To Be Argued By:
JONATHAN S. MASSEY
Time Requested: 20 Minutes

Appeal No. CTQ-2019-0003

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 RESPONDENTS TOBIAS BERMUDEZ CHAVEZ, ET AL.

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QUESTIONS PRESENTED

This Court accepted the following questions 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 this 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

Regarding the first question presented, this Court should hold that New York law recognizes cross-jurisdictional class-action tolling. The pendency of a putative class action filed in federal court or in the court of another state should toll the three-year New York statute of limitations for personal injury suits, just as putative class actions filed in New York courts toll limitations. New York recognized class-action tolling more than a century before the U.S. Supreme Court's decision in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and the same policies that led New York to adopt class-action tolling in the first place should lead it to recognize cross-jurisdictional tolling.

As to the second question presented, this Court should hold that the Orders in this case did not terminate tolling. There is no need to decide, categorically,

precisely what kinds of orders do (or do not) terminate class-action tolling. Rather, this Court should follow the reasoning of the Supreme Court of Delaware in *Marquinez v. Dow Chemical Co.*, 183 A.3d 704 (Del. 2018), and the U.S. District Court for the Southern District of New York (Engelmayer, J.), both of which examined the Orders at issue and concluded they did not terminate tolling, on the basis of the specific procedural history of this case. Plaintiffs' position is consistent with the rulings of ten courts and with the understanding of the federal judge (the Hon. Sim Lake) in the Southern District of Texas who issued the Orders in the first place.

This case illustrates the compelling reasons for cross-jurisdictional tolling. As Judge Engelmayer noted, "[t]he injuries allegedly suffered by the class were experienced abroad, at the hands of multiple U.S. chemical manufacturers based in different states. For as long as the named plaintiffs pursued a live putative class action on behalf of a nationwide class against such manufacturers, the absent class members reasonably anticipated vindicating their rights in that lawsuit." A346-47. He correctly found "[i]t was reasonable for these class members to stay their hands and hold off initiating individual actions against each particular manufacturer, whether in New York and/or the other states in which such entities were based." A347.

Occidental contends that the more than 200 plaintiffs in this appeal should have initiated their own individual "[p]rotective filings" (Occidental Br. 34) rather than relying on the class action to protect their interests. But the prospect of 200 separate filings in New York would run counter to the very purpose of class-action tolling: encouraging absent class members to rely on previously filed class actions rather than pursuing hundreds (or thousands) of independent lawsuits. What Occidental describes as Plaintiffs' "sit[ting] on their hands" (Occidental Br. 4) is actually proper reliance on a pending class action. "New York courts have long . . . embraced the principles of *American Pipe*," under which "absent putative class members are expected and encouraged to remain passive during the early stages of the class action and to 'rely on the named plaintiffs to press their claims.'" *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987) (Kearse, J.) (citation omitted), *overruled on other grounds*, *Agency Holding Corp. v. Malley–Duff & Associates, Inc.*, 483 U.S. 143 (1987).

Adopting Occidental's position in this appeal would only reward it for the nearly two-decades-long litigation delay that prevented plaintiffs from obtaining a hearing on the merits of their claims. In remanding this very case to the Delaware district court, the unanimous *en banc* Third Circuit observed: "For over two decades, the plaintiffs have been knocking on courthouse doors all over the country and, indeed, the world, only for those doors to remain closed." *Chavez v. Dole Food Co.,*

Inc., 836 F.3d 205, 234 (3d Cir. 2016) (en banc). The Delaware Superior Court found that a "fairer reading of the procedural history here is that defendants have attempted to tranquilize these claims through repeated forum shopping removals and technical dismissals, playing for time and delay and striving to prevent, or arguably frustrate, the claims from ever being heard on the merits in any court." A1345-46. The Delaware Supreme Court agreed: "[D]efendants have caused a lot of the delay—upon which they now seek to rely—through their own procedural maneuvering and they may not take refuge behind it. Plaintiff here has tried to act continuously since the filing of the original [ ] action, and has been procedurally thwarted at every turn by defendants . . . ." *Dow Chemical Corp. v. Blanco*, 67 A.3d 392, 394 (Del. 2013) (quoting the Delaware Superior Court).

Occidental has continued the same delay strategy in New York. After four years of litigation in Delaware, Occidental decided to challenge personal jurisdiction and try its hand in a new forum in New York. Occidental sought to re-litigate the issues it previously lost in Delaware, where the Delaware Supreme Court recognized that cross-jurisdictional tolling applied to plaintiffs' claims under Delaware law, *Dow Chemical Corp.*, 67 A.3d 392, and plaintiffs had prevailed in the *en banc* Third Circuit.

Without cross-jurisdictional tolling, defendants like Occidental will have every incentive to delay and stonewall, in the hope that statutes of limitations will

run before plaintiffs can secure a forum to hear their claims. This Court should put an end to Occidental's gambit.

STATEMENT OF THE CASE

I. Allegations In The Complaint.

Plaintiffs worked on banana plantations in Costa Rica, Ecuador, and Panama. A10. Occidental manufactured and distributed a pesticide called dibromochloropropane ("DBCP"). A10, A233-34, A244-46. DBCP was suspended for use in the United States in 1977 because of the dangers it posed, but Occidental continued to distribute it for use abroad, exposing thousands of laborers, including plaintiffs, to a chemical known to cause sterility, cancer, and sexual and reproductive abnormalities. A226-28.

II. The Procedural History Of Plaintiffs' Claims.

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

Plaintiffs were members of a putative class action filed in Texas state court in 1993 known as *Carcamo* alleging injuries from DBCP. A327, A371. In the words of the Third Circuit, "defendants quickly adopted a three-step strategy for defeating the plaintiffs' claims." *Chavez*, 836 F.3d at 211. "First, they impleaded various foreign entities under the Foreign Sovereign Immunities Act. This, in turn, provided

a hook for federal jurisdiction.[1] Second, the defendants removed the case to the United States District Court for the Southern District of Texas. Third, the defendants asked the Texas District Court to dismiss the plaintiffs' class action on the ground of *forum non conveniens*." *Id.*; *see also* A329-30. Upon removal, Judge Lake of the Southern District of Texas consolidated *Carcamo* with other DBCP-related class actions ("*Carcamo/Delgado*"). A330, A372, A441-60.

Prior to removal to federal court, plaintiffs had filed a motion for class certification in Texas state court, under the Texas rules of civil procedure. A371, A420-39, A473-80. After removal, in preparation for a status conference, Judge Lake asked the parties to state their positions on class certification, among other issues, and requested plaintiffs provide the court with copies of the plaintiffs' state-court motion for class certification and any responses by the defendants. A372, A482-85.

In response to Judge Lake's request, defendants filed a "submission regarding class certification issues" (A496) in which they noted that plaintiffs "sought certification in state court under Texas Rules of Civil Procedure 42(b)(4) and 42(b)(1)(A)," but had not yet "proceed[ed] in this Court under the analogous Federal Rules." A497 n.2. The defendants acknowledged they had "not filed a brief in state

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

court in response to Plaintiffs' state court amended motion for class certification." A496 n.1. The defendants stated that their submission was "not intended to be defendants' brief on class action issues," and they requested from the court additional time and "the opportunity to file a brief and evidentiary material before the Court makes any ruling on class certification." *Id.*

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

Plaintiffs contended that foreign forums could not resolve their claims and urged the denial of the *forum non conveniens* motions. Judge Lake noted: "Plaintiffs . . . argue that many of their home countries do not provide an available alternative forum because many of the defendants are not subject to personal jurisdiction in those courts." *Delgado v. Shell Oil. Co.*, 890 F. Supp. 1324, 1356 (S.D. Tex. 1995). "Plaintiffs argue that consent by defendants may not be sufficient because the courts in several of their home countries will decline to exercise jurisdiction over consenting defendants because plaintiffs initiated the action elsewhere." *Id.*

Defendants insisted that procedures for the aggregation of claims were available in foreign courts and submitted the affidavit of Professor Saul Litvinoff:

> Regardless of whether a class action is viable under United States law, the fact is that the procedural laws of the countries involved in this case have rules that would allow the joinder of all plaintiffs involved in this case under principles governing joinder of parties and actions. . . . Thus, it is possible under the procedural laws of all jurisdictions involved in these proceedings to cumulate plaintiffs' actions in one suit.

A2269-70. Plaintiffs' Costa Rican expert explained that "in the cases where it is permitted by law, different causes of action could be accumulated to be resolved in a single ruling," although the "class action" procedure as known in the United States does not exist in Costa Rica. A2237. Judge Lake never resolved the extent to which collective adjudication of class members' claims was available in foreign courts.

On July 11, 1995, Judge Lake issued an Order conditionally granting the defendants' motion to dismiss for *forum non conveniens*. The f.n.c. dismissal Order required plaintiffs to test the jurisdiction of foreign courts, but it included a "return jurisdiction" clause to ensure that plaintiffs could return to the Southern District of Texas if foreign courts held they lacked jurisdiction (as plaintiffs predicted they would rule): "To ensure availability of an alternative forum in the event that defendants' motion is ultimately successful the court will condition dismissal not only on the defendants' and third-party defendants' stipulation to waive all jurisdictional and limitations defenses but also upon acceptance of jurisdiction by the foreign courts involved in these cases." 890 F. Supp. at 1357.

The court's "return jurisdiction" clause stated:

> Notwithstanding the dismissals that may result from this Memorandum and Order, in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in these actions in his home country or the country in which he was injured, that plaintiff may return to this court and, upon proper motion, the court will resume jurisdiction over the action as if the case had never been dismissed for [*forum non conveniens*].

A331.

When Judge Lake entered the July 1995 dismissal order, he did not specifically rule on class certification. He noted that "while plaintiffs have sought class certification in several of the pending actions, no classes have been certified." 890 F. Supp. at 1368. He did not expressly state that a *federal* motion to certify the class was pending, or include any discussion of the requirements of class certification under Federal Rule 23, let alone deny certification for a substantive Rule 23 deficiency. Instead, the last paragraph of his order contained a generic housekeeping provision stating that "all pending motions . . . not otherwise expressly addressed in this Memorandum and Order are DENIED as MOOT." *Id.* at 1375.

On October 27, 1995, Judge Lake entered a "Final Judgment" based on *forum non conveniens,* certifying that the domestic conditions of f.n.c. dismissal earlier set by the court had been met. A331. The final judgement did not abrogate the return jurisdiction clause. The Fifth Circuit affirmed in 2000, and the Supreme Court denied certiorari. A332. Nevertheless, Judge Lake did not remove the case from his

docket, and it remained pending in his court until 2004. *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 809 (S.D. Tex. 2004).

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

Shortly after Judge Lake's forum non conveniens dismissal order, the Costa Rican courts held that they lacked jurisdiction over DBCP claims previously filed in *Carcamo/Delgado*. A331-32, A373, A726-892. On April 1, 1996 – just over five months after Judge Lake's October 27 1995 "Final Judgment" – Costa Rican plaintiffs in *Carcamo/Delgado* filed a motion for reinstatement before Judge Lake pursuant to the return jurisdiction clause. A373, A712-23. Judge Lake deferred ruling on that motion. A373, A894-95. While the motion was pending, the U.S. Supreme Court decided *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which rejected the jurisdictional basis on which *Carcamo* had been removed in the first place and abrogated the Fifth Circuit's 2000 decision upholding subject-matter jurisdiction.

Shortly thereafter, the Costa Rican plaintiffs and intervenors moved Judge Lake to vacate his Order of dismissal and to remand to state court, because federal subject-matter jurisdiction was lacking in light of the Supreme Court's decision in *Patrickson*. A373, A897-908. Judge Lake granted that motion in part and denied it in part. A373-74, A910-928. The Costa Rican plaintiffs then moved Judge Lake to

remand *Carcamo/Delgado* to state court for a ruling on the request for return of jurisdiction and reinstatement of the action. A373, A932-38.

On June 18, 2004, Judge Lake granted the motion. A333. In a memorandum and opinion addressing both the Costa Rican plaintiffs' original 1996 motion to reinstate and their 2004 motion to remand, Judge Lake held that the return jurisdiction clause was "an express statement of the court's intent to *retain jurisdiction* over this action, . . . to ensure that an American forum remains available to adjudicate plaintiffs' claims if and when the highest court of a foreign country dismisses them for lack of jurisdiction," and that the motion to reinstate was "a *direct continuation* of the prior proceedings over which the court expressly stated its intent to retain jurisdiction." *Delgado*, 322 F. Supp. 2d at 813 (emphases added).

Judge Lake held that the 1995 *forum non conveniens* dismissal was *not* "final" for purposes of 28 U.S.C. § 1447(c). A334. He explained that the dismissal was "final" "only for purposes of appealing the court's f.n.c. decision" and "was not a 'final judgment' that extinguished the court's duty either to continue examining its subject matter jurisdiction over this case, or to remand the underlying cases to state court when and if it determines that it lacks subject matter jurisdiction." *Delgado*, 322 F. Supp. 2d at 816. Accordingly, he remanded the entire cases identified by their civil action numbers – not portions or subsets of the cases. *See id.* at 817 ("*Delgado v. Shell Oil Co.*, H–94–1337, is REMANDED to the 212th District Court

of Galveston County, Texas, and *Jorge Carcamo v. Shell Oil Co.*, H–94–1359, is REMANDED to the 23rd District Court of Brazoria County.").

In the Texas state courts, Occidental and the other defendants objected to the reinstatement of the cases for failure to comply with the return jurisdiction clause. A334. In April 2005, the District Court of Brazoria County rejected those objections and granted the motion to reinstate *Carcamo.* A374, A981. The *Carcamo* case continued to be captioned as a putative class action in Texas state court, as though it had never been removed or dismissed. A986-1005.

The Dole Defendants, co-defendants of Occidental in the Texas action, sought a writ of mandamus in the Texas 14th Court of Appeals, arguing that the plaintiffs failed to comply with the "return jurisdiction" clause. A983-84. In September 2005, the Texas Court of Appeals denied the writ and rejected the defendants' argument "that the state court judges in these proceedings abused their discretion by reinstating the actions in state court without requiring the real parties to comply with the return jurisdiction clause in the federal court's order." A984.

In September 2009, Plaintiffs Nelson Rivas Ramirez and Eduardo Riva Ledezma moved the Texas state court for class certification. A374, A1007-34. The defendants reacted by again removing the case to the Southern District of Texas on the purported ground that, in light of the 1995 dismissal, the 2009 motion for class certification represented a new class action filed after the 2005 effective date of the

Class Action Fairness Act, 28 U.S.C. § 1332(d), making it removable to federal court. A334, A374, A1037-47.

Intervenor-plaintiffs Ramirez and Ledezma moved to remand, arguing that "the relevant procedural history of this case is very simple: a putative class action filed in Texas state court in 1993, Intervenors' uncontested intervention in 1994, and a motion for class certification in 2009 that did not change the class nature of the case." A1059. They denied that the 1995 *forum non conveniens* dismissal ended the class action, and they further responded to the defendants' argument that they had failed to comply with the reinstatement provisions of the return jurisdiction clause. A1059-66.

Judge Hoyt (sitting on the same bench as Judge Lake) agreed with Intervenor-plaintiffs and remanded the action to state court. He rejected the defendants' arguments and found that the "class action . . . has been pending in one forum or another since 1993." A1076. Judge Hoyt concluded that "this action commenced with the filing of the state-court petition in 1993, not in 2009 when the Plaintiffs-Intervenors submitted their class certification motion." *Id.*

Defendants sought permission to appeal, arguing that Judge Lake had denied a then-pending motion for class certification in 1995, that Intervenor-plaintiffs Ramirez and Ledezma had failed to comply with the reinstatement provisions of the return jurisdiction clause, and that "the new class claims" made the action

"essentially a new lawsuit." A1087. The Fifth Circuit unanimously denied permission to appeal. A375, A1116.

After remand to state court, defendants continued to argue that the cases had been dismissed in 1995. A375. The District Court of Brazoria County, Texas, again rejected the argument. A1121.

The case proceeded as a putative class action until June 3, 2010. On that date, the District Court of Brazoria County, Texas denied the motion for class certification filed by Intervenor-plaintiffs. A375, A1124.

C. Proceedings In Delaware And Transfer Of This Case To The Southern District Of New York.

After the denial of class certification in the Texas action in 2010, absent class members faced a decision about where to continue to prosecute their claims. They were hampered by the reality that defendants had succeeded in delaying their claims for some 17 years. To ensure a forum for their claims, plaintiffs filed substantively identical actions in federal court in Louisiana and Delaware. A377-78. The Louisiana cases were dismissed on the basis of the Louisiana prescription statute in 2012. A335.

The Delaware district court dismissed the claim against Occidental based on the "first-to-file" rule, concluding the prior filing of the Louisiana cases barred plaintiffs' claim in Delaware. A335. The Third Circuit reversed *en banc* and revived plaintiffs' claims against Occidental. *Chavez*, 836 F.3d at 234.

Following remand from the Third Circuit, Occidental sought a new procedural roadblock to plaintiffs' claims. In November 2016 – after more than four years of litigation in federal court in Delaware – Occidental moved to dismiss for lack of personal jurisdiction. A335-36. The Delaware federal district court denied the motion to dismiss, but transferred the action to the Southern District of New York, where Occidental is incorporated. A335-36.

A different plaintiff (Blanco) filed a related case against Occidental and other defendants the Delaware Superior Court, which rejected the same limitations arguments Occidental is pursuing here. A377. The Delaware Superior Court held that Delaware law recognizes cross-jurisdictional tolling, A1333-46, and the Supreme Court affirmed. *Blanco*, 67 A.3d 392. After reviewing Judge Lake's 1995 Orders, the Superior Court noted the conditional nature of the dismissal and the presence of the return jurisdiction clause, A1347, and concluded that "[t]his action did not end in Texas until June 2010. To imply otherwise . . . is misleading at best." *Blanco v. AMVAC*, 2012 WL 6215301, at *2 (Del. Super. Ct. Sept. 18, 2012).

III. The Federal Lawsuit in New York.

Occidental moved to dismiss on the ground that the three-year New York statute of limitations in personal injury action barred plaintiffs' claims. Plaintiffs responded that, if applicable, the statute was tolled by class-action tolling principles.

A11. On January 10, 2018, the Southern District denied Occidental's motion to dismiss. A327-60.

First, Judge Engelmayer explained that "the fact that New York courts have extended the principle of *American Pipe* tolling to cover lawsuits originally filed in New York suggests that the Court of Appeals is likely to adopt cross-jurisdictional tolling as well," because the principles articulated in *American Pipe* "apply with equal force in the context of cross-jurisdictional tolling." A346. Judge Engelmayer was "unpersuaded by Occidental's concern that recognizing cross-border tolling would open the floodgates to New York litigation," noting that "Occidental fails to offer even anecdotal evidence" of such a risk. A347-48. Instead, Judge Engelmayer reasoned that *Occidental's position* presented the "floodgate" risk. Occidental's approach would "incentiviz[e] problematic filings" by "inspir[ing] a profusion of duplicative 'placeholder' suits intended to preserve as broadly as possible plaintiffs' rights while other class actions remain pending elsewhere." A347.

Regarding the second issue presented by Occidental, Judge Engelmayer applied the legal standard urged by Occidental (A351-52) and held that class-action tolling did not end with either (i) Judge Lake's July 1995 *forum non conveniens dismissal* order, which effected only a *conditional* dismissal and included a "return jurisdiction" clause, or (ii) the October 1995 "Final Judgment," which did not terminate the court's jurisdiction.

Judge Engelmayer assumed (per Occidental's argument) that a motion for class certification was pending before Judge Lake in July 1995. A352 n.8. Nevertheless, he found that the July 1995 f.n.c. dismissal order "was a far cry from a paradigmatic order that could be taken as implying the impossibility of a future class action, such as an order granting with prejudice a motion to dismiss under Rule 12(b)(6)." A353. In fact, the "return jurisdiction" clause told absent class members the opposite: it assured them that their claims "would either proceed in a foreign forum or, if jurisdiction there proved lacking, remain within [the] court's jurisdiction." *Id.*

Judge Engelmayer held the October 1995 "Final Judgment" also "fell short of unequivocally interring any pending class action." *Id.* The judgment "did not abrogate the return jurisdiction clause" and "merely used the 'Final Judgment' label to certify that the domestic conditions of dismissal earlier set by Judge Lake had been met." A354. Moreover, the October 1995 judgment "was not 'final' in the sense of permanently extinguishing the case (or the possibility of class certification). The decision was 'final' only insofar as it triggered the named plaintiffs' right to appeal." *Id.* "For that reason, once the Costa Rican plaintiffs returned to Judge Lake's court with a motion to reinstate, invoking the return jurisdiction clause, Judge Lake held that that motion was 'a direct continuation of the prior proceedings over

which the court expressly stated its intent to retain jurisdiction.'" *Id.* (citation omitted).

Judge Engelmayer found that "Judge Lake's orders reasonably allowed for class proceedings in any forum as the lawsuit moved forward," because they "effected only a conditional dismissal and very much left open the prospect of a continued putative class action in Texas." A364. Judge Engelmayer noted that the "return jurisdiction" clause "thus provided a domestic backstop to ensure that, even as the *Carcamo/Delgado* plaintiffs tested the jurisdiction of foreign courts, Texas would remain available as a forum for the putative class action," given that "the prospects for plaintiffs to secure jurisdiction over defendants abroad appeared doubtful." A365.

The Second Circuit opined that "New York courts' adoption of *American Pipe* tolling for New York-only cases may be the most persuasive evidence of how the Court of Appeals would decide this question," because "the principles from which *American Pipe* tolling derives" "'apply with equal force in the context of cross-jurisdictional tolling.'" A32 (citation omitted). Nevertheless, the Second Circuit certified the questions presented to this Court.

SUMMARY OF ARGUMENT

I. New York law should recognize cross-jurisdictional class action tolling. New York has been a pioneer in class-action tolling, having adopted the tolling

principle more than a century before the U.S. Supreme Court's decision in *American Pipe*. The same policies of state law that led New York to adopt class-action tolling in the first place militate in favor of recognizing cross-jurisdictional tolling here.

New York precedent and policy strongly support cross-jurisdictional tolling. New York has articulated a strong policy of respecting the judicial proceedings of sister states. Drawing the arbitrary line urged by Occidental would require New York courts to prefer class actions in New York courts over those in federal courts or in the courts of sister states, contrary to New York policy. Occidental's proposed rule would also risk triggering additional litigation in New York, because it would force class members with claims against companies incorporated or with a principal place of businesses in New York to file preemptive actions in New York, without waiting to see if an out-of-state class action is certified. Such a proliferation of protective filings runs counter to New York policies and principles of law.

Occidental gives short shrift to New and instead relies primarily on out-of-state authorities. But its arguments are unpersuasive. For example, Occidental errs in portraying cross-jurisdictional tolling as an isolated principle. Rather, as Judge Engelmayer noted, the "majority" of States to have considered the question have adopted cross-jurisdictional tolling, A348 n.6, including Delaware, which (like New York) is home to many business corporations.

II. Judge Lake's Orders did not terminate tolling. Both the Supreme Court of Delaware and Judge Englemayer examined the procedural history of this case and correctly rejected Occidental's arguments. The Orders failed to place absent class members on notice that they could not rely on the putative class action to protect their interests. Rather, the Orders effected only a conditional dismissal and, by virtue of the return jurisdiction clause, contemplated a continued putative class action in Texas. In fact, in 1995 plaintiffs told Judge Lake they would return to his court because foreign courts would hold they lacked jurisdiction over the lawsuit – precisely what ultimately happened. Events proceeded just as plaintiffs predicted, and Judge Lake remanded the *Carcamo* and *Delgado* actions in their entirety to state court, where *Carcamo* resumed as a class action, with the same caption it always had, as though it had never been removed or dismissed.

Occidental advances two inconsistent positions in this Court. On the one hand, it proposes an "objective reasonableness" test, and on the other hand, it urges a "bright-line rule" that any dismissal or denial of certification, for any reason, terminates tolling. This Court need not consider Occidental's conflicting arguments in order to conclude that, whatever the test, the Orders here did not terminate tolling. This Court should not adopt a view of the Orders at odds with Judge Lake's interpretation of his own handiwork and with the rulings of ten courts.

ARGUMENT

I. New York Law Should Recognize "Cross-Jurisdictional" Class-Action Tolling.

A. New York Courts Have Long Recognized Class-Action Tolling.

New York precedent strongly supports cross-jurisdictional tolling. "[T]he New York courts have, in the interest of avoiding 'court congestion, wasted paperwork and expense,' long embraced the principles of *American Pipe*." *Cullen*, 811 F.2d at 719.

Indeed, New York adopted class-action tolling a century before the U.S. Supreme Court's decision in *American Pipe*. In *Brinckerhoff v. Bostwick*, 99 N.Y. 185 (1885), this Court held a representative suit by a single stockholder tolled limitations for the remaining stockholders. *Id.* at 194-95. In *Snyder v. Town Insulation*, 81 N.Y.2d 429, 432 (1993), this Court recognized class-action tolling in the toxic tort personal injury context. In *Sutton Carpet Cleaners v. Firemen's Ins. Co. of Newark*, 68 N.Y.S.2d 218 (N.Y. Sup. Ct. 1947), the court explained "[t]he law undoubtedly is that a representative action timely brought saves all represented claims from the running of the statutory or contractual period of limitations," and found tolling even though the plaintiff was not a proper class representative. *Id.* at 224. This Court affirmed. 299 N.Y. 646 (1949).

New York courts have applied class-action tolling in a wide range of contexts. *See Yollin v. Holland Am. Cruises, Inc.*, 97 A.D.2d 720, 721 (1st Dep't 1983) (breach

of contract); *Osarczuk v. Associated Universities, Inc.*, 130 A.D.3d 592, 595 (2d Dep't 2015) (toxic tort from hazardous waste contamination); *Paru v. Mut. of Am. Life Ins. Co.*, 52 A.D.3d 346, 348 (2d Dep't 2008) (covenant of good faith and fair dealing).[2]

Occidental asserts that New York law does not recognize "cross-jurisdictional tolling," but only "intra-jurisdictional" tolling. Neither *American Pipe* nor the New York decisions restrict tolling to the "intra-jurisdictional" context. The decisions speak of tolling principles in broad terms and do not suggest that class members' individual claims are tolled only when a putative class action is pending in the same jurisdiction.

Moreover, the justifications articulated by New York courts also extend to cross-jurisdictional tolling. For example, in *Yollin*, the Appellate Division cited the "undesirable consequences" of "court congestion, wasted paperwork and expense." 97 A.D.2d at 721. All these factors apply in the cross-jurisdictional context.

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[2] Occidental is wrong in contending that two New York courts have rejected cross-jurisdictional tolling. Occidental Br. 23. *Henry v. Bank of Am.*, 147 A.D.3d 599, 602 (1st Dep't 2007), summarily dismissed (without explanation and in the concluding sentence of the opinion) the plaintiff's attempt to invoke *American Pipe*. *In re New York Hormone Replacement Therapy Litig.*, No. 109479/05, 2009 WL 4905232 (N.Y. Sup. Ct. Nov. 30, 2009), questioned the wisdom of adopting any kind of class-action tolling (not simply cross-jurisdictional) in mass tort cases. Moreover, that case contained facts inapplicable here: absent class members filed individual actions before the court had ruled on certification and attempted to invoke tolling for multiple class actions.

Cross-jurisdictional tolling promotes "the underlying reasons why courts originally developed class-action tolling: a class complaint gives fair notice of claims to defendants; a putative class member acts reasonably when he relies on a class action to vindicate his rights; and run-of-the-mill individual suits are disfavored when a class action is viable because too many individual suits would subvert the modern class-action mechanism." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *140 (S.D.N.Y. Oct. 20, 2015). Hence, "the reasoning of *American Pipe* and analogous state-court cases applies with equal force regardless of whether a class action is filed in the same jurisdiction as the subsequent individual action or in a different jurisdiction." *Id.* "States that are receptive to these concerns in the context of intra-jurisdictional tolling should be equally receptive in the context of cross-jurisdictional tolling." *Id.*

In the absence of cross-jurisdictional tolling, class members like plaintiffs would be forced to file preemptive actions while the putative class action was still pending, long before any ruling on class certification – precisely what New York law seeks to avoid. "[A] rule requiring" members of a putative class "to commence duplicative litigation simply to preserve the statute of limitations would frustrate the objectives of efficiency and economy underlying CPLR article 9." *Adams v. Bigsbee Enterprises, Inc.*, 53 Misc. 3d 1210(A), 48 N.Y.S.3d 264 (N.Y. Sup. Ct. 2015).

Thus, the parallel lawsuits cited by Occidental (Occidental Br. 12-14) prove the opposite of what it asserts. Those lawsuits demonstrate the need to adopt cross-jurisdictional tolling, in order to encourage class members to rely on the pending class action rather than filing their own lawsuits. Judge Engelmayer observed that DBCP litigation "supplies a good illustration" of that "inefficiency"; "placeholder DBCP suits, paralleling the existing class actions, [have been] filed solely to maximize the likelihood that some forum would one day be available to resolve plaintiffs' claims on the merits." A348.

B. Cross-Jurisdictional Class Action Tolling Is Consistent With New York Legal Principles And Policy.

Additional principles of New York law militate in favor of cross-jurisdictional tolling. First, New York has articulated a strong "policy of respecting the judicial proceedings of sister States." *Home Ins. Co. v. Am. Home Prod. Corp.*, 75 N.Y.2d 196, 205 (1990). Drawing the arbitrary line urged by Occidental would require New York courts to prefer class actions in New York courts over those in federal courts or in the courts of sister states, contrary to New York policy.

This Court's reasoning in *Home Ins. Co.* is equally applicable here. There, a pharmaceutical manufacturer argued that New York should not cede its authority to Illinois to decide the validity of a punitive damages award, an argument similar to Occidental's position here. This Court rejected that position: "We have no reason to question the regularity of the Illinois proceedings or the legitimacy of the Illinois

judgment." *Id.* at 205. By the same token, New York courts should not question Judge Lake's decision to remand the *Delgado* and *Carcamo* cases in their entirety or the decision of the Texas courts to resume jurisdiction over *Carcamo* as a putative class action, as it had always been captioned.

New York's policy of nondiscrimination toward other states is also reflected in the cross-jurisdictional effect that has been accorded to N.Y. C.P.L.R. § 205(a), allowing a plaintiff whose case has been dismissed to refile within 6 months. In *Stylianou v. Incorporated Village of Old Field*, 23 A.D.3d 454 (2d Dep't 2005), the court held that plaintiffs' state-law class claims were tolled during the pendency of a federal class action raising the same claims. *Id.* at 574. In *Kleinberger v. Town of Sharon*, 116 A.D.2d 367, 370 (3d Dep't 1986), the court opined in a similar cross-jurisdictional situation that "[t]he instant case falls squarely within the protection of that section." And in *Dunton v. Suffolk County, State of N.Y.*, 729 F.2d 903, 911 n.8 (2d Cir. 1984), the Second Circuit explained that § 205(a) applies to federal court dismissals as well as New York state actions. *See also Brown v. Bullock*, 17 A.D.2d 424, 427 (1st Dep't 1962) (*per curiam*) (pendency of action commenced in Southern District of New York and dismissed for lack of diversity jurisdiction would toll statute). Judge Engelmayer noted that these examples show that "New York is not categorically averse to tolling based on a class action pending elsewhere." A347.

In addition, New York's "strong public policy of deciding cases on the merits," *Bobet v. Rockefeller Ctr., N., Inc.*, 78 A.D.3d 475, 475 (1st Dep't 2010), further justifies cross-jurisdictional tolling. In the absence of such tolling, class members face the risk that their claims may never be heard solely because of the timing of judicial resolution of non-merits issues, such as class certification or *forum non conveniens*, as this case illustrates. When confronted with such a risk, the New York courts and legislature have applied statutes of limitations to effectuate the public policy of providing a judicial forum to hear claims. *See*, *e.g.*, *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-49 (1978) (applying equitable estoppel to toll limitations); 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); *id.* § 214-c (discovery rule).

Occidental argues New York law disfavors tolling, but the cases it cites are inapposite.[3] Occidental points to New York's policy of repose. Occidental Br. 25-28. But class-action tolling already accommodates that interest. *American Pipe*,

[3] *See Overall v. Estate of Klotz*, 52 F.3d 398, 404 (2d Cir. 1995) (accepting tolling based on plaintiff's minority but declining to apply "duress tolling" to extend claim by 40 years) (cited Occidental Br. 3, 26). Occidental also cites *Varo, Inc. v. Avis PLC*, 261 A.D.2d 262 (1st Dep't 1999), but that case explained that under New York law "tolls pursuant to CPLR 204(a) have been found in cases where a plaintiff was prevented from bringing suit by court order or statute and 'the "spirit" of this section has been invoked to create a toll when considerations of basic equity call for it.'" *Id.* at 268 (citation omitted).

414 U.S. at 554-55 ("The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,' are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."). Moreover, this case involves a statute of limitations and does not require this Court to decide whether statutes of repose are tolled under *American Pipe*.

Occidental is also wrong in arguing that cross-jurisdictional tolling "relinquishes control" over limitations periods. Occidental Br. 29. In adopting cross-jurisdictional tolling, New York would not be ceding authority to another state. Rather, it would be adhering to its own policy of avoiding harsh limitations periods and respecting proceedings of sister states. Further, New York has chosen to protect its interest through its borrowing statute, CPLR Section 202, which requires that a plaintiff must meet both the New York statute of limitations and the statute of limitations where the cause of action accrued. This provision addresses Occidental's objection; it shows that "New York already has a mechanism in place to prevent opportunistic filings." A348.

Moreover, Occidental's approach creates a greater risk: it would cede control over limitations to a private defendant. As Judge Engelmayer warned, "[a] legal

regime that does not recognize cross-border tolling may incent a defendant to pursue delay, so as to run out the clock as to the claims of absent class members." A349. Occidental's delays and jurisdictional machinations in this case prove the danger. *See also Blanco,* 2012 WL 3194412, at *9 (absence of cross-jurisdictional tolling "would encourage defendants to delay the ruling on a motion for class certification"); *Staub v. Eastman Kodak Co.*, 320 N.J. Super. 34, 56 (App. Div. 1999) ("a contrary rule would reward defendants who caused a court to delay decision of class action certification until the statute of limitations had run against any potential plaintiffs").

C. Cross-Jurisdictional Tolling Is The Majority Rule In States That Have Considered It.

As Judge Engelmayer observed, the "majority" of states to have considered the question have adopted cross-jurisdictional tolling. A348 n.6. Further, "the trend is in favor of tolling." *LIBOR*, 2015 WL 6243526, at *141. "Since 2010, only Virginia (which, unusually, lacks a class-action procedure and which has a general policy of construing its statutes of limitations strictly) has rejected cross-jurisdictional tolling." *Id.* Several states have accepted cross-jurisdictional tolling, including Delaware, which (like New York) "has general personal jurisdiction over many large businesses." *Id.*

In *Dow Chem. Corp. v. Blanco*, 67 A.3d 392 (Del. 2013), the Delaware Supreme Court explained that "[r]eading *American Pipe* too narrowly would defeat

an important purpose of a class action, which is to promote judicial economy." *Id.* at 395. The Delaware Supreme Court concluded that the principles animating *American Pipe* applied equally to "cross-jurisdictional" tolling because "[i]f members of a putative class cannot rely on the class action tolling exception to toll the statute of limitations, they will be forced to file 'placeholder' lawsuits to preserve their claims. This would result in wasteful and duplicative litigation." *Id.* "Reading *American Pipe* too narrowly would defeat an important purpose of a class action, which is to promote judicial economy. Allowing cross-jurisdictional tolling recognizes and gives effect to the proposition that the policy considerations underlying our statute of limitations are met by the filling of a class action. Cross-jurisdictional tolling also discourages duplicative litigation of cases within the jurisdiction of our courts." *Id.*

In another DBCP case repeatedly cited by Occidental, *Patrickson v. Dole Food Company, Inc.*, 368 P.3d 959 (Haw. 2015) (cited at Occidental Br. 13, 14, 24, 42), the Hawaii Supreme Court *disagreed* with Occidental's position on cross-jurisdictional tolling and held that "a class action filed in another jurisdiction will toll the applicable Hawai'i statute(s) of limitations." *Id.* at 970. The court explained that "[w]e find the reasoning of those states adopting cross-jurisdictional tolling to be more persuasive." *Id.* *See also Lombardo v. CitiMortgage, Inc.*, 2019 WL 3546630, *12 (D. Mass. Mar. 4, 2019) ("The reasoning underlying *American Pipe*

and *Crown*, including the fair notice to defendant of possible claims by unnamed class members and avoiding a multiplicity of individual actions during the class certification process, lends additional support to concluding that the SJC will likely accept tolling during the class certification process. Trends in other jurisdictions . . . are also indicative that the SJC will adhere to cross-jurisdictional tolling during the class certification process.").

Similarly, in *Stevens v. Novartis Pharmaceuticals Corp*., 247 P.3d 244 (Mont. 2010), the Montana Supreme Court adopted cross-jurisdictional tolling, explaining that "[w]e are convinced that the decisions adopting cross-jurisdictional tolling more effectively balance the considerations at issue." *Id*. at 255. The Montana court explained that Defendants' approach would increase the burdens of litigation and violate the principle of *American Pipe*:

> We suspect that a greater burden on the court system will be imposed by *not* adopting the rule, as plaintiffs would be required to file protective individual suits in Montana courts to avoid limitations defenses, while otherwise relying on a pending class action suit filed elsewhere. This directly conflicts with the rationale underlying the class action tolling rule: to promote judicial economy by encouraging individual plaintiffs to defer to class action suits to protect their claims. . . . Where, as here, the defendants are already on fair notice of the claims against them through a timely class action suit, the policies underlying the limitations period are not subverted.

Id. at 256 (emphasis in original).

In *Vaccariello v. Smith & Nephew Richards, Inc*., 763 N.E.2d 160, 161-62 (Ohio 2002), the Ohio Supreme Court held that a federal class action filed in Eastern

District of Pennsylvania tolled limitations for a subsequent Ohio State court action involving the claims of a plaintiff injured by a medical device. "Whether a class action is filed in Ohio or in the federal court system, the defendant is put on notice of the substance and nature of the claims against it." *Id.* at 162-63. The Ohio court criticized *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102 (Ill. 1998), on which Occidental relies, explaining that the prediction that cross-jurisdictional tolling would lead to a flood of time-barred suits was not "a realistic potential problem." 763 N.E.2d at 163. The Ohio court added:

> Our holding today merely allows a plaintiff who could have filed suit in Ohio irrespective of the class action filed in federal court in Pennsylvania to rely on that class action to protect her rights in Ohio. To do otherwise would encourage all potential plaintiffs in Ohio who might be part of a class that is seeking certification in a federal class action to file suit individually in Ohio courts to preserve their Ohio claims should the class certification be denied. The resulting multiplicity of filings would defeat the purpose of class actions.

Id.; *see also Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. App. 1986) (adopting cross-jurisdictional tolling); *Staub v. Eastman Kodak Co.*, 320 N.J. Super. 34, 58, 726 A.2d 955, 967 (App. Div. 1999) (same).

Occidental cites *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), but that case upheld tolling for individual claims like those here. *Id.* at 1806. It merely held that *American Pipe* does not permit successive class actions, *id.* at 1811, an issue not presented by this case.

D. Occidental's Remaining Arguments Against Cross-Jurisdictional Tolling Are Flawed.

Occidental's objections to cross-jurisdictional tolling do not withstand scrutiny. In fact, the policies cited by Occidental favor recognition, not rejection, of cross-jurisdictional tolling.

1. Occidental speculates that cross-jurisdictional tolling would lead to a flood of litigation. Not so. As Judge Engelmayer noted, numerous states have adopted cross-jurisdictional tolling, but Occidental does not identify a single one that has experienced a flood of claims. A348. Rather, the contrary rule of not recognizing cross-jurisdiction tolling is more likely to inspire a profusion of duplicative "placeholder" suits, particularly given New York's status as the home forum for many business corporations, where personal jurisdiction can be secured.

Nor would cross-jurisdictional tolling lead to endless extension of limitations periods. The same argument could have been made in opposition to class-action tolling in general, yet New York has recognized such tolling for over a century, and the federal system for over 40 years, "without evident ill effects." A349. Moreover, Occidental's own authority, *China Agritech,* addresses that risk by making clear that class actions cannot be "stacked" to extend tolling periods and that *American Pipe* applies only to individual suits. 138 S. Ct. at 1811.

2. Occidental argues that this Court should not "invent" a new tolling principle. Occidental Br. 26. But this case does not involve such a request. The

New York courts adopted class-action tolling in 1885 and have already decided that such tolling is consistent with state policy. The only question presented is whether the tolling principles already recognized in New York should be interpreted as extending to the cross-jurisdictional context. New York law and policy dictate such a result.

Occidental's suggestion that the issue should be "left to the legislature" (Occidental Br. 36) is misplaced. Class-action tolling was adopted by the New York courts over a century ago, not the legislature. The legislature has never restricted it. If anything, drawing the line Occidental proposes between cross-jurisdictional and intra-jurisdictional tolling would constitute impermissible judicial lawmaking by imposing a distinction that is contrary to New York policy.

3. Lastly, Occidental argues that this court should not recognize class action tolling in personal injury class actions. Occidental Br. 34-35. There is no principled basis for such an exclusion. This Court has already recognized class-action tolling in toxic tort personal injury cases. *Snyder v. Town Insulation*, 81 N.Y.2d 429, 432 (1993). *American Pipe* itself was a complex antitrust suit with a broad class definition encompassing end users of concrete and steel pipe. 414 U.S. at 541. *Blanco*, 67 A.3d 392, where the Delaware Supreme Court recognized cross-jurisdictional tolling in an appeal in which Occidental was a party, was a DBCP case arising from the same allegations. *Patrickson*, where the Hawaii Supreme Court

recognized cross-jurisdictional tolling, was a DBCP case as well (in which Occidental was a party). 368 P.3d at 970. *See also Stevens*, 247 P.3d at 253 n.2 ("courts have extended class action tolling in mass tort cases"); *Vaccariello*, 763 N.E.2d at 161-62 (medical device-related injury); *Staub*, 726 A.2d at 967 (x-ray liquid-related injury); A1343-46 (Delaware Superior Court decision rejecting defendants' argument that tolling does not apply in personal injury actions).

II. Judge Lake's 1995 Dismissal Order And Final Judgment Did Not Terminate Tolling.

A. Ten Courts, Including The Judge Who Issued The Orders At Issue, Have Rejected Occidental's Argument.

The Orders at issue in this appeal — Judge Lake's 1995 dismissal Order and Final Judgment — did not end class-action tolling under any conceivable legal standard. Rather, as Judge Engelmayer found, "Judge Lake's orders reasonably allowed for class proceedings in any forum as the lawsuit moved forward," because they "effected only a conditional dismissal and very much left open the prospect of a continued putative class action in Texas." A364. Judge Engelmayer explained that the "return jurisdiction" clause "provided a domestic backstop to ensure that, even as the *Carcamo/Delgado* plaintiffs tested the jurisdiction of foreign courts, Texas would remain available as a forum for the putative class action," given that "the prospects for plaintiffs to secure jurisdiction over defendants abroad appeared doubtful." A365.

"Many Latin American countries apply the doctrine of preemptive jurisdiction," under which "the filing of suit in one forum extinguishes the jurisdiction of any other forum." *Marquinez*, 183 A.3d at 713 n.37. Plaintiffs warned Judge Lake that, under the doctrine of preemptive jurisdiction, foreign courts would hold that they lacked jurisdiction over the claims, and he therefore included language in his dismissal order allowing the federal court to "resume jurisdiction over the action as if the case had never been dismissed." 890 F. Supp. at 1375. The October 1995 judgment was "final" only for purposes of appeal and to certify that the domestic conditions of f.n.c. dismissal earlier set by Judge Lake had been met. Indeed, by its very nature, an f.n.c. dismissal assumes that a claim can be prosecuted in another forum; it does "not resolve the merits of th[e] claim." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 141 (1988).

Judge Engelmayer concluded that, "[i]n view of this conditional dismissal and Judge Lake's overt reservation of the possibility – and anticipation – of continued class litigation before him, absent members of the putative class reasonably could have relied on a continuing putative class action in the United States as a reason not to initiate their own lawsuits." A365. "Judge Lake's orders made clear that class treatment in the United States remained available within the context of the same litigation in the readily foreseeable event that jurisdiction abroad over defendants was found lacking." A365 n.1.

The Delaware Supreme Court, reviewing the same record, unanimously agreed with Judge Engelmayer's conclusion: "A resumption of jurisdiction over the 'action as if the case had never been dismissed,' it seems to us, includes resumption of jurisdiction over the putative class action." *Marquinez*, 183 A.3d at 711. "[C]lass action tolling in the instant case did not end until the Texas state court denied class certification on June 3, 2010." *Id.* Plaintiff's construction of Judge Lake's Order and Judgment is consistent with the rulings of ten courts.[4]

Occidental's apparent position (Occidental Br. 42) is that it was objectively unreasonable for plaintiffs to rely on the conditional nature of the dismissal and the resumption of jurisdiction in the *Carcamo/Delgado* class action *even when the scenario anticipated by Judge Lake and plaintiffs is exactly what came to pass*. That is, in 1995 plaintiffs told Judge Lake that his f.n.c. dismissal would lead foreign courts to deny jurisdiction over their claims, and, as predicted, the Costa Rican courts held exactly that. *Delgado*, 890 F. Supp. at 1356; A331-32, A373, A726-892. As plaintiffs anticipated, a motion to reinstate was filed before Judge Lake on April 1,

[4] The ten courts include: (1) Judge Lake, 322 F. Supp. 2d at 813, 815; (2) the District Court of Brazoria County, Texas, in 2005, A981; (3) the Texas Court of Appeals, A983-84; (4) Judge Hoyt of the Southern District of Texas, A1076; (5) the Fifth Circuit, A1116; (6) the District Court of Brazoria County in 2010, A1121; (7) the Delaware Superior Court, A1346-48; (8) Judge Engelmayer, A350-55, A364-67; (9) the Delaware Supreme Court in *Marquinez*, 183 A.3d 704; and (10) the Third Circuit in *Chavez*, 836 F.3d at 233-34.

1996 – just over five months after the October 27, 1995 final judgment. A373, A712-23.

Judge Lake explained that "the return jurisdiction clause included in the court's July 11, 1995, Memorandum and Order constitutes an express statement of the court's intent to *retain jurisdiction* over this action, both to enforce the agreements on which the dismissal was premised and to ensure that an American forum remains available to adjudicate plaintiffs' claims if and when the highest court of a foreign country dismisses them for lack of jurisdiction." 322 F. Supp. 2d at 813 (emphasis added). He described the motion to reinstate as "a *direct continuation* of the prior proceedings over which the court expressly stated its intent to retain jurisdiction." *Id.* (emphasis added); *see also id.* at 815 ("[T]he court has concluded that plaintiffs' motion to reinstate is a direct continuation of the prior proceedings over which the court expressly stated its intent to retain jurisdiction."). Judge Lake remanded *Carcamo* to state court as a putative class action, in the form in which it was originally filed in state court. *Delgado*, 322 F. Supp. 2d at 817. Representative plaintiffs in that action then filed an amended petition re-asserting their class claims. A986-1005.

Occidental's position requires it to argue that Judge Lake's interpretation of his own orders was objectively unreasonable and that the courts following Judge Lake were objectively unreasonable as well. For example, in the Texas state courts,

Occidental and other defendants objected to reinstatement, but the Texas courts rejected this objection and reinstated *Carcamo* as a class action, as though it had never been removed or dismissed. A374, A981. Defendants sought a writ of mandamus to the 14th District Court of Appeals in Texas, challenging the reinstatement of the actions, which the Texas Court of Appeals rejected. A374, A984. These rulings, according to Occidental's position, must have been objectively unreasonable.

So, too, must have been Judge Hoyt's decision in 2009 rejecting the defendants' attempt to remove the *Carcamo* class action as a "new" suit under the Class Action Fairness Act. Judge Hoyt (who sat on the same bench as Judge Lake) held that the "class action . . . has been pending in one forum or another since 1993." A1076. Judge Hoyt concluded that "this action commenced with the filing of the state-court petition in 1993, not in 2009 when the Plaintiffs-Intervenors submitted their class certification motion." *Id.* Moreover, the Fifth Circuit, which unanimously denied permission to appeal Judge Hoyt's ruling, A375, A1116, must have been objectively unreasonable, too. And the District Court of Brazoria County, Texas, which in 2010 rejected (again) defendants' argument that *Carcamo* had been dismissed in 1995, A375, A1121, presumably was objectively unreasonable as well.

Similarly, Occidental's position requires it to take the view that the Delaware Superior Court and Delaware Supreme Court were objectively unreasonable in

rejecting its interpretation of Judge Lake's Orders. The Delaware Superior Court cited the conditional nature of the dismissal and the return jurisdiction clause, A1347, and concluded that "[t]his action did not end in Texas until June 2010. To imply otherwise . . . is misleading at best." *Blanco v. AMVAC*, 2012 WL 6215301, at *2 (Del. Super. Ct. Sept. 18, 2012). The Delaware Supreme Court reached the same conclusion:

> [Judge Lake's] 2004 discussion of the nature and effect of his 1995 opinion and orders . . . confirms that the court retained jurisdiction to reinstate the case if the foreign courts did not accept jurisdiction and that a motion to reinstate would be a continuation of the case . . . . The Texas District Court did not address the class action on the merits in its earlier opinion and orders. There were known doubts about whether the foreign courts would exercise jurisdiction over the plaintiffs' claims, doubts which proved true.
>
> *Marquinez*, 183 A.3d at 713.

The Third Circuit, sitting *en banc*, criticized Occidental's argument as "an extremely fine-grained interpretation of what occurred in Texas in 1995." *Chavez*, 836 F.3d at 233. The Third Circuit noted that Occidental's view failed to "acknowledge that when the Texas District Court reinstated the class action in 2004, it framed its decision as 'a direct continuation of the prior proceedings over which the court expressly stated its intent to retain jurisdiction.'" *Id.* at 234.

According to Occidental's argument, each of the decisions in this long list was objectively unreasonable in interpreting Judge Lake's Orders. Occidental would have this Court adopt an interpretation at odds with Judge Lake's understanding of

his own Orders and at odds with the interpretation adopted by ten courts – including the Texas state courts, which reinstated the *Carcamo* case as a putative Texas state-court class action, as if it had never been removed to federal court. Such second-guessing of the decisions of sister states is foreclosed by fundamental principles of New York law. *See Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 311 (1994) ("New York will not undertake collateral review of a sister State's application of its own law."); *Home Ins. Co.*, 75 N.Y.2d at 205 (defendant "asks us to discredit the application of Illinois law by the Illinois courts . . . . We decline to do so.").

B. Judge Lake's July 1995 Order Denying "All Pending Motions" As "MOOT" Did Not End Tolling.

Occidental argues that tolling was terminated by a generic housekeeping provision (included by Judge Lake in the last paragraph of his 41-page July 1995 Order) denying "all pending motions" as "MOOT." *Delgado*, 890 F. Supp. at 1375. Occidental is wrong, for several reasons.

1. No Federal Class Certification Motion Under Rule 23 Was Actually Pending Before Judge Lake In July 1995.

Although Judge Engelmayer accepted Occidental's premise that the pending motions encompassed by the July 1995 Order included a motion for class certification (while noting that "the matter is not free from doubt," A352 n.8), the better reading of the procedural history is that the Order did not encompass such a

motion. As the defendants acknowledged before Judge Lake, the plaintiffs had sought certification in state court, but had not filed a motion in federal court for class certification under Rule 23. A497 n.2. Nor, as the defendants also conceded, did the parties brief or argue class certification in state or federal court. A496 n.1 (explaining that "Defendants did not file a brief in state court in response to Plaintiffs' state court amended motion for class certification," and "request[ing] an opportunity to file a brief and evidentiary materials" before any ruling on class certification). Because plaintiffs had not moved for class certification under Federal Rule 23, class certification could not have been among the "pending motions" that the Order denied as "moot." There was no pending motion under Rule 23 to deny.

Accordingly, a federal class certification motion was not even pending in 1995. Texas Rule 42 and Federal Rule 23 are similar but indisputably distinct. *Compare* TEX. R. CIV. P. 42(c) *with* FED. R. CIV. P. 23(c) (providing for different procedures for determining whether class status is available). *See also Stipelcovich v. Directv, Inc.*, 129 F. Supp. 2d 989, 994 (E.D. Tex. 2001) (noting that claiming "class action status under Texas Rule of Civil Procedure 42" was not sufficient to "[demonstrate] federal class action status under Fed. R. Civ. P. 23.").

When Judge Lake entered the July 1995 dismissal order, he did not state that a *federal* motion to certify the class was pending or include any discussion of the requirements of class certification under Federal Rule 23, let alone deny certification

for a substantive Rule 23 deficiency. After the order of July 1995, the *Carcamo* case continued to be treated as a putative class action. A898, A910-11 n.1. When the case was remanded to the Texas state courts, it was remanded as a class action, not as an individual action. A374, A977, A981, A983-84. After the Texas Court of Appeals upheld the reinstatement of the case, plaintiffs filed their Eighth Amended Petition *re-alleging* their class allegations. A986-1005. And it was the Texas *state* court that ultimately issued the order denying plaintiffs' *state* court motion for class certification – in 2010. A375, A1124.

2. Even If A Federal Class Certification Motion Was Pending, It Did Not End Tolling.

Even if the July 1995 Order in fact encompassed a class certification motion, it did not end tolling. Judge Engelmayer found that the July 1995 Order "effected only a *conditional* dismissal," Judge Lake "retained jurisdiction over the action," and the Order "held out the guarantee of 'resum[ing] jurisdiction . . . *as if the case had never been dismissed.*" A353 (brackets in original; emphasis added). The Order "was a far cry from a paradigmatic order that could be taken as implying the impossibility of a future class action, such as an order granting with prejudice a motion to dismiss under Rule 12(b)(6)." *Id.* In fact, the "return jurisdiction" clause told absent class members the opposite: it assured them that their claims "would either proceed in a foreign forum or, if jurisdiction there proved lacking, remain within [the] court's jurisdiction." *Id.* The Order's sole ground was mootness, in

connection with the *f.n.c.* dismissal, rather than any substantive reason for the denial of certification. "That the motion for class certification was terminated for reasons other than the merits, and specifically to permit the named plaintiffs to pursue the same lawsuit in more convenient fora (which they in fact did), tends to support that it was reasonable for plaintiffs here to continue to rely on the *Carcamo/Delgado* putative class action as protecting their interests." A352.

Occidental contends that tolling depended on a "mere" possibility that, after dismissal, someone "might" step forward to serve as class representative. Occidental Br. 42. Not so. At all relevant times, the *Carcamo/Delgado* case was captioned as a putative class action with class representatives, including intervenor-plaintiffs. A371-75, A977, A986-1005, A1007, A1072, A1121, A1124. As Judge Engelmayer noted, "continued class litigation before" Judge Lake was not merely possible but "anticipat[ed]," given that "the prospects for plaintiffs to secure jurisdiction over defendants abroad appeared doubtful." A365.

Occidental accuses class members of inaction and sleeping on their rights. That is inaccurate. After Judge Lake's October 27, 1995 Final Judgment, a motion to reinstate was filed before him on April 1, 1996 (A373, A712-23) – just over *five months* later. Judge Lake deferred ruling on that motion until 2004 (A373, A894-95) and remanded *Carcamo/Delgado* to Texas state court the same year (A333), where it was actively litigated as a putative class action until certification was denied

in 2010. (A1124). There were no "decades" of delay by plaintiffs. Moreover, Occidental should not be rewarded for delaying the litigation via meritless removals and procedural machinations. It should not be able to obstruct justice and then cite the resulting delay to deprive plaintiffs of class action tolling. Judge Engelmayer was amply justified in finding that "absent class members such as the plaintiffs here, following these orders, could reasonably have relied thereafter on the continued maintenance of the *Carcamo/Delgado* putative class action." A352.

Occidental's suggestion that the named class representatives did not seek to represent absent class members is untrue. The named plaintiffs and intervenors moved to remand *Carcamo/Delgado* (A712-23, A897-908, A932-38), which was reinstated in state court as a putative class action. JA874.

Occidental contends the motion to reinstate before Judge Lake was limited to individual Costa Rican plaintiffs. Occidental Br. 41. Judge Engelmayer properly dismissed this argument, A366-67, which rehashes objections repeatedly rejected in the federal and state courts of Texas in 2005, 2009, and 2010. A373-75. In remanding *Delgado* and *Carcamo*, Judge Lake instructed that "the return jurisdiction clause can be considered by the state courts in which the cases originated." A972. The Texas state courts considered the defendants' objections and rejected them. A981, A983-84, A1121. Thus, a Texas state appellate court rejected defendants' contention "that the state court judges in these proceedings abused their discretion

by reinstating the actions in state court without requiring the real parties to comply with the return jurisdiction clause in the federal court's order." A884. The Texas federal courts rejected defendants' objections as well. A1037-47, A1048-70, A1071-77, A1078-1114, A1116. The "return jurisdiction" clause may have required a plaintiff or intervenor to file a motion, but the effect of reinstatement was not limited to individual Costa Rican plaintiffs or putative class representatives. The clause provided for resumption of "jurisdiction over the action as if the case had never been dismissed" (890 F. Supp. at 1375), in the form of a class action, not individual actions, or geographic-specific subclasses, which had never been proposed or certified. Thus, the *Carcamo* case continued to be captioned as a putative class action in both the federal and state Texas courts (A898, A910-11 n.1, A981), and it was remanded as a putative class action (A374, A977), reinstated as a putative class action by the Texas state courts (A981, A983-84), reasserted as a class action by the plaintiffs (A985-1005, A1006-36), and remained a putative class action until 2010. A1124.

Further, even under Occidental's interpretation of Judge Lake's return jurisdiction clause, the requirements of that clause were satisfied because Costa Rican intervenor-plaintiffs filed a motion triggering remand and prosecuted *Carcamo* as a putative class action in the Texas courts. Nelson Rivas Ramirez and Eduardo Riva Ledezma, residents of Costa Rica, intervened into the *Carcamo* case

in 1994 and became plaintiffs for all purposes. A371, A461-71. In 2003, the Costa Rican plaintiffs ***and intervenors*** filed with Judge Lake a motion to vacate order of dismissal and to remand. A897-908. Judge Lake remanded the *Carcamo* case to Texas state court. A977. Nelson Rivas Ramirez and Eduardo Riva Ledezma moved for class certification in *Carcamo.* A1006-36.

Occidental argues that a host of post-1995 developments made it objectively unreasonable for absent class members to rely on the resumption of jurisdiction pursuant to the return jurisdiction clause. For example, Occidental notes the post-1995 decision of other plaintiffs to settle their claims. Occidental Br. 40. It notes the 2008 denial of certification in a Hawaii class action. *Id.* at 52. But none of these developments changed the fact that *Carcamo/Delgado* was continually pending as a putative class action on which plaintiffs reasonably relied. And Occidental's argument is inconsistent with its own contention that a court should not use post hoc events or "20/20 hindsight" (*id.* at 47) in deciding whether tolling has been terminated.

Occidental also mistakenly relies on the Florida *Abarca* action. Occidental Br. 12. But *Abarca* was a purely defensive response to defendants' efforts to enjoin the litigation of any additional DBCP cases by Judge Lake. The *Abarca* complaint was never served on defendants (A375, ¶ 40), and, as soon as Judge Lake indicated he would not grant the requested injunction, plaintiffs voluntarily dismissed the

Abarca action in favor of the already-pending *Carcamo* putative class action. A375, ¶ 41, A1225-27. Far from negating *Carcamo's* tolling effect, the *Abarca* complaint and its dismissal signaled the unmistakable intent of plaintiffs to rely on *Carcamo*, as the Delaware Superior Court properly found in rejecting Occidental's argument. A1349-51.

C. The October 1995 "Final Judgment" Did Not End Tolling.

Occidental half-heartedly argues that the October 1995 "Final Judgment" terminated tolling. Occidental Br. 39. As Judge Engelmayer observed, the "Final Judgment" did not terminate tolling because it "did not abrogate the return jurisdiction clause" and "merely used the 'Final Judgment' label to certify that the domestic conditions of dismissal earlier set by Judge Lake had been met." A354. Judge Lake explained that it "was not a 'final judgment' that extinguished the court's duty either to continue examining its subject matter jurisdiction over this case, or to remand the underlying cases to state court when and if it determines that it lacks subject matter jurisdiction." 322 F. Supp. 2d at 816 (citations omitted). Indeed, he described the plaintiffs' subsequent filing as "a *direct continuation* of the prior proceedings over which the court expressly stated its intent to retain jurisdiction." *Id.* at 813 (emphasis added). The case was not removed from his docket, and he did

not relinquish jurisdiction in the matter until 2004, when he remanded the putative class actions to Texas state court.[5]

D. This Court Need Not Consider Occidental's Arguments Regarding The Legal Standard For Terminating Tolling.

Occidental advances inconsistent arguments in this Court. On the one hand, it proposes an "objective reasonableness" test (Occidental Br. 42), under which "courts should judge the reasonableness of reliance by absent class members objectively, based on the facts known at the time class certification is considered." *Id.* at 47. Judge Engelmayer expressly applied this legal standard, which Occidental defended in the Southern District: "As defendant here puts the point, '[T]he touchstone for determining whether class-action tolling has ended is whether it would be "objectively reasonable" for a plaintiff to continue relying on the action to protect his claims.'" A351-52 (quoting Occidental's Brief at 8 and *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 117 (2d Cir. 2013)). Judge Engelmayer found, on

[5] Occidental contends that Judge Lake's 1995 dismissal did not operate as a stay. Occidental Br. 53-54. Although this Court need not reach the issue, Judge Lake's decision to retain jurisdiction, while declining to hear the case on *f.n.c.* grounds, is the functional equivalent of a stay under N.Y. C.P.L.R. § 327, which does not terminate an action in a way sufficient to put putative class members on notice to bring individual claims. *See Blanco*, 2012 WL 3194412, at *12 ("where a stay is entered here on the grounds of *forum non conveniens*, but jurisdiction is retained, it necessarily operates to toll a statute of limitations").

the procedural history here, that it was objectively reasonable for plaintiffs to rely on the *Carcamo* class action.

On the other hand, Occidental urges this Court to adopt a "bright-line rule" that tolling ends when class certification is denied or if a case is dismissed "for any reason." Occidental Br. 42, 46. But such a rule is not consistent with Occidental's own "objective reasonableness" approach or with the purposes of class-action tolling. "Class members are permitted — even encouraged — to rely on the class plaintiffs to advance their claims, and the initiation of a class suit gives defendants all the information they need to prepare their defense." *In re WorldCom Securities Litigation*, 496 F.3d 245, 254 (2d Cir. 2007). "[I]t was not the purpose of *American Pipe* . . . to force individual plaintiffs to make an early decision whether to proceed by individual suit or rely on a class representative. Nor was the purpose of *American Pipe* to protect the desire of a defendant 'not to defend against multiple actions in multiple forums.' The *American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually." *Id.* at 256 (emphasis in original; citation omitted).

Occidental would force individual class members to file separate actions even when it would be objectively reasonable to rely on the class, and even when a trial-court order fails to put absent class members on notice of the need to file individual

claims to protect their interests. For example, it might well be objectively reasonable to rely on the class action when a court dismisses a class action for defective service of process, or when a court denies certification for want of an adequate representative, but identifies another member of the class who may be substituted as class representative. Occidental's proposed rule would undermine the purposes of class-action tolling by forcing putative class members to file individual preemptive actions anytime they fear that a subsequent reviewing court, potentially many years later, might retroactively conclude that an ambiguous district court order has terminated tolling. As the *en banc* Third Circuit explained, *American Pipe* "does not require litigants to see through a glass darkly in order to predict whether a court will consider their claims timely." *Chavez*, 836 F.3d at 222. *See also Marquinez*, 183 A.3d at 711 ("A member of a putative class should not have to deal with ambiguity in deciding whether class action tolling has ended, and the consequent waste of judicial resources by filing a protective action to avoid risking later dismissal on statute of limitations grounds.").[6]

[6] Occidental claims that the Delaware Supreme Court applied the wrong legal standard in *Marquinez* by including the words "clearly" and "unambiguously" in its opinion. Occidental Br. 42. Yet in the Second Circuit, Occidental conceded it was an "uncontroversial position that class action tolling ends only after an *unambiguous* order disallowing class status." Occidental CA2 Br. 43 n.13 (emphasis added). Occidental has acknowledged the Delaware Supreme Court's approach was correct.

Ultimately, there is no need for this Court to render a categorical decision about whether non-merits dismissals do (or do not) terminate class-action tolling, because the Orders at issue in this case did not end the litigation or terminate tolling, even under Occidental's "bright-line rule." The conditional nature of the f.n.c. dismissal, coupled with the return jurisdiction clause and Judge Lake's continued jurisdiction over *Carcamo*, means that there was no "dismissal" sufficient to terminate tolling.

Occidental does not correctly describe the authority it cites. One of its own authorities disavows its "bight-line" approach. *See* Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 GEO. MASON L. REV. 339, 373 (2016) ("courts should, when possible, avoid articulating bright-line prohibitions") (cited Occidental Br. 3, 24). Occidental cites a treatise for the proposition that tolling terminates "if the case comes to an end" for any reason (Occidental Br. 22) (citation omitted). But the *Carcamo/Delgado* case did not "come to an end" in 1995.

In fact, there is no authority for finding that the Orders in this appeal terminated tolling. None of the cases cited by Occidental involves anything resembling Judge Lake's conditional dismissal, coupled with the "return jurisdiction" clause and express reservation of jurisdiction. Rather, the cases involve rulings sufficiently clear to put absent class members on notice that they must

institute individual actions to protect their rights, such as unambiguous denials of class certification pursuant to the requirements of Rule 23.

For example, *China Agritech* involved a district court's express denial of class certification for failure to comply with Rule 23. 138 S. Ct. at 1804. In *American Pipe*, the Supreme Court instructed that tolling ends when "the court has found the suit inappropriate for class action status." 414 U.S. at 553. But Judge Lake made no such determination.

Occidental cites *Desrosiers v. Perry Ellis Menswear, LLC*, 139 A.D.3d 473 (1st Dep't 2016), *aff'd*, 30 N.Y.3d 488 (2017), but that case affirmed that "commencement of a class action suit tolls the running of the statute of limitations for all purported members of the class." *Id.* at 474. The court noted that "the limitations period could run on the putative class members' cases following discontinuance of the [representative] plaintiff's action," *id.*, but here *Carcamo* was not discontinued or terminated until 2010. Moreover, *Desrosiers* showed solicitude for the interests of absent class members by reversing the Supreme Court's denial of CPLR 908 notice to the putative class members. In that respect, it supports plaintiffs here.

Occidental cites *Clifton Knolls Sewerage Disposal Co. v. Aulenbach,* 88 A.D.2d 1024 (3d Dep't 1982), but that case recognized over 8 years of class-action tolling, terminated only when the trial court granted summary judgment on the

merits of the claim. Notably, the Appellate Division applied tolling even though the parties disputed whether the case had been a class action at all. *Id.* at 1025.

Occidental cites *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987), but that case referred to "a *definitive determination* of the inappropriateness of class certification." *Id.* at 879 (emphasis added). There was no "definitive determination" here.

Occidental also relies on *Giovanniello v. ALM Media, LLC*, 726 F.3d 106 (2d Cir. 2013), but that case involved a clear and unambiguous district court decision dismissing a putative federal class action for lack of jurisdiction, not a conditional dismissal, "return jurisdiction" clause, or promise of reinstatement. *See Giovanniello v. New York Law Publ'g Co.*, No. 07 Civ. 1990 (HB), 2007 WL 2244321, at *4 (S.D.N.Y. Aug. 6, 2007) ("Defendant's motion to dismiss is GRANTED. The Clerk of the Court is instructed to close this case and remove it from my docket."). Courts have recognized that *Giovanniello* does not terminate tolling where (as here) "the appropriateness of a class action had not been addressed in any of the previously-filed putative class actions." *Betances v. Fischer*, 144 F. Supp. 3d 441, 458 (S.D.N.Y. 2015). *See id.* at 457 (tolling continued where prior court "did not address the merits of the class certification motion. . . . Thus, no court 'definitively denied' class certification. In two of these actions, no motion for class certification was ever made. In the third, plaintiffs moved for class certification, but

the motion was denied as moot and the court never addressed the merits of class certification.").

Occidental relies at length on *Bridges v. Dep't of Md. State Police*, 441 F.3d 197 (4th Cir. 2006). But *Bridges* is not analogous to this case. In *Bridges*, the district court entered an order "denying the motion for class certification without prejudice and providing that the motion would 'automatically [be] considered renewed' if the plaintiffs filed a reply to the defendants' opposition to class certification." *Id.* at 203. The plaintiffs never filed a reply. *Id.* at 212. Even so, the Fourth Circuit was reluctant to rely on the order alone and explained that "if the district court's denial of class certification did not adequately alert class members by its language alone, when coupled with the ensuing conduct of the litigation, it should have alerted absent class members that the district court's denial of the class action would not be resurrected at least with respect to a portion of the class members' claims. If they were inclined to preserve those claims, they would have had to file separate suits or a motion to intervene." *Id.* at 211-12.

By contrast, in this case, the ensuing conduct of the parties and the courts reveal the opposite conclusion. The *Carcamo* action was reinstated and continued to be treated and captioned as a putative class action in the federal court, even after Judge Lake's 1995 Orders. It was remanded to the Texas state court as such. The

putative class action remained pending until an order denying class certification was issued by the Texas state court in 2010.

E. Occidental Relies On Inapposite Precedent From DBCP Litigation.

Occidental relies on two decisions from prior DBCP litigation, one from Hawaii and the other from the Eastern District of Louisiana (affirmed in an unpublished decision by the Fifth Circuit). Neither helps Occidental.

In *Patrickson v. Dole Food Company, Inc.*, 368 P.3d 959 (Haw. 2015), the Hawaii Supreme Court *disagreed* with Occidental's primary argument here and held that Judge Lake's "July 11, 1995 order did not terminate class action tolling" because it did not "'put putative members of the class on notice that' the Hawai'i state statute of limitations had begun to run against them." *Id.* at 970-71. The Hawaii court explained that "[t]he Plaintiffs' arguments are persuasive. . . . [The July 1995 Order] 'did not contain any discussion of the requirements of class certification under Federal Rule 23.' The denial of class certification in the July 11, 1995 order was, as Plaintiffs argue, not express." *Id.* at 970. "[T]he July 11, 1995 order did not unambiguously signal to putative class members of the need to act to protect their interests." *Id.* at 971. Although the Hawaii court stated that that the "Final Judgment" issued in October 1995 terminated tolling, *id.* at 971, that aspect of decision was *dictum*. Whether tolling stopped on October 27, 1995, or continued to run thereafter, was not relevant to the Hawaii issue because in either circumstance,

the October 3, 1997 Hawaii complaint was timely. In any event, the Hawaii court did not address the import of the "return jurisdiction" clause or any of the other aspects of Judge Lake's ruling cited by Judge Engelmayer and *Marquinez*.

Occidental also cites Judge Barbier's decision in the Eastern District of Louisiana opining that the 1995 *forum non conveniens* dismissal "restarted the prescriptive period" under the Louisiana prescription statute. *Chaverri v. Dole Food Company, Inc.*, 896 F. Supp. 2d 556, 569 (E.D. La. 2012), *aff'd*, 546 F. App'x 409 (5th Cir. 2013). That case is inapposite because it applied the Louisiana prescription statute rather than New York law. Judge Barbier explained that, "[i]n assessing the argument, the Court looks to Louisiana's class action tolling laws as they existed before 1997," and he stressed the distinctive features of Louisiana law. *Id.* at 568. He concluded that "[p]er Louisiana law," the prescriptive period was restarted for purposes of the Louisiana statute. *Id.* at 569. Judge Barbier expressly declined to follow decisions by Judge Lake, Judge Hoyt, or the Delaware Superior Court regarding the nature of the 1995 dismissal. A2188 ("That might be what one judge said but that's not really correct."); A2193 ("I may just not agree with the Delaware court."). Judge Barbier stated that he did not expect his ruling to bind any other judge. A2193-94 ("[O]ne of the beauties about being a district court judge is that whatever we say is not binding on anybody other than myself, and then it's not even binding on myself in the next case.").

The Fifth Circuit, in its unpublished decision, similarly framed the question before it as being limited to the Louisiana prescription statute. The Fifth Circuit opined that "Chaverri's arguments fail because none of the decisions address the specific issue presented in this case: did the putative class action in Texas interrupt prescription of Chaverri's 2011 claims *under the specific Louisiana rules*?" 546 F. App'x at 414 (emphasis added).[7]

Accordingly, the Delaware Supreme Court gave persuasive reasons for not following either the Hawaii Supreme Court or the Fifth Circuit:

> Those courts gave no effect to the conditional nature of the dismissal resulting from the return jurisdiction clause in the Texas District Court's *Delgado I* opinion and order. The return jurisdiction clause allowed the Texas District Court to resume jurisdiction upon motion of the plaintiffs, which included resumption of its consideration of plaintiffs' class action certification request. Under our view of class action tolling, a conditional dismissal does not finally decide a pending request for class certification. Thus, neither the 1995 *Delgado I* opinion and order nor the 1995 *Delgado I* Final Judgment finally dismissed the request for class action certification.

Marquinez, 183 A.3d at 714. The Delaware Supreme Court's reasoning is correct, and class-action tolling did not end in this case until 2010.

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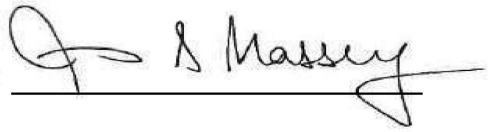
[7] Louisiana law recognizes that other states may entertain actions deem barred by the Louisiana prescription statute. Under Louisiana law, "[a] dismissal on the grounds of the expiration of a mere time limit" "does not automatically preclude consideration of the substantive merits by a different or foreign court system, especially 'in other jurisdictions with longer, unexpired limitations periods.'" *Griffin v. BSFI Western E&P, Inc.*, 812 So.2d 726, 732 (La. App. 2002) (citation omitted).

CONCLUSION

Regarding the first question presented, this Court should hold that New York law recognizes cross-jurisdictional class action tolling. As to the second question presented, this Court should hold that Judge Lake's Orders in this case did not terminate tolling.

Dated: January 10, 2020

By: 

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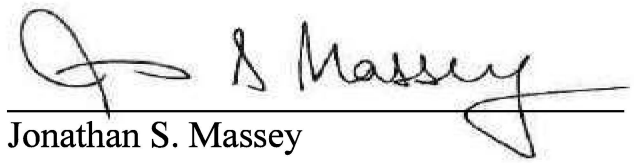

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