No. 18-_____

In the Supreme Court of the United States

KEVIN McCABE and TODD C. BANK

Petitioners,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether class-action statute-of-limitations tolling under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), should continue until a district court's denial of class certification is affirmed on appeal.

2. Whether the fact that a district court grants a party's motion for sanctions necessarily precludes the court from granting the sanctioned party's cross-motion for sanctions where the cross-motion was based primarily on misrepresentations in the first motion.

3. Whether a district court may impose, upon an attorney, sanctions based on the district court's finding that the bringing of the district-court action was frivolous because a precedent of the instant circuit court was binding (in the district court's view) and thus barred the plaintiff"s claims, even though: (i) the precedent had been decided in a different factual context; (ii) the plaintiff exercised, with respect to his claims, the right to assert them and make corresponding arguments in order to preserve such claims and arguments for further appellate review in the event that the district court were to find that the arguments, and thus the claims, were foreclosed by binding circuit precedent; (iii) neither the circuit court *en banc* nor this Court had ever been presented with, much less rejected, the party's arguments; and (iv) the district court acknowledged that the party's arguments were not substantively frivolous.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The caption lists all of the parties. Petitioners, Kevin McCabe ("McCabe") and Todd C. Bank ("Bank") are natural persons. Therefore, no corporate-disclosure statement is required under Supreme Court Rule 29.6

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INTRODUCTION

Kevin McCabe and Todd C. Bank respectfully petition this Court for a writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The Summary Order of the Court of Appeals (Appx. A, 1a-10a) will be published in the Federal Appendix and is currently available at 2019 WL 409440.

The Report and Recommendation of the Magistrate Judge of the District Court (Appx. B, 11a-62a), is available at 2018 WL 1521860.

The Order of the District Court (Appx. C, 63a) adopting the Report and Recommendation is not reported.

The Order of the Court of Appeals denying Petitioner Todd C. Bank's Petition Bank for Rehearing with Suggestion for Rehearing *En Banc* (Appx. D, 64a-65a), is not reported.

STATEMENT OF JURISDICTION

On January 31, 2019, the Summary Order was entered.

On February 8, 2019, Bank, solely for himself, filed a petition for panel rehearing, or, in the alternative, for

rehearing *en banc*, which the Second Circuit denied on March 18, 2019.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

McCabe brought the underlying action (the "District Court action") in the Eastern District of New York, which had jurisdiction under 28 U.S.C. § 1331.

McCabe alleged that Respondent, Lifetime Entertainment Services, LLC ("Lifetime"), violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA").

REASONS FOR GRANTING THE PETITION

I. *AMERICAN PIPE* TOLLING SHOULD APPLY DURING THE PENDENCY OF AN APPEAL FROM A DENIAL OF CLASS CERTIFICATION

A. Background

The Second Circuit, in *Giovanniello v. ALM Media, LLC*, 726 F.3d 106 (2d Cir. 2013), addressed a prior putative TCPA class action (the "*Giovanniello* prior action") in which the district court had not ruled on the question of class certification, but had instead "denied class status" (*id.* at 119) on the basis that "[a] New York law [that] did not permit a class action predicated

on statutory damages" was applicable in New York federal courts. *Id.* at 108 (citation and quotation marks omitted).[1]

In the *Giovanniello* prior action, the district court, upon dismissing the *class* claims, dismissed the entire case for lack of subject-matter jurisdiction because "the maximum damages [that the named plaintiff] could potentially [have] receive[d] as an individual claimant . . . fell short of the minimum amount required for *diversity* jurisdiction under 28 U.S.C. § 1332(a)." *Id.* at 108 (emphasis added).[2]

Giovanniello held: "*American Pipe* [*& Constr. Co. v. Utah*, 414 U.S. 538 (1974)] tolling does not extend beyond the denial of class status. Class status was denied . . . when the [district court] determined that a class action was unavailable under New York law." *Id.* at 116. Until the Second Circuit issued the Summary Order, *Giovanniello* had been the only decision of the

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[1] The Second Circuit later abrogated that holding. *See Bank v. Independence Energy Group LLC*, 736 F.3d 660 (2d Cir. 2013), overruling *Holster v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010), and *Bonime v. Avaya, Inc.*, 547 F.3d 497 (2d Cir. 2008).

[2] When the district court issued its decision, diversity was the *only* available type of original subject-matter jurisdiction over TCPA claims in the Second Circuit. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006). However, in *Mims v. Arrow Fin. Svcs., LLC*, 565 U.S. 368 (2012), this Court held that there is *federal-question* jurisdiction over TCPA claims, thereby abrogating *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432 (2d Cir. 1998).

Second Circuit addressing the period of time during which *American Pipe* tolling applies. *See Giovanniello*, 726 F.3d at 115-116.

In neither of the two cases, *i.e.*, *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), in which this Court has found that *American Pipe* tolling continues until a district court denies class certification did this Court "address[] whether tolling continues during the *pendency of an appeal* after the suit is dismissed *or* class certification is denied," *Collins v. Village of Palatine*, 875 F.3d 839, 843 (7th Cir. 2017) (emphases added), nor did *Collins*, except in dicta, *see* Reply Brief of Plaintiff-Appellant ("McCabe Reply Br.") at 8-10 (Appx. H at 125a-128a); *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 391 (1977) ("[n]either the named plaintiffs [in *American Pipe*] nor any . . . member of the [putative] class appealed [the class-certification denial], either [by an interlocutory appeal] or at any later time.").

B. Reliance is Not a Condition of *American Pipe* Tolling

In *Giovanniello*, the court found:

> [E]ven where the [named] plaintiffs seek reconsideration or appeal, ostensibly representing the rights of [the putative] plaintiffs, *reliance* is not objectively reasonable. As the court in *Armstrong* [*v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998) (*en banc*)] identified,

> reconsideration and appeal rarely result in a reversal.

Giovanniello, 726 F.3d at 117-118 (emphasis added). However, *American Pipe* tolling protects putative class members who "*did not rely* upon the commencement of the class action (or who were *even unaware* that such a suit existed) and thus *cannot claim* that they refrained from bringing timely motions for individual intervention or joinder because of a *belief that their interests would be represented in the class suit*." *American Pipe*, 414 U.S. at 551 (emphases added).

Giovanniello further stated that the "objectively[-]reasonable[-]reliance rationale breaks down once the district court disallows class status [because] . . . 'the named plaintiffs *no longer have a duty to advance the interests of the excluded putative class members*.'" *Giovanniello*, 726 F.3d at 117, quoting *Armstrong*, 138 F.3d at 1381 (emphasis added). However, in addition to there being no reliance requirement, a named plaintiff does *not* have a duty to advance the interests of the putative class members *before* a district court rules on class certification. Rather, that duty arises *only* if and when the putative class is *certified*. *See Martens v. Thomann*, 273 F.3d 159, 173, n.10 (2d Cir. 2001); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 203 (3d Cir. 2005). A 2003 amendment to Rule 23(e) reflects this principle. As amended, Rule 23(e) provides that, "[t]he claims . . . of a *certified class* may be settled, voluntarily dismissed, or compromised *only with the court's approval*," Fed. R. Civ. P. 23(e) (emphases added), such that a named plaintiff may,

without court approval, settle his individual claims prior to the granting of class certification, in which event he would lose standing to pursue the class claims, and the action will be dismissed (if there are no other named plaintiffs).

The *Giovanniello* court's statement that, "[a]fter class status is denied, the named plaintiff thus has no responsibility to pursue any additional avenue to maintain the action as a class action under Rule 23, such as appeal or reconsideration," *Giovanniello*, 726 F.3d at 117, citing *Armstrong*, 138 F.3d at 1381, *i.e.*, that "Rule 23 no longer operates to protect non-named plaintiffs," *id.*, is true but irrelevant, for, again, a named plaintiff does not have a responsibility to pursue class certification in the *first* place. Similarly, *Giovanniello*'s assertion that, "during the pendency of class certification[,] . . . Rule 23 requires that named plaintiffs function as representatives of [the] *potential* class members," *id.* at 117 (emphasis added), whereas, "once class status has been disallowed, Rule 23 no longer operates to protect non-named plaintiffs," *id.* (emphases added), is a misstatement, for the protection of the putative class members depends upon the *voluntary* (not obligatory) actions of the named plaintiff both *before* the district court rules upon class certification and, in the event of a denial, *thereafter*, *i.e.*, by seeking reconsideration of, and/or appealing, that denial.

In *Armstrong*, the court addressed a prior action in which the district court had "certified a plaintiff class that did not include . . . the appellants in [*Armstrong*]."

Armstrong, 138 F.3d at 1379. That is, with respect to those appellants, class certification had been *denied*, just as it had been in the prior action that was at issue in the District Court action, *see* Appx. B at 15a-16a, such prior action having been *Leyse v. Lifetime Entertainment Services, LLC*, No. 13-cv-5794 (S.D.N.Y.) ("*Leyse I*"). *See id.* The appellants in *Armstrong*, like McCabe, subsequently brought a new action. *See id.* Given the comparable facts at issue in *Armstrong* and in the District Court action, *Giovanniello*'s discussion of *Armstrong,* and citation (albeit without discussion) to other cases that concerned Rule 23 class-certification denials (*see Giovanniello*, 726 F.3d at 115-116) *rather than* the type of ruling at issue in *Giovanniello*, suggest that, ***if*** *Giovanniello* had been presented with a Rule 23 class-certification denial, *Giovanniello* would *likely* have ruled that *American Pipe* tolling ended upon that denial regardless of whether the named plaintiff had appealed it; that is, *likely but not necessarily*, for the arguments presented to the *Giovanniello* Court would presumably have reflected that difference.

C. The Second Circuit, in *Giovanniello*, Erroneously Described the Majority of Cases of Other Courts of Appeals to Which the Second Circuit Cited

Giovanniello stated: "each of our sister circuits to have discussed this issue has *determined* that *American Pipe* tolling ends upon denial of class certification," *Giovanniello*, 726 F.3d at 116 (emphasis added), citing *Taylor v. UPS, Inc.*, 554 F.3d 510 (5th

Cir. 2008), *Bridges v. Dept. of Md. State Police*, 441 F.3d 197 (4th Cir. 2006), *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004), *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000), *Armstrong*, *supra*, *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), and *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982); *see also* Summary Order at ("[t]he arguments Bank presented to the district court . . . have been consistently rejected by this Court and by other circuits," Appx. A at 8a, citing *Giovanniello*, 726 F.3d at 107, and *Armstrong*; Appx. B at 27a, n.4 ("[e]ight other circuits reached the same conclusion prior to . . . *Giovanniello*"), citing only *Taylor* and *Culver*. However, in five of the eight cases, including *Taylor* and *Culver*, the courts, although *stating* that tolling ended upon a district court's denial of class certification, were, like *American Pipe* and *Crown, Cork*, *not presented with the issue* of *whether, or when,* tolling continues *after* such a denial: *Fernandez*, in which the issue was whether such a denial "did not merely reactivate the statute of limitations [under] the *American Pipe* rule, but instead caused it to run anew" based upon state law, *Fernandez*, 681 F.2d at 48; *Andrews*, which held that, following the denial of certification, a plaintiff's formally stated intention to bring a second certification motion did not cause *American Pipe* tolling to continue prior to the filing of the second motion, *see Andrews*, 851 F.2d at 149-150; *Culver*, in which the issue was whether notice should have been given to the putative class members after the action was decertified and the case was dismissed due to the mooting of the named plaintiff's individual

claims, *see Culver*, 277 F.3d at 913-914; *Bridges*, which held that *American Pipe* tolling ended when the district court in the prior action had issued an *administrative* order denying class certification, which *Bridges* treated as a *formal* order, *see Bridges*, 441 F.3d at 212-213; and *Taylor*, which held that *American Pipe* tolling continues through the appeal of a merits dismissal of the claims of a certified class. *See Taylor*, 554 F.3d at 519-521.

D. Numerous Decisions, Including Ones That Are Entirely on Point, Have Found That *American Pipe* Tolling Continues During the Appeal of a District Court's Denial of Class Certification

As set forth below, numerous decisions, including of this Court and including some that have held, exactly as McCabe argues, that *American Pipe* tolling continues during an appeal, *whether successful or not*, of a district court's denial of class certification, support McCabe's position.

(i) *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)

In *McDonald*, this Court, with respect to a putative class member's post-judgment motion to intervene in order to appeal the district court's earlier denial of class certification, held that *American Pipe* tolling had continued until "it became clear to [that member] that the interests of the [putative] class members *would no longer be protected by the named class represent-*

*ative*s," *McDonald*, 432 U.S. at 394 (emphasis added), which occurred "[a]fter [the member] learn[ed] that a final judgment had been entered . . ., and that despite [the named plaintiffs'] earlier attempt to [bring an interlocutory appeal, such that] . . . there was no reason for the [member] to [have] suppose[d] that [the named plaintiffs] would not later take a[] [post-judgment] appeal[,]" *id.* at 390, 394, the member "was advised[,] . . . after the trial court had entered its final judgment [upon the settlement of the named plaintiffs' individual claims][,] [that][,] . . . to the contrary, *** the [named] plaintiffs did not . . . intend to file a[] [post-judgment] appeal." *Id.* at 390, 394.

In regard to *Leyse I*, in which the named plaintiff had attempted to bring an interlocutory appeal, *see* Appx. B at 19a, "it became clear to [McCabe] that the interests of the [putative] class members [(of which McCabe was one)] would no longer be protected by the named class representative[,]" *McDonald*, 432 U.S. at 394, when this Court denied the petition for *certiorari* in *Leyse I*. *See Leyse v. Lifetime Entertainment Services, LLC*, 138 S. Ct. 637 (2018). As *McDonald* noted, and as is equally applicable with respect to *Leyse I*: "[t]o be sure, the case was stripped of its character as a class action upon denial of certification by the [d]istrict [c]ourt[,] [b]ut it does not . . . follow that the case must be treated as if there never was an action brought on behalf of absent class members." *McDonald*, 432 U.S. at 393 (citations and quotation marks omitted).

As in *McDonald*, "the *filing of the [class-action]*

complaint [in *Leyse I*] . . . put [Lifetime] on *notice* . . . of the *possibility of classwide liability*." *Id.* at 395 (emphases added).

Furthermore, *McDonald* observed: "the [putative class member]'s motion to intervene . . . necessarily concern[ed] the *same evidence, memories, and witnesses as the subject matter of the original class suit*," *id.* at 393, n.14, and that, therefore, "[t]here [was] no reason to believe that[,] in th[e] short period of time [following the issuance of the judgment[,] [the defendant] *discarded evidence or was otherwise prejudiced*." *Id.* at 393, n.14 (emphases added; citation and quotation marks omitted). Here, McCabe commenced his action *before* the resolution of *Leyse I*. *See* Appx. B at 12a, 19a-20a.

Finally, *McDonald* reasoned:

> A rule requiring putative class members who seek only to appeal from an order denying class certification to move to intervene shortly after entry of that order *would serve no purpose*. . . . [S]uch a rule would *induce putative class members to file protective motions* to intervene to guard against the possibility that the named representatives *might not appeal from the adverse class determination.* The result would be the *very multiplicity of activity which Rule 23 was designed to avoid.*

Id. at 393, n.15 (emphases added; citations and quotation marks omitted). If, in *Leyse I*, *American Pipe* tolling had ended when the district court denied class certification, McCabe would have had to bring his action within four days, *i.e.*, the time remaining in the limitations period when *Leyse I* was commenced (*see* Appx. B at 45a), in order to guard against the possibility that there either would not be an appeal or that there would be an appeal that would be *unsuccessful*, thereby "result[ing] . . . [in] the very multiplicity of activity [that] Rule 23 was designed to avoid." *McDonald*, 432 U.S. at 393, n.15. Moreover, whereas a putative class member's "mov[ing] to intervene shortly after entry of th[e] [class-certification-denial] order would serve no purpose," *id.*, the commencement of a separate, protective action would typically result in an even greater use of judicial resources than would a motion for intervention.

(ii) *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980)

In *Roper*, this Court held that the named plaintiffs, whose individual claims had been mooted by post-class-certification-denial unaccepted offers of judgment, whereupon the entire action was dismissed, continued to have standing to appeal the class-certification denial. This Court noted, in dicta, that, "[i]t appears that by the time the [d]istrict [c]ourt entered judgment and dismissed the case, *the statute of limitations had run on the individual claims of the [putative] class members*," *id.* at 330 (emphasis added; footnoted omitted), but explained that, "*[r]eversal* of

the [d]istrict [c]ourt's denial of certification by the Court of Appeals may *relate back* to the time of the *original motion for certification for the purposes of tolling the statute of limitations on the claims of the [putative] class members*." *Id.* at 330, n.3, citing *McDonald* (emphases added).

The problem with limiting tolling to cases in which the appeal of a class-certification denial is successful is that risk-adverse putative class members would continue to be induced to bring protective actions.

(iii) *Gelman v. Westinghouse*, 556 F.2d 699 (3d Cir. 1977)

In *Gelman*, the court explained:

> [W]hen an appellate court *reverses* a district[-]court denial of class certification[,] the status of the class members is to be determined by *relation back to the date of the initiation of the suit*. . . . Any other rule would result in denying class members any *meaningful appellate review*, since, in most cases, such review will not be available until after the applicable limitations period has run.

Id. at 701 (emphases added). *Accord*, *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 376, n.8 (5th Cir. 2013); *Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978) (*en banc*).

In *Jimenez v. Weinberger*, 523 F.2d 689 (7th Cir. 1975) (op. by Stevens, *J.*), the court seemed to find, unlike *Gelman*, *Hall*, and *Satterwhite*, that *American Pipe* tolling should continue during the appeal of a class-certification *without regard* to the result of the appeal: "we think [*American Pipe*] tolling would have continued . . . *if* the [named] plaintiffs had [brought a post-judgment] appeal[] from [the denial of class certification], but probably would not have continued if they had *acquiesced* [by not appealing]." *Id.* at 696 (7th Cir. 1975) (emphases added).

Absent *American Pipe* tolling during the pendency of an appeal that turns out to be *successful*, such an appeal will indeed have amounted to a "meaning[less] appellate review" (*Gelman*, 556 F.2d at 701) for those class members whose "applicable limitations period ha[d] run" (*id.*) before the reversal. However, the *limiting* of tolling to the pendency of those appeals that turn out to be successful ignores the fact that putative class members *do not know if the appeal is going to succeed or fail*, such that putative class members would *still* be forced to bring protective actions. That is why tolling during the pendency of an appeal of a class-certification denial must, in order to avoid "a needless multiplicity of actions," *Crown, Cork*, 462 U.S. at 351, continue *regardless* of whether the denial of class certification turns out to be *reversed* ***or*** *affirmed*.

(iv) *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md.), *aff'd on other grounds*, 769 F.2d 210 (4th Cir. 1985)

In a prior action, putative class members had successfully brought post-judgment motions to intervene in order to appeal the denial of class certification, *see id.* at 1315; and, "[w]hile [their] appeal was pending, . . . filed the [*Davis*] action," during the pendency of which "the Fourth Circuit *affirmed* the denial." *Id.* (emphasis added).

The *Davis* court emphatically ruled that tolling continues *until an appellate court* rules on a district court's denial of class certification, whether the appellate court *affirms* ***or*** *reverses* that denial:

> The defendants argue that the pendency of the appeal would toll the statute of limitations *only* if the plaintiffs were *successful* on appeal. *That argument has no merit*. Acceptance of [the] defendants' argument would lead to a multiplicity of individual suits filed for protective purposes *after* the appeal was taken but *before a* decision were rendered by the Court of Appeals. *American Pipe* sought to prevent such a situation. *See* [*American Pipe*,] 414 U.S. at 551-53; *see also Jimenez* [], 523 F.2d 689 at 696 . . . .

Id. (emphases added).

(v) West Haven Sch. Dist. v. Owens-Corning Fiberglas Corp., 721 F. Supp. 1547 (D. Conn. 1988)

In *West Haven*, in which, in the prior litigation at issue, class certification had been granted in part *and denied in part*, the Third Circuit had *upheld the partial denial*, and a subsequent petition for *certiorari* had been denied. As a result, the *West Haven* court held that, "there was a 'definitive determination' of [] class certification no earlier than when" the petition for *certiorari* was denied, *id.* at 1555, "and until [then] the statute of limitation was suspended under [the] *American Pipe* rule." *Id.*

Whereas *West Haven* held, consistent with McCabe's position, that *American Pipe* tolling continues through the entire appellate process, McCabe could not have known, when commencing the District Court action, whether, in the ensuing litigation, it would ultimately be held that, due to *American Pipe* tolling, his action had been timely commenced, and, if so, whether tolling would be found to have continued in *Leyse I* only until the Second Circuit affirmed the district court's class-certification denial but *not* during the pendency of the *Leyse I* petition for rehearing/*en banc* or petition for *certiorari*. Thus, the timing of McCabe's commencement of his action was due to such uncertainty.

(vi) *Byrd v. Travenol Laboratories, Inc.*, 675 F. Supp. 342 (N.D. Miss. 1987)

In *Byrd*, class certification was granted in a racial-discrimination case, but, thereafter, the named plaintiffs "amend[ed] their complaint to allege sex discrimination[,] [upon which] the *sole male [named] plaintiff* . . . voluntarily *withdrew* from the case." *Id.* at 343 (emphases added). Accordingly, the court "*conditionally* . . . redefined the class so that it did not include males," *id.* at 344 (emphasis added), and thereafter, "made *final* the [re-]definition." *Id.* (emphasis added). The court held that *American Pipe* tolling had continued until, following the redefinition, the Fifth Circuit had "affirmed in part and reversed in part [a] limited injunction." *Id.*

(vii) *Clark v. ConocoPhillips Co.*, 465 S.W.3d 720 (Tex. App. 2015)

In *Clark*, the court held that *American Pipe* tolling had not ended when, earlier in the litigation, the court reversed the trial court's granting of class certification. Instead, the court held that tolling continued until the Texas supreme court *affirmed* that reversal. One of the court's three rationales is entirely supportive of McCabe's position:

> If . . . tolling ended when this Court issued its judgment [reversing the trial court], thousands of [putative] subclass members could [have] protect[ed] their rights only by *intervening* in the trial

> court or filing their *own new lawsuits* and by pursuing their separate claims over the years that the certification issue was pending before the [Texas] supreme court, only to abandon those claims if the supreme court *reinstated the certification* of subclasses . . . . Such a proliferation of suits and accompanying waste of party and judicial resources is the *very result that the tolling doctrine was designed to prevent*. . . . *see Crown, Cork & Seal*, 462 U.S. at 350-51; *American Pipe*, 414 U.S. at 553-54 (observing that "a rule requiring *successful anticipation* of the determination of the viability of the class would *breed needless duplication* of motions" to intervene and "would deprive ... class actions of the efficiency and economy of litigation[,] which is a principal purpose of the procedure").

Id. at 727 (emphases added).

***(viii) American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992)**

In *American Tierra*, the court held that *American Pipe* tolling, which the court adopted as a matter of state law, *see id.* at 761-762, continues through the appeal of a class-certification denial *regardless* of whether that denial is affirmed or reversed on appeal, explaining:

> Several *lower federal courts* have . . . *uniformly conclud[ed]* that the *rationale* for tolling continues *throughout the pendency of the appeal*. *See*, *e.g.*, *Jimenez* [], 523 F.2d [at] 696 []; *West Haven* [], 721 F.Supp. [at] 1555 []); *Byrd*, 675 F.Supp. at 347; *Davis* [], 600 F.Supp. [at] 1316 (D.Md.1985). *See generally* 54 C.J.S. *Limitations of Actions* § 122, at 165 (1987) (*"[L]imitations will not run until the final disposition of the appeal."*). We agree with the federal interpretations and conclude as a matter of Utah law that *when a proper appeal of a class[-]certification decision is taken*, the tolling benefit continues on behalf of all members of the class *until the class issue is finally determined by the decision on appeal*."

Id. at 762 (emphases added; citation omitted).

E. The Rationales of *American Pipe* Tolling Remain Applicable During the Appeal of a District Court's Denial of Class Certification, Whether or Not the Appeal is Successful

There are two primary rationales of *American Pipe* tolling. First, "the commencement of [a putative class] action satisfie[s] the purpose[s] of the [statutes of] limitation . . . as to all those who might subsequently participate in the suit as well as for the named plaintiffs," *American Pipe*, 414 U.S. at 551, such purposes being those of "ensuring essential fairness to defendants and of barring a plaintiff who has slept on

his rights," *id.* at 554, which "are satisfied [because] . . . [the] commence[ment] [of] [the] suit . . . 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," *id.* at 554-555, such that, "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation." *Id.* at 555.

Second, *American Pipe* tolling furthers the purpose of class actions themselves, for the alternative to tolling is "the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551.

It simply does not make sense that *American Pipe* tolling should continue during the appeal of a denial of class certification *only* if that appeal is successful. First, until it is clear that there will not be further review of a district court's denial of certification, the defendant continues to be aware "not only of the substantive claims being brought against [it], but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 555.

Second, just as the absence of tolling between the commencement of a putative class action and the district court's *ruling on class certification* would pose the risk that certification will be granted and thereby result, retroactively, in "a needless multiplicity of actions," *Crown, Cork*, 462 U.S. at 351, *i.e.*,

duplicative, protective actions that were brought *before* that ruling and then rendered wasteful *by* that ruling, the absence of tolling during the *appeal* of a district court's denial of certification poses the risk that that denial will be *reversed* on appeal and thereby result, retroactively, in "a needless multiplicity of actions," *i.e.*, duplicative, protective actions that were brought *before* that reversal and then rendered wasteful *by* that reversal.

A rule that tolling will *not* be deemed to have continued in the event of an *affirmance* of a class-certification denial turns the entire matter into a *de facto* game by forcing a putative class member into limbo, wherein he must: (i) refrain from bringing his own action and, instead, *hope* that the denial of certification will be reversed on appeal; or, (ii) bring his own action and risk having to waste his, and the court's, time and resources, as well as the defendant's, in the event that the denial is reversed.

It is unclear how the above-described dilemma is beneficial to anyone, *i.e.*, the putative class member, the judicial system, and the defendant.

Finally, enabling putative class members to refrain from filing their own actions until "it bec[o]me[s] clear . . . that the interests of the [putative] class members [will] no longer be protected by the named class representatives," *McDonald*, 432 U.S. at 394, would, given that a case proceeds upon the claims of the *named plaintiffs* after class certification is denied, give putative class members, in many cases, the benefit,

before having to decide whether to bring their own actions, of a ruling on the *merits* of the named plaintiff's claims, which, if negative, would likely dissuade the putative class members from bringing their own actions once they are forced to decide whether to do so.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER BECAUSE THE SECOND CIRCUIT APPLIED AN UNHEARD-OF STANDARD IN DEROGATION OF THE AXIOMATIC RIGHT OF A LITIGANT TO PRESERVE FORECLOSED CLAIMS AND ISSUES FOR FURTHER APPELLATE REVIEW

It is unfathomable that this Court, in response to McCabe's presentation of his arguments regarding *American Pipe* tolling, *see* Point I, *supra*, *i.e.*, the same arguments that McCabe presented to the District Court and the Second Circuit, will sanction McCabe for making frivolous arguments; yet, such sanctions would necessarily be warranted if the sanctions that the Second Circuit upheld had been warranted. This alone makes clear that the Second Circuit's imposition of sanctions was unsupportable.

A. The Summary Order

(i) The Summary Order states:

> McCabe principally argues that *Giovanniello* was *wrongly decided*. . . .

***

> *Giovanniello* explicitly *foreclosed* Bank's argument that *American Pipe* tolling continued through appeal.

Appx. A at 6a, 8a (emphases added). Inexplicably, the Summary Order did not even allude to the axiomatic right to preserve foreclosed, but substantively non-frivolous, arguments for further appellate review, a principle that reaches its height where, as here, neither the Court of Appeals *en banc*, nor this Court, had addressed, much less rejected, the arguments at issue.

In *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994) (*per curiam*), this Court addressed the right to preserve arguments that are foreclosed by circuit precedent:

> The Court of Appeals *correctly rejected [the] petitioner's argument* . . . . However, if the only basis for the order imposing sanctions on [the] petitioner's attorney was that [the] argument was *foreclosed by Circuit precedent*, the order was *not proper*. As [the] petitioner noted in his memorandum opposing dismissal and sanctions, ***this Court*** *had not yet ruled on the [argument]. Filing an appeal was the only way [the] petitioner could preserve the issue pending a possible favorable decision by* ***this Court***.

> Although . . . there was ***no circuit conflict*** on the [argument], that question had *divided the District Courts* ***and*** its answer was *not so clear as to make [the] petitioner's position frivolous*.

Id. at 659-660 (emphases added). Plaintiff-Appellant's Memorandum of Law in Opposition to Defendant's Motion for Dismissal of the Complaint and Defendant's Motion for Sanctions ("McCabe Opp. Mem."), like Point I herein, was replete with supportive, including on-point, case law. *See* McCabe Opp. Mem. at 23-36 (Appx. E at 73a-93a).

As the Second Circuit has recognized:

> The fact that a legal theory is a *long-shot* does not necessarily mean it is sanctionable. The operative question is *whether the argument is frivolous*, *i.e.*, the legal position has *no chance of success*, ***and*** there is *no reasonable argument to extend, modify[,] or reverse the law* ***as it stands***.

Fishoff v. Coty Inc., 634 F.3d 647, 654 (2d Cir. 2011) (emphases added; citation and quotation marks omitted); *accord*, *Ferguson v. Commissioner of Tax and Finance*, 739 F. Appx. 19, 22 (2d Cir. 2018). Where, as here, the challenged "law as it stands" does not include any *en banc* opinion of the Court of Appeals, nor of *this Court*, such challenged law may even include a ruling of the latter. *See Foreman v. Wadsworth*, 844 F.3d 620,

626 (7th Cir. 2016); *Holmes v. F.E.C.*, 823 F.3d 69, 73-74 (D.C. Cir. 2016).

As the Seventh Circuit explained:

> Courts do not penalize litigants who *try to distinguish adverse precedents*, *argue for the modification of existing law*, ***or*** *preserve positions for presentation to the Supreme Court*. . . . But if the attorney fails to provide a non-frivolous argument for changing the law, the district court may order the attorney to show cause why he or she should not be sanctioned. Fed. R. Civ. P. 11(c). Burying one's head in the sand, in the hope that a judge will *disregard* an adverse [binding] decision . . ., is a paradigm of frivolous litigation.

Foreman, 844 F.3d at 626 (emphases added; citation and quotation marks omitted). In the present litigation, neither the District Court nor the Second Circuit even suggested that Bank was any less than entirely candid at each stage of the litigation; and, in addition, the District Court acknowledged that Bank's arguments were substantively non-frivolous. *See* Principal Brief of Todd C. Bank ("Bank Pr. Br.") at 14-15 (Appx. G at 112a-113a).

During the oral argument, Bank stated: "one of [the Magistrate Judge]'s very clear misunderstandings [was that] we didn't have the right to cite what [the Magistrate Judge] referred to . . . as law that was no

longer good. Well, that's a total misunderstanding of the very nature of persuasive authority. Anything can be cited for its reasoning." Appx. J at 145a. Bank further stated:

> [L]et's suppose I cited a case from another circuit . . . [and] let's say we agree that that case in that circuit is, quote, no longer good law, and this Court - . . . - I gave examples - this Court found that, we think that the - the Southern District of Iowa, for example, was correct, and that . . . the [Eighth] Circuit, in reversing or abrogating that decision, was wrong, and we hereby adopt or follow the reasoning of the district court. I - I gave actual examples of that. Now, *how is it possible, or even logical, that this Court can do that but I can't?*

Appx. J at 156a. An opinion that is "no longer good law" in *its* circuit, just like an opinion that *is* "good law" in its circuit, holds weight, *outside* of that circuit, to the extent, and only to the extent, that its *reasoning* is persuasive; that is, persuasive to a *litigant* who argues in favor of that reasoning or to a court that agrees with it. That is because a court, in the absence of binding authority, must exercise *independent judgment*, which is why a court would be *abdicating its duty of judicial independence* to state, upon expressing agreement with the *reasoning* of an *out-of-circuit* opinion that is "no longer good law" in its circuit, that it will nevertheless adopt the reasoning of the ruling

that rendered that opinion "bad law"; *i.e.*, a ruling with which the court *disagrees*.

The notion that a litigant's right to cite an out-of-circuit opinion for its *reasoning* (indeed, the only basis for citing a non-binding opinion altogether) is stripped when that opinion ceases to be "good law" in its circuit is simply nonsensical, for it could never have been offered for its "authoritativeness" in the first place, but *only* for its reasoning. *See* Frederick Schauer, *Authority and Authorities*, 94 Va. L. Rev. 1931, 1943-1944. (2008). As the word "authority" sows so much of the confusion regarding "persuasive authority," a less confusing term, and, indeed, a more accurate one, would be "persuasive opinion."

In *This is Unprecedented: Examining The Impact of Vacated State Appellate Court Opinions*, 13 J. App. Practice and Process 231 (2012), Michael D. Moberly noted:

> [C]ourts and litigants freely cite *reversed* and *overruled* opinions, *plurality* opinions, and *concurring* and *dissenting* opinions. *None of* these opinions are *precedential*. Like vacated opinions, they instead *merely reflect their authors' views of "what the law should be"* (or in the case of reversed and overruled opinions what the law once was), and "*not what the law is*."

Id. at 254-256 (emphases added; footnotes omitted). *See also* Bank Pr. Br. at 12 (Appx. G at 111a) (quoting,

as follows, from *Maximov v. United States*, 299 F.2d 565, 571 (2d Cir. 1962): "[w]e believe [the Ninth Circuit's] decision to be erroneous, and accept instead the *reasoning* . . . in the decision there *reversed*" (emphases in the brief)); *Holmes v. FDIC*, 861 F. Supp. 2d 955 (E.D. Wisc. 2012):

> The court . . . respectfully disagrees with the . . . finding [in *Aguilar v. F.D.I.C.*, 63 F.3d 1059 (11th Cir. 1995)] . . . . Instead, the court agrees with . . . *First Union Nat'l Bank of Fla. v. Royal Trust Tower, Inc.*, 827 F.Supp. 1564, 1567–68 (S.D.Fla.1993). . . . [3]
>
> [3] [T]he [plaintiffs] argue that *Aguilar* overruled *First Union*, among other 11th Circuit district court cases. However, . . . this court *still agrees with the district court's reasoning*. Any overruling by *Aguilar* is *no more persuasive than Aguilar itself*.

Id. at 958-959 (emphases added).

If "persuasive authority" were limited to opinions that had "authority" in the *legalistic*, *i.e.*, "good law," sense of that word, then nothing outside of judicial opinions would even be *eligible* as a "persuasive authority." Law-journal articles, for example, are merely the opinions of their authors, yet carry no "authority" in the legalistic sense; but, of course, such articles may be invoked, by both courts and litigants,

for their *reasoning*. Moreover, regardless of how many non-binding opinions, or how many articles, express disagreement with a law-journal article, both courts and litigants are entitled to rely upon the article's reasoning (unless, in the case of a litigant, the reasoning is *itself* frivolous). As explained in Moberly, *supra*:

> [C]ourts and litigants also occasionally rely on *non-judicial legal writings*, such as law[-]review articles and legal treatises, to support their positions. Not only do these authorities also *lack binding precedential force*, but they often advocate positions *directly contrary to existing precedent*. Courts and litigants increasingly cite even *non-legal sources* in support of their legal arguments, despite the fact that those sources are *even less authoritative* than non-precedential judicial opinions.

Moberly, 13 J. App. Practice and Process at 256-257 (emphases added).

(ii) The Summary Order states:

> Bank contends that his citations to older or abrogated cases provided *persuasive authority* that sufficed to justify his arguments as *not frivolous*. Where, as here, the law of ***this Circuit*** is clearly contrary to a litigant's arguments,

> such cases *cannot constitute a good-faith argument that existing law should be reversed*.

Appx. A at 9a (emphases added).

The Second Circuit, in ruling that a litigant may not, in preserving foreclosed arguments for further review, cite "older or abrogated cases" that are not in accord with the law of the Second Circuit, plainly misunderstood the nature both of persuasive authority *and* the right to preserve foreclosed arguments for further appellate review.

(iii) The Summary Order states: "[t]he arguments Bank presented to the district court were frivolous, ***and*** his arguments have been consistently rejected by this Court and by other circuits." Appx. A at 8a (emphasis added). First, the District Court, as noted above, acknowledged that Bank's arguments were substantively non-frivolous, and the Second Circuit *never even purported to explain otherwise*, instead making only the above-quoted *conclusory assertion*.

Second, the opinions of the other Courts of Appeals were not nearly as uniform in rejecting McCabe's position as the District Court and Second Circuit had claimed; indeed, the majority of those opinions expressed, only in dicta, their disagreement with McCabe's position, *see* Point I(C), *supra*; *see also* Bank Pr. Br. at 21-23 (Appx. G at 113a-115a); McCabe Opp. Mem. at 7-8 (Appx. E at 70a-71a).

(iv) The Summary Order states:

> Bank did not point to any judicial or scholarly criticism of *Giovanniello*, failed to assert that the Second Circuit had previously overlooked an argument, and cited only outdated and abrogated cases or cases that had no bearing on the issues to support his argument.

Appx. A at 8a-9a. First, the cases that McCabe cited very clearly bore, and in some cases perfectly bore, on McCabe's arguments. *See* Point I(D), *supra*.

First, the notion that McCabe could not make his arguments unless he had relied upon opinions, be they judicial or scholarly, that were issued after *Giovanniello* or that expressed disagreement with *Giovanniello*, is plainly antithetical to a litigant's right to present arguments in order to preserve them for further appellate review before a Court that is not precedent-bound to reject them. Like placing "*who* said it" considerations over "*what* was said" independent analysis, there is no justification for placing "*when* it was said" over "what was said." Here, of course, this principle stands at its pinnacle, as neither the Second Circuit *en banc*, nor this Court, had addressed, much less rejected, McCabe's arguments.

Second, the notion that a party's arguments, when presented in order to preserve them for further review, are nonetheless frivolous if those arguments do not point out that the precedent in question had

"previously overlooked an argument" misunderstands the very essence of the right to preserve foreclosed arguments, which, by its nature, tends to concern arguments that were previously rejected, not merely overlooked.

(v) The Summary Order states:

> One day after this Court's decision in *Leyse I*, Bank filed two putative class[-]action suits—one brought in the Southern District of New York and one in the Eastern District of New York (*i.e.*, the District Court action) . . . . At the encouragement of the district court [in the Southern District action], Bank voluntarily dismissed *Leyse v. Lifetime Entertainment Services, LLC* ("*Leyse II*"), No. 17-cv-1212, less than two months after filing the action.

Appx. A at 3a-4a & n.1. First, *Leyse II* was voluntarily dismissed due to a reason that was applicable *only* to that case. *See* Bank Pr. Br. at 39-40 (Appx. G at 115a-116a). Second, sanctions are limited to conduct that occurs in the course of the action *sub judice*. *See id.* at 40 (Appx. G at 116a-117a).

(vi) The Summary Order states:

> Bank [sic] cross-moved for sanctions against Lifetime's counsel for bringing a frivolous sanctions motion. . . . *** But

> because Lifetime's motion was meritorious, Lifetime's motion was not frivolous and did not warrant sanctions under Rule 11 or 28 U.S.C. § 1927.

Appx. A at 4a, 10a.

The Second Circuit ignored, as had the Magistrate Judge, the fact that most of the arguments in support of McCabe's motion for sanctions were not based on whether "Lifetime's motion was meritorious." Instead, McCabe's motion was based primarily on the many false and misleading representations that Lifetime's counsel made in seeking sanctions. Indeed, Lifetime's counsel continued engaging in that practice before the Second Circuit, *see* McCabe Reply Br. at 1-6, 10-11 (Appx. H at 120a-128a-130a); Reply Brief of Appellant Todd C. Bank ("Bank Reply Br.") at 9, 25 (Appx. I at 133a-134a, 136a-137a), including during the oral argument. *See* Appx. J. at 152a (claiming that *China Agritech, Inc. v. Resh*, --- U.S. ---, 138 S. Ct. 1800 (2018), supports *Giovaniello* even though *Giovanniello* addressed tolling with respect only to the named plaintiff's *individual* claims, whereas *China Agritech* concerned tolling with respect only to *class* claims. *See* McCabe Reply Br. at 3-6 (Appx. H at 122a-125a).

(vii) The Summary Order states: "[the] allegations [in the *McCabe* and *Leyse* actions were] that Lifetime violated the TCPA in August 2009 by calling *Time Warner Cable subscribers* in New York." Appx. A at 3a-4a (emphasis added). This characterization, though not relevant, is incorrect. *See*

Bank Reply Br. at 22-23 (Appx. I at 136a-137a). Moreover, the District Court in *Leyse I* denied Lifetime's motion for summary judgment. *See Leyse v. Lifetime Entertainment Services, LLC*, No. 13-cv-5794, 2015 WL 5837897, *4 (S.D.N.Y. Sept. 22, 2015).

B. The Second Circuit Ignored the Distinction that McCabe Drew Between the District Court Action and *Giovanniello*

McCabe drew a distinction between the facts before the District Court and the facts that were at issue in *Giovanniello*. That distinction was that the amount of tolling that McCabe sought would have been much less than that which would have resulted in *Giovanniello* if, in *Giovanniello*, the Second Circuit had held in favor of the plaintiff. *See* McCabe Opp. Mem. at 2-4, 8-9 (Appx. E at 68a-70a, 72a-73a); Principal Brief of Appellant Kevin McCabe ("McCabe Brief"; Doc. 48) 7; 13-15 (Appx. F at 103a, 105a-107a). In *Giovanniello*, there would have been "*two* tolling periods: first, from the commencement of the action until the resolution of the post-judgment appeal of the dismissal; and, second, in the event that such dismissal were reversed and [the case was] remanded, from the resolution of the post-judgment appeal until [(at least)] the district court's subsequent ruling . . . on class certification." *Id.* at 7 (Appx. F at 103a) (emphasis in original).

The Summary Order did not even acknowledge McCabe's drawing of the above-quoted distinction, much less address it.

C. A Remarkable Misunderstanding was Shown by One of the Second Circuit Judges

Bank, as the attorney for the plaintiff in *Giovanniello*, had brought a reharing/*en banc* petition and a petition for *certiorari*, each of which was denied. It is a black-letter principle, however, that "nothing about the merits of a case is revealed in the standard order denying rehearing," *United States v. Taylor*, 752 F.3d 254 (2d Cir. 2014), just as "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Golb v. Attorney Gen. of N.Y.*, 870 F.3d 89, 98 (2d Cir. 2017) (citation and quotation marks omitted). As Justice Frankfurter explained:

> [A] denial of a petition for writ of certiorari . . . *simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion'*. A *variety of considerations* underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. . . . A decision may satisfy all the[] technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of *judicial policy* here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects

> of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

State of Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-918 (1950) (Frankfurter, *J.*, op. respecting denial of pet. for *cert.*) (emphases added; citation omitted).

As the foregoing makes clear, any suggestion that McCabe's preservation of his right to present his arguments to an *en banc* panel of the Second Circuit, and/or to this Court, was precluded or was sanctionable because McCabe's counsel had 'had his chance in *Giovanniello*' would be unprecedented. Nevertheless, that is exactly what one of the Second Circuit judges suggested:

> **JUDGE RAGGI**: . . . [D]id you seek either *en banc* or Supreme Court review in *Giovanniello*?
>
> **MR. BANK:** Yes, both.
>
> **JUDGE RAGGI:** And you were denied.
>
> **MR. BANK:** That's correct.
>
> **JUDGE RAGGI:** So why isn't that - that makes it even more difficult, it would seem to me, for you to say you've got a good-faith argument that this panel should not follow *Giovanniello*.

Appx. J. at 154a-155a.

In sum, the standards that govern sanctions have not even been arguably met here, and it would be a miscarriage of justice were Bank forced to choose, in countless future cases, either to explain why he should not have been sanctioned, and thereby risk causing a judge to be prejudiced against him for having defended himself, or falsely admit (even if only by implication from his silence) that he believed that he deserved to be sanctioned.

CONCLUSION

This Petition should be granted.

Respectfully submitted,

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APRIL, 2019