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

REPLY BRIEF OF APPELLANT OCCIDENTAL CHEMICAL CORPORATION

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Date Completed: February 3, 2020

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

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Chaverri v. Dole Food Co.,
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Chavez v. Dole Food Co.,
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Cases—Continued: **Page(s)**

China Agritech, Inc. v. Resh,
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Marquinez v. Dow Chem. Co.,
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Rolwing v. Nestle Holdings, Inc.,
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Other Authorities:

David D. Siegel & Patrick M. Connors, *New York Practice*
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Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 La. L. Rev. 433 (2014) 10, 12

John H. Beisner & Jessica D. Miller, *Litigate the Torts, Not the Mass* (2009), https://bit.ly/2TjLDKg 6, 10, 12, 18

Joseph M. McLaughlin, *McLaughlin on Class Actions*
(16th ed. 2019) 22, 24

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) 12

PRELIMINARY STATEMENT

It is undisputed that Plaintiffs' claims are time-barred unless they prevail on *both* certified questions. First, this Court would have to depart from the rule that "time limitations created by statute are not tolled in the absence of statutory authority," *King v. Chmielewski*, 76 N.Y.2d 182, 187 (1990), and adopt a cross-jurisdictional class-action tolling rule without any statutory basis or any New York precedent adopting such a rule. Plaintiffs would justify that departure based almost entirely on concerns about potential "'placeholder' suits." Chavez Br. 32. But the U.S. Supreme Court has repeatedly rejected materially identical arguments for extending tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1810-11 (2018); *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2053-54 (2017). Such threadbare policy arguments do not justify departing from this Court's rule of leaving the extension of tolling principles to the Legislature.

Second, for Plaintiffs to prevail, this Court must depart from overwhelming authority supporting an objective, bright-line rule for determining when tolling ends: tolling ceases when class certification is denied or the case is dismissed, for whatever reason. Plaintiffs perceive "no need" for a "categorical[]" rule. Chavez Br. 1-2. They exhort the Court to simply decide "on the basis of the specific procedural history of this case" that tolling persisted for seventeen years. *Id*. Such a fact-

intensive, case-specific approach runs contrary to this Court's consistent "preference for certainty [and] . . . bright-line approach[es]" in the statute-of-limitations context. *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 130 n.6 (2019) (citation omitted). And the open-ended approach Plaintiffs urge—among other things, requiring courts to look behind final judgments to see whether they "functional[ly]" ended the matter, Chavez Br. 48 n.5—would leave future litigants in the dark about when they must file suit, and about their litigation risks. If it reaches the second question, this Court should adopt the U.S. Supreme Court's view that denials of class certification should not have "different [tolling] effect based on the reason for the denial," *China Agritech*, 138 S. Ct. at 1809 n.5.

ARGUMENT

I. CROSS-JURISDICTIONAL CLASS-ACTION TOLLING HAS NO PLACE IN NEW YORK LAW

Plaintiffs laud the alleged policy benefits of cross-jurisdictional tolling. Those arguments are wrong. But Plaintiffs never dispute the most important point: the absence of *any* basis for such tolling in New York's numerous, meticulously crafted tolling statutes. As this Court explained nearly a century ago:

> The Legislature determines under what circumstances the time limited by statute for commencing an action shall be suspended. The courts construe provisions made by the Legislature creating exceptions or interruptions to the running of the time limited by statute in which an action may be begun. They may not themselves create such exceptions.

Mack v. Mendels, 249 N.Y. 356, 358-59 (1928).

Plaintiffs do not contest that principle. *Accord King*, 76 N.Y.2d at 187. Nonetheless, they urge that applying it here would be "misplaced" because "New York courts" have occasionally endorsed intra-jurisdictional class-action tolling. Chavez Br. 32-33. But this Court has never endorsed even the core doctrine of *American Pipe* under modern class-action rules—let alone *cross-jurisdictional* class-action tolling. Plaintiffs ask this Court to do precisely what it has previously refused: to "open a new tributary in the law" without statutory basis, "breath[ing] life into otherwise stale claims—some, like this one, going back nearly 20 years." *Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52, 58 (2007). This Court should decline to do so.

A. New York Case Law Does Not Support Cross-Jurisdictional Class-Action Tolling

Plaintiffs assert that New York precedent "strongly supports" them. Chavez Br. 21. But their cited cases establish, at most, that New York courts have occasionally endorsed intra-jurisdictional class-action tolling. Plaintiffs do not cite (nor is Occidental aware of) any New York decision endorsing cross-jurisdictional tolling.

Plaintiffs urge without elaboration that cases "speak of tolling principles in broad terms." Chavez Br. 22. This Court has cautioned against overreading "[g]eneral language in judicial opinions" to justify statutorily unsupported tolling rules. *Mack*, 249 N.Y. at 359. Regardless, the premise is false. Far from endorsing

tolling "in broad terms," Plaintiffs' principal authority—*Brinckerhoff v. Bostwick*, 99 N.Y. 185 (1885)—spoke narrowly. *Brinckerhoff* merely held that, in an equitable shareholder action "*necessarily* commenced in [all stockholders'] behalf and for their benefit," and which "*could not* have been commenced by one stockholder for himself alone," it was proper to treat later-joining plaintiffs as if they had been parties since the beginning. *Id.* at 194 (emphasis added). *Brinckerhoff* laid out no "broad" "tolling principles." Indeed, it did not even apply tolling to a newly-filed action in the same jurisdiction (i.e., the rule of *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)). Moreover, its stated rationale is plainly inapplicable to the kind of actions countenanced under modern class-action rules.[1]

Plaintiffs' other citations are even less relevant. *See Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 432 (1993) (observing, in dicta, that defendants did

[1] This Court's reasoning in *Brinckerhoff* is unsurprising given the history of New York class actions. Under the "New York criterion for the class action" that persisted "with little change from the Field Code amendment of 1849" until CPLR Article 9 was enacted in 1975, class actions were restricted "virtually to the point of exclusiveness" to cases "where only injunctive or declaratory relief was sought," with the exception of "money claims [that] could be satisfied only out of a limited fund." David D. Siegel & Patrick M. Connors, *New York Practice* § 140 (6th ed. 2019). By contrast, cases where (as here) "the court would have to award money judgments in different sums to a large number of people" were "prototypical of where class status would be denied." *Id.* Plaintiffs' reliance on *Brinckerhoff* thus ignores not only the narrow scope of that decision, but also the fact that it dealt with a very different representative-action statute that created an "almost total barrier to the use of class actions for money." *Id.*

not challenge tolling); *Sutton Carpet Cleaners, Inc. v. Firemen's Ins. Co.*, 299 N.Y. 646 (1949) (affirming, without opinion, Appellate Division order affirming, without opinion, Supreme Court order mentioning tolling in passing). And while some Appellate Division decisions have endorsed *American Pipe* tolling, *see* Chavez Br. 21-22 (citing cases), they did so with virtually no analysis generalizable to the cross-jurisdictional context. Certainly, the cases give no consideration to the rule that courts may not create new tolling principles under New York law. Regardless, because "[t]he rule of *American Pipe* . . . does not mandate cross-jurisdictional tolling," *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008), cases endorsing the *American Pipe* rule shed no light on the latter issue. *See* Occidental Br. 23-24.

Plaintiffs separately assert that "the justifications" for intra-jurisdictional tolling "also extend to cross-jurisdictional tolling." Chavez Br. 22. In their view, cross-jurisdictional tolling promotes the same interest of avoiding protective lawsuits and promoting judicial efficiency. *Id.* at 22-24. But Plaintiffs' myopic focus on the specter of protective lawsuits ignores that class-action tolling "represent[s] a careful balancing of [different] interests," which courts have resisted woodenly extending to new contexts. *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 119 (2d Cir. 2013) (citation omitted). Notably, the U.S. Supreme Court has limited *American Pipe* tolling *twice* in the past three years—both times rejecting

arguments for expanded tolling based on the risk of protective filings. *China Agritech*, 138 S. Ct. at 1810-11; *ANZ Sec., Inc.*, 137 S. Ct. at 2053-54. Plaintiffs never acknowledge, let alone grapple with, the Supreme Court's repeated rejection of materially identical policy arguments.[2]

Plaintiffs' effort to equate intra- and cross-jurisdictional tolling ignores the context in which traditional class-action tolling developed. The Supreme Court's class-action tolling cases were federal-question cases brought in federal court. *See Crown, Cork*, 462 U.S. at 347-48; *American Pipe*, 414 U.S. at 540-41. *American Pipe* tolling is thus self-contained—applying the same jurisdiction's laws in both the initial class action and subsequent individual actions, internalizing tolling's costs and benefits within one judicial system.

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[2] Plaintiffs claim the DBCP litigation "demonstrate[s] the need to adopt cross-jurisdictional tolling . . . to encourage class members to rely on the pending class action rather than filing their own lawsuits." Chavez Br. 24. Not so. Class-action tolling reduces needless individual lawsuits *only* "[i]f certification is granted," in which case "the claims [can] proceed as a class and there would be no need for the assertion of any claim individually." *China Agritech*, 138 S. Ct. at 1806. But where (as here) no class is ever certified, plaintiffs must still ultimately file individual actions, and tolling only serves to postpone claims that would need to be litigated individually anyway. Indeed, the DBCP litigation is a textbook illustration of why, *contra* Chavez Br. 33-34, "the purposes of *American Pipe*" are "ill-served" in mass-tort cases, which "are widely recognized as usually uncertifiable." John H. Beisner & Jessica D. Miller, *Litigate the Torts, Not the Mass* 42 (2009), https://bit.ly/2TjLDKg.

Cross-jurisdictional tolling, by contrast, imposes costs on jurisdictions with little or no offsetting benefit. Most importantly, it abandons a state's "interest in managing its own judicial system." *Clemens*, 534 F.3d at 1025; *see* Occidental Br. 29. Plaintiffs claim that "adopting cross-jurisdictional tolling . . . would not be ceding authority to another state." Chavez Br. 27. But they cannot contest that cross-jurisdictional tolling would hold New York hostage to the inefficiencies and idiosyncrasies of myriad other jurisdictions. Plaintiffs assert that New York is protected by its borrowing statute, N.Y. C.P.L.R. 202. But CPLR 202 simply requires "a court, when presented with a cause of action accruing outside New York, [to] apply the limitation period of the foreign jurisdiction if it bars the claim," unless "the cause of action accrues in favor of a New York resident." *Ins. Co. of N. Am. v. ABB Power Generation, Inc.*, 91 N.Y.2d 180, 187-88 (1997). CPLR 202 would not prevent indefinite tolling due to the divergent laws and policies of other jurisdictions.

B. New York Law and Policy Counsel Against Cross-Jurisdictional Tolling

Occidental identified compelling legal and policy reasons to reject cross-jurisdictional tolling. *See* Occidental Br. 25-35. Plaintiffs respond that New York's policy of "respecting the judicial proceedings of sister States" supports cross-jurisdictional tolling. Chavez Br. 24 (quoting *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 205 (1990)). But declining to recognize cross-jurisdictional tolling does not involve disregarding another state court's judgment respecting the

parties before it, let alone "discredit[ing] the application of [another state's] law by [that state's] courts." *Home Ins. Co.*, 75 N.Y.2d at 205. The only question is whether *New York* statutes of limitations are tolled by class actions in other jurisdictions.

Plaintiffs next perceive a supposed "policy of nondiscrimination toward other states" in CPLR 205(a), which permits a plaintiff whose case has been dismissed to refile within six months. Chavez Br. 25. But such a "policy" of "nondiscrimination" is belied by CPLR 202, which explicitly applies a more generous limitations rule to New York residents than residents of other states. *See* N.Y. C.P.L.R. 202. True, CPLR 205(a) applies without regard to where the original action was filed—but it *only* provides a six-month re-filing window, *only* when the original action was terminated on specified grounds, and *only* for "'the plaintiff' who prosecuted the initial action." *Reliance*, 9 N.Y.3d at 57 (quoting N.Y. C.P.L.R. 205(a)). CPLR 205(a) thus represents a careful "balance struck by the Legislature," *Depczynski v. Adsco/Farrar & Trefts*, 84 N.Y.2d 593, 596 (1994), which this Court has scrupulously enforced—even forbidding the "parent corporation" of the original plaintiff to take advantage of "the benefit provided by [CPLR 205(a)]." *Reliance*, 9 N.Y.3d at 57. CPLR 205(a) does not support Plaintiffs' effort to "open a new tributary in the law, . . . and breathe life into otherwise stale claims." *Id.* at 58. It supports *Occidental* by showing how cautiously the Legislature has trod in this area.

Plaintiffs cite numerous other tolling statutes, attempting to suggest a general legislative policy in favor of tolling. Chavez Br. 26. But the fact that the Legislature has enacted so many carefully crafted tolling provisions, *not one of which applies to Plaintiffs*, strongly supports Occidental. Adherence to the principle that "time limitations created by statute are not tolled in the absence of statutory authority," *King*, 76 N.Y.2d at 187, is "*particularly* [warranted] where, as here, the legislature has proven itself adept at listing exceptions," *Weatherly v. Pershing, L.L.C.*, 945 F.3d 915, 919 (5th Cir. 2019) (emphasis added).

Finally, Plaintiffs contend that rejecting cross-jurisdictional tolling would "cede control over limitations to a private defendant." Chavez Br. 27. Not so. Absent putative class members can file individual actions within the normal statutory limitations period (as modified by otherwise applicable tolling doctrines). Plaintiffs accuse Occidental of "delays and jurisdictional machinations," Chavez Br. 28—apparently a reference to Occidental filing largely "*success[ful]* . . . motions" to enforce black-letter procedural rules and protect its rights, A349 (emphasis added)—that Plaintiffs assert "prevented [them] from obtaining a hearing on the merits of their claims." Chavez Br. 3. But nothing prevented Plaintiffs from filing individual claims in a proper forum: thousands of individual DBCP plaintiffs (including some Plaintiffs in this case) filed individual claims in June 1995, *see* A375 (¶39)—less than three years after Plaintiffs allege their "claims were

discovered, and thus accrued," A340. And, far from delaying, Occidental resolved virtually all of the original *Carcamo/Delgado* claims by 1997, A900 (¶17), and all defendants settled with the rest of the plaintiffs (except for two intervenors) by 2006. A1040. Thus, to the extent New York has a "policy of deciding cases on the merits," Chavez Br. 26 (quoting *Bobet v. Rockefeller Ctr., N., Inc.*, 78 A.D.3d 475, 475 (1st Dep't 2010)), that policy favors clear limitations periods requiring plaintiffs to bring timely claims. Had Plaintiffs diligently pursued individual claims, their cases would almost certainly have been decided or settled long ago.

By contrast, cross-jurisdictional tolling would make "the limitations period . . . subject to manipulation," allowing plaintiffs to toll the New York limitations period by filing a putative class action in another jurisdiction (perhaps deliberately chosen for slowness), and seeking "stays, extensions or postponements" that New York courts cannot control. *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 542 (1994). This is not a hypothetical concern: filing class claims simply "to prolong limitations periods" has become "a stock tool for some plaintiffs' lawyers." Beisner & Miller, *Litigate the Torts* at 31; *see also* Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 La. L. Rev. 433, 438 (2014) ("the predominant reason behind the continued filing of putative personal injury class actions is likely" to exploit tolling).

C. Cross-Jurisdictional Tolling Is a Minority Rule, and Courts Are Increasingly Loath to Expand Class-Action Tolling

Plaintiffs repeat the district court's assertion that a "majority of states to have considered the question have adopted cross-jurisdictional tolling," and argue that "the trend is in favor of tolling." Chavez Br. 28 (internal quotation marks omitted). Respectfully, both statements are incorrect. On the contrary, "most state supreme courts to consider cross-jurisdictional tolling have rejected it." Occidental Br. 24 n.10 (surveying cases).[3] Despite ostensibly dedicating a section of their brief to arguing otherwise, Plaintiffs never contest Occidental's survey of relevant state cases or "show their work" in counting to a supposed "majority."

Nor is there a "trend" in favor of tolling. First, Plaintiffs' assertion that "only Virginia" has rejected cross-jurisdictional tolling "[s]ince 2010" (Chavez Br. 28 (citation omitted)) is wrong: Missouri and Louisiana rejected cross-jurisdictional tolling in 2014 and 2012, respectively. *Rolwing v. Nestle Holdings, Inc.*, 437 S.W.3d 180, 181, 184 (Mo. 2014) (en banc); *Quinn v. La. Citizens Prop. Ins. Corp.*, 118 So. 3d 1011, 1022 (La. 2012).

More importantly, searching for a "trend" loses the forest for the trees. The U.S. Supreme Court has declined to extend class-action tolling *twice* in the last three

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[3] Similarly, "[a]t least five state intermediate courts have rejected the doctrine." Occidental Br. 24 n.10. Plaintiffs cite just two contrary state intermediate court decisions. Chavez Br. 31.

years, in decisions that postdate the state supreme court cases Plaintiffs cite. *China Agritech*, 138 S. Ct. at 1804; *ANZ Sec., Inc.*, 137 S. Ct. at 2052. Both times, the Supreme Court rejected arguments invoking the risk of protective filings as a basis for extending tolling—the heart of Plaintiffs' argument here.

Plaintiffs also ignore the growing recognition of the "exorbitant" costs of class-action tolling. Mitchell A. Lowenthal & Norman M. Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 537 (1996). Contrary to Plaintiffs' conclusory assertion that tolling has no "evident ill effects," Chavez Br. 32 (quoting A349), class-action tolling has been regarded with increasing skepticism *precisely* because of its negative consequences. Tolling often "undermine[s] [settlement] efforts . . . by creating disabling uncertainty about current and future plaintiff populations." Grabill, *The Pesky Persistence of Class Action Tolling*, 74 La. L. Rev. at 481. And "[s]avvy plaintiffs' lawyers . . . have exploited [class-action tolling] precisely to . . . extend[] limitations periods by filing class actions that in truth have no hope of certification." Beisner & Miller, *Litigate the Torts* at 37. Insofar as there is a relevant "trend," it is growing acknowledgment that class-action tolling "invit[es] abuse," *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring), and should not be lightly expanded. This Court should leave any extension of tolling to the Legislature.

II. ANY CLASS-ACTION TOLLING ENDED IN 1995

If this Court reaches the second certified question, it should hold that "a non-merits dismissal of class certification [can] terminate class action tolling." A13. Tolling ends when class certification is denied (and, *a fortiori*, when the case is dismissed without being certified) for any reason, including mootness. Occidental Br. 42-47. Therefore, tolling from the *Delgado* putative class action ended in 1995. *Id.* at 39. Plaintiffs disagree with that conclusion, but studiously avoid articulating (let alone justifying) any clear alternative rule for determining when tolling ends—doubtless because any rule that could justify *seventeen years* of tolling here would be broadly overinclusive, exceptionally vague, or both.

A. Class-Action Tolling Ends When a Court Denies Class Certification or Dismisses the Case for Any Reason

This Court should adopt "[a] bright-line rule that ends tolling when 'class certification is denied for whatever reason'" or, *a fortiori*, when the case is dismissed for any reason before class certification is decided. Occidental Br. 46 (quoting *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006)). That rule would be clear and easily administered, consistent with this Court's longstanding preference for "bright line, readily verifiable rule[s]" in the statute-of-limitations context. *MRI Broadway Rental, Inc. v. U.S. Mineral Prods. Co.*, 92 N.Y.2d 421, 427 (1998) (citation omitted). Plaintiffs' arguments against that approach are meritless, and they offer no workable alternative.

1. Precedent and Policy Support Occidental's Bright-Line Approach

A bright-line rule encompassing merits and non-merits denials of class certification (or dismissals) is consistent with—and logically flows from—an approach to class-action tolling grounded in objective reasonableness. *Contra* Chavez Br. 20, 48-49. Tolling ends when it is no longer "objectively reasonable" to rely on a putative class action to protect the interests of absent class members. *Giovanniello*, 726 F.3d at 117. But once a case is dismissed or certification is denied, "the named plaintiffs no longer have a duty to advance the interests of the excluded putative class members." *Id.* (quoting *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir. 1998) (en banc)). And it is not objectively reasonable to rely on others to advance one's interests once they lack any duty to do so. *Id.* The focus is on what was reasonable, at the time, from a plaintiff's perspective.[4] Therefore, tolling ends when class certification is denied or the case is dismissed, "for whatever reason." *Bridges*, 441 F.3d at 211. Plaintiffs resist that conclusion, but never squarely dispute its premises.

[4] Occidental's position does not imply that later decisions by other courts interpreting the 1995 dismissal (often addressing questions unrelated to tolling) were "objectively unreasonable." *Contra* Chavez Br. 36-40. In any case, to the extent those courts applied a legal standard ungrounded in New York law and contrary to the majority view of other jurisdictions, their conclusions are unpersuasive.

Occidental's bright-line approach is also consistent with the overwhelming weight of authority. *See* Occidental Br. 43-47. Plaintiffs attempt to distinguish some of Occidental's authorities, Chavez Br. 51-55, but resort to the kind of fact-specific distinctions that always exist between cases.[5] Tellingly, Plaintiffs never engage the *reasoning* of the numerous authorities rejecting a distinction between merits and non-merits denials of class certification. For example, Plaintiffs distinguish *China Agritech* on its facts, but never address the Supreme Court's express rejection of a distinction between merits- and non-merits certification denials for tolling purposes. *See China Agritech*, 138 S. Ct. at 1809 n.5. And while Plaintiffs suggest the Fourth Circuit was "reluctant" to rely solely on the rule it adopted in *Bridges*, Chavez Br. 54, they never dispute that the court *did adopt and apply* the "bright-line rule" that tolling ends on "the date [class certification] is denied, for whatever reason." *Bridges*, 441 F.3d at 212. And, to the extent the Fourth Circuit drew additional support from "the events that followed" certification denial, *id.* at 211-12, much the same (and more) could be said about post-1995 events here. *See infra* pp. 27-29; Occidental Br. 4-5, 40-41, 49-52.

[5] Indeed, Plaintiffs' arguments inadvertently highlight the problem with their case-specific, non-bright-line approach: unpredictability due to the ever-present availability of case-specific distinctions.

Other than the district court decision in this case and the Delaware DBCP litigation, the only contrary authority cited by Plaintiffs is *Betances v. Fischer*, 144 F. Supp. 3d 441 (S.D.N.Y. 2015), in which the New York Attorney General (representing state official defendants in a putative class action) *endorsed* the duty-based rationale of *Giovanniello* and the bottom-line conclusion that tolling ends when (as here) a case is dismissed and class certification is denied for mootness. *See id.* at 456-58; Defs.' Mem. Supp. Mot. Summ. J. at 18-22, *Betances v. Fischer*, 144 F. Supp. 3d 441 (S.D.N.Y. 2015) (No. 11-cv-3200), 2015 WL 13679839; Defs' Mem. Opp'n Pls.' Mot. Summ. J. at 19-22, *Betances v. Fischer*, 144 F. Supp. 3d 441 (S.D.N.Y. 2015) (No. 11-cv-3200), 2015 WL 13679844. The district court disagreed. *Betances*, 144 F. Supp. 3d at 457-58. But the *Betances* court's reasoning has aged less well than the Attorney General's, having been superseded by *China Agritech*, 138 S. Ct. at 1809 n.5.[6]

[6] The *Betances* court's comments on *when* tolling ends were dicta: the issue in *Betances* was whether (pre-*China Agritech*) plaintiffs could avail themselves of tolling to file a second class action, where a court dismissed a prior action and denied class certification as moot. Subsequently, the district court concluded that its 2015 holding was still sound under *China Agritech*, *see Betances v. Fischer*, 403 F. Supp. 3d 212, 222-27 (S.D.N.Y. 2019), but the district court never cited, and appears to have simply overlooked, the Supreme Court's express rejection of the merits/non-merits distinction adopted in *Betances*. *See China Agritech*, 138 S. Ct. at 1809 n.5. The Second Department recently adopted the same misreading of *China Agritech* in *Badzio v. Americare Certified Special Services, Inc.*, 177 A.D.3d 838 (2d Dep't 2019), likewise overlooking the critical portion (footnote 5) of *China Agritech*.

Sound policy also supports Occidental's approach. In the statute-of-limitations context, this Court has repeatedly refused to embrace open-ended standards "dependent on a litany of events." *Glob. Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 530 (1999). Rightly so. The risk that courts will "afford different weight to the same factors based on different circumstances, possibly generating inconsistent outcomes," *Deutsche Bank Nat'l Trust Co. v. Barclays Bank PLC*, --- N.Y.3d---, 2019 N.Y. Slip Op. 08519, at *4 (2019), would generate unacceptable uncertainty for litigants. For defendants, a "bright line approach" ensures "a degree of certainty and predictability." *MRI Broadway*, 92 N.Y.2d at 428 (citation omitted). Plaintiffs, too, need "a clear date" for the end of tolling so their ability to bring individual claims is not unexpectedly extinguished. *Bridges*, 441 F.3d at 212-13. Indeed, in this context, clarity is arguably more important for plaintiffs than the length of tolling. Absent class members are subject to the same limitations periods (and other tolling doctrines) as injured parties normally are. Those prepared to file individual claims if needed—the only ones who would benefit from tolling under *China Agritech*—simply need to know *when* to file.

Plaintiffs contend that a bright-line rule is "[in]consistent with . . . the purposes of class-action tolling." Chavez Br. 49. But the sole purpose of class-action tolling is "efficiency and economy of litigation." *China Agritech*, 138 S. Ct. at 1806, 1811 (quoting *American Pipe*, 414 U.S. at 553); *see ANZ Sec., Inc.*, 137 S.

Ct. at 2051; *Crown, Cork*, 462 U.S. at 349-51; Beisner & Miller, *Litigate the Torts* at 37.[7] That purpose is advanced by "a clear rule that operates early in the litigation, and that settles the tolling question with regard to all parties"—not a "vague rule[] under which the tolling period will be indeterminate" and subject to fact-intensive litigation. *Armstrong*, 138 F.3d at 1378 n.3. Plaintiffs rely on *In re WorldCom Securities Litigation*, 496 F.3d 245, 254-56 (2d Cir. 2007), but that case merely held that a plaintiff does not relinquish the benefit of class-action tolling by filing an individual action prior to the class certification decision. *In re WorldCom*'s emphasis on the propriety of individual actions only further supports Occidental's core point: diligent plaintiffs can protect their rights by filing timely individual claims.

2. Plaintiffs Offer No Sound Alternative Rule

Plaintiffs urge this Court to reject Occidental's bright-line approach, but offer no workable alternative. Plaintiffs are vague on the specifics of their preferred approach, but appear to endorse a fact-intensive *ex post* inquiry into "the specific procedural history of [a given] case." Chavez Br. 2. To that end, Plaintiffs meander for pages through the lengthy history of the DBCP litigation, *see id.* at 34-48.

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[7] The need to provide "injured person[s] . . . a reasonable opportunity to assert a claim," *Blanco v. AT&T Co.*, 90 N.Y.2d 757, 773-74 (1997), by contrast, is already met by the standard limitations periods and accrual/tolling rules applicable to all plaintiffs.

That kind of standardless, fact-intensive approach would "ensnare trial courts" in "excessive factual inquiries," *Blanco*, 90 N.Y.2d at 774, and foster "unpredictability and confusion," *Deutsche Bank*, 2019 N.Y. Slip Op. 08519, at *4. Plaintiffs' assertion that *Occidental's* proposed rule would require absent class members to file because a court "might retroactively conclude that an ambiguous district court order has terminated tolling," Chavez Br. 50, is precisely backwards. It is *Plaintiffs'* proposed approach—apparently, a fact-intensive inquiry based on "the specific procedural history of th[e] case," *id.* at 2—that would require future litigants to peer "through a glass darkly," *id.* at 50 (citation omitted).

Plaintiffs inadvertently preview the confusion their approach would generate. Consistently eschewing any "bright-line rule," Plaintiffs say it "*might well* be objectively reasonable" to remain passive even "when a court dismisses a class action for defective service of process," or perhaps "when a court denies certification for want of an adequate representative, but identifies another member of the class who may be substituted." Chavez Br. 50-51 (emphasis added). But "might well" gives scant guidance to future parties facing these scenarios (or innumerable fact-specific variations). Occidental's proposed rule, by contrast, would provide clear guidance in both scenarios: tolling ends. Under either rule, diligent parties would be well-advised to file protective actions in these scenarios (under Plaintiffs' rule to avoid uncertainty and under Occidental's rule to avoid a clear time-bar). The only

difference is that a vague, fact-specific approach would spawn more litigation and disagreement—with poor results for parties who guess wrong.

Plaintiffs appear to suggest tolling should end only with an order "implying the *impossibility* of a future class action." Chavez Br. 17 (emphasis added) (quoting A353); *see id.* at 42. But that standard—drawn from the district court's opinion in this case, and similar to the rule that "tolling ends only when a . . . trial court has clearly, unambiguously, *and finally* denied class action status," *Marquinez v. Dow Chem. Co.*, 183 A.3d 704, 711 (Del. 2018) (emphasis added)—is manifestly incorrect. *See* Occidental Br. 42-46. Not only are these heightened standards contrary to overwhelming authority, they would yield "tolling period[s] [that are] indeterminate and almost certainly very long," *Armstrong*, 138 F.3d at 1378 n.3, routinely requiring *ex post* litigation over whether and when the "possibility" of class status was "finally" extinguished—as the DBCP litigation vividly illustrates. *Compare* A353-54 ("Although the Supreme Court of Hawaii and a Louisiana federal district court have held that [the October 27, 1995 order] conclusively denied class status, this Court holds otherwise" (citations omitted)), *and Marquinez*, 183 A.3d at 714 ("[w]e respectfully disagree with the Fifth Circuit's and the Hawai'i Supreme Court's" analysis of "the return jurisdiction clause"), *with Chaverri v. Dole Food Co.*, 896 F. Supp. 2d 556, 573-74 (E.D. La. 2012) (A1278) ("[T]he return jurisdiction clause" "does not indicate that the right to return extended to putative

class members, . . . or even that other plaintiffs . . . would be allowed to rejoin the case in Texas."), *aff'd* 545 F. App'x 409 (5th Cir. 2013) (A1285), *and Patrickson v. Dole Food Co.*, 368 P.3d 959, 961, 971 (Haw. 2015) (A1254, A1267) ("[T]he . . . 1995 final judgment . . . clearly denied class certification" and "unequivocally dismissed the putative class action.").[8] This Court should not depart from an overwhelming body of precedent to embrace a rule leading to such confusion.

B. Tolling Terminated Upon Denial of Class Certification and Entry of a "Final Judgment" Dismissing the Case

Under Occidental's bright-line rule, tolling plainly terminated in 1995. In July 1995, Judge Lake "denied" "class certification" "alongside all other 'pending motions.'" A16. Then, in October 1995, Judge Lake "entered a 'final judgment' dismissing the action." A17. That sufficed to end tolling: class certification was denied *and* the case was dismissed. It makes no difference that class certification was denied for mootness rather than "on the merits," or that the dismissal contained a "return jurisdiction" clause. Occidental Br. 42-51. As Occidental explained—and Plaintiffs never dispute—"[b]eginning in 1995, the named class members were

[8] Contrary to Plaintiffs' contention, Occidental did not "acknowledge[]" the "correct[ness]" of the Delaware Supreme Court's standard. *Cf.* Chavez Br. 50 n.6. Occidental has consistently criticized that court's standard as contrary to "both the law and reason." Br. for Def.-Appellant at 39-40, *Chavez v. Occidental Chem. Corp.*, No. 18-1120 (2d Cir.) (Doc. 40). Looking for an "unambiguous order disallowing class status," *id.* at 43 n.13—as existed here, *accord* A16, A35, A39—is different from requiring that class status be "unambiguously . . . *and finally*" denied, *Marquinez*, 183 A.3d at 711 (emphasis added).

under no duty to protect the interests of absent members." *Id*. at 22. Further reliance would therefore have been objectively unreasonable. *Id.*

Plaintiffs contend that no class certification motion was pending before Judge Lake. Chavez Br. 40-42. That ignores the Second Circuit's clear determination to the contrary. *See* A16, A35, A39. That conclusion is correct under governing federal procedural law. *See* Occidental Br. 54-57. Plaintiffs read the procedural history differently, Chavez Br. 40-41, but never rebut Occidental's federal authorities—including the Second Circuit in this case. Plaintiffs' *ipse dixit* offers no reason for this Court to "discredit the application of [federal procedural] law by the [federal] courts." *Id.* at 40 (quoting *Home Ins. Co.*, 75 N.Y.2d at 205).

Regardless, "[t]o the extent . . . there was any ambiguity in the effect of the denial of class certification as moot," the fact remains that Judge Lake entered a "'final judgment' dismissing the case." *Chaverri*, 896 F. Supp. 2d at 569 (A1276). It is hornbook law that "if 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 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 3:15 (16th ed. 2019) (emphasis added); *see* Occidental Br. 44-46.

Even if a *forum non conveniens* dismissal means "a claim can be prosecuted in another forum," Chavez Br. 35, that does not mean it *must*. Absent class members had no "assur[ance]" (*id.* at 42) the *Carcamo/Delgado* cases would proceed as class

actions in foreign courts (where the availability of such actions was uncertain, *see Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1368 (S.D. Tex. 1995) (A674)), or if jurisdiction there were lacking, upon return to the United States. Occidental Br. 50. Nor does it matter whether potential future class litigation was "anticipat[ed]." Chavez Br. 36; *but see Chaverri*, 896 F. Supp. 2d at 571-72 (A1277-78). The case was dismissed, and it is not objectively reasonable to rely on a dismissed class action to protect one's rights. *See Chaverri*, 896 F. Supp. 2d at 571-72 (A1277-78). And while Plaintiffs assert that "Judge Lake did not remove the case from his docket, and it remained pending in his court until 2004," Chavez Br. 9-10, the docket plainly reads "Case closed" on "10/26/1995." *Delgado v. Shell Oil Co.*, No. 94-cv-1337 (S.D. Tex.).

Plaintiffs nonetheless argue that the case was not *really* dismissed in 1995—or at least not "sufficient[ly]" so—because of the return jurisdiction clause. Chavez Br. 51. Not so. As a Louisiana federal court explained in a "well-reasoned opinion" affirmed by the Fifth Circuit, *Chaverri v. Dole Food Co.*, 546 F. App'x 409, 413 (5th Cir. 2013) (per curiam) (A1288), the return-jurisdiction clause did not change the fact that the October 1995 judgment was a "dismissal" and "was *final*." *Chaverri*, 896 F. Supp. 2d at 572-74 (A1278-79). It merely gave the "actual named plaintiffs and intervenors . . . the right to return to the Texas district court and motion to have the case reopened." *Id.* at 573 (A1278).

That reasoning is sound; Plaintiffs' attempt to read Judge Lake's "FINAL JUDGMENT" that "DISMISSED" the cases (A709) as something other than a final judgment of dismissal is *not* sound. Indeed, on Plaintiffs' theory, no case dismissed for *forum non conveniens* in the Fifth Circuit—where return-jurisdiction clauses are mandatory, *see* Occidental Br. 9—would *ever* "come to an end" in the ordinary course. They would simply languish in indefinite non-finality—quite literally *forever*, if the clause were not invoked.[9] Courts intimately familiar with Fifth Circuit return-jurisdiction clauses have rejected that view. So should this Court.

Plaintiffs assert that Occidental's position is "at odds . . . with the rulings of ten courts." Chavez Br. 20; *see id.* at 36 & n.4 (listing rulings). That is incorrect. Setting aside the truism that adopting Occidental's view would require this Court to rule differently than the district court "predict[ed]" it would, A350, the true number is effectively one: the Delaware Supreme Court in *Marquinez v. Dow Chemical Co.*, 183 A.3d 704. Plaintiffs cite two other decisions addressing the tolling effect of Judge Lake's orders under Delaware law, but the Delaware Superior Court decision Plaintiffs cite has been superseded by *Marquinez*, and the Third Circuit did not rule

[9] Moreover, if tolling continued whenever a post-dismissal "reopen[ing]" was possible, *Chaverri*, 896 F. Supp. 2d at 573 (A1278), tolling would logically continue through all appeals, *cf.* A2190—contrary to overwhelming authority, *see Armstrong*, 138 F.3d at 1382-83; 1 *McLaughlin on Class Actions* § 3:15.

on the tolling question in *Chavez v. Dole Food Co.*, 836 F.3d 205, 233-34 (3d Cir. 2016) (en banc).

The remaining six decisions Plaintiffs cite did not even *consider* the tolling effect of Judge Lake's orders, and addressed only nongermane issues: Judge Hoyt's decision holding defendants' 2009 federal-court removal under the Class Action Fairness Act untimely because not brought within one year of the suit's commencement, A1072, and the Fifth Circuit's summary denial of discretionary appeal, A1116; a state-court order summarily reinstating *Carcamo* on remand, A981, and a state-court order denying mandamus to block reinstatement, A983; a two-sentence state-court order denying the defendants' pleas to the jurisdiction, A1121; and Judge Lake's 2004 order granting remand, A940. Plaintiffs mine Judge Lake and Judge Hoyt's rulings (on unrelated legal issues) for favorable-sounding language. Chavez Br. 37-38. But those exact arguments were raised to, and rejected by, the district court in *Chaverri*, 896 F. Supp. 2d at 562 & n.13, 565 (A1272-74, A1280); *see* A2188-90, and the Fifth Circuit—which had appellate jurisdiction over all of Judge Lake's and Judge Hoyt's orders—affirmed its "well-reasoned opinion" "[l]argely for the reasons expressed" therein, 546 F. App'x at 413 (A1288).

As to the cases that actually did disagree with Occidental's position—the district court here, and the Delaware Supreme Court in *Marquinez*—those courts analyzed the issue under different (and incorrect) legal standards contrary to an

overwhelming body of authority. *See supra* pp. 20-21; Occidental Br. 42-46. Moreover, the *Chaverri* decisions *agreeing* with Occidental deserve special deference given those courts' expertise in Fifth Circuit return-jurisdiction clauses, a federal procedural matter on which courts in the Fifth Circuit have far more expertise than the Delaware state courts on which Plaintiffs rely.[10]

The Hawaii Supreme Court likewise "h[e]ld that the . . . 1995 final judgment . . . *clearly* denied class certification" and ended tolling. *Patrickson*, 368 P.3d at 971 (A1267) (emphasis added). Plaintiffs seek to undermine that holding's relevance by emphasizing the brevity of the court's analysis. Chavez Br. 55-56. But the Hawaii Supreme Court evidently deemed the point so clear as to barely warrant elaboration. As explained above, parties—including plaintiffs—need a clear rule as to when class-action tolling ends. If, under Plaintiffs' proposed approach, even the *Hawaii Supreme Court* cannot accurately discern which self-styled "final judgment[s]" count as "unequivocal[] dismiss[als]," *Patrickson*, 368 P.3d at 961 (A1254), and which do not, *cf.* Chavez Br. 51, that approach cannot provide adequate clarity to future litigants.

[10] Plaintiffs emphasize that *Chaverri* was applying Louisiana tolling law, Chavez Br. 56-57, but do not explain why that matters. The principal significance of *Chaverri* is its authoritative analysis of Fifth Circuit return-jurisdiction clauses, a matter of federal law.

C. It Was Not Objectively Reasonable for Plaintiffs to Rely on the *Carcamo/Delgado* Plaintiffs for Nearly Two Decades

Even if this Court declined to adopt the bright-line approach described above, the result would be the same under a more fact-specific reasonableness inquiry. Plaintiffs cannot prevail unless they reasonably relied on the *Carcamo/Delgado* litigation "*at least* until June 1, 2009." A33-34 (emphasis added). Plaintiffs fall well short of that standard. *See* Occidental Br. 4-5, 40-41, 49-52.

Plaintiffs emphasize that the Costa Rican plaintiffs filed a motion to reinstate "just" five months after the 1995 dismissal, Chavez Br. 36-37, 43, although nothing in that motion discussed class claims, A712-24. But the motion was denied in early 1997 pending completion of appeal. A373 (¶17.2), A894-95. While the denial was without prejudice to renewal, nothing assured absent class members that the Costa Rican plaintiffs would return, let alone pursue class claims. *See* Occidental Br. 40-41. The case languished for nearly 44 months—more than a full three-year New York limitations period—before the Fifth Circuit decided the appeal. A373. And the matter was not remanded until 2004. A374 (¶25). Meanwhile, other DBCP lawsuits were filed and pursued elsewhere, *see* Occidental Br. 12-13, and the *Delgado* named plaintiffs settled their claims against Occidental and most of the other defendants, *id.* at 11, apparently without regard for absent class members. Plaintiffs have no explanation for why it was reasonable for them to wait that entire time.

Plaintiffs cannot justify sitting idly as the named plaintiffs systematically took action inconsistent with protecting absent class members' interests. After remand, the *Carcamo* plaintiffs filed their Eighth Amended Petition in February 2006. A374 (¶28), A986-1005. But within months thereafter, *all* of the named plaintiffs settled with all remaining defendants. A374 (¶29), A1043, A1056, A1074-75; *see also* A900 (¶17) (noting previous 1997-1998 settlements). The matter then sat "dormant in state court until [two non-settling intervenors] filed [a] motion for class certification," A1076—in September 2009, *three-and-a-half years* (yet another New York limitations period) after the Eighth Amended Petition was filed, A374 (¶30), A1007-34. (If the case was "continually pending as a putative class action" from 1995, Chavez Br. 46, Plaintiffs do not explain why the intervenors filed a new motion for class certification in 2009.) And, during the same period, class certification was definitively denied in Hawaii, A376 (¶53).

It was not objectively reasonable for Plaintiffs to sit on their hands through this entire period. Plaintiffs insist formalistically that despite these developments, "*Carcamo/Delgado* was continually pending as a putative class action," Chavez Br. 46—apparently in reference to how the "case was captioned," *id.* at 43; *see id.* at 12, 45, although the earliest post-dismissal document Plaintiffs cite that "caption[s]" the case as a class action is from 2005, *see* A981. However, Plaintiffs cannot have it both ways. If the correct approach is to adopt a bright-line rule (and it is), then any

tolling ended in 1995 when certification was denied and the case was dismissed. But Plaintiffs cannot invite this Court to pursue a fact-intensive inquiry into "the specific procedural history of this case," Chavez Br. 2, then ignore the inconvenient parts of that history. Plaintiffs bear the burden to show that tolling continued not just past the 1995 dismissal, or the 1996 reinstatement motion, or the 2006 settlements, or the 2008 certification denial in Hawaii, but through all that time and more. That is a burden they have not, and cannot, meet.

CONCLUSION

This Court should reject the doctrine of cross-jurisdictional class action tolling. If this Court concludes otherwise, then it should hold that a non-merits dismissal of class certification terminates class action tolling, and the Orders at issue here did so.

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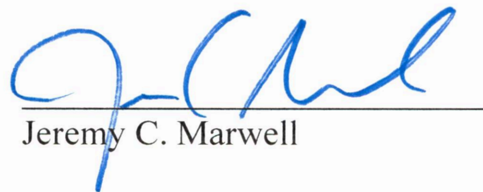

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