*, 2012 WL 5374255 (La. Nov. 2, 2012), but that decision turned on the specific text of a Louisiana statute and the differences between federal Rule 23 and Louisiana Civil Code procedure. In fact, *Quinn* noted the arguments in favor of cross-jurisdictional tolling in states (like Delaware) whose rules are modeled on the federal rules. *Quinn*, 2012 WL 5374255, at *8 ("[U]nlike those cases such as *Vaccariello*, where Ohio's class action rule was found to be virtually identical to federal law, Louisiana's class action provisions differ from their federal counterpart in significant respects, creating the potential for disparate results depending on whether the class action is filed in Louisiana or federal court.").

[3] *E.g.*, *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560, 562 (7th Cir. 2011) (prior state-court class action tolled limitations for subsequent class action in federal court); *City Select Auto Sales, Inc. v. David Randall Associates, Inc.*, 2012 WL 426267, at *2 n.2 (D.N.J. Feb. 7, 2012) (same); *In re Linerboard Antitrust Litig.*, 223 F.R.D. 335, 346-51 (E.D. Pa. 2004) (concluding that putative federal class action would have cross-jurisdictional tolling effects for State law claims in such states as Colorado, Indiana, Kansas and South Carolina because those States had adopted class action tolling rules); *Primavera Familienstifung v. Askin*, 130 F.Supp.2d 450, 515-16 (S.D.N.Y.2001) (concluding that Connecticut would recognize cross-jurisdictional class action tolling); *In re Norplant Contraceptive Products Liability Litigation*, 961 F. Supp. 163, 167-68 (E.D. Tex. 1997) (denying tolling would "undermine the rationale underlying the *American Pipe* tolling doctrine. The whole purpose behind tolling in the class setting is to promote economy and efficiency by deterring the filing of a multiplicity of suits in order to protect litigants' rights."); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 389 (Mo. Ct. App. 1990) (federal class action tolls limitations for State-court plaintiffs); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 n.4 (N.J. Super. Ct. 1999 (applying cross-jurisdictional tolling in a personal injury suit against a (continued…)

has experienced the flood of stale claims that Defendants predict. Moreover, the Delaware limitations borrowing statute already addresses the risk. The statute, 10 *Del. C.* § 8121, applies the shortest limitations period to bar the re-filing of claims and thus addresses the danger that cases time-barred in the jurisdictions in which they otherwise would have been brought will be re-filed in Delaware. Delaware is even less at risk than other states.

Defendants' argument that "Delaware has no interest in furthering the class action procedures of another jurisdiction," Dow Br. at 20, misses the point. By recognizing cross-jurisdictional tolling, Delaware would further ***its own interest*** in avoiding duplicative litigation in its own courts. In fact, Delaware is uniquely vulnerable in this regard. Contrary to Defendants' arguments, the main attraction of a Delaware forum

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drug manufacturer and observing that "[w]e see no reason for tolling to depend on whether the class action is pending in State or federal court," and that application of cross-jurisdictional tolling "would tend to promote the efficiency of both State and federal court systems because suits asserting the individual claims of the class members might be filed in either court system or in both."); *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986) ("the State claims were preserved by the federal district court action); *cf. In re W. Va. Rezulin Litig. v. Hutchison*, 585 S.E.2d 52, 66 n. 10 (W.V. Sup. Ct. App. 2003) (deciding the case on other grounds, but stating that the lower court's concern over differing limitations periods applying to the numerous plaintiffs was misplaced because of the probable application of the class action tolling rule, and not recognizing a distinction for cross-jurisdictional tolling).

is not a two-year statute of limitations in tort cases (which is fairly common among the states) but rather the unique personal jurisdiction and venue benefits that stem from the Delaware forum, the place of incorporation of many business corporations, including several of the defendants in this case. Plaintiffs concerned about jurisdictional and venue issues will have a strong interest in preserving their access to a Delaware forum. Accordingly, if Delaware fails to recognize cross-jurisdictional tolling, it is more likely than other states to experience preemptive suits from class members in putative class actions who fear losing access to the Delaware forum, which offers important personal jurisdiction and venue benefits. Defendants' policy arguments fail to account for the special status of Delaware as a place of incorporation.

C. Cross-Jurisdictional Tolling Is Consistent With Delaware Law and Policy.

Defendants warn that Delaware will become the victim of "forum shopping" if it recognizes cross-jurisdictional tolling. That argument is doubly ironic: (i) Defendants themselves have engaged in far more "forum shopping" than Plaintiff. Defendants have delayed the instant litigation for over a decade by repeatedly invoking a federal forum without any legal basis. The Superior Court observed that Defendants have engaged in a pattern of delay and procedural obstructionism:

> A fairer reading of the procedural history here is that defendants have attempted 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. . . .
> [D]efendants have caused a lot of the delay – upon which they now seek to rely – through their own procedural maneuvering and they may not take refuge behind it. Plaintiff here has tried to act continuously since the filing of the original Carcamo action, and has been procedurally thwarted at every turn by defendants; the statute of limitations has, therefore, not run against him.

Canales Blanco, 2012 WL 3194412, at *12, 13..

(ii) It is not "forum shopping" for Plaintiff to sue Defendants on their "home turf" – the place of incorporation of several of the defendants in this case. Nor was it "forum shopping" for Plaintiff's attorney to file additional DBCP cases in Delaware after the Superior Court's Order denying Defendants' motion. In fact, on May 31, 2012, the Superior Court notified the parties that it intended to deny Defendants' motion for judgment on the pleadings, so that additional plaintiffs could file their claims in Delaware before the statute of limitations expired.[4]

Apart from these ironies, Defendants' "forum shopping" argument is not grounded in Delaware law. Delaware has repeatedly rejected similar alarmist cries in other contexts –

[4] Additional plaintiffs did file cases in Delaware state and federal court following the court's letter notification.

that the State would become a clearinghouse for asbestos litigation, for example, unless Delaware changed its approach to the doctrine of *forum non conveniens*. Accordingly, Delaware has consciously declined to follow the reasoning urged by Defendants here. To the contrary, the Delaware courts have shown that they are well equipped to handle mass torts efficiently and to manage and resolve large numbers of cases filed by out-of-state plaintiffs.

In *Ison v. E.I. DuPont De Nemours & Co.*, 729 A.2d 832 (Del. 1999), for example, this Court held that foreign nationals whose children allegedly suffered birth defects as result of their mothers' prenatal exposure to a fungicide known as Benlate could bring products liability actions in Delaware against the manufacturer, which was a Delaware corporation: "The fact that the plaintiffs are foreign nationals does not deprive them of the presumption that their choice of forum should be respected." *Id.* at 835. The Superior Court followed the same approach in *Wright v. American Home Prods. Corp.*, 768 A.2d 518 (Del. Super. Ct. 2000), when it applied standard *forum non conveniens* principles to a mass tort lawsuit against French pharmaceutical companies. This Court held that "the French defendants have not shown a sufficient hardship to defeat the plaintiffs' choice of forum." *Id.* at 538. This Court did not create a special rule for mass tort litigation, even when it had a foreign focus.

In *In re Asbestos Litig.*, 929 A.2d 373 (Del. Super. Ct. 2006), the court was confronted with the same sky-is-falling prediction of a litigation "flood" as Defendants make here:

> According to the defendants, the existing body of precedent applying the overwhelming hardship standard offers little guidance because Delaware Courts have never been subjected to this number of tort filings by out-of-State plaintiffs. They invite the Court to invoke its inherent power to control its docket and manage its own affairs as a basis to depart from the overwhelming hardship standard, or at least to view the standard through a lens that is less deferential to the plaintiff's choice of forum.

Id. at 382. The Superior Court flatly rejected the defendants' argument:

> Plaintiffs in tort cases are entitled to the same respect for their choice of forum as plaintiffs in corporate and commercial 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.

Id. "[T]he 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 in either these cases or the Court's docket as a whole." *Id.* at 389.

In *Lluerma v. Owens Illinois, Inc.*, 2009 WL 1638629 (Del. Super. Ct. June 11, 2009) (Tab K), the court applied the same approach and permitted Spanish nationals to bring actions in Delaware courts alleging that they had been exposed to asbestos

while working aboard American warships in Spain. The court denied a *forum non conveniens* motion despite defendant's argument "that allowing this litigation to move forward in Delaware would open the 'flood-gates' to foreign asbestos plaintiffs seeking United States jurisdiction and limit the options of Delaware corporations." *Lluerma*, 2009 WL 1638629, at *11.

Delaware law also recognizes the need to construe statutes of limitations to effectuate plaintiffs' rights to judicial remedies. Thus, this Court has held that the limitations period does not begin to run until a party knows or has reason to know that he or she has been injured. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004). For example, the statute of limitations did not begin to run for a plaintiff who discovered, seven years after a surgical procedure, that the surgeon had left a hemostat in her abdomen. *Layton v. Allen*, 246 A.2d 794 (Del. 1968). This Court has also opined that a defendant's fraudulent concealment "tolls the applicable statute of limitations until such time as the cause and the opportunity for bringing an action against another could have been discovered by due diligence." *Walls v. Abdel-Malik*, 440 A.2d 992, 996 (Del.1982). These tolling principles support cross-jurisdictional tolling here.

D. Defendants' Predictions of Prejudice Are Flawed.

Defendants contend that this case is "extraordinary," Dole Br. at 27, because of the passage of time between Plaintiff's injury and the instant action. But it was Defendants' delaying tactics that were chiefly responsible for the delay, which has harmed Plaintiff much more than Defendants. For more than a decade, Defendants' meritless procedural tactics denied Plaintiff his day in court. In contrast, Defendants have suffered little if any prejudice. The 1993 *Jorge Carcamo* filings in Texas put Defendants on notice of the substantive claims being brought against them, and the 1995 *Abarca* petition in Florida advised Defendants of the very identities of thousands of absent class members. If anything, the unusual specificity of the *Abarca* petition makes this an especially appropriate case in which to apply *American Pipe* tolling. "[T]he defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action [or not]." *American Pipe*, 414 U.S. at 555.

In fact, Plaintiff did act with diligence. He filed suit on July 21, 2011, just thirteen months after the Texas state court denied class certification on June 3, 2010, Order Denying Plaintiff-Intervenors' Motion for Class Certification, *Carcamo, et al. v. Shell Oil Comp., et al.* Tex. Dist. Ct., No. 93-C-2290, Hardin, J. (June 3, 2010) (Tab C), *also available at* App. at A-

942, and thus more promptly than the instances cited by Defendants. Dole Br. at 26 (citing delays of two years, slightly less than two years, and 16 months). Dole maintains that Plaintiff should be denied the benefit of tolling because he was not "prevented" by fraud or disability from filing his own action sooner than he did. Dole Br. at 27. However, "it was not the purpose of *American Pipe* . . . to force individual plaintiffs to make an early decision whether to proceed by individual suit or rely on a class representative. Nor was the purpose of *American Pipe* to protect the desire of a defendant not to defend against multiple actions in multiple forums. The *American Pipe* tolling doctrine was created to protect class members from being forced to file individual suits in order to preserve their claims." *In re WorldCom Securities Litigation*, 496 F.3d 245, 256 (2d Cir. 2007) (emphasis in original). In *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004), *cert. denied*, 544 U.S. 1048 (2005), the Third Circuit opined that, "[s]ince *American Pipe,* it has been well-settled that would be class members are justified-even encouraged-in relying on a class action to represent their interests with respect to a particular claim or claims, and in refraining from the unnecessary filing of repetitious claims." *Id.* at 111. Under *American Pipe*, plaintiffs are entitled to "sit on their rights until they know whether they will be part of a pending class action." *City*

Select Auto Sales, Inc. v. David Randall Assocs., Inc., 2012 WL 426267, at *5 (D.N.J. Feb. 7, 2012) (Tab H).

Defendants contend that, while a class action in federal court might be entitled to tolling effect, a state-court class action is not. Dole Br. at 24-27. This argument was not preserved below and is waived. Further, it would offend principles of federalism and Full Faith and Credit, which do not permit state courts to discriminate against the decisions of sister states. In any event, the *Carcamo* class action was continuously pending in either federal or state court since 1993.[5]

Nor is there any basis for denying cross-jurisdictional tolling in complex cases. *American Pipe* itself was a complex antitrust suit with a broad class definition encompassing end users of concrete and steel pipe. 414 U.S. at 541. *Dubroff* involved shareholder litigation, which is equally if not more complex than mass torts. *See also Stevens*, 247 P.3d at 253 n.2 ("courts have extended class action tolling in mass tort cases"); *Vaccariello*, 763 N.E.2d at 161-62 (medical device); *Staub*, 726 A.2d at 967 (x-ray liquid).

[5] Judge Hoyt of the Southern District of Texas found that the *Carcamo* "class action. . . has been pending in one forum or another since 1993." Memorandum and Order Granting Motion to Remand, *Carcamo, et al. v. Shell Oil Comp., et al.*, at 5, S.D. Tex., No. G-09-258, Hoyt, J. (Dec. 18, 2009) (Tab A).

Dole contends that tolling would be inappropriate in light of *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384 (5th Cir. 1989), which held that the tolling of a claim under the federal Farm Labor Contractor Registration Act ended with the denial of class certification. Dole Br. at 5, 28. But Plaintiff's action is timely under *Calderon*, because (as the Superior Court found, *see* Corrected Order of September 6, 2012 Upon Motion of Defendants for an Application for Certification of Interlocutory Appeal, *Canales Blanco v. Amvac Chem. Corp., et al.*, Del. Super. Ct., No. N11C-07-149-JOH, Herlihy, J. (Sept. 18, 2012) (Tab D); *Canales Blanco,* 2012 WL 3194412, at *12, class certification was not denied in this case until June 2010. In any event, Defendants cannot explain how a Fifth Circuit decision construing federal law is relevant to Delaware law.

II. THIS COURT SHOULD NOT REVIEW THE ADDITIONAL QUESTIONS RAISED BY DEFENDANTS, WHICH THE SUPERIOR COURT DID NOT CERTIFY.

The Superior Court's Order of September 6, 2012 (as corrected September 18, 2012) certified a single question to this Court regarding cross-jurisdictional tolling. The Court noted that Dole and Dow had proposed additional questions, but the Superior Court found that "the only question which is worthy and appropriate for certification for an interlocutory appeal is whether Delaware will recognize cross-jurisdictional tolling." Corrected Order of September 6, 2012 Upon Motion of Defendants for an Application for Certification of Interlocutory Appeal, at 2, *Canales Blanco v. Amvac Chem. Corp., et al.*, Del. Super. Ct., No. N11C-07-149-JOH, Herlihy, J. (Sept. 18, 2012) (Tab D). The other questions "do not meet any criteria for an interlocutory appeal" and "are thinly disguised efforts to reargue issues on which Dole did not prevail in this Court. They are unworthy of the Supreme Court's time and attention." *Id.* at 3.

This Court's Order of September 20, 2012 accepted interlocutory review only as to the question certified by the Superior Court. *Dow Chem. Corp. v. Canales Blanco*, Del. Supr., No. 492,2012 Berger, J., Jacobs, J., Ridgely, J. (Sept. 20, 2012)("[T]he Court has concluded that, as to that portion of the appellant's application that was granted by the Superior Court,

the appellant's application for interlocutory review meets the requirements of Rule 42 and, therefore, should be granted.").

However, Dole and Dow persist in their attempts to raise questions the Superior Court declined to certify. Dow contends that a 1995 *forum non conveniens* dismissal by the U.S. District Court for the Southern District of Texas raises a "threshold question" precluding *American Pipe* tolling, Dow Br. at 16, and Dow devotes the first part of its brief to this issue, Dow Br. at 16–19. Dole leads off its brief with the same argument, Dole Br. at 13, and devotes substantial attention to it. Dole Br. at 25, 27–35. Further, both Dole and Dow insist that Plaintiff may not invoke *American Pipe* tolling because he filed the *Abarca* complaint in June 1995 in Florida state court (and then voluntarily dismissed it, before serving it on any defendant). Dow Br. at 7–8; Dole Br. at 8, 25, 27. This Court should not consider these additional questions. The Superior Court refused to certify them, and the nature of the 1995 Texas dismissal and the 1995 Florida action do not involve issues of Delaware law as to which this Court's review would be appropriate on an interlocutory basis. In any event, Defendants' arguments lack merit.

A. The 1995 *Forum Non Conveniens* Dismissal In *Delgado* Did Not Prevent Tolling.

Defendants argue that a 1995 *forum non conveniens* dismissal

by Judge Sim Lake in the *Delgado* case in the Southern District of Texas prevents tolling, and they rely on a recent decision to that effect by Judge Carl Barbier of the Eastern District of Louisiana. *Chaverri v. Dole Food Co., Inc.*, 2012 WL 4097216 (E.D. La. Sept. 17, 2012) (Tab G). The Superior Court below rejected this argument in the strongest terms: "[t]his action did not end in Texas until June 2010. To imply otherwise . . . is misleading at best." Corrected Order of September 6, 2012 Upon Motion of Defendants for an Application for Certification of Interlocutory Appeal, *Canales Blanco v. Amvac Chem. Corp., et al.*, Del. Super. Ct., No. N11C-07-149-JOH, Herlihy, J. (Sept. 18, 2012) (Tab D); *Canales Blanco,* 2012 WL 3194412, at *12. The Superior Court was correct.

Judge Lake, the very federal judge who entered the Final Judgment dismissing the *Delgado* action in 1995, had occasion to review that Order and did not share Judge Barbier's view of the effect of the Judgment he had entered. When Judge Lake dismissed the *Delgado* case, he included a "return jurisdiction" clause expressly providing that, if a foreign forum did not prove adequate, the class action would be reinstated "***as if the case had never been dismissed***." *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995) (emphasis added). Judge Lake explained that, even though the f.n.c. dismissal was a final judgment, it was "final" "only for purposes of appealing

the court's f.n.c. decision" and "was not a 'final judgment' that ***extinguished*** the court's duty either to continue examining its subject matter jurisdiction over this case, or to remand the underlying cases to state court when and if it determines that it lacks subject matter jurisdiction." *Delgado v. Shell Oil Co.*, 322 F.Supp.2d 798, 816 (S.D. Tex. 2004) (citations omitted). Hence, Judge Lake opined that the 1995 dismissal did not prevent the continuation of the action: "the court concludes that plaintiffs' filing (or reassertion) of their motion to reinstate is a ***direct continuation of the prior proceedings over which the court expressly stated its intent to retain jurisdiction***." *Id.* at 813 (emphasis added). Court records confirm that the *Delgado* case was not removed from Judge Lake's docket in 1995. App. at A792-801. Rather, Judge Lake did not relinquish jurisdiction in the matter until June 21, 2004, when he remanded the case to the Texas state court where it had been originally filed. *Chaverri*, 2012 WL 4097216, at *2. Under Delaware law, the statute of limitations continues to be tolled when a court retains jurisdiction over an action. *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283-84 (Del. 1970).

Defendants have argued time and again that the *Carcamo* class action was no longer pending after the 1995 f.n.c. dismissal and that the reinstatement of the action was not

(contrary to Judge Lake's statements) "a direct continuation of the prior proceedings" "as if the case had never been dismissed for f.n.c." Court after court has rejected this argument.

For example, when Judge Lake remanded the Delgado and Jorge Carcamo cases as putative class actions in 2004, defendants objected on the ground that the cases had already been dismissed. Judge Lake rejected this argument. The Texas state courts similarly rejected this argument and reinstated the cases as class actions, as though they had never been removed or dismissed. *Chaverri*, 2012 WL 4097216, at *2. On July 15, 2005, the Defendants sought a writ of mandamus to the 14th District Court of Appeals in Texas, challenging the reinstatement of the actions on the ground that Judge Lake had entered a final order of dismissal. By Order of September 13, 2005, the Texas appellate court rejected Defendants' argument and denied the writ of mandamus. *In re Standard Fruit Co.*, 2005 WL 2230246 (Tex. App. 14th Dist. Sept. 13, 2005).

The *Carcamo* plaintiffs filed an Eighth Amended Petition as a putative class action in state court on February 2, 2006, App. at A-921, and moved the state court for class certification on September 29, 2009. Defendants responded by removing the action to the U.S. District Court for the Southern District of Texas (Hon. Kenneth M. Hoyt) on the purported ground that, in light of the f.n.c. dismissal, the class action was a new action filed

after the 1995 effective date of the Class Action Fairness Act, 28 U.S.C. § 1332(d), and therefore removable to federal court. Judge Hoyt (sitting on the same bench as Judge Lake) rejected the Defendants' argument and remanded based on his finding that the "class action . . . has been pending in one forum or another since 1993." Memorandum and Order Granting Motion to Remand, *Carcamo, et al. v. Shell Oil Comp., et al.*, at 5, S.D. Tex., No. G-09-258, Hoyt, J. (Dec. 18, 2009) (Tab A). Defendants sought permission to appeal, which the Fifth Circuit denied. After remand to state court, Defendants again argued that the cases had been dismissed in 1995, and the Court rejected the argument. Order Denying Pleas to the Jurisdiction, *Carcamo, et al. v. Shell Oil Comp., et al.*, Tex. Dist. Ct., No. 93-C-2290, Hardin, J. (June 3, 2010)(Tab B).

There is no merit to Defendants' continued relitigation of the effect of the 1995 dismissal. It should be barred by issue preclusion. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979). This Court should not review the Superior Court's decision on this issue, which is demonstrably correct. [6]

[6] Defendants assert that class certification supposedly was denied in the Southern District of Texas case in July 1995, causing tolling to cease. Dow Br. at 16; Dole Br. at 27-28. The Superior Court correctly rejected that argument. *Canales Blanco,* 2012 WL 3194412, at *12 In July 1995, the federal court issued a generic housekeeping order in *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), denying "all pending (continued…)

B. The 1995 Abarca Complaint Did Not Prevent Tolling.

Defendants argue that the *Abarca* complaint filed (but never served) in Florida in June 1995 demonstrated an intent by Plaintiff to "opt out" of the *Jorge Carcamo* class action. Dow Br. at 7–8; Dole Br. at 8, 25, 27. The Superior Court correctly rejected this argument, finding that "plaintiff's action in Florida was not an opt out and did not operate to start Delaware's statute of limitations." *Canales Blanco,* 2012 WL 3194412, at *14 "[I]f the Texas District Court judge believed the Florida action was an opt out, he would have said so; he did not. Further, the record from Texas shows Dole had waived this argument. This issue is the proverbial red herring and is unworthy of an interlocutory appeal." Corrected Order of September 6, 2012 Upon Motion of Defendants for an Application for Certification of Interlocutory Appeal, *Canales Blanco v. Amvac Chem. Corp., et al.*, Del. Super. Ct., No. N11C-07-149-JOH, Herlihy, J. (Sept. 18, 2012) (Tab D). Defendants do not respond to the Superior Court's finding of waiver, and their argument is flawed for additional reasons.

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motions" as "MOOT." *Id.* at 1375. The order did not specifically refer to any motion for class certification and did not contain any discussion of the requirements of class certification under federal Rule 23. After the Order of July 1995, the *Jorge Carcamo* case continued to be captioned the same – as a putative class action. When the case was remanded to the Texas state courts, it was remanded as a class action, not as an individual action.

First, the *Abarca* complaint did not represent an intent to "opt out" of the *Jorge Carcamo* class action. *Abarca* was a defensive measure filed in response to an overly broad injunction sought by the defendants in *Jorge Carcamo* that would have threatened the plaintiffs' ability to prosecute their own individual cases. *Abarca* was a temporary, defensive measure that was never pursued by the plaintiffs. The complaint was filed in Florida State Court on June 9, 1995, but it was never served on any defendant. Indeed, the Notice of Removal filed by the defendants in *Abarca* stated: "Service of process has not been accomplished on any of the defendants named in the lawsuit, nor, to this defendant's knowledge, have plaintiffs requested that service be issued." App. at A-808. A mere four weeks later, the plaintiffs then voluntarily dismissed the complaint in *Abarca* on July 12, 1995, pursuant to Fed. R. Civ. P. 41(a)(1), once the federal court in *Jorge Carcamo* made clear that it would reject the defendants' extravagant injunctive request. No defendant filed an Answer to the *Abarca* complaint before it was dismissed. The only proceeding of substance was the *Abarca* defendants' own notice of removal. Far from negating the tolling effect of *Jorge Carcamo*, the dismissal of the *Abarca* complaint signaled the unmistakable intent of Plaintiff to rely on the putative class action in *Jorge Carcamo*.

Further, *Abarca* did not "commence" an action for purposes

of the Delaware statute of limitations. The filing of a complaint with no intention to serve it does not "commence" an action, under *Russell v. Olmedo*, 275 A.2d 249, 250 (Del.1971) (complaint and praecipe did not commence an action for statute of limitations purposes because they did not contain "a positive order for the issuance of the necessary process to put the judicial machinery in motion" and plaintiff must "diligently seek to bring the defendant into court and subject him to its jurisdiction"). Similarly, the filing of the *Abarca* complaint with the court, with no attempt to serve it on defendants, did not constitute the commencement of an action. *Abarca* therefore did not interrupt the tolling effect of *American Pipe*.

CONCLUSION

The Superior Court's Order should be affirmed.

PERRY & SENSOR

By: /s/ Michael L. Sensor
Michael L. Sensor, Esquire
Delaware Bar ID No. 3541
One Customs House, Suite 560
P.O. Box 1568
Wilmington, DE 19899-1568
Telephone: (302) 655-4482
Attorney for Plaintiff Below-Appellee

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