THE SUPREME COURT OF THE STATE OF DELAWARE

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

CONSOLIDATED WITH

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

APPELLANTS' RESPONSE TO THE AMICUS CURIAE BRIEF OF THE DELAWARE TRIAL LAWYERS ASSOCIATION

Date: January 9, 2013

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ARGUMENT

Adopting cross-jurisdictional class action tolling is not "the next logical step" in Delaware's tolling jurisprudence. To the contrary, it is a step that most courts have refused to take, and for good reason. In fact, adopting cross-jurisdictional class action tolling would be out of step with Delaware case law, and would have far-reaching, adverse consequences for Delaware corporations and courts. The Delaware Trial Lawyers Association (the "DTLA") itself recognizes these burdens, but ignores, among other things, that this case is exactly the kind of "particular[ly] problematic situation[]" in which cross-jurisdictional class action tolling is inappropriate.

I. Cross-Jurisdictional Tolling Is Not A "Logical" Extension Of Intra-Jurisdictional Tolling, And Even Courts That Recognize The Former Have Declined To Adopt The Latter

Neither the holding nor the reasoning of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), requires that either state or federal courts adopt cross-jurisdictional tolling. In American Pipe, the United States Supreme Court adopted intra-jurisdictional class action tolling based on the text, history and purpose of Rule 23 of the Federal Rules of Civil Procedure. Id. at 545-51. In particular, the Court focused on the 1966 amendments to Rule 23, which had "eliminated" the "difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class." Id. at 550.

Given this grounding in the text, history and purpose of Rule 23, American Pipe cannot reasonably be read to require cross-jurisdictional class action tolling as a matter of federal law. Ra-

ther, the Court merely held that, as a result of the 1966 amendments, federal courts should accord tolling effect to class actions asserting federal claims under Rule 23. As such, it is entirely consistent with the logic of American Pipe for federal courts to decline to accord tolling effect to putative class actions under state law, as the Seventh Circuit held in In re Copper Antitrust Litigation, 436 F.3d 782, 793-94 (7th Cir. 2006). Likewise, it is entirely consistent with the logic of American Pipe for state courts to decline to accord tolling effect to putative class actions under the laws of other jurisdictions. See, e.g., Casey v. Merck & Co., 653 F.3d 95 (2d Cir. 2011); Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008).

The DTLA's claim that cross-jurisdictional class action tolling follows "logically" from intra-jurisdictional tolling is thus unfounded. Indeed, even states that recognize intra-jurisdictional class action tolling have declined to adopt cross-jurisdictional tolling. Compare Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1105 (Ill. 1998); Bell v. Showa Denko K.K., 899 S.W.2d 749, 758 (Tex. Ct. App. 1995); Ravitch v. Pricewaterhouse, 793 A.2d 939, 945 (Pa. Super. Ct. 2002), with Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 370 (Tex. App. Ct. 1987); Cunningham v. Ins. Co. of N. Am., 530 A.2d 407, 408-09 (Pa. 1987); Steinberg v. Chicago Med. Sch., 371 N.E.2d 634, 645 (Ill. 1977).

II. Adopting Cross-Jurisdictional Class Action Tolling Would Not Be Consistent With Existing Delaware Case Law

The DTLA argues that adopting cross-jurisdictional class action tolling would be consistent with existing Delaware case law. See DTLA Amicus Curiae Br., at 11-12. But Delaware courts are reluctant to create judicial exceptions to the legislatively prescribed statutes of limitations, and no Delaware court has done so in circumstances similar to those present here. See Dole's Opening Br., at 26-28. Moreover, the cases on which the DTLA relies are inapposite.

Like Plaintiff, the DTLA relies heavily on Dubroff v. Wren Holdings, LLC, 2011 WL 5137175 (Del. Ch.). But Dubroff is an intra-jurisdictional case in which the Chancery Court denied a motion to dismiss equitable claims -- which are not subject to the legislatively prescribed statutes of limitations -- on the grounds of laches. Id. at *12-13. Further, in Dubroff, the plaintiffs in the second action filed suit only three months after the denial of class certification in the putative class action. Id. at *13. Here, Plaintiff did not file the action below for over 16 years. As such, Dubroff is distinguishable and not controlling here.

The DTLA also relies on forum non conveniens cases. See DTLA Amicus Curiae Br., at 6-10. But these cases have no relevance here. Plaintiff did not file first in Delaware, and Dole is not seeking to dismiss for forum non conveniens. Moreover, the rationale for these decisions has been called into question. In a recent opinion, Judge Ableman, the former asbestos judge in the Superior Court, warned that the current asbestos caseload is "barely manageable," and that the

"specter of a 'new wave' of filings from plaintiffs . . . from around the world [in the asbestos litigation] . . . may render this case the appropriate time and opportunity to revisit whether Delaware can expand its virtual 'open door' policy to encompass this and other foreign cases 'soon to follow.'" Martinez v. E.I. DuPont De Nemours & Co., Inc., C.A. No. N10C-04-209-ASB, slip op. at 59 (Del. Super.)(December 5, 2012) (Exhibit A hereto). Adopting cross-jurisdictional class action tolling would only further burden Delaware courts at both the state and federal level. Indeed, Plaintiff's counsel already has filed eight DBCP actions on behalf of thousands of plaintiffs in the District Court and an additional DBCP action in the Superior Court. See Dole's Reply Br., at 13.

Again mirroring Plaintiff's arguments, the DTLA draws upon cases interpreting Delaware's Savings Statute, including Reid v. Spazio, 970 A.2d 176 (Del. 2009). But Plaintiff has never contended his claims are saved by the Savings Statute, and the Superior Court agreed the Savings Statute does not apply here. See Dole's Reply Br., at 9. Thus, these cases are irrelevant. The DTLA's reliance on Reid is particularly perplexing. In that case, the plaintiff filed suit in Delaware only six months after the United States Supreme Court denied certiorari. Reid, 970 A.2d at 179. Thus, his claims were timely. Id. at 182. Here, the Supreme Court denied review in 2001, but Plaintiff did not file suit until a decade later – in 2011. See Delgado v. Shell Oil Co., 532 U.S. 972 (2001). Thus, even if Reid governed here

(which it does not), Plaintiff's claims would be hopelessly time barred under Delaware's two-year statute of limitations.

III. This Case Involves A "Particular[ly] Problematic Situation[]" For Which Cross-Jurisdictional Tolling Would Be Inappropriate

The DTLA concedes that adopting cross-jurisdictional class action tolling may impose substantial burdens on Delaware courts, but urges the Court to postpone any consideration of those burdens until another day. Specifically, the DTLA writes that "nothing prevents the Delaware courts from subsequently determining that they should not apply cross-jurisdictional tolling in particular[ly] problematic situations such as where the class in question was pending for a long time." See DTLA Amicus Brief, at 8. But the DTLA ignores the fact that this case is precisely the kind of "particular[ly] problematic situation[]" for which cross-jurisdictional class action would not be appropriate.

Indeed, this case involves the very circumstances that even the Montana Supreme Court agreed would not be covered by cross-jurisdictional class action tolling. In Stevens v. Novartis Pharmaceuticals Corp., 247 P.3d 244, 256-57 (Mont. 2010), the Montana Supreme Court cautioned that if it were to confront a situation "where the class action suit was alleged to have tolled the statute of limitations for over a decade," it would be inclined to "find the principles of notice and fairness to defendants not met and the doctrine [of cross-jurisdictional class action tolling] inapplicable." This same caution should be heeded here, where Plaintiff alleged the same claims in Florida over 16 years ago, and the putative Texas class action was dismissed over 16 years ago. In these extreme circumstances, cross-jurisdictional class action tolling should not apply.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Opening and Reply Briefs, Dole respectfully requests that the Court decline to adopt cross-jurisdictional class action tolling here.

Respectfully submitted,

Date: January 9, 2013

By: _____

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