EFiled: Oct 26 2017 01:00PM EDT
Filing ID 61287135
Case Number 231,2017

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)

CORRECTED APPELLANTS' REPLY BRIEF

DATED: OCTOBER 26, 2017

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The federal District Court in this case held that the limitations period on Plaintiffs' class claims commenced in July 1995 because, at that point, "the motion for class certification was no longer pending after the [federal Texas] District Court denied it as moot." *Marquinez v. Dole*, 12-695 (Memorandum dated May 27, 2014) (Mem.) at 6 (attachment to Opening Brief). Plaintiffs' opening brief demonstrated that this was error: Plaintiffs had not moved for class certification under Federal Rule of Civil Procedure 23, so class certification could not have been among the "pending motions" that were denied as "moot." Opening Br. at 29-33. Moreover, even if a motion had been pending, a generic housekeeping order like the one on which the District Court relied could not end the tolling of the limitations period because it was not sufficiently clear and unambiguous to put absent class members on notice that they must institute individual actions to protect their rights, Opening Br. 19-33.

Defendants *do not refute,* nor even join, this argument. They *do not contend* that the Delaware District Court correctly relied on the order denying pending motions as moot to terminate tolling. To the contrary, they abandon any reliance on the Delaware District Court's order that is the basis of this appeal. Answering Br. 15 ("[T]his Court need not decide whether tolling was halted by the federal Texas District Court's July 1995 order denying as moot the pending motion for class

certification."); *id.* 22 (arguing that tolling ended even if there was no "decision on the class certification question").

Abandoning their core argument in the District Court and the Third Circuit,[1] Defendants now assert that tolling terminated in October 1995 based *solely* on entry in the federal Texas District Court's docket of a "final judgment," and that no inquiry is necessary into the reasons for, or circumstances surrounding, that entry. Answering Br. 3, 5, 14-16, 20, 22, 24.

The argument Defendants press here is one that the Delaware District Court in this case, and the Delaware Superior Court in an earlier case, expressly rejected. The Delaware District Court agreed with the earlier Superior Court decision and held that the entry of the final judgment after dismissal on *forum non conveniens* grounds *did not* terminate tolling. Mem. at 5 (citing *Blanco v. AMVAC Chem. Corp.*, 2012 WL 3194412, at *12 (Del. Super. August 8, 2012). As the District Court explained, "the statute of limitations must have been tolled" notwithstanding entry of the "final judgment" "as the case was reinstated in Texas state court" in 2004, which would have been impossible had the limitations period commenced anew in 1995. *Id.* n.7.

Defendants never address this core flaw in their theory, which the Delaware District Court specifically pointed out: the case could not have been reinstated in

[1] D.Ct. Dkt. 82 at 11 (Dkts 119, 123-126), Br. of Appellee, Case No. 14-4245 (3d Cir.) at 12-14 (filed on November 29, 2016)

Texas state court in 2004 unless the statute of limitations was tolled notwithstanding the October 1995 "final judgment." Mem. at 5 n.7; Opening Br. at 36-40. Defendants simply ignore the reinstatement of the case, the Delaware District Court's reliance on this fact, and the substance and reasoning of the federal Texas District Court's 44-page decision on which the "final judgment" depended. Instead, they assert that entry on the docket of the magic words "final judgment" in October 1995 is the "only . . . fact . . . necessary to answer the certified question." Answering Br. 16.

Defendants assert that their approach is "simple," Answering Br. 14, 23-25, because it allegedly offers a "bright line rule," *id.* at 24. However, their effort to extinguish Plaintiffs' rights under the cover of a mischaracterized "simple, bright-line rule" not only ignores critical aspects of this case, but also fails on its own terms.

Defendants repeatedly assert that the tolling of the limitations period continues so long as it is "objectively reasonable" for absent class members to rely on the earlier-filed suit. Answering Br. 3, 18, 35. "[A]n inquiry into reasonableness is, by its nature, highly contextual and fact specific." *Cellular Network Corp. v. Car-Talk, Inc.*, No. C.A. 11352, 1990 WL 71342, at *5 (Del. Ch. May 24, 1990). Defendants' arbitrary one-size-fits-all rule is impossible to square with the fact-specific "reasonableness" inquiry for which they also advocate – their argument is internally inconsistent and their "bright-line rule" unworkable. By contrast, as Plaintiffs demonstrated in their Opening Brief, permitting tolling to continue absent

a clear and unambiguous order to the contrary protects the reasonable expectations of absent class members and prevents unnecessary and duplicative filings. Opening Br. 19-24.

The Delaware District Court (and the Delaware Superior Court) were correct that the October 1995 "final judgment" did not terminate tolling.[2] The judgment was entered for the limited purpose of making the July 1995 *forum non conveniens* order appealable, and that order did not terminate tolling. As the federal Texas District Court that issued the order explained, Plaintiffs' claims remained pending after the entry of the final judgment of the *f.n.c.* order of dismissal pursuant to the "return jurisdiction" clause. Those claims subsequently were reinstated "as if they had never been dismissed," and remanded to Texas state courts where this case remained a putative class action until class certification was denied in 2010.

[2] As noted above, the Delaware District Court concluded that Plaintiffs' claims were not timely because the federal Texas District Court order denying "all pending motions" as "moot" terminated class action tolling by denying a purported motion to certify a class. Mem. at 6-7. In their Opening Brief, Plaintiffs established that, in fact, no such motion to certify was pending and explained why this conclusion was therefore error. Opening Br. 19-27, 29-33, 36-40. Defendants' Answering Brief did not respond to those arguments, or otherwise defend the District Court's holding. Defendants therefore waived the argument that the July 1995 order terminated tolling, and it should not be considered by the Court. DEL. SUP. CT. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

I. The Court Should Reject the Defendants' So Called "Bright Line Rule".

A. Defendants' "Bright Line Rule" Ignores The Effect Of The Return Jurisdiction Clause.

Defendants contend that even though the federal Texas District Court did not issue "a decision on the class certification question," tolling nevertheless ended in 1995 because "the case [came] to an end" when the federal Texas District Court entered a "final judgment" after entering its *forum non conveniens* order. Answering Br. at 22 (*quoting* McLaughlin on Class Actions: Law & Practice § 3:15 (12th ed. 2016)).

However, the judge who issued the 1995 order maintained that his order did not end the case. *See* Opening Br. at 36 ¶(i). So did the federal judge sitting on the same bench in 2009 who held the class action had been "pending in one forum or another since 1993." *Id.* at 37 ¶(iv). As did the Texas state courts that continued to adjudicate the *Carcamo* case as a class action through 2010. *Id.* at 36-37 ¶¶(ii-iii). The Texas courts' consistent rulings on this issue deserve deference.

Defendants' effort to persuade this Court to disregard the uniform holdings of state and federal courts in Texas ignores the effect of the return jurisdiction clause, which directly led to the resumption of the case in 2004 in the same form in which it existed in 1995 —*as if it had never been dismissed*.

1. The Return Jurisdiction Clause Allowed The District Court To Resume Prosecution Of The Case, Which It Did.

Defendants suggest the Court should ignore the "return jurisdiction" clause, claiming it merely duplicated the purpose and effect of Federal Rule of Civil Procedure 60(b). Answering Br. 27-28. That is simply not correct. Rule 60(b) allows relief from a prior judgment only upon a showing of "extraordinary circumstances," *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014), while the return jurisdiction clause codified the plaintiffs' ability to return to the federal Texas District Court as a matter of right merely by meeting the conditions for doing so contained in the *f.n.c.* order.

This difference is highlighted in both of the cases on which Defendants rely: *Palacios v. Coca-Cola Co.*, 499 Fed. Appx. 54 (2d Cir. 2012) and *Dawson v. Compagnie Des Bauxites De Guinee*, 112 F.R.D. 82 (D. Del. 1986). Answering Br. 28. In *Palacios*, the plaintiffs admitted that they had not complied with the requirements of the return jurisdiction clause. 499 Fed. Appx. at 56. For this reason, they were relegated to seeking reinstatement of their case under Rule 60(b). Their gambit failed because they were unable to meet "the rigorous standard" for relief "from the effect of a final judgment under subsections (b) and (d) of Rule 60. . . ." *Id.* Similarly, in *Dawson*, the court noted that it had "been unable to locate any case where a party, after being dismissed on *forum non conveniens* grounds has sought to use Rule 60(b)(6) to reopen legal proceedings in the original jurisdiction." 112 F.R.D. at 85. The court declined to break new ground under Rule 60(b) because the

plaintiff "made no showing of extraordinary circumstances justifying reopening this Court's judgment." *Id.*

The return jurisdiction clause, by contrast, required no showing of the "extraordinary circumstances" required by Rule 60(b). It directly led to resumption of proceedings in the federal Texas District Court without resort to the rigorous standard for relief under Rule 60(b).

2. The Return Jurisdiction Clause Provided For The Case To Resume Exactly As It Existed In 1995.

Defendants next contend that to the extent the return jurisdiction clause permitted the case to resume, it applied only to "individually named plaintiffs" and not unnamed class members. Answering Br. 29. They also argue that to the extent the clause allowed resumption of class claims, only a class of Costa Rican plaintiffs could take advantage of it because it was Costa Rican individuals who invoked the clause. Answering Br. 30.

Defendants' arguments are largely a rehash of objections they previously pressed repeatedly (and unsuccessfully) in the federal and state courts of Texas.[3]

[3] *See Marquinez v. Dole*, 12-cv-695, Dkt. Nos. 99-8 (Notice of Removal, *Carcamo, et al. v. Shell Oil Co., et al.*, (S.D. Tex. October 26, 2009)); 99-9 (Defendant the Dow Chemical Company's Opposition to Intervenors' Motion to Remand at 3-9. 13-16, *Carcamo, et al. v. Shell Oil Co., et al.*, 3:09-CV-00258 (S.D. Tex. Dec. 4, 2009)); 99-13 (Defendant the Dow Chemical Company's Plea to the Jurisdiction, *Carcamo, et al. v. Shell Oil Co., et al.*, 93-C-2290 (D.CT. Tex., Brazoria Cty., April 15, 2010)).

Their argument overlooks the plain language of the return jurisdiction clause, Judge Lake's own explanation of the clause, and the subsequent interpretation and implementation of the clause by the Texas state and federal courts. As Judge Lake explained: "Because the return jurisdiction clause expressly provides that plaintiffs are to seek return via motion filed in this court, the court concludes that plaintiffs' filing (or reassertion) of their motion to reinstate is a *direct continuation of the prior proceedings* over which the court expressly stated its intent to retain jurisdiction." *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 813 (S.D. Tex. 2004) (emphasis added).

Under the return jurisdiction clause, the trigger event for reinstatement may have required a plaintiff or intervenor to file a motion, but the effect of implementing the "return jurisdiction" clause was not limited to individual plaintiffs. The clause provided for resumption of "jurisdiction over the action as if the case had never been dismissed," in the form it was pleaded at the time of the *f.n.c.* order—as a class action, not individual actions, or geographic-specific subclasses, which had never been proposed or certified. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995). Indeed, Defendants' contrary interpretation does not make sense. It would have required every individual putative class member to file actions in their home countries, even in those countries whose courts previously had determined that they lacked jurisdiction. Then, having satisfied the supposedly individualized

requirements of the return jurisdiction clause, it is impossible to explain why the supposedly individual claims that returned to federal Texas District Court were remanded as a single putative class action, and treated as a class action by the Texas state courts until 2010 when class certification was denied.

Following the 1995 "final judgment," the *Carcamo* case continued to be captioned as a putative class action in both the federal and state Texas courts: the federal Texas District Court maintained the case on its docket to enforce its orders and to consider motions brought under the return jurisdiction clause, then remanded the case as a class action after concluding it lacked subject matter jurisdiction. The Texas state court reinstated the case as a class action, relating it back to the date it was originally filed, and it remained a class action until 2010 when the Texas state court ruled on class certification. Appx. 88-97.

Following remand by the federal Texas District Court in 2004, Defendants sought to dismiss the state-court class action on the purported ground the plaintiffs had failed to properly seek its reinstatement. The trial and appellate courts in Texas squarely rejected their arguments. *In re Standard Fruit Co.*, 14-05-00697-CV, 2005 WL 2230246, at *1 (Tex. App. Sept. 13, 2005) (specifically rejecting Defendants' argument "that the state court judges in these proceedings abused their discretion by reinstating the actions in state court without requiring the real parties to comply with the return jurisdiction clause in the federal court's order").

The Delaware Superior Court similarly rejected Defendants' arguments. Reviewing the 1995 order and judgment and the subsequent procedural history of the Texas case, the Delaware Superior Court opined that "[i]mplicit in Judge Lake's remand decision [in 2004] was a determination that he retained subject matter jurisdiction to do that. Judge Lake's original decision to dismiss did not start plaintiff's Delaware statute of limitations." *Blanco*, 2012 WL 3194412, at *12.

3. The *Forum Non Conveniens* Dismissal With The Return Jurisdiction Clause Was The Substantive Equivalent Of A Stay.

Under Defendants' theory, the October 1995 "final judgment" terminated tolling because a final judgment signifies the dismissal of a case and, therefore, always terminates tolling, regardless of any other circumstances. Answering Br. at 15, 22-25. The Delaware Superior Court in *Blanco*, following the decision of the federal Texas District Court judge who entered the order, concluded that the 1995 order was not final and did not terminate the action. *Blanco*, 2012 WL 3194412, at *12-13. Rather, the Superior Court recognized that a dismissal that includes a clause permitting resumption of the case upon a specified condition "is logically equivalent to a stay" under Delaware law. *Id.*, at *12. The court explained that "[u]nder Delaware law, where a stay is entered . . . it necessarily operates to toll a statute of limitations." *Id.* The Third Circuit, in *Chavez*, agreed with the Superior Court, recognizing that *Mergenthaler v. Asbestos Corp. of Am.*, 500 A.2d 1357 (Del. Super

Ct. 1985) also held that a court-imposed stay tolls the statute of limitations under Delaware law. *Chavez v. Dole Food Company,* 836 F.3d 205, 234 (3d Cir. 2016).

Defendants argue this conclusion is wrong because Judge Lake "did not consider his judgment to have been a stay." Answering Br. 32-33. However, the core question is not one of terminology, but one of substance: Did the 1995 *f.n.c.* dismissal definitively and unambiguously terminate the action such that class members with viable claims under Delaware law would be on notice of the need to pursue them? On this question, Judge Lake held that his order did not terminate the case:

> Because the return jurisdiction clause expressly provides that plaintiffs are to seek return via motion filed in this court, the court concludes that plaintiffs' filing (or reassertion) of their motion to reinstate is a direct continuation of the prior proceedings over which the court expressly stated its intent to retain jurisdiction.
>
> . . .
>
> [T]he *f.n.c.* dismissal entered in this case was "final" only for purposes of appealing the court's *f.n.c.* decision; *the f.n.c. dismissal was not a "final judgment" that extinguished the court's duty* either to continue examining its subject matter jurisdiction over this case, or *to remand the underlying cases to state court* when and if it determines that it lacks subject matter jurisdiction.

Delgado, 322 F. Supp. 2d at 813, 816 (emphasis added). In fact, the federal Texas District Court's docket sheet in *Delgado* reveals a continuing flow of motions and orders up until the federal Texas District Court remanded the case to Texas state court in 2004. *Delgado v. Shell Oil Co.,* 94-cv-1337 (S.D. Tex) (docket entries 395

through docket entries 503 showing consistent litigation from entry of "final judgment" in October 1995 through remand order in August 2004). Indeed, remand could not have occurred unless the case had remained pending on the Texas District Court's docket.

Defendants nevertheless urge this Court to reject the Superior Court's analysis and follow instead the decision of a federal District Court in Louisiana which was applying Louisiana law to the cross-jurisdictional tolling question presented there.

The Louisiana "prescription statute" is meaningfully different from Delaware law governing statutes of limitations. *Compare Quinn v. Louisiana Citizens Property Ins. Corp.*, 118 So. 3d 1011 (La. 2012) (declining to recognize cross-jurisdictional tolling under Louisiana's prescription statute) *with Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013) (holding that Delaware law recognizes cross-jurisdictional tolling). And the Louisiana District Court's conclusion that the 1995 federal Texas District Court order did not "restart the prescriptive period" relied repeatedly and expressly on the distinct features of "Louisiana's class action tolling laws as they existed before 1997." *Chaverri v. Dole Food Company, Inc.*, 896 F. Supp. 2d 556, 568-69 (E.D. La. 2012). The Third Circuit in an earlier appeal noted the fundamental differences between Louisiana and Delaware law and criticized the lower court's tolling analysis for "focus[ing] on cases from other jurisdictions that applied the state law of Louisiana, . . . rather than the law of Delaware." *Chavez*, 836 F.3d at 234.

The Louisiana District Court's order in *Chaverri* is not persuasive authority on the meaning of Delaware law. The Delaware Superior Court's analysis in *Blanco* is.

Acknowledging that *Chaverri* applied Louisiana law, Defendants assert that "there is no distinction between the law of Delaware, Louisiana and Hawai'i as to when the *Carcamo* toll ended." Answering Br. 35. For this proposition, they cite a one-line order in *Chaverri v. Dole Food Co.*, No. 642, 2013, 2014 WL 7367000 (Del. Oct. 20, 2014), affirming a trial court order "for the reasons assigned by the Superior Court." The "reason assigned" by the Superior Court (*Chaverri v. Dole Food Co., Inc.*, CV N12C-06-017, 2013 WL 5977413, at *1 (Del. Super. Ct. Nov. 8, 2013)) was that an earlier-filed action involving the same parties and issues was pending in a federal court in Louisiana, which warranted dismissal under the Delaware rule of *McWane v. McDowell*, 263 A.2d 281 (Del. 1970). Neither this Court, nor the Superior Court expressed any opinion on the differences or similarities between the Delaware's statute of limitations and the Louisiana prescription statute.[4]

[4] Defendants devote significant attention to disputing the effect of the separate injunction entered by the federal Texas District Court, which barred the named plaintiffs and "[a]ll persons ... who receive actual notice of this judgment" from commencing any related actions "in any court in the United States." *Chavez*, 836 F.3d at 233. *See* Answering Br. 36-39. Defendants contend that this injunction did not impede DBCP plaintiffs from filing suit. This misses the point. The Delaware Superior Court in *Blanco* concluded that the 1995 *f.n.c.* dismissal, coupled with a return jurisdiction clause, "[wa]s logically equivalent to a stay" under Delaware law

B. Defendants' "Bright Line Rule" Lacks Legal Support.

Though Defendants insist that the "bright-line rule" they proffer is "the majority rule," Answering Br. 22, the case law they muster is noticeably thin. Defendants assert that the Hawai'i Supreme Court "held" that the October 1995 "final judgment" triggered the resumption of the statute of limitations. Answering Br. at 21-22 (citing *Patrickson v. Dole Food Co.*, 137 Hawai'i 217, 228-30 (2015)),

The question presented to the Hawai'i court was meaningfully different, however. The Hawai'i case commenced on October 3, 1997. *Patrickson*, 137 Hawai'i at 228. The defendants (the same defendants here) argued the Hawai'i complaint was not timely *because the July 1995 order terminated tolling*, which is an argument they declined to raise in this appeal. *Id.* The Hawai'i court *rejected* that argument. "[W]e agree with the Plaintiffs that the July 11, 1995 order did not terminate class action tolling in a sufficiently clear and unambiguous way in order to put putative members of the class on notice that the Hawai'i state statute of limitations had begun to run against them." *Id.* at 228-29 (internal quotations omitted).

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and therefore operated to toll the statute of limitations. 2012 WL 3194412, at *12. The Third Circuit in *Chavez* recognized the same principle of Delaware law. 836 F.3d at 234. Defendants do not and cannot answer this correct application of Delaware law, which refutes Defendants' argument that tolling terminated in 1995.

Whether the limitations period ended in October 27, 1995, or continued to run thereafter, was not relevant to the issue before the court because in either circumstance, the plaintiffs' October 3, 1997 complaint was timely. The court's statement on the effect of the October 1995 judgment therefore is pure *dicta*, which, in any event, fails to address the import of the return jurisdiction clause.

Defendants also cite *In re Nine Systems Corp. S'holders Litig.*, No. 3940-VCN, 2014 WL 4383127 (Ct. Chancery Del. September 4, 2014) for the proposition that an *f.n.c.* dismissal terminates tolling under Delaware law. Answering Br. 20.[5] *In re Nine Systems* is easily distinguishable, however, because the *f.n.c* dismissal at issue there did not include a "return jurisdiction" clause.

Further, even leaving aside this critical fact, *In re Nine Systems* still does not support the principle for which it is cited. In *In re Nine Systems*, the plaintiffs were members of a California class action that was dismissed on *f.n.c.* grounds on September 21, 2007. 2014 WL 4383127, at at *53. They became members of a second, New York class action filed on October 19, 2007 and dismissed in April 2008. They were then included in a third class action that began in August 2008 and ended with the denial of class certification on August 20, 2010. *Id.* The court

[5] Defendants' argument in the present appeal is based entirely on the existence of a document in the federal Texas District Court proceeding entitled "final judgment" but there was no analogous document discussed, or even identified, in *In re Nine Systems*.

concluded that the plaintiffs' claims were timely if the limitations period tolled during the pendency of the three actions. Whether the limitations period was tolled for the 28 days between the *f.n.c.* dismissal of the California action and the initiation of the New York case was irrelevant: the cumulative effect of tolling was sufficient without including the 28 days to make the complaint timely.

Thus, Defendants' only support for their construction of Delaware law is an inference drawn from fleeting and unexamined dicta in a 67-page trial court opinion from a case easily distinguishable on the facts. By contrast, the Delaware Superior Court's decision in *Blanco* applied Delaware law to the exact circumstances and procedural record presented in this case, and concluded that the 1995 *f.n.c.* order did not terminate tolling of the limitations period for Plaintiffs' claims under Delaware law.

Lastly, Defendants rely on *In re Westinghouse Sec. Litig.*, 982 F. Supp. 1031 (W.D. Pa. 1997). Answering Br. 17, 22. The District Court in *Westinghouse* affirmed that absent a ruling on class certification, tolling ceases only upon a "definitive" dismissal of the "entire civil action." *Id.* at 1035. The federal Texas District Court's *f.n.c.* dismissal with a return-jurisdiction clause was not such a final dismissal of the "entire civil action," as demonstrated by the docket sheet following the October 1995 entry of that order and the subsequent remand of the case to Texas state court. In light of this history and Judge Lake's express holding that the order was *not* a

definitive dismissal of the "entire civil action," the holding in *Westinghouse* does not apply to the facts of this case.[6]

[6] Defendants rely on *Bridges v. Dep't of Md. State Police*, 441 F.3d 197 (4th Cir. 2006), and *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998). Answering Br. at 18-19. Those cases, and the cases cited in the footnote at page 18 of the Answering Brief, addressed when the denial of class certification would terminate tolling. Defendants *do not argue* in this appeal that tolling ceased because class certification was denied. Answering Br. at 15, 22. Therefore, those cases are inapposite.

II. The Court Should Not Consider Arguments Forfeited By Defendants.

Defendants, represented by able counsel, do not argue that tolling terminated when the federal Texas District Court entered an order in July 1995 dismissing "all pending claims as moot." Answering Br. 15, 22. Defendants' own concession in the record that no Rule 23 motion to certify was pending before the federal Texas District Court when it denied "all pending motions as moot" soundly refutes the basis for this argument. Appx. 125 n.2. Thus, Defendants exclusively argue that the final judgment entered in October 1995 terminated tolling, waiving any reliance on the July 1995 Order. DEL. SUP. CT. R. 14(b)(vi)(A)(3).

Amicus curiae Dole Food Company ignores the record and seeks to revive an issue that Defendants deliberately dropped, asserting that the July 1995 order terminated tolling, not the October 1995 judgment. Dole Br. 3. Dole's attempt to resuscitate this ground to affirm the dismissal should not be considered by the Court. "[A]n amicus lacks standing to make claims not raised by a represented party in its opening brief on appeal." *Gibson v. Car Zone*, No. CIV.A. K10A08009, 2011 WL 3568258, at *2 (Del. Super. Ct. May 3, 2011), *aff'd*, 31 A.3d 76 (Del. 2011). "If the appellant or cross-appellant is represented by counsel, an amicus curiae brief is also *limited to addressing the issues raised by counsel in the party's opening brief*." *Turnbull for Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994) (emphasis added). Because Defendants are represented by counsel, Dole, as amicus curiae, "is

precluded from presenting argument on any issue which was not included in" the Defendants' opening brief. *Id.*

This rule is consistent with the traditional "limit[ed]" role that amicus play: "assisting the court, by *supplementing* the efforts of the actual parties' counsel, through the presentation of non-duplicative authoritative arguments" in support of the grounds raised by the party. *Id.* (emphasis added). Indeed, without this limitation, "amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (citing *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000)). Given that Defendants' brief weighed in only 121 words under this Court's word limitation, Dole's last-minute arrival as *amicus* with an entirely new argument -- and 5,000 more words -- effectively permits Defendants to present additional grounds abandoned in their Answering Brief. This Court should discourage such tactics by enforcing the rule that amici, who are not parties to the proceeding, are not permitted to raise issues forfeited by the party they are supporting.

III. Neither Law Nor Policy Supports Dole's Argument That Tolling Ended When The Federal Texas District Court Dismissed All "Pending Motions" As "Moot."

A. Dole Misstates The Law On When Class Action Tolling Ceases.

Dole asserts that "seven federal circuits and numerous state courts have held that class tolling ends when class certification is denied regardless of the reason for denial." Dole Br. 5-6. However, the cases Dole cited to support this assertion involved denials of class certification, or decertification of a class, based on the class's failure to satisfy substantive Rule 23 criteria. Those cases are consistent with the rule in *Yang v. Odom*, Opening Br. 19-23, and offer no support for the broader rule Dole advocates.

For example, Dole cites *Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002), for the proposition that in the Seventh Circuit any denial of class certification terminates tolling. That misconstrues the court's opinion. In fact, in *Gomez v. St. Vincent Health, Inc.*, 622 F. Supp. 2d 710 (S.D. Ind. 2008), a District Court in the Seventh Circuit called Dole's interpretation of Seventh Circuit law into question. In *Gomez*, the court noted that the issue was unresolved in the Seventh Circuit and followed the Third Circuit's decision in *Yang v. Odom* requiring a definitive denial of class certification based on substantive Rule 23 criteria, finding *Yang* was the best reasoned decision. "[I]f the first denial of class certification is based on a combination of reasons that include the inadequacy of the class

representative and/or class counsel, it is hard to see why absent class members should be bound by the results of the inadequate champions' efforts on the merits of the class determination." *Id.* at 718.

Similarly, Dole identifies in its unexplained string cite a case from the Second Circuit purportedly holding that "class tolling ends when class certification is denied regardless of the reason for denial." Dole Br. 5-6 (citing *Giovanniello v. ALM Media LLC*, 726 F.3d 106 (2d Cir. 2013)). But a recent decision of the District Court for the Southern District of New York explained that *Giovanniello* does not say what Dole claims:

> Defendants' reliance on *Giovanniello* [ ] is misplaced. . . . Although defendants correctly note that the District Court had dismissed the putative class action for lack of subject matter jurisdiction, defendants fail to note the underlying reason for the lack of jurisdiction. . . . *Because the appropriateness of a class action had not been addressed in any of the previously-filed putative class actions, American Pipe tolling applies,* and the statute of limitations was tolled during the pendency of the three previous actions. Therefore, defendants' motion to exclude claims that are time barred is denied.

Betances v. Fischer, 144 F. Supp. 3d 441, 458 (S.D.N.Y. 2015) (emphasis added).

The same is true in the Sixth Circuit. Dole asserts that *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988) supports its position, yet a District Court bound by Sixth Circuit law held differently. In *In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d 703, 715-16 (N.D. Ohio 2010), the court concluded "that *Andrews* does not preclude class action treatment" because "the issue of class certification was never

really litigated" in the earlier lawsuit. Thus, the court allowed the claim to proceed because "there has been no determination at all regarding the appropriateness of class certification" *even though* the court in the first class action expressly "indicat[ed] that it had previously 'dismissed the class claims as moot.'" *Id.*

Dole fails to address cases from the Eighth Circuit and Ninth Circuit which expressly adopted the same rule as the Third Circuit in *Yang. Great Plains Trust Co. v. Union Pacific R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) ("Whether the *American Pipe* rule applies to subsequent class actions, however, depends on the reasons for the denial of certification of the predecessor action."); In *Catholic Social Services, Inc. v. Immigration and Naturalization Service*, 232 F.3d 1139 (9th Cir. 2000) (en banc) (recognizing tolling of the statute for class claims because there had been no Rule 23 flaw in the original class action and because the plaintiffs were "not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class.").

Dole relies heavily on the Fourth Circuit's decision in *Bridges*, 441 F.3d 197. Dole Br. 7. *Bridges* is not analogous to this case, and the differences between the situation in *Bridges* and this case demonstrate why tolling applies. In *Bridges*, the District Court entered an order "denying the motion for class certification without prejudice and providing that the motion would 'automatically [be] considered renewed' if the plaintiffs filed a reply to the defendants' opposition to class

certification." 441 F.3d at 203. The Fourth Circuit noted: "The plaintiffs never filed a reply. . . If this 2001 administrative order was not the moment when the statute of limitations stopped tolling, then at no moment did it stop tolling, for there was no other order denying class certification." *Id*. at 212. Notably, in this case, there *was* another order denying class certification—in June 2010.

Moreover, the Fourth Circuit was reluctant to rely on the order alone and explained that "if the district court's denial of class certification did not adequately alert class members by its language alone, when coupled with the ensuing conduct of the litigation, it should have alerted absent class members that the district court's denial of the class action would not be resurrected at least with respect to a portion of the class members' claims. If they were inclined to preserve those claims, they would have had to file separate suits or a motion to intervene." *Id*. at 211-12. The opposite is true in the record of this case. The ensuing conduct of the litigation in Texas indicated that the case could be, *and in fact was*, resurrected with respect to the class.

Thus, the court in *Bridges*, like the Third Circuit in *Yang*, revealed the same concern for clear notice to absent class members of a "final adverse determination of class claims" before tolling ceases. *Yang*, 392 F.3d at 102. The conduct of the parties and the courts in this case reveal such notice was not provided: the *Carcamo* lawsuit remained captioned as a putative class action in the federal court and was

remanded to the Texas state court as a class action. Unlike *Bridges*, there was a separate order denying class certification in this case, issued by the Texas state court in 2010. It would have required extraordinary foresight for Plaintiffs to anticipate that they should have filed new claims in 1995 notwithstanding the pendency of their claims in the class action in the federal Texas District Court. Plaintiffs should not be required to "to see through a glass darkly in order to predict whether a court will consider their claims timely." *Chavez*, 836 F.3d at 222.

B. Dole's Proposed Rule Would Undermine The Policies *American Pipe* And *Blanco* Were Intended To Foster.

Dole identifies purported "policy" reasons for ending *American Pipe* tolling whenever an ambiguous order purportedly denies class certification even for non-substantive, technical, or provisional reasons. Dole Br. 9-12. Specifically, Dole asserts that its rule has the benefit of "avoid[ing] open-ended tolling." *Id*. at 9. However, the rule for which Dole advocates would undermine the fundamental policy on which *American Pipe* is based.

In *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal*, the Supreme Court held that tolling was necessary to encourage absent class members to rely on putative class actions to prevent a dispersion of protective, unnecessary filings in courts around the country. "A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result

would be a needless multiplicity of actions-precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350-51 (1983).

In *Dow Chemical v. Blanco*, this Court explained that "[r]eading *American Pipe* too narrowly would defeat an important purpose of a class action, which is to promote judicial economy." 67 A.3d 392, 395 (Del. 2013). This Court concluded that the principles animating *American Pipe* applied equally to "cross-jurisdictional" tolling because "[i]f members of a putative class cannot rely on the class action tolling exception to toll the statute of limitations, they will be forced to file 'placeholder' lawsuits to preserve their claims. This would result in wasteful and duplicative litigation." *Id.*

If, as Dole suggests, putative class members' claims will be extinguished even when no substantive decision on class certification has been made absent class members "will be forced to file 'placeholder' lawsuits to preserve their claims," causing the same "wasteful and duplicative litigation" *American Pipe* and *Blanco* sought to avoid.

IV. It Is Dole And The Other Defendants That Have Engaged In "Forum Shopping and Procedural Gamesmanship" To Deny Plaintiffs A Forum Where Their Claims Can Be Heard On The Merits.

Dole spends the bulk of its argument on an effort to cast aspersions on Plaintiffs' counsel by name. Dole Br. 12-21. Setting aside the impropriety and unprofessionalism of this tactic, it is both diversion and projection. It is diversion because Dole makes only cursory efforts to explain why prior filings in other cases, on which neither party relies in their briefs, have any significance to the tolling question at issue. It is projection because Defendants themselves are guilty of serial forum-shopping through multiple meritless removals of the *Carcamo/Delgado* putative class actions to federal court, which produced over a decade of delay until the U.S. Supreme Court unanimously ruled that there was no federal subject-matter jurisdiction. The Delaware Superior Court aptly described Defendants' tactics in *Blanco:* "A fair[ ] reading of the procedural history here is that defendants have attempted to tranquilize these claims through repeated forum shopping removals and technical dismissals, playing for time and delay and striving to prevent, or arguably frustrate, the claims from ever being heard on the merits in any court." *Blanco*, 2012 WL 3194412, at *12. This Court subsequently embraced this characterization. *Dow Chemical Corp.*, 67 A.3d at 394 ("[D]efendants have caused a lot of the delay—upon which they now seek to rely—through their own procedural maneuvering and they may not take refuge behind it. Plaintiff here has tried to act continuously since

the filing of the original [ ] action, and has been procedurally thwarted at every turn by defendants . . . .") (quoting *Blanco*).

These procedural efforts to eradicate Plaintiffs claims continue. Last year, in remanding to the Delaware District Court, the Third Circuit, sitting en banc, unanimously stated: "For over two decades, the plaintiffs have been knocking on courthouse doors all over the country and, indeed, the world, only for those doors to remain closed." *Chavez*, 836 F.3d at 234. The judges of the Third Circuit went on to "express our sincerest hope that" after remand, this case would "proceed[ ] with more alacrity than it has to the present date." *Id*.

Notwithstanding the "sincere[] hope" expressed in the Third Circuit's remand order, one of Dole's co-defendants raised personal jurisdiction objections to the Delaware forum resulting in the transfer of the case against it to the United States District Court for the Southern District of New York -- over four years after the *Chavez* complaint was filed in federal Delaware District Court. *Chavez v. Occidental Chem. Corp.*, No. 17-cv-3459 (S.D.N.Y). Thus, the issue presented here is simultaneously being presented to the New York District Court under New York tolling law because one defendant – Occidental Chemical Corporation – sought to thrust yet another procedural obstacle in Plaintiffs' path to delay confronting the merits. *Id.* Dkt. Nos. 196-197. Contrary to Dole's assertion, it is Defendants who

consistently have manipulated procedural rules and pursued frivolous removals to extend, delay, and prevent resolution of these claims.

Moreover, the accusations against Plaintiffs are groundless. Seeking to have one's claims heard on the merits is not impermissible forum shopping or gamesmanship. The only issue that Plaintiffs lost in the Fifth Circuit was whether the Louisiana doctrine of "prescription" barred their claims. Dole Br. 17-19. Proceeding in Delaware does not give them a second bite at the apple or risk a conflicting decision on that question. Rather, filing suit in Delaware provides Plaintiffs the rightful opportunity to present their claims on the merits because they are not barred by the Delaware statute of limitations.

The United States Supreme Court addressed this interest in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984), stating, "[p]etitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." The Supreme Court approved a similar approach in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). In that case, Pennsylvania plaintiffs brought claims in federal District Court in Mississippi that would have been barred under Pennsylvania's statute of limitations but that were not barred in Mississippi. They then transferred the case to Pennsylvania and argued that the transfer rules permitted them to apply Mississippi law and litigate in their

choice of forum. The Supreme Court agreed and upheld the application of Mississippi law and the transfer to Pennsylvania.

In the face of this precedent, Dole's accusations lack force. Its criticism of the Hawai'i cases is particularly misplaced, Dole Br. 14, as it was that case that led to the U.S. Supreme Court decision holding that Defendants' contrived removals were improper, and resulting in the reinstatement of the *Delgado* class action. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). Without that case, Defendants may have succeeded in permanently "tranquiliz[ing] these claims." *Blanco*, 2012 WL 3194412, at *12.

CONCLUSION

For the foregoing reasons, and those presented in Appellants' Opening Brief, the certified question should be answered as follows: Based on the procedural history of this case, class action tolling did not end when a federal Texas District Court dismissed a class action for *forum non conveniens* in 1995. Rather, class action tolling ended when the Texas state court clearly and unambiguously denied class certification of the same class action in 2010.

Respectfully submitted.

Dated: October 26, 2017

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