EFiled: Aug 08 2017 04:23PM EDT
Filing ID 60956199
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' OPENING BRIEF

DATED: AUGUST 8, 2017

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NATURE OF PROCEEDINGS

Plaintiff-Appellant Luis Antonio Aguilar Marquinez is the lead plaintiff in two consolidated actions brought in the United States District Court for the District of Delaware. Plaintiffs in these consolidated actions were members of an earlier putative class action in Texas state court, known as *Jorge Carcamo*, which ended on June 3, 2010 when the District Court of Brazoria County, Texas denied class certification. *Carcamo, et al. v. Shell Oil Comp.*, et al. Tex. Dist. Ct., No. 93-C-2290, Hardin, J. (June 3, 2010). A.88. On May 31, 2012, Plaintiffs filed their complaint in this matter in Delaware federal court. A.23-85. Defendants moved for summary judgment, arguing, *inter alia*, that Plaintiffs' claims were untimely under Delaware's two-year statute of limitations. 10 Del. C. § 8119. Plaintiffs responded that the *Carcamo* putative class action tolled the limitations period under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) and *Blanco v. AMVAC Chemical Corp.*, 2012 WL 3194412 (Del. Super. Aug. 8, 2012), *aff'd by Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013).

The Delaware federal District Court granted summary judgment. The court expressly disagreed with the Delaware Superior Court's holding in *Blanco* and concluded Plaintiffs' claim was tolled only until 1995 when a federal Texas District Court conditionally dismissed *Carcamo* for *forum non conveniens*, denied all pending motions as moot, and incorporated into its order a "return jurisdiction"

clause, which allowed the cases to return to the federal Texas District Court under certain conditions (which eventually occurred). *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995).

Plaintiffs appealed to the United States Court of Appeals for the Third Circuit, which certified to this Court the following question of Delaware law, which this Court accepted:

> 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?

A.104-114.

SUMMARY OF ARGUMENT

1. This Court should answer the certified question by holding that, under Delaware law, the tolling period initiated by the filing of a putative class action concludes only with a clear, specific, and unambiguous order ending the class claims. That rule is required by this Court's reasoning in *Dow Chemical* and is compelled by well-established principles of Delaware law. It is also consistent with federal practice. *See Yang v. Odom*, 392 F.3d 97, 100 (3d Cir. 2004), *cert. denied*, 544 U.S. 1048 (2005).

2. Under the proper legal standard, class action tolling in this case was not terminated by the 1995 order and final judgment issued by the federal Texas District Court conditionally granting a *forum non conveniens* dismissal. Instead, tolling terminated in 2010 when the Texas state court denied class certification. The 1995 order did not specifically rule on a motion for class certification, much less identify the particular reasons for denying certification or cite the specific provisions of Rule 23 at issue. Indeed, in *Carcamo* in 1995, there was not even a pending motion for class certification under *federal* Rule 23. The motion had been filed in *state court* under the Texas rules, which are not identical to the federal rules. Moreover, even if the 1995 order were construed as a denial of class certification, its only stated ground was "mootness," rather than anything about the structural invalidity of the putative class or any substantive Rule 23 deficiency.

3. The 1995 order did not clearly and unambiguously inform absent class members that they needed to file individual actions to protect their interests. In fact, the order told them the opposite. The order included a "return jurisdiction" clause providing that, if a foreign forum did not prove adequate, the action would be reinstated "*as if the case had never been dismissed*." *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995) (emphasis added). The order thus created a procedure for the Plaintiffs' claims to *return* to the federal Texas District Court in the form in which they existed prior to being dismissed (*i.e.*, as a putative class) in the event foreign forums proved inadequate.

The Delaware Superior Court opined in *Blanco* that "[u]nder Delaware law where a stay is entered here on the grounds of *forum non conveniens*, but jurisdiction is retained, it necessarily operates to *toll a statute of limitations*." 2012 WL 3194412, *12 (emphasis added). In *Chavez v. Dole Food Company*, the Third Circuit, sitting *en banc*, echoed this holding, noting that the Delaware federal District Court's dismissal order failed to acknowledge that "when the Texas District Court reinstated the class action in 2004, it framed its decision as 'a direct continuation of the prior proceedings over which the court expressly stated its intent to retain jurisdiction.'" 836 F.3d 205, 234 (3d Cir. 2016).

4. Defendants' argument that the case terminated (and tolling therefore ended) in 1995 has been rejected not merely by the Delaware Superior Court but

by a total of *seven* different courts, including the federal Texas District Court that issued the 1995 order, and the Texas state courts, which resumed jurisdiction over the *Carcamo* class action as if it had never been dismissed, relating it back to 1993.

STATEMENT OF FACTS

A. Background.

The Plaintiffs in this action worked on banana plantations in Costa Rica, Ecuador, and Panama. A.105 ¶ 1, A.111 ¶ 2. Defendants are corporations that owned and operated the banana plantations, and corporations that manufactured and distributed a pesticide called dibromochloropropane ("DBCP"). *Id.* This Court previously addressed statute of limitations issues raised by the personal injuries caused by this "toxic pesticide" in *Dow Chemical Corp. v. Blanco*, 67 A.3d 392, 393 (Del. 2013). DBCP was suspended for use in the United States in 1977 because of the dangers it posed, but Defendants continued to export and use it abroad, exposing thousands of laborers, including Plaintiffs, to a chemical known to cause sterility, sexual and reproductive abnormalities, and cancer. A.25-26, 31.

B. The Procedural History Of DBCP Litigation.

As the United States Court of Appeals for the Third Circuit observed in an appeal of a related case, DBCP plaintiffs have encountered "[a] series of byzantine procedural developments." *Chavez*, 836 F.3d at 209. In brief, "plaintiffs' class action was filed in Texas state court, removed to the Texas District Court, dismissed on the ground of *forum non conveniens*, and then reinstated several years later." *Id.* at 213.

1. The Filing And Removal Of *Carcamo* In Texas State Court And Its Dismissal For *Forum Non Conveniens* By A Federal Texas District Court.

Plaintiffs were members of a putative class action filed in Texas state court in 1993. *Jorge Carcamo v. Shell Oil Co.* ("*Carcamo*"), No. 93-2290 (Brazoria County, Texas). As the Third Circuit explained in *Chavez*, "[t]he defendants quickly adopted a three-step strategy for defeating the plaintiffs' claims." 836 F.3d at 211. "First, they impleaded various foreign entities under the Foreign Sovereign Immunities Act. This, in turn, provided a hook for federal jurisdiction.[1] Second, the defendants removed the case to the United States District Court for the Southern District of Texas. Third, the defendants asked the Texas District Court to dismiss the plaintiffs' class action on the ground of *forum non conveniens*." *Id.*; *see also* A.105 ¶¶ 2-3. Upon removal, the federal Texas District Court consolidated *Carcamo* with other DBCP-related class actions under the case *Delgado v. Shell Oil Co.*, Civil Action No. H-94-1337.

Prior to removal to federal court, the Plaintiffs had filed a motion for class certification in Texas state court, under the Texas rules of civil procedure. After removal, in preparation for a status conference, the federal Texas district court judge asked the parties to state their positions on class certification, among other

[1] Ultimately – a decade later – the U.S. Supreme Court ruled that Defendants' strategy did *not* provide a hook for federal subject-matter jurisdiction. *Dole Food Company, Inc. v. Patrickson*, 538 U.S. 468, 476-77 (2003).

issues, and requested the Plaintiffs provide the court copies of the Plaintiffs' state court motion for class certification, and any responses by Defendants. A.115-18. Plaintiffs provided copies of their state court motion and disclosed that the Defendants had yet to file a response. A.119-23.

In response to the Court's request, Defendants filed a "submission regarding class certification," in which they noted that Plaintiffs "sought certification in state court under Texas Rules of Civil Procedure 42(b)(4) and 42(b)(1)(A)," but had not yet "proceed[ed] in this Court under the analogous Federal Rules." A.125 n.2. Defendants further acknowledged that they had "not filed a brief in state court in response to Plaintiffs' state court amended motion for class certification." A.124 n.1. Defendants requested from the Court additional time and "the opportunity to file a brief and evidentiary material before the Court makes any ruling on class certification." *Id.* A.133 ("if the court desires to make a ruling on class certification, defendants request that the Court allow them to fully brief and provide evidentiary material").

Plaintiffs never filed a motion under Rule 23 in the federal Texas District Court, and no briefing or evidence on the issue of class certification was ever submitted to the federal Texas district court. Rather, consistent with the request of certain of the defendants, the court ruled on the jurisdictional and *forum non conveniens* motions in advance of any briefing on class certification.

On July 11, 1995, the court concluded it had jurisdiction and granted Defendants' motion to dismiss for *forum non conveniens*. A.105-06 ¶ 4. The court's 41-page "Memorandum and Order," included a "return jurisdiction" clause, which stated:

> 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 resume jurisdiction over the action as if the case had never been dismissed for [*forum non conveniens*].

Delgado v. Shell Oil Co. (*Delgado I*), 890 F. Supp. 1324, 1375 (S.D. Tex. 1995).

When the federal Texas District Court entered its dismissal in July 1995, it did not specifically rule on class certification. The last paragraph of the order contained a generic housekeeping provision stating "all pending motions . . . not otherwise expressly addressed in this Memorandum and Order are Denied as Moot. A.106 ¶ 5 (quoting *Delgado*, 890 F. Supp. at 1375). The order did not include any discussion of the requirements of class certification under federal Rule 23 let alone deny certification for a substantive Rule 23 deficiency.[2]

[2] On this point, the Question Presented by the Third Circuit paints with too broad a brush. The Question Presented states that the *Delgado* court's denial of "all pending motions" as moot "include[d] the motion for class certification." A.106 ¶ 5. However, at the time of the *Delgado* order, the Plaintiffs' motion for class certification was a state-court motion filed under the Texas Rules of Civil

On October 27, 1995, in conjunction with the entry of final judgment based on *forum non conveniens*, the federal Texas District Court entered an injunction enjoining Plaintiffs and others with knowledge of the judgment from commencing new DBCP-related litigation.[3] A.106 ¶ 5. The Fifth Circuit affirmed the judgment in 2000 and the Supreme Court denied certiorari. 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). A.106 ¶ 6. Nevertheless, the federal Texas District Court did not remove the case from its docket, and it remained pending in that court until 2004. *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 809 (S.D. Tex. 2004).

Procedure rather than federal Rule 23, and Defendants themselves disputed the status of that motion in federal court. Defendants conceded below that the motion for class certification was filed in state court rather than federal court. Dist. Ct. Dkt. 82 at 4.

[3] Final Judgment at 2, *Delgado v. Shell Oil Co.*, No. 94-cv-1337, ECF No. 393 (S.D. Tex. Oct. 27, 1995). The full sentence from the Texas District Court's judgment stated:

> All persons in active concert or participation with plaintiffs and intervenors who receive actual notice of this judgment by personal service or otherwise, including, but not limited to, the attorneys who have appeared in these actions and their law firms, as well the officers, agents, servants, and employees of any of these persons, are PERMANENTLY ENJOINED from commencing or causing to be commenced any action involving a DBCP-related claim in any court in the United States, and from filing an intervention in Rodriguez, Erazo, or any other pending action in a court in the United States, on behalf of any plaintiff or intervenor plaintiff in Delgado, Jorge Carcamo, Valdez, and Isae Carcamo.

Id. at 2-3.

2. Reinstatement, Remand, And Denial Of Class Certification In Texas State Court.

After they were unable to prosecute their claims outside the United States, Plaintiffs invoked the return jurisdiction clause in the 1995 order and sought reinstatement of their claim in the federal Texas district court. A.107 ¶ 7. While that request was pending, the Supreme Court in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), rejected the jurisdictional basis on which *Carcamo* had been removed in the first place. A.107 ¶ 7; A.112 ¶ 4.

In light of *Patrickson*, the federal Texas District Court remanded the putative class action to Texas state court in June 2004. *Delgado*, 322 F. Supp. 2d at 816. Judge Lake explained that his 1995 *forum non conveniens* dismissal was "final" "only for purposes of appealing the court's f.n.c. decision" and "was not a 'final judgment' that extinguished the court's duty either to continue examining its subject matter jurisdiction over this case, or to remand the underlying cases to state court when and if it determines that it lacks subject matter jurisdiction." *Id*. (citations omitted). Judge Lake continued: "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." *Id*. at 813 (emphasis added).

In the Texas state courts, Defendants argued that the cases had already been dismissed so could not be reinstated. The Texas courts rejected this argument and resumed jurisdiction over the cases as class actions as though they had never been removed or dismissed. *Carcamo* continued to be captioned as a putative class action in Texas state court. A.97.

In 2005, the Defendants sought a writ of mandamus challenging the reinstatement of the actions by the Texas state courts on the ground that Judge Lake had entered a final order of dismissal in 1995. A.107 ¶ 8. The Texas Court of Appeals denied the writ, holding "because the federal court lacked subject matter jurisdiction, its *forum non conveniens* order, including any requirements it imposed, is void. Therefore, the state courts could not have abused their discretion by failing to comply with a void order." *In re Standard Fruit Co.*, 2005 WL 2230246, at *1 (Tex. App. 14th Dist. Sept. 13, 2005).

Plaintiffs subsequently moved the state court for class certification. A.108 ¶ 9; A.112 ¶ 4. Defendants reacted by again removing the case to the U.S. District Court for the Southern District of Texas on the purported ground that, in light of the 1995 dismissal, the 2009 motion for class certification represented a new class action filed after the 2005 effective date of the Class Action Fairness Act, 28 U.S.C. § 1332(d), making it removable to federal court. D.Ct. Dkt. 99-8, 99-9. The federal Texas District Court (same bench, different judge) rejected the Defendants'

argument and remanded to state court, finding that the "class action ... has been pending in one forum or another since 1993." A102. The court concluded that "this action commenced with the filing of the state-court petition in 1993, not in 2009 when the Plaintiffs-Intervenors submitted their class certification motion. Consequently, the filing of a motion to certify the pre-CAFA pending class action does not establish federal subject matter jurisdiction." *Id*.

Defendants sought permission to appeal, arguing that "in every conceivable way, when Intervenors filed the new class claims for the first time, the action was essentially a new lawsuit, one for which the defendants had no notice." *The Dow Chemical Co. v. Nelson Ramirez*, Motion for Leave to Appeal, No. 09-60 (5th Cir. Dec. 24, 2009). The Fifth Circuit unanimously denied permission to appeal. *The Dow Chemical Co. v. Nelson Ramirez*, No. 09-60 (5th Cir. Feb. 18, 2010).

After remand to state court, Defendants again argued that the cases had been dismissed in 1995. D.Ct. Dkt. 99-13 at 4 ("The Intervenors' claims were dismissed in federal court, and were never reinstated in state court, thus disposing of their claims."). The Texas state court again rejected the argument. A.88.

The case proceeded as a putative class action until June 3, 2010. On that date, the District Court of Brazoria County, Texas denied Plaintiffs' motion for class certification in. *Id.*

C. Delaware Actions.

After the denial of class certification in the Texas action, the *Carcamo* Plaintiffs filed four actions in Delaware, where many of the Defendants are incorporated. Two of the Delaware actions are of relevance: an individual Plaintiff (Canales Blanco) filed suit in in the Superior Court of New Castle County, Delaware; and Plaintiffs in the consolidated actions here on appeal (the *Marquinez* Plaintiffs) filed suit in the United States District Court for the District of Delaware. A.23-85.[4]

1. The Delaware State Courts In *Blanco* Confirm Class Action Tolling Under Delaware Law.

The Superior Court of New Castle County held, as a matter of Delaware law, that the *Jorge Carcamo* class action tolled the Delaware statute of limitations under *American Pipe* until the Texas state court denied the motion for class

[4] Another group of Plaintiffs filed in Louisiana and then in the Superior Court of New Castle County, which dismissed their claims under the Delaware version of the first-filed rule. *See Eduardo Alvarado Chaverri, et al. v. Dole Food Company, Inc., et al*., 2013 WL 5977413 (Del. Super. Ct., New Castle County Nov. 8, 2013), *aff'd*, *Chaverri v. Dole Food Company., Inc.*, 2014 WL 7367000 (Del. Oct. 20, 2014) (unpublished order). A final group filed both in Louisiana and Delaware federal District Courts. The Delaware federal District Court dismissed the claims under the federal first-filed rule and for lack of personal jurisdiction, but the Third Circuit reversed in an *en banc* decision. *Chavez v. Dole Food Company, Inc.*, CIV.A. 12-697-RGA, 2012 WL 3600307 (D. Del. Aug. 21, 2012), *vacated and remanded,* 836 F.3d 205 (3d Cir. 2016). The claims of the *Chavez* Plaintiffs are pending in the Delaware federal District Court.

certification in *Carcamo* in 2010. *Blanco*, 2012 WL 3194412, *aff'd*, 67 A.3d 392 (Del. 2013).

The Superior Court held that Delaware law recognizes cross-jurisdictional tolling, *i.e.*, the tolling of a statute of limitations in one jurisdiction by a putative class action in another jurisdiction. It further concluded that the 1995 *forum non conveniens* dismissal of *Carcamo* by the federal Texas District Court did not end the tolling of the Delaware statute of limitations: "Judge Lake's original decision to dismiss did not start plaintiff's Delaware statute of limitations." *Id.* at *12.

This Court certified for interlocutory review, and affirmed, the superior court's holding that Delaware recognizes cross-jurisdictional tolling. *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013). This Court declined to certify for appeal, and did not rule on, when tolling ended under the procedural facts of *Blanco*, which are the same procedural facts presented here. 67 A.3d at 399 ("declin[ing] to entertain" request to reverse Superior Court's denial of motion to dismiss because it "goes beyond the bounds of the question certified and accepted by this Court").

2. The District Court's Grant Of Summary Judgment In *Marquinez*.

The federal District Court in *Marquinez* reached a different conclusion than the Superior Court in *Blanco*. Initially, the District Court was skeptical of the Defendants' argument that "any tolling stopped in 1995." A.86-87. It was

persuaded by the reasoning of *Blanco* and therefore unwilling "to hold that the class action terminated in 1995." A.87.

However, five months later, the District Court changed its mind. Memorandum dated May 27, 2014 (attachment to brief). Relying on a district court decision of a Louisiana District Court dismissing related claims under Louisiana law, the Delaware federal District Court concluded "that tolling stopped in 1995." *Id.* at 4. On September 22, 2014, the District Court entered a Final Judgment resolving all claims by all Plaintiffs against all Defendants. D.Ct. Dkt. 136.

After full briefing on the merits, the Third Circuit Court of Appeals certified to this Court the question of law of whether "based on the procedural history set forth above," class action tolling ended when the Texas federal district court dismissed *Carcamo* for *forum non conveniens* in 1995.[5]

[5] Plaintiffs appealed other issues resolved by the Delaware federal court when it granted summary judgment, but only the certified question regarding when tolling terminated is before this Court. Del SCT Order (June 16, 2017).

ARGUMENT

QUESTION PRESENTED

This Court certified for review the following question of 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?

STANDARD AND SCOPE OF REVIEW

The standard of review of the legal issue considered by this Court is *de novo.* *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013) (where no material facts are in dispute, "only issues presented are questions of law" subject to de novo review).

MERITS OF ARGUMENT

In *Dow Chemical*, this Court expressly "[a]ccept[ed] the rationale of the United States Supreme Court" in *American Pipe* and held "that class action members' individual claims are tolled while a putative class action on their behalf is pending." 67 A.3d at 393. This appeal presents the question whether *Dow Chemical/American Pipe* tolling, which commenced with the filing of a putative class action in Texas state court in 1993, terminated in 1995 when a federal Texas District Court (to which the case had been improperly removed) conditionally granted a *forum non conveniens* dismissal. Alternatively, were Plaintiffs' claims tolled until a Texas state court, after remand, entered an order denying a motion for class certification in 2010?

The Delaware Superior Court – in what this Court described as a "thorough" and "expansive" analysis of "Delaware's statute of limitations and case law on intra-jurisdictional tolling," *Dow Chemical*, 67 A.3d at 393 – concluded that tolling did not end for putative members of the 1993 Texas class action until the Texas state court denied class certification in 2010. The Delaware federal District Court rejected the Superior Court's analysis, holding that the 1995 *f.n.c.* dismissal ended class action tolling.

The Delaware federal District Court's holding is inconsistent with this Court's reasoning in *Dow Chemical*, and undermines Delaware's longstanding

"'preference for deciding cases on the merits.'" 67 A.3d at 397 (quoting *Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009). This Court should reject it and hold that the tolling initiated by the filing of the Texas class action did not terminate until the motion for class certification was denied by the Texas state court in 2010.

I. A District Court Order Terminates Class Action Tolling Only If It Clearly And Unambiguously Has That Effect.

A. This Court's Decision In *Dow Chemical*, As Well As Longstanding Delaware Precedent, Require That Tolling Can Be Terminated Only By A Clear, Specific, And Unambiguous Order Ending The Class Claims.

The principles and purposes that inform tolling under Delaware law require that the tolling period initiated by the filing of a putative class action concludes only with a clear, specific, and unambiguous order ending the class claims. Only then will putative members of the class understand that the tolling period has ended and that they are required to take independent action to protect their interests. Using a hair-trigger to terminate class action tolling would unfairly prejudice class members, who are entitled (and encouraged by considerations of judicial economy) to rely on class actions to protect their interests. Further, even if the Defendants' contrary view was accepted – imputing to class members an unrealistic omniscient understanding of class action procedure – it would disserve the administrative needs of the judiciary by forcing putative class members to file individual actions anytime they fear that a subsequent reviewing court, potentially many years later,

might retroactively conclude that an ambiguous district court order has terminated tolling.

This Court has instructed that the filing of a class action in any jurisdiction tolls the Delaware limitations period for every member of the putative class until the action in the first forum reaches a "'full resolution.'" 67 A.3d at 397 (quoting *Reid*, 970 A.2d at 181). Relying on the United States Supreme Court's rationale in *American Pipe*, this Court reasoned that Delaware law favors broad tolling principles in order to promote judicial economy and forestall the preemptive filing of individual lawsuits:

> Reading *American Pipe* too narrowly would defeat an important purpose of a class action, which is to promote judicial economy. Allowing cross-jurisdictional tolling recognizes and gives effect to the proposition that the policy considerations underlying our statute of limitations are met by the filing of a class action. Cross-jurisdictional tolling also discourages duplicative litigation of cases within the jurisdiction of our courts. *If 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*.

Dow Chemical, 67 A.3d at 395 (emphasis added); *see also Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175 (Del. Ch. Oct. 28, 2011) (without tolling, "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation — to simplify litigation involving a large number of class members with similar claims — would be defeated") (citation and internal quotation marks omitted).

This Court's recognition of cross-jurisdictional tolling relied on the reasoning in *Reid v. Spazio*, 970 A.2d 176. In *Reid*, a plaintiff filed suit in Texas state and federal courts, the defendants successfully defended the Texas actions on procedural grounds, and the plaintiff subsequently sued the defendants in Delaware. *Id.* at 178-80. The trial court dismissed the Delaware complaint as outside the limitations period, but this Court reversed, explaining that "the prejudice to defendants is slight because in most cases," the filing of the initial claim in the foreign jurisdiction is sufficient to put the defendants "on notice that the plaintiff intends to press his claims." *Id.* at 182. At the same time, judicial economy was served by encouraging a plaintiff to continue to prosecute its out-of-state action rather than forcing it to file a premature action in Delaware: "[A]llowing a plaintiff to bring his case to a full resolution in one forum before starting the clock on his time to file in this State will discourage placeholder suits, thereby furthering judicial economy. Prosecuting separate, concurrent lawsuits in two jurisdictions is wasteful and inefficient." *Id.* at 181-82.

The interest of judicial economy dovetails with Delaware's "public policy" to "prefer[ ] that cases be decided on the merits." *Blanco*, 2012 WL 3194412, at *13. As the Superior Court explained in *Blanco*: "Delaware courts, as a general rule, should be open to plaintiffs seeking redress, especially where Delaware corporations are potentially involved." *Id.* *9. Thus, Delaware law provides a

number of tolling principles that prevent statutes of limitations from being extinguished before plaintiffs have had a chance to vindicate their claims in court. *See id.* at *8. In *Dow Chemical*, this Court confirmed Delaware's "'preference for deciding cases on the merits.'" 67 A.3d at 397 (quoting *Reid*, 970 A.2d at 180).

These considerations militate in favor of a rule recognizing that tolling continues until there is a clear, specific, and unambiguous order denying class claims. A class member facing an ambiguous order like the 1995 dismissal by the federal Texas District Court confronts a dilemma. It can either file a placeholder action in another jurisdiction, which would undermine the purpose of *Dow Chemical* and *American Pipe* to preserve judicial resources, or risk the loss of its claim based on another court's *post hoc* interpretation of the effect of the earlier order. Given the lack of prejudice to defendants who are already on notice of claims against them, the interests in judicial economy and preservation of remedies strongly counsel in favor of a clear statement rule.

This case presents a text-book example of the burden on the judiciary and unfairness to litigants that would result from Defendants' proposed rule. Defendants would bar members of the putative class in *Carcamo* from bringing claims if they failed to file new lawsuits within two years of the federal Texas District Court's 1995 Order. But the 1995 Order contained an express injunction prohibiting such claims, likely resulting in collateral litigation in every jurisdiction

in which a new claim was filed. *See*, *supra*, at 10 n.3. Further, because the Texas action was subsequently reinstituted based the "return jurisdiction" clause in the 1995 order, any new actions filed by putative class members would have been redundant, resulting in multiple courts needlessly expending resources on the same claims -- causing the exact problem *American Pipe* was intended to prevent.

The need for a clear and unambiguous statement is further warranted by the fundamental principle that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.); Del. Const., Art. 1, § 9 ("every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land"). *See also Dorsey v. State*, 761 A.2d 807, 821 (Del. 2000) (availability of a remedy for the violation of a right is critical to "the entire fabric of protections in Delaware's two hundred and twenty-five-year-old Declaration of Rights").

When this Court adopted the *American Pipe* class action tolling rule, it did so because the rule furthers Delaware's public policies of judicial economy and efficiency and deciding cases properly brought in Delaware courts on the merits. A rule that terminates tolling based on an ambiguous order that neither resolved the

merits of the earlier-filed claim, nor determined the propriety of the class, does not serve either interest. Moreover, given the right to a remedy under Delaware law, this Court should not lightly extinguish the claims of unwitting plaintiffs on the basis of reinterpretations of trial court orders decades after the fact.

B. Federal Practice Also Provides For Tolling Until There Is A Clear, Specific, And Unambiguous Order Denying Class Claims.

Delaware's tolling jurisprudence parallels, and is informed by, that of the federal courts, which, under *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983), rely on the same principles of judicial economy and lack of prejudice this Court cited in *Dow Chemical* and *American Pipe*, 414 U.S. at 553 (disallowing tolling during the pendency of a class action would undermine the "efficiency and economy of litigation which is a principal purpose of the [class action] procedure"); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983) ("Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification.").

Federal practice is consistent with the rule Plaintiffs urge. In *Yang v. Odom*, 392 F.3d 97, 100 (3d Cir. 2004), *cert. denied*, 544 U.S. 1048 (2005), the Third Circuit held that a district court order addressing class certification operated to end tolling only if it clearly and unambiguously has that effect, and only if it definitively analyzes whether class certification criteria were met before denying

class certification. *Id.* at 102. *Yang* involved two trial court orders relating to certification. The first rejected a stipulation by the parties for class certification without addressing the Rule 23 criteria and left open the possibility of a renewed motion, *id.* at 100, while the second order was clearer and more specific, denying certification and "addressing each of the subclasses in turn and citing [Rule 23] deficiencies in each." *Id.*

The Third Circuit held that only the second order operated to terminate tolling. The court found that the first order was too general and abbreviated to end the tolling period, because it stated merely that "the parties have failed to make an appropriate showing that the requirements of Rule 23 have been satisfied." *Id*. at 102. Such an order did not end tolling where it "does not identify the basis for the rejection or even the particular requirement(s) of Rule 23 that had not been satisfied." *Id.* The court opined that forcing absent class members to file premature individual suits would burden the judiciary: "Since *American Pipe*, it has been well-settled that would-be class members are justified — even encouraged — in relying on a class action to represent their interests with respect to a particular claim or claims, and in refraining from the unnecessary filing of repetitious claims." *Id*. at 111. The court concluded that denial of certification for a non-fatal flaw would not terminate tolling, because tolling is not ended "where class certification has been denied solely on the basis of the lead plaintiffs'

deficiencies as class representatives, and not because of the suitability of the claims for class treatment." *Id*. at 111.

Yang thus demonstrates 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. A concurrence by then-Judge Alito suggested the same approach. *See also Yang*, 392 F.3d at 112-13 (Alito, J. concurring) ("I join the opinion of the Court insofar as it holds that a prior action in which class certification is denied based solely on deficiencies of the class representative tolls the statute of limitations for filing a later, substantively identical action with a new representative. The logic of our decision in *McKowan Lowe & Co. v. Jasmine Ltd*., 295 F.3d 380 (3d Cir.), *cert. denied*, 537 U.S. 1088 (2002), leads to this conclusion.") (internal citation edited). *Cf. McKowan Lowe & Co. v. Jasmine, Ltd*., 295 F.3d 380, 389 (3d Cir. 2002) ("[W]e see no good reason why class claims should not be tolled where the district court had not yet reached the issue of the validity of the class.").

As the Third Circuit recently stated (in the context of the first-filed rule): the law "does not require litigants to see through a glass darkly in order to predict whether a court will consider their claims timely." 836 F.3d at 222. The court held (unanimously) that, where "[t]he law was simply unclear," plaintiffs could not be expected to "guess whether other jurisdictions would recognize cross-

jurisdictional class action tolling" in order to preserve their claims. *Id.* An order that does not clearly and unambiguously operate to terminate tolling does not adequately put absent class members on notice of the need to file individual claims to protect their interests.

Similarly, the Third Circuit has emphasized that "the interest of justice" favors the right of the plaintiffs in these actions to secure a forum in which their claims will be heard on the merits. *Chavez*, 836 F.3d at 224. The court in *Chavez* expressed concern that "to date no court has reached the merits of the plaintiffs' claims" and that "there is a serious possibility that no court will ever reach the merits of the plaintiffs' claims." *Id.* at 210-11. The court reversed the District Court's dismissals under the first-filed rule because "a court exercising its discretion under the first-filed rule should be careful not to cause unanticipated prejudice to the litigants before it." *Id.* at 219.

That reasoning supports the rule sought by Plaintiffs here: finding a forum where the Plaintiffs can present their case on the merits and secure a remedy is just as vital here as it was in *Chavez*.

II. The 1995 Order And Final Judgment Do Not Meet The Legal Standard For Terminating Class Action Tolling.

The 1995 federal Texas District Court order and final judgment did not meet the proper legal standard for terminating class action tolling under *American Pipe* and *Dow Chemical*. Indeed, the Superior Court found that tolling did not stop in

1995: "[t]his action did not end in Texas until June 2010. To imply otherwise . . . is misleading at best." A.94. Contrary to the statement of the Delaware federal District Court, the Delaware Superior Court specifically referred to the motion for class certification under the Texas state rules of civil procedure and concluded that the federal Texas District Court conditionally dismissed *Carcamo* for *forum non conveniens* "without deciding the request for class certification." *Blanco*, 2012 WL 3194412, *1. The Delaware Superior Court explained:

> [Defendants'] argument fails on three independent grounds. First, Judge Lake's dismissal was based entirely on *forum non conveniens*, which is emphatically not a decision on the merits in the Fifth Circuit. Second, the dismissal included a "return jurisdiction" clause as mandated by Fifth Circuit precedent. A dismissal conditioned on a right of return is logically equivalent to a stay of the action. Under Delaware law where a stay is entered here on the grounds of *forum non conveniens*, but jurisdiction is retained, it necessarily operates to toll a statute of limitations. Third, the dismissal on the grounds of *forum non conveniens* rendered moot the pending request for class certification. . .. Judge Lake's original decision to dismiss did not start plaintiff's Delaware statute of limitations.

Id. at *12. *See also Chavez,* 836 F.3d at 233 ("Contrary to *Marquinez*'s characterization, *Blanco* in fact summarized the defendants' argument that the 'plaintiff[s] cannot rely on the [Texas] actions to toll the statute of limitations because all pending motions, including one for class certification, were denied as moot.' In denying the defendants' motion for judgment on the pleadings, the *Blanco* Court appears to have rejected that assertion.").

The Delaware Superior Court thus squarely rejected the suggestion that the 1995 order and final judgment ended tolling and restarted the limitations period. The Delaware Superior Court concluded that "Judge Lake . . . expressly considered this question and nonetheless remanded to the Texas state court. Implicit in Judge Lake's remand decision 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." *Id*.

In 2013, Defendants challenged the Superior Court's ruling in this Court, but failed to persuade this Court to accept their argument. *See* 67 A.3d at 399. There is no reason for a different result now.

A. The July 1995 Order Denying "All Pending Motions" As "MOOT" Did Not End Tolling.

The Delaware federal District Court erred in holding that tolling was terminated by a generic housekeeping provision (included by the federal Texas District Court in the last paragraph of its 41-page July 1995 order) denying "all pending motions" as "MOOT." 890 F. Supp. at 1375. The 1995 order did not specifically rule on class certification, nor did it include any discussion of the requirements of class certification under federal Rule 23. Its sole ground was mootness, in connection with the *f.n.c.* dismissal, and did not suggest a separate Rule 23 reason for the denial of certification or even state that motion for class certification was pending.

In fact, prior to removal, the *Carcamo* Plaintiffs filed their motion for class certification in Texas *state* court, under *Texas* rule of civil procedure 42(b) rather than *federal* Rule 23. Defendants, themselves, acknowledged that Plaintiffs had not moved for class certification in federal court "under the analogous Federal Rules." A.125. Nor, as Defendants also conceded, was class certification briefed or argued in state or federal court. A.124 n.1 (Defendants' submission explaining that "Defendants did not file a brief in state court in response to Plaintiffs' state court amended motion for class certification," and "request[ing] an opportunity to file a brief and evidentiary materials" before any ruling on class certification). The federal Texas District Court never ordered briefing for class certification nor issued any decision on the propriety of class certification.

For the reasons discussed above, an unclear and ambiguous order denying certification does not operate to halt tolling, particularly if it does not address Rule 23 criteria. *See Yang*, 392 F.3d at 102 (tolling not ended by order that "does not identify the basis for the rejection [of class certification] or even the particular requirement(s) of Rule 23 that had not been satisfied.").

The 1995 order in this case cannot meet the standard for ending tolling. It did not specifically rule on the motion for class certification, much less identify the particular reasons for the denial or cite the specific provisions of Rule 23 at issue. Indeed, in the *Carcamo* case in 1995, there was not even a pending motion for

class certification under *federal* Rule 23. The motion had been filed in *state court* under the Texas rule, which, although it shares common features with the federal counterpart, is different in substance and procedure from federal Rule 23. *Adams v. Reagan*, 791 S.W.2d 284, 293 (Tex. App. – Fort Worth 1990) ("While the federal counterpart to Rule 42(b)(1)(A) may be satisfied *only* where a legal quagmire would otherwise result, we feel the better Texas rule would be to permit other considerations herein discussed to support a 42(b)(1)(A) finding where to fail to certify could result in inconsistent or varying results."); *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360, 367 (Tex. App. 14th Dist. 1994) (recognizing that Texas and federal class action "opt-out" rules differ), *abrogated on other grounds by Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349 (Tex. App. 14th Dist. 2003); *Stipelcovich v. Directv, Inc.*, 129 F. Supp. 2d 989, 994 (E.D. Tex. 2001) (noting that claiming "class action status under Texas Rule of Civil Procedure 42" was not sufficient to "[demonstrate] federal class action status under Fed. R. Civ. P. 23."). *Compare* Tex. R. Civ. P. 42(c) *with* Fed. R. Civ. P. 23(c) (providing for different procedures for determining whether class status is available and notifying absent class members).

Thus, the July 1995 order did not operate as a denial of class certification *at all* because there was no pending motion under Rule 23 to deny. After the order of July 1995, the *Carcamo* case continued to be captioned the same – as a putative

class action. When the case was remanded to the Texas state courts, it was remanded as a class action, not as an individual action. A.97. In fact, after the Texas Court of Appeals upheld the reinstatement, Plaintiffs filed their Eighth Amended Petition *re-alleging* their class allegations. And it was the Texas *state* court that ultimately issued the order denying the Plaintiffs' *state* court motion for class certification. But that did not come until 2010.

Moreover, even if the July 1995 order were construed as a denial of class certification, its only stated ground was "mootness," rather than anything about the structural invalidity of the putative class or any substantive Rule 23 deficiency. The federal Delaware District Court below conceded that "the denial of the motion was not on the merits." Memorandum dated May 27, 2014 at 6 (attached). A "mootness" dismissal in a housekeeping order is, by its nature, provisional. Denial of certification for a non-fatal flaw does not terminate tolling, particularly when the issue could be revisited in the future, as it was in this case. *See Yang*, 392 F.3d at 111 (tolling is not ended "where class certification has been denied solely on the basis of the lead plaintiffs' deficiencies as class representatives, and not because of the suitability of the claims for class treatment"); *McKowan*, 295 F.3d at 389 ("[W]e see no good reason why class claims should not be tolled where the district court had not yet reached the issue of the validity of the class.").

In short, the July 1995 Order did not terminate tolling because it was not sufficient to put putative class members reasonably on notice of the need to file separate actions to protect their interests.

B. The *Forum Non Conveniens* Dismissal Did Not End Tolling.

The federal Delaware District Court also addressed the 1995 *forum non conveniens* dismissal as a basis for terminating tolling. Memorandum dated May 27, 2014 at 5-6. But that dismissal did not clearly and unambiguously inform absent class members that they needed to file individual actions to protect their interests. Indeed, the order told them the opposite. The order included a "return jurisdiction" clause providing that, if a foreign forum did not prove adequate, the action would be reinstated "*as if the case had never been dismissed*." 890 F. Supp. at 1375 (emphasis added). The order thus created a procedure for the Plaintiffs' claims to *return* to the federal Texas District Court in the form in which they existed prior to being dismissed (*i.e.*, as a putative class action) in the event foreign forums proved inadequate. The order did not put absent class members on notice of the need to file new individual actions in Delaware (or anywhere else).

Nor was the *forum non conveniens* dismissal the kind of permanent resolution of the action that would provide sufficient notice to absent class members of the need to file individual actions. Both this Court and the U.S. Supreme Court have distinguished *forum non conveniens* orders from other kinds

of final judgments. Under this Court's precedent, a *forum non conveniens* dismissal does not terminate an action because it should only be granted when the claim can be heard, and is in fact pending, in another forum. *States Marine Lines v. Domingo*, 269 A.2d 223, 226 (Del. 1970); *see also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988) (*f.n.c.* dismissal does "not resolve the merits of this claim"). As Judge Lake explained, his 1995 *forum non conveniens* dismissal was "final" "only for purposes of appealing the court's *f.n.c.* decision" and "was not a 'final judgment' that extinguished the court's duty either to continue examining its subject matter jurisdiction over this case, or to remand the underlying cases to state court when and if it determines that it lacks subject matter jurisdiction." 322 F Supp.2d at 816 (citations omitted).

Judge Lake continued: "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." *Id.* at 813 (emphasis added). The case was not removed from his docket, and he did not relinquish jurisdiction in the matter until 2004, when he remanded the putative class actions to Texas state court. As the Delaware Superior Court opined in *Blanco*, "[u]nder Delaware law where a stay is

entered here on the grounds of *forum non conveniens*, but jurisdiction is retained, it necessarily operates to toll a statute of limitations." 2012 WL 3194412, at *12.

Furthermore, "when the Texas District Court dismissed the class action in 1995, it did more than include a return clause in its dismissal order. It also entered injunctions that 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 (quoting *Delgado*, No. 94-cv-1337, ECF No. 393, Final Judgment at 3).

In *Mergenthaler v. Asbestos Corp. of America*, 500 A.2d 1357 (Del. Super. Ct. 1985), the Delaware Superior Court reviewed a "line of cases [that] recognized that where a paramount authority prevents the exercise of a legal remedy, the statute of limitations is tolled." *Id.* at 1363. The court explained that this "line of logic" encompassed "cases in which the statute of limitations was tolled by the pendency of other legal proceedings which prevented a plaintiff from exercising his legal rights." *Id.* In support of its holding, the court in *Mergenthaler* cited *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218 (1869), where the U.S. Supreme Court stated that when a plaintiff "has been disabled to sue, by a superior power, without any default of his own ... unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue." *Id.* at 222-23.

Accordingly, on its own terms, the *f.n.c.* dismissal was not the type of final resolution necessary to terminate tolling under Delaware law. The return jurisdiction clause and the stay the federal Texas District Court entered when it issued the order further supports this conclusion.

C. Defendants' Argument Is Inconsistent With The Conclusions Of Seven Courts.

Defendants' argument that tolling ended in 1995 has been rejected not merely by the Delaware Superior Court but by a total of *seven* different courts, including the federal Texas District Court that issued the 1995 order, a federal Texas District Court that promptly remanded the case after a 2009 removal, and the Texas state courts, which resumed jurisdiction over the *Jorge Carcamo* class action and related it back to 1993.

(i) In remanding the *Jorge Carcamo* case to Texas state court as a putative class action in 2004, Judge Lake explained that "plaintiffs' filing (or reassertion) of their motion to reinstate is a *direct continuation* of the prior proceedings." 322 F. Supp.2d at 813 (emphasis added). Accordingly, Judge Lake remanded the *Jorge Carcamo* case as a putative class action, in the form in which it was originally filed in state court. The Delaware federal District Court's dismissal contradicts Judge Lake's understanding of his own order.

(ii) On remand, the Texas state courts continued to adjudicate the cases as though they had never been removed or dismissed. D.Ct. Dkt. 99-5, 99-6,

99-7. The *Jorge Carcamo* action continued to be captioned as a putative class action. The Defendants objected to the reinstatement on the ground that the cases already had been dismissed. The Texas trial courts rejected this argument. D.Ct. Dkt. 99-5, 99-6.

(iii) The Defendants sought a writ of mandamus to the 14th Court of Appeals in Texas, challenging the reinstatement of the actions. The Texas appellate court denied the writ. *In re Standard Fruit Co*., 2005 WL 2230246, at *1 (Tex. App. 14th Dist. September 13, 2005). In fact, the Texas state appellate court went even further than Judge Lake, finding that his *forum non conveniens* dismissal was void for lack of subject matter jurisdiction in light of the Supreme Court's decision in *Dole Food Co. v. Patrickson*. 538 U.S. 468 (2003).

(iv) Plaintiffs subsequently moved the state court for class certification on September 29, 2009. D.Ct. Dkt. 99-7. Defendants reacted by again removing the action to the U.S. District Court for the Southern District of Texas, on the ground that the 2009 motion for class certification represented a new class action filed after the 2005 effective date of the Class Action Fairness Act, 28 U.S.C. § 1332(d), giving rise to federal subject matter jurisdiction.

The federal Texas District Court rejected that argument and remanded the case to state court, finding that the "class action . . . has been pending in one forum or another since 1993." A.102. The federal court opined that "[e]ven though the

case may have been dormant in state court until Plaintiffs-Intervenors filed their motion for class certification, dormancy does not change the nature of the case." *Id.* The court concluded that "this action commenced with the filing of the state-court petition in 1993, not in 2009 when the Plaintiffs-Intervenors submitted their class certification motion." *Id.*

(v) Defendants sought leave to appeal, arguing that "in every conceivable way, when Intervenors filed the new class claims for the first time, the action was essentially a new lawsuit, one for which the defendants had no notice." *The Dow Chemical Co. v. Nelson Ramirez*, Motion for Leave to Appeal, No. 09-60 (5th Cir. December 24, 2009). The Fifth Circuit denied the petition. *The Dow Chemical Co. v. Nelson Ramirez*, No. 09-60 (5th Cir. Feb. 18, 2010) ("Order Denying Motion for Leave to Appeal").

(vi) After remand to state court, Defendants again argued that the cases had been dismissed in 1995 by filing a plea to the jurisdiction, and the Texas state court again rejected the argument. A.88.

(vii) The Delaware Superior Court has also rejected Defendants' argument, as previously discussed in part II, *supra*.[6]

[6] By contrast, a federal District Court for the Eastern District of Louisiana found that the 1995 *f.n.c.* dismissal "restarted the prescriptive period." *Chaverri v. Dole Food Company, Inc.*, 896 F. Supp. 2d 556, 568-69 (E.D. La. 2012). *But see*

In sum, court after court has rejected the contention that the 1995 *forum non conveniens* dismissal ended the *Carcamo* class action. The Texas state courts resumed jurisdiction over the case as if it had never been dismissed, in accordance with the return jurisdiction clause, and related its filing back to 1993. The Texas Court of Appeals upheld the trial court's decision. Defendants renewed their objections in the Texas federal and state courts in 2009 and 2010, and lost again.

Chavez, 836 F.3d at 234 (criticizing Delaware district court for following *Chaverri* which "applied the state law of Louisiana . . . rather than the law of Delaware").

CONCLUSION

For the foregoing reasons, 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 denied class certification of the same class action in 2010.

Respectfully submitted.

Dated: August 8, 2017

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TRIAL COURT'S JUDGMENT AND RATIONALE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Luis Antonio Aguilar Marquinez, *et al.*, Plaintiffs, v. **Dole Food Company, Inc.,** *et al.*, Defendants.	Civil Action No. 12-695-RGA (consolidated)

MEMORANDUM

Presently before the Court are Defendants [Dole and Standard]'s Motion for Summary Judgment (D.I. 81) and related briefing (D.I. 82, 99, 103, 108) as well as Defendant [Chiquita's] Motion for Rehearing/Renewed Motion for Dismissal of Claims Pursuant to Rule 12(b)(6) Based on Statute of Limitations (D.I. 104) and related briefing (D.I. 105).[1] The two motions are premised on the same basic argument.[2]

This litigation stems from injuries allegedly caused by the misuse of dibromochloropropane ("DBCP") on banana plantations in Panama, Ecuador, Guatemala, and Costa Rica. The seven Plaintiffs in No. 12-695 describe themselves as four Panamanian citizens who were exposed to DBCP in 1972 (Aguilar Marquinez), 1973-75 (Serrano Chito), 1976 (Salinas Jiminez), various times from 1970-84 (Martinez Ibarra), and three Ecuadorian citizens who were exposed to DBCP in 1972-80 (Castro Epifano), 1978-82 (Pesantez Redrovan), and

[1] There are twelve defendants, some of which are obviously related to each other. There are seven different defendant groups – AMVAC Chemical, Chiquita, Del Monte, Dole (and Standard), Dow Chemical, Occidental Chemical, and Shell Oil. The only pending motions are those of Chiquita, Dole and Standard.

[2] The motion to dismiss has a stipulation permitting Plaintiffs to respond thirty days after this decision. Because the motion to dismiss is implicated in this decision, it will be dismissed with leave to refile in light of this memorandum.

1974-75 (Malla Lopez). (D.I. 1 ¶¶ 112-20). While the Complaint does not state when Plaintiffs became aware of their injuries, it does allege that, "None of the Plaintiffs discovered their injuries were due to their DBCP exposure prior to . . . August 31, 1993." (*Id.* ¶ 124).[3] The allegations of the 12-696 complaint, with its three thousand plaintiffs, are less specific, but do include the boilerplate assertion that no Plaintiff knew the cause of his injuries before August 31, 1993.

In August 1993, a putative DBCP class action was filed in Texas state court. The case was removed to federal court based on the Foreign Sovereign Immunities Act ("FSIA") because one of the defendants was largely owned by the State of Israel. In July 1995, the federal court dismissed the case based on *forum non conveniens* ("*f.n.c.*"). In the memorandum and order dismissing the case, the court denied as moot all pending motions, one of which was the motion for class certification. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995). The dismissal was affirmed by the Fifth Circuit, *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000), and the Supreme Court denied review, 532 U.S. 972 (2001).

Meanwhile, Plaintiffs' Counsel filed a putative DBCP class action in Hawaii, which was also removed to federal court based on the FSIA and dismissed for *f.n.c.* On appeal, the Ninth Circuit reversed the district court's decision permitting removal under the FSIA, *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001), and the Supreme Court affirmed, *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). Based on this ruling, the *Delgado* plaintiffs filed a motion to have the Texas federal case remanded to Texas state court and to reinstate the individual plaintiffs' claims pursuant to a "return jurisdiction" clause included in the 1995 *f.n.c.*

[3] There were originally eight actions filed in this District. There are seven plaintiffs in No. 12-695 and about three thousand named plaintiffs in No. 12-696. There were an additional three hundred or so plaintiffs in the other six actions (Nos. 12-697 to 12-702). The last six cases have been resolved in ways irrelevant to the issues at hand, and are currently on appeal.

dismissal order. *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 803-04 (S.D. Tex. 2004). Because *Patrickson* divested the district court of subject matter jurisdiction, the Texas federal court remanded the case to Texas state court. *Id.* at 815, 817. The case was reinstated in Texas state court. Plaintiffs filed a motion for class certification in 2009, which the state court denied on June 3, 2010.

Subsequently, Plaintiffs' Counsel filed DBCP suits in the Eastern District of Louisiana, Delaware Superior Court, and this Court. The Plaintiffs argue that the denial of class certification did not occur until June 3, 2010, that cross-jurisdictional tolling applied, and therefore the claims were within the applicable statutes of limitations.[4] In *Blanco v. AMVAC Chemical Corp.*, 2012 WL 3194412 (Del. Super. Aug. 8, 2012), the Delaware Superior Court held that Delaware recognizes this type of cross-jurisdictional tolling, and rejected Defendants' argument that such tolling ended in 1995 when the case was dismissed based on *f.n.c. Id.* at *12-13. The Delaware Supreme Court accepted an interlocutory appeal, and decided one question of law: "'Does Delaware recognize the concept of cross jurisdictional tolling?'" *Dow Chemical Corp. v. Blanco*, 67 A.3d 392, 394 (Del. 2013). The Delaware Supreme Court held that Delaware does. The Supreme Court noted that the issue decided did "not implicate the factual determination of from when the statute of limitations was tolled in this case." *Id.* Meanwhile, in *Chaverri v. Dole Food Co., Inc.*, 896 F. Supp. 2d 556 (E.D. La. 2012), the United States District Court for the Eastern District of Louisiana assumed that cross-jurisdictional tolling applied under Louisiana law, *see id.* at 567, but concluded that any tolling stopped in 1995, or, alternatively, in 2001. *See id.* at 571-72.

[4] One year for Louisiana and two years for Delaware.

It was based upon this state of affairs that I denied Defendants' earlier motion to dismiss and motion for summary judgment. I noted, however, that *Chaverri* was on appeal, and that the Fifth Circuit's ruling might be informative. (D.I. 96 ¶ 4, 98 ¶ 3). As it turns out, the Fifth Circuit's decision did not really shed any more light on the issue than was previously available. *See Chaverri v. Dole Food Co. Inc.*, 2013 WL 5274446, * 1 (5th Cir. Sept. 19, 2013) (per curiam) (unpublished) ("Largely for the reasons expressed in the district court's well-reasoned opinion, we agree that Chaverri presented no facts relevant to any statute or caselaw to support that [the statute of limitations] was interrupted for a sufficient period of time.").

I previously stated that I thought the Delaware Superior Court's opinion was more persuasive than the District Court's decision in *Chaverri*. (D.I. 98 ¶ 3). After further review, including consideration of the additional briefing in this case, the Fifth Circuit's stated rationale for affirmance of *Chaverri*, and a recent decision of the Hawaii Intermediate Court of Appeals,[5] I conclude that the Eastern District of Louisiana's opinion is indeed persuasive, and that tolling stopped in 1995. In the Eastern District of Louisiana, since the court assumed that Louisiana recognized cross jurisdictional tolling, there were only two questions before the court:

> (1) did the July 1995 denial of class certification as moot count as a denial for the purposes of restarting prescription; and/or, (2) was the October 1995 order dismissing *Delgado* on the grounds of f.n.c. a final judgment, such that the action was no longer pending for prescription purposes.

Chaverri, 896 F. Supp. 2d at 568.[6] The Delaware Superior Court's opinion dealt mainly with whether Delaware recognizes cross jurisdictional tolling, limiting its discussion of the *f.n.c.* dismissal to the issue of finality. *Blanco*, 2012 WL 3194412, at *12 ("[B]ut this decision, while

[5] *See* footnote 9 *infra.*

[6] Under Louisiana law, the concept of a statute of limitations is covered by the roughly equivalent concept of prescription.

final for purposes of appealability, was not on the merits, and therefore lacks the *res judicata* or *collateral estoppel* effect for which they try to invoke it."). Judge Herlihy equated the dismissal on *f.n.c.*, coupled with a return jurisdiction clause, as the "logical [] equivalent to a stay," which would toll the statute of limitations.[7] *Id.* Applying this logic to the questions before the Eastern District of Louisiana, Judge Herlihy implicitly answered the second question in the negative. Judge Herlihy did not reach the first question, which forms an alternative basis to end tolling. *See Chaverri*, 896 F. Supp. 2d at 568 ("An affirmative answer to either of these questions results in the prescription of the Plaintiffs' claims.").[8]

Extending tolling in the manner advocated for by Plaintiffs would go far beyond the policy based justifications set forth in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), as well as *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998). In *American Pipe*, the Supreme Court found that tolling the statute of limitations for putative class members was appropriate because it

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[7] Indeed the statute of limitations must have been tolled, at least for the named Plaintiff, as the case was reinstated in Texas state court.

[8] Plaintiffs make a number of arguments (D.I. 99 at 18-19) as to why this Court should be bound by the Superior Court's decision. First, Plaintiffs argue that the Superior Court's decision is preclusive because of collateral estoppel. Second, Plaintiffs argue that the *Rooker-Feldman* doctrine bars relitigation.

As for collateral estoppel, it only applies "where a question of fact essential to the judgment is litigated and determined by a valid and final judgment." *Brown v. State*, 721 A.2d 1263, 1265 (Del. 1998). As I have stated, Judge Herlihy did not decide whether the July 1995 denial of class certification as moot restarted the statute of limitations, so Defendants are not estopped. Additionally, the Superior Court decision was a denial of a motion for judgment on the pleadings, so this question was not even fully litigated. In any event, the Superior Court's decision is still subject to appeal to the Delaware Supreme Court, and it is therefore not final. Finally, under Third Circuit law, I am not bound by it. *See, e.g., Safeco Ins. Co. v. Wetherill*, 622 F.2d 685, 688-89 (3d Cir. 1980) ("[T]he decisional law of lower state courts and other federal courts... should be accorded proper regard . . . but not conclusive effect."); *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661-63 (3d Cir. 1980) ("In determining state law, a federal tribunal should be careful to avoid the danger of giving a state court decision a more binding effect than would a court of that state under similar circumstances.") (internal citations omitted).

As for the *Rooker-Feldman* argument, it does not apply here. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) ("The *Rooker–Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.). Defendants did not bring this suit, and therefore the doctrine does not apply.

promoted judicial economy such that individual class members need not file individual suits. 414 U.S. at 551. In *Crown, Cork & Seal*, the Supreme Court further explained that, "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork & Seal*, 462 U.S. at 354. In *Armstrong*, the Eleventh Circuit expounded upon the Supreme Court's reasoning, finding that tolling lasted only until the denial of class certification, not until the termination of the appeals process. 138 F.3d at 1378. Because the policy justification for tolling is to "encourage class members reasonably to rely on the class action to protect their rights," tolling ends when "reliance on the named plaintiffs' prosecution of the matter ceases to be reasonable." *Id.* at 1380.

The Eastern District of Louisiana summarized the case law well, identifying three factors for "determining whether or not a [limitations] period has been [tolled]":

> (1) the actual pendency of the class action itself; (2) the objective reasonableness of an individual's reliance on the action to protect his or her rights; and, (3) the balance of prejudice to both the plaintiff and defendant based upon the principles underlying class actions and statutes of limitations.

Chaverri, 896 F. Supp. 2d at 571. The motion for class certification was no longer pending after the district court in 1995 denied it as moot. While the denial of the motion was not on the merits, any reliance would have been objectively unreasonable, as the case was dismissed. Because most of the plaintiffs' home countries did not have mechanisms for class actions, *see Delgado*, 890 F. Supp. at 1368, plaintiffs were put on notice in 1995 that they would need to file individual suits to preserve their rights.[9] Defendants allege that in fact many of the Plaintiffs did participate by name in earlier lawsuits.

[9] Indeed, suits were filed in Mississippi and Louisiana in 1996, Hawaii in 1997, and California in 2004, 2005, and 2008. (D.I. 82 at 10-11, 13). The Hawaii Intermediate Court of Appeals recently decided that class action tolling

Even assuming that tolling operated during the pendency of the appeals process, the Fifth Circuit affirmed the *f.n.c.* dismissal and the Supreme Court denied certiorari in 2001. While *Patrickson* set forth a basis for reinstating the case, that decision was not until 2003, two years after the appeals process had run.

The Plaintiffs have not been unfairly prejudiced. The case was reinstated in Texas state court. Plaintiffs have had their chance to be heard as a class. Class certification was finally denied on the merits in 2010. Plaintiffs had plenty of opportunity to pursue individual claims, but chose not to.[10]

There is a second basis on which summary judgment to Dole and Standard might be granted. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). The moving party has the initial burden of proving the absence of a genuinely disputed material fact relative to the claims in question. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). When determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007).

Defendants point out that that there is no evidence at all that supports tolling from the dates of exposure (generally in the 1970's) to August 1993. Dole submitted an expert declaration stating, in essence, that exposure to DBCP does not cause the latent type of

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ended in 1995 upon the *Delgado* denial of class certification. *See Patrickson v. Dole Food Co.*, 2014 WL 895186, *7-9 (Ha. Ct. App. Mar. 7, 2014).

[10] It is true that Defendants have vigorously opposed Plaintiffs' attempts to be heard on the merits. It is not clear to me that this is relevant to determining whether the statute of limitations has been tolled.

reproductive issues of which Plaintiffs complain. (D.I. 84-1 at 10-13). Additionally, Dole submitted a letter dated July 27, 1993 from Charles S. Siegel, addressed to defense counsel as well as Dole, indicating which clients were represented in the DBCP litigation. (D.I. 87 Ex. 9). Dole contends that this letter indicates that forty-seven of the plaintiffs, whose names appear on that list, must have been aware of their claims at the time the letter was sent. (D.I. 82 at 25).

While Plaintiffs state that this is insufficient to grant summary judgment, I think it is sufficient to put the burden on Plaintiffs to come forward with evidence supporting the proposition that each Plaintiff was unaware of his injuries, or was unaware of the cause of his injuries.[11] There is only the boilerplate statement in the complaints that the Plaintiffs did not know of the cause of their injuries. There seems to be agreement that it would be appropriate[12] to give the Plaintiffs a period of time to supply such evidence. (D.I. 99 at 26; D.I. 108 at 20). The Court would allow an appropriate amount of time for Plaintiffs to do so should that become necessary.

The Court will enter a separate order.[13]

Entered this 27th day of May, 2014.

United States District Judge

[11] The Complaint alleges not only injuries that might not have been easily discovered such as infertility or increased cancer risk, but other injuries that would have been obvious, such as "vision loss, chronic urinary tract infections," "chronic skin conditions," and "gastro-intestinal problems, chronic headaches and body pain." (D.I. 1 ¶¶ 114, 116, 119).

[12] *See* Fed. R. Civ. P. 56(d).

[13] I do not understand Plaintiffs to be arguing that there is any basis to oppose Defendants' summary judgment motion if there has not been cross-jurisdictional tolling since 1995.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Luis Antonio Aguilar Marquinez, *et al.*, Plaintiffs, v. **Dole Food Company, Inc.,** *et al.*, Defendants.	Civil Action No. 12-695-RGA (consolidated)

ORDER

Presently before the Court are Defendants [Dole and Standard]'s Motion for Summary Judgment (D.I. 81) and related briefing (D.I. 82, 99, 103, 108) as well as Defendant [Chiquita's] Motion for Rehearing/Renewed Motion for Dismissal of Claims Pursuant to Rule 12(b)(6) Based on Statute of Limitations (D.I. 104) and related briefing (D.I. 105). Defendant Chiquita's motion (D.I. 104) has not been fully briefed, and therefore is **DISMISSED** with **LEAVE TO REFILE** in light of the accompanying memorandum..

For the reasons discussed in the accompanying memorandum, Defendants' motion for summary judgment (D.I. 81) is hereby **GRANTED**.

Entered this 27th day of May, 2014.

Richard G. Andrews
United States District Judge

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS ANTONIO AGUILAR MARQUINEZ, et al. Plaintiffs Below, Appellants, v. DOLE FOOD COMPANY INC., 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)

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,160 words, which were counted by Microsoft Word 2016.

Dated: August 8, 2017

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CERTFICATE OF SERVICE

I, Barbara Stratton, hereby certify that on August 8, 2017, a copy of Corrected Appellants' Opening Brief was served via File and Serve Xpress upon all counsel of record.

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