To Be Argued By:
JEREMY C. MARWELL
Time Requested: 20 Minutes

Appeal No. CTQ-2019-00003

Court of Appeals

of the

State of New York

TOBIAS BERMUDEZ CHAVEZ, *et al*.,

Respondents,

v.

OCCIDENTAL CHEMICAL CORPORATION,

Appellant.

ON QUESTIONS CERTIFIED FROM THE U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT IN DOCKET NO. 18-1120

BRIEF OF APPELLANT OCCIDENTAL CHEMICAL CORPORATION

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Date Completed: November 15, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1 of the New York Rules of Appellate Procedure, Appellant Occidental Chemical Corporation ("Occidental") is a wholly owned subsidiary of Occidental Petroleum Corporation, which is a publicly traded company whose shares are listed on the New York Stock Exchange under the symbol "OXY." Occidental and Occidental Petroleum Corporation disclose the following subsidiaries and affiliates:

Amarok Gathering, LLC

Armand Products Company

Aventine LLC

Bravo Pipeline Company

Cain Chemical Inc.

Concord Petroleum Corporation

Conn Creek Shale Company

D.S. Ventures, LLC

DMM Financial LLC

Downtown Plaza II

FP Westport Commodities Limited

FP Westport GmbH

FP Westport Limited

FP Westport LLC

FP Westport Services LLC

FP Westport Trading LLC

Glenn Springs Holdings, Inc.

Grand Bassa Tankers, Inc.

Grupo OxyChem de Mexico, S.A. de C.V.

Houndstooth Resources, LLC

INDSPEC Chemical B.V.

INDSPEC Chemical Corporation

INDSPEC Chemical Export Sales, LLC

INDSPEC Holding Corporation

Ingleside Cogeneration GP 2, Inc.

Ingleside Cogeneration GP, Inc.

Ingleside Cogeneration Limited Partnership

Ingleside Ethylene, LLC

Interore Trading Ltd.

Joslyn Partnership

Laguna Petroleum Corporation

Liwa Oil & Gas Ltd.

Mariana Properties, Inc.

Marico Exploration, Inc.

MC2 Technologies LLC

Miller Springs Remediation Management, Inc.

Moncrief Minerals Partnership, L.P.

MTD Pipeline LLC

Natural Gas Odorizing, Inc.

NGL Ventures LLC

Occidental (Bermuda) Ltd.

Occidental (East Shabwa), LLC

Occidental Advance Sale Finance, Inc.

Occidental Al Hosn, LLC

Occidental Andina, LLC

Occidental Angola Holdings Ltd.

Occidental Canada Holdings Ltd.

Occidental Chemical Asia, Limited

Occidental Chemical Belgium B.V.B.A.

Occidental Chemical Chile Limitada

Occidental Chemical Corporation

Occidental Chemical de Mexico, S.A. de C.V.

Occidental Chemical Export Sales, LLC

Occidental Chemical Far East Limited

Occidental Chemical Holding Corporation

Occidental Chemical International, LLC

Occidental Chemical Investment (Canada) 1, Inc.

Occidental Chile Investments, LLC

Occidental Chile Minority Holder, LLC

Occidental CIS Services, Inc.

Occidental Colombia (Series G) Ltd.

Occidental Colombia (Series J) Ltd.

Occidental Colombia (Series K) Ltd.

Occidental Colombia (Series L) Ltd.

Occidental Colombia (Series M) Ltd.

Occidental Colombia (Series N) Ltd.

Occidental Colombia (Series O) Ltd.

Occidental Condor LLA Block 39 Ltd.

Occidental Condor LLA Block 52 Ltd.

Occidental Condor, LLC

Occidental Crude Sales, Inc. (Canada)

Occidental Crude Sales, Inc. (International)

Occidental Crude Sales, LLC (South America)

Occidental de Colombia, LLC

Occidental del Ecuador, Inc.

Occidental Dolphin Holdings Ltd.

Occidental Energy Marketing, Inc.

Occidental Energy Ventures LLC

Occidental Exploradora del Peru Ltd.

Occidental Exploration and Production Company

Occidental Hafar, LLC

Occidental International (Libya), Inc.

Occidental International Corporation

Occidental International Exploration and Production Company

Occidental International Holdings Ltd.

Occidental International Oil and Gas Ltd.

Occidental International Services, Inc.

Occidental International Ventures Ltd.

Occidental Joslyn GP 1 Co.

Occidental Joslyn GP 2 Co.

Occidental Latin America Holdings, LLC

Occidental Libya Oil & Gas B.V.

Occidental LNG (Malaysia) Ltd.

Occidental MENA Manager Ltd.

Occidental Middle East Development Company

Occidental Mukhaizna, LLC

Occidental of Abu Dhabi (Bab) Ltd.

Occidental of Abu Dhabi (Shah) Ltd.

Occidental of Abu Dhabi Ltd.

Occidental of Abu Dhabi, LLC

Occidental of Bahrain Ltd.

Occidental of Bangladesh, Inc.

Occidental of Colombia (Chipiron), Inc.

Occidental of Colombia (Cosecha), Inc.

Occidental of Colombia (Medina), Inc.

Occidental of Colombia (Teca) Ltd.

Occidental of Dubai, Inc.

Occidental of Iraq Holdings Ltd.

Occidental of Iraq, LLC

Occidental of Oman, Inc.

Occidental of Russia Ltd.

Occidental of South Africa (Offshore), Inc.

Occidental of Yemen (Block 75), LLC

Occidental Oil and Gas (Oman) Ltd.

Occidental Oil and Gas Corporation

Occidental Oil and Gas International Inc.

Occidental Oil and Gas International, LLC

Occidental Oil and Gas of Peru, LLC

Occidental Oil and Gas Pakistan LLC

Occidental Oil Asia Pte. Ltd.

Occidental Oil Shale, Inc.

Occidental Oman (Block 27) Holdings Ltd.

Occidental Oman Block 51 Holding Ltd.

Occidental Oman Block 51, LLC

Occidental Oman Block 65 Holding Ltd.

Occidental Oman Block 65, LLC

Occidental Oman Block 72 Holding Ltd.

Occidental Oman Block 72, LLC

Occidental Oman Gas Company LLC

Occidental Oman Gas Holdings Ltd.

Occidental Oman North Holdings, Ltd.

Occidental Oriente Exploration and Production Ltd.

Occidental Overseas Holdings B.V.

Occidental Peninsula II, Inc.

Occidental Peninsula, LLC

Occidental Permian Ltd.

Occidental Permian Manager LLC

Occidental Permian Services, Inc.

Occidental Peruana, Inc.

Occidental Petrolera del Peru (Block 101), Inc.

Occidental Petrolera del Peru (Block 103), Inc.

Occidental Petroleum (Pakistan), Inc.

Occidental Petroleum Corporation

Occidental Petroleum Corporation Political Action Committee

Occidental Petroleum de Venezuela, S.A.

Occidental Petroleum of Nigeria

Occidental Petroleum of Oman Ltd.

Occidental Petroleum of Qatar Ltd.

Occidental Power Marketing, L.P.

Occidental Power Services, Inc.

Occidental PVC, LLC

Occidental Qatar Energy Company LLC

Occidental Red Sea Development, LLC

Occidental Research Corporation

Occidental Resource Recovery Systems, Inc.

Occidental Resources Company

Occidental Shah Gas Holdings Ltd.

Occidental South America Finance, LLC

Occidental Specialty Marketing, Inc.

Occidental Tower Corporation

Occidental Transportation Holding Corporation

Occidental West Texas Overthrust, Inc.

Occidental Yemen Ltd.

Occidental Yemen Sabatain, Inc.

Oceanic Marine Transport Ltd.

OEVC Energy, LLC

OEVC Midstream Projects, LLC

OLCV CE Holdings, ULC

OLCV CE US Holdings, Inc.

OLCV Net Power, LLC

OOG Partner LLC

OOOI Chem Holdings, LLC

OOOI Chem Sub, LLC

OOOI Chemical International, LLC

OOOI Chile Holder, LLC

OOOI Ecuador Management, LLC

OOOI Oil and Gas Sub, LLC

OOOI South America Management, LLC

Opcal Insurance, Inc.

OPM GP, Inc.

Oxy BridgeTex Limited Partnership

Oxy C & I Bulk Sales, LLC

Oxy Cactus II, LLC

OXY Campus, LLC

Oxy Canada Sales, Inc.

Oxy Carbon Solutions, LLC

Oxy Climate Ventures, Inc.

Oxy Cogeneration Holding Company, Inc.

Oxy Colombia Holdings, LLC

OXY CV Pipeline LLC

Oxy Delaware Basin Plant, LLC

Oxy Delaware Basin, LLC

Oxy Dolphin E&P, LLC

Oxy Dolphin Pipeline, LLC

Oxy Energy Canada, Inc.

Oxy Energy Services, LLC

Oxy Expatriate Services, Inc.

Oxy FFT Holdings, Inc.

Oxy Holding Company (Pipeline), Inc.

OXY Inc.

Oxy Levelland Pipeline Company, LLC

Oxy Levelland Terminal Company, LLC

OXY Libya E&P Area 35 Ltd.

OXY Libya E&P Concession 103 Ltd.

OXY Libya E&P EPSA 102 B.V.

OXY Libya E&P EPSA 1981 Ltd.

OXY Libya E&P EPSA 1985 Ltd.

OXY Libya Exploration, SPC

OXY Libya, LLC

OXY Little Knife, LLC

Oxy Low Carbon Ventures, LLC

OXY LPG LLC

Oxy LPG Terminal, LLC

OXY Mexico Holdings I, LLC

OXY Mexico Holdings II, LLC

OXY Middle East Holdings Ltd.

Oxy Midstream Strategic Development, LLC

OXY of Saudi Arabia Ltd.

OXY Oil Partners, Inc.

Oxy Oleoducto SOP, LLC

Oxy Overseas Services Ltd.

OXY PBLP Manager, LLC

Oxy Permian Gathering, LLC

Oxy Petroleum de Mexico, S. de R.L. de C.V.

Oxy Renewable Energy LLC

Oxy Salt Creek Pipeline LLC

OXY Support Services, LLC

Oxy Taft Hub, LLC

Oxy Technology Ventures, Inc.

Oxy Transport I Company, LLC

OXY Tulsa Inc.

OXY USA Inc.

OXY USA WTP LP

Oxy Vinyls Canada Co.

Oxy Vinyls Export Sales, LLC

Oxy Vinyls, LP

OXY VPP Investments, Inc.

OXY West, LLC

Oxy Westwood Corporation

Oxy Y-1 Company

OXYCHEM (CANADA), INC.

OxyChem do Brasil Ltda.

OxyChem Ingleside Ethylene Holdings, Inc.

Oxychem Shipping Ltd.

OxyChile Investments, LLC

OxyCol Holder Ltd.

OXYMAR

Permian Basin Limited Partnership

Permian VPP Holder, LP

Permian VPP Manager, LLC

Placid Oil Company

Ramlat Oxy Ltd.

Rio de Viento, Inc.

San Patricio Pipeline LLC

Scanports Shipping, LLC

Swiflite Aircraft Corporation

Transok Properties, LLC

Troy Potter, Inc.

Turavent Oil GmbH

Tuscaloosa Holdings, Inc.

Vintage Gas, Inc.

Vintage Petroleum Argentina Ltd.

Vintage Petroleum Boliviana, Ltd.

Vintage Petroleum International Finance B.V.

Vintage Petroleum International Holdings, LLC

Vintage Petroleum International Ventures, Inc.

Vintage Petroleum International, LLC

Vintage Petroleum Italy, Inc.

Vintage Petroleum South America Holdings, Inc.

Vintage Petroleum South America, LLC

Vintage Petroleum Turkey, Inc.

YT Ranch LLC

STATEMENT OF RELATED LITIGATION

This case is before this Court on questions certified by the U.S. Court of Appeals for the Second Circuit in *Chavez v. Occidental Chemical Corp.*, No. 18-1120. The Second Circuit retained jurisdiction over that case pending this Court's disposition of the certified questions.

Litigation involving similar claims against various defendants including Occidental Chemical Corporation is currently pending in Hawaii state court, *Patrickson v. Dole Food Co.*, Civil No. 07-1-0047 (Hawaii First Circuit Ct.), and in Delaware federal district court, *Marquinez v. Dole Food Co.*, No. 12-cv-695 (consolidated) (D. Del.). Litigation involving similar claims by the same plaintiffs against other defendants remains pending as *Chavez v. Dole Food Co.*, No. 1:12-cv-697 (consolidated) (D. Del.).

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Mitchell A. Lowenthal & Norman M. Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532 (1996)..... 34, 37

Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev. 339 (2016) 3, 24

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the certified questions pursuant to 22 N.Y.C.R.R. § 500.27.

QUESTIONS PRESENTED

This Court accepted the following questions, as certified by the U.S. Court of Appeals for the Second Circuit:

(1) Does New York law recognize cross-jurisdictional class action tolling, as described in th[e] opinion [*Chavez v. Occidental Chemical Corp.*, 933 F.3d 186 (2d Cir. 2019)]?

(2) Can a non-merits dismissal of class certification terminate class action tolling, and if so, did the Orders at issue here do so?

PRELIMINARY STATEMENT

Plaintiffs filed this lawsuit in June 2012, alleging they were injured by exposure to the nematicide dibromochloropropane ("DBCP") while working on banana farms in Central and South America between 1965 and 1990. Plaintiffs concede that their causes of action are subject to New York's three-year statute of limitations, *Chavez*, 933 F.3d at 196, 198 n.6 (A27, A34), and that "[a]bsent a toll," the limitations period expired *decades* ago. A340.

As the case comes to this Court, Plaintiffs rely exclusively on the theory of "cross-jurisdictional class-action tolling" to prevent their cases from being dismissed as untimely. That theory provides that absent members of a putative class may rely

on a class-action lawsuit filed in another jurisdiction to protect their rights, such that the statute of limitations in their home jurisdiction is tolled until the other court denies class status. At that time, tolling stops, as it would no longer be "objectively reasonable" for absent members to rely on the putative class to protect their interests. *See Chavez*, 933 F.3d at 196, 199 (A27, A35) (quoting *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 117 (2d Cir. 2013)); *see generally China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804, 1806 (2018) (tolling ends when "class-action status has been denied" and the action has been "shorn of its class character"); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54, 561 (1974) (tolling continues "only during the pendency of [a] motion to strip the suit of its class action character"). Here, plaintiffs contend that their claims were tolled beginning in August 1993, when a DBCP putative class action was filed in Texas, and that tolling continued for *seventeen years*, even though in 1995 the Texas case was dismissed on grounds of *forum non conveniens*, the request for class certification denied as moot, and a final judgment entered. *See* A272-73.

Plaintiffs' claims can be timely only if they prevail on *both* issues presented by this appeal. First, this Court would have to adopt cross-jurisdictional class action tolling. Only a "handful of states" have adopted that theory, *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008), and "the majority of states that have considered cross-jurisdictional tolling appear to have rejected it

outright." Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev. 339, 372 & n.240 (2016).

This Court should decline to recognize cross-jurisdictional tolling. That theory is inconsistent with fundamental principles of New York law, which "construes tolling doctrines as narrowly as possible" to further the State's well-settled policy favoring repose, *Overall v. Estate of Klotz*, 52 F.3d 398, 404 (2d Cir. 1995), and directs courts not to "extend the Statute of Limitations" or "invent tolling" principles, *Varo, Inc. v. Alvis PLC*, 261 A.D.2d 262, 268 (1st Dep't 1999); *accord McCoy v. Feinman*, 99 N.Y.2d 295, 300-01 & n.2 (2002) (courts should not extend tolling doctrines without legislative approval). Adopting cross-jurisdictional tolling would make New York's limitations provisions "effectively dependent on" the law and policy choices of every other state in the union, and "the efficiency (or inefficiency) of courts in those jurisdictions," when states have "historically resisted such dependency." *Wade v. Danek Med., Inc.*, 182 F.3d 281, 288 (4th Cir. 1999). Unlike *intra*-jurisdictional (so-called "*American Pipe*") tolling, which promotes efficiency and economy of litigation within a single judicial system, cross-jurisdictional tolling would not promote the efficiency of New York's courts. Instead, it would turn New York into a magnet for litigation only tenuously connected to the State, subjecting New York courts to a "flood" of filings from "forum-shopping plaintiffs" seeking to "take advantage of [a] cross-jurisdictional

tolling rule . . . shared by only a few other states." *Id.* at 287. Cross-jurisdictional tolling is inconsistent with the purpose of statutes of limitations and tolling provisions. *See Quinn v. La. Citizens Prop. Ins. Corp.*, 118 So. 3d 1011, 1022 (La. 2012); *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808-09 (Tenn. 2000).

Second, even if this Court were to adopt the theory of cross-jurisdictional tolling, Plaintiffs' claims are *still* untimely unless it was objectively reasonable for them to sit on their hands for seventeen years after class certification was denied in the Texas case and the putative class action dismissed. This Court would need to conclude such persistent inaction was reasonable, year after year after year, even after other former members of the putative class litigated their own individual cases in foreign countries; a group of former named plaintiffs from just one of the 25 countries in the original class reinstated their individual claims and obtained remand to state court, *see infra* pp. 11-16; even after that same group protected their own individual interests by settling their personal claims against all defendants without regard for absent class members, *infra* pp. 11; even after other absent class members, represented by Plaintiffs' counsel here, filed a putative class action in Hawaii, *infra* pp. 12-14, and other absent class members filed actions in other states; even after the Hawaii court then denied class certification, *infra* p. 13; and even after the vast majority of claims, from virtually all of the plaintiffs in the 25 nations encompassed by the original putative class, sat dismissed for more than ten years. In short,

Plaintiffs' claims can be timely only if such persistent inaction was objectively reasonable at a time when thousands of other individual plaintiffs—some of them represented by the same counsel here—conscientiously pursued their own claims, and class certification was denied *twice*. Because reliance on a dismissed class action under such circumstances is nowhere close to objectively reasonable, Plaintiffs' claims are untimely.

STATEMENT OF THE CASE

This case's long procedural history is fairly divided into two phases: (1) the class proceedings in other jurisdictions on which Plaintiffs' class-action tolling argument depends (the *Carcamo/Delgado* proceedings), in which Plaintiffs were absent members of the putative class; and (2) the Plaintiffs' current individual actions (the *Chavez* proceedings). A detailed timeline of both proceedings and related DBCP litigation is available in the Appendix. *See* A371-79; *see also Chavez v. Occidental Chem. Corp.*, 933 F.3d 186, 190-95 (2d Cir. 2019) (A5, A13-24); *Chavez v. Occidental Chem. Corp.*, 300 F. Supp. 3d 517, 522-27 (S.D.N.Y. 2018) (A327-36).

A. The *Carcamo/Delgado* Proceedings

In August 1993, a putative class action was filed in Texas state court. *See Carcamo v. Shell Oil Co.*, 93-C-2290 (Brazoria Co., TX) .[1] A371 (¶1). None of the plaintiffs' alleged injuries arose in Texas; instead, plaintiffs claimed they were injured by exposure to DBCP while working on banana farms in the representative plaintiffs' home countries of Honduras, Costa Rica, Guatemala, Ivory Coast, Burkina Faso, Dominica, St. Lucia, St. Vincent, Ecuador, the Philippines, and Australia.[2] A371 (¶1); A444 (¶13). The *Carcamo* plaintiffs sought to have Texas state courts resolve claims for a class that was, by any standard, breathtakingly broad: "[a]ll persons exposed to DBCP . . . designed, manufactured, marketed, distributed, or used by [ten companies, including Occidental] . . . between 1965 and 1990" in 25 countries worldwide.[3] A371 (¶6).

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[1] Originally styled *Bermudez v. Shell Oil Co.*, the case was later re-captioned *Carcamo v. Shell Oil Co*. *See* A371 (¶4).

[2] The Fifth Circuit characterized the plaintiffs' choice of Texas as "a classic exercise of forum shopping," noting various "plaintiff-friendly features" of Texas law at the time of filing. *Delgado v. Shell Oil Co.*, 231 F.3d 165, 169 (5th Cir. 2000); *cf.* Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 456 (2011) ("DBCP cases from Nicaragua and elsewhere" have been "[c]alled among the most wide-ranging efforts at forum-shopping in our legal history" (internal quotation marks omitted)).

[3] Although the *Carcamo* plaintiffs initially defined the class to include only the representative plaintiffs' 11 countries, A444 (¶13), their Amended Motion for Class Certification defined the class to extend more broadly to 25 countries: (1) Honduras, (2) Costa Rica, (3) Guatemala, (4) Panama, (5) Nicaragua, (6) Mexico,

In November 1993, the *Carcamo* plaintiffs filed a motion for class certification. A371 (¶3). While their motion was pending, an impleaded third-party defendant majority-owned indirectly by a foreign state (Dead Sea Bromine of Israel) removed the case to federal court under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1330.

Carcamo was consolidated with several other Texas state DBCP cases that had been removed to the U.S. District Court for the Southern District of Texas as *Delgado v. Shell Oil Co.*, No. H-94-1337 (S.D. Tex.) ("*Delgado*"), involving named plaintiffs from a total of twelve countries. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1335, 1337 (S.D. Tex. 1995) ("*Delgado I*") (A630-35). The case was assigned to Judge Sim Lake. A372 (¶¶8-9).

Judge Lake directed the parties to provide their views on "[w]hether class certification [was] appropriate," A483; *see also* A372 (¶9), and ordered the plaintiffs to file "a copy of Plaintiffs' Amended Motion for Class Certification filed in [state court]," A483. Although the *Carcamo* plaintiffs initially sought class certification in Texas state court under the Texas Rules of Civil Procedure—whose class action

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(7) Venezuela, (8) Ecuador, (9) Argentina, (10) Dominica, (11) St. Lucia, (12) St. Vincent, (13) Dominican Republic, (14) Ivory Coast, (15) Burkina Faso, (16) Senegal, (17) Cameroon, (18) Tanzania, (19) Philippines, (20) Thailand, (21) Indonesia, (22) Malaysia, (23) India, (24) Australia, and (25) Papua New Guinea. A474. After the case was removed to federal court, the *Carcamo* plaintiffs asked the federal court to certify this same class. *See* A490-91.

procedures are "patterned after Federal Rule of Civil Procedure 23," *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000)—the plaintiffs in the consolidated *Delgado* action before Judge Lake argued that class treatment would be appropriate under Federal Rule of Civil Procedure 23, and they supplied Judge Lake with the motion for class certification and memorandum in support that they had filed in Texas state court. A372 (¶10); A490-91. Plaintiffs invoked "Fed. R. Civ. P. 23 criteria" and "Rule 23 jurisprudence" and "pray[ed] that their motion for certification be granted." A525-26. Defendants responded that "plaintiffs' motions for class certificat[ion] should be denied" because the requirements of Federal Rule 23 were not met, A505, as "diverse questions of fact and law [] predominate[d] over . . . common issues" and the "representatives . . . [in]adequately represent the class." *See* A497-505; *see also* A497 n.2 (stating that "[s]ince plaintiffs sought certification in state court under Texas Rules of Civil Procedure . . . defendants assume that plaintiffs will proceed in this Court under the analogous Federal Rules, i.e., 23(b)(3) and 23(b)(1)(A)").

a. Judge Lake dismisses the action on grounds of *forum non conveniens*

Months later, but before class certification was resolved, defendants moved to dismiss on grounds of *forum non conveniens*. A372 (¶14). On July 11, 1995, Judge Lake granted that motion. *See Delgado I*, 890 F. Supp. 1324 (A622-701). The court first concluded that federal jurisdiction was proper under the FSIA. *Id.* at 1372

(A680). Judge Lake acknowledged that "class actions are unavailable in many of [plaintiffs'] home countries and . . . joinder of large numbers of actions is not customary" there, and thus the plaintiffs might be "forced to commence thousands of individual actions." *Id.* at 1368 (A674); *see also id.* at 1358 (A659) (acknowledging that "plaintiffs may not find a substantially comparable remedy in the foreign forum"). He nonetheless concluded that adequate alternative fora existed in plaintiffs' home countries and thus conditionally dismissed the case on *forum non conveniens* grounds. Judge Lake conditioned dismissal on defendants' participating in expedited domestic discovery and waiving certain procedural and jurisdictional defenses abroad. *Id.* at 1372-73 (A680-83). He also issued an injunction barring "plaintiffs and intervenor-plaintiffs in the present actions" from commencing new DBCP-related actions in the United States. *Id.* at 1374-75 (A684-85) (citation omitted).

In keeping with the Fifth Circuit's usual practice, Judge Lake's order contained a "return jurisdiction" clause. *E.g.*, *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991) (Circuit law "requires the courts to ensure that plaintiffs can reinstate suits in American courts if the defendants obstruct jurisdiction in the alternative forum"); *see also Robinson v. TCI/US West Commc'ns, Inc.*, 117 F.3d 900, 907 (5th Cir. 1997) ("failure to include a return jurisdiction clause in a[] [*forum non conveniens*] dismissal constitutes a *per se* abuse of discretion"). The order

provided that if the *Delgado* plaintiffs were unable to establish jurisdiction abroad, *those plaintiffs* could return to the United States and the court would resume jurisdiction over their actions:

> 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 I, 890 F. Supp. at 1375 (A685-86). Judge Lake noted that "while plaintiffs have sought class certification in several of the pending actions, no classes have been certified." *Id.* at 1368 (A675). Although Judge Lake suggested that class treatment would be problematic, he did not resolve the issue on the merits. *See id.* (agreeing with defendants that "each plaintiff will still have to present individual proof of exposure, injury, and causation"). Instead, the court "DENIED as MOOT" "all [other] pending motions"—including plaintiffs' then-pending motion for class certification. *Id.* at 1375 (A686).

On October 27, 1995, after the defendants had satisfied the conditions for dismissal, Judge Lake issued a document captioned "**FINAL JUDGMENT**" (and which concluded with the words, "This is a FINAL JUDGMENT") dismissing *Delgado* and permanently enjoining plaintiffs and others with knowledge of the judgment from initiating new DBCP-related litigation in the United States. *See*

A708-10. In a separate order, Judge Lake clarified that the injunction applied only to "plaintiffs (and intervenor plaintiffs) in the actions before the court," rather than "any potential plaintiff not before it," and did not prevent counsel to existing named plaintiffs from "representing any person, not a party in the actions pending before the court, in a DBCP-related claim." A704-05. Plaintiffs appealed the court's final judgment, arguing that the court lacked subject-matter jurisdiction under the FSIA. A373 (¶17). The Fifth Circuit unanimously affirmed, *see Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000), and the Supreme Court denied certiorari, *see Delgado v. Shell Oil Co.*, 532 U.S. 972 (2001).

In 1997 and 1998, while the appeal on FSIA issues remained pending, the *Delgado* named plaintiffs settled their claims against Occidental and most of the other defendants (all but Dole Food Co., Inc. and Dole Fresh Fruit Co.). A900 (¶17).

b. Certain Costa Rican plaintiffs seek to reinstate claims

While the *Delgado* appeal was pending, the Costa Rican plaintiffs in 1996 obtained a judgment from Costa Rica's Civil Court that it lacked jurisdiction over the DBCP-claims. *See* A900 (¶14). Thereafter, those plaintiffs sought to reinstate their claims before Judge Lake under the return-jurisdiction clause.[4] A897-98 (¶2).

[4] The Costa Rican plaintiffs informed Judge Lake that some of the original plaintiffs' claims were "still pending in the plaintiffs' home countries," including the Philippines, Honduras, and Ecuador, A899 (¶13), highlighting that the *Carcamo/Delgado* case had lost its class character after Judge Lake's dismissal and final judgment.

Judge Lake denied the motion without prejudice, deferring consideration pending resolution of the plaintiffs' Fifth Circuit appeal. *See* A933 (¶4).

c. Plaintiffs bring litigation in other courts; Hawaiian suit successfully challenges federal jurisdiction, but class certification is denied

In June 1995, while the *Delgado* defendants' motion to dismiss was pending (and shortly before Judge Lake's *forum non conveniens* dismissal and denial of class certification), more than three thousand individuals—including some of the Plaintiffs in this matter—filed suit in Florida state court. The plaintiffs in that case later voluntarily dismissed their case when it was removed to federal court. A375 (¶¶39-41). Three other suits were filed in Louisiana state court; all were eventually dismissed.[5] And after Judge Lake dismissed *Delgado* in July 1995, five more suits were filed in Mississippi state court; four were dismissed on grounds of *forum non conveniens*, and one remains pending.[6]

In 1997, a separate set of plaintiffs, represented by counsel involved in this matter, filed a DBCP class action in Hawaii state court against the same group of defendants, including Occidental. Like *Carcamo/Delgado*, that case was removed

[5] *See Soriano v. Amvac Chem. Corp.*, No. 99-3598, 2003 WL 21467557, at *1 (E.D. La. June 23, 2003).

[6] *See Espinola-E v. Coahoma Chem. Co.*, 248 F.3d 1138 (5th Cir. 2001) (per curiam) (unpublished disposition) (affirming dismissal of four cases and remanding fifth).

to federal court under the FSIA, where it was dismissed on *forum non conveniens* grounds. *See* A375 (¶¶42-46). The Ninth Circuit reversed that dismissal, holding that the same foreign party as in *Delgado* (Dead Sea Bromine) did not support FSIA jurisdiction. *See* A375 (¶47); *Patrickson v. Dole Food Co.*, 251 F.3d 795, 805-08 (9th Cir. 2001). The Supreme Court granted certiorari and held that because Dead Sea Bromine was only *indirectly* owned by Israel (and separated from the state by intermediate corporate tiers), it was not an instrumentality of the State of Israel and thus its involvement did not support removal under the FSIA. *See* A376 (¶49); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003).

The Hawaii plaintiffs returned to state court, which denied class certification on July 16, 2008, and granted defendants' motion for summary judgment on limitations grounds in 2009. *See* A376 (¶¶50-58). The Hawaii Intermediate Court of Appeals affirmed, *see* A377 (¶59), but the Supreme Court of Hawaii later reversed and ordered the individual Hawaii actions reinstated, *see* A377 (¶60); *Patrickson v. Dole Food Co.*, 368 P.3d 959, 972 (Haw. 2015) (A1267-68). The Hawaii Supreme Court concluded that, although Judge Lake's July 1995 order did not terminate the tolling period, his "October 27, 1995 final judgment dismissing *Carcamo/Delgado* for [*forum non conveniens*] clearly denied class certification and triggered the resumption of our state statute of limitations." *Patrickson*, 368 P.3d at 971 (A1267).

Because the Hawaii plaintiffs had filed within two years of that date, their action was timely. *Id.*

d. Costa Rican plaintiffs seek remand of the Texas action to state court, and class certification is ultimately denied

In Texas, the subset of *Delgado* plaintiffs from Costa Rica filed a motion in 2003 asking Judge Lake to vacate the 1995 *forum non conveniens* dismissal and to remand the case to Texas state court, arguing that the Supreme Court's *Patrickson* decision had vitiated the FSIA rationale for federal-court jurisdiction in *Delgado*. A373 (¶21). Judge Lake agreed that his permanent injunction against filing new matters was now void; but denied the motion to vacate the *forum non conveniens* dismissal. Judge Lake reasoned that a subsequent change in the law did not require vacatur where an "arguable" basis existed for the exercise of jurisdiction. *See* A917-19, A927-28. Accordingly, on March 12, 2004, Judge Lake issued a second "Final Judgment," which vacated the permanent injunction and dismissed the action for lack of jurisdiction. *See* A373-74 (¶23), A930.

The Costa Rican plaintiffs then moved Judge Lake to "remand[] the claims of Costa Rican plaintiffs" to Texas state court, for a determination of whether their action should be reinstated. *See* A935 (¶10). On June 18, 2004, Judge Lake granted that motion. *See* A374 (¶25); *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798 (S.D. Tex. 2004) (*Delgado II*) (A939-77). In an opinion addressing both the Costa Rican plaintiffs' original 1996 motion to reinstate (which the court had denied without

prejudice) and their 2004 motion to remand, Judge Lake first explained that under the 1995 return jurisdiction clause, the court had retained jurisdiction to "enforce the agreements on which the dismissal was premised and to ensure that an American forum remain[ed] available to adjudicate plaintiffs' claims if and when the highest court of a foreign country dismisse[d] them for lack of jurisdiction." *Delgado II*, 322 F. Supp. 2d at 813 (A969). Judge Lake thus held that the motion to reinstate was "a direct continuation of the prior proceedings over which the court expressly stated its intent to retain jurisdiction." *Id*.

Nevertheless, Judge Lake gave two reasons why he lacked jurisdiction to decide plaintiffs' motion to reinstate: first, review of such a motion was unnecessary to enforce the agreements on which dismissal was premised; and second, after the Supreme Court's *Patrickson* decision, no other basis for federal jurisdiction remained. *Delgado II*, 322 F. Supp. 2d at 812-14 (A969). Because the court lacked jurisdiction, remand was required so long as the court had not yet issued a "final judgment" within the strict meaning of 28 U.S.C. § 1447(c). Judge Lake reasoned that he had *not* issued such a judgment because the 1995 *forum non conveniens* dismissal had not been "final" in the sense of "extinguish[ing] 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 determine[d] that it lack[ed] subject matter jurisdiction." *Delgado II*, 322 F. Supp. 2d at 816 (A974-75). Accordingly,

while emphasizing that "the court's [*forum non conveniens*] dismissal remains valid and enforceable" and "final," Judge Lake granted the motion to remand. *Delgado II*, 322 F. Supp. 2d at 814-15 (A970); A374 (¶25). Judge Lake did not remand the other cases that had been consolidated under *Delgado* involving plaintiffs from other countries.

The Costa Rican plaintiffs from *Delgado* thus returned to the Texas state courts where, in 2006, the remaining defendants settled with all plaintiffs aside from two plaintiffs-intervenors, Nelson Rivas Ramirez and Eduardo Riva Ledezma. *See* A374 (¶29). In September 2009, Ramirez and Ledezma filed a motion for class certification. *See* A374 (¶30). After defendants unsuccessfully attempted to remove the case to federal court under the recently enacted Class Action Fairness Act of 2005, *see* A374-75 (¶¶31-35), the state court denied intervenors' motion for class certification on June 3, 2010, A375 (¶37). The next day, intervenors voluntarily dismissed their complaint. A375 (¶38).

B. The *Chavez* Proceedings

Plaintiffs are absent members of the *Delgado* putative class. Plaintiffs initially filed seven DBCP suits in the U.S. District Court for the Eastern District of Louisiana in 2011. A377 (¶61). On June 1-2, 2012, while the Louisiana cases remained pending—and almost two years to the day after the Texas state court's denial of class certification in *Delgado*—Plaintiffs also filed eight DBCP suits

against Occidental and other defendants in the U.S. District Court for the District of Delaware, six of which were consolidated under the lead case *Chavez*. *See* A378 (¶¶69, 72). The Louisiana court ultimately dismissed the cases before it on prescription (i.e., statute of limitations) grounds. *See* A377 (¶63); *Chaverri v. Dole Food Co.*, 896 F. Supp. 2d 556 (E.D. La. 2012) (A1269-83), *aff'd*, 546 F. App'x 409 (5th Cir. 2013) (A1285-89); A377 (¶64). But because the Louisiana cases had been pending when the Delaware cases were filed, the Delaware district court dismissed Plaintiffs' claims under the first-filed rule. *See* A378 (¶73). A Third Circuit panel affirmed the dismissal, *see* A379 (¶78), but in 2016, the *en banc* court reversed, resuscitating Plaintiffs' claims. *See* A379 (¶80).

The Delaware district court then concluded it lacked personal jurisdiction over six of the eight cases against Occidental—the cases at issue here. *See* A379 (¶83); *Chavez v. Dole Food Co., Inc.*, No. 12-697, 2017 WL 1363304 (D. Del. Apr. 10, 2017). Those six cases were then transferred to the U.S. District Court for the Southern District of New York in May 2017. A379 (¶83). The other two remain pending in Delaware.[7]

[7] The Third Circuit certified the two remaining cases to the Delaware Supreme Court to address whether Judge Lake's *forum non conveniens* dismissal and denial of class certification restarted the statute of limitations under Delaware law. A379 (¶84). In March 2018, the Delaware Supreme Court held that the denial of class certification in Texas state court in June 2010—and not the 1995 dismissal—ended class action tolling under Delaware law. *See Marquinez v. Dow Chem. Co.*, 183

In September 2017, Occidental moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), urging that Plaintiffs' claims were time-barred under New York's three-year limitations period.[8] Plaintiffs responded that, as absent members of the *Delgado* putative class, the limitations period governing their claims was tolled until the Texas state court denied class certification in June 2010—a period of nearly *two decades*. *See* A272-73. In response, Occidental argued that New York has never recognized the doctrine of "cross-jurisdictional class-action tolling," and even if New York did recognize that doctrine, any tolling ended with Judge Lake's 1995 "Final Judgment" dismissing *Delgado* on *forum non conveniens* grounds after denying plaintiffs' class-certification motion as moot. Noting that the touchstone for determining when class-action tolling ends is whether it would be "objectively reasonable" for an absent class member to continue relying on the putative class action to protect his claims, *see Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 117-18 (2d Cir. 2013), Occidental urged that it was unreasonable for absent class members to rely on a putative class action where, among other things, that action has been dismissed in a final judgment. *See* Occidental Mem. in

A.3d 704, 711 (Del. 2018). Today, the cases remain pending in the U.S. District Court for the District of Delaware.

[8] The parties agree that under New York law, a three-year limitations period applies to Plaintiffs' claims. *See Chavez*, 933 F.3d at 196 (A27).

Supp. of Mot. for Judgment on Pleadings at 18-21, *Chavez v. Occidental Chemical Corp.*, No. 1:17-cv-3459 (S.D.N.Y. Sept. 1, 2017), ECF No. 196-1.

On January 10, 2018, the district court denied Occidental's motion to dismiss and *sua sponte* certified the order for interlocutory appeal. *See* A328, A355-59, *Chavez*, 933 F.3d at 194-95 (A23-24). Recognizing that "New York courts have not squarely addressed whether New York law permits cross-jurisdictional tolling," and observing that "[c]ourts in this District have split, 2-2, on . . . whether the New York Court of Appeals would apply cross-jurisdictional tolling," the court concluded that, "although the matter is not free of doubt, New York most likely would recognize cross-jurisdictional class-action tolling." *See* A342-43. The court held that because Judge Lake's dismissal, through its "return jurisdiction" clause, "expressly informed absent class members that their class action would . . . proceed in a foreign forum" and did not "permanently extinguish[] . . . the *possibility* of class certification," class-action tolling persisted "until class certification was actually denied, in 2010." *See* A353-55 (emphasis added).

Occidental sought reconsideration, noting, among other things, that Judge Lake could not have "expressly informed" absent class members that their putative class actions would proceed abroad because, as the district court recognized and the *Delgado* plaintiffs readily acknowledged, class actions are not available in those foreign jurisdictions. *See* Occidental Mem. in Supp. of Mot. for Recons. at 5, *Chavez*

v. Occidental Chemical Corp., No. 1:17-cv-3459 (S.D.N.Y. Jan. 16, 2018), ECF No. 205. The court denied reconsideration, *see* A361, and again certified the matter for interlocutory appeal, A368-69. Occidental timely petitioned the U.S. Court of Appeals for the Second Circuit for permission to appeal pursuant to 28 U.S.C. § 1292(b), which the Second Circuit granted. A2158.

Following full merits briefing and oral argument, the Second Circuit certified two questions to this Court pursuant to this Court's Rule 500.27 and Second Circuit Rule 27.2:

1. Does New York law recognize cross-jurisdictional class action tolling, as described in th[e] [Second Circuit's] opinion?

2. Can a non-merits dismissal of class certification terminate class action tolling, and if so, did the Orders at issue here do so?

Chavez, 933 F.3d at 202 (A42). On the first question, the Second Circuit concluded that, given the current state of New York law and the differences between *American Pipe* tolling and cross-jurisdictional tolling, it could not determine whether this Court would adopt cross-jurisdictional tolling. *See id.* at 196-98 (A27-33). The Second Circuit similarly could not predict whether, even assuming New York law recognized cross-jurisdictional tolling, "a denial of class certification must be on the merits in order to terminate class action tolling." *See id.* at 198-201 (A33-39). The Second Circuit noted that "courts are divided on the issue of the effect on tolling, if any, of the 'return jurisdiction clause' in the July 1995 Order," citing decisions from

the Delaware Supreme Court, the Fifth Circuit, and the Hawaii Supreme Court examining the issue under Delaware, Louisiana, and Hawaii law. *Id.* at 200 & n.7 (A37-38).

On August 29, 2019, this Court accepted the two certified questions from the Second Circuit. A45-46.

SUMMARY OF ARGUMENT

It is undisputed that, "[a]bsent a toll," Plaintiffs' lawsuit must be dismissed as untimely under New York's three-year statute of limitations. A340; *see also Chavez*, 933 F.3d at 196 (A27). To avoid that limitations bar, Plaintiffs invoke the doctrine of cross-jurisdictional class-action tolling. A340, A272-73. Under that doctrine, the filing of a putative class action in one jurisdiction tolls the applicable statute of limitations for all persons encompassed by the class complaint, such that putative class members may later bring an individual suit in another jurisdiction if class-action status is denied in the first case. Because the *Delgado* proceedings were, in Plaintiffs' view, "continually pending from August 31, 1993 until . . . June 3, 2010," A272-73, Plaintiffs argue that the limitations period applicable to their claims was tolled during that entire *seventeen-year* period. *Chavez*, 933 F.3d at 190, 198 (A11, A33-34).

Plaintiffs' argument suffers from two independent flaws, either of which forecloses the availability of tolling.

First, New York has not adopted the doctrine of cross-jurisdictional class-action tolling in the context of state-law claims, and it should not do so now. That doctrine is a minority rule at odds with New York's longstanding and well-settled policy favoring repose, and adopting it would impose widely recognized costs on New York's court system without offsetting benefits. If New York is to allow cross-jurisdictional class action tolling, that is a decision for the Legislature, not the courts.

Second, even if this Court were to recognize cross-jurisdictional tolling, the *Delgado* class-certification motion was denied, and the underlying case dismissed in a final judgment, in 1995—*seventeen years* before Plaintiffs initiated this case. Beginning in 1995, the named class members were under no duty to protect the interests of absent members (and in fact *did not* protect them, instead seeking reinstatement and remand only for named class members' own individual claims). As a result, it would have been unreasonable for absent class members to rely on a non-existent putative class from a long-ago dismissed case. "[I]f the case comes to an end *for any reason* before class certification is decided, . . . [it] becomes unreasonable for any class member to continue to rely on the case and tolling ends." 1 *McLaughlin on Class Actions: Law and Practice* § 3:15 (16th ed. 2019) (emphasis added); *accord China Agritech, Inc. v. Resh*, 138 S. Ct. at 1809 n.5 (2018) (in addressing scope of *American Pipe* tolling, rejecting proposition that "denials of class certification [should be given] different effect based on the reason for the

denial"). Because Plaintiffs' claims are barred unless cross-jurisdictional tolling applies here, *see* A340, dismissal is warranted.

ARGUMENT

I. THIS COURT SHOULD NOT ADOPT THE DOCTRINE OF CROSS-JURISDICTIONAL CLASS-ACTION TOLLING

As the Second Circuit recognized, cross-jurisdictional class-action tolling has not been adopted by New York's legislature or this Court. *Chavez v. Occidental Chem. Corp.*, 933 F.3d 186, 196-97 (2d Cir. 2019) (A5, A27-30). Moreover, both history and recent trends demonstrate that a majority of courts to consider the issue have rejected the doctrine. At least two New York courts have declined to adopt cross-jurisdictional tolling, *see Henry v. Bank of Am.*, 147 A.D.3d 599, 602 (1st Dep't 2017); *In re New York Hormone Replacement Therapy Litig.*, No. 109479/05, 2009 WL 4905232 (N.Y. Sup. Ct. Nov. 30, 2009), and "most courts applying New York law have rejected *American Pipe*'s application to cross-jurisdictional actions," *McLaughlin on Class Actions*, *supra*, § 3:15.[9] Adopting cross-jurisdictional tolling

[9] *See, e.g.*, *In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 995 F. Supp. 2d 291, 311-12 (S.D.N.Y. 2014), *aff'd sub. nom.*, *SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016); *Adams v. Deutsche Bank AG*, No. 11-1893, 2012 WL 12884365, at *5 (S.D.N.Y. Sept. 24, 2012), *aff'd*, 529 F. App'x 98 (2d Cir. 2013); *Soward v. Deutsche Bank AG*, 814 F. Supp. 2d 272, 280 (S.D.N.Y. 2011); *Romig v. Pella Corp.*, No. 14-mn-00001, 2014 WL 7264388, at *5-6 (D.S.C. Dec. 18, 2014); *Coe v. Philips Oral Healthcare Inc.*, No. C13-518, 2014 WL 5162912, at *5 (W.D. Wash. Oct. 14, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1015, 1021-22 (N.D. Cal. 2014); *cf. Chavez*, 933 F.3d at 196 n.5 (A28-29) ("Courts in this Circuit have not arrived at a consensus

would place New York among just a "handful of states" to have done so. *Clemens v. DaimlerChrysler Corp.,* 534 F.3d 1017, 1025 (9th Cir. 2008). "[T]he majority of states that have considered cross-jurisdictional tolling appear to have rejected it outright." Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev. 339, 372 & n.240 (2016); *accord Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co.*, No. 13-2418, 2013 WL 6842596, at *5 (D. Kan. Dec. 27, 2013) (noting "only a small minority of jurisdictions have adopted cross-jurisdictional tolling," and rejecting cross-jurisdictional tolling to "follow the majority rule").[10]

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in predicting whether the New York Court of Appeals would adopt cross-jurisdictional tolling." (collecting cases)).

[10] Although "[t]he majority of states have not had occasion to address the issue directly," *Quinn v. La. Citizens Prop. Ins. Corp.*, 118 So. 3d 1011, 1020-21 (La. 2012), most state supreme courts to consider cross-jurisdictional tolling have rejected it. *See Rolwing v. Nestle Holdings, Inc.*, 437 S.W.3d 180, 184 (Mo. 2014) (en banc); *Quinn*, 118 So. 3d at 1022; *Casey v. Merck & Co.*, 722 S.E.2d 842, 846 (Va. 2012); *One Star v. Sisters of St. Francis*, 752 N.W.2d 668, 680-81 & n.4 (S.D. 2008); *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808-09 (Tenn. 2000); *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1104 (Ill. 1998). A handful of state supreme courts have reached the opposite conclusion. *See Patrickson v. Dole Food Co.*, 368 P.3d 959, 972 (Haw. 2015); *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 399 (Del. 2013); *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 255 (Mont. 2010); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002). At least five state intermediate courts have rejected the doctrine. *See Rader v. Greenberg Traurig, LLP*, 352 P.3d 465, 471 (Ariz. Ct. App. 2015); *Adedje v. Westat, Inc.*, 75 A.3d 401, 418 (Md. Ct. Spec. App. 2013); *Easterly v. Metro. Life Ins. Co.*, No. 06-1580, 2009 WL 350595, at *5 (Ky. Ct. App. Feb. 13, 2009); *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 944 (Pa. Super. Ct. 2002); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 758 (Tex. App.–Amarillo 1995, writ denied); *see also, e.g.*,

There are many sound reasons why New York has not adopted the doctrine of cross-jurisdictional tolling, and why this Court should decline to do so now.

A. Cross-Jurisdictional Tolling Is Contrary to New York Policy Favoring Repose

This Court should be reluctant to expand tolling in light of New York's well-settled presumption in favor of repose, and the serious public-policy implications from expanding tolling. Although "limitations provisions serve various policy goals," *Chavez*, 933 F.3d at 201 n.8 (A40), this Court has long recognized that "the primary purpose of a limitations period is fairness to a defendant." *Duffy v. Horton Mem'l Hosp.*, 66 N.Y.2d 473, 476 (1985) (citing *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969)); *accord United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (limitations "primarily designed to assure fairness to defendants" (citation omitted)). Statutes of limitations protect defendants from being forced to "defend[] stale claims, but also 'express[] a societal interest or public policy of giving repose to human affairs.'" *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 130 n.6 (2019) (quoting *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593 (2015)); *see also Britt v. Legal Aid Soc'y, Inc.*, 95 N.Y.2d 443,

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Clemens, 534 F.3d at 1025 (rejecting cross-jurisdictional tolling under California law); *Love v. Wyeth*, 569 F. Supp. 2d 1228, 1234-37 (N.D. Ala. 2008) (holding that Alabama courts would reject cross-jurisdictional tolling); *Thelen v. Mass. Mut. Life Ins. Co.*, 111 F. Supp. 2d 688, 694-95 (D. Md. 2000) (holding that Maryland would not adopt cross-jurisdictional tolling).

448-49 (2000). Limitations periods serve other interests as well: they "protect the judicial system," *Duffy*, 66 N.Y.2d at 476-77; *see also Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 125 (1948), and "avoid[] the disruptive effect of unsettled claims upon commercial intercourse," *Connell v. Hayden*, 83 A.D.2d 30, 41 (2d Dep't 1981); *see also Ehrlich-Bober Co. v. Univ. of Hous.*, 49 N.Y.2d 574, 581 (1980) (noting "New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world").

To avoid undermining the important interests in "finality, certainty and predictability," *Ajdler*, 33 N.Y.3d at 130 n.6, New York courts have traditionally construed tolling doctrines "as narrowly as possible." *Overall v. Estate of Klotz*, 52 F.3d 398, 404 (2d Cir. 1995) (citing *McCarthy v. Volkswagen of Am., Inc.*, 55 N.Y.2d 543, 548 (1982) ("tolling provisions should not readily be given an expansive interpretation")).[11] To that end, New York courts "may not extend a Statute of Limitations or invent tolling principles," *Brown v. State*, 250 A.D.2d 314, 319 (3d

[11] Given the important policies underlying statutes of limitations, the United States Supreme Court similarly has explained that statutes of limitations should be "liberally interpreted in favor of repose." *See Marion*, 404 U.S. at 322 n.14. New York's narrow construction of tolling doctrines, *Estate of Klotz*, 52 F.3d at 404, stands in sharp contrast to states such as Delaware where the "law favors broad tolling principles" and that have accepted interjurisdictional class-action tolling, *Marquinez v. Dow Chem. Co.*, 183 A.3d 704, 709 (Del. 2018).

Dep't 1998); *see also Varo, Inc. v. Alvis PLC*, 261 A.D. 262, 268 (1st Dep't 1999), "even when a party's case seems particularly compelling," *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 435-36 (1993); *accord Gregoire*, 298 N.Y. at 125 ("At times, [a statute of limitations] may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims." (citation omitted)); *Ali v. Moss*, 35 A.D.3d 640, 641 (2d Dep't 2006) ("the courts, in general, have no inherent power to extend a period of limitations in the interest of justice"). "As a rule," this Court has cautioned, "time limitations created by statute are not tolled in the absence of statutory authority." *King v. Chmielewski*, 76 N.Y.2d 182, 187-88 (1990). Thus, courts "may only construe provisions made by the Legislature creating exceptions or interruptions to the running of the time limited by statute. . . . They may not themselves create such exceptions." *Id.* at 187 (internal quotation marks and citation omitted); *cf. Jang Ho Choi v. Beautri Realty Corp.*, 135 A.D.3d 451, 452 (1st Dep't 2016) ("the doctrine of equitable tolling is not available in state causes of action in New York").[12]

[12] The New York Legislature has similarly cautioned courts not to expand tolling provisions without legislative approval. *See McCoy v. Feinman*, 99 N.Y.2d 295, 300-01 & n.2 (2002). And New York courts have recognized that even judge-made tolling doctrines are available only to "a concededly very limited extent." *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 33 (2d Dep't 1989).

Consistent with these fundamental principles, New York's Legislature has enacted numerous specific tolling provisions, reflecting its judgment that tolling requires careful weighing of competing interests. It is revealing that *none* applies to absent class members filing claims related to dismissed putative class actions.[13] Tellingly, the legislature has allowed a plaintiff to "commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action." N.Y. C.P.L.R. § 205(a). While the Second Circuit noted that some courts have applied that provision to provide cross-jurisdictional tolling, *see Chavez*, 933 F.3d at 198 (A33), it has been applied (consistent with its plain language) only when the very same plaintiff re-files an individual action—not when a previously absent plaintiff in a putative class action first brings an individual action. *E.g.*, *Stylianou v. Inc. Vill. of Old Field*, 23 A.D.3d 454, 455-56 (2d Dep't 2005); *Kleinberger v. Town of Sharon*, 116 A.D.2d 367, 370 (3d Dep't 1986). Thus, applying § 205(a) in that context is consistent with legislative intent, and does not require judicial expansion of the tolling provision.

[13] *See, e.g.*, N.Y. C.P.L.R. § 207 (tolling during defendant's absence from state); *id.* § 208 (infancy or insanity); *id.* § 209 (war); *id.* § 210 (death of party); *id.* § 214-a (medical malpractice).

B. The Costs of Adopting Cross-Jurisdictional Tolling Outweigh the Benefits

Adopting cross-jurisdictional tolling would have a number of disadvantages for the New York court system, without countervailing benefits. To begin, adopting cross-jurisdictional tolling effectively relinquishes control over the limitations period for litigation in the State's own courts—one of the most basic and fundamental aspects of state judicial policy. If another jurisdiction treats a putative class action as still pending—whether because of permissive class-action rules, judicial backlogs, or inefficiency in resolving certification or dismissal motions—the limitations period for suits in New York would not even begin running, no matter New York's own rules governing class certification, no matter how efficient New York's courts, and no matter how strong the State's policy favoring repose. *See Quinn*, 118 So. 3d at 1022 (under cross-jurisdictional tolling, "another jurisdiction's laws and the efficiency (or inefficiency) of its operations . . . control the commencement of a statute of limitations"); *Wade v. Danek Med., Inc.*, 182 F.3d 281, 288 (4th Cir. 1999) (same). As other states have recognized in rejecting the doctrine, cross-jurisdictional tolling essentially grants other jurisdictions' courts an unreviewable "power to decide when [another state's] statute of limitations begins to run." *Maestas*, 33 S.W.3d at 809; *see also Quinn*, 118 So. 3d at 1022. That result is at odds with states' historical desire not to be dependent on other jurisdictions to

determine when claims can be brought in their own courts. *See Wade*, 182 F.3d at 288.

Creating such cross-jurisdictional dependency brings with it the possibility—vividly illustrated by the facts of this case—of "suspending [the statute of limitations] indefinitely into the future and, in the process, undermining the very purpose of statutes of limitation." *Quinn*, 118 So. 3d at 1022; *accord Love*, 569 F. Supp. 2d at 1235-36 (cross-jurisdictional tolling would allow "spurious putative national class actions filed in various jurisdictions" to "prevent an Alabama statute of limitations from ever expiring"). "Such an outcome is contrary to [a state] legislature's power to adopt statutes of limitations and the exceptions to those statutes . . . ." *Maestas*, 33 S.W.3d at 809 (citations omitted). "Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*." *China Agritech*, 138 S. Ct. at 1808-09; *accord Snyder*, 81 N.Y.2d at 435-36 (rejecting rule that would give "a plaintiff . . . the power to put off the running of the Statute of Limitations indefinitely").

The Second Circuit noted that some New York courts have applied *American Pipe* tolling to lawsuits filed in New York, suggesting that allowance of *intra-jurisdictional* tolling supports also recognizing *cross-jurisdictional* tolling. *Chavez*, 933 F.3d at 198 (A32). But, as the Second Circuit ultimately conceded, intra-jurisdictional and cross-jurisdictional class-action tolling implicate very different

interests. *See id.* Intra-jurisdictional tolling does not subject New York courts and litigants to the policy choices and inefficiency of other jurisdictions. Without intra-jurisdictional tolling, a "single [judicial] system would be burdened *both* by the class action litigation and . . . numerous protective filings from the members of the class seeking to preserve their rights to bring suit individually should class certification be denied." *Maestas*, 33 S.W.3d at 808 (emphasis added; citing cases). Intra-jurisdictional tolling thus promotes "the efficiency and economy of the state's class action procedures," *Wade*, 182 F.3d at 287, and it serves the primary interests behind *American Pipe* tolling: i.e., efficiency and economy of litigation, *China Agritech*, 138 S. Ct. at 1806, 1811.

There are "no comparable benefit[s] from cross-jurisdictional tolling." *Maestas*, 33 S.W.3d at 808. While cross-jurisdictional tolling may "assist in advancing the effectiveness of suits in other jurisdictions," *Adedje*, 75 A.3d at 418, New York "has no interest . . . in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state." *Maestas*, 33 S.W.3d at 808 (quoting *Wade*, 182 F.3d at 287); *see also Barela v. Showa Denko K.K.*, No. 93-1469, 1996 WL 316544, at *4 (D.N.M. Feb. 28, 1996) (cross-jurisdictional tolling would not "further[] the economy and efficiency afforded by the New Mexico class action procedure"); *Wilke v. New England Mut. Life Ins. Co.*, No. 97-1621, 1998 WL 35167144 (Ala. Cir. Ct. July 23,

1998) ("any interest an Alabama court has in furthering economy and [e]fficiency is absent when the class action is brought in [an] outside jurisdiction"). Unsurprisingly, a number of jurisdictions that recognize *intra*-jurisdictional tolling have rejected *cross*-jurisdictional tolling. *See, e.g.*, *Maestas*, 33 S.W.3d at 808 & n.1 (Tennessee); *Ravitch*, 793 A.2d at 943-44 (Pennsylvania); *see also Love*, 569 F. Supp. 2d at 1235-37 (concluding that Alabama would reject cross-jurisdictional tolling although it had adopted intra-jurisdictional tolling); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2007 WL 3334339, at *6 (E.D. La. Nov. 8, 2007) (same, under Indiana law) .

In addition, tolling rules "invit[e] abuse." *Singer v. Eli Lilly & Co.*, 153 A.D.2d 210, 220 (1st Dep't 1990) (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring)). Any state that allows cross-jurisdictional class-action tolling

> would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as forum-shopping plaintiffs from across the country rush into [the state's] courts to take advantage of its cross-jurisdictional tolling rule, a rule that would be shared by only a few other states.

Wade, 182 F.3d at 287; *Ravitch*, 793 A.2d at 944 ("any state which independently [adopts cross-jurisdictional tolling] will invite into its court a disproportionate share of suits" (quoting *Portwood*, 701 N.E. 2d at 1104)); *Adedje*, 75 A.3d at 418 (cross-jurisdictional tolling would "render our state the focal point for complainants whose

class certifications were denied"). Given New York's broad personal jurisdiction standards and the huge amount of business transacted here, *see generally McGowan v. Smith*, 52 N.Y.2d 268, 272-73 (1981), the state would be an irresistible draw for absent class members looking for a soft landing after dismissal of a stale putative class. Adopting cross-jurisdictional tolling would make New York "a clearinghouse for cases that are barred in the jurisdictions in which they otherwise would have been brought," *Maestas*, 33 S.W.3d at 808, filed by litigants with no relationship to New York (and often against defendants with only minimal contacts with the State), "deplet[ing] [New York's] judicial resources," *Adedje*, 75 A.3d at 418.

Plaintiffs have suggested that rejecting cross-jurisdictional tolling could lead to "a profusion of duplicative 'placeholder suits.'" A347-48 (citation omitted); *see also Chavez*, 933 F.3d at 197-98 (A31-32). But Plaintiffs have not shown that placeholder suits have multiplied in any jurisdiction that rejected cross-jurisdictional tolling, and thus have not carried their burden of proving that New York's statute of limitations should be tolled here. *See* A339; *Doyon v. Bascom*, 38 A.D.2d 645, 646 (3d Dep't 1971); *cf. China Agritech*, 138 S. Ct. at 1810-11 (noting that "there is little reason to think that protective class filings will substantially increase" if *American Pipe* tolling is not extended to cover successive class action suits; noting that parties seeking tolling had "ma[d]e no showing that" circuits rejecting tolling "have experienced a disproportionate number of duplicative, protective . . . filings");

California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2054 (2017) (in holding that *American Pipe* tolling does not apply to a statute of repose, concluding that concerns about potential "influx of protective filings" "likely are overstated").

Any administrative burdens from docketing and then holding in abeyance "'protective' filings by plaintiffs who wish to preserve their right to file suit in [New York] while they seek class certification elsewhere" would be "greatly outweighed by the burdens presented by the mass exodus of rejected putative class members from federal court" and other state courts to pursue claims on the merits in New York, if the State allows cross-jurisdictional tolling. *Maestas*, 33 S.W.3d at 808-09; *accord Wade*, 182 F.3d at 287-88. Protective filings are much less onerous than the active cases that cross-jurisdictional tolling would invite. Among other things, New York courts have "ample tools at their disposal" to manage protective filings, *China Agritech*, 138 S. Ct. at 1811, including a stay of proceedings. *See Wade*, 182 F.3d at 287 n.8; *Quinn*, 118 So. 3d at 1022.

Even if this Court is not prepared to reject cross-jurisdictional tolling altogether, it should decline to find such tolling applicable in the context of the personal injury class actions relevant here. *See generally* Mitchell A. Lowenthal & Norman M. Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532 (1996); *see also Barela*, 1996 WL 316544, at *4 (explaining that because most federal courts refuse to certify mass tort

class actions, *American Pipe* "tolling in such instances would be inappropriate"). Personal injury cases necessarily involve "difficult questions of causation and the extent of injury." *Hooper v. HM Mane Sols., LLC*, 11 Misc. 3d 1091(A), 2006 WL 1214818, at *2 (N.Y. Sup. Ct. Mar. 15, 2006); *see also Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 138 (2d Dep't 2008) (New York courts have been reluctant to certify mass tort class actions); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) ("highly individualistic" determinations of harm and causation). Recognizing the individualized nature of personal injury cases, at least one New York court has questioned the wisdom of adopting cross-jurisdictional tolling in mass tort cases. *See New York Hormone*, 2009 WL 4905232. Tellingly, this putative class was never certified in *any* jurisdiction. *See* A329.

C. Because Cross-Jurisdictional Tolling Implicates Important Policy Interests and Imposes Real Costs, the Legislature, Not the Courts, Should Be the Entity to Adopt That Doctrine

Establishing statutes of limitations, and the appropriate grounds for tolling the same, are paradigmatic legislative tasks, and require careful balancing of competing interests. This Court should not usurp that legislative function by adopting cross-jurisdictional class action tolling. This Court has long recognized that addressing "complex societal and governmental issues is a subject left to the discretion of the political branches of government." *See New York State Inspection, Sec. & Law Enf. Emps. v. Cuomo*, 64 N.Y.2d 233, 240 (1984) (collecting cases); *see also, e.g.*, *People*

v. Francis, 30 N.Y.3d 737, 750-51 (2018). That the judiciary may not arrogate legislative powers to itself is "a fundamental principle" of New York's "tripartite governmental framework." *See N.Y. State Inspection*, 64 N.Y.2d at 239-40; *accord Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 28 (2006).

Statutes of limitations are created "by way of the Legislature, not through the judicial process," *Gregoire*, 298 N.Y. at 125; *see also Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), and they "represent the balance struck by the Legislature" between competing policy considerations, *Depczynski v. Adsco/Farrar & Trefts*, 84 N.Y.2d 593, 596-97 (1994); *see also, e.g.*, *ACE Sec.*, 25 N.Y.3d at 593; *Duffy*, 66 N.Y.2d at 476-77; *McCarthy*, 55 N.Y.2d at 548; *accord Burnett v. Grattan*, 468 U.S. 42, 51-53 (1984) ("A legislative definition of a statute of limitations . . . reflects a policy assessment of the state causes of action to which it applies."); *Lujan v. Regents of Univ. of Cal.*, 69 F.3d 1511, 1521-22 (10th Cir. 1995) (crafting statutes of limitations "peculiarly within the competence of the legislature"). Tolling provisions are also generally the product of legislative design and compromise. *See Snyder*, 81 N.Y.2d at 435-36; *McCarthy*, 55 N.Y.2d at 548. Cross-jurisdictional tolling, in particular, requires a delicate balancing of important policy considerations. *See Quinn*, 118 So. 3d at 1020-22; *Maestas*, 33 S.W.3d at 809. Because of the significant policy interests implicated by cross-jurisdictional tolling, the decision whether to adopt or reject the doctrine should be left to the legislature.

Maestas, 33 S.W.3d at 809; *accord Snyder*, 81 N.Y.2d at 436 ("the responsibility for balancing the equities and altering Statutes of Limitations lies with the Legislature"); *accord* Lowenthal, *The Impropriety of Class Action Tolling*, 64 Geo. Wash. L. Rev. at 569 & n.258 (discussing separation of powers concerns raised when courts "announc[e] a common law rule tolling limitation periods during the pendency of class actions").

II. IN THIS CASE, ANY CROSS-JURISDICTIONAL CLASS-ACTION TOLLING ENDED IN 1995

Even if this Court were to adopt the doctrine of cross-jurisdictional class-action tolling, Plaintiffs' claims would still be time-barred. Plaintiffs' tolling argument is based entirely on the 1993 *Carcamo/Delgado* putative class action. A272-73. But applying the legal framework adopted by state and federal courts nationwide, any tolling from the *Delgado* putative class action ended no later than Judge Lake's October 1995 Final Judgment. Once that court had denied class certification as moot and closed the case with a "FINAL JUDGMENT," the case had been effectively "shorn of its class character," *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1804 (2018). As such, "the named plaintiffs no longer ha[d] a duty to advance the interests of the excluded putative class members." *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 117 (2d Cir. 2013) (citation omitted). After that point, no members of the putative class could have reasonably relied on the dismissed action to protect their interests, especially when the named plaintiffs subsequently

took actions calculated to protect their own individual interests, and that were "inconsistent with the case proceeding as a class action." *See Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211-12 (4th Cir. 2006).

A. *Delgado* Lost Its Class-Action Character When Judge Lake Denied the Certification Motion as Moot, Thereby Relieving the Named Plaintiffs of Any Duty to Protect Absent Class Members

American Pipe tolling is based on the idea that potential class members are protected by the commencement and existence of a putative class action. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349-50 (1983); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551-52, 554 (1974); *accord Yollin v. Holland Am. Cruises, Inc.*, 97 A.D.2d 720, 720-21 (1st Dep't 1983). Tolling ends when the district court denies "class-action status," and the case is "shorn of its class character." *China Agritech*, 138 S. Ct. at 1804. At that point, "the named plaintiffs no longer have a duty to advance the interests of the excluded putative class members." *Giovanniello*, 726 F.3d at 117 (quoting *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir. 1998) (en banc)); *accord Collins v. Vill. of Palatine*, 875 F.3d 839, 844 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2014 (2018); *Bridges*, 441 F.3d at 211-12. Although Federal Rule of Civil Procedure 23 "requires that named plaintiffs function as representatives of potential class members" "during the pendency of class certification," once class status is denied, the "named plaintiff has no responsibility to pursue any additional avenue to maintain the action as a class

action," *Giovanniello*, 726 F.3d at 117; *see also id.* (after class certification is denied, "Rule 23 no longer operates to protect non-named plaintiffs"). After denial of class certification, any party who wishes to pursue a remedy must either intervene in an existing suit or file an individual action, as it is no longer objectively reasonable to assume that his rights are being protected by the actions of others. *See id.*; *Collins*, 875 F.3d at 844, 846 ("parties are on notice that they must take steps to protect their rights").

Viewed in this legal frame, any tolling from the *Delgado* putative class action ended no later than October 27, 1995, when the district court entered a "FINAL JUDGMENT" dismissing the case after having denied class certification as moot. A373 (¶17). A touchstone for determining when class action tolling ends is whether it is "objectively reasonable" for an absent class member to continue relying on the putative class action to protect his claims. *Giovanniello*, 726 F.3d at 117; *Bridges*, 441 F.3d at 211-13. Because Judge Lake's dismissal of *Delgado* and denial of class certification eliminated the named plaintiffs' legal duty to protect the interests of absent class members, it was no longer objectively reasonable for those absent class members to rely on the *Delgado* plaintiffs to protect their claims. *See Giovanniello*, 726 F.3d at 117. In fact, in dismissing the case, Judge Lake acknowledged that plaintiffs might be "forced to commence thousands of individual actions" because "class actions are unavailable in many of [plaintiffs'] home countries and . . . joinder

of large numbers of actions is not customary" there. *Delgado I*, 890 F. Supp. at 1368 (A674).

Even if Judge Lake's order "left doubts in the minds of reasonable absent class members whether they would be protected, . . . the acts that followed entry of that order surely put the issue to rest." *Bridges*, 441 F.3d at 211. After the dismissal of the putative class action, the *Delgado* putative class representatives and the thousands of named plaintiffs *made no effort* to protect the interests of absent class members. The *Delgado* class representatives consisted of citizens of 12 countries, who asserted claims on behalf of absent class members from 25 countries. After dismissal, only the Costa Rican plaintiffs sought to reopen the Texas litigation against the remaining defendants, and even those plaintiffs explicitly limited their efforts to "the claims of plaintiffs from Costa Rica." A935 (¶11). When that motion was denied without prejudice, the named plaintiffs did not ask for relief again until May 2003, more than six years later, when they sought to vacate the *forum non conveniens* dismissal based on the Supreme Court's *Patrickson* ruling. A373 (¶21).

Rather than seeking to protect the interests of absent class members, the named plaintiffs from *Delgado* took actions to protect their own individual interests. For instance, within three years of the 1995 dismissal, the Costa Rican plaintiffs had settled their individual claims against Occidental and most other defendants. A900 (¶17). Not until 2009—nearly *fourteen years* after the 1995 dismissal—did two non-

settling Costa Rican intervenors finally try (and ultimately fail) to certify a class. In this context, it was not objectively reasonable for absent class members to wait passively for well over a decade as the former class representatives served their own individual interests and made no effort to revive the claims of any remaining putative class members.

One federal court and one state supreme court, addressing the precise question before this Court, concluded that tolling ended by October 1995. *See Chavez*, 933 F.3d at 200 & n.7 (A38). As the U.S. District Court for the Eastern District of Louisiana explained:

> While the denial of class certification may not have been on the merits, coupled with the dismissal of the action, it was nonetheless sufficient to alert putative class members that they could not reasonably expect their rights to be protected by the class action. By denying the motion as moot and dismissing the case, every member of the putative class was put on notice that the motion for class action was no longer pending in the court and, therefore, that the court would not entertain the certification of the class. Thus, each member of the class was alerted that they needed to act to preserve their rights.

Chaverri v. Dole Food Co., 896 F. Supp. 2d 556, 571 (E.D. La. 2012) (A1277-78). The Fifth Circuit—which had appellate jurisdiction over Judge Lake's order, and had earlier affirmed the *Delgado* dismissal—agreed with "the [Louisiana] district court's well-reasoned opinion" that "dismissal of [*Delgado*] in 1995 would have caused the prescriptive period to begin anew." *Chaverri v. Dole Food Co.*, 546 F. App'x 409, 413 (5th Cir. 2013) (per curiam) (A1288). The Hawaii Supreme Court

likewise concluded that the October 1995 Final Judgment "clearly denied class certification and triggered the resumption of our state statute of limitations." *Patrickson v. Dole Food Co.*, 368 P.3d 959, 971 (Haw. 2015) (A1267).

Courts reaching a contrary conclusion have applied a different legal standard that is incompatible with New York law and inappropriate here. For instance, the Delaware Supreme Court reasoned that "cross-jurisdictional class action tolling ends only when a sister trial court has clearly, unambiguously, and finally denied class action status." *Marquinez v. Dow Chem. Co.*, 183 A.3d 704, 711 (Del. 2018). As discussed below, *see infra* pp. 42-46, that conclusion conflicts with the "objective reasonableness" test, New York law, and logic. Similarly, the district court in this case reasoned that a mere "possibility" that someone *might* eventually step forward to protect absent class members' claims, A354, even decades later, was enough to toll the statute of limitations indefinitely. That position cannot be the law. *Cf. China Agritech*, 138 S. Ct. at 1808-09 (tolling does not protect individuals who "slept on their rights," and "[e]ndless tolling of a statute of limitations is not a result envisioned by *American Pipe*").

B. Tolling Ends When a Court Denies Class Certification for Any Reason, Including Mootness

In its certification order, the Second Circuit stated that "[e]xisting case law sheds little light on whether a non-merits denial of class status necessarily terminates

tolling."[14] *See Chavez*, 933 F.3d at 198-201 (A33-40). That statement overlooks decisions of federal and state courts consistently and repeatedly holding that the underlying reason for the termination of class status is irrelevant to tolling. As the Second Circuit explained in *Giovanniello*, tolling stops upon denial of the class certification motion because "[a]fter class status is denied, the named plaintiff thus has no responsibility to pursue any additional avenue to maintain the action as a class action under Rule 23." 726 F.3d at 117. A contrary rule would make little sense, given that unnamed class members are protected by "'the *existence* of the [putative class action] suit,'" and that "once class status has been disallowed, Rule 23 no longer operates to protect non-named plaintiffs." *Id.* (quoting *Crown, Cork,* 462 U.S. at 350) (emphasis added; alteration in original).

In case after case, across a broad array of jurisdictions, courts have consistently held that the end of tolling is "untethered . . . from any necessary connection to the reasons for denying certification." *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003) (citing *Crown, Cork*, 462 U.S. at 353-54). To the contrary, "toll[ing] for all members of the putative class" continues only "until class certification is denied *for whatever reason*," *Bridges*, 441 F.3d at 211 (emphasis

[14] In holding that the *forum non conveniens* dismissal was not sufficient to terminate tolling, the district court focused on the fact that Judge Lake terminated "class certification . . . for reasons other than the merits, and specifically to permit the named plaintiffs to pursue the same lawsuit in more convenient fora." A352.

modified; internal quotation marks omitted). Thus, the Seventh Circuit held that when a court grants a defendant summary judgment and "terminate[s] the motion for class certification as moot," "[t]olling stops immediately" because the absent class members are "on notice that they must take steps to protect their rights or suffer the consequences." *Collins*, 875 F.3d at 841, 843-44 (internal quotation marks omitted). In *Bridges*, the Fourth Circuit concluded that tolling ends when a district court enters an administrative order denying certification *without prejudice to later renewal* even though "the district court intended its order . . . to be a case management device." 441 F.3d at 211-13. As the Fourth Circuit explained, after even a denial of certification without prejudice, "no absentee class member could reasonably have relied on the named plaintiffs, nor the district court, to protect their interests in the period following the . . . certification denial . . . even though that certification denial was only for administrative purposes," and even though the district court had established a simple method for reviving the class action. *Id.* at 211.

Consistent with this generally accepted principle, New York courts have held that terminating a class action on grounds unrelated to flaws in the class nonetheless ends tolling. For example, *Desrosiers v. Perry Ellis Menswear, LLC*, 139 A.D.3d 473, 474 (1st Dep't 2016), *aff'd*, 30 N.Y.3d 488 (2017), held that tolling ends when "the time for the individual plaintiff to move for class certification ha[d] expired."

Accord Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010, 1018-19 (9th Cir. 2000) (holding that *American Pipe* tolling ended even though "the issue of class certification was never decided"). *Clifton Knolls Sewerage Disposal Co. v. Aulenbach*, 88 A.D.2d 1024, 1025 (3d Dep't 1982), suggested that tolling ended when the court ruled on the merits of the underlying case; the court did not focus on class certification. Similar decisions from other state and federal courts are legion. *See, e.g.*, *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 562-63 (7th Cir. 2011) (voluntary dismissal of putative class action ends tolling); *Guy v. Lexington-Fayette Urban Cty. Gov't*, 488 F. App'x 9, 20 (6th Cir. 2012) (tolling ends when "certification is denied *or* the case is otherwise dismissed without being certified" (emphasis added)); *McClelland v. Deluxe Fin. Servs., Inc.*, 431 F. App'x 718, 720, 722 (10th Cir. 2011) (tolling ends when court denies class certification motion as moot in light of settlement).[15] As one leading treatise explains: "Of course, if the case comes to an end *for any reason* before class certification is decided, . . . it also becomes unreasonable for any class member to continue to rely

[15] *See also Shak v. JPMorgan Chase & Co.*, 156 F. Supp. 3d 462, 477-78 (S.D.N.Y. 2016) (unreasonable for plaintiffs to rely on class action after dismissal, even where order allowed the plaintiffs to seek leave to replead); *In re Westinghouse Sec. Litig.*, 982 F. Supp. 1031, 1035 (W.D. Pa. 1997) ("the dismissal of an entire civil action is about as 'definitive' a disposition of a motion for class certification as one is likely to find"); *see also Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244, 252 n.1 (Mont. 2010) (courts have not treated "the specific basis for denial of class certification" as "a significant factor" in analyzing class-action tolling).

on the case and tolling ends." *McLaughlin on Class Actions*, *supra*, § 3:15 (emphasis added). Any doubt on this question was eliminated by the Supreme Court's recent decision in *China Agritech*, which clarified that, for purposes of *American Pipe* tolling, there is no basis for "giv[ing] denials of class certification different effect based on the reason for the denial." 138 S. Ct. at 1809 n.5.

A bright-line rule that ends tolling when "class certification is denied for whatever reason," *Bridges*, 441 F.3d at 211 (internal quotation marks and emphasis omitted), best serves the purposes of tolling. "[F]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 354 (2d Cir. 1990) (citation omitted); *see also Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 130 n.6 (2019) ("[I]n the context of the statute of limitations, our preference for certainty militates in favor of a bright line approach." (citation and internal quotation marks omitted)). And because the generous rule created by *American Pipe* "invit[es] abuse," *Singer v. Eli Lilly & Co.*, 153 A.D.2d 210, 220 (1st Dep't 1990) (quoting *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring)), courts have "emphasize[d] the need for a bright-line rule in this area of law," *Giovanniello*, 726 F.3d at 119; *see also Bridges*, 441 F.3d at 212 (*American Pipe* requires "a bright-line rule"); *In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir. 2006) (adopting class-action tolling rule that was "clear and easy to enforce"). Any application of *American Pipe*

tolling, therefore, must stay within the doctrine's "carefully crafted parameters." *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987). "[A] narrow, clearly defined rule best serves *American Pipe* tolling," which operates as "an exception to the operation of an applicable statute of limitations" and thus stands in derogation of important societal interests in repose. *See Giovanniello*, 726 F.3d at 119.

For similar reasons, courts should judge the reasonableness of reliance by absent class members objectively, based on the facts known at the time class certification is considered. *See id*. at 117; *Collins*, 875 F.3d at 844-46; *Bridges*, 441 F.3d at 211-12. In judging whether reliance was reasonable, courts must not attribute to absent class members 20/20 hindsight, or rely on the possibility that speculative contingencies will come to pass. *See Giovanniello*, 726 F.3d at 117-18 (mere "possibility of reversal of the district court's denial of class status does not provide a basis for objectively reasonable reliance"); *Bridges*, 441 F.3d at 212-13 (given desirability of "bright-line rule" for *American Pipe* tolling, parties may not "ignor[e] a district court's administrative order denying class certification in favor of relying on plaintiffs' [subsequent] conduct").

C. The "Return Jurisdiction" Clause Did Not Prolong Tolling

The district court in this case took a different view, and suggested that "only a decision definitively disallowing class status terminates *American Pipe* tolling."[16] *Chavez*, 300 F. Supp. 3d at 535 (A351). In the district court's view, because Judge Lake's 1995 orders "anticipated that the *Carcamo*/*Delgado* class action would continue to be pursued, albeit potentially in different judicial fora," and retained jurisdiction to entertain claims if a foreign country's high court dismissed them, those orders did not terminate tolling. *Id.* (A352). Rather, only a resolution that "impl[ies] the *impossibility* of a future class action" and "*extinguish[es] . . . the possibility* of class certification" would stop tolling. *Id.* at 536-37 (A353-54) (emphasis added).

This Court should reject that legal standard and ultimate conclusion, both of which are unmoored from existing law. Neither this Court nor the majority of courts confronted with the issue have ever suggested that anything approaching "the impossibility of a future class action" is required to stop tolling. Instead, courts have asked whether it is "objectively reasonable" for absent class members to assume that others will protect their rights. *See Giovanniello*, 726 F.3d at 117. This Court should apply that same standard here.

[16] The Second Circuit took no position on the issue. *See Chavez*, 933 F.3d at 199-200 (A36-39).

Under that test, even if Judge Lake "anticipated that the *Carcamo/Delgado* class action would continue to be pursued" after entering a "FINAL JUDGMENT" dismissing the entire class action, A352, the dismissal unquestionably relieved the named class representatives of any "duty to advance the interests of the excluded putative class members." *Giovanniello*, 726 F.3d at 117. The fact that a future class action might have remained a theoretical "possibility," A354, falls far short of the necessary showing. *Cf. Giovanniello*, 726 F.3d at 118 (the "possibility of reversal of the district court's denial of class status does not provide a basis for objectively reasonable reliance by individual plaintiffs"). If "no absentee class member could reasonably have relied on the named plaintiffs . . . to protect their interests in the period following" a without-prejudice certification denial for administrative purposes in *Bridges*, *see* 441 F.3d at 211, absentee class members could not have reasonably relied on named plaintiffs here. Absent class members had no basis to assume that the named plaintiffs would protect their interests either in litigation abroad—where counsel acknowledged class actions were often unavailable, *see Delgado I*, 890 F. Supp. at 1368 (A675)—or upon potential future return to the United States. The best and most objective indication that the *Delgado* plaintiffs had no continuing obligation to protect the interests of the putative class is the fact that they promptly *did* stop representing the interests of absent class members. *See supra* pp. 40-41.

The mere existence of a return jurisdiction clause does not change that outcome. By its own terms, that clause stated that "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 . . . , *that plaintiff* may return to this court." A372 (¶15) (emphasis added). As explained by the Louisiana district court—which has long experience with the clauses that are standard features of Fifth Circuit *forum non conveniens* dismissals, *e.g.*, *Robinson v. TCI/US West Commc'ns, Inc.*, 117 F.3d 900, 907-08 (5th Cir. 1997)— Judge Lake's provision speaks in terms of *individual plaintiffs*:

> Most importantly, it does not indicate that the right to return extended to putative class members, that the case would necessarily be reopened, much less reopened as a class action, or even that other plaintiffs, aside from the plaintiff making the motion, would be allowed to rejoin the case in Texas.

Chaverri, 896 F. Supp. 2d at 573 (A1278). The Fifth Circuit agreed with that court's analysis of this standard provision. 546 F. App'x at 413. And while the return jurisdiction clause might have provided an opportunity to return, it did not obligate any litigant to return, nor did it obligate the district court "on its own [to] reconsider the certification motion at a particular time." *Bridges*, 441 F.3d at 211-12. In that respect, it shares key characteristics with other orders that have been found to terminate tolling. *See id.* (tolling ended by administrative denial of class certification

without prejudice, subject to reinstatement "*if* the plaintiffs filed a reply" "requesting the court to consider the certification motion").

Of the named plaintiffs in *Delgado*, only the Costa Rican plaintiffs ever even sought to return; no plaintiff ever sought reinstatement for other actions consolidated with *Delgado*, which involved thousands of plaintiffs from other countries. In this context, it was objectively unreasonable for absent plaintiffs to rely on the mere "possibility," *Giovanniello*, 726 F.3d at 117-18, or "hope," *Armstrong*, 138 F.3d at 1381, that others would someday invoke the return jurisdiction clause on their behalf and reinstate the entire *Delgado* class action. There was no assurance or legal duty encouraging *any* plaintiff to seek reinstatement. And under the district court's logic, tolling would have continued indefinitely. It is telling that district courts within the Fifth Circuit have sometimes adopted return jurisdiction clauses conditioned on defendants first "waiv[ing] the assertion of any limitations defenses." *E.g.*, *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991); *see also Sunoco, Inc. v. Home Ins. Co.*, 300 A.D.2d 19, 20 (1st Dep't 2002) (conditioning *forum non conveniens* dismissal "upon the tolling of the limitations period during the pendency of the New York action"). Such agreements would be unnecessary if return jurisdiction clauses necessarily tolled the running of the statute of limitations.

The Hawaii litigation further demonstrates that Plaintiffs' claims are untimely and that any reliance on the named *Delgado* plaintiffs was unreasonable. First, the

decision by many plaintiffs to file that action in October 1997—almost two years to the day after Judge Lake entered the *Delgado* Final Judgment and just as the Hawaii statute of limitations was about to expire—shows that the Hawaii plaintiffs and their counsel (who are counsel in this matter) plainly understood that their interests would not be protected by the dismissed *Delgado* putative class action. Second, even if the district court here were correct that "only a decision definitively disallowing class status terminates *American Pipe* tolling," *Chavez*, 300 F. Supp. 3d at 535 (A351), a "definitive[] disallow[ance]" of class status is *precisely what happened* in the Hawaii action on July 16, 2008. *See* A376 (¶53). It was unreasonable for absent class members to rely on the dismissed *Delgado* putative class action to protect their interests, even after the Hawaii court concluded that the DBCP claims of "banana workers from Costa Rica, Ecuador, Guatemala and Panama," *Patrickson v. Dole Food Co.*, 251 F.3d 795, 798 (9th Cir. 2001), were not amenable to class resolution. A376 (¶¶50-53). The denial of class certification in Hawaii occurred *nearly four years* before the current actions were filed in June 2012, rendering Plaintiffs' claims untimely even under the district court's theory.[17]

[17] As noted, the denial of class certification in Hawaii underscores why it was unreasonable for Plaintiffs to rely on the dismissed putative class action in *Delgado*. In any event, the Plaintiffs here make no argument that the *Patrickson* litigation provides a basis for tolling.

D. The District Court's *Forum Non Conveniens* Dismissal Was a Final Order and Did Not Constitute a Stay

Plaintiffs have argued that Judge Lake's 1995 *forum non conveniens* dismissal should not be taken at face value as a "FINAL JUDGMENT," *see* Br. For Plaintiffs-Appellees at 39-40, 53-54 & n.6, *Chavez v. Occidental Chemical Corporation*, No. 18-1120 (2d Cir.) (Doc. 51) ("*Chavez* 2d Cir. Br."); A709-10; A373 (¶17), but rather viewed as equivalent to a stay. That argument fails.

An order dismissing a case on *forum non conveniens* grounds is a final, appealable order. *E.g.*, *Moreno v. LG Elecs., USA Inc.*, 800 F.3d 692, 696 n.3 (5th Cir. 2015); *United States ex rel. Mosher Steel Co. v. Fluor Corp.*, 436 F.2d 383, 384 (2d Cir. 1970). More importantly, because a *forum non conveniens* dismissal "puts an end to the action and hence is final and appealable," it does not preserve the dismissed action "as against the running of the statute of limitations and for all other purposes." *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) (citation omitted); *see also Castanho v. Jackson Marine, Inc.*, 484 F. Supp. 201, 206 (E.D. Tex. 1980) (*forum non conveniens* dismissal, "unlike a stay, does not toll the running of the statute of limitations"), *aff'd in part, appeal dismissed in part*, 650 F.2d 546 (5th Cir. 1981).

Neither the July 1995 dismissal order nor the October 1995 Final Judgment purported to stay the case; by its plain terms, the Final Judgment dismissed the Texas litigation in its entirety. *See* A709-10. "A dismissal," even one on *forum non*

conveniens grounds, "ends the case before the court." *Mañez v. Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 583 (7th Cir. 2008). Thus, Judge Lake's comment that his dismissal "was 'final' only for purposes of appealing the court's [*forum non conveniens*] decision," *Delgado II*, 322 F. Supp. 2d at 816 (A974), meant that Plaintiffs' claims were "finished before the U.S. courts" and "the underlying litigation [was] finished," *see Mañez*, 533 F.3d at 583-84. Moreover, consistent with these well-established principles, Judge Lake repeatedly rejected Plaintiffs' attempts to recharacterize his dismissal order, explaining that the *forum non conveniens* dismissal was both "valid," *Delgado II*, 322 F. Supp. 2d at 809 (A959-60), and "final," *id.* at 813 (A967). *See also Chaverri*, 896 F. Supp. 2d at 569 (A1276).

E. Judge Lake Dismissed Plaintiffs' Then-Pending Motion for Class Certification

Plaintiffs have also argued that because the *Delgado* plaintiffs did not replead their Texas state-law motion for class certification under Federal Rule of Civil Procedure 23 after removal, the denial did not operate as a denial of class certification because "[t]here was no pending motion under Rule 23 to deny." *Chavez* 2d Cir. Br. 41-42. Both the Second Circuit and the district court correctly rejected that argument, which provides no basis for this Court to extend tolling. *Chavez*, 933 F.3d at 192, 201 (A16, A39); A352.

Repleading was unnecessary after removal because "federal courts will accept, as operative, papers served in state court which satisfy the notice-giving

function of pleadings under the Federal Rules of Civil Procedure." *Frank B. Hall & Co. v. Rushmore Ins. Co.*, 92 F.R.D. 743, 745 (S.D.N.Y. 1981) (citing Fed. R. Civ. P. 81(c)(2)). The Fifth Circuit has consistently held that plaintiffs in a removed action can rely on state court pleadings. *E.g.*, *Peña v. City of Rio Grande City*, 879 F.3d 613, 617 (5th Cir. 2018) (per curiam); *Murray v. Ford Motor Co.*, 770 F.2d 461, 464 (5th Cir. 1985). Thus, if a federal district court determines that a plaintiff's motion for class certification filed in state court satisfies Rule 23's requirements, Rule 81(c) applies and the plaintiff need not file a new motion in federal court. *See Stipelcovich v. Directv, Inc.*, 129 F. Supp. 2d 989, 990 (E.D. Tex. 2001) (considering "plaintiff's pending motion (filed in the state action) for a national class action"); *see also East Maine Baptist Church v. Union Planters Bank, N.A.*, 244 F.R.D. 538, 541 (E.D. Mo. 2007) ("[W]hen a state-court certified class action is removed to federal court, it arrives at the federal court as a certified class in the same procedural posture as it left the state court." (citing *FDIC v. Meyerland Co.*, 960 F.2d 512, 520 (5th Cir. 1992)).

Plaintiffs have argued that the Texas class action rule is "indisputably distinct" from the federal rule. *See* Chavez 2d Cir. Br. 42. But "Rule 42 of the Texas Rules of Civil Procedure . . . is patterned after Federal Rule of Civil Procedure 23." *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000). Recognizing that the Federal Rules of Civil Procedure "apply to a civil action after it is removed from

a state court," Fed. R. Civ. P. 81(c), Judge Lake ordered the *Delgado* plaintiffs to file "a copy of Plaintiffs' Amended Motion for Class Certification filed in [state court]" to determine "[w]hether class certification [was] appropriate." A483-84. Both parties and Judge Lake expressed an understanding that plaintiffs had a motion for certification pending. In opposition to the plaintiffs' motion, the defendants explained at length "why class certification is not appropriate" under "Federal Rule[] of Civil Procedure 23," and made clear their understanding that "[s]ince plaintiffs sought certification in state court under [state rules]" they would "proceed in this Court under the analogous Federal Rules, i.e., 23." A496-97 & n.2. The defendants further argued that "plaintiffs' *motion for class certificat[ion]* should be denied," arguing that the requirements of Federal Rule 23 were not met. *See* A505 (emphasis added). The plaintiffs also explicitly invoked "Fed. R. Civ. P. 23 criteria" and "Rule 23 jurisprudence" to "pray that their *motion for certification* be granted." A525-26 (emphasis added). And Judge Lake noted in the very opinion where he dismissed *Delgado* that "plaintiffs have sought class certification in several of the pending actions." *Delgado I*, 890 F. Supp. at 1368 (A675).

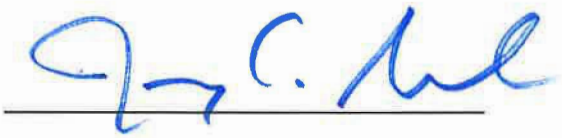
Thus, as both the Second Circuit and the district court here correctly recognized, class certification was directly before Judge Lake, and he explicitly denied as moot Plaintiff's "motion for certification." A525-26; *see also Chavez v. Dole Food Co.*, 836 F.3d 205, 212 (3d Cir. 2016) (en banc) (A2117) (holding that

Judge Lake's order denying "all other pending motions as moot" included "the plaintiffs' pending motion for class certification" (citing *Delgado I*, 890 F. Supp. at 1375)).

CONCLUSION

As to the first certified question, this Court should hold that New York law does not recognize the doctrine of cross-jurisdictional class action tolling. If this Court concludes otherwise as to the first question, then it should answer the second certified question in the affirmative and hold that a non-merits dismissal of class certification terminates class action tolling, and the Orders at issue here did so.

Dated: November 15, 2019



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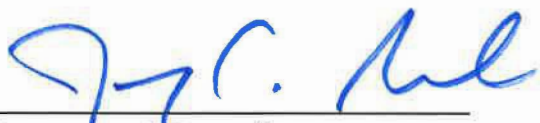

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