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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS ANTONIO AGUILAR MARQUINEZ, et al. Plaintiffs-Below, Appellants, v. DOW CHEMICAL COMPANY, et al. Defendants-Below, Appellees.	No. 231,2017 On Acceptance of Petition for Certification by the United States Court of Appeals for the Third Circuit (No. 14-4245), There on appeal from the United States District Court for the District of Delaware (Nos. 12-CV-695, 12-CV-696)

APPELLEES' ANSWERING BRIEF

Dated: September 8, 2017

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NATURE OF PROCEEDINGS

The underlying lawsuits were filed in the United States District Court for the District of Delaware as (1) *Aguilar Marquinez v. Dole Food Company Inc. et al.* (C.A. No. 1:12-cv-00695) on May 31, 2012, which was then consolidated with another, much larger, lawsuit styled (2) *Abad-Castillo v. Dole Food Company Inc. et al*., (C.A. No. 1:12-cv-00696) filed June 1, 2012. Plaintiffs allege occupational exposure to 1,2-dibromo 3-chloropropane ("DBCP") when they worked on banana farms in Costa Rica, Ecuador, Guatemala and Panama over 30 years ago. *See* Pl. App. at A.24.[1] The applicable statute of limitations for personal injury actions in Delaware is two years. *See* 10 Del. C. § 8119. Plaintiffs do not dispute that, but for "class action tolling" established by *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974), and unless such tolling lasted continuously from August 1993 until June 2010, both consolidated cases are time-barred.

The federal district court granted motions for summary judgment on May 27, 2014, dismissing the (then) 2,700 remaining plaintiffs in the consolidated actions based on the Delaware statute of limitations.[2] *See* Def. App. at B.208-215.

[1] "Pl. App." refers to Corrected Appendix to Appellants' Opening Brief filed on August 8, 2017.

[2] Earlier, on September 19, 2013, 14 plaintiffs were dismissed on first-filed grounds based on their prior filing in Louisiana in *Chaverri v. Dole Food Co. Inc.*, 896 F. Supp. 2d 556 (E.D. La. 2012) (hereinafter "*Chaverri* (*La.*)"), *aff'd*, 546 Fed. Appx. 409, 415 (5th Cir. 2013). *See* Appellees' Appendix To Answering Brief filed here with ("Def. App. at B.1-218").

In that opinion, the Court held "that tolling stopped in 1995," *i.e.*, the year the federal court in the Southern District of Texas granted defendants' *forum non conveniens* motion and then entered a final judgment of dismissal under a consolidated case styled *Delgado v. Shell Oil Co*., Civ. A. No. H-94-1337 (Lake, J.) (hereinafter "*Delgado*").

Of the original 2,700 Plaintiffs below, only 57 appealed to the Third Circuit Court of Appeals and as to only certain Defendants.[3] After briefing was complete, the Third Circuit certified this question of law to this Court:

> Does class action tolling end when a federal district court dismisses a matter for *forum non conveniens* and, consequently, denies as moot "all pending motions," which include the motion for class certification, even where the dismissal incorporated a return jurisdiction clause stating that "the court will resume jurisdiction over the action as if the case had never been dismissed for *f.n.c*.," *Delgado v. Shell Oil Co*., 890 F. Supp. 1324, 1375 (S.D. Tex. 1995)? If it did not end at that time, when did it end based on the procedural history set forth above?

Pl. App. at A.113.

[3] Plaintiffs' Notice of Appeal did not include Defendants Dole Food Company, Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company. Def. App. at B.216-218.

SUMMARY OF ARGUMENT

Pursuant to Rule 14(b)(iv), Defendants deny Plaintiffs' Summary of Argument specifically as follows:

1. Denied. This Court should answer the certified question in the affirmative by holding that the tolling period initiated by the filing of a class action complaint ends once it is no longer objectively reasonable for absent class members to rely on the putative action to protect their individual rights.

2. Denied. Under that legal standard, the toll provided by the class action styled *Jorge Carcamo v. Shell Oil. Co.*, 93-C-2290 (Brazoria County, Texas) (hereinafter "*Carcamo*") class action terminated in 1995 with the order and final judgment issued by the federal court in Texas dismissing the consolidated *Delgado* action (including the putative *Carcamo* class action) on grounds of *forum non conveniens* in favor of litigation in plaintiffs' home countries. After entry of final judgment in *Delgado*, no putative class member could reasonably have believed his interests were still being protected by the putative class representatives. Absent class members cannot reasonably expect tolling to continue after entry of a final judgment dismissing the putative class action whether or not the court addressed the merits of class certification before dismissing the suit. *See* McLaughlin on Class Actions: Law & Practice § 3:15 (12th ed. 2016) ("Of course, if the case comes to an end for any reason before class

certification is decided…it also becomes unreasonable for any class member to continue to rely on the case and tolling ends.").

3. Denied. A dismissal of a putative class action on grounds of *forum non conveniens* terminates any tolling afforded by such action. *See In re Nine Systems Corporation Shareholders Litigation*, C.A. No. 3940-VCN, 2014 WL 4383127, at *53 (Del. Ch. 2014). Nothing about the 1995 final judgment in *Delgado* supports a different rule. That final judgment:

(a) included a "return jurisdiction" clause to provide for the contingency—not certainty—that an individually named *Delgado* plaintiff could apply to reinstate his own claims *if* he were unable to litigate those claims in his home country. The rights established by that clause were limited to the individually named plaintiffs in *Delgado*, and relief under the clause did not revive class claims. Moreover, the clause anticipated a mere possibility that a reinstatement could occur at some unspecified date in the future. As of October 27, 1995, no *Carcamo* class member could objectively have relied on the action being reinstated to hold off (for over a decade) asserting their claims;

(b) by its terms did not stay the litigation pending the outcome of proceedings in foreign countries; it dismissed the Texas litigation; and

(c) contained no injunction inhibiting absent class members such as Plaintiffs from filing their own DBCP claims.

Plaintiffs' counsel has acknowledged that the procedural history of the *Delgado* litigation turned out to be a "one-in-a-million instance." *Chaverri* (*La.*), 896 F. Supp.2d at 574. Defendants respectfully submit that this unique set of facts and related proceedings compels a narrow, straightforward answer to the certified question: that the *American Pipe* "class action" tolling in this case ended no later than the October 27, 1995 final judgment in *Delgado*.

4. Denied. In answering the certified question in the affirmative, the Court should join not only the federal district court below, but also the federal district court in *Chaverri* (*La.*), 896 F. Supp.2d at 569, as affirmed by the United States Court of Appeals in *Chaverri*, 546 Fed. Appx. at 415, and the Hawai'i Supreme Court in *Patrickson v. Dole Food Co.*, 137 Hawai'i 217, 228, 368 P.3d 959, 970 (2015) in holding that class action tolling ends when there is a final judgment dismissing the underlying putative class action. The Delaware Superior Court's non-final, unreviewed order in *Blanco v. Dow Chemical Co.*, 2012 WL 3194412 (Del. Super. Ct. 2012), fundamentally misapprehended the procedural history of *Delgado*, and predates the later and better reasoned court decisions rejecting its analysis.

STATEMENT OF FACTS

The *relevant* procedural history of this appeal is much simpler than the eleven pages Plaintiffs include. Pl. Brief at 6-16.[4]

In its shortest form, a final judgment of dismissal was entered on October 27, 1995 by the Southern District of Texas in the putative class action upon which Plaintiffs purport to rely for class action tolling. That decision was affirmed by the Fifth Circuit in 2000 and *certiorari* was denied the next year.

I. The Texas Putative Class Action.

The only case upon which Plaintiffs purport to rely for tolling of limitations is the putative class action originally brought in Texas state court in August 1993, styled *Jorge Carcamo v. Shell Oil Co*., 93-C-2290 (Brazoria Co., Texas) ("*Carcamo*"). Pl. Brief at 18.

Carcamo was filed as a putative class action and defined the class broadly as "all persons exposed to DBCP or DBCP-containing products designed, manufactured, marketed, distributed, or used by [defendants] between 1965 and 1990" in 25 countries. *See* Def. App. at B.16; s*ee also Delgado* 890 F. Supp. at 1337. In addition to the twelve putative class representatives, *Carcamo* was brought by thousands of individually named plaintiffs from twelve countries. Plaintiffs here were not and do not claim to have been named plaintiffs or

[4] "Pl. Brief" refers to Corrected Appellants' Opening Brief filed on August 8, 2017.

intervenors in *Carcamo*, but merely allege that they are members of the putative class in *Carcamo*. *See* Pl. Brief at 33. Plaintiffs' counsel, Scott M. Hendler, represented two intervenors in *Carcamo*.[5]

The *Carcamo* putative class representatives filed a motion for class certification in state court. Def. App. at B.13-41. Before that motion was heard, the case was removed to federal court in the Southern District of Texas in April 1994 and was thereafter consolidated with six other cases then known collectively as *Delgado*.[6] 890 F. Supp. at 1336-39.

After removal, the Texas federal district judge (Judge Lake) set a scheduling conference to discuss, among other issues, "[w]hether class certification is appropriate" and directed the parties to make certain submission on the question. *See* Pl. App. at A.115. Defendants' submission noted several reasons why plaintiffs' proposed class should not be certified under "Federal Rules of Civil Procedure 23(b)(3) and 23(b)(1)(A)" including choice of law issues, causation issues, individual damages and exposure issues. Pl. App. at A.125. Plaintiffs'

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[5] *See Delgado v. Shell Oil Co*., 890 F. Supp. 1324, 1333 (S.D. Tex. 1995) (identifying Scott M. Hendler as counsel for "intervenors"). Those intervenors were Nelson Rivas Ramirez and Eduardo Rivas Ledezma (the "Rivases").

[6] As used here, "*Delgado*" refers to the consolidated cases that included *Carcamo* and the decision by the Texas district court at *Delgado*, 890 F. Supp. 1324. "*Carcamo*" refers to the putative class action whenever it is necessary to distinguish it from *Delgado*.

reply brief ends with an express request to grant the pending certification motion. Def. App. at B.51.

II. The October 27, 1995 Dismissal of the *Delgado* Lawsuit.

On July 11, 1995, Judge Lake issued a memorandum opinion conditionally granting the *Delgado* defendants' motion to dismiss on the grounds of *forum non conveniens* ("*f.n.c.*") *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). The dismissal was conditioned upon defendants, *inter alia*, participating in expedited discovery and making certain waivers regarding the foreign fora. *Id*. at 1373. The next to last sentence of the opinion noted that there were additional pending motions besides the *f.n.c.* motion, but that "Because *Delgado*, *Jorge Carcamo*, *Valdez*, and *Isae Carcamo* may be dismissed in 90 days, all pending motions in those cases not otherwise expressly addressed in this Memorandum and Order are DENIED as MOOT." *Delgado*, 890 F. Supp. at 1375.

The *Delgado* defendants satisfied the conditions to dismissal and, on October 27, 1995, Judge Lake entered a "FINAL JUDGMENT" of dismissal in the *Delgado* case. Def. App. at B.105-107 (emphasis in original).[7] The concluding sentence of the document also states: "This is a FINAL JUDGMENT." *Id.* The

[7] That Final Judgment was entered in four of the consolidated cases; *Delgado*, No. H-94-1337; *Jorge Carcamo*, No. H-94-1359; *Valdez*, No. H-95-1356; and *Isae Carcamo*, No. H-95-1407. Def. App. at B.105-107.

Delgado docket sheet contains an entry dated the day before which says simply: "Case Closed (fmremp) (Entered: 11/02/1995)." Def. App. at B.87.

That same day, Judge Lake issued a separate order clarifying that the injunction against re-filing DBCP-related claims in the United States included in his July 1995 opinion applied only to "plaintiffs (and intervenor plaintiffs) in the actions before the court." Def. App. at B.102.

The *Delgado* plaintiffs appealed only the question of the district court's subject matter jurisdiction, which was affirmed by the Fifth Circuit on October 19, 2000. 231 F.3d 165, 169 (5th Cir. 2000). The United States Supreme Court denied *certiorari* on April 16, 2001. 532 U.S. 972 (2001).

III. The *Patrickson* Decision and Subsequent Proceedings in *Delgado*.

After a decision by the United States Supreme Court in a related case, *Dole Food Company Inc. v. Patrickson*, 538 U.S. 468 (2003), the *Delgado* plaintiffs filed a motion in the Texas federal district court asking it to vacate the 1995 *f.n.c.* dismissal. Def. App. at B.115-154. Judge Lake denied that motion and declined to vacate the 1995 *Delgado f.n.c.* dismissal. Def. App. at B.155-173. In that same order, however, Judge Lake vacated the earlier injunction completely. Def. App. at B.174.

Later that same month, the Costa Rican *Delgado* plaintiffs (but not plaintiffs from any other country) moved the Texas federal district court for a ruling on their

earlier motion under the return jurisdiction clause. *Rodriguez Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 800 (S.D. Tex. 2004) (hereinafter "*Delgado II*").[8] In that same motion, the *Delgado* plaintiffs also challenged the court's jurisdiction to rule on reinstatement in light of *Patrickson* and moved to remand. *Id.* Judge Lake granted the motion in part, remanding the two actions containing Costa Rican plaintiffs, *Delgado* and *Carcamo* to the Texas state courts for consideration of the reinstatement motion. *Id.* at 817. He did not remand either *Valdez* or *Isae Carcamo*, which had been brought by plaintiffs from countries other than Costa Rica. In the court's ruling on remand, Judge Lake reaffirmed that "despite the change in Supreme Court decisional law effected by *Patrickson*, 123 S. Ct. at 1655, the court's *f.n.c.* dismissal remains valid and enforceable." *Id.* at 814; *see also id.* at 812-13 (emphasis added):

> Because the court's assertion of subject matter jurisdiction was affirmed on appeal in an opinion that the Supreme Court declined to review before it decided *Patrickson*, 123 S. Ct. at 1655**, the court's decision to assert subject matter jurisdiction over this action and its decision that plaintiffs' claims should be dismissed under the doctrine of f.n.c. are both final.**

[8] Plaintiffs include this quote from the Third Circuit's decision in *Chavez*: "By the early-2000s, it had become clear that foreign courts were, as the Texas District Court anticipated, unwilling to hear these cases." Pl. Brief at 11. Plaintiffs' counsel knows this to be inaccurate. While there were plaintiffs from twelve different countries in *Carcamo* alone, only plaintiffs from Costa Rica ever sought reinstatement under the return jurisdiction clause. *Delgado*, 890 F. Supp. at 1337; *Delgado II*, 322 F. Supp. 2d. at 800.

see also id. at 815 ("[T]he resulting judgment is neither void nor invalid.").

The next year, the two Texas state courts reinstated the Costa Rican plaintiffs in the *Carcamo* and *Delgado* actions under the return jurisdiction clause. Pl. Brief at 12. Four years later, in *Carcamo*, Mr. Hendler's clients, the Rivases, filed a new motion for class certification, which the state court denied in a one line order on June 3, 2010. Pl. App. at A.88. The Rivases voluntarily dismissed their claims in Texas state court the very next day.

ARGUMENT

QUESTION PRESENTED

The certified question to this Court is, under Delaware law:

> Does class action tolling end when a federal district court dismisses a matter for *forum non conveniens* and, consequently, denies as moot "all pending motions," which include the motion for class certification, even where the dismissal incorporated a return jurisdiction clause stating that "the court will resume jurisdiction over the action as if the case had never been dismissed for *f.n.c*.," *Delgado v. Shell Oil Co*., 890 F. Supp. 1324, 1375 (S.D. Tex. 1995)? If it did not end at that time, when did it end based on the procedural history set forth above?

Pl. App. at A.113.

STANDARD AND SCOPE OF REVIEW

A certified question is one of law which this Court decides *de novo*. *Lambrecht v. O'Neal*, 3 A.3d 277 (Del. 2010).

MERITS OF ARGUMENT

Although posited by the Third Circuit as a question of review, the certified question before the Court is really a point of error, based on facts and proceedings unique to this case. For that reason, Defendants respectfully submit that the Court should adopt the simplest and narrowest rule: that class action tolling ends when final judgment is entered in the putative class action relied on for tolling. To adopt the rule urged by Plaintiffs would establish a rule in Delaware that class action tolling in any similar action, *i.e.*, a *forum non conveniens* dismissal subject to a return jurisdiction clause, could continue indefinitely, awaiting events in foreign courts that might never occur, and that "reasonable reliance" by the putative class members is not a factor in determining when tolling ends.

Applying Defendants' proposed rule, class action tolling ended no later than when the *Delgado f.n.c.* dismissal was memorialized in a document entered on October 27, 1995, titled "FINAL JUDGMENT" and which concluded with the sentence: "This is a FINAL JUDGMENT." Def. App. at B.105-107. In addition, the Texas federal district court's docket contains an entry dated the day before which says simply: "Case Closed (fmremp) (Entered: 11/02/1995)." Def. App. at B.87. From then on, putative class members, including Plaintiffs, could not reasonably have relied on the *Carcamo* putative class action to have tolled limitations. Any possible doubts were certainly put to rest when the Fifth Circuit

affirmed that judgment in 2000 and when the United States Supreme Court denied those plaintiffs' petition for writ of certiorari the next year.

As a result, this Court need not decide whether tolling was halted by the Texas federal district court's July 1995 order denying as moot the pending motion for class certification three months before the October 1995 Final Judgment. If the toll ended any time before June 3, 2010, Plaintiffs' claims are undisputedly time-barred.

Moreover, the return jurisdiction clause did not negate the finality of the October 27, 1995 final judgment or its cessation of the class action tolling. Return jurisdiction was expressly contingent on the possibility that a foreign court(s) might dismiss the *Delgado* plaintiffs' actions and, even then, that dismissal had to be affirmed by the highest court in a given country—events with no guarantee of ever occurring. Indeed, although *Delgado* included plaintiffs from twelve different countries, only the Costa Rican plaintiffs ever sought or were granted reinstatement under the return jurisdiction clause.

Nor did anyone understand the *Delgado* final judgment to be a stay, most notably its author: Judge Lake. In fact, when the *Delgado* plaintiffs filed a motion to vacate the 1995 final judgment after the United States Supreme Court's 2003 decision in *Patrickson*, Judge Lake refused to do so, finding the dismissals to be

final and enforceable. In that same order, he vacated his earlier injunction; yet, Plaintiffs still did not file the instant action for another eight years.

Lastly, despite Plaintiffs' suggestion to the contrary, the only two courts (other than the Superior Court in *Blanco* and the district court below) to ever address the precise question here agreed that *Delgado* class action tolling ended no later than the October 27, 1995 final judgment.

I. The 1995 Final Judgment in *Delgado* Should End *American Pipe* Tolling Under Delaware Law.

In contrast to Plaintiffs' eleven page statement of procedural history, Defendants respectfully submit that only one fact is necessary to answer the certified question before the Court: on October 27, 1995, the Texas federal district court entered a "FINAL JUDGMENT" of dismissal in *Delgado* (and the case was closed on its docket). This is the last possible moment that any member of the *Carcamo* putative class, including Plaintiffs, could have reasonably relied on any tolling that case provided. Indeed, if the putative class members were not required to act at that point, there would literally be no end to *American Pipe* tolling for the *Carcamo* putative class members.

A. No Putative Class Member Could Have Reasonably Relied on the *Carcamo* Putative Class After Final Judgment Was Entered.

This Court has decided that Delaware follows the "class action tolling" doctrine established in the United States Supreme Court's decision in *American*

Pipe. *Dow Chemical Co. v. Blanco*, 67 A.3d 392, 399 (Del. 2013) (holding Delaware recognizes cross-jurisdictional class action tolling). *See also Dubroff v. Wren Holdings, LLC*, No. 3940-VCN, 2011 WL 5137175 (Del. Ch. Oct. 28, 2011). This rule is intended to promote judicial economy by discouraging class members from intervening in a putative class action or filing their own lawsuits for so long as a pending class action could protect the rights of absent class members. *Id*. at 551; *see also Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351 (1983) (*American Pipe* tolling rule and Federal Rule of Civil Procedure 23 were "designed" to avoid "needless multiplicity of actions").

This Court has not addressed the question of when class action tolling ends. In other jurisdictions applying *American Pipe*, it is well-settled that tolling ends with the termination of the class certification question by whatever means, including denial of class certification, voluntary withdrawal of class claims, or dismissal on grounds unrelated to class certification. *See, e.g.*, *Sawyer v. Atlas Heating and Sheet Metal Works*, 642 F.3d 560, 563 (7th Cir. 2011) (*American Pipe* tolling ends with plaintiff's voluntary dismissal of lawsuit); *In re Westinghouse Sec. Litig*., 982 F. Supp. 1031, 1035 (W.D. Pa. 1997) ("it is beyond cavil that the

dismissal of an entire civil action is about as 'definitive' a disposition of a motion for class certification as one is likely to find.").[9]

Once a court enters an order inconsistent with claims proceeding on a class-wide basis, the named plaintiffs no longer have a duty to protect the interests of the excluded putative class members, *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir. 1998), and the "objectively reasonable reliance rationale breaks down" for class members to refrain from pursuing their own claims. *Id*.

Defendants submit that "objectively reasonable reliance" is the only proper and only workable test for determining when class action tolling ends. And unlike Plaintiffs' proposed rule, it has not been invented for this "one-in-a-million" case. As explained by the Fourth Circuit in *Bridges v. Dep't of Md. State Police*: "the Supreme Court signaled that *American Pipe* tolling extends as far as is justified by the *objectively reasonable reliance* interests of the absent class members." 441 F.3d at 211 (emphasis added). In *Bridges*, the district court denied class certification without prejudice and allowed the motion to "automatically [be] considered renewed" if the plaintiffs filed a reply brief. *Id.* at 203. Instead, the

[9] *Yang v. Odom*, 392 F.3d 97, 102 (3d Cir. 2004); *Giovanniello v. ALM Media*, 726 F.3d 106, 119 (2d Cir. 2013); *Taylor v. United Parcel Serv., Inc*., 554 F.3d 510, 519 (5th Cir. 2008); *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006); *Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355-56 (Fed. Cir. 2000); *Armstrong v. Martin Marietta Corp*., 138 F.3d 1374, 1391 (11th Cir. 1998) (*en banc*); *Fernandez v. Chardon*, 681 F.2dd 42, 48 (1st Cir. 1982).

plaintiffs, *inter alia*, advised the putative class members that they were actively pursuing settlement individually. *Id.* The Fourth Circuit held that the district court's order halted *American Pipe* tolling:

> In this case, we conclude that no absentee class member *could reasonably have relied* on the named plaintiffs, nor the district court, to protect their interests in the period following the district court's 2001 certification denial—particularly in light of the events that followed—even though that certification denial was only for administrative purposes. If the denial order left doubts in the minds of reasonable absent class members whether they would be protected, then the acts that followed entry of that order surely put the issue to rest.

Id. at 211 (emphasis added). To hold otherwise would be to allow tolling indefinitely, "for there was no other order denying certification." *Id*. at 212; *see also Armstrong*, 138 F.3d at 1389-90 (unreasonable for putative class members to rely on class action after class certification denied).

Likewise, after the October 27, 1995 Final Judgment was entered in *Delgado*, the members of the putative class, including Plaintiffs, no longer had any objectively reasonable basis to assume that their rights were still being protected by that proceeding. Thus, the Delaware federal district court below got it exactly right that, after entry of the *Delgado* final judgment, "any reliance would have been objectively unreasonable." *Marquinez v. Dole Food Co*., 45 F. Supp. 3d 420, 424 (D. Del. 2014). This is especially true where, as here, the Fifth Circuit affirmed the Texas district court's judgment, *Delgado v. Shell Oil Co.*, 231 F.3d

165, 169 (5th Cir. 2000), and the United States Supreme Court denied *certiorari* a year later. 532 U.S. 972 (2001).

B. Delaware Law Supports Defendants' View.

At least one Delaware court has recognized that dismissal of a putative class action on grounds of *f.n.c.* stops the tolling period afforded by that action. *See In re Nine Systems Corporation Shareholders Litigation*, C.A. No. 3940-VCN, 2014 WL 4383127, at *53 (Del. Ch. 2014). There, the Court of Chancery determined the periods during which limitations was tolled due to the pendency of a class action in a complex, multi-jurisdictional litigation. With respect to a putative class action that had been filed in California, the Vice Chancellor found that limitations was tolled from the day it was filed until the date the California court ruled the action should be dismissed on grounds of *f.n.c.* *Id*. Applying that case here, the dismissal of the *Delgado* action on grounds of *f.n.c.* by the "FINAL JUDGMENT" on October 27, 1995 marked the end of the *Delgado* putative class action.

C. Both *Chaverri* and *Patrickson* Held There Was No Tolling Beyond the *Delgado* Final Judgment.

Considering the issue before this Court, the Eastern District of Louisiana, the Fifth Circuit Court of Appeals, and the Supreme Court of Hawai'i agreed that the latest that class tolling from *Delgado* ended was when the Texas district court entered final judgment on October 27, 1995. In *Chaverri*, the Louisiana federal district court found that event "absolutely stopped the pendency of the case" and

restarted limitations. *Chaverri* (*La.*), 896 F. Supp. 2d at 569 (limitations began on October 27, 1995, making the 2011 filing of the Louisiana action "approximately fifteen years too late"). Going further, the *Chaverri* court found that the denial of the class certification motion, in combination with the final judgment, was "sufficient to alert putative class members that they could not reasonably expect their rights to be protected by the class action." *Id*. at 571. As Judge Barbier explained:

> By denying the motion as moot and dismissing the [*Delgado*] case, every member of the putative class was put on notice that the motion for class action was no longer pending in the court and, therefore, that the court would not entertain the certification of the class. Thus, each member of the class was alerted that they needed to act to preserve their rights.

Chaverri (*La.*) at 571. The Fifth Circuit affirmed Judge Barbier's "well-reasoned opinion," *Chaverri*, 546 Fed. Appx. 409 (5th Cir. 2013), and specifically his determination that "dismissal of…[the *Delgado*] suit in 1995 would have caused the [limitations] period to begin anew."

Similarly, in *Patrickson,*[10] the Hawai'i Supreme Court held that "the Texas district court's October 27, 1995 final judgment dismissing *Carcamo/Delgado* for *f.n.c.* clearly denied class certification and triggered the resumption of our state

[10] Two Plaintiffs, Gerardo Dennis Patrickson and Benigno Torres Hernandez, are also plaintiffs in the pending Hawai'i *Patrickson* action and are subject to the Hawai'i Supreme Court holding that the *Carcamo* toll ended on October 27, 1995. *Id.* at 230 n2.

statute of limitations." *Patrickson v. Dole Food Co.*, 137 Hawai'i 217, 228-30, ("[T]olling also ends when a court in our sister jurisdiction enters final judgment dismissing the underlying class action.").

D. Dismissals of the Putative Class Action Always Halt Tolling Under *American Pipe*.

Chaverri (*La.*) and *Patrickson* represent the majority rule. Other courts have similarly ruled that a dismissal of a putative class action, without a decision on the class certification question, halts *American Pipe* tolling. As a leading treatise explains: "Of course, if the case comes to an end for any reason before class certification is decided . . . it also becomes unreasonable for any class member to continue to rely on the case and tolling ends." McLaughlin on Class Actions: Law & Practice § 3:15 (12th ed. 2016).

For this simple reason, Defendants' proposed rule is superior to Plaintiffs': it is fundamental that dismissals of a putative class action always halt *American Pipe* tolling. *See, e.g., In re Westinghouse Sec. Litig.*, 982 F. Supp. at 1035 (the dismissal of an entire civil action "is about as 'definitive' a disposition of a motion for class certification as one is likely to find").

E. *Yang v. Odom* Simply Has No Application to These Facts.

Plaintiffs repeatedly invoke the Third Circuit's decision in *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004), for the proposition that "an order denying certification does not operate to halt tolling when it does not address whether class action

criteria have been met and when certification could be revisited at a later point in time." Pl. Brief at 26. However, *Yang* is irrelevant to this case for the simple reason that, unlike here, there was no final judgment in the lawsuit relied on for tolling.

In *Yang*, the Third Circuit considered *American Pipe* tolling under the following factual situation: (1) the defendants stipulated to class certification; (2) on July 26, 2001, the district court nonetheless rejected the stipulation, finding the parties had not satisfied the Rule 23 requirements; (3) a renewed motion for class certification was filed on January 9, 2002, which was unopposed; and (4) the district court denied the motion with prejudice on July 1, 2002. In that case, the Third Circuit rejected defendants' argument that tolling ended on July 26, 2001 (as opposed to July 1, 2002), finding unremarkably that the "initial denial was a rejection of the parties' proposed joint stipulation of a class definition," and not a "final adverse determination of class claims." *Id.* at 102.

Thus, the broadest rule that might be derived from *Yang* is that, where a trial court denies a stipulation as to class certification, but leaves open the possibility that it might be re-urged by formal motion, tolling does not end until the subsequent motion is denied with prejudice or the case is dismissed. *Id.* In truth, however, *Yang* simply has no application to the tolling issues here.

F. The Entry of Final Judgment is a Simple Bright Line Marker.

As Judge Barbier observed in *Chaverri*, Plaintiffs' proposed tolling rule would essentially rely on hindsight to establish a "one-in-a-million rule that would blur the lines and confuse future plaintiffs." *Chaverri* (*La.*), 896 F. Supp. 2d at 574.[11] In contrast, Defendants' proposed rule—that a final judgment terminating the putative class action operates to end *American Pipe* tolling—is a simple, bright line rule. And it is consistent with the many cases which observed the need for just such a "bright-line rule in this area of the law." *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 119 (2d Cir. 2013); *see also Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (holding that "few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations"). Nowhere is this point better identified than in *American Pipe* and *Crown, Cork* themselves, which warn that any tolling rule should operate early in the litigation. *American Pipe*, 414 U.S. at 552 (noting that class action decision should "be made as soon as practicable after the commencement of an action"); *see also Crown, Cork*, 462 U.S. at 354 (1983) (Powell, J., concurring) (warning that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse.").

[11] On the one hand, Plaintiffs argue that "a discussion of the requirements of class certification under federal Rule 23" is required in any order that ends tolling. Pl. Brief at 29, 30. On the other hand, they contend (Pl. Brief at 3), that the *Carcamo* tolling ended on June 3, 2010, when the Texas state district court denied class certification in a one line order with no analysis of class action certification at all. Pl. App. at A.88.

The need for certainty requires that the reasonableness of reliance on tolling be assessed objectively only as of the events at the time and not based on future contingencies that may never occur. *See Calderon v. Presidio Valley Farmers Ass'n*, 863 F.3d 384, 389 (5th Cir. 1989) (court's reconsideration of class certification "did not and could not" restart the two-year statute of limitations that "had run during the time between the original denial and the district court's reversal" on reconsideration).

In sum, Defendants submit that the far better answer to the certified question is the simplest one: a final judgment dismissing on any basis the putative class action ends tolling. Applying that rule to this case, the October 27, 1995 final judgment in *Delgado* ended any tolling that stemmed from that putative class action on that date. Indeed, if the Court was to hold otherwise, *i.e.*, that tolling extended beyond final judgment, the effect would be that reasonable reliance is not a requirement for *American Pipe* tolling under Delaware law.

II. Plaintiffs' Attempts to Re-Characterize the October 27, 1995 Final Judgment Are Unavailing.

Because the *Delgado* final judgment completely undermines their position, Plaintiffs repeatedly attempt to distinguish it on the grounds that (1) the dismissal was based on *f.n.c.* and (2) contained a "return jurisdiction" clause. *See* Pl. Brief at 33-34. But Plaintiffs' ignore that the words "FINAL JUDGMENT" appear on the face of the document entered by the Texas federal district court on October 27,

1995, and that the document expressly states: "This is a FINAL JUDGMENT." Def. App. at B.105-107. And Plaintiffs also ignores that the case was contemporaneously closed on the court's docket. Def. App. at B.87. Neither the return jurisdiction clause nor the *f.n.c.* basis of dismissal changed the character of the *Delgado* final judgment. It is what it twice says it is: a final judgment which disposed of the case in its entirety necessarily meaning that, come October 28, 1995, there was no pending putative class action on which any class member could rely to refrain from pursuing his individual DBCP claim.

A. The "Return Jurisdiction" Clause Did Not Impact the Finality of the 1995 *Delgado* Judgment.

Plaintiffs argue that, because Judge Lake's July 11, 1995 Order included a "return jurisdiction" clause, that order "did not put absent class members on notice of the need to file new individual actions." Pl. Brief at 33.[12] But here is the language of the "return jurisdiction" clause:

> Notwithstanding the dismissals that may result from this Memorandum and Order, in the event that 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

[12] Plaintiffs' position that in order to stop tolling a court order must "unambiguously inform absent class members that they need to file individual actions to protect their interests," Pl. Brief at 4, is unsupported by precedent or logic.

> resume jurisdiction over the action as if the case had never been dismissed for *f.n.c*.

Delgado, 890 F. Supp. at 1375. And, of course, dismissals did "result from this Memorandum and Order," as reflected by the October 27, 1995 final judgment. Indeed, *Delgado* was appealed, affirmed by the Fifth Circuit and *certiorari* denied by the Supreme Court. Then, for the next eight years it remained wholly and completely dismissed. In fact, thousands of the *Delgado* plaintiffs remain dismissed to this day on the basis of that judgment. The judgment was final in every sense of the word.

> Moreover, even though the Texas district court remanded the Costa Rican petition back to state court much later in 2004, the Court notes that the Texas District Court did not vacate its prior dismissal or its corresponding denial of pending motions, but rather, *found that its previous decision was final*.

See also Chaverri (La.), 896 F. Supp. 2d at 573-74 (emphasis added).

1. "Return Jurisdiction" Clauses Were Required by the Fifth Circuit in Any *FNC* Dismissal.

At the time of the *f.n.c.* dismissal in *Delgado*, the Fifth Circuit required that such dismissals be subject to return jurisdiction provisions "to ensure that defendants will not attempt to evade the jurisdiction of the foreign courts." *See Robinson v. TCI/US West Communications, Inc*., 117 F.3d 900, 907-08 (5th

Cir. 1997).[13] The *Delgado* "return jurisdiction" clause satisfied this requirement, by allowing any plaintiff or intervenor—whose refiled suit abroad and whose dismissal for lack of jurisdiction was affirmed by the foreign forum's highest court—to file a motion to return to the Southern District of Texas. *See Robinson*, 117 F.3d at 907-08 ("return jurisdiction" clause is "part of a larger set of measures needed to ensure that defendants will not attempt to evade the jurisdiction of the foreign courts which may also include agreements between the parties"). As the *Chaverri* court recognized; this clause was a safeguard to "ensure that an *actual* plaintiff in a suit is not prejudiced by the *f.n.c*. dismissal." *Chaverri (La.)*, 896 F. Supp. 2d at 573.

Such clauses are explicit confirmation of what other courts accomplish via a Rule 60 motion in *f.n.c*. cases in the event litigants are unable to pursue claims abroad. *E.g., Palacios v. Coca-Cola Co*., 499 Fed. Appx. 54 (2d Cir. 2012); *Dawson v. Compagnie Des Bauxites De Guinee*, 112 F.R.D. 82 (D. Del. 1986). But just as the possibility of filing a post-judgment Rule 60 motion "does not affect the judgment's finality or suspend its operation," FED. R. CIV. P. 60(c)(2); Del. Super. Ct. Rule 60(b); Del. Ch. Ct. Rule 60(b), so too the "return jurisdiction" clause did

[13] In addition to the "return jurisdiction" clause, there were also additional measures taken, such as in *Delgado*, which required defendants to participate in expedited discovery and waive jurisdictional defenses. *See Delgado*, 890 F. Supp. at 1373.

not deprive the *Delgado* judgment of finality or create any reasonable expectation after October 1995 that any claims would be reinstated.

2. The "Return Jurisdiction" Clause Reflects an Individual Right to Return, Not a Right of the Putative Class.

Plaintiffs' reliance on the "return jurisdiction" clause to continue class tolling is also misplaced because the "right of return" was expressly limited to the individually named plaintiffs in *Delgado*. 890 F. Supp. at 1375 (". . . *that plaintiff* may return to this court…") (emphasis added). As the Louisiana federal district court explained in *Chaverri*, "at the time that the *f.n.c.* dismissal was issued, the only thing known to any plaintiff, intervenor, *or putative class member was that if an actual plaintiff's* case was dismissed [in his home country], then *that same plaintiff* could return to the Texas district court and motion for the court to resume jurisdiction over the action." *Chaverri* (*La.*), 896 F. Supp. 2d at 573 (emphasis added); *see also id.* ("It gave the actual named plaintiffs . . . the right to return to the Texas district court . . ."). Most importantly, the return clause is completely silent as to the putative class and:

> . . . does 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, aside from the plaintiff making the motion, would be allowed to rejoin the case in Texas. Therefore, in April 1996, when the Costa Rican plaintiffs returned, their return did not affect the rights or status of any party to the *Delgado* case, aside from their own, much less the putative class members.

Id. Put another way, the return jurisdiction clause was only an individual right to return, not a right held by the putative class or a way to revive the putative class action.

Indeed, later events in *Delgado* illustrate this fact. When, some nine years after the entry of the 1995 final judgment, Judge Lake entered an order of remand pursuant to the "return jurisdiction" clause, he remanded only the two actions involving Costa Rican plaintiffs—*Delgado* and *Carcamo*.[14] *Delgado II*, 322 F. Supp. 2d at 809-17. Two other actions that were consolidated under *Delgado*—*Valdez* and *Isae Carcamo*—which involved plaintiffs from countries other than Costa Rica, who never sought reinstatement, were not remanded, and remain dismissed today. Moreover, even among the *Delgado* and *Carcamo* plaintiffs, only the Costa Rican plaintiffs ever sought or were granted relief under the return jurisdiction clause. Like the plaintiffs in *Valdez* and *Isae Carcamo*, none of the thousands of other *Delgado or Carcamo* plaintiffs from Burkina Faso, Ivory Coast, Dominica, Saint Lucia, Saint Vincent, Ecuador, Honduras, Nicaragua, Panama, or

[14] At the time of the 1995 dismissal, the *Carcamo* action was actually comprised of (1) *Delgado v. Shell Oil*, No. H-94-1337; (2) *Jorge Carcamo v. Shell Oil Co*., No. H-94-1359; (3) *Valdez v. Shell Oil Co*., No. H-95-1356 and (4) *Isae Carcamo*, No.H-95-1407. While these cases were all consolidated into the *Delgado* action, the countries from which each of these lawsuits' plaintiffs haled differed. But only the Costa Rican plaintiffs, who alleged that their claims had been dismissed and that dismissal affirmed by the highest Costa Rican court, moved to remand the case to rule on the "return jurisdiction" clause.

the Philippines ever moved for reinstatement or were reinstated under the return jurisdiction clause.

3. The Return Jurisdiction Clause Did Not Extend Tolling.

Plaintiffs' argument class action tolling continued because the return jurisdiction clause somehow "modified" what is, on its face, a final judgment suffers from an obvious logical flaw: the *Delgado* plaintiffs were in any way guaranteed to return to the Texas federal district court. *See Chaverri* (*La.*), 896 F. Supp. 2d at 573. The "right of return" would be triggered only "*in the event* that 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 . . ." and even then could be enforced only "upon proper motion." *Delgado*, 890 F. Supp. at 1375 (emphasis added). But for the fact that the Costa Rican plaintiffs—plaintiffs from only one of twelve countries—were reinstated, under Plaintiffs' position, the class action tolling from *Carcamo* would never have terminated. There would be potential absent class members whose claims would have remained tolled even to this day, contingent on possible future actions by foreign courts.

Moreover, according to Plaintiffs, tolling from *Carcamo* did not end until 2010, despite nearly a ten year gap between the 1995 final judgment and the 2005 orders from two Texas state courts reinstating the Costa Rican plaintiffs in those

cases.[15] Thus, Plaintiffs' proposed rule creates a completely unworkable situation for determining when a putative class action dismissed on the basis of *f.n.c.* ends.

In short, because the "return jurisdiction" clause was an individual right, not a procedure to revive the class, and was contingent on events in no way certain to ever occur, it did not affect the finality of the judgment entered on October 27, 1995 and did not extend *American Pipe* tolling.

B. The October 27, 1995 Dismissal Was Not a "Stay."

Completely ignoring both the title of and the sentence "This is a FINAL JUDGMENT" concluding the document executed by Judge Lake in *Delgado*, Plaintiffs nonetheless argue that under Delaware law where a case is dismissed on *f.n.c. grounds* that includes a right of return, it (1) is equivalent to a stay and (2) tolls the limitation period for putative class members. Pl. Brief at 34-35. But Judge Lake repeatedly made it clear that he did not consider his judgment to have been a stay. Instead, he confirmed that the 1995 *f.n.c*. dismissal was a final judgment. *Delgado II*, 322 F. Supp. 2d at 813:

> Because the court's assertion of subject matter jurisdiction was affirmed on appeal in an opinion that the Supreme Court declined to review before it decided *Patrickson*, 123 S. Ct. at 1655, the court's decision to assert subject matter jurisdiction over this action and its decision that plaintiffs' claims should be dismissed under the doctrine of f.n.c. are both final.

[15] Even then, Plaintiffs did not file this case for seven more years.

See also Chaverri (*La.*), 896 F. Supp. 2d at 573-74 (finding "even though the Texas district court remanded . . . the Texas District Court did not vacate its prior dismissal . . . but rather, found that its previous decision was final.").

Plaintiffs' sole basis for treating a dismissal as a stay is Judge Herlihy's opinion in *Blanco v. Amvac Chem. Corp.*, C.A. No. N11C-07-149 JOH, 2012 WL 3194412 (Del. Super. Ct. Aug. 8, 2012) (unpub.), where he held that "[a] dismissal conditioned on a right of return is logically equivalent to a stay of the action." 2012 WL 3194412, at *12.[16]

As a threshold matter, in the interlocutory appeal of Judge Herlihy's order, this Court expressly declined to address the exact issue with which it is now presented. 67 A.3d at 399.[17] And it will never have that opportunity. Shortly after he was deposed, the single plaintiff in *Blanco* voluntarily dismissed that case.

[16] Judge Herlihy cited only one case for the proposition that a stay would toll limitations under Delaware law: *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970). In that case, the defendant in an Alabama action filed two lawsuits in Delaware—one in Superior Court and one in the Court of Chancery, both of which were based on its counterclaim in the Alabama action. The defendant in the Delaware suits, McWane, filed identical motions to dismiss or stay in both the Chancery Court and Superior Court; it was granted in the Chancery Court, but the Superior Court denied the stay, which was the basis of the *McWane* appeal. There is no discussion of limitations in *McWane*, and the case has no relation to tolling principles under *American Pipe* or to tolling principles regarding non-parties to the case; it is simply inapplicable.

[17] Plaintiffs misstate the record in insinuating that in 2013 Defendants "failed to persuade this Court to accept their argument" as to the toll end date. Pl. Brief at 29. This Court never considered that question; had it done so in 2013 it would not have accepted certification of that very question in 2017.

See Stipulation of Dismissal with Prejudice, Docket No. 126 E-file transaction No. 56159407, *Jose Rufino Canales Blanco v. Amvac*, C.A. No. N11C-07-149 ALR. As a result, Judge Herlihy's decision on this issue was not and will never be, subject to appellate review. *See Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).

The Superior Court's *Blanco* decision on the toll end date was wrong for reasons articulated by the Eastern District of Louisiana in *Chaverri*, which correctly observed that the United States Supreme Court has specifically held that a *f.n.c.* dismissal "puts an end to action and hence is final and appealable." *Chaverri* (*La.*), 896 F. Supp. 2d at 569 (citing quotation and following citations omitted). In addition, at least one other federal district court has specifically held that, a federal court dismissal on grounds of *f.n.c.*, "unlike a stay, does not toll the running of the statute of limitations." *Castanho v. Jackson Marine Inc*., 484 F. Supp. 201, 206 (E.D. Tex. 1980).[18]

Accordingly, Judge Herlihy's opinion in *Blanco*, which predates *Chaverri* (*La.*) and *Marquinez* (as well as *Patrickson* in Hawai'i), is neither binding nor

[18] The Superior Court's opinion in *Blanco* also did not properly address that the class certification motion was "DENIED as MOOT" (stating only that the motion was "rendered moot"). Moreover, it was ruling on pleadings-based motions. The Superior Court thus assumed all facts as true even though many of the facts relied upon were in error, including: that plaintiff Blanco was a named plaintiff in *Delgado*, that Blanco filed a suit in Costa Rica, that Blanco filed a motion for reinstatement in *Delgado*, and that defendants were at fault for most of Blanco's nearly 16-year delay in filing suit. *Blanco*, 2012 WL 3194412, at *1-*4, *11, *12.

instructive on how this Court should rule. Indeed, this Court's later affirmance of the *Chaverri* (*Del.*) dismissal, No. 642, 2013, 2014 WL 7367000, at *1 (Del. Oct. 20, 2014) (en banc) (unpub.), confirms that there is no distinction between the law of Delaware, Louisiana, and Hawai'i as to when the *Carcamo* toll ended. In *Chaverri* (*Del.*), the Delaware Superior Court dismissed the DBCP claims of 30 plaintiffs represented by Mr. Hendler, who had previously sued in the *Chaverri* (*La.*) case on the grounds that "[p]laintiffs' allegations were vigorously pursued and litigated to conclusion in the Louisiana District Court," even though the issue "vigorously pursued and litigated" in Louisiana was when the *Delgado* toll ended for purposes of the Louisiana statute of limitations. *Chaverri v. Dole Food Co. Inc.*, 2013 WL 5977413, at *2 (Del. Super. Ct. 2013). This Court's affirmance of that dismissal "on the basis of and for the reasons assigned by the Superior Court" supports the view that Delaware law is in accord with the law of Louisiana or Hawai'i as to when the *Carcamo* class action toll ended: it ended when it was no longer objectively reasonable to rely on that action as a pending class action, which occurred no later than the entry of a final judgment of dismissal.

In sum, the final judgment in Delgado terminated the case on October 27, 1995 and ended *American Pipe* tolling.

III. The Injunction Did Not Extend Tolling.

Plaintiffs also suggest that the 1995 dismissal did not end class action tolling because of the injunction issued by Judge Lake in *Delgado*. Pl. Brief at 22; *see also Delgado*, 890 F. Supp. at 1375 (specifying the injunction). To be clear, Plaintiffs do not contend explicitly that they were precluded by Judge Lake's injunction from filing suit; they knew (for reasons explained below) there was no preclusion. Instead, Plaintiffs cite the Third Circuit's opinion in *Chavez v. Dole Food Co.*, 836 F.3d 205 (3rd Cir. 2016) that in turn quotes and incorrectly expands the scope of Judge Lake's injunction. Pl. Brief at 35. There is no question that the *Delgado* injunction did not impede any Plaintiff in the instant action from filing his case long before 2012.

First, any doubt as to the scope of Judge Lake's injunction was eliminated in his October 27, 1995 Order, entered the same day as the Final Judgment, in which he confirmed that the injunction applied only to the plaintiffs and intervenors in his court and not to unnamed members of the putative class or to counsel. *See* Def. App. at B.101-104; *see Chaverri* (*La.*), 896 F. Supp. 2d at 560 n.11 ("The court's order clarified that the injunction only applied to the plaintiffs and intervenor plaintiffs who were named/had participated in the *Delgado* suit.").

Second, in any event, Judge Lake vacated the injunction on March 15, 2004, after which no one could have been under any misapprehension that any court

order precluded anyone from filing DBCP suits in this country. Def. App. at B.174.

Third, Plaintiffs admitted below that the injunction never applied to them. Before the district court, Plaintiffs defended certain of their participation in and then subsequent dismissal of the *Abarca v. CNK Disposition, Inc., et al*. suit in Florida (filed on June 9, 1995) as an attempt to avoid "an overly broad injunction sought by defendants in *Delgado* that would have threatened plaintiffs' ability to prosecute their own individual cases." Def. App. at B.199. According to Plaintiffs, *Abarca* was then voluntarily dismissed on July 12, 1995 "once the federal court in *Jorge Carcamo* made clear [on July 11, 1995 in its injunction] that it would reject the defendants' extravagant injunctive request." *Id*. *See also Chaverri* (*La.*), 896 F. Supp. 2d at 562 n.14 (noting plaintiffs' argument that the July 11, 1995 order "restricted the injunction to only the plaintiffs already named in *Delgado*").

Moreover, after the Texas district court's *f.n.c.* dismissal in *Delgado,* Plaintiffs' counsel here began filing the claims of his other clients, who (except for two *Delgado* intervenors) were *not* named plaintiffs or intervenors in *Delgado,* in various courts in the United States, demonstrating that Plaintiffs here were not subject to any injunction. For example:

- In May 1996, Mr. Hendler filed five one-plaintiff DBCP suits in Mississippi, which a case assignment noted were the "first" of a

planned "mass filing of some 3,000 additional cases involving similar issues." Def. App. at B.108. Those planned cases were never filed, either in state court or after the five suits were removed to federal court. *Espinola-E. v. Coahoma Chemical Co., Inc.*, 248 F.3d 1138 (5th Cir. 2001) (*per curiam*) (affirming removal to federal court in all actions except where plaintiff stipulated to recovering less than the jurisdictional amount).

- On October 28, 1996, Mr. Hendler filed suit on behalf of 180 of his clients in St. Charles Parish, Louisiana in three actions styled *Godoy Rodriguez*, *Martinez Puerto*, and *Soriano* (joined by over 2,500 plaintiffs represented by other counsel). Def. App. at B.109-111.

- On October 3, 1997, Mr. Hendler filed the *Patrickson* action, a putative class action in Hawai'i state court in both Oahu and Maui counties, which originally included 12 named plaintiffs/class representatives. Def. App. at B.112-114. After the United States Supreme Court confirmed the state court's jurisdiction, Mr. Hendler moved for class certification on February 25, 2008, which was denied after a hearing on July 16, 2008. Mr. Hendler never sought to add his clients to the Hawai'i suit after class certification was denied there.

- Between 2005 and 2008, 23 of the Plaintiffs here were among numerous other plaintiffs who filed suit in California state court, where they were represented by different counsel (the "California cases"). The California courts dismissed those actions for *forum non conveniens*.

Indeed, of the 57 remaining Plaintiffs before this Court:

- Only 18 brought suit for the first time in the instant actions in 2012;[19]

- 16 were formerly plaintiffs in Mr. Hendler's *Abarca* case in 1995 and had no claim on file in any subsequent action until these cases were filed in 2012;[20]

[19] The names of these 18 Plaintiffs can be found in Plaintiff's Litigation History. One of the Plaintiffs' names appears twice in *Abad-Castillo*. *See* Def. App. at B.1-5.

- 2 of these 16, Gerardo Dennis Patrickson and Benigno Torres Hernandez, are active plaintiffs in the *Patrickson* action in Hawai'i that was filed in October 1997 and where the Hawai'i Supreme Court held that the class action toll ended in 1995 upon entry of final judgment.

- 23 were plaintiffs in the California cases before filing in the instant actions;[21]

  - One of these 23, Manuel Mayorga Morediba, was a plaintiff in *Chaverri* (*La.*) and *Abrego Abrego* 2005 and then here in *Abad-Castillo*.

In sum, an injunction limited to the named plaintiffs in *Delgado*—none of whom are before this Court—that was vacated eight years before the instant actions were filed—did not prevent Plaintiffs from filing suit at any time before 2012. *See* Pl. Brief at 35 (citing *Mergenthaler v. Asbestos Corp. of Amer.*, 500 A.2d 1357, 1363 (Del. Super. Ct. 1985)). Accordingly, the injunction provides no basis to conclude that the tolling afforded by the *Carcamo* putative class action extended beyond the *Delgado* final judgment on October 27, 1995.

IV. Ending Tolling in 1995 is Not "Inconsistent" With or Even Addressed by the Decisions Cited by Plaintiffs Except *Blanco*.

Lastly, Plaintiffs assert that Defendants' argument that tolling ended in 1995 is inconsistent with decisions of "seven courts." Pl. Brief at 36. Of course, the

[20] The names of these 16 were formerly plaintiffs in *Abarca* in 1995 and had no claim on file in any subsequent action until these cases were filed in 2012.

[21] The names of these 23 plaintiffs can be found at Def. App. at B.1-B5.

Hawai'i Supreme Court, the federal district court in Louisiana, the Fifth Circuit,[22] and the Delaware federal district court below, when considering this precise issue, all agreed that the *Carcamo* toll in fact ended in 1995 or, at the very latest, in 2001, when the writ of *certiorari* was denied. Nonetheless, Plaintiffs point to Judge Lake's 2004 *Delgado II* opinion as one of the "seven" decisions supportive of their position. But as Judge Lake observed in that same opinion "despite the change in Supreme Court decisional law effected by *Patrickson*, 123 S. Ct. at 1655, the court's *f.n.c*. dismissal remains valid and enforceable." *Delgado II*, 322 F. Supp.2d at 812-13 (emphasis added); *see also id.* at 814:

> Because the court's assertion of subject matter jurisdiction was affirmed on appeal in an opinion that the Supreme Court declined to review before it decided *Patrickson*, 123 S. Ct. at 1655, *the court's decision to assert subject matter jurisdiction over this action and its decision that plaintiffs' claims should be dismissed under the doctrine of f.n.c. are both final*.

see also id. at 815 ("[T]he resulting judgment is neither void nor invalid."). Indeed, Judge Lake would not have had to consider whether the "court has jurisdiction to rule on plaintiffs' motion to reinstate" if the case was not, at that moment, dismissed. The same is true for the Texas state courts, which allegedly "remanded as a class action," and for the Fourteenth Court of Appeals' decision,

[22] *Patrickson v. Dole Food Co*., 137 Hawai'i 217 (2015); *Chaverri v. Dole Food Co*., 896 F. Supp. 2d 556 (E.D. La. 2012); *Chaverri v. Dole Food Co*., 546 Fed. Appx. 409 (5th Cir. 2013); *Marquinez v. Dole Food Co*., 45 F. Supp. 3d 420 (D. Del. 2014).

that allegedly "upheld the reinstatement." Pl. Br. at 32. Those courts would have had nothing to reinstate but for the fact that the cases had been dismissed since October 27, 1995.

Similarly, Plaintiffs rely heavily on an opinion by Judge Hoyt, claiming that he stated in *dicta* that the *Carcamo* "class action . . . has been pending in one forum or another since 1993." Pl. Brief at 37. But Judge Hoyt did not address whether class action tolling ceased upon the denial of class certification and the entry of final judgment in 1995. Rather, he addressed only whether the filing of *Carcamo* predated the effective date of the Class Action Fairness Act of 2005 ("CAFA"). *See* Pl. App. at A.102. Notably, that same 2009 opinion recites the now familiar procedural history of that case, including the fact that Judge Lake had previously declined to vacate his 1995 dismissal and later remanded the case to state court for consideration of the motion to reinstate because *Delgado* remained dismissed. *Id*. And although Plaintiffs rely on the Fifth Circuit's order declining to review Judge Hoyt's opinion, that one sentence order merely denies defendants' attempt to seek permissive review under CAFA. *See* Def. App. at B.175.

At bottom, none of these isolated, fragmented statements change the reality that from October 27, 1995 onwards there was no case in the United States which a putative class member could reasonably rely on to protect their interests.

CONCLUSION

The certified question should be answered in the affirmative, that is, under Delaware law, the *American Pipe* "class action" tolling afforded by *Carcamo* ended no later than the October 27, 1995 entry of final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald E. Reid, hereby certify that on this 8th day of September, 2017, a copy of Appellees' Answering Brief was served via File and Serve Xpress upon all known counsel of record.

/s/ Donald E. Reid
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