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,	No. 493, 2012
v.	
JOSE RUFINO CANALES BLANCO,	Court Below: Superior Court of the State of Delaware in and for New Castle County
Appellee.	C. A. No. N11C-07-149 JOH

CONSOLIDATED WITH

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

APPELLANTS' REPLY BRIEF ON INTERLOCUTORY APPEAL

Dated: January 7, 2013
(As Modified From
December 20, 2012 Version)

POTTER ANDERSON & CORROON LLP

Somers S. Price, Jr.
DSBA #279
1313 North Market Street, 6th Floor
Wilmington, Delaware 19801
Telephone: (302) 984-6000

Attorneys for Defendants-Appellants Dole Food Company, Inc.; Dole Fresh Fruit Company; Standard Fruit Company; and Standard Fruit & Steamship Company

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Plaintiff's Answering Brief confirms that the extreme circumstances of this case do not warrant the judicial creation of an exception to the two-year statute of limitations on personal injury claims, 10 Del. C. § 8119. Plaintiff does not claim that he was unaware of his injuries, that he was unaware of Dole's identity, or that a court order prevented him from timely filing suit. In short, none of the circumstances in which Delaware courts have created exceptions to the statutes of limitations is present here.

Instead, Plaintiff claims the Court should ignore his 1995 lawsuit in Florida alleging identical claims -- which conclusively establishes he had notice of his claims over 16 years ago -- because at that time he also happened to be an unnamed member of a putative class action then pending in Texas, which was itself dismissed only months later. But Plaintiff fails to identify any case in which a court adopted cross-jurisdictional class action tolling in circumstances like these. As Dole's Opening Brief showed, most courts have declined to adopt such tolling for sound policy reasons that the facts here make particularly compelling. Even jurisdictions that recognize such tolling have limited its scope in ways that would render it inapplicable here.

Plaintiff has no real response to these arguments, offering instead only empty rhetoric. For instance, Plaintiff claims the distinction between intra- and cross-jurisdictional tolling is a "legal fiction," even though dozens of state and federal cases have long drawn that distinction. In continuing the trend, the Louisiana Supreme Court recently rejected cross-jurisdictional tolling because doing so "most effectively balances the twin concerns of judicial efficiency and protection against stale claims." Quinn v. La. Citizens Prop. Ins. Corp., 2012 WL 5374255, at *7-9 (La.). Likewise, Plaintiff claims that failing to recognize cross-jurisdictional tolling would somehow "violate" federal law and "discriminate" against sister states, but neither American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), nor Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983), requires states to adopt cross-jurisdictional class action tolling.

Plaintiff also argues that cross-jurisdictional class action tolling is "consistent" with Delaware law. Plaintiff relies on inapposite case law. For example, while the Chancery Court adopted intra-jurisdictional class action tolling in an equitable action involving the defense of laches, that case does not support the adoption of cross-jurisdictional class action tolling here, where the putative class action Plaintiff purports to rely on was dismissed over 16 years ago, and where the legislatively prescribed statutes of limitations on personal injury claims govern.

Finally, Plaintiff wrongly claims that the effect of the Texas federal court's 1995 order denying class certification and dismissing the putative class action is outside the scope of this appeal. To the contrary, the effect of the 1995 order is central. Plaintiff claims that class action tolling ended in June 2010, when the Texas state court denied class certification, and that the 1995 order did not end tolling. But the Superior Court could not have found that Plaintiff's claims were timely absent its holding that the 1995 order was not a valid, final judgment and, thus, did not end tolling -- a holding contrary to decisions by two separate federal courts, one issued a month after the Superior Court's decision.

In sum, adopting cross-jurisdictional class action tolling is not in Delaware's interest. But to resolve this appeal, it is enough for the Court to find that, in this case, based on these extreme facts, such tolling should not apply to Plaintiff's claims. Plaintiff was aware of his claims over 16 years ago. He should not benefit from tolling based on an improbable series of procedural events in cases in which he was not a party and over which Delaware courts had no control.

I. The Court Should Decline to Adopt Cross-Jurisdictional Class Action Tolling, Especially in the Extreme Circumstances Here

Contrary to Plaintiff's claim, neither American Pipe nor Crown, Cork requires states to adopt cross-jurisdictional class action tolling. Indeed, most courts have declined to recognize such tolling for policy reasons that have particular force here, where the putative class action was dismissed more than 16 years ago, and where, before that, Plaintiff had asserted nearly identical claims. In fact, no court has recognized cross-jurisdictional class action tolling in circumstances like those here, and the few jurisdictions that recognize such tolling generally, cabin the doctrine with limitations that would be fatal to the claims of Plaintiff here. Finally, recognizing such tolling would not be consistent with Delaware law, which disfavors the judicial creation of exceptions to the statutes of limitations.

A. The Distinction Between Intra- and Cross-Jurisdictional Class Action Tolling Is Not a "Legal Fiction," and Failing to Recognize the Latter Is Not "Discrimination"

The distinction between intra- and cross-jurisdictional class action tolling is not a "legal fiction." See Pl.'s Answering ("Ans.") Br., at 8. For over a decade, state and federal courts have drawn that distinction,[1] because, in both American Pipe and Crown, Cork, the putative class action was filed in the same court system as the second action. Thus, neither decision requires cross-jurisdictional class action tolling. See Dole's Br., at 13-15. Declining to adopt such tolling here would not "violate" American Pipe or "discriminate" against federal law. See Pl.'s Ans. Br., at 10-18. While Plaintiff cites several federal cases purportedly recognizing cross-jurisdictional class action tolling, none of those cases supports applying such tolling here.[2]

In Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560 (7th Cir. 2011), the issue on appeal was whether a prior putative class action in Wisconsin state court asserting claims under federal law tolled the statute of limitations on the plaintiff's claims under

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[1] See, e.g., Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999); In re Diet Drugs, 1999 WL 554608, at *1 n.1 (E.D. Pa.); Ravitch v. Pricewaterhouse, 793 A.2d 939, 945 (Pa. Super. Ct. 2002); Haggerty v. Bethel, 2001 WL 310369, at *1-3 (Wash. Ct. App.); Maestas v. Sofamor Danek Grp., Inc., 33 S.W.3d 805, 809 (Tenn. 2000); Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1103-1105 (Ill. 1998); Portwood v. Ford Motor Co., 685 N.E.2d 941, 944-45 (Ill. App. Ct. 1997); see also Quinn, 2012 WL 5374255, at *7-9.

[2] The state cases cited by Plaintiff are also distinguishable. See Pl.'s Ans. Br., at 16 n.3; Dole's Br., at 24-26.

the same federal law in the second case, which also was filed initially in Wisconsin state court. Id. at 561. The court there did not decide the issue of cross-jurisdictional class action tolling because "both suits began in state court," and because federal law provided the rule of decision in both suits. Id. at 562-63. Thus, the language on which Plaintiff purports to rely is dicta. See Pl.'s Ans. Br., at 9. Unlike in Sawyer, the putative Texas class action here was filed in a different jurisdiction and asserted only state law claims.

In City Select Auto Sales, Inc. v. David Randall Associates, Inc., 2012 WL 426267 (D.N.J.), the plaintiff attempted to rely on a prior state court class action under federal law, in which the plaintiff waited several years before seeking class certification. Id. at *1-2. The defendant moved to dismiss on statute of limitations grounds, arguing that the prior action was never genuinely a class action, id. at *1-4, but did not oppose tolling on cross-jurisdictional grounds. Id. at *3 n.2. As with Sawyer, the language on which Plaintiff purports to rely is thus dicta. See Pl.'s Ans. Br., at 10. And unlike here, both actions were filed in the same state (New Jersey), both actions asserted federal claims for which federal law defined the limitations period, and the second action was filed less than one month after the first one settled (here, the named plaintiffs settled years before the intervenors moved for class certification).

In In re Norplant Contraceptive Products Liability Litigation, 961 F. Supp. 163 (E.D. Tex. 1997), the plaintiffs sued in Texas federal court after that same court dismissed a class action of which they were putative members. Id. at 167. Defendants moved to dismiss, arguing the plaintiffs were members of an earlier putative class action in California state court and, thus, could rely only on that case for tolling purposes. Id. The court refused to give the California class action any tolling effect, because it was "filed in another state, not in another division of the Eastern District of Texas," and because there was no evidence "Plaintiffs had relied on the existence of the California state court to protect their rights as litigants." Id.

In re Linerboard Antitrust Litigation, 223 F.R.D. 335, 348-51 (E.D. Pa. 2004), is also irrelevant here, because the court there adopted cross-jurisdictional tolling in the context of a federal antitrust class action in which classes had been certified. Here, there are no federal claims, and no class was ever certified.

The issue in Marian Bank v. Electronic Payments Services, Inc., 1999 WL 151872 (D. Del.) was whether federal courts are required to give notice to a putative class of the need for an intervenor if class certification is denied. Id. at *1. Rejecting the argument that notification was necessary under American Pipe, the court explained that American Pipe "merely stands for the proposition that 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." Id. at *3 n.3. This language cannot reasonably be construed to adopt cross-jurisdictional class action tolling, which was not even at issue in the case.

Finally, in Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450 (S.D.N.Y. 2011), the court held that a putative federal securities class action in the Northern District of California tolled the statute of limitations on a Connecticut plaintiff's state law securities claims. Id. at 514-16. Lacking any guidance from the Connecticut courts, the court concluded that the federal interests supported tolling. Id. at 516. However, in Casey v. Merck & Co., 653 F.3d 95, 100 (2d Cir. 2011), the Second Circuit rejected Primavera's reliance on federal interests, making clear that cross-jurisdictional tolling is a state law issue. Primavera is thus no longer good law.

In addition to federal cases purportedly recognizing cross-jurisdictional class action tolling, Plaintiff cites two cases for the proposition that declining to recognize such tolling would "discriminate" against federal law and the laws of sister states. Those cases do not support Plaintiff's strained argument.

In Howlett v. Rose, 496 U.S. 356, 375 (1990), the Supreme Court held that state-law defenses cannot bar a federal claim, where those defenses would not be available if the action had been filed in federal court. Here, no federal claims have been asserted. And in Columbia Casualty Co. v. Playtex FP, Inc., 584 A.2d 1214 (Del. 1991), this Court held that Kansas law determines the collateral estoppel effect of a judgment rendered by a Kansas federal court. Id. at 1217-18. In other words, the question posed in that case was "essentially a choice of laws determination." Id. at 1217. Moreover, that case did not implicate the Full Faith and Credit Clause, because the prior action was in federal court. Id. at 1218. Thus, Columbia Casualty does not support Plaintiff's argument that declining to recognize cross-jurisdictional class action tolling would somehow "discriminate" against Texas law.[3]

B. No Delaware Court Has Created a Judicial Exception to the Statute of Limitations in Circumstances Like Those Here

Plaintiff argues that cross-jurisdictional class action tolling is consistent with Delaware law and policy. See Pl.'s Ans. Br., at 18-22. However, none of the cases on which Plaintiff relies involves circumstances similar to those present here.

Plaintiff relies heavily on Dubroff v. Wren Holdings, LLC, 2011 WL 5137175 (Del. Ch.). But Dubroff is an intra-jurisdictional case where the Court of Chancery denied a motion to dismiss on the grounds of laches. Id. at *12-13. The claims there were equitable and, thus, not subject to statutes of limitations. Id. at *12. Further, the plaintiffs in the second action filed suit only three months

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[3] Columbia Casualty's holding that the effect of a judgment issued in another state is determined by the rendering state's laws cuts against Plaintiff. The present case deals with the effect of a 1995 order by a Texas federal court dismissing a putative class action asserting state law claims. Texas does not recognize cross-jurisdictional tolling, see Bell v. Showa Denko K.K., 899 S.W.2d 749, 758 (Tex. Ct. App. 1995); the Fifth Circuit does not recognize such tolling for Texas state law claims, see Vaught v. Show Denko K.K., 107 F.3d 1137, 1141-47 (5th Cir. 1997); and the Fifth Circuit has made clear that tolling under American Pipe ceases upon the first denial of class certification, see Calderon v. Presidio Valley Farmers Ass'n, 863 F.2d 384, 390 (5th Cir. 1989). Moreover, the Texas federal court held that its 1995 order was not "void." See Dole Br., at 9-10, 32-34. Columbia Casualty thus favors according that order the same effect that a Texas federal court would. Indeed, failing to accord it such effect would "encourage forum shopping." Columbia Cas., 584 A.2d at 1218.

after the denial of class certification. Id. at *13. Here, Plaintiff waited over 16 years before filing suit in Delaware.

Plaintiff also confusingly relies on cases involving the "relation back" doctrine and Delaware's Savings Statute, 10 Del. C. § 8118(a), but neither of those doctrines has anything to do with Plaintiff's cross-jurisdictional arguments. In re MAXXAM Inc., 698 A.2d 949 (Del. Ch. 1996), involved the application of the "relation back" doctrine where a plaintiff attempted to intervene in an existing derivative action. Plaintiff relies on language that is pure dicta in which the court describes the holding of American Pipe in a parenthetical. Compare Pl.'s Ans. Br., at 9, with In re Maxxam, 698 A.2d at 958 n.8. Reid v. Spazio, 970 A.2d 176 (Del. 2009), involved the application of Delaware's Savings Statute to discretionary appeals. Plaintiff relies on language that relates to the purposes of Delaware's Savings Statute, see Pl.'s Ans. Br., at 10-11, and is not a justification for judicially created exceptions to the statutes of limitations. The Savings Statute was created by the General Assembly, and is irrelevant here. Plaintiff has never argued his claims are saved by the Savings Statute, and the Superior Court agreed the statute is inapplicable here. Blanco v. AMVAC Chem. Corp., 2012 WL 3194412, at *50 n.505 (Del. Super. Ct.).

In addition, Delaware courts have refused to create judicial exceptions to the legislatively prescribed statute of limitations, absent specific equitable circumstances not present here. See Dole Br., at 26-27. Plaintiff is not claiming that he was prevented from timely filing suit for over 16 years because he had an unknown injury, because Dole concealed its identity, or because of a court order. Thus, Wal-Mart Stores, Inc. v. AIG Life Insurance Co., 860 A.2d 312 (Del. 2004); Layton v. Allen, 246 A.2d 794 (Del. 1968); Walls v. Abdel-Malik, 440 A.2d 992 (Del. 1982); and Mergenthaler v. Asbestos Corp. of America, 500 A.2d 1357 (Del. Super. Ct. 1985), are all distinguishable. See Dole's Br., at 27 n.9.

Lastly, Plaintiff's reliance on Ison v. E.I. DuPont De Nemours & Co., 729 A.2d 832 (Del. 1999); In re Asbestos Litigation, 929 A.2d 373 (Del. Super. Ct. 2006); Lluerma v. Owens Illinois, Inc., 2009 WL 1638629 (Del. Super. Ct.); and Wright v. American Home Products Corp., 768 A.2d 518 (Del. Super. Ct. 2000) is misplaced. These are forum non conveniens ("f.n.c.") cases in which foreign plaintiffs filed products liability claims in Delaware. None involved statutes of limitations issues. As such, they are irrelevant here. Even if Delaware were Plaintiff's first choice of forum -- and it was not -- Dole is not seeking a f.n.c. dismissal. The issue here is whether Plaintiff's claims are stale, not whether Delaware is the appropriate forum to litigate those stale claims. The Court can respect Plaintiff's desire to sue in Delaware while holding that his claims are barred.

C. Substantial Policy Considerations Weigh Against Adopting Cross-Jurisdictional Class Action Tolling, Especially Here

Most jurisdictions have declined to adopt cross-jurisdictional class action tolling for three reasons that have particular force here: (1) it subjects the forum's limitations periods to the vagaries of foreign proceedings; (2) it encourages forum shopping; and (3) the forum has no interest in furthering the efficiency of the class action procedures of other jurisdictions given the burdens such tolling imposes. See Dole's Br., at 15-23. Plaintiff ignores the first reason, and provides only cursory responses to the second and third.

i. Adopting Cross-Jurisdictional Class Action Tolling Would Subordinate the General Assembly's Choices to the Vagaries of Foreign Proceedings

Statutes of limitations serve important public policy goals, including "protect[ing] defendants from having to confront controversies in which the search for truth may be thwarted by the loss of evidence, the fading of memories, or the disappearance of witnesses," and "protect[ing] the courts by relieving them of the burden of trying stale claims." Nat'l Iranian Oil Co. v. Mapco Int'l, Inc., 983 F.2d 485, 493 (3d Cir. 1992). See also Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646, 650 (Del. Super. Ct. 1985).

For over 100 years, the General Assembly has concluded that a one- or two-year statute of limitations on personal injury claims best serves these goals. See 10 Del. C. § 8119. The General Assembly has made this choice even though Delaware's default statute of limitations is three years, see 10 Del. C. § 8106, and other causes of action have longer limitations periods, see, e.g., 6 Del. C. § 2-725 (4-year limitation on action on a sales contract); see 10 Del. C. § 8121.

Adopting cross-jurisdictional class action tolling would undermine these carefully considered legislative choices by subjecting Delaware's statute of limitations to the vagaries of foreign proceedings. Here, for instance, the putative Texas class action was denied and case dismissed in 1995, after which six years passed for the appellate process to work its way to conclusion with the United States Supreme Court denying certiorari in 2001; three years later, in 2004, the plaintiffs sought reinstatement, which was granted in 2005; the named plaintiffs settled in 2006; three years later, in 2009, the intervenors filed a motion for class certification, which was denied in 2010; and over one year later Plaintiff, a putative class member, filed this action. While Plaintiff claims that any delay was the result of Dole, Dole had no control over the inherent delay of the appellate process that the plaintiffs pursued, when the plaintiffs sought reinstatement, or the intervenors' three-year delay in moving for class certification. Nor did Delaware. Adopting cross-jurisdictional tolling would thus extend the statute of limitations on Plaintiff's claims for over 16 years, effectively vitiating the two-year limitations period set by the General Assembly.

Moreover, while the action below involves personal injury claims, a rule adopting cross-jurisdictional class action tolling would sweep far more broadly, encompassing putative class actions of every kind -- everything from consumer class actions asserting claims of fraudulent misrepresentation or breach of contract to shareholder class actions asserting claims for breach of fiduciary duty. All claims asserted in any putative class action in any other jurisdiction, state or federal, would be subject to an arbitrary statute of limitations -- one dictated, not by the General Assembly, but by plaintiffs' counsel's choices of foreign forum and the vagaries of those foreign proceedings. Even claims with differing statutes of limitations under Delaware law would be subject to identical tolling based solely on the happenstance that a plaintiff somewhere filed a class complaint -- no matter how unlikely ever to receive class certification -- asserting those claims. There is no compelling justification for overriding the General Assembly's choices and subjecting Delaware defendants and courts to potentially decades-old claims.

ii. The Superior Court's Decision Has Already Encouraged Forum Shopping by Thousands of Plaintiffs

Plaintiff argues that forum shopping is not a legitimate concern, because Defendants "cannot identify a single [state] that has experienced the flood of stale claims that Defendants predict." See Pl.'s Ans. Br., at 16-17. In fact, Dole did identify a state that has experienced a flood of stale claim following a trial court's adoption of cross-jurisdictional class action tolling: Delaware. Within days of learning that the Superior Court would deny Dole's motion, Plaintiff's counsel filed eight DBCP actions in Delaware federal court on behalf of 2,930 plaintiffs and an additional DBCP action in Delaware state court on behalf of 30 more plaintiffs. See Dole's Br., at 21.

Moreover, there can be no question here that Plaintiff is forum shopping. Plaintiff could have intervened in the Texas state court action, where the putative Texas class action was originally filed. Doing so would have avoided the issue of cross-jurisdictional class action tolling.[4] And Plaintiff could have proceeded in Florida, where

[4] Plaintiff obviously recognized that he could not sue in Texas federal court because class tolling was precluded by Calderon v. Presidio

he filed his 1995 action. Instead, Plaintiff filed in Delaware, which has no connection to the prior proceedings.

iii. Adopting Cross-Jurisdictional Class Action Tolling Would Not Avoid Duplicative Litigation

Any interest Delaware might have in furthering the efficiency of the class action procedures of other jurisdictions is outweighed by the disadvantages accompanying cross-jurisdictional class action tolling. See Dole's Br., at 22-23. In response, Plaintiff argues that Delaware should recognize such tolling because it would "further [Delaware's] own interest in avoiding duplicative litigation in its courts." See Pl.'s Ans. Br., at 17. But Plaintiff ignores the fact that a Delaware court could stay or dismiss any such lawsuits, pending the outcome of the motion for class certification. See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970). Regardless, it is a fictional problem -- Plaintiff fails to identify a single state that has experienced a flurry of duplicative individual lawsuits by putative class members because that state has declined to recognize cross-jurisdictional class action tolling. Indeed, despite the fact that the putative Texas class action was filed nearly 20 years ago, Delaware never experienced a flurry of duplicative lawsuits by putative class members until the Superior Court sent its May 2012 letter stating that it intended to deny Dole's motion to dismiss on statute of limitations. Only then were thousands of former putative class members roused from their nearly two-decade slumber.

Valley Farmers Association, 863 F.2d 384, 390 (5th Cir. 1989). See Dole Br., at 28-29.

Moreover, adopting cross-jurisdictional class action tolling would not avoid duplicative lawsuits, but merely postpone them. Once class certification was denied, such suits would follow -- to the extent putative class members ever intended to pursue their claims. And because Delaware would be one of the few states recognizing cross-jurisdictional class action tolling, adopting such tolling would invite "a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run." Portwood, 701 N.E.2d at 1104.

D. Even Courts That Recognize Cross-Jurisdictional Class Action Tolling Impose Significant Limitations, and No Court Has Recognized Such Tolling in Circumstances Present Here

Plaintiff does not dispute that those few jurisdictions that recognize cross-jurisdictional class action tolling have imposed significant procedural and substantive limitations on its application. See Dole's Br., at 24-25. Likewise, Plaintiff does not dispute that none of the state court cases upon which he relies involved a plaintiff who delayed filing suit for over 16 years. Id. at 25-26.

II. Adopting Cross-Jurisdictional Class Action Tolling Would Not Save Plaintiff's Claims Because Any Such Tolling Ceased in 1995

Any meaningful tolling rule necessarily includes both beginning and end points -- otherwise, it would not toll, but eliminate, the statute of limitations. 51 Am. Jur. 2d Limitation of Actions § 169 (2000). Thus, the issue on appeal here logically includes not only if class action tolling can permissibly begin but, if so, when it ends.

Plaintiff does not dispute that, under American Pipe, class action tolling ceases upon the denial of class certification. Instead, Plaintiff claims that tolling ended in June 2010 when the Texas state court denied a second motion for class certification, not in 1995 when the Texas federal court denied the original class certification motion, because the 1995 order (1) was a "generic housekeeping order," (2) was final "only" for purposes of appeal, and (3) contained a return jurisdiction clause. See Pl.'s Ans. Br., at 28-32. Plaintiff is wrong on the facts and the law.

A. The 1995 Order Was Not a "Generic Housekeeping Order"

At 71 pages, the 1995 federal order was hardly "generic."[5] Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995). It adjudicated the defendants' motions to dismiss and the plaintiffs' motions to remand. Id. at 1340-75. And contrary to Plaintiff's dismissive comments, the Fifth Circuit affirmed the order on appeal, Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000), and the Supreme Court denied review, Delgado v. Shell Oil Co., 532 U.S. 972 (2001).

[5] In contrast, the June 2010 order is a two paragraph order denying the intervenors' motion for class certification without explanation. See Pl's. App., Tab C.

Regardless, even purely administrative orders denying a motion for class certification are sufficient to end class tolling. Bridges v. Dep't of Md. State Police, 441 F.3d 197, 213 (4th Cir. 2006).

B. Plaintiff Does Not Dispute That the 1995 Order Was a Valid, Final Order, and That It Was Not Analogous to a Stay

Plaintiff does not dispute that the Superior Court's application of cross-jurisdictional class action tolling turned on its holding that the 1995 federal order of dismissal for f.n.c. was not a valid, final judgment, but was instead "logically equivalent" to a stay. Blanco, 2012 WL 3194412, at *12. Nor does Plaintiff dispute that both holdings are contrary to federal law. See Dole's Br., at 32-35. Instead, Plaintiff argues that even if the 1995 order was final, it was final "only" for purposes of appeal. See Pl.'s Ans. Br., at 29-30. But Plaintiff never explains why that distinction matters.

Federal orders denying class certification are not final, even if they are now appealable in some cases under Rule 23(f). Coopers & Lybrand v. Livesay, 437 U.S. 463, 476-77 (1978). Yet, as Plaintiff does not dispute, every circuit that has addressed the issue has held that class tolling ceases upon the denial of class certification. See Dole's Br., at 27-32. Indeed, federal courts had reached that conclusion even before the promulgation of Rule 23(f) in 1998. See, e.g., Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1378, 1380 (11th Cir. 1998); Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1013 (3d Cir. 1995). Thus, whether the 1995 order was final "only" for purposes of appeal is irrelevant to whether it ended tolling.

Rather, the relevant inquiry is whether the 1995 order stripped the putative class action of its class character such that continued reliance on it for tolling was unreasonable. Armstrong, 138 F.3d at 1380. See also In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 2012 WL 1097244, at *4 (C.D. Cal.). An order denying class certification clearly strips an action of its class character. Armstrong, 138 F.3d at 1380. See also United Airlines, Inc. v. McDonald, 432 U.S. 385, 393 (1977); Fed. R. Civ. P. 23 advisory comm. notes ("A negative determination [regarding class certification] means that the action should be stripped of its character as a class action.").

Here, the 1995 order not only denied class certification, but dismissed the case as well. As such, it clearly stripped the action of its class character, and Plaintiff could no longer reasonably rely on it for tolling purposes. The fact that a new class complaint was filed over a decade later is irrelevant, and cannot revive stale claims that expired years earlier. As the Fifth Circuit held in Calderon, 863 F.2d at 390, tolling ceases when class certification is first denied, regardless of later proceedings. See also In re Countrywide, 2012 WL 1097244, at *4 (holding that tolling ceased when the trial court dismissed the putative class action, even though the dismissal was reversed on appeal).

C. The Return Jurisdiction Clause Is Irrelevant

Despite having previously argued that the 1995 order of dismissal for f.n.c. was void, Plaintiff now places great weight on the fact that the order contained a return jurisdiction clause. See Pl.'s Ans.

Br., at 29-31. But that clause is irrelevant here, as it only applied to the named plaintiffs and intervenors.[6] As the Eastern District of Louisiana recently held, the return jurisdiction clause merely "gave the actual named plaintiffs and intervenors in the suit the right to return to the Texas district court and motion to have the case reopened," and did not "indicate that the right to return extended to putative class members, that the case would necessarily be reopened, much less reopened as a class action, or even that other plaintiffs . . . would be allowed to rejoin the case in Texas." Chaverri v. Dole Food Co., 2012 WL 4097216, at *11 (E.D. La.). Plaintiff, a putative class member, could not have reasonably believed that the return jurisdiction clause was tolling the statute of limitations on his claim.

Moreover, the return jurisdiction clause merely provided what its name suggests: the ability of the named plaintiffs or intervenors to return to the court and seek to have the action reinstated. It did not guarantee that any would return or that the court would grant reinstatement. Thus, it could not have meant, as Plaintiff contends, that the action was continuously pending during the decade between its dismissal in 1995 and its reinstatement in 2005. Indeed, courts in the Fifth Circuit have held that a dismissal on f.n.c. grounds does not toll the statute of limitations, a holding irreconcilable with

[6] It provided only that "if the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in these actions in his home country or the country in which he was injured, that plaintiff may return to this court and, upon proper motion, the court will resume jurisdiction over the action as if the case had never been dismissed for f.n.c." Delgado, 890 F. Supp. at 1375 (emphases added).

Plaintiff's position. Castanho v. Jackson Marine, Inc., 484 F. Supp. 201, 206 (E.D. Tex. 1980).

Regardless, the return jurisdiction clause does not alter the fact that the case had been stripped of its class character in 1995. Even assuming that it was "pending" during the period between the 1995 dismissal and the 2005 reinstatement by virtue of the return jurisdiction clause or the court's injunction -- a legal fiction if there ever was one -- it was pending only as to the named plaintiffs and intervenors, which did not include Plaintiff here. The return jurisdiction clause did not provide putative class members such as Plaintiff with a right to return. Likewise, the court's injunction applied only to the plaintiffs, the intervenors, their attorneys, and their agents, see Delgado, 890 F. Supp. at 1373-74, not unnamed putative class members, many of whom filed separate class actions, see Chaverri, 2012 WL 4097216, at *3.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Opening Brief, 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,

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By: ______________________________
SOMERS S. PRICE, JR. (#279)
POTTER ANDERSON & CORROON LLP
1313 North Market Street, 6th Floor
Wilmington, Delaware 19801
Telephone: (302) 984-6000

Attorneys for Defendants-Appellants