IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSE RUFINO CANALES BLANCO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N11C-07-149 JOH
	)	
AMVAC CHEMICAL CORPORATION; AMVAC, INC.; THE DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION; DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY,	)	
	)	
Defendants.	)	

Date Submitted: April 5, 2012
Date Decided: August 8, 2012

*Upon Dow Chemical Company's Motion for Judgment on the Pleadings—**DENIED***

*Upon Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company and Standard Fruit and Steamship Company's Motion for Judgment on the Pleadings or in the Alternative Motion to Dismiss—**DENIED***

*Upon Occidental Chemical Corporation's Motion for Judgment on the Pleadings or in the Alternative Motion to Dismiss—**DENIED***

*Upon AMVAC Chemical Corporation's Motion for Judgment on the Pleadings or in the Alternative Motion to Dismiss—**DENIED***

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HERLIHY, Judge

In 1993 a number of plaintiffs filed a putative class action claim in a Texas state court alleging personal injuries suffered by workers in various foreign countries due to exposure to a pesticide. Within a short while, the case was removed to a federal court in Texas. Issues then arose concerning federal jurisdiction over one of the defendants, a foreign company, and *forum non conveniens*. The District Court conditionally dismissed the suit on that latter ground without deciding the request for class certification but it left open the possibility of reopening the case.

Years later, it was reopened after the United States Supreme Court, in a parallel litigation, held there was no federal jurisdiction over the same defendant. Thereafter, plaintiffs asked the District Court in Texas to reopen the case and remand it to the state court, which it did. In June 2010 that court finally denied plaintiffs' request for class certification.

One of those plaintiffs, Jose Rufino Canales Blanco ("Blanco") has now filed suit here. Delaware has a two-year statute of limitations for personal injury cases. Delaware jurisprudence has recognized tolling of the statute of limitations where plaintiff relies upon a pending class action in the same jurisdiction. The issue raised by the defendants' motions in this case, however, involves the issue of whether Delaware will recognize cross-jurisdictional tolling – that is whether its statute of limitations is tolled by actions in another jurisdiction. The issue is one of first impression.

The Court holds that the Delaware statute of limitations was tolled even though the original filing was in another jurisdiction. Defendants' motions are DENIED.

Factual Background[1]

Plaintiff Blanco worked on a banana plantation in Costa Rica from 1979-1980 as a contract laborer. He alleges that during this time, he was exposed to a now banned toxic pesticide known as dibromochloropropane ("DBCP"). Banana farmers used DBCP to kill worms that attack the roots of banana trees. Exposure to DBCP causes sterility, sexual and reproductive abnormalities and cancer. Defendants in this action are alleged to have manufactured, sold, distributed, used and placed DBCP into the stream of commerce, thereby exposing banana plantation workers to it. Blanco is one of thousands of individuals allegedly injured by exposure to DBCP. Litigation of claims relating to DBCP exposure is complicated and dates back to at least 1993. A review of the relevant procedural history of DBCP litigation is necessary to understand better why this case is now pending in this Court and why defendants[2] have moved for judgment on the pleadings, or in the alternative moved to dismiss.

DBCP Litigation Procedural History[3]

Blanco was a member of a putative class asserting claims for injuries caused by exposure to DBCP in an action originally filed in a state court in Texas on August 24,

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[1] The factual background is derived from the allegations in the complaint.

[2] Plaintiff filed a notice of voluntary dismissal of defendant AMVAC, Inc. on Sept. 22, 2011. The other defendants all remain parties to this litigation and have filed motions addressed in this opinion.

[3] The relevant procedural history is for the most part undisputed.

1993.[4] That case became known as *Jorge Carcamo v. Shell Oil Co.*, No. 93C-2290 (Brazoria County, Texas) ("*Carcamo*"). The putative class included:

> All persons exposed to DBCP, or DBCP-containing products, designed, manufactured, marketed, distributed or used by [...] Dow Chemical Company, Occidental Chemical Corporation (individually and as successor to Occidental Chemical Company and Occidental Chemical and Agricultural Products, Inc.) or used by defendants Standard Fruit Company, Standard Fruit and Steamship Co., Dole Food Company, Inc., [and] Dole Fresh Fruit Company[.][5]

Soon after plaintiffs filed *Carcamo*, the defendants in that action filed a third party petition impleading the Dead Sea Bromine Company, which also produced DBCP and which was indirectly owned by the State of Israel. Defendants then immediately removed the case to federal court, asserting the Texas state court lacked jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 ("FSIA"). The FSIA provides exclusive original jurisdiction in federal courts over foreign states or any instrumentality or agency of a foreign state.[6] If the entity is not an instrumentality or agency of a foreign state, there is no federal jurisdiction.

Before *Carcamo* had been removed to federal court, several other actions were filed by different plaintiffs in Texas state courts alleging injuries as a result of exposure

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[4] *Carcamo* was originally filed as an individual action and subsequently amended by additional plaintiffs to add class allegations in their Second Amended Petition. *See* Dow Chem. Co.'s Supplemental Brief in Support of its Motion for Judgment on the Pleadings [hereinafter "Dow's Supp. Br."], App. Ex. 4, Second Amended Petition.

[5] Dow's Supp. Br., App. Ex. 3, p. 4; Although not listed here as a defendant in *Carcamo*, AMVAC Chemical Corporation is alleged to have manufactured, sold, distributed, and used DBCP directly or through its parents, subsidiaries, affiliates or predecessors in interest. *See* Pl. Compl. ¶ 11.

[6] 28 U.S.C. § 1330; 28 U.S.C. § 1603.

to DBCP.[7] Those actions were filed against most of the defendants sued in *Carcamo*. Defendants in the other actions had those cases removed to federal court also based on the FSIA. The actions with similar allegations and defendants were consolidated in the United States District Court for the Southern District of Texas, Houston Division, before Judge Sim Lake in June 1994. The consolidated case became known as *Delgado v. Shell Oil Co.*, Civil Action No. H-94-1337 (Lake, J.) ("*Delgado"*). As a result of the consolidation, Blanco then became a member of the putative class in *Delgado*.[8]

In April 1995, the *Delgado* defendants moved to dismiss the consolidated actions on the grounds of *forum non conveniens*.[9] They simultaneously sought to enjoin any further DBCP litigation in the United States. Before Judge Lake could act on the request for an injunction, approximately 3,000 plaintiffs filed a complaint in Florida state court on June 9, 1995. The Florida case, filed as a defensive measure against the injunction sought by defendants, was known as *Abarca v. CNK Disposition Corp.*, Civil Action No. 95-3765 ("*Abarca*").

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[7] *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1336-40 [hereinafter "*Delgado I*"] (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 [hereinafter "*Delgado II*"] (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001).

[8] To avoid any confusion, *Delgado* refers to the entire consolidated action, beginning in 1994 when the state court claims were removed to the District Court and concluding upon remand to the Texas state courts in 2005. *Delgado I* and *II* refer to decisions issued by the District Court in 1995 and the Fifth Circuit in 2000 respectively.

[9] Neither Texas nor Florida recognized the doctrine of *forum non coneniens* when the first DBCP cases were filed in Texas. That doctrine was very strong, however, in the federal courts. This distinction is important because the plaintiffs apparently chose the jurisdictions in which to file based on whether or not the doctrine was recognized. The doctrine was also important to defendants. Once the cases were successfully removed to federal court, the doctrine became available as a defense strategy. *See* H'rg Tr. 12:5-13, Mar. 9, 2012.

Judge Lake entered a narrower injunction than defendants originally sought and plaintiffs, no longer fearing the broad injunction defendants had requested and prior to them being served, voluntarily dismissed *Abarca* on July 12, 1995.[10]

On July 11, 1995, Judge Lake issued an opinion ("*Delgado I*") indicating that he would grant defendants' motion to dismiss for *forum non conveniens*.[11] That opinion contained a return jurisdiction clause, required by Fifth Circuit precedent,[12] stating:

> 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*].[13]

The District Court's opinion also denied all other pending motions as moot. The class certification motion was one of many motions pending before the court at that time. Judge Lake also listed several conditions precedent that had to be satisfied prior to the *forum non conveniens* dismissal taking effect. Dismissal was conditioned upon the parties' agreement to complete expedited discovery in the United States, plaintiffs filing

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[10] "[T]he defendants had asked for a very broad injunction of all future filings by banana workers and their counsel, Mr. Blanco and 3,000 other plaintiffs represented by Mr. Hendler filed an action in Hillsborough County, Florida, which was removed to federal court in Florida. The intervening event is that Judge Lake enters his order granting an injunction, but a much narrower injunction than the one we had asked for." H'rg Tr. 6:13-21, Mar. 9, 2012.

[11] *Delgado I*, 890 F. Supp. at 1365.

[12] *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1166 (5th Cir. 1987); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675 (5th Cir. 2003).

[13] *Delgado I*, 890 F. Supp. at 1375.

suit in their home countries, and defendants waiving certain procedural and limitations defenses to those foreign suits.

The parties satisfied the conditions required prior to the *forum non conveniens* dismissal including plaintiffs filing suit in their home countries. Blanco and other Costa Rican workers filed in Costa Rican courts on August 9, 1995. Because the conditions in the *Delgado I* opinion had been satisfied, Judge Lake entered a final judgment on October 27, 1995 dismissing the action for *forum non conveniens*. That order dismissed the consolidated *Delgado* actions and enjoined plaintiffs from "commencing or causing to be commenced in any court in the United States any action involving DBCP-related claims and from intervening in [other pending DBCP cases.]"[14]

In the meantime, plaintiffs, including Blanco, prosecuted the actions in their home countries. The Costa Rican trial courts dismissed plaintiffs' actions and they appealed. The Supreme Court of Costa Rica entered a final order holding that the Costa Rican courts lacked jurisdiction over the DBCP claims.[15] The parties dispute what happened in Costa Rica but they all agree plaintiffs' claims were not resolved on the merits.[16] The Costa Rican Supreme Court entered its final order on February 21, 1996.

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[14] Dow's Supp. Br., App. Ex. 2, *Delgado v. Shell Oil Co.*, No. H94-1337, at 2 (S.D. Tex. Oct. 27, 1995) (ORDER) (final judgment dismissing consolidated class action for *forum non conveniens*).

[15] *See Canales Martinez v. Dow. Chem. Co.*, 219 F. Supp. 2d 719, 729 (E.D. La. 2002).

[16] Defendants contend plaintiffs "went [to Costa Rica] after the forum non conveniens dismissal, pleaded themselves into getting dismissed, got dismissed. The Court of Appeals order said that the plaintiffs didn't have standing to appeal because they got what they asked for. They asked to be dismissed and they were. Now, again, that has been hotly contested, and frankly, the defendants have not prevailed on that point." Hr'g Tr. 23:7-16, Mar. 9, 2012.

In addition to prosecuting the DBCP cases in their home countries, the *Delgado* plaintiffs, including Blanco, appealed the District Court's *Delgado I* decision to the Fifth Circuit arguing the FSIA did not provide the District Court subject matter jurisdiction and the *forum non conveniens* dismissal was improper. On October 19, 2000, the Fifth Circuit affirmed *Delgado I*, concluding removal and jurisdiction were proper under the FSIA and the District Court correctly applied *forum non conveniens* in dismissing *Delgado*.[17] The Fifth Circuit's opinion ("*Delgado II*") held that the federal courts had exclusive original jurisdiction under the FSIA because the State of Israel indirectly owned a majority interest in one of the impleaded Israeli companies.[18] Plaintiffs' petition for *certiorari* in the United States Supreme Court was denied on April 16, 2001.[19]

After unsuccessfully prosecuting their claims in Costa Rica, plaintiffs, including Blanco, filed a motion for reinstatement in the District Court in Texas pursuant to the return jurisdiction clause in the *forum non conveniens* dismissal. Plaintiffs filed their first motion for reinstatement while *Delgado* was on appeal to the Fifth Circuit. The District Court denied the motion to reinstate without prejudice because of the pending appeal. Even when the *Delgado* appeals concluded in 2001, the District Court delayed resolving the motion to reinstate because of a pending appeal in another unrelated DBCP action.

That other DBCP action had been filed in October 1997 in Hawaii state court while *Delgado* was on appeal in the Fifth Circuit. It involved allegations and defendants

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[17] *Delgado II*, 231 F.3d 165 (5th Cir. 2000).

[18] *Id.*

[19] *Delgado v. Shell Oil Co.*, 532 U.S. 972 (2001).

similar to *Delgado*. The plaintiffs there, who did not include Blanco, claimed they had been exposed to DBCP while working on banana plantations in several central American countries. Defendants in the Hawaii case also impleaded Dead Sea Bromine Company and Bromine Compounds Limited, both indirectly owned by the State of Israel. As with *Delgado*, the presence of a possible instrumentality or agency of a foreign country meant the case had to be transferred to a federal court pursuant to the FSIA. The Hawaii action was titled *Patrickson v. Dole Food Co.* ("*Patrickson*"). The District Court in Hawaii held it had jurisdiction but dismissed *Patrickson* under *forum non conveniens* and plaintiffs appealed. The Ninth Circuit reversed, holding that the two Israeli companies were not agencies or instrumentalities of the State of Israel.[20] Since the only basis for federal jurisdiction was grounded on the FSIA and that law was inapplicable, the Ninth Circuit reversed the District Court and remanded it to that court to, in turn, return the case to the Hawaii state court (in other words, the District Court lacked jurisdiction to decide the *forum non conveniens* issue). In reaching its decision, the Ninth Circuit acknowledged the Fifth Circuit's contrary decision in *Delgado II*.[21]

The contrary decisions of the Fifth and Ninth Circuits created a split of authority regarding interpretation of the FSIA and federal subject matter jurisdiction. The United States Supreme Court resolved that circuit split on a grant of *certiorari* from the Ninth Circuit's decision in *Patrickson*. Affirming the Ninth Circuit, the Supreme Court held that the impleaded companies were not instrumentalities of the State of Israel because it

[20] *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001).

[21] *Id.* at 807.

did not directly own a majority interest in the defendant companies. The FSIA provides for federal subject matter jurisdiction only where a company is an instrumentality of a foreign state and the impleaded companies in *Patrickson* and by implication in *Delgado* did not qualify as such.[22]

Following *Patrickson*, the *Delgado* plaintiffs moved the Texas District Court to remand the case back to the Texas state courts. Because the FSIA did not provide a basis for federal jurisdiction, the U.S. District Court for the Southern District of Texas granted plaintiffs' request and remanded the putative class actions to Texas state courts on June 21, 2004. Judge Lake held that *Patrickson* terminated whatever ancillary jurisdiction existed in the federal District Court and a remand allowed the state courts to consider plaintiffs' rights under the "right to return" provisions of the 1995 *forum non conveniens* dismissal.[23]

Back in the Texas state courts, plaintiffs moved to reinstate their claims under the "right of return" clause. The Texas state court reinstated *Carcamo*, the case in which Blanco was a putative class member, on April 26, 2005. Shortly thereafter, defendants sought a writ of mandamus to the Texas Court of Appeals, arguing the plaintiffs did not comply with the "return jurisdiction" clause and should not be permitted to reinstate their claims. The Texas Court of Appeals denied the writ of mandamus and held the federal

[22] *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

[23] *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 817 (S.D. Tex. 2004).

court *forum non conveniens* dismissal was void for lack of subject matter jurisdiction in federal court.[24]

After successfully persuading the Texas courts to reinstate their claims, on February 1, 2006, plaintiffs filed their Eighth Amended Petition reasserting class allegations. Plaintiffs (less those who had reached settlement agreements) moved for class certification on September 28, 2009. The court denied plaintiffs' motion for class certification on June 3, 2010.[25]

Then, on July 21, 2011, Blanco filed his Delaware action alleging the same injuries for which he had sought compensation in *Carcamo* and *Delgado*.

Parties' Contentions

Defendants move for judgment on the pleadings on all causes of action asserted by Blanco. Together, they filed two separate briefs essentially presenting similar arguments.[26] They contend the Court should dismiss plaintiff's claims as barred by Delaware's two year statute of limitations for personal injury claims. Assuming plaintiff would rely on class action tolling, defendants raise four other arguments in support of

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[24] *In re Standard Fruit Co.*, 2005 WL 2230246, at *1 (Tex.App.-Houston [14th Dist.] Sept. 13, 2005, no pet.).

[25] Dow's Supp. Br., App. Ex. 11, *Carcamo v. Shell Oil Co.*, No. 93-C-2290 (District Court of Brazoria County, Texas June 3, 2010) (ORDER).

[26] Dow Chemical filed an initial motion for judgment on the pleadings on September 30, 2011. Dole Food Co., Inc., Dole Fresh Fruit Co., Standard Fruit Co. and Standard Fruit and Steamship Co. joined Dow Chemical's motion and alternatively moved to dismiss. Occidential Chemical Corp. filed its own motion for judgment on the pleadings or alternatively, to dismiss, shortly thereafter on October 12, 2011. AMVAC Chemical Corp. then joined in Dow Chemical Co.'s motion and alternatively moved to dismiss. After this "first round" of motions, the parties stipulated to a briefing schedule with extended page limits. Plaintiff then filed his brief in opposition followed by defendants' reply briefs.

dismissal. First, in an issue never previously addressed in Delaware, they urge the Court to decline to adopt a rule permitting cross-jurisdictional tolling. Second, they assert this Court should adopt a rule prohibiting the tolling of limitations periods in mass tort cases. This proposed rule, they believe, would reduce the risk of prejudice to defendants, which statutes of limitations are designed to prevent, because in mass tort cases potential plaintiffs are difficult to identify. Third, defendants claim that plaintiff cannot rely on the *Carcamo* and *Delgado* actions to toll the statute of limitations because all pending motions, including one for class certification, were denied as moot in *Delgado I*. Fourth, they argue even if the Court is inclined to adopt cross-jurisdictional tolling, plaintiff opted-out of the *Carcamo* class action upon which he relies to toll the statute of limitations by his filing in the Florida *Abarca* action in 1995. This would mean that the Delaware statute of limitations began to run in 1995 and plaintiff's claim expired in 1997.[27]

Plaintiff opposes defendants' motions and argues his claims should be considered timely filed relying upon two United States Supreme Court decisions which permit class action tolling. Though these cases involve intra-jurisdictional tolling, he asserts they are equally applicable to cross-jurisdictional tolling and any distinction between intra-jurisdictional and cross-jurisdictional tolling is "fictional" and contrary to the rationale

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[27] Counsel for Dole Food Co., Inc, Dole Fresh Fruit Co., Standard Fruit Co., and Standard Fruit and Steamship Co. made an additional argument at the hearing on these motions that Blanco's claims were potentially time-barred in the original *Carcamo* action. That argument was not properly raised in those defendants' brief and will not be addressed here. Nor did they seek permission from the Court for supplemental briefing on that issue. In addition, that argument was waived by those defendants as one of the conditions precedent in the *Delgado I* dismissal. *See* H'rg Tr. 26:10-28:10 (Counsel's argument).

underlying intra-jurisdictional class action tolling. For this reason, he asks the Court to recognize that his claims were preserved by relying on the *Carcamo* and *Delgado* actions to toll the statute of limitations. Next, he contends Delaware courts have previously declined to recognize different procedural rules for mass tort plaintiffs and this Court should do no differently when considering cross-jurisdictional tolling. He asserts there are no special circumstances in this action that warrant providing defendants additional procedural protections which would be to plaintiff's detriment. In response to defendants' third argument, plaintiff disputes that the class certification motion was denied in the *Carcamo* action in 1995. He contends that *Delgado I* dismissed the case under the doctrine of *forum non conveniens* and that court's denial of all other pending motions as moot did not act to start the clock on the statute of limitations. Finally, he argues the *Abarca* action in 1995 was not an "opt-out" of the pending *Delgado* action because *Abarca*, of which he was a plaintiff, was filed purely as a defensive measure and plaintiffs voluntarily dismissed that case without it being served on defendants. For these reasons, plaintiff asks the Court to find that his claims were filed within the applicable statute of limitations.

Applicable Standard

All defendants move the Court for judgment on the pleadings and some defendants additionally seek dismissal. The standard for a motion for judgment on the pleadings is

"almost identical" to the standard for a motion to dismiss.[28] A motion for judgment on the pleadings may be filed after the pleadings are closed but within such time as not to delay the trial.[29] On such a motion, the Court must accept all the complaint's well-pled facts as true and construe all reasonable inferences in favor of the non-moving party.[30] Only where there are no disputed facts and the moving party is entitled to judgment as a matter of law may the Court grant a motion for judgment on the pleadings.[31]

Superior Court Civil Rule 12(c) also requires the Court convert a motion for judgment on the pleadings to one for summary judgment where matters outside the pleadings are presented to and considered by the Court. Although numerous documents were submitted to the Court in support of the defendants' motions and plaintiff's opposition, they are not the types that require conversion.[32] The documents provided consist mostly of pleadings, court filings and decisions from the various courts in which

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[28] *Ross Holding and Mgmt. Co. v. Advance Realty Group, LLC*, 2010 WL 1838608, at *5 (Del. Ch. Apr. 28, 2010) (citing *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 1456494, at *4 (Del. Ch. Nov. 5, 2001)).

[29] Super. Ct. Civ. R. 12(c).

[30] *Doe v. Bradley*, 2011 WL 290829, at *3 (Del. Super. Jan. 21, 2011).

[31] *O'Leary v. Telecom Res. Serv.*, 2011 WL 379300, at *3 (Del. Super. Jan. 14, 2011).

[32] Conversion to a motion for summary judgment allows the Court to consider matters outside of the pleadings such as exhibits and documents creating factual disputes. Items commonly requiring conversion include affidavits, deposition transcripts and testimony. *See, e.g.*, *Furman v. Del. Dep't of Transp.*, 30 A.3d 771, 774 (Del. 2011).

this action was previously pending. Additionally, no party has argued that the attached documents require conversion.[33]

Neither defendants nor plaintiff have presented any disputed material facts affecting the outcome of this motion nor has anyone claimed the pending motions are for summary judgment necessitating notice from the Court and additional briefing. The issues presented are purely questions of law. Since defendants are moving the Court to dismiss based on the affirmative defense of the statute of limitations, they bear the burden of proving that the statute of limitations has run.[34] Conversely, since "plaintiff [is] asserting a tolling exception [he] must plead facts supporting the applicability of that exception."[35]

Discussion

Delaware law provides a two year statute of limitations on personal injury actions.[36] Even though plaintiff's alleged exposure to DBCP occurred as long ago as

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[33] *Compare Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275 (Del. 2007) (This Court had converted motions to dismiss to motions for summary judgment. No party arguing before this Court claimed the additional papers submitted with the motions converted them to summary judgment and no one requested additional briefing on the very issue raised in the motion to dismiss nor was reargument sought after the Court granted the motion for summary judgment. The party not prevailing before this Court disingenuously claimed on appeal, for the first time, that this Court erred by that conversion without notice to it that it was converting the motion.).

[34] *See, e.g.*, *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. 2005).

[35] *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 525 (Del.Ch. 2005).

[36] 10 *Del. C.* § 8119.

1979, he claims the limitations period began to run on June 3, 2010,[37] the date on which class certification was denied in *Carcamo*.[38] The class action tolling exception upon which he relies was first adopted by the United States Supreme Court in *American Pipe & Constr. Co. v. Utah*[39] and later expanded in *Crown, Cork & Seal Co. v. Parker*.[40] In *American Pipe* the Supreme Court held that the limitations period was tolled during the pendency of a class action for all putative class members who intervened in that case after class certification was denied.[41] In *Crown Cork & Seal*, the Supreme Court extended the *American Pipe* tolling rule in an intra-jurisdictional case to putative class members who filed individual suits rather than intervening in the original action.[42] The litigation, however, was all in the same jurisdiction, the District Court in Maryland.

In a case of intra-jurisdictional tolling, the Court of Chancery has adopted class action tolling based on Chancery Rule 23 in a derivative action started by one of two

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[37] The Court recognized, and counsel confirmed at the hearing on the motion, that this action could affect other plaintiffs' decision of where to file suit. Because the two year statute of limitations expired on June 3, 2012, the Court notified counsel, by letter, that it intended to deny defendants' motions. In particular, the Court informed the parties that the prior class action had tolled plaintiff's statute of limitations.

[38] It is worth noting that the Court has no need to calculate any running of the statute of limitations prior to filing of the actions related to this case in Texas state court, since defendants waived such defenses in conjunction with grant of their motion to dismiss based on *forum non conveniens*. *Delgado I*, 890 F.Supp. at 1373.

[39] 414 U.S. 538 (1974).

[40] 462 U.S. 345 (1983).

[41] *American Pipe*, 414 U.S. at 552-53.

[42] *Crown, Cork & Seal*, 462 U.S. at 350.

groups of shareholders.[43] The court, however, refused their request for class certification and several months later a second group filed suit and sought to intervene. Their action was beyond a potentially applicable statute of limitations. The defendants opposed intervention, in part based on laches. The Court of Chancery found the statute of limitations was tolled when the first group's putative class action was pending in that court. Chancery viewed favorably and adopted the tolling reasoning set forth in *American Pipe* and *Crown, Cork & Seal*.[44] Superior Court Civil Rule 23, Court of Chancery Rule 23, and Federal Rule of Civil Procedure 23 are textually similar as Chancery noted in its decision; one reason it adopted the *American Pipe* reasoning.[45]

Where the Superior Court's rules closely track the Federal Rules, cases interpreting the Federal Rules are persuasive authority.[46] The same is true for Court of Chancery Rules. Without a class action tolling rule "all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated."[47] This Court adopts *American Pipe* tolling based on Superior Court Civil Rule 23 and its relationship to the equivalent Federal Rule.

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[43] *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175, at *13 (Del. Ch. Oct. 28, 2011).

[44] *Id.*

[45] *Id.*

[46] *Appriva*, 937 A.2d at 1286 (citing *Hoffman v. Cohen*, 538 A.2d 1096 (Del. 1988)).

[47] *Dubroff*, 2011 WL 5137175, at *13 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002)).

As defendants correctly point out however, prior applications of *American Pipe* and *Crown, Cork & Seal* have involved plaintiffs filing suits in the same jurisdiction in which the putative class action acted to toll the statute of limitations. This case involves the significant issue of whether *American Pipe's* ruling on intra-jurisdictional tolling and *Crown, Cork & Seal's* holding involving class actions should apply to allow a plaintiff to file suit in a jurisdiction different from that in which the putative class action was first filed and had been pending.

Defendants claim the majority of courts which have addressed this issue have declined to allow "cross-jurisdictional" tolling. Plaintiff disagrees that the majority of courts have not allowed such cross-jurisdictional tolling and asserts that many jurisdictions used in defendants' majority/minority analysis were double counted.

A. Cross-Jurisdictional Tolling of the Statute of Limitations

The Court is confronted with a question of first impression in Delaware: what rule should be followed in "cross-jurisdictional tolling" where, as here, a statute of limitations has expired here while the claim has been pending as a putative class action in another jurisdiction?[48] The parties directly address whether Delaware should "recognize"[49] or "limit"[50] cross-jurisdictional tolling.

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[48] The Delaware Supreme Court had before it the issue of cross-jurisdictional tolling but did not consider that issue in reversing the Court of Chancery on other grounds. *See Harman v. Masoneilan Intern., Inc.*, 442 A.2d 487 (Del. 1982) (The defendant had raised the defense of laches in a case involving a claim of breach of fiduciary duty by a majority shareholder. There had been earlier litigation in New York three years before. Eventually a New York court decertified the class action suit. A minority shareholder filed suit in Delaware. The Court of Chancery dismissed the suit for lack of subject matter jurisdiction. But the Delaware Supreme Court held such a ruling was premature and as such erroneous. The Supreme Court said it was not necessary or appropriate to pass on the laches issue).

1. <u>Tolling of Delaware Statutes of Limitations Generally</u>

Statutes of limitations are creatures of the legislature, and thus first subject to such expansion or contraction as it desires. For instance, the Delaware General Assembly has tolled or carved out exceptions to the statute of limitations, such as, where a Vietnam veteran has not yet been diagnosed with illness due to "Agent Orange" exposure,[51] a plaintiff is under a disability,[52] a defendant is absent from the State,[53] a patient mails a "Notice of Intent to investigate" to a healthcare provider,[54] service of process is defective,[55] or any child sexual abuse claim that had been previously time-barred.[56] Conversely, it has completely immunized defendants from suit for harms arising from donated food,[57] volunteer service[58] and the inherent risks of equine activities.[59]

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[49] Dow Chem. Co.'s Reply Brief in Support of its Motion for Judgment on the Pleadings [hereinafter "Dow's Reply Br."], at 2.

[50] Plaintiff's Brief in Opposition to Defendants' Motion for Judgment on the Pleadings at 10.

[51] 10 *Del. C.* § 8131.

[52] 10 *Del. C.* § 8116.

[53] 10 *Del. C.* § 8117.

[54] 18 *Del. C.* § 6856(3).

[55] 10 *Del. C.* § 8118.

[56] 10 *Del. C.* § 8145.

[57] 10 *Del. C.* § 8130.

[58] 10 *Del. C.* § 8133.

[59] 10 *Del. C.* § 8140.

Courts also have inherent power to prevent otherwise unjust results that might result from a strict reading of a statute of limitations.[60] The Delaware Supreme Court has recognized that the limitations period does not begin to run until a party knows or has reason to know that he or she has been injured.[61] For example, the statute of limitations did not begin to run for a plaintiff who discovered, seven years after a surgical procedure, that the surgeon had left a hemostat in her abdomen.[62] The Delaware Supreme Court has also found that a defendant's fraudulent concealment "tolls the applicable statute of limitations until such time as the cause and the opportunity for bringing an action against another could have been discovered by due diligence."[63]

In the absence of controlling Delaware precedent on class action cross-jurisdictional tolling, cross-jurisdictional tolling in individual cases is instructive. This Court has previously used its "inherent power . . . to engraft implied exceptions upon the statute of limitations where the legislative purpose of the statute is not contravened,"[64] and specifically done so "in a context in which a court order forestalled an individual's

[60] *See Mergenthaler v. Asbestos Corp. of America*, 500 A.2d 1357, 1364-65 (Del. Super. 1985) ("The Court is satisfied that, given the inherent power of the Court to engraft implied exceptions upon the statute of limitations where the legislative purpose of the statute of limitations is not contravened…a court-imposed stay will result in a tolling of the statute of limitations where it prevents plaintiff from discovering the identity of an otherwise unknowable defendant.") (citations omitted).

[61] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004).

[62] *Layton v. Allen*, 246 A.2d 794 (Del. 1968).

[63] *Walls v. Abdel-Malik*, 440 A.2d 992, 996 (Del. 1982).

[64] *Mergenthaler*, 500 A.2d at 1364-65.

attempt to ascertain the viability of a civil suit."[65] In *Mergenthaler v. Asbestos Corp. of America*, personal injury plaintiffs were delayed in discovering the identity of a defendant due to a stay issued pursuant to a pending bankruptcy proceeding in the United States Bankruptcy Court in Delaware. This Court reviewed a "line of cases [that] recognized that where a paramount authority prevents the exercise of a legal remedy, the statute of limitations is tolled."[66] It cited United States Supreme Court precedent tolling a limitations period while administrative remedies were exhausted[67] and "cases in which the statute of limitations was tolled by the pendency of other legal proceedings which prevented a plaintiff from exercising his legal rights,"[68] ultimately allowing a defendant to be joined who had otherwise not been named and served within the limitations period.

Delaware law regarding the general scope of tolling is also instructive. For example, the Court of Chancery allowed intervention after expiration of the statute of limitations when it is discovered after trial in that court that none of the original plaintiffs held stock sufficient to establish standing in a derivative suit.[69] In language useful for the resolution of this case, that Court quoted from the Superior Court, which stated:

> As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to

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[65] *Id.* at 1365.

[66] *Id.* at 1363.

[67] *Braun v. Sauerwein*, 77 U.S. 218 (1870).

[68] *Mergenthaler*, 500 A.2d at 1363 (citing *Weisz v. Spindletop Oil & Gas Co.*, 664 S.W.2d 423 (Tex. App. 1983)).

[69] *In re MAXXAM Inc./Federated Dev.*, 698 A.2d 949 (Del. Ch. 1996).

> protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense.[70]

In sum, while respecting, as it must, the legislative authority to set statutes of limitations, Delaware courts have recognized their limited discretion to recognize well-founded exceptions to specific limitations.

2. Cross-Jurisdictional Tolling in Other Courts

The parties also call the Court's attention to other jurisdictions' responses to the issue of whether to allow or disallow cross-jurisdictional tolling; and those responses are definitely divergent.[71] Defendants claim that a vast majority of courts which have considered cross-jurisdictional tolling have rejected it;[72] but this is misleading. Many of those cases were federal courts applying state law,[73] which frequently attempted to divine

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[70] *Id.* at 958 (quoting *Child, Inc. v. Rodgers*, 377 A.2d 374, 377 (Del. Super. 1977) (quoting Wright and Miller, 6 Federal Practice and Procedure § 1501(1971))).

[71] Cases that have endorsed cross-jurisdictional tolling for class actions include *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 389 (Mo. Ct. App. 1990); *In re Norplant Contraceptive Prod. Liab. Litig.*, 961 F.Supp. 163 (E.D. Tex. 1997); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 (N.J. Super. Ct. App. Div. 1999); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160 (Ohio 2002); *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004); *In re WorldCom Sec. Litig.*, 496 F.3d 245 (2d Cir. 2007); and *City Select Auto Sales Inc v. David Randall Assoc., Inc.*, 2012 WL 426267 (D.N.J. Feb. 7, 2012). Cases that have rejected the doctrine include *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 758 (Tex. App. 1995); *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1105 (Ill. 1998); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000); *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 945 (Pa. Super. Ct. 2002); and *In re Aredia and Zometa Prod. Liab. Litig.*, 754 F.Supp.2d 939 (M.D. Tenn. 2010).

[72] Dow's Supp. Br., at 14.

[73] *Wade v. Danek Med., Inc.*, 182 F.3d 281, 287 (4th Cir. 1999); *Thelen v. Massachusetts Mut. Life Ins. Co.*, 111 F.Supp.2d 688, 695 (D. Md. 2000); *In re Vioxx Prod. Liab. Litig.*, 2007 WL 3334339 (E.D. La. Nov. 8, 2007); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (continued on next page…)

that law where there was no state precedent on point.[74] Defendants' analysis potentially double-counts jurisdictions adopting or rejecting cross-jurisdictional tolling.

The courts that have clearly rejected cross-jurisdictional class action tolling cite various reasons. The first of these is subjecting state statutes of limitation to uncertain closure as class actions languish in other courts.[75] This is a risk when any limitations period is tolled. Where, as here, however, the defendants are already on notice of the name and nature of the plaintiff and his alleged injuries, it potentially threatens less prejudice than other firmly-established judicially-recognized tolling doctrines such as the "discovery rule."

A second reason some courts have rejected cross-jurisdictional tolling is the prospect that being one of a few jurisdictions to adopt the doctrine will attract a flood of

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(…continued)
(9th Cir. 2008); *Love v. Wyeth*, 569 F.Supp.2d 1228, 1236 (N.D. Ala. 2008); *In re Urethane Antitrust Litig.*, 663 F.Supp.2d 1067 (D. Kan. 2009); *In re Aredia and Zometa Prod. Liab. Litig.*, 754 F.Supp.2d 939 (M.D. Tenn. 2010).

[74] *See, e.g.*, *Wade v. Danek Med. Inc.*, 182 F.3d 281, 287 (4th Cir. 1999); *Thelen v. Massachusetts Mut. Life Ins. Co.*, 111 F.Supp.2d 688, 695 (D. Md. 2000); *In re Vioxx Prod. Liab. Litig.*, 2007 WL 3334339 (E.D. La. Nov. 8, 2007); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008); *Love v. Wyeth*, 569 F.Supp.2d 1228, 1236 (N.D. Ala. 2008); *In re Urethane Antitrust Litig.*, 663 F.Supp.2d 1067 (D. Kan. 2009).

[75] *See, e.g.*, *Maestas*, 33 S.W.3d 805, 809 (Tenn. 2000) ("Finally, the practical effect of our adoption of cross-jurisdictional tolling would be to make the commencement of the Tennessee statute of limitations contingent on the outcome of class certification as to any litigant who is part of a putative class action filed in any federal court in the United States. It would essentially grant to federal courts the power to decide when Tennessee's statute of limitations begins to run. Such an outcome is contrary to our legislature's power to adopt statutes of limitations and the exceptions to those statutes, and would arguably offend the doctrines of federalism and dual sovereignty. If the sovereign state of Tennessee is to cede such power to the federal courts, we shall leave it to the legislature to do so.") (citations omitted).

plaintiffs who have lost class action status in other courts.[76] This is only a risk if but few jurisdictions welcome such plaintiffs. In any event, Delaware's expansive understanding of *forum non conveniens*, as articulated in the progeny of cases under *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*[77] stands for the proposition that Delaware courts, as a general rule, should be open to plaintiffs seeking redress, especially where Delaware corporations are potentially involved.

Courts expressing the concern of opening the flood gates have accused such hypothetical plaintiffs with forum shopping,[78] a charge defendants level against plaintiff's counsel in the instant case.[79] Forum shopping is frowned upon in Delaware[80] as in most jurisdictions; but that phrase implies a plaintiff choosing among multiple courts for the one that offers him the most favorable law.

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[76] *See, e.g.*, *Portwood*, 701 N.E.2d 1102, 1104 (Ill. 1998) ("Unless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run,"); *See also Maestas*, 33 S.W.3d 805, 808 (Tenn. 2000) ("Adoption of the doctrine would run the risk that Tennessee courts would become a clearinghouse for cases that are barred in the jurisdictions in which they otherwise would have been brought. Litigants who ordinarily would have filed in other states' courts would file in Tennessee solely because our cross-jurisdictional tolling doctrine would have effectively created an overly generous statute of limitations.") (citation omitted).

[77] 263 A.2d 281 (Del. 1970).

[78] *See, e.g.*, *Portwood.*, 701 N.E.2d 1102, 1104 (Ill. 1998); *Maestas*, 33 S.W.3d 805, 808 (Tenn. 2000).

[79] Dole Food Co.'s Supplemental Brief in Support of its Motion for Judgment on the Pleadings [hereinafter "Dole's Supp. Br."], at 16. 4, Second Amended Petition.

[80] *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 58 (Del. 1957).

Courts that have adopted cross-jurisdictional tolling have provided compelling policy reasons for doing so. The Superior Court of New Jersey, Appellate Division, noted that failure to toll limitations in a mass tort personal injury case filed in a foreign jurisdiction would encourage defendants to delay the ruling on a motion for class certification, in turn compelling potential plaintiffs to file individual suits to avoid expiration of the statute of limitations.[81] The resulting multiplicity of suits is exactly what *American Pipe* and *Crown, Cork & Seal* sought to avoid.

Citing other important considerations, the Ohio Supreme Court adopted cross-jurisdictional tolling. That court stated it is "more important to ensure efficiency and economy of litigation than to rigidly adhere" to a rule allowing tolling only in cases previously commenced or attempted to be commenced in Ohio.[82] In addition, defendants are not prejudiced in situation where a prior class action put them on notice of the substance and nature of plaintiffs' claims.[83] This Court finds the reasoning in these two cases, and others, to be persuasive.

This Court is not persuaded that an overwhelming number of other jurisdictions have rejected cross-jurisdictional tolling. Further, the reasons for rejecting it are not

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[81] *Staub*, 726 A.2d at 966.

[82] *Vaccariello*, 763 N.E.2d at 162-63.

[83] *Id.*

persuasive in light of Delaware precedent, particularly a policy making our courts available for resolving disputes involving Delaware corporations.[84]

3. Mass Tort Exception to Class Action Tolling

Defendants next argue that if the Court recognizes cross-jurisdictional class action tolling generally, it should nevertheless reject it when the suits brought are personal injury torts. They assert that *American Pipe* and its progeny require that the original class definition provide defendants "adequate notice of the plaintiff's eventual individual claim,"[85] and they claim that standard is not met here. Indeed, they posit (as do other courts and commentators endorsing their position) that it will rarely be met in putative personal injury class actions, since:

> [W]hether a class action is appropriate turns on the existence and extent of common questions of law and fact[…and t]he major elements in tort actions for personal injury - liability, causation, and damages - may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation.[86]

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[84] Indeed, some of the defendants in this action including The Dow Chemical Company, Dole Food Company, Inc., Standard Fruit Company, and Standard Fruit and Steamship Company are incorporated under the laws of Delaware.

[85] Dole's Supp. Br. at 10.

[86] *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 936 (Cal. 1988) (citations omitted).

From this, they deduce that "[t]he same reasons that render certification of mass-tort claims generally inappropriate render inappropriate the application and extension of *American Pipe* [. . .] to the present case."[87]

Delaware has previously rejected such requests for different procedural rules to apply only to mass tort plaintiffs, all of whom were not Delaware residents. In *In re Asbestos Litigation*, this Court previously refused to recognize a different procedural rule for mass tort cases.[88] In that case, defendants requested that the court, when considering a motion to dismiss for *forum non conveniens*, depart from the overwhelming hardship standard or at least view the standard through a lens that is less deferential to plaintiffs' choice of forum.[89] In declining to deviate from the settled standard used in Delaware to consider *forum non conveniens*, the Court said:

> Plaintiffs in tort cases are entitled to the same respect for their choice of forum as plaintiffs in corporate and commercial cases receive as a matter of course in Delaware. That several plaintiffs in separate actions are

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[87] *Jolly*, 751 P.2d at 936; Defendants mischaracterize the California Supreme Court's holding in *Jolly* when they cite it solely for the proposition that "mass tort class definitions . . . are 'presumptively' inadequate under *American Pipe* because they are 'incapable of apprising defendants of "the substantive claims being brought against them."''" Dole's Supp.Br. at 12 (quoting *Jolly*, 751 P.2d at 937). The decision in *Jolly* turned on the fact that the prior class action suit did not seek personal injury damages for class members, while the subsequent individual case at bar did. *Jolly*, 751 P.2d at 936. This was the "deficiency . . . alone sufficient to deny plaintiff relief under *American Pipe*." *Jolly,* 751 P.2d at 936-37. The court did not find any inherent impropriety in applying *American Pipe* to putative personal injury class actions. Indeed, the *Jolly* court expressly reserved that question: "[i]n light of our disposition, we need not address the broader question whether in any personal injury mass-tort case the filing of a class action complaint can serve to toll the statute of limitations for putative class members when the class ultimately is denied certification for lack of commonality." *Jolly*, 751 P.2d at 937.

[88] 929 A.2d 373, 381-83 (Del. Super. 2006).

[89] *Id.* at 382.

> represented by the same law firm and claim the same injury does not justify rewriting or even refining now settled principles of Delaware law.[90]

In the context of a motion to dismiss on the ground of *forum non conveniens*, the defendants in *In re Asbestos Litigation* made the same *ad horrendum* "flood gates" argument as the defendants here: allowing such suits will overwhelm the Court. That argument was rejected in *In re Asbestos Litigation* and is similarly rejected here.

Other defense arguments in this case are equally as uncompelling as defendants' arguments were in *In re Asbestos Litigation*. The Court finds the instant defendants' reasoning unpersuasive on three separate grounds. First, the asserted difficulty of certifying most mass tort personal injury class actions, even if true, in no way entails that *American Pipe* tolling should not be extended to them. Defendants' approach would immediately precipitate the concerns that motivated *American Pipe*: potential plaintiffs would disregard all pending putative personal injury class actions (since they could be presumed unlikely to be certified) and file defensive individual claims.[91] Just as class certification depends on the court's judgment of the commonality of law and facts in

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[90] *Id.*

[91] Defendants cite Justice Blackmun's concurrence in *American Pipe* for the proposition that the decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." Dole's Supp. Br. at 15-16 (quoting *American Pipe*, 414 U.S. at 561). The rejoinder to this is that this risk is implicit in the class action mechanism itself. If the intended policy is to limit recovery only to plaintiffs manifestly aware of and asserting their rights, then class actions are unnecessary, for all such plaintiffs can and will pursue either individual or joint actions as named parties. By providing for class actions, our judicial system has implicitly rejected the limitation defendants and Justice Blackmun's concurrence propose.

dispute rather than the broad-brush rule defendants propose, so tolling the statute of limitations after certification is denied is properly within the court's discretion.

Second, the degree of commonality required under their proposed approach is unreasonably stringent. For certification, class actions require that the issues of law and fact among the putative class members be in harmony, not unison.[92] Since harmony among the legal and factual issues is the standard for certification, it follows that something less applies for tolling after certification has been denied.

The United States Supreme Court in *American Pipe* and *Crown, Cork & Seal* addressed these very concerns. A class action complaint "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."[93] In *Crown, Cork & Seal* the Court said:

> The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification.
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> … Moreover, although a defendant may prefer not to defend against multiple actions in multiple forums once a class has been decertified, this is not an interest that statutes of limitations are designed to protect.[94]

Finally, conceding *arguendo* the "adequate notice" purpose of *American Pipe*, defendants would, nevertheless return class actions to "fact pleading" to meet the

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[92] *See In re Philadelphia Stock Exch. Inc.*, 945 A.2d 1123, 1140-41 (Del. 2008) (citing *Leon N. Weiner & Assoc., Inc. v. Krapf*, 584 A.2d 1220 (Del. 1991)).

[93] *American Pipe*, 414 U.S. at 555.

[94] *Crown, Cork & Seal*, 462 U.S. at 353 (citations omitted).

standard they prescribe. They complain that "[p]roviding the name of a person who may or may not have some connection to [the defendant] somewhere in the world at some point during a 25-year period that ended in 1990 is not adequate notice under any standard[.]"[95] But as early as plaintiffs' Second Amended Petition in *Delgado* (filed August 30, 1993), the original class action included alphabetized lists of persons plaintiffs' counsel in Texas alleged had been injured by occupational exposure to DBCP. Such exposure, it was claimed, had caused physical injuries including sterility, and plaintiffs were grounding their causes of action in negligence, failure to warn, conspiracy, strict liability, intentional tort, implied warranty and violations of the Texas Deceptive Trade Practices Act.[96] Under modern standards of notice pleading, the Court fails to see what more the defendants could require before discovery. Indeed, the defendants here are the same defendants, or allegedly successors-in-interest to the defendants, originally sued in the Texas action.

Defendants, invoking Justice Blackmun's concurrence in *American Pipe*, also contend that allowing such tolling in mass tort personal injury cases, as here, will allow "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared."[97] A fairer reading of the procedural history here is that defendants have attempted to tranquilize these claims

[95] Dole's Supp. Br. at 12.

[96] Dow's Supp. Br., App. Ex. 4, Second Amended Petition.

[97] Dole's Supp. Br. at 13 (quoting *American Pipe*, 414 U.S. at 561).

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.[98] Defendants had adequate notice of the nature and extent of the claims against them from the initial class actions filed in Texas state court, and should have taken all steps necessary to preserve all evidence within their control since then. Plaintiff is still available for deposition, medical examination and other discovery defendants may seek, and still bears the burden of proof in the case-in-chief. Any prejudice defendants suffer due to lapse of time was due, in part, to their own decision to wage the extended procedural war delaying the prior action as reflected in the procedural history.

In short, the defendants have presented no compelling reasons for a "carve out" of a special rule covering tolling in mass tort class actions.

4. Finality of the Federal District Court's *Forum Non Conveniens* Dismissal

Defendants seek to hang much on the July 11, 1995 *forum non conveniens* dismissal of the pending putative class action by the United States District Court for the Southern District of Texas; but this decision, while final for purposes of appealability, was not on the merits, and therefore lacks the *res judicata* or *collateral estoppel* effect for which they try to invoke it.

[98] The Court finds it telling that no foreign manufacturers or suppliers of DBCP have been impled since *Patrickson* closed the door on using the Foreign Sovereign Immunities Act as a tool for dismissal.

Defendants' first claim is that the 1995 dismissal ended any tolling of the statute of limitations,[99] which, therefore, would have expired well before this present action was filed. This argument fails on three independent grounds. First, Judge Lake's dismissal was based entirely on *forum non conveniens*, which is emphatically not a decision on the merits in the Fifth Circuit.[100] Second, the dismissal included a "return jurisdiction" clause as mandated by Fifth Circuit precedent.[101] A dismissal conditioned on a right of return is logically equivalent to a stay of the action. Under Delaware law where a stay is entered here on the grounds of *forum non conveniens*, but jurisdiction is retained, it necessarily operates to toll a statute of limitations.[102] Third, the dismissal on the grounds of *forum non conveniens* rendered moot the pending request for class certification.

Defendants also argue that plaintiff's tolling argument implicitly requires this Court to allow an impermissible collateral attack on a final judgment of a federal court for lack of subject matter jurisdiction.[103] This argument is meritless. As defendants point out in their brief, Judge Lake, deprived of subject matter jurisdiction by the US Supreme Court's decision in *Patrickson*, expressly considered this question and nonetheless

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[99] Dow's Reply Br. at 7-9.

[100] *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 676 (5th Cir. 2003). It is worth noting that this case also involved foreign personal injury plaintiffs dismissed to a foreign court under *forum non conveniens* requiring a return jurisdiction clause and including a federal injunction against state court litigation.

[101] *In re Air Crash,* 821 F.2d at 1166; *See also Vasquez* 325 F.3d at 675.

[102] *See McWane*, 263 A.2d at 283-84.

[103] Dow's Supp. Br. at 13 (citing *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009)).

remanded to the Texas state court.[104] Implicit in Judge Lake's remand decision was a determination that he retained subject matter jurisdiction to do that. Judge Lake's original decision to dismiss did not start plaintiff's Delaware statute of limitations.

5. Conclusion as to Tolling of the Statute of Limitations

In *Reid v. Spazio*,[105] a plaintiff filed suit in Texas state and federal courts, and defendants successfully resisted on procedural grounds. When the plaintiff subsequently sued the defendants in Delaware, the Court of Chancery dismissed his claim on limitations. Reversing that decision, the Delaware Supreme Court first noted that public policy prefers that cases be decided on the merits.[106] Further, the court remarked that

> allowing a plaintiff to bring his case to a full resolution in one forum before starting the clock on his time to file in this State will discourage placeholder suits, thereby furthering judicial economy. Prosecuting separate, concurrent lawsuits in two jurisdictions is wasteful and inefficient. [Finally], the prejudice to defendants is slight because in most cases, a defendant will be on notice that the plaintiff intends to press his claims.[107]

This Court must tread lightly in recognizing any tolling exceptions to the General Assembly's duly-enacted and otherwise unambiguous statutes of limitation. The Court

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[104] *Id.* at 7-8 (citing *Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 805 (S.D. Tex. 2004)). It is significant that after remand and on appeal, the Texas state appellate court went even further than Judge Lake, finding that his original dismissal based on *forum non conveniens* was now void for lack of subject matter jurisdiction in light of *Patrickson*. *Id.* (citing *In re Standard Fruit Co.*, 2005 WL 2230246, *1 (Tex. App. – Houston [14th Dist.] 2005, no pet.)).

[105] 970 A.2d 176 (Del. 2009). Although *Reid* relied on the Delaware Savings Statute, 10 *Del. C.* 8118(a) (which is inapplicable here), this Court finds the reasoning apposite and compelling.

[106] *Id.* at 180 (citing *Vari v. Food Fair Stores, New Castle, Inc.*, 205 A.2d 529, 530 (Del. 1964); *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del.1964)).

[107] *Id.* at 181-82.

finds three factors especially compelling in its decision allowing tolling of the statute of limitations for plaintiff. First, all of the defendants to be bound by the ultimate decision in this case were clearly on notice of the action at the outset. Second, plaintiff can show actual reliance on the pending putative class and related individual actions in his decision to not file an individual action prior to denial of class certification. Third, defendants 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 *Carcamo* action, and has been procedurally thwarted at every turn by defendants; the statute of limitations has, therefore, not run against him.

In its decision reversing the Hawaii District Court, the Ninth Circuit stated, "This case represents one front in a broad litigation war between these plaintiffs' lawyers and these defendants. In some of the cases, plaintiffs have reportedly won multimillion dollar settlements."[108] Delaware has now become a new front in this "war" and accepts that responsibility but will not tolerate "war-like" tactics or behavior.

B. "Opt Out" Due to *Abarca* Filing

Having found cross-jurisdictional class action tolling to apply, the Court now turns to defendants' final contention that plaintiff lost the benefit of it, hence the statute of limitations started to run, by filing an independent action in Florida while the putative class action was still pending in Texas. To support this, however, defendants conflate the post-class-certification "opt out" procedure prescribed in modern class action procedure

[108] *Patrickson*, 251 F.3d at 798.

(Super. Ct. Civ. R. 23(c)(2)(A)) with what plaintiff did here. In 1995 Blanco and others filed a prophylactic complaint under the threat of injunction against any filings outside of the pending class action prior to the decision on class certification. He then voluntarily dismissed it without prejudice before it was served on any defendants when the injunction issued was narrower in scope than expected.

Understanding the distinction between an "opt out" and plaintiff's action here requires analysis of a plaintiff class member's exercise of the right to opt out of a class action. That right has federal Constitutional dimensions, at least when the relief sought is "wholly or predominately for money judgments" as the complaint here seeks. [109] But the steps which are either sufficient or necessary to opt out have not been exhaustively defined. According to the United States Supreme Court, the Due Process Clause requires that a plaintiff's class member "be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."[110] Because class certification requires notice to potential class members of the right to opt out, the option to exercise that right must necessarily exist after class certification is granted.[111] Further, there is nothing in the record that plaintiff notified the Texas District Court he was opting out of the putative class action there.

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[109] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811, n. 3 (1985). The US Supreme Court has expressly reserved judgment on putative plaintiffs' right to opt out when equitable relief is sought and the Delaware Supreme Court has accordingly not hesitated to bind unwilling plaintiffs in class actions. *See, e.g., Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989).

[110] *Shutts*, 472 U.S. 797, 812 (1985).

[111] *See Nottingham Partners*, 564 A.2d at 1098-99 (citing Ct. Ch. R. 23(c)(2)).

Defendants cite early lower federal court responses, finding plaintiffs who filed individual actions before class certification was decided to have opted out by that act;[112] but more recent decisions at the appellate level indicate the opposite trend.[113] In sum, plaintiff's action in Florida was not an opt out and did not operate to start Delaware's statute of limitations.

The Court holds that the doctrine of cross-jurisdictional class action tolling applies in Delaware. The consequence in this case is that plaintiff's claim is not dismissed.

Conclusion

For the reasons stated herein, defendants' motions to dismiss and/or motions for judgment on the pleadings are DENIED.

IT IS SO ORDERED.

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J.

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[112] *See, e.g., Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983); *Rahr v. Grant Thornton LLP*, 142 F.Supp.2d 793, 799-800 (N.D. Tex. 2000); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005); *Kozlowski v. Sheahan*, 2005 WL 3436394 (N.D. Ill. Dec. 12, 2005).

[113] *See, e.g., In re Worldcom Sec. Litig.*, 496 F.3d 245, 256 (2d Cir. 2007); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2007); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223 (10th Cir. 2008).