APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

No. 18-1149

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of January, two thousand nineteen.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
DEBRA ANN LIVINGSTON,
Circuit Judges.

Kevin McCabe,

Plaintiff-Appellant,

TODD C. BANK,

Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

Appearing for Appellants: Todd C. Bank, Esq., Kew Gardens, N.Y.

Appearing for Appellee: Sharon L. Schneier, Davis Wright Tremaine LLP (Eric J. Feder, *on the brief*), New York, N.Y.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Korman, *J.*; Bulsara, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiff-Appellant Kevin McCabe and Appellant Todd Bank appeal from the March 26, 2018 order of the United States District Court for the Eastern District of New York (Korman, *J.*), adopting in full the report and recommendation of Magistrate Judge Sanket J. Bulsara, which granted the motions of Lifetime Entertainment Services, LLC ("Lifetime") to dismiss the putative class action suit alleging Telephone Consumer Protection Act ("TCPA") violations and sanction Bank for filing a time-barred claim. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On August 16, 2013, Bank filed a putative class in the Southern District of New York alleging that in August 2009, Lifetime violated the TCPA by calling Time Warner Cable subscribers in New York with a prerecorded advertisement. On September 22, 2015, the Southern District of New York (Hellerstein, *J.*) denied class certification, finding that the proposed class was not ascertainable. *Leyse v. Lifetime Entm't Servs., LLC*, No. 13 Civ. 5794 (AKH), 2015 WL 5837897, at *5 (S.D.N.Y. Sept. 22, 2015) ("*Leyse I*"). We affirmed the denial on February 15, 2017. *See Leyse v. Lifetime Entm't Servs. LLC*, 659 F. App'x 44 (2d Cir. 2016).

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—that made nearly identical allegations that Lifetime violated the TCPA

in August 2009 by calling Time Warner Cable subscribers in New York. McCabe (represented by Bank) brought the individual and class action claims at issue here in the Eastern District of New York.[1] Lifetime thereafter moved to dismiss the Eastern District complaint under Federal Rule of Civil Procedure 12(b)(6) as time barred and sought sanctions against Bank under Rule 11. Bank cross-moved for sanctions against Lifetime's counsel for bringing a frivolous sanctions motion. The magistrate judge recommended granting both of Lifetime's motions and denying Bank's. The district court adopted the recommendation, dismissed the complaint, and sanctioned Bank for knowingly filing a time-barred complaint. McCabe appealed, and Bank was later added as a pro se appellant to challenge the sanctions order against him.

I. Tolling

"We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

The district court properly dismissed McCabe's claims as time barred. The parties agree that claims

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[1] At the encouragement of the district court, Bank voluntarily dismissed *Leyse v. Lifetime Entertainment Services, LLC* ("*Leyse II*"), No. 17-cv-1212, less than two months after filing the action.

under the TCPA are subject to a four-year statute of limitations. *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 107 (2d Cir. 2013) (applying generic federal statute of limitations in 28 U.S.C. § 1658 to claims brought under the TCPA). McCabe's TCPA claim accrued on August 20, 2009, and therefore, he had until August 20, 2013, to timely file a complaint. The parties disagree, however, as to how long the *Leyse I* action tolled the four-year statute of limitations. McCabe argues that under the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), the statute of limitations was tolled for the period between when *Leyse I* was filed (August 16, 2013) and when the Second Circuit affirmed the denial of class certification (February 15, 2017). Lifetime contends that pursuant to this Court's interpretation of *American Pipe* in *Giovanniello*, tolling ceased when the district court denied class certification on *Leyse I*. Applying *Giovanniello*, we affirm.

In *American Pipe*, the Supreme Court considered whether class-action proceedings toll the statute of limitations period when a class action ultimately is not certified. *Am. Pipe*, 414 U.S. at 552-53, 94 S.Ct. 756. The Supreme Court held "that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554, 94 S.Ct. 756. In *Giovanniello*, we held that *American Pipe* permits tolling only until a district court denies class certification. 726 F.3d at 116. We found this rule

appropriate because members of a putative class can "rely on the existence of the putative class action suit to protect their rights." *Id.* at 117 (alterations omitted) (internal quotation marks omitted). Neither a motion for reconsideration nor an appeal from a denial of class certification continues tolling because class members can no longer reasonably rely on the named plaintiffs to represent their interests once the district court denies certification. *Id.* at 116-18. We apply this "bright-line rule" because *American Pipe* tolling is an exception to the statute of limitations and invites abuse. *Id.* at 119.

Under *American Pipe* tolling rules, when the *Leyse I* complaint was filed on August 16, 2013, four days short of the limitations period, the prospective class action tolled the statute of limitations for McCabe's claim because McCabe was a potential class member. However, when the Southern District denied class certification on September 12, 2015, the statute of limitations began to run again. Thus, McCabe had four days thereafter to bring his individual claims. But McCabe waited until February 2017—over a year after the denial of class certification—to bring his complaint. His claims were therefore untimely.

McCabe principally argues that *Giovanniello* was wrongly decided. We do not address the argument because we are bound to follow *Giovanniello*. "It is a longstanding rule of our Circuit that a three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting *en banc* or by the Supreme Court." *Doscher v. Sea Port Grp. Secs., LLC*,

832 F.3d 372, 378 (2d Cir. 2016). McCabe does not offer any argument that warrants reconsideration of *Giovanniello*, nor does he identify any intervening Supreme Court decision that casts doubt on the reasoning therein.

The district court therefore properly dismissed McCabe's TCPA claims as untimely. Because McCabe's individual claims were time barred, the district court also properly dismissed the class claims as moot. *See Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("[I]n general, if the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot.").

II. Sanctions

The denial of a motion for sanctions under Rule 11 is reviewed for abuse of discretion. *Perez v. Posse Comitatus*, 373 F.3d 321, 326 (2d Cir. 2004). "A pleading, motion or other paper violates Rule 11 either when it has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Kropelnicki v. Siegel*, 290 F.3d 118, 131 (2d Cir. 2002) (emphasis omitted) (internal quotation marks omitted); *see also* Fed. R. Civ. P. 11(b)(2) (by presenting a paper to the court that argues the law should be changed, an attorney certifies, inter alia, that "the claims, defenses, and other legal contentions are warranted ... by a

nonfrivolous argument for ... reversing existing law"). Rule 11 requires that the conduct in question be objectively unreasonable and therefore does not require a finding of subjective bad faith. *See Muhammad v. Walmart Stores E., L.P.*, 732 F.3d 104, 108 (2d Cir. 2013) (noting that sanctions issued pursuant to a motion require that an attorney's conduct be "objectively unreasonable").

A. Sanctions Against Bank

The district court did not abuse its discretion by sanctioning Bank. As discussed above, *Giovanniello* explicitly foreclosed Bank's argument that *American Pipe* tolling continued through appeal, *Giovanniello*, 726 F.3d at 107, and none of the arguments Bank made before the district court were objectively "good faith argument[s] for the extension, modification or reversal of existing law." *Kropelnicki*, 290 F.3d at 131 (internal quotation marks omitted).

The arguments Bank presented to the district court were frivolous, and his arguments have been consistently rejected by this Court and by other circuits. *See Giovanniello*, 726 F.3d at 107 (rejecting Bank's arguments that *American Pipe* tolling continues through appeal); *see also*, *e.g.*, *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1382-83 (11th Cir. 1998) (concluding that *American Pipe* tolling does not extend to appeals). Bank's post-argument briefing, which we have considered, reiterates these points. 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. *Cf. Gilmore v. Shearson/Am. Exp. Inc.*, 811 F.2d 108, 110-12 (2d Cir. 1987) (declining to sanction attorney for arguing that precedent should be overturned where attorney raised new arguments and precedent was "severely criticized" by multiple courts of appeals), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

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. *See Gurary v. Winehouse*, 235 F.3d 792, 798 (2d Cir. 2000) ("Rule 11 is violated when it is clear *under existing precedents* that there is no chance of success...." (emphasis added) (internal quotation marks omitted)); *see also Four Keys Leasing & Maint. Corp. v. Simithis*, 849 F.2d 770, 774 (2d Cir. 1988) (applying objective standard prior to 1993 amendment and concluding that "[a] competent attorney, after reasonable inquiry into the applicable law and the facts and procedural history of this case[,] would have known that there was no justification whatever" for the petition and thus the "petition could not have been filed in good faith").

Given that McCabe's complaint and opposition to

the motion to dismiss were frivolous, the district court did not abuse his discretion by sanctioning Bank.

B. Sanctions Against Lifetime's Counsel

McCabe argues that the district court abused its discretion by denying his motion for sanctions against Lifetime's counsel. 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. *See Kropelnicki*, 290 F.3d at 131 (finding that when "it is not completely inconceivable that a legal theory" could have supported a litigant's claims, sanctions were not appropriate); *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 115 (2d Cir. 2000) (sanctions under Section 1927 are warranted only when an "attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose" (internal quotation marks omitted)).

We have considered the remainder of McCabe's and Bank's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

REPORT AND RECOMMENDATION

17-CV-908-ERK-SJB
Signed 01/04/2018

Kevin MCCABE,

Plaintiff,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant.

Bulsara, United States Magistrate Judge:

Plaintiff Kevin McCabe ("McCabe") filed this action against Lifetime Entertainment Services, LLC ("Lifetime") individually and on behalf of a putative class, alleging a violation of the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227(b)(1)(B), and its companion regulation, 47 C.F.R. § 64.1200(a)(2).

The Honorable Edward R. Korman referred three motions to the undersigned for a report and recommendation: (1) Lifetime's motion to dismiss filed

pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim; (2) Lifetime's motion for sanctions against Plaintiff's counsel, Todd Bank ("Mr. Bank"); (3) and a cross-motion for sanctions brought by Mr. Bank against Lifetime's attorneys.

For the reasons stated below, the court respectfully recommends that the motion to dismiss be granted, Lifetime's motion for sanctions be granted, and the cross-motion for sanctions be denied.

Background and Procedural History

I. The Present Lawsuit

The Complaint in this action was filed on February 16, 2017, with Kevin McCabe as lead plaintiff ("McCabe Complaint"). (Dkt. No. 3). It alleges that on August 19 or 20, 2009, Lifetime placed one or more telephone calls to McCabe using an artificial or prerecorded voice message that advertised the commercial availability and quality of Lifetime Television, a cable-television network that Lifetime owns and operates. (Compl. ¶ 7). McCabe alleges that he did not agree to receive these calls (Compl. ¶ 10), and the phone call(s) violated the TCPA. (Compl. ¶¶ 13-15).

McCabe seeks statutory damages of $500 per violation for himself and on behalf of the other members of the putative class. He also seeks additional statutory damages, claiming that Lifetime's violations were knowing or willful; an injunction; costs; and

attorney's fees. (Compl. at 5 (Prayer for Relief)). McCabe styled his case as both an individual and putative class action, as follows:

> 1. Plaintiff brings this action individually and as a class action on behalf of all persons to whose residential telephone lines Defendant, or a third party acting on behalf of Defendant, placed one or more telephone calls using an artificial or prerecorded voice that delivered a message that advertised the commercial availability or quality of property, goods, or services, other than Defendant, its officers, employees, and representatives, and their families (the "Class"), during the period from August 17, 2009, to the present (the "Class Period").
>
> 2. Plaintiff's claims arise under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(B), and the regulation, 47 C.F.R. § 64.1200(a)(2) .... Plaintiff seeks, individually and on behalf of the other Class Members, statutory damages, injunctive relief, attorney's fees, and costs[.]
>
> ....
>
> 7. On or about August 19 or 20, 2009, Lifetime, or a third party acting on behalf of Lifetime, placed, to McCabe's

> residential telephone line, a telephone call using an artificial or prerecorded voice that delivered a message ("Message") that advertised the commercial availability and quality of Lifetime Television, a cable-television network that Lifetime owns and operates (a "Lifetime Robocall").

(Compl. ¶¶ 1, 2, 7). McCabe's counsel in this case is Mr. Bank.

II. The Southern District of New York Lawsuits

A. *Leyse I*

Mr. Bank filed a lawsuit with virtually identical claims on August 16, 2013, in the United States District Court for the Southern District of New York before Judge Alvin K. Hellerstein. (*See Leyse v. Lifetime Entm't Servs., LLC* ("*Leyse I*"), 13-CV-5794 (S.D.N.Y.), Dkt. No. 1). The plaintiff, Mark Leyse, also sued Lifetime, pursuant to the TCPA on both an individual and class basis:

> 1. Plaintiff brings this action individually and as a class action on behalf of all persons to whose residential telephone lines Defendant, or a third party acting on behalf of Defendant, placed one or more telephone calls using an artificial or prerecorded voice that delivered a message that advertised the commercial

> availability or quality of property, goods, or services, other than Defendant, its officers, employees, and representatives, and their families (the "Class"), during the period from August 17, 2009, to the present (the "Class Period").
>
> 2. Plaintiff's claims arise under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(B), and the regulation, 47 C.F.R. § 64.1200(a)(2) .... Plaintiff seeks, individually and on behalf of the other Class Members, statutory damages, injunctive relief, attorney's fees, and costs.
>
> ....
>
> 7. On or about August 19, 2009, Lifetime, or a third party acting on behalf of Lifetime, placed, to Leyse's residential telephone line, a telephone call using an artificial or prerecorded voice that delivered a message that advertised the commercial availability or quality of Lifetime Television, a cable-television network that Lifetime owns and operates.

(*Leyse I*, Compl. ¶¶ 1, 2, 7).

On February 28, 2014, following completion of discovery, Plaintiff filed a motion for class certification. (*See Leyse I*, Dkt. No. 25). On September 22, 2015,

Judge Hellerstein denied the motion. (*See Leyse I*, Dkt. No. 96); 2015 WL 5837897, at *1 (S.D.N.Y. Sept. 22, 2015).

In the course of denying the motion, Judge Hellerstein noted that discovery had revealed the following:

Lifetime is a cable television channel that airs original scripted series, nonscripted reality series, and movies, along with syndicated programming that originally appeared on network television. In 2009, Lifetime was available in New York City to customers of Time Warner Cable ("TWC"), RCN, Cablevision, DirecTV, and DISH, with TWC being the predominant cable provider. *Leyse I*, 2015 WL 5837897, at *1 (citations omitted).

In 2009, Lifetime began airing the television show "Project Runway." Project Runway, which had aired on the television channel Bravo for its first five seasons and is hosted by Tim Gunn ("Gunn"), is a reality television series in which contestants compete against one another in designing specific articles of clothing. In 2009, Project Runway moved from Bravo to Lifetime, but reruns of the show continued to be aired on Bravo. Prior to the sixth season premiere of Project Runway, scheduled to be aired on August 20, 2009, TWC moved Lifetime from its long-held channel position, Channel 12, to Channel 62. *Id.* (citations omitted).

To notify its customers of this change, Lifetime and Gunn recorded the following message:

> Time Warner Cable customers, this is Tim Gunn. Do you know that Lifetime has moved to Channel 62? Tune in to Lifetime on Channel 62 tomorrow at 10 p.m. and see me and Heidi Klum in the exciting Season 6 premiere of "Project Runway." The "Project Runway" season premiere tomorrow at 10 p.m., following "The All–Star Challenge." Be there and make it work-only on Lifetime, now on Channel 62.

Id. To broadcast the message, Lifetime provided a third-party company with a list of zip codes for the areas of New York City in which TWC customers lived, and the third-party obtained (by purchasing them from a vendor) phone numbers of individuals living in those zip codes. *Id.* at *2 (citations omitted). Sometime in July 2009, Leyse heard the Lifetime message on his roommate's answering machine or voicemail. *Id.* Four years later, he filed the lawsuit against Lifetime in the Southern District of New York. *Id.*

The motion for class certification sought certification of a class of "all persons to whose residential telephone lines" Lifetime initiated "in August 2009, a telephone call using a prerecorded voice to deliver" the Gunn message. *Id.* at *5. Despite the completion of discovery, the parties could not find a list of the 450,000 phone numbers that Lifetime allegedly called in August 2009. *Id.* Leyse proposed that notification to the class be made via publication in New York City newspapers and on Lifetime's website,

which Judge Hellerstein denied. *Id.* In the absence of a list of called numbers, he concluded that the court could not determine whether any particular individual was a member of Leyse's proposed class. As a result, the proposed class failed to meet the ascertainability requirement of Fed. R. Civ. P. 23(b), and the motion for class certification was denied. *Id.* ("Since I am unable to determine if any particular individual is a member of Leyse's proposed class, the class is unascertainable, and therefore I deny the motion."). Judge Hellerstein issued his decision on September 22, 2015.

On October 6, 2015, Plaintiff filed a motion for reconsideration. (*See Leyse I*, Dkt. Nos. 98-101). That motion was denied on October 19, 2015. (*See Leyse I*, Dkt. No. 102). In so doing, Judge Hellerstein found that Leyse had not made any new arguments. *Id.* ("All arguments were made previously. Nothing more has been shown."). In the absence of any documentary evidence, such as the list of numbers called, the parameters of any proposed class remained unascertainable:

> Documentary evidence has not established, nor does it seem likely that it will establish, the parameters of the class. The parties, despite full opportunity of discovery, have not discovered any copy of a list said to have been used by a third party to call telephone numbers. Nor could class members realistically be expected to recall a brief phone call received six years

> ago or be expected to retain any concrete documentation of their receipt of such a phone call. Plaintiff's request for still another opportunity to conduct discovery again is denied, as its entire motion for reconsideration.

Id. As such, Judge Hellerstein reiterated his denial of the class certification motion, finding again that "Leyse's proposed class fails to meet the ascertainability requirement of Fed. R. Civ. P. 23(b)." *Id.* Following the denial of the class motion, only Leyse's individual TCPA claim remained in the case. On October 30, 2015, Leyse filed a petition in the Second Circuit for an interlocutory appeal. On March 2, 2016, the Second Circuit held that "an immediate appeal is unwarranted." (*See Leyse I*, Dkt. No. 126).

Lifetime then offered to pay Leyse $1503 plus costs to resolve the individual claim, and moved to enter judgment in favor of Leyse and dismiss the complaint. *Leyse v. Lifetime Entm't Servs., LLC*, 171 F. Supp. 3d 153, 154 (S.D.N.Y. 2016), *aff'd*, 679 Fed.Appx. 44 (2d Cir. 2017). Leyse objected; the Court overruled the objection because Lifetime had tendered all available relief under the TCPA to him. Judge Hellerstein entered judgment of $1,903 in Leyse's favor and entered an injunction prohibiting Lifetime from calling Leyse. (*See Leyse I*, Dkt No. 129).

On April 20, 2016, Leyse appealed the denial of the class certification and the entry of judgment to the Second Circuit. On February 15, 2017, the Second

Circuit issued a summary order affirming denial of the class certification motion, finding that Judge Hellerstein did not abuse his discretion in finding that the class was not ascertainable, and in light of the tender by Lifetime, concluded that the district court was permitted to enter judgment in Leyse's favor. *Leyse v. Lifetime Entm't Servs., LLC*, 679 Fed.Appx. 44, 47-8 (2d Cir. 2017). Mr. Bank filed a motion for rehearing en banc on March 1, 2017. (*Leyse v. Lifetime Entm't Servs., LLC*, No. 16-CV-1133 (2d Cir.), Dkt. No. 135).

On April 11, 2017, the Second Circuit denied the motion for rehearing en banc. (*Id.*, Dkt. No. 148). On April 17, 2017, the Second Circuit issued an order for Leyse to pay $249.80 for Lifetime's costs in the appeal. (*See id.*, Dkt. No. 151; *see also Leyse I*, Dkt. No 134). To date, that has not been paid. (*See* Dkt. No. 18, Def. Ex. 11-Schneier Decl. ¶ 11). On July 29, 2017, Leyse filed a petition for a writ of certiorari. (Petition for a Writ of Certiorari, *Leyse v. Lifetime Entm't Servs., LLC*, No. 17-162 (U.S. July 29, 2017)). As of the date of this recommendation, that petition is still pending.

B. *Leyse II*

On February 16, 2017, the day after the Second Circuit's decision denying the *Leyse I* appeal, and on the same day that the McCabe lawsuit was filed in the Eastern District of New York, Mr. Bank filed a second lawsuit in the Southern District of New York. Mark Leyse was again the Plaintiff, and the identical claims were brought against Lifetime. (*See Leyse v. Lifetime*

Entm't Servs., LLC ("*Leyse II*"), No. 17-CV-1212 (S.D.N.Y. Feb. 16, 2017), Dkt. No. 2). The case was assigned to District Judge William H. Pauley, III.

Judge Pauley held a conference with the parties, which Mr. Bank attended, on March 30, 2017. (*See Leyse II*, Dkt. No. 19). At the conference, Mr. Bank admitted that the allegations in the *Leyse II* complaint were identical to the allegations in the Leyse I complaint. (Transcript of Proceedings held on Mar. 30, 2017 before Judge William H. Pauley, III, *Leyse II*, Dkt. No. 19 ("*Leyse II* Tr.") at 3:7-10). Judge Pauley told Mr. Bank that "this case is identical to the case you filed before Judge Hellerstein, and you have not exhausted your available avenues of relief with respect to that case." (*Leyse II* Tr. at 18:1-4). In Judge Pauley's view, because the Second Circuit was considering (on the pending motion for rehearing en banc) issues related to Mr. Leyse's first complaint, there was no viable case or controversy for another complaint that was identical to the first. (*Leyse II* Tr. at 18:10-11). Judge Pauley asked Mr. Bank whether he would withdraw the case; Mr. Bank demurred. (*Leyse II* Tr. at 18:22-25). Almost one month later, on April 24, 2017, Leyse filed a stipulation of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). (*See Leyse II*, Dkt. No. 17).

Subsequently, in this case, on August 21, 2017, Lifetime filed a motion to dismiss for failure to state a claim under Rule 12(b)(6), and a separate motion for sanctions. (See Dkt. Nos. 17-18). On September 22, 2017, McCabe filed a cross-motion for sanctions. (*See*

Dkt. No. 23).

Discussion

I. Motion to Dismiss

A. Legal Standards

In reviewing a motion to dismiss for failure to state a claim, this court "must accept as true all of the factual allegations set out in plaintiff's complaint." *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001). The court then draws "inferences from those allegations in the light most favorable to plaintiff, and construe[s] the complaint liberally." *Id.* Once the facts are construed in the light most favorable to the plaintiff, there must be sufficient facts that allege a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss [pursuant to Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and quotations omitted). The factual allegations must be more than speculative. *Id.*

"In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district

court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference. Of course, it may also consider matters of which judicial notice may be taken under Fed. R. Evid. 201." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). This "court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) (internal citations and quotations omitted). Statements contained in public documents or records may be considered, "although the statements contained therein may only be considered to prove that such statements were made and may not be used to prove the truth of the matters asserted therein." *Giannone v. Bank of Am., N.A.*, 812 F. Supp. 2d 216, 221 n.2 (E.D.N.Y. 2011) (collecting cases).

"While a statute of limitations defense may be raised in a motion to dismiss ... such a motion should not be granted unless it appears beyond doubt that the [defendant] can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Ortiz v. Cornetta*, 867 F.2d 146, 148 (2d Cir. 1989) (internal quotations omitted). Dismissing claims on statute of limitations grounds at the complaint stage "is appropriate only if a complaint clearly shows the claim is out of time." *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999).

Lifetime's motion to dismiss argues that the four-year statute of limitations for McCabe's TCPA claims expired. McCabe's lawsuit is—like *Leyse I* and *Leyse II*—brought as both an individual and putative class action. Lifetime, albeit not differentiating between the two, argues all claims are time barred.

B. McCabe's Individual Claim

McCabe alleges that "[o]n or about August 19 or 20, 2009," Lifetime placed a telephone call to him in violation of the TCPA. (Compl. ¶ 7). Because a four-year statute of limitations applies to the TCPA, McCabe had until August 20, 2013 to file a claim against Lifetime, unless there was some tolling of the statute of limitations period.[1] McCabe, relying on the tolling rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), argues that his lawsuit is timely.

1. *American Pipe*

American Pipe held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. In other words, when a named plaintiff files a class action, the statute of limitations period is tolled for the individual

[1] The TCPA itself does not contain a statute of limitations. However, there is a federal "catch-all" statute of limitations that applies to the TCPA. The federal catch-all,

claims of each of the other class members. That tolling extends until "class action status is denied." *Id.*; *Giovanniello*, 726 F.3d at 116 ("We now take this opportunity to join our sister circuits and hold that *American Pipe* tolling does not extend beyond the denial of class status.").[2] Upon denial of class status, individual class members are required to take action to preserve their rights—for example, by filing an individual lawsuit—or "face the possibility that their action could become time barred," because the statute of limitations clock starts to run again. *Id.*

Tolling under *American Pipe* persists only while the class action is pending. *American Pipe*, 414 U.S. at 561 ("[T]he commencement of the class action in this case suspended the running of the limitation period *only* during the pendency of the motion to strip the suit of its class action character.") (emphasis added); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied."). And any definitive decision by the District Court to deny class status stops the tolling of the statute of limitations. "Although

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[2] "The theoretical basis on which *American Pipe* rests is the notion that class members are treated as parties to the class action 'until and unless they received notice thereof and chose not to continue.' Because members of the asserted class are treated for limitations purposes as having instituted their own actions, at least so long as they continue to be members of the class, the limitations period does not run against them during that time." *In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007) (quoting *American Pipe*, 414 U.S. at 551).

American Pipe's holding was limited to the denial of class certification for failure to show 'the class is so numerous that joinder of all members is impracticable,' " *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003) (quoting *American Pipe*, 414 U.S. at 552–53), subsequent decisions have made clear that tolling ceases when class status is denied for any reason. *Id.* (citing *Crown, Cork & Seal Co.*, 462 U.S. at 353-4 (1983)). A district court's decision that class status should be denied, for whatever reason, places all class members on notice that they are not members of any putative or actual class. At that point "the class is no longer putative; having been subjected to a legal decision, the class is either extant or not." *Giovanniello*, 726 F.3d at 117; *Collins v. Vill. of Palatine, Ill.*, 875 F.3d 839, 845 (7th Cir. 2017) ("An uncertified class-action suit is decidedly not a class action once all class claims have been dismissed. The statute of limitations immediately resumes.").[3]

Tolling does not extend, if after class action status is denied, a party moves for reconsideration before the district court. The Second Circuit made this clear in 2013 in *Giovanniello*. 726 F.3d at 107-108; *see also*

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[3] *Crown, Cork & Seal* referred to a decision denying class certification as the point where tolling for class members ceases. 462 U.S. at 354. Subsequent decisions, keying off of *American Pipe*'s reference to "class action status," 414 U.S. at 552, have found that tolling ceases when class *status* is denied—whether through denial of a motion for certification or for any other reason, including dismissal of the case. *See Giovanniello*, 726 F.3d at 116 (referring to "class status" denials); *Collins*, 875 F.3d at 845 (referring to "dismissal" of class claims).

Collins, 875 F.3d at 841 (7th Cir. 2017) ("We ... adopt a simple and uniform rule: Tolling stops immediately when a class-action suit is dismissed—with or without prejudice—before the class is certified."). The Second Circuit also made clear that tolling does not begin again should the plaintiff appeal the denial of class status.[4] *Giovanniello* at 107-108. In so deciding, the Second Circuit

> emphasize[d] the need for a bright-line rule in this area of law. *American Pipe* tolling is an exception to the operation of

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[4] Eight other circuits reached the same conclusion prior to the Second Circuit's decision in *Giovanniello*. *See, e.g.*, *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 519 (5th Cir. 2008) ("Therefore, it is clear from these cases that if the district court denies class certification under Rule 23, tolling of the statute of limitations ends.... [A]n appeal of the denial of class certification does not extend the tolling period."); *Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002) ("[W]hen the suit is dismissed without prejudice or when class certification is denied the statute resumes running for the class members."). Plaintiff spends significant time attempting to distinguish these cases and impugn the Second Circuit's reliance upon them. (*See* Pl. Resp., Dkt. No. 20 at 7-8). Whatever the merits of these arguments—and none are apparent—the Second Circuit, whose decisions control cases filed in this Court, was definitive in its holding that tolling does not extend beyond the initial decision to deny class status. And that ruling was not dependent upon the rulings of sister circuits, but the Second Circuit's independent determination that such a result was "consistent with the reasoning underlying *American Pipe* tolling." 726 F.3d at 116-18 ("If the [Supreme] Court had contemplated that tolling continued through the pendency of reconsideration or through appeal, there would be no need for class members to take action to protect their rights[.]").

> an applicable statute of limitations.... Some members of the Supreme Court have expressed concern that *American Pipe* tolling might be abused. *See Crown, Cork*, 462 U.S. at 354, 103 S.Ct. 2392 (Powell, J., concurring) (reiterating that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse"). We have likewise explained that "*American Pipe* and *Crown, Cork* represent a careful balancing of the interests of plaintiffs, defendants, and the court system." *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987). Given the uncertainty that exists in extending tolling beyond denial of class status, even under Rule 23(f)'s new regime, we conclude that a narrow, clearly defined rule best serves *American Pipe* tolling.

Id. at 119.[5]

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[5] Plaintiff contends that extending *American Pipe* tolling during the pendency of an appeal aligns with the rationale of the doctrine. (*See* Pl. Resp., Dkt. No. 20 at 2, 35, 37). The Second Circuit explained, in rejecting that view, that *American Pipe* rationales do not warrant extending tolling. *Giovanniello*, 726 F.3d at 117-8. Potential class members are protected by the commencement of a putative class action. *See American Pipe*, 414 U.S. at 550–52; *see also Crown, Cork*, 462 U.S. at 350 (individual class members may "rely on the existence of the [putative class action] suit to protect their rights."). Class members may presume that the class representative and class counsel will protect their interests while a class action represented by another class member is pending. Once that class action is dismissed,

2. *American Pipe*'s Impact on McCabe's Claim

McCabe is a member of the *Leyse I* class, which he does not dispute. (*Compare* Compl. ¶ 7 *with Leyse I* Compl. ¶ 7). The call that allegedly violated the TCPA was placed on August 19 or 20, 2009. McCabe, therefore, had until August 20, 2013 to file his lawsuit and have it be timely. On August 16, 2013, Leyse filed his first lawsuit in the Southern District of New York. The statute of limitations on McCabe's claim, therefore, was tolled pursuant to *American Pipe*; however, only 4 days remained in the limitations period. On September 22, 2015, Judge Hellerstein denied Leyse's motion for class certification. As a result, the tolling of all other class members' claims, including McCabe's ceased. *Giovanniello*, 726 F.3d at 107-8. McCabe, despite having only 4 days remaining in the limitations period, waited until February 16,

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Giovanniello, 726 F.3d at 117, the named representative and class counsel no longer have a duty to advance the interests of the putative class members. As such, the other class members are on notice that there is no pending action that will protect their interests, and the statute of limitations on their claims should begin to run again.

There is also a countervailing interest that counsels against tolling beyond the initial denial of class certification: the need to let statute of limitations operate. "[C]ontinuing to toll the limitations period beyond the dismissal of a noncertified class claim would encroach more severely on the interests underlying statutes of limitations, the purpose of which is to 'protect defendants against stale or unduly delayed claims.' " *Collins*, 875 F.3d at 845 (quoting *Credit Suisse Secs. (USA) v. Simmonds*, 566 U.S. 221, 227 (2012)).

2017 to file his lawsuit. That is well beyond the period in which the statute of limitations expired on his TCPA claim. His claim, therefore, must be dismissed. *See*, *e.g.*, *Collins*, 875 F.3d at 845 (affirming dismissal of plaintiff's claim under four-year statute of limitations under the Driver's Privacy Protection Act, finding that "[t]he statute was tolled when [another class member] filed suit on behalf of a proposed class on August 27, 2010. And it began to run once again when the district court dismissed that case on September 22, 2010. Once the claim was dismissed, American Pipe's tolling rule no longer controlled. The statute of limitations for [plaintiff's] claim immediately resumed. The limitations period expired on July 10, 2011, long before he filed this suit."); *Bridge v. Ocwen Fed. Bank FSB*, No. 07-CV-02739, 2013 WL 331095, at *13 (N.D. Ohio Jan. 29, 2013) (dismissing TCPA claim with prejudice where telephone call occurred more than four years before complaint filing).

And this dismissal should be with prejudice. Motions to dismiss are typically granted without prejudice, giving parties an opportunity to replead. However, where the statute of limitations bars the claim, a court may dismiss with prejudice when the plaintiff can never bring a proper claim and any amended complaint would be futile. McCabe's claim is based on an August 19 or 20, 2009 phone call, and it is without doubt that there is no basis for tolling; any proposed amended complaint would also be time barred and, therefore, futile. It is therefore appropriate to dismiss the complaint with prejudice. *See*, *e.g.*, *Rivera v. Governor of New York*, 92 Fed.Appx. 25, 26

(2d Cir. 2004) ("[W]e agree with the district court's determination that Rivera's complaint falls outside the statute of limitations on New York-based Section 1983 claims and is properly dismissed. Furthermore, we agree with the district court's decision to dismiss the claim with prejudice because amendment would be futile.").

McCabe makes are a series of arguments to avoid this result. None have merit.

First, he argues that *American Pipe* tolling extends to motions for reconsideration and appeals, and therefore the filing of such motions in *Leyse* continued to toll the statute of limitations. (*See* Pl. Resp., Dkt. No. 20 at 16). *Giovanniello* squarely rejected this position; and Mr. Bank should be aware of this since he was counsel of record in that case, both in the district courts and the Court of Appeals. *See Giovanniello v. New York Law Publ'g Co.*, No. 07-CV-1990, Dkt. Sheet (S.D.N.Y. 2007); *Giovanniello v. ALM Media, LLC*, No. 3:09-CV-1409, Dkt. Sheet (D. Conn. 2010); *Giovanniello v. ALM Media, LLC*, No. 10-CV-3854, Dkt. Sheet (2d Cir. 2013).

Recognizing—as he conceded at oral argument—that Giovanniello forecloses any tolling after the denial of certification, Mr. Bank cites to number of cases which he contends allows such tolling. (Tr. at 72:3-20). These cases provide no support for finding that McCabe's claims were tolled. Two are 20-year-old district court cases that were abrogated by their respective Court of Appeals, each of which held

that tolling stops after class certification is denied. *See West Haven Sch. Dist. v. Owens-Corning Fiberglas Corp.*, 721 F. Supp. 1547 (D. Conn. 1988) (cited by Pl. Resp., Dkt. No. 20 at 25-6), *abrogated by Giovanniello*, 726 F.3d at 107-8; *Byrd v. Travenol Laboratories, Inc.*, 675 F. Supp. 342 (N.D. Miss. 1987) (cited by Pl. Resp., Dkt. No. 20 at 26-30), *abrogated by Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 519 (5th Cir. 2008) ("[I]t is clear from these cases that if the district court denies class certification under Rule 23, tolling of the statute of limitations ends."); *see also Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1384 n.18 (11th Cir. 1998) ("We believe the various district court statements cited to [including *Byrd*] have been wrongly decided."). Two other cases involve state class action procedures. *Clark v. ConocoPhillips Co.*, 465 S.W. 3d 720, 725-26 (Tex. App. 2015) (cited by Pl. Resp., Dkt. No. 20 at 32-4) (relying on Texas Appellate Procedure rules to determine when tolling ceased); *Am. Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992) (cited by Pl. Resp., Dkt. No. 20 at 34-6). *American Tierra* relies on *West-Haven* and *Byrd*, which are no longer good law; and it incorrectly characterizes federal law by suggesting that federal courts uniformly held that *American Pipe* tolling extended to an appeal of a class certification denial. That has never been the case; the case simply cannot be relied upon. *Armstrong*, 138 F.3d at 1384 n.18 ("We also note that the Utah Supreme Court case contains no rationale, and instead bases its holding [on] ... district court decisions alone, without citing or discussing [decisions of the federal courts of appeals]; we therefore conclude that the *American Tierra* court misread federal law.").

Finally, he cites to *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md. 1985) (cited by Pl. Resp., Dkt. No. 20 at 30-2) and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (cited by Pl. Resp., Dkt. No. 20 at 9-17). *Davis* has nothing to do with the issues in the present case; the district court there instructed plaintiffs' counsel to identify a class representative whose claims were not time barred, and if counsel could not do so, it would dismiss the action as being time barred. *Id.* at 1325. Nothing about the limits of *American Pipe* tolling was implicated. Similarly, in *McDonald*, the Supreme Court held that a claim may be tolled where an intervenor appeals a class certification decision when there is some infirmity with the named plaintiff that may defeat the class claim. 432 U.S. at 394-6. Neither case is like the present one. And, whatever the import of these cases may be, they provide no basis for this Court to depart from *Giovanniello*, a binding decision from the Second Circuit issued a mere 4 years ago.[6]

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[6] McCabe also cites to two more recent Southern District of New York cases. In *Betances v. Fisher* the court declined to apply the *Giovanniello* rule, because "the appropriateness of a class action had not been addressed in any of the previously-filed putative actions." 144 F. Supp. 3d 441, 458 (S.D.N.Y. 2015) (cited by Pl. Resp., Dkt. No. 20 at 45-6). Here, in contrast, Judge Hellerstein determined the merits of class treatment in *Leyse I*. The second case—*In re Vivendi Universal, S.A. Securities Litigation*—did permit *American Pipe* tolling to extend through an interlocutory appeal of a class certification denial. 281 F.R.D. 165, 169 (S.D.N.Y. 2012) (cited by Pl. Resp., Dkt. No. 20 at 36-7). But Vivendi was decided before *Giovanniello* and, like some of the other cases cited, is no longer good law.

Second, he cites to a number of decisions which found that when a Court of Appeals reverses a denial of class certification, *American Pipe* tolling is retroactively applied to the period between the denial and the appellate reversal.[7] (Pl. Resp., Dkt. No. 20 at 17-25). That may be, but in the present situation, the Second Circuit affirmed the denial of class certification, and thus, there is no basis retroactively to extend the tolling period.

Third, McCabe argues that *Giovanniello* only

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[7] *See*, *e.g.*, *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 376 n.8 (5th Cir. 2013) ("[i]f a denial of certification is reversed on appeal, the putative class members can claim the benefit of uninterrupted tolling from the original class[-]action filing date."); *Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978) (en banc) ("if a trial court's decision that the class may not be maintained is reversed on appeal, the status of class members is to be determined from the time that suit was instituted."); *Jimenez v. Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975); *Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 766 (3d Cir. 1983).

These cases also do not establish that tolling automatically applies retroactively in such a situation. When a class certification decision is reversed on appeal, courts may exercise their equitable power to waive the time bar against those class members' individual claims, but also may choose not to do so. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 359, n.22 (1980) ("As the District Court may be called upon to determine whether the equitable doctrine of 'relation back' permits it to toll the statute of limitations on remand, it will hardly be inappropriate for that court to consider the equities on both sides. In the circumstances presented, the District Court may well see no reason to exercise its equitable discretion in favor of putative class members who have slept on their rights these many years.").

applies to situations where the denial of class certification was based on state law, not to denials based on failures to satisfy the requirements of Rule 23. (Pl. Resp., Dkt. No. 20 at 3-4). Or put differently, a class member may rely on *American Pipe* tolling following the denial of class certification (and through appeal), so long as that denial was not based on a failure to satisfy Rule 23. The flaws in this argument are manifold.

In *Giovanniello*, the Second Circuit was faced with a plaintiff in a TCPA lawsuit who was seeking to take advantage of *American Pipe* tolling following the denial of class certification in an earlier class action. *Giovanniello*, 726 F.3d at 109 ("*Giovanniello* asks us to conclude that the applicable limitations period was also tolled during either or both the pendency of ... [the] motion for reconsideration of the dismissal ... [or the] appeal from the judgment of dismissal in that same case."). And to be sure, that earlier class action was dismissed, not because the class failed to satisfy Rule 23, but because New York law barred the class the named plaintiff sought to certify. Indeed, the District Court did not even address Rule 23, but dismissed the case on subject matter jurisdiction grounds. *Id. at* 108 ("Because New York law did not permit a class action 'predicated on statutory damages,' the district court concluded that the court lacked subject-matter jurisdiction to hear ... [the] putative class action.") (quoting *Giovanniello v. New York Law Publ'g Co.*, 2007 WL 2244321, at *4).

But in ruling that a class member's claim is not

tolled while a class action dismissal is being appealed, *Giovanniello* did not limit its decision to a particular type of class status denial. Quite to the contrary, it announced a "bright-line rule in this area of law," one that is applicable to all denials of class status. *Giovanniello*, 726 F.3d at 119. It is accurate that the dismissal of the prior class action in *Giovanniello* is unlike the present case. In *Giovanniello*, the class was dismissed on the basis of subject matter jurisdiction; the *Leyse I* class was dismissed under Rule 23. That distinction does not help McCabe. It hurts him. In *Giovanniello*, the Court of Appeals declined to extend *American Pipe* tolling for absent class members after the prior class action was dismissed at the case's outset. There was no discovery and no certification motion filed in the prior case. Absent class members were deemed to be on notice that following the dismissal of the prior class action, they must file their own actions. *Giovanniello*, 726 F.3d at 117 ("[O]nce class status is denied, 'class members may choose to file their own suits or to intervene as plaintiffs in the pending action.' ") (quoting *Crown, Cork*, 462 U.S. at 354). And no tolling would be extended to them after the dismissal. If there is no reason to extend tolling in a case like *Giovanniello*, where dismissal occurs at the outset of a case, there is certainly none in the present case, where class certification has been litigated and denied by the district court. Surely class members can be deemed to be on notice of the need to file their own actions, after a motion for *class certification* has been

denied.[8] Perhaps that is why McCabe's counsel concedes that had the *Giovanniello* panel been presented with the facts of this case, it would have reached the identical result. (*See* Tr. at 25:5-9 (Mr. Bank: "*Giovanniello* gave no indication to believe that had the facts in *Giovanniello* been exactly as the fact[s] are here, that the Court would have ruled in a different way. We've never suggested that."); *see also* 28:16-18).[9]

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[8] Mr. Bank advanced another distinction at the hearing. (Tr. at 30:15-31:3). He argued that in *Giovanniello* because the earlier class was dismissed at the outset of the case, extending tolling through an appeal would create too long a tolling period. In contrast, in this case, the tolling period following a denial of a Rule 23 motion and after the close of discovery through an appeal, would be shorter. That is a distinction without a difference: no court (and certainly not the Second Circuit) has suggested that the availability of *American Pipe* tolling depends on or should depend on the length of the potential tolling period.

[9] *Cf. Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006). In *Bridges*, multiple class actions were brought on behalf of African Americans against the state police department, alleging that officers engaged in a pattern of race-based stops of motorists. The magistrate judge issued what was framed as an administrative order denying the motion for class certification without prejudice. The Fourth Circuit held that tolling ceased as of the date of the administrative order, even though it was not a final Rule 23 denial. *Id.* (" '[T]he Crown, Cork & Seal Court appears to have untethered this tolling rule from any necessary connection to the reasons for denying certification.' In untethering the rule, the Supreme Court signaled that *American Pipe* tolling extends as far as is justified by the objectively reasonable reliance interests of the absent class members. If courts were to toll statutes of limitations only when class

Because there was no basis to toll the statute of limitations after class certification in *Leyse I* was denied, McCabe's claim was filed almost 17 months after the statute of limitations expired, and is therefore time barred.[10]

C. The Status of the Class Action Claim

McCabe's complaint is also styled as a putative class action, with McCabe representing the identical class as *Leyse I*. This putative class action should also be dismissed.

McCabe cannot serve as a class representative since his individual claim is time-barred. Dismissal of the only named class member's claim disposes of the class action: the class action is deemed to be moot.[11]

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certification was denied for lack of numerosity, the rule, which would turn on the substantive reason for the denial, would not discourage premature intervention because class members could not know or predict at the time of filing why class certification might eventually be denied.") (quoting *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003)).

[10] *See also* Tr. at 20:7-11 (The Court: "The only way Mr. McCabe's case is timely, is if tolling is imposed after Judge Hellerstein's decision in September of 2015?" Mr. Bank: "Yes, that's absolutely correct.").

[11] The exceptions to this general rule, where a plaintiff can remain a class representative even when his claim had become moot, do not apply to this case. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 401 (1975) ("Although the controversy is no longer alive as

See Swan v. Stoneman, 635 F.2d 97, 102 n.6 (2d Cir. 1980) ("As a general rule, a class action cannot be maintained unless there is a named plaintiff with a live controversy both at the time the complaint is filed and at the time the class is certified."); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("[I]n general, if the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot.");[12] *Collins*, 875 F.2d at 846 ("When the plaintiff's own claim is dismissed, he can no longer serve as the class representative. At that point either another class representative must be found or the suit is kaput.") (quotations omitted); *see, e.g.*, *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 436 (8th Cir.

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to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent. Like the other voters in *Dunn*, new residents of Iowa are aggrieved by an allegedly unconstitutional statute enforced by state officials. We believe that a case such as this, in which, as in Dunn, the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs.").

[12] Where a class representative has her claims dismissed, courts—like the ones cited here—have referred to standing doctrine, or its component requirement, mootness. It is alternatively possible to find that where a class representative's claim is barred—and any intervenor who could be an alternative class representative also has no viable claim—that Rule 23's typicality requirement is not satisfied. *See* 5 James WM. Moore et al., *Moore's Federal Practice* § 23.25 (3d ed. 2017) ("To meet the typicality requirement, there must be at least one class representative who has been injured by and has a claim against each and every defendant.").

1999) ("Because Rainy Lake's individual claim was properly dismissed for lack of standing, it was not a member of the class and could not represent the class. Because Rainy Lake was the only remaining named plaintiff, the class proposed in the Second Amended Complaint could not have been properly certified.") (citations and quotations omitted).

In light of the dismissal of McCabe's claim, there is no live case-or-controversy, and this Court would typically not consider the question of whether a class should be certified. There is also no motion for class certification pending. A court may, however, hold the class action open to permit another class member to intervene to serve as class representative. The Court recommends that this course not be followed; there is no individual with a valid claim in the class. No other member of the *Leyse I* class could serve as a class representative, because each and every member's claim is also time barred. Each member of the class received a call on August 19 or 20, 2013. (Tr. at 5:10-12 (Lifetime's counsel: "The only phone calls that are really the subject of this claim at all are the phone calls that were in August 2009."); 19:1-9 (Mr. Bank: "... [D]iscovery in—I'll just refer to it as the Leyse litigation, did show that all of the calls were made in August of 2009 ... But yes, those are the phone calls.")). The statute of limitations on every class member's individual claim was tolled as of the date Leyse filed his class action complaint; that tolling ceased when Judge Hellerstein denied class certification. And as a result, the statute of limitations on their respective individual claims expired on September 26, 2015.

The parties spend significant time discussing this issue of whether the class allegations are time barred, as a result of the Second Circuit's decision in *Korwek v. Hunt*. In *Korwek*, the Second Circuit held that *American Pipe* tolling does not apply "to permit the filing by putative class members of a subsequent *class* action nearly identical in scope to the other class action which was denied certification." 827 F.2d 874, 876 (2d Cir. 1987) (emphasis in original). As such, a different plaintiff—who was a member of the original putative class that was not certified—could not file a repetitive or duplicative class action, and claim entitlement to tolling for the period the original case was pending. Id.; *see also* 7B Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 1795 (3d ed. 2017). This "anti-piggybacking" rule is now the subject of a case before the Supreme Court—*(China Agritech, Inc. v. Resh*, 857 F.3d 994 (9th Cir. 2017), *cert. granted*, 2017 WL 4224769 (U.S. Dec. 8, 2017) (No. 17-432))—leaving the import of *Korwek* in flux. There is no need to address these complex issues and their effect on the present case, in light of the infirmity of the plaintiff McCabe, which renders the class action moot.

II. Motion for Sanctions

Lifetime has filed a separate Rule 11 motion for sanctions against McCabe, seeking recovery of its costs and fees in defending this lawsuit. Lifetime also bases its motion on 28 U.S.C § 1927 ("Section 1927") and the court's inherent power to grant sanctions. For the reasons explained below, the Court recommends that

Lifetime's motion for Rule 11 sanctions be granted. The Complaint, which contained claims obviously barred by the statute of limitations, warrants sanctions. The Court respectfully recommends that Mr. Bank be ordered to pay Lifetime's costs in bringing its motion to dismiss the claims in the Complaint, and pay Lifetime a sum certain of $5,000.

A. Legal Standards

"A pleading, motion or other paper violates Rule 11 either when it has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Kropelnicki v. Siegel*, 290 F.3d 118, 131 (2d Cir. 2002) (internal quotation marks omitted). *See* Fed. R. Civ. P. 11(b)(2) ("By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.").[13]

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[13] There are procedural requirements that must be complied with before Rule 11 sanctions may be imposed. A party seeking sanctions must make the motion "separately from any other

Rule 11 imposes a duty on every "attorney to conduct a reasonable pre-filing inquiry ... to certify that the legal arguments are supported by existing law, and therefore that they are not frivolous." *Capital Bridge Co. v. IVL Techs. Ltd.*, No. 04-CV-4002, 2007 WL 3168327, at *10 (S.D.N.Y. Oct. 26, 2007); *see also Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) ("No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.").

"[S]anctions *shall* be imposed when it appears that a competent attorney could not form the requisite reasonable belief as to the validity of what is asserted in the [pleading]." *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (emphasis added). This test is an objective, not subjective inquiry. *Id.* But Rule 11 is violated only when it is "patently clear that a claim has

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motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. P. 11(c)(2). Those requirements have been met, and Mr. Bank does not make any argument to the contrary.

absolutely no chance of success." Id. "If after notice and a reasonable opportunity to respond" the Court determines that Rule 11(b) was violated, "an appropriate sanction" may be imposed upon any "attorney, law firm, or party" who violated, or is responsible for, the violation.[14] Fed. R. Civ. P. 11(c).

The Second Circuit has required that notice and opportunity be given to parties or counsel to respond to a motion for sanctions. "Courts should be sensitive to the impact of sanctions on attorneys. They can be economically punishing, as well as professionally harmful; due process must be afforded. This does not mean, necessarily, that an evidentiary hearing must be held. At a minimum, however, notice and an opportunity to be heard is required." *Oliveri*, 803 F.2d at 1280. *See also Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999) ("granting a hearing for oral argument would generally be the better practice"). On December 12, 2017, a hearing was held on the parties' respective motions.

B. Sanctions Are Appropriate for Filing the *McCabe* Complaint

Any competent attorney in 2016 would have considered whether a TCPA claim based on a phone call in 2009 was within the statute of limitations;

[14] Lifetime does not say whether it is seeking sanctions against Plaintiff personally or his attorney Mr. Bank. The court recommends that the sanctions recommended be imposed on Mr. Bank.

recognized with the most minimal legal research that there was a four-year statute of limitations, which would have expired in 2013; and concluded that while some tolling was available under *American Pipe*, any additional tolling following Judge Hellerstein's class certification denial in *Leyse I* was foreclosed by *Giovanniello*. *Cf. Eastway Const. Corp.*, 762 F.2d at 254 (reversing denial of attorney's fees, where "[Plaintiff's] claim of an antitrust violation by non-competitors, without any allegation of an antitrust injury, was destined to fail. Moreover, a competent attorney, after reasonable inquiry, would have had to reach the same conclusion."); *Pentagen Techs. Intern. Ltd. v. United States*, 172 F. Supp. 2d 464, 471 (S.D.N.Y. 2001) (awarding Rule 11 sanctions, where "[w]ith respect to plaintiffs' *qui tam* claim under the FCA, at the time of filing there existed clear, long-standing precedent establishing that the Government cannot be sued unless it has waived its sovereign immunity."). When *Leyse I* was filed, McCabe had only four days remaining before the statute of limitations on his individual claim expired. That limitations period was tolled pursuant to *American Pipe*; after class certification was denied on September 22, 2015, he had until September 26, 2015 to assert his individual claim. But he waited until February 16, 2017 to do so. And there was no basis to believe that McCabe was entitled to tolling after September 22, 2015 following *Giovanniello*.

Mr. Bank certainly was aware of the four-year statute of limitations for a TCPA action; he has filed many TCPA lawsuits. *E.g.*, *Weitzner v. Cynosure, Inc.*,

No. 12-CV-3668, 2014 WL 508237 (E.D.N.Y. Feb. 6, 2014).[15] Defendants in those cases have moved to dismiss complaints filed by him on statute of limitations grounds. *Id. at* *1. But here we have more than that; Mr. Bank was counsel of record in the case (*Giovanniello*) that established the binding precedent barring the present lawsuit. The knowledge that the statute of limitations had run on McCabe's individual claim is sufficient to impose sanctions. *See, e.g.*, *Mirman v. Berk & Michaels, P.C.*, No. 91-CV-8606, 1992 WL 332238, at *4 (S.D.N.Y. Oct. 30, 1992) ("Plaintiffs' counsel clearly knew that the statute of limitations had run in this case. The Court agrees. Plaintiffs' counsel's familiarity with the parties involved and the claims asserted in the three other actions leads this Court to the conclusion that the allegations of this complaint were not made in good faith after reasonable inquiry. Accordingly, the Court grants Defendants' motion for Rule 11 sanctions.").

A legal claim must either be "warranted by existing law" or "by a nonfrivolous argument for extending, modifying, or reversing existing law." *See supra*; Fed. R. Civ. P. 11(b)(2). Any argument that McCabe's TCPA claim is timely depends entirely on *American Pipe* tolling being extended beyond the class certification

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[15] Bank has also brought other TCPA claims outside of S.D.N.Y. with Leyse as the named plaintiff. *See Leyse v. Bank of Am., N.A.*, No. 3:09-CV-97, 2009 WL 2855713, at *1 (W.D.N.C. Sept. 1, 2009). In another TCPA case, McCabe was one of the objectors to the class settlement and Mr. Bank was his attorney. *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-CV-4069, 2017 WL 818854, at *1 (N.D. Ill. Mar. 2, 2017).

denial. That position is not warranted by governing Second Circuit law. *Giovanniello*, in no uncertain terms, foreclosed the tolling of statute of limitations for individual claims after the denial of class status. *Giovanniello*, 726 F.3d at 116.

Nor does Mr. Bank advance any "nonfrivolous" argument for "extending, modifying or reversing" *Giovanniello*. "[T]o constitute a frivolous legal position for purposes of Rule 11 sanction, it must be clear ... that there is no chance of success." *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 830 (2d Cir. 1992) (internal quotations omitted). Mr. Bank takes the position that to be frivolous, an argument must be something akin to absurd, ridiculous, laughable or perhaps intellectually totally vacuous. (Tr. at 72:24-25 (Mr. Bank: "It's the legal issues. Is it inconceivable[?]"); 83:11-19 (The Court: "I am just trying to understand what the term non-frivolous means." ... Mr. Bank: "If you were to conclude that as an intellectual matter, that my argument—that our arguments are ridiculous, okay[.]"); 91:20-22 (The Court: "It would have to be an objective standard." Mr. Bank: "Yeah, objectively ridiculous.")). Interpreting frivolous in such a manner would render virtually all legal claims—short of those that suggest the Jedi Code or Star Trek intergalactic legal principles permit recovery from a defendant—would be non-frivolous. (*See* Tr. at 76:13-20 (Mr. Bank suggesting that a case where someone sues the planet Jupiter is frivolous)). But the concept of frivolous is not so weak. It is, as explained earlier, it is an objective standard—not subject to the individual vagaries of the lawyer. As a general principle, and as

the Advisory Committee Note to the 1993 Amendment to Rule 11 explains, "the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated." While not dispositive, *see id.*, such authority helps push an argument or pleading from frivolous to non-frivolous.

There is no dissent in *Giovanniello*. No circuit has a contrary rule, and no scholar is cited who disagrees with its principle. There is little to suggest, therefore, that any of Mr. Bank's arguments as to the timeliness of McCabe's complaint are non-frivolous. All Mr. Bank does is argue *Giovanniello* does not apply to this case; to do so, he relies on cases that are overruled, inapplicable doctrines from other contexts, or irrelevant distinctions. *See supra* at 16-20. None of those contentions have even colorable merit. *Id.* Mr. Bank also just rehashes before this Court arguments he made when arguing *Giovanniello* and which the Second Circuit rejected. (*Compare Giovanniello* Mem., No. 10-CV-3854, Dkt. No. 39, at 8 (2d Cir. Nov. 9, 2010) ("[T]he two rationales of class-action tolling, *i.e.*, the prevention of the need for multiple individual actions, and the satisfaction of the purpose of statutes of limitations, applies equally to the present action, in which the plaintiff was also the plaintiff in the S.D.N.Y. Action.") *with McCabe*, Pl. Resp., Dkt. No. 20, at 21 ("Those rationales are, first, that a class action is more desirable, when feasible, than are numerous individual actions, ... second, that the commencement,

within the statute-of-limitations period, of a putative class action notifies the defendant of the nature of the claims and the number and generic identities of the putative class members, ... and, third, that *American Pipe* tolling is intended to encourage putative class members to withhold their own actions and instead await the resolution of the class action.")). There is nothing new to Mr. Bank's approach. (*See* Tr. at 74:17-23 (Mr. Bank: "Judge, we discussed a bit today and more in the briefs about ... the underlying rationales of the tolling—of *American Pipe* tolling?" The Court: "But if those were already presented—those were presented in *Giovanniello*, am I wrong about that?" Mr. Bank: "I believe that they were.")).

There was, therefore, no non-frivolous basis on which to conclude that McCabe's complaint was entitled to tolling and timely filed. (*See* Tr. at 24:8-16 (The Court: "And so on what basis are you saying that the Second Circuit's rule which as far as I can tell, is crystal clear that there is no *American Pipe* tolling after a denial of class certification, where does it give any room to make the argument that you're now making?" Mr. Bank: "The way the Court expressed its opinion, as we discussed at length in the papers, did not provide that room.")). Rule 11(b) does not provide protection for such a pleading. *See, e.g.*, *Hoatson v. New York Archdiocese*, 280 Fed.Appx. 88, 92 (2d Cir. 2008) (affirming award of Rule 11 sanctions, finding Plaintiff's "Title VII claim is ... untimely and rests on a theory of sexual orientation discrimination, which this Circuit has stated is not within the ambit of Title VII" and Plaintiff had offered "no argument for

reversing this settled law").

Mr. Bank makes a series of arguments why sanctions are not warranted. None have merit.

First, he argues that filing the *McCabe* lawsuit was necessary to preserve his arguments about the validity of *Giovanniello*. (*See* Pl. Resp., Dkt. No. 20 at 46-9). His argument is essentially that he is entitled to preserve and make arguments for challenging established and settled law. To do so, he relies on *McKnight v. Gen. Motors Corp.*, 511 U.S. 659 (1994) (per curiam) (cited by Pl. Resp., Dkt. No. 20 at 46-7). *McKnight* reversed a sanctions order imposed because counsel argued a position that had been foreclosed by the Seventh Circuit. *Id. at* 660. The Supreme Court found that counsel was entitled to make an argument to preserve it for appellate review before the Supreme Court. *Id.* It is certainly true that under *McKnight* merely raising an argument to preserve it for appellate review is not sanctionable. But doing so only makes an argument meritless; it has to be frivolous to be sanctionable. As explained above, this lawsuit crossed over from meritless to frivolous. Mr. Bank is relitigating arguments recently rejected; providing no new reason why the case was wrongly decided, or change in the law since the case was decided to suggest the rule be overturned.[16] You simply cannot under the

[16] Mr. Bank also cites *Gilmore v. Shearson/Am. Express Inc.*, 811 F.2d 108, 111 (2d Cir. 1987) (cited by Pl. Resp., Dkt. No. 20 at 46) where the Second Circuit declined to impose sanctions where an attorney attacked a long standing Supreme Court precedent

guise of preserving arguments reargue the same position over and over again. *See* 2A *Fed. Proc.*, L.Ed. § 3:983 ("The appellate courts generally apply an objective standard to determine whether an appeal is frivolous.... This standard is met where an objectively reasonable litigant should have realized that the appeal had no chance of success from the outset. Thus, one who assumes a "never-say-die" attitude and drags a dispute through the court system without an objectively reasonable belief it will prevail does so at the risk of being sanctioned."). Such behavior is sanctionable. *See, e.g.*, *Sargent v. U.S. Dep't of Educ.*, No. 07-CV-618, 2007 WL 3228821, at *2 (E.D. Wis. Oct. 31, 2007) (issuing Rule 11 sanctions against

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about the appealability of an order denying a stay pending arbitration. Unlike in this case, the precedent in question had been the subject of withering criticism, in a multitude of legal opinions. The counsel in that case had also identified an argument previously unaddressed (including a statutory amendment to the interlocutory appeal rule), relied on dissenting legal opinions, and argued that the rule be overturned. *Id.* at 110-11. Mr. Bank does not argue *Giovanniello* should be overturned and cites to no criticism of the decision or the multitude of other courts of appeals decisions that adopted the same principle. Nor does he advance any new argument about *American Pipe* tolling; he restates the same ones he made in arguing *Giovanniello*. In any event, Gilmore was decided before the 1993 amendments to Rule 11, which put in place the requirement that legal contentions be warranted by existing law or nonfrivolous arguments for modifying or reversing the precedent. *See also* Comments to 1993 Amendments to Rule 11 (noting that amendments to (b)(2) standard "establishes an objective standard, intended to eliminate any 'empty-head pure heart' justification for patently frivolous arguments."). And Mr. Bank's McCabe complaint fails that test.

plaintiff who brought FERPA claim after the Supreme Court's ruling that a private right of action did not exist) (citing *Gonzaga University v. Doe*, 536 U.S. 273, 290 (2002)).

Second, he cites cases where the Supreme Court or a court of appeals has overturned its own rulings. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Court overruled the 11 circuits that had addressed the issue of whether a private plaintiff could bring an aiding and abetting claim under § 10(b) of the 1934 Securities and Exchange Act. 511 U.S. 164 (1984) (cited by Pl. Resp., Dkt. No. 20 at 48). This is a different case. In *Central Bank*, the Supreme Court explained there was "continuing confusion" about the scope of § 10(b) liability; courts of appeals had issued decisions expressing that doubt; and law professors had also questioned whether aiding and abetting liability could exist in light of more recent pronouncements by the Supreme Court. 511 U.S. at 169-70. This is not such a case. The uncertainty present about the *Central Bank* doctrine does not exist around *Giovanniello*. Moreover, as the Second Circuit explained, the "bright line" rule that tolling does not apply following a denial of certification comes directly from the Supreme Court's original *American Pipe* decisions. *Giovanniello*, 726 F.3d at 116 (citing *American Pipe*, 414 U.S. at 561 & *Crown, Cork*, 462 U.S. at 354). And unlike *Brown v. Board of Education*, 347 U.S. 483 (1954)) or *Lawrence v. Texas*, 539 U.S 558 (2003), which he also cites, Mr. Bank is not advancing good faith, non-frivolous arguments why *Giovanniello* should be reversed. Instead, he is simply

arguing (and rearguing) on the basis of irrelevant, immaterial and baseless distinctions why the case should not apply to him.[17]

Third, he cites a variety of cases in which the Supreme Court or a Court of Appeals has rejected sanctions motions. (Pl. Resp., Dkt. No. 20 at 46-48). These are cases where the underlying issues being litigated were not yet decided or where the law remained in flux, and thus, were situations where permitting counsel to advance their arguments—albeit unsuccessful ones—was necessary to permit ultimate resolution and clarification of a disputed legal question. *See, e.g.*, *McKnight*, 511 U.S. at 660 (reversing sanctions where Court of Appeals had not ruled on relevant legal question); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 156 (4th Cir. 2002) (reversing attorney suspension which "was in large part premised on her legal contention ... in connection with a body of law that was in a state of flux.").

In a letter to the court, Mr. Bank also argues that

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[17] He also cites *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc) (cited by Pl. Resp., Dkt. No. 20 at 48) to suggest that at any time a court of appeals could reverse itself; and therefore he is entitled to (re)argue positions recently rejected in *Giovanniello*. Mr. Bank suggests that in *Rybicki*, decided in 2003, the Second Circuit reversed its decision in *United States v. Handakas*, 286 F.3d 92, issued only one year before. The complexities of these decisions from the criminal context have no application to Mr. Bank's civil claims, which are governed by civil Rule 11.

he has been entirely upfront with the Court, did not act in bad faith, and consistent with his ethical obligations, brought contrary authority to the Court's attention. (Pl. Ltr., Dkt. No. 30 at 2; Tr. at 65:20-66:10 ("[A]lthough we said we thought those differences were material, we've said all along, we've been as candid as any lawyer has probably ever been, said there was no specific reason to believe that *Giovanniello* would have come out differently had the facts of this case been before the Court in *Giovanniello*. We didn't lie. We didn't mislead. We didn't—far from attempted to be misleading or anything of the sort, we did the complete, complete opposite.")). But those are not elements of Rule 11, and do not make an objectively frivolous argument non-frivolous. *See Oliveri*, 803 F.2d at 1275. And notwithstanding the alleged candor, Lifetime was still forced to defend against the lawsuit while two other identical suits were pending.

This class action was filed on February 16, 2017. That was the same day that *Leyse II* was filed in the Southern District of New York. It was also the day after the Second Circuit decided the *Leyse I* appeal, a decision that Mr. Bank continued to litigate through a motion for rehearing en banc, and continues to litigate in the Supreme Court. (*Leyse v. Lifetime Entm't Servs., LLC*, No. 16-CV-1133 (2d Cir. Apr. 11, 2017), Dkt. No. 148); (*Leyse v. Lifetime Entm't Servs., LLC*, 679 Fed.Appx. 44 (2d Cir. 2017), *petition for cert. filed*, (U.S. Aug. 2, 2017) (No. 17-162)). In other words, Mr. Bank—despite having filed a new class action lawsuit in this court—continued to litigate the viability of that exact class action in the Southern District of New

York, the Second Circuit, and the Supreme Court.

Lifetime did not move to dismiss the present lawsuit based on the rule against duplicative litigation, but it surely could have. "As part of its general power to administer its docket, a district court may stay or dismiss as suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) (citations omitted). "[P]laintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time." *Id. at* 139. "The power to dismiss a duplicative lawsuit is meant to foster judicial economy and the 'comprehensive disposition of litigation.' " *Pacheco v. Home Am.*, No. 11-CV-0965, 2012 WL 254474, at *3 (N.D.N.Y. Jan. 27, 2012) (quoting *Kerotest Mfg. Co. v. C–O–Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). "The doctrine is also meant to protect parties from 'the vexation of concurrent litigation over the same subject matter.' " *Pacheco*, 2012 WL 254474, at *3 (quoting *Adam v. Jacob*, 950 F.3d 89, 93 (2d Cir. 1991)).

It is true that there are different named plaintiffs in this case and *Leyse I*. But they are members of the same putative class. The issues to be decided on certification in this case are the same that were considered by the Second Circuit and being considered by the Supreme Court in *Leyse I*. While there remained some chance that the Second Circuit or the Supreme Court would reverse Judge Hellerstein's class certification decision and permit a class action to go forward in *Leyse I*, the present case served no purpose

at all, and filing it simply forced Defendant and the Court to expend resources unnecessarily. *See, e.g.*, *DiGennaro v. Whitehair*, 467 Fed.Appx. 42, 44 (2d Cir. 2012) ("Adjudication of the claims against Whitehair would necessarily involve findings on the exact same facts required to resolve the claims in the first action.").

Indeed, in the *Leyse II* litigation, Judge Pauley suggested that bringing the identical claim after the Second Circuit affirmed the class certification denial in *Leyse I* and while moving for rehearing by the Second Circuit in *Leyse I* was sanctionable:

> THE COURT: I am not granting a stay in the case. You filed this case on February 16, 2017. I have no idea when the Second Circuit will pass on your motion for rehearing, and I have no idea what you will do after that. But on the date that you filed this complaint, Mr. Leyse does not present a case or controversy in my view. Now, if you're not willing to just drop this case, then I am going to tee up the defendant's motion. And while, generally, I don't like dealing with motions for sanctions and the like, which they have proposed to make, I am going to permit them to make their motion. So I guess I will return to the sort of question that I asked at the very beginning that I was serious about: Do you want to end the madness of this case,

> 17 Cv. 1212, here and now, or do you insist that the defendants make a motion and then I will deal with the motion?

(*Leyse II* Tr. at 18:6-21). Presumably to avoid such a sanctions motion, he voluntarily dismissed the *Leyse II* complaint.

Even if McCabe's claim were to survive a 12(b)(6) motion, the putative class in his case would have no chance of being certified. Judge Hellerstein found that in the absence of a list of individuals who received the allegedly improper phone call, the parameters of the class could never be ascertained. Mr. Bank—at oral argument—identified no new potential way that the list could be discovered. (*See* Tr. at 19:14-16 (The Court: "[D]o you have any reason to believe discovery would show more [today]?" Mr. Bank: "No specific reason, no."); 20:21-21:1; 50:2-5 (The Court: "But you have no basis to believe that you could get the list of phone numbers that received the phone call, is that correct? Mr. Bank: "That's correct."")). Even if Judge Hellerstein's decision on class certification was not issue preclusive, *Smith v. Bayer*, 564 U.S. 299, 317 (2011), it would be entitled to comity, since it is from a District Judge in the same circuit resolving the same class issues. *See id.* ("[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."); *Mast, Foos, & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) ("Comity ... is something more than mere courtesy, which implies only deference to the opinion of others, since it has substantial value in

securing uniformity of decision, and discouraging repeated litigation of the same question."); *e.g.*, *Baker v. Home Depot USA, Inc.*, No. 11-CV-6768, 2013 WL 271666, at *5 (N.D. Ill. Jan. 24, 2013) (striking class action allegations from complaint, by applying comity to several other courts' decisions that had denied class status); *Gomez v. St. Vincent Health, Inc.*, No. 08-CV-153, 2009 WL 1853120, at *1 & *4 (S.D. Ind. June 25, 2009) (denying class certification of "nearly identical action" previously rejected, finding no basis to "effectively overrule a colleague on the district court on an indistinguishable record"). But this Court would also be obligated to follow—whether through comity, stare decisis or the basic precept that District Courts follow the law of the circuit—the Second Circuit's decision finding that Judge Hellerstein was correct in denying certification of the same class pled here. *See Smith*, 564 U.S. at 317 ("[O]ur legal system generally relies on principles of stare decisis and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."); *Taylor v. Sturgell*, 553 U.S. 880, 903 (2008) ("*[S]tare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit.").

It is certainly a tremendous waste of judicial resources to have this Court entertain a putative class action identical to a previously rejected class, where the new complaint contains no additional evidence or allegations proffered to overcome the deficiencies identified by the prior court. It is implausible to think that any competent attorney, in light of the Second Circuit's affirmance of the reasons articulated by

Judge Hellerstein for rejecting the class, could conclude that this Court might reach a different conclusion. Nor could any reasonable attorney find any room in *Giovanniello*'s bright line test to rescue an action clearly barred by the statute of limitations. And it certainly is a waste for three different courts in this circuit to address the same claims at the same time simultaneously. *Cf. Pentagen*, 172 F. Supp. 2d at 471, 473 ("Despite repeated dismissals, however, plaintiffs' counsel continues to file actions based on the same facts and circumstances previously addressed by this and other courts.... [C]ounsel, by seeking to contravene the explicit findings of prior litigation without any meritorious arguments to extend the law, went far beyond the standard of objective unreasonableness in filing this action."); *Amorosa v. Ernst & Young LLP*, No. 03-CV-3902, 2010 WL 245553, at *4 (S.D.N.Y. Jan. 20. 2010) (awarding Rule 11 sanctions and concluding that Plaintiff's claims in the second amended complaint "were identical (except in ways already found to be immaterial) to claims against *Ernest & Young* that Judge Kram had already thrown out in *AOL II*. For that reason, the claims fall comfortably within the definition of 'frivolous.' ").

All of this merely underscores that the McCabe complaint, alleging identical class claims already litigated and through a named plaintiff whose claims are plainly time-barred, and filed while two other lawsuits adjudicating the same issues remained pending, is frivolous and deserving of Rule 11 sanctions. This Court respectfully recommends that the District Court grant Defendant's motion for Rule

11 sanctions and require Plaintiff's counsel to pay Lifetime's costs of defending the McCabe complaint.

This Court is, however, cognizant of the need not to impose punitive sanctions under Rule 11, but simply the amount necessary to deter the improper conduct. Fed. R. Civ. P. 11(c)(4) ("A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."). Mr. Bank is a solo practitioner. Lifetime has not put forward an itemization of the fees incurred in this case, but it is not difficult to imagine that in the current rate environment for large law firms, those fees are in the tens, if not hundreds, of thousands of dollars. It would be a significant financial penalty to require Mr. Bank to pay fees of that magnitude; and almost certainly would be more than necessary to deter other lawyers from filing repetitive lawsuits in the fashion that Mr. Bank has done. And it may have the deleterious effect, one which is to be avoided under Rule 11, of stifling creative lawyering by other attorneys, particularly in complex areas like *American Pipe* tolling or the TCPA. The Court therefore recommends that a modest fee sanction—of $5,000—be imposed on Mr. Bank, in addition to the payment of costs to Lifetime.

In light of the recommendation that sanctions be imposed pursuant to Rule 11, it is unnecessary to reach the alternative bases of awarding sanctions, including Section 1927 and the court's inherent power

to sanction.[18]

Conclusion

It is respectfully recommended that:

1. Lifetime's motion to dismiss McCabe's claim pursuant to Rule 12(b)(6) be granted with prejudice;

2. Lifetime's motion for sanctions be granted, pursuant to Rule 11;

3. Lifetime be awarded its costs incurred in connection with the motion to dismiss, not including the costs and fees for the motion for sanctions or defending the cross-motion for sanctions. Lifetime also be awarded $5,000 in attorney's fees. These fees and costs are to be paid by Mr. Bank;

4. McCabe's cross-motion for sanctions be denied, in light of the decision to grant Lifetime's sanctions motion.[19]

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[18] The test for sanctions under section 1927 is stricter, and requires a clear showing of bad faith on the part of an attorney. *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1010 (2d Cir. 1986) (quoting *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1092 (2d Cir. 1971)).

[19] *See, e.g.*, *Bletas v. Deluca*, No. 11-5422, 2013 WL 2948103 (2d Cir. Jan. 17, 2013); *Lora v. NHS, Inc.*, No. 12-CV-2357, 2014 WL 2134589, at *8 (E.D. Pa. May 22, 2014).

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court within fourteen days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may waive the right to appeal the District Court's order. *See Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate [judge's] report operates as a waiver of any further judicial review of the magistrate [judge's] decision.").

[s/ Sanket J. Bulsara]
Sanket J. Bulsara
United States Magistrate Judge

Brooklyn, New York
January 4, 2018

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

17-CV-908-ERK-SJB

Kevin MCCABE,

Plaintiff,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATIONS. After de novo review, I adopt the report and recommendation of Magistrate Judge Bulsara granting Defendant's motion to dismiss and motion for sanctions, and denying Plaintiff's cross-motion for sanctions. Ordered by Judge Edward R. Korman on 3/26/2018. (Loeb, Jana)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of March, two thousand nineteen.

ORDER

No. 18-1149

Kevin McCabe,

Plaintiff-Appellant,

TODD C. BANK,

Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

Appellant, Todd C. Bank, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*.

The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[s/ Catherine O'Hagan Wolfe]

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

17-CV-908-ERK-SJB
[Dkt. No. 20]

Kevin MCCABE,

Plaintiff,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR DISMISSAL OF THE COMPLAINT AND DEFENDANT'S MOTION FOR SANCTIONS

TODD C. BANK,
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Kew Gardens, New York 11415
(718) 520-7125

Counsel to Plaintiff

[p.1] INTRODUCTION

Plaintiff, Kevin McCabe ("McCabe"), by the undersigned counsel, submits this memorandum of law in opposition to: (i) the motion by Defendant, Lifetime Entertainment Services, LLC ("Lifetime"), for dismissal of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and (ii) the motion by Lifetime for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the Court's inherent authority.

ARGUMENT

POINT I

AMERICAN PIPE TOLLING SHOULD APPLY DURING THE PENDENCY OF A PLAINTIFF'S EFFORTS TO CONTINUE TO SEEK CLASS CERTIFICATION FOLLOWING A DISTRICT COURT'S INITIAL DENIAL

[A.] Principles of *American Pipe* Tolling as Set forth by the Supreme Court and the Second Circuit

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[p.2] As set forth in this memorandum of law, forcing putative class members to choose between bringing separate actions or correctly anticipating that a court is going to rule in favor of class certification is no more desirable, and arguably less so, when the class-

certification decision is to be made on appeal from a district court's denial of certification than when that decision is to be made by a district court in the first instance.

Lifetime argues that "[t]he Second Circuit has squarely held that any *American Pipe* tolling 'does not extend beyond the denial of class status' by the district court." Defendant's Memorandum of Law in Support of Dismissal Motion ("Def. Dism. Mem.") at 7, quoting *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 116 (2d Cir. 2013). *Giovanniello* was the first time that the Second Circuit addressed the issue of the period of time during which *American Pipe* tolling is applicable. *See Giovanniello*, 726 F.3d at 115-116 ("[w]e have not had occasion to determine the scope of *American Pipe* tolling.").

In the prior action that was the subject of *Giovanniello*, there had not been a Rule 23 denial **[p.3]** of class certification. Instead, "[the prior] putative class action [had been] denied class status" (*id.* at 119) because the district court had ruled, with respect to claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), that "[a] New York law [that] did not permit a class action predicated on statutory damages," *id.* at 108 (citation and quotation marks omitted), was applicable in New York federal courts (the Second Circuit later abrogated that ruling, holding, to the contrary, that the New York law does *not* apply to TCPA claims in New York federal courts, *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)).

In addition to there having been no Rule 23 denial of class certification in the prior action at issue in *Giovanniello*, the district court in the prior action had, upon dismissing the class claims, dismissed the named plaintiff's individual claims, and thus the entire case, because it found, as described by *Giovanniello*, that "the maximum damages [that the named plaintiff] could potentially receive as an individual claimant ($1500) fell short of the minimum amount required for *diversity jurisdiction* under 28 U.S.C. § 1332(a)." *Giovanniello*, 726 F.3d at 108 (emphasis added) (when *Giovanniello* was decided, diversity was the only available type of original federal subject-matter jurisdiction over TCPA claims in the Second Circuit, *see Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006); but, in *Mims v. Arrow Fin. Svcs., LLC*, 565 U.S. 368 (2012), the Court held that TCPA claims give rise to federal-question jurisdiction, thereby abrogating the contrary ruling in *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432 (2d Cir. 1998)).

The differences between the prior action at issue in *Giovanniello* and the prior action at issue in the present case, *i.e.*, *Leyse v. Lifetime Entertainment Servs., LLC*, No. 13-cv-5794 (S.D.N.Y.) (the "*Leyse* action"), are significant. In the *Leyse* action, the issue upon which putative class members were (and remain) dependent is that of class certification under Rule 23, whereas the putative class **[p.4]** members of the prior

action at issue in *Giovanniello* were dependent on: first, the matter of whether TCPA class actions could be brought in New York federal courts in the first place; and, second, but if and only if the district court's ruling on the first matter were ultimately reversed, the issue of Rule 23 class certification, to be first decided by the district court and, if denied, to be further addressed, if at all, on appeal.

Although *Giovanniello* did not focus on, or appear to rely upon, the distinctions that are described in the preceding paragraph, it remains that *Giovanniello* was decided in a factual context that is different than the one at issue here, *i.e.*, the one that existed in the *Leyse* litigation. The question, therefore, is: whether those difference are material, in which event *Giovanniello* would not bind this Court, but would, instead, be available only as persuasive authority; or whether, by contrast, the differences in the two contexts are merely "irrelevant factual distinctions," *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013), in which case this Court would be bound to apply *Giovanniello*.

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[p.7] The *Giovanniello* court stated that "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, citing *Taylor v. UPS, Inc.*, 554 F.3d 510 (5th Cir. 2008); *Bridges v. Dep't 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). However, five of these cases did *not* hold that *American Pipe* tolling is inapplicable during an appeal from the denial of class certification: *Fernandez*, in which the issue was whether "the denial of class[-]action certification in [the prior action] did not merely reactivate the statute of limitations [under] the *American Pipe* rule, but instead caused it to run anew," *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*, in which the court held that *American Pipe* tolling ended when the district court in the prior action had issued an administrative order denying class certification, which the court treated as a formal order; and *Taylor*, which held that *American Pipe* tolling continues through the appeal of a merits dismissal of the claims of a certified **[p.8]** class. *See Taylor*, 554 F.3d at 519-521.

Similarly, *Giovanniello*'s reliance on *In re Worldcom Secs. Litig.*, 496 F.3d 245 (2d Cir. 2007), and *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d

Cir. 1987), *see Giovanniello*, 726 F.3d at 116, was unwarranted. In *In re WorldCom*, the court held that *American Pipe* tolling applies to putative class members who file separate actions *before* a district court's initial class-certification ruling; and, in *In re Agent Orange*, the court merely held that *American Pipe* tolling does not apply to plaintiffs who were not part of the earlier action's putative class. *See In re Agent Orange*, 818 F.2d at 213-214.

The likelihood that *Giovanniello* would have found that *American Pipe* tolling ended when the *Leyse* district court denied class certification does not change the fact that the prior action at issue in *Giovanniello* did not involve a Rule 23 denial of class certification, as a result of which the putative class members' ability to recover in that prior action would have depended on two rounds, rather than one round, of successful litigation, *i.e.*, first, appellate success on the issue of whether the New York class-action prohibition applies to TCPA claims in New York federal courts, and, second, the issue of Rule 23 class certification itself (also subject to appeal). Thus, whereas the court in *In re Vivendi Universal, S.A. Sec. Litig.*, 281 F.R.D. 165 (S.D.N.Y. 2012), found that the cessation of *American Pipe* tolling occurs when a district court denies class certification, rather than when the appellate process has run its course, and thus avoids the risk of danger resulting from [such] 'a substantial extension of the tolling period,'" *id.* at 168 (S.D.N.Y. 2012), quoting *Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir. 1995) (additional citation and quotation marks omitted), that concern is significantly more pronounced

in cases like the prior action at issue in *Giovanniello*. Again, although *Giovanniello* would likely have reached the same result if the court had been addressing the facts at issue in the *Leyse* action, that is not necessarily so. Accordingly, *Giovanniello* is persuasive, **[p.9]** but not binding, authority.

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[p.23]

C. The Rationale of Numerous Other Decisions Concerning *American Pipe* Tolling Supports the Inclusion, in the *American Pipe* Tolling Period, of the Time Between a District Court's Denial of Class Certification and That Denial's Affirmance on Appeal

(i) *Edwards v. Boeing Vertol Co.*, 717 F.2d 761 (3d Cir. 1983)

In *Edwards v. Boeing Vertol Co.*, 717 F.2d 761 (3d Cir. 1983), the court held that the *American Pipe* tolling period had continued until the resolution of a *post-judgment* appeal in a prior class action (the "*Croker* action") alleging racial discrimination against the putative class's employer. *See id.* at 762. The *Croker* class was certified (which *Edwards* does not state explicitly, but *see Croker v. Boeing Co.*, 662 F.2d 975, 980 (3d Cir. 1981) (*en banc*) (noting that the class was certified)); but, "at the end of the liability stage of a bifurcated trial, . . . [t]he [district] court [in *Croker*] held that the [named] plaintiffs had failed to prove that the employer [had] engaged in a **[p.24]** pattern or practice of discrimination[,] [upon which] [t]he

[district] court [] . . . not[ed] that th[is] [holding] . . . did not preclude a finding in favor of *individual* victims of discrimination." *Id.* at 764-765 (emphasis added).

Following the trial of the named plaintiffs' individual claims, the *Croker* district court "dismissed the claims of all class members who were not parties," *Edwards*, 717 F.2d at 765, upon which the named plaintiffs in *Croker* brought an appeal, *see id.*, the result of which was an affirmance. *See id.*

The *Edwards* court found that "it is clear that *until . . . the appeal in the Croker case was decided*, a class action was pending [in *Croker*] which sought relief for the class of which [the plaintiff in *Edwards*] was a [putative] member." *Edwards*, 717 F.2d at 765 (emphasis added). Furthermore, the court found that, "[e]ven though the scope of relief in an individual claim might be different, if the [*Croker*] class action were to succeed[,] [the plaintiff in *Edwards*] might receive all the relief he desired," *id.* at 766, and, therefore, "was entitled to rely on the pendency of that action *so long as it was pending*," *id.*, and that "[a]ny other rule would *needlessly proliferate separate lawsuits*." *Id.* (emphases added).

The *Edwards* court also noted that the plaintiff had been "a witness in the [*Croker*] class action [and] was not sleeping on his rights," *id.*, but it is apparent that the court's holding applied to *all* of the putative class members of the *Croker* action, as the court did not intimate that the tolling period for the plaintiff had extended through the appeal in the *Croker* but ended

at some earlier time for the other putative class members. First, an putative class member need not even be aware of a prior action, *see* Point I(A), *supra*, much less participate in it, in order to be entitled to the benefits of *American Pipe* tolling.

Second, in neither *American Pipe* nor *Crown, Cork* did the Supreme Court suggest any **[p.25]** distinction between "active" and "passive" putative class members with respect to *American Pipe* tolling; rather, the opposite. *See* Point I(A), *supra*.

Third, regardless of whether an putative class member had participated in the *Croker* action, it remains that the point of tolling, which is to avoid "needlessly proliferat[ing] separate lawsuits," *Edwards*, 717 F.2d at 765, applies to all putative class members, not just the rare class member who "participated" in the prior action.

In *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004), the Third Circuit found that "there is no basis for extending applicable tolling through the pendency of the [prior action's] appeal in the Eleventh Circuit." *Yang*, 392 F.3d at 102. Here, *Yang* was referring to the fact that the plaintiff in the prior action had unsuccessfully sought further review of the class-certification denial. *See id.* at 100 ("[t]he plaintiffs' motions for reconsideration and for interlocutory Eleventh Circuit review were denied."). However, the reasoning that underlies *American Pipe* tolling supports the continuation of that tolling during the time in which further review of a class-certification

denial is sought. Indeed, the difference between *Edwards* and *Yang* is that, in *Edwards*, the issue on appeal concerned the merits of the action, whereas, in *Yang*, the issue on appeal was class certification. However, in each case, tolling was held to have benefitted individuals who, as a result of the district courts' rulings, were not parties to the action. Again, in *Edwards*, non-party status resulted from a ruling on the merits, and, in *Yang*, it resulted from a ruling on certification; but, the rationale of *American Pipe* tolling applies to both scenarios, not just the one that was presented in *Edwards*.

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

In *West Haven Sch. Dist. v. Owens-Corning Fiberglas Corp.*, 721 F. Supp. 1547 (D. Conn. 1988), the prior action at issue was "the so-called 'Philadelphia class action' filed in the Eastern District of Pennsylvania," *id.* at 1549, in which the district court had granted the plaintiffs' class-**[p.26]**certification motion in part and denied it in part. *See id.* at 1555. On appeal, the Third Circuit partially upheld the partial granting, partially reversed it, and fully upheld the partial denial. *See id.* The Third Circuit's "rulings . . . were sustained on subsequent appeals," the last of which was in the form of a denial of a petition for *certiorari*. *See id.*, citing (without the name or date), *Nat'l Gypsum Co. v. Sch. Dist. of*

Lancaster, 479 U.S. 915 (1986). As a result, the *West Haven* court held "there was a 'definitive determination' of [] class certification no earlier than when the appeals on that issue ran their course on *October 20, 1986*, and until that date the statute of limitation was suspended under [the] *American Pipe* rule." *Id.* (emphasis added). Thus, the court held that, with respect to the granting *and denial* of class certification, that *American Pipe* tolling ended when the appellate process had run its maximum course.

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

In *Byrd v. Travenol Laboratories, Inc.*, 675 F. Supp. 342 (N.D. Miss. 1987), a prior action (the "*Payne* action"), which was pending before the same judge who presided over *Byrd*, *see id.* at 343, had been "commenced on March 2, 1972, when [three] individuals filed a class[-]action complaint alleging *race* discrimination in certain of Travenol's employment practices," *id.* (emphasis added); and, "[o]n November 16, 1972, th[e] [*Payne*] court defined a class for that action consisting of all black employees and applicants for employment at [the defendant] since March 3, 1970." *Id.* However, "[t]his class certification became *obsolete or meaningless* on December 1, 1972 when the *Payne* plaintiffs sought and were granted leave (on May 1, 1973) to amend their complaint to allege *sex* discrimination[;] [and] on May 8, 1973, the *sole male [named] plaintiff* in *Payne* . . . [then] voluntarily *withdrew* from the case" *Id.* (emphases added).

On **December 20, 1974**, the court conditionally "redefined the class so that it did not include males," *id.* at 344 (dates to which reference is made in McCabe's argument are bolded for the **[p.27]** convenience of the reader); and, "[o]n **December 8, 1976**, the . . . court made *final* the definition of the class which had been conditionally entered on **December 20, 1974**" (emphasis added).

On appeal, the Fifth Circuit, in 1978, "affirmed in part and reversed in part the limited injunction entered . . . on February 19, 1976 . . . [based upon a] trial [that] was held in March 1975." *Id.* Following the appellate ruling, the district court, in 1980, entered "a final decree[,] [from which] [b]oth parties appealed." *Id.* On April 22, 1982, the Fifth Circuit "upheld the exclusion of black males from the class," *id.*, and "noted that there was no black[-]male plaintiff and thus a separate subclass of black males could not be created." *Id.*

In February, 1983, "six black applicants, each one a plaintiff in [*Byrd*], moved for leave to intervene as additional plaintiffs in *Payne*," *id.*, but "[t]he motion to intervene . . . [would] be addressed in a separate manner at a later date." *Id.* at 345. However, that motion had no bearing on the court's ruling with respect to *American Pipe* tolling. *See id.* at 351 ("[t]he court can discern no authority for the proposition that a motion to intervene in one action tolls the statute of limitations in a separate, independent action.")

In September, 1983, the putative interveners

commenced the *Byrd* action "[in order] [t]o avoid the possibility of losing their right to bring suit during the pendency of their application for leave to intervene, . . . filed [the *Byrd*] action." *Id.*

In contesting the scope of *American Pipe* tolling, "[the] [d]efendants argue[d] that the issue of class certification was decided when th[e] [district] court finally redefined the class in *Payne* by its order of December 8, 1976[,] . . . . or December 20, 1974, when the court initially redefined the class in *Payne* to exclude black males." *Id.* at 346. The plaintiffs, on the other hand, "point[ed] to the proposed need for a rule that would not result in a multitude of duplicative filings[,] [and] [t]hey suggest[ed] that the putative subclass representatives should not be required to file . . . a new lawsuit **[p.28]** while the original plaintiffs in [*Payne*] are still seeking the district court's *reconsideration* of the limitations on the class and are challenging those limitations *on appeal*." *Id.* (emphases added). The court sided with the plaintiffs' argument:

> The *American Pipe* decision supports the plaintiffs' contention and indicates that the *functional purpose* of a statute of limitations is to prevent stale lawsuits or suits brought after "evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 554. Since the *Payne* action continued to be *actively prosecuted*, [the] plaintiffs [in *Byrd*] apparently argue that their claims[,] [which are] alleged to arise from the *same*

> *discriminatory actions* [at issue in *Payne*][,] could not have become stale.

Id. at 346 (emphases added).

The court further explained that the fact that the claims were the same in the two actions meant that the commencement of the first of those actions, *i.e.*, the *Payne* action, put the defendants on sufficient notice of the putative class claims: "[a]nother purpose often cited for statutes of limitation is to provide the defendant with *timely notice of potential claims*. As the Supreme Court noted in *American Pipe*, the filing of a class action by one plaintiff who is found to be representative of a class provides *sufficient notice* to the defendant of potential additional *plaintiffs who may participate in the judgment*." *Id.*, citing *American Pipe*, 414 U.S. at 554-555 (emphases added).

Whereas "[t]he defendants . . . suggest[ed] that under the rationale of *American Pipe* and *Crown, Cork & Seal*, the tolling of the statute of limitations ended either in 1974 or 1976 with respect to th[e] [*Byrd*] plaintiffs and that their actions [were] now time-barred," *id.*, "[the] [p]laintiffs suggest[ed] . . . that until the possibility that the *denial of class certification* ***or*** *the restrictions on class membership* is *'cleared up' on appeal*, it is *senseless to require [putative] class members to take action*." *Id.* (emphases added). The plaintiffs further argued that, "[t]o require putative, prospective class members to file *separate lawsuits* while issues in the *original class action suit remain to be resolved* ***on appeal*** . . . would constitute the sort of

'*needless multiplicity of actions*' **[p.29]** which the Supreme Court sought to prevent with the tolling rule of *American Pipe* and *Crown, Cork & Seal*." *Id.* (emphases added).

Before stating its decision, the court found:

> There are at least five separate dates from which to begin running the statute of limitations against the [*Byrd*] plaintiffs' claims: **(1)** December 8, 1976, when this court finalized its earlier redefinition of the class in *Payne* (thereby denying certification to the subclass [that the *Byrd*] plaintiffs [seek to] represent . . .); **(2)** March 23, 1978, when the Fifth Circuit handed down its decision in *Payne I*; **(3)** October 2, 1978, when the Supreme Court denied *certiorari* on *Payne I*; **(4)** April 22, 1982, when the Fifth Circuit handed down its latest opinion on appeal in *Payne II*; or **(5)** November 29, 1982, when the Supreme Court denied *certiorari* on *Payne II*.

Id. at 347 (bolding added for the convenience of the reader).

The court found that the third of the five dates was the one to which *American Pipe* tolling had extended during the *Payne* action, explaining: "[i]nasmuch as the Fifth Circuit did not disturb on appeal the district court's redefinition of the class to exclude black males,

the court construes the appropriate final order to be the Supreme Court's denial of *certiorari* on *Payne I* in 1978. *At that point in time*, the *plaintiffs* in th[e] [*Byrd*] action were put on notice that *their rights were no longer being represented by the class[-]action plaintiffs in Payne*." *Id.* (emphases added). The court further reasoned as follows:

> Since the Fifth Circuit ruling [in *Payne I*] *did not reverse or otherwise disturb* the district court's order of December 8, 1976 redefining the class in *Payne* to exclude black males, [the *Byrd*] plaintiffs had no basis for delaying their intervention in *Payne at that time* to seek the certification of a subclass of black males. Nor were [the *Byrd*] plaintiffs justified in assuming that the Fifth Circuit might later require certification of a subclass of black males when *Payne* went up on appeal once again. As evidenced by the 1982 Fifth Circuit decision in *Payne II*, no further action whatsoever was taken on the issue of the composition of the class in *Payne* at that time.

Id. at 347-348 (emphases added). Thus, the court found that the Fifth Circuit's first ruling in *Payne* **[p.30]** had made it "'clear to the [plaintiffs] that the interests of the [putative] class members would no longer be protected by the named class representatives, [and that the putative class members should therefore have] promptly moved to intervene to protect those

interests.'" *Id.*, quoting *McDonald*, *supra*, 432 U.S. at 394.

(iv) *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md. 1985)

In *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md.), *aff'd on other grounds*, 769 F.2d 210 (4th Cir. 1985), the court found that *American Pipe* tolling continued through the appeal of a class-certification denial in a prior action (the "*Lane* action"). *See id.* at 1314. Following the denial of certification in *Lane*, "parties informed the court of a tentative settlement resolving the claims of the named plaintiffs," *id.* (citation and quotation marks omitted), upon which "the court approved the proposed settlement[,] ... [and] final judgment for the defendants and against the plaintiffs was entered by the Clerk on October 28, 1981." *Id.* at 1315 (brackets and ellipsis in original; citation and quotation marks omitted).

On November 25, 1981, four putative class members from *Lane* successfully moved to intervene in *Lane* "for the purpose of *appealing* the *denial of class certification*," *id.* (emphases added); and "[w]hile that appeal was pending, [those] four [intervenors], in November, 1982, filed the [*Davis*] action," during the pendency of which "the Fourth Circuit affirmed the denial of class certification in *Lane*." *Id.*

To "[t]he defendants['] argu[ment] that the [*Davis*] action is barred by the statute of limitations[,] [t]he plaintiffs . . . responded that their class[-]based and

individual claims are not time barred, relying to some extent on tolling principles which they argue are applicable because of the pendency of the *Lane* case *and the subsequent appeal* [in *Lane*]." *Id.* (emphasis added).

Initially, the *Davis* court noted that, in *American Pipe*, the Supreme Court had "explained the **[p.31]** fairness of [the] tolling rule [of *American Pipe*] on the grounds that the defendants had been notified by the filing of the original class action '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.*, quoting *American Pipe*, 414 U.S. at 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 the size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with intervenors.'" *Id.*, quoting *American Pipe*, 414 U.S. at 555.

The *Davis* court further noted that "[t]he Court reiterated in *Crown, Cork & Seal v. Parker* that because the defendant there had notice of the substantive claims and generic identities of the potential class plaintiffs due to the filing of the class[-]action suit, '[t]olling the statute of limitations thus creates no potential for unfair surprise, regardless of [whether] the class members choose to enforce their rights upon denial of class certification . . . . *** [by]

fil[ing] their own suits or interven[ing] as plaintiffs in the pending action.'" *Id.* at 1315, 1316, quoting *Crown, Cork*, 462 U.S. at 354.

Regarding the rationale of *American Pipe* tolling, the *Davis* court explained that "[t]wo considerations set out in *American Pipe* and its progeny provide the analytical framework within which to determine whether the statute of limitations is tolled in this case[,] [t]he first [of which] is aimed at protecting ... the vitality of the class action suit from a needless 'multiplicity of activity' [in the form of protective lawsuits][,] [and] [[t]he second of which] focuses on [] the integrity of the notice requirement underlying any statute of limitations." *Id.* at 1316 (citation and quotation marks omitted).

Given the considerations that bear upon the extent of *American Pipe* tolling, the court **[p.32]** explained that such tolling continues until an appellate court rules on a district court's denial of class certification *regardless of 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 v. Weinberger*, 523 F.2d 689 at 696 (7th Cir.1975), *cert. denied*, 427 U.S. 912 (1976) (if the district court refused to certify the class "we think the tolling would have continued if the plaintiffs had appealed from such a ruling....").

Id. (emphases added).

Although, as noted above, the named plaintiffs in *Davis* had successfully sought to intervene in *Lane* as *appellants*, they had also "sought leave to intervene in *Lane* to pursue their claims *individually*, [but] [the district] court denied that request and the Fourth Circuit affirmed the denial." *Id.* The rejection of their motion to intervene individually in *Lane* and the Fourth Circuit's affirmance of the *Lane* district court's class-certification denial (*see id.* at 1315) "required these unsuccessful plaintiffs to initiate a separate lawsuit and to seek the application of *American Pipe* tolling provisions in the newly instituted suit." *Id.* (the *Davis* court ultimately found that *American Pipe* tolling was inapplicable because "[t]he facts and procedural history of the present case present the rare situation in which [the complaint in] a previous class[-]action suit [(*i.e.*, in *Lane*)] did not provide notice to the defendants of the substantive claims being brought against them." *Id.* at 1319 (footnote omitted)).

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

In *Clark v. ConocoPhillips Co.*, 465 S.W. 3d 720 (Tex. App. 2015), the court held that *American Pipe* tolling did not end when, earlier in the litigation, the court reversed the trial court's granting of class certification. Instead, tolling continued until the Texas supreme court affirmed the **[p.33]** appellate court's ruling. The court based its ruling on two factors: first, that the appellate "court [had] never issued its mandate reversing the certification . . . because the . . . [named] plaintiffs [had] filed a petition for review that the [Texas] supreme court granted, ... [such that the appellate court's] judgment reversing the certification . . . [had] not take[n] effect" *id.* at 726; and, second, that, in contrast to the federal judicial system, in which "the court of appeals might choose not to permit an appeal, and in any event it is no longer reasonable after the denial for putative class members to rely on the named plaintiffs to protect their interests," *id.* (footnote omitted), "interlocutory orders of Texas [trial] courts granting or denying class certification are appealable as of right." *Id.* However, the court also explained as follows, in reasoning that supports the continuation of *American Pipe* tolling during the pendency of an appeal of a district court's denial of class certification regardless of whether the appellate court affirms or reverses that denial:

> If [the defendant] were correct that tolling ended when th[e] [appellate] [c]ourt issued its judgment [that reversed

> the trial court's granting of class certification], thousands of [putative] subclass members could protect 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 in which they still wished to participate*. *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). Thus, the court recognized that a former putative class member, *i.e.*, *former* because a court has denied class certification, should not have his rights depend upon either accurately predicting the success of an appeal or, instead, filing a duplicative action that will have **[p.34]** been wasteful in the event of a successful appeal. The

difference with respect to the *Leyse* action is that, there, the district court denied class certification, whereas, in *Clark*, an appellate court did so; but, that difference is immaterial, as the commonality of the two situations is that a court (indeed, a higher court in *Clark*) has told the putative class members that, absent reversal on appeal, their rights will not be exercised in that litigation. Thus, *Clark*'s rationale is applicable with respect to the *Leyse* action (and, arguably, even more so given that a higher court had denied certification in *Clark*).

The *Clark* court further explained:

> Decisions on tolling should balance the competing interests of class[-]action litigation (efficiency and economy) against those of statutes of limitation (protection against stale claims). As we have explained, *continuing tolling through [Texas] supreme[-]court review promotes efficiency and economy*. In addition, the filing of the class action *provided [the defendant] with stale-claim protection by giving it notice of the claims [of the plaintiff/invtervenor] raises and the general identities of the plaintiffs who had such claims, allowing it to preserve relevant evidence and witnesses*. *See Crown, Cork & Seal*, 462 U.S. at 352–53. [The defendant] contends that the length of tolling is *abusive* and that allowing [the plaintiff/invtervenor]'s

> individual claims disturbs society's interest in repose. But *it is [the defendant] that for many years fought against class-based resolution of these claims; the result of its success is that it must now defend timely individual lawsuits alleging those same claims. [S]ee Crown, Cork & Seal*, 462 U.S. at 353 ("[A]lthough 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*.").

Id. at 727-728 (emphases added; additional citations and quotation marks omitted). This reasoning clearly applies equally with respect to *Leyse*.

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

In *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992), the court found that *American Pipe* tolling continued through the appeal of a class-certification denial in the prior action (the "*Call* action"). The plaintiffs in the *Call* action had sought the return of fees that had been **[p.35]** assessed under an ordinance of the defendant. The state trial court denied class certification in 1978, *see id.* at 758; and, "[i]n 1986, after a series of proceedings including appeals to and remands from this court, [the Utah Supreme Court, in '*Call III*'][,] declared [the] ordinance

[] invalid and void *ab initio* and upheld the trial court's denial of class[-]action status." *Id.* In 1987, the named plaintiffs in *American Tierra* filed complaints (that were subsequently consolidated) in a state trial court, "alleging that because [the] ordinance [had been declared] void [in the *Call* action], they are entitled to a refund of [the] fees [that they had] paid [under that ordinance]." *Id.* at 758 (presumably, the *American Tierra* plaintiffs were putative class members in the *Call* action).

The court, in response to the [*American Tierra* plaintiffs'] argu[ment] . . . that any statute of limitation [had been] tolled until [the] [Utah Supreme] [C]ourt ruled in *Call III* on the question of class certification," *id.* at 761, stated: "[w]e agree. 'The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action,'" *id.* at 761-762, quoting 54 C.J.S. *Limitations of Actions*, § 234, at 311 (1987), adding that "[t]his principle is firmly established in federal law." *Id.* at 762, citing *Crown, Cork* and *American Pipe*. The court then adopted *American Pipe* tolling as a matter of state law:

> [A]s long as the purported class is representative of all claims such that the defendant has *adequate notice*, then tolling serves to *avoid duplication of litigation*, *promote justice*, *do equity*, and *generally further the judicial efficiency*

> *and economy that class actions are designed to promote*. *See* [*Crown, Cork*,] 462 U.S. at 350-51, [*American Pipe*,], 414 U.S. at 553-55. We now adopt the same rule as a matter of Utah law and hold that the commencement of a class action tolls the statute of limitation as to all putative class members who would have been parties had class certification been approved.

Id. (emphases added).

Having held that *American Pipe* tolling applies in Utah, the court then addressed "[the] further **[p.36]** question, however, [of] how long this tolling effect continues," *id.*, and held that it had continued until the Utah Supreme Court had *affirmed* the trial court's denial of class certification:

> [The defendant] argues that any tolling effect lasts only until the trial court resolves the class[-]certification issue. The [plaintiffs] argue that the tolling effect continues during the appeal of the class[-] certification question. *American Pipe* and *Crown, Cork & Seal* left this issue *unclear as a matter of federal law*. *See Byrd v. Travenol Laboratories, Inc.*, 675 F.Supp. 342, 347 (N.D.Miss.1987). Several *lower federal courts* have since addressed this issue, *uniformly concluding that the rationale for tolling*

> *continues throughout the pendency of the appeal. See, e.g., Jimenez v. Weinberger*, 523 F.2d 689, 696 (7th Cir.1975); *West Haven School Dist. v. Owens-Corning Fiberglas Corp.*, 721 F.Supp. 1547, 1555 (D.Conn.1988); *Byrd*, 675 F.Supp. at 347; *Davis v. Bethlehem Steel Corp.*, 600 F.Supp. 1312, 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. (emphases added).

Even the dissenting opinion agreed with the majority that *American Pipe* continues until an appellate court addresses the trial court's denial of class certification, but explained that, in its view, the tolling period had ended upon an earlier appeal in the *Call* action on the basis that, in that appeal, "[the] affirmance included the denial of class certification even though that point was not expressly discussed in the opinion." *Id.* at 764 (Howe, Assoc. *C.J.*, dissenting).

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[p.46] POINT III

PLAINTIFF IS ENTITLED, IF NECESSARY, TO PRESERVE THE ARGUMENT THAT *AMERICAN PIPE* TOLLING SHOULD CONTINUE THROUGH THE APPELLATE PROCESS

If this Court were to disagree with McCabe and find that *Giovanniello*, *supra*, is a binding precedent that precludes McCabe's claims, *see* Point I(A), *supra*, McCabe would, by filing this action and making his arguments herein, have preserved the right to present those arguments for review by the Second Circuit and/or the Supreme Court. In *Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108 (2d Cir. 1987), for example, the court rejected the appellant's request for sanctions against the appellee's counsel for having argued that a rule that had been established by the Supreme Court in 1935, and last followed by the Second Circuit the year before, was "'obsolete" and "'anachronistic,'" and [for having] urge[d] that it be overturned," *id.* at 111, explaining: "[b]y raising this argument[,] [the appellee] has prudently preserved his position, which would enable him to seek Supreme Court review on this issue. Although we find that we are constrained to follow the [challenged] rule, . . . [the appellee]'s attack on the rule is far from frivolous." *Id.* at 111-112.

In *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994), the Supreme Court vacated the **[p.47]** Seventh Circuit's imposition of sanctions on the petitioner's

counsel, finding that, "if the only basis [for imposing sanctions] . . . was that [counsel's] . . . argument was foreclosed by Circuit precedent, the order was not proper," *id.* at 660, and further explaining: "[a]s [the] petitioner noted in his memorandum opposing dismissal and sanctions, *this Court* had not yet ruled on the [underlying legal question]. Filing an appeal was *the only way [the] petitioner could preserve the issue pending a possible favorable decision by this Court*. *Id.* (emphases added).

The *McKnight* Court also noted that, "[a]lthough, as of [the date of the Seventh Circuit's ruling], there was no circuit conflict on [the legal] question [at issue]," *id.*, that question had divided the [d]istrict [c]ourts and its answer was not so clear as to make [the] petitioner's position frivolous." *Id.* As set forth in Points II(B) and (C), *supra*, numerous courts, including the Supreme Court, support McCabe's arguments in favor of applying *American Pipe* tolling during an appeal from the denial of class certification. Indeed, some of these courts have held that *American Pipe* tolling applies exactly as McCabe argues it should.

In *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985), the Second Circuit, in addressing the "somewhat more expansive standard for the imposition of attorneys' fees" (*id.* at 253) that was implemented by the 1983 amendment of Rule 11, under which "subjective good faith no longer provide[d] the safe harbor it once did," *id.*, *i.e.*, that "a showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule," *id.* at 253-254,

explained as follows:

> In framing this standard, *we do not intend to stifle* the *enthusiasm* or *chill the creativity* that is the *very lifeblood* of the law. *Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom*, and a rule that *penalized such innovation and industry* would run *counter to our notions of the common law itself*. Courts must strive to *avoid the wisdom of hindsight* in determining whether a pleading was valid when signed, and *any and all doubts must be resolved in favor of the* **[p.48]** *signer*. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, *and* where no reasonable argument can be advanced to *extend, modify or reverse the law as it stands*, Rule 11 has been violated. Such a construction serves to punish *only those who would manipulate the federal court system for ends inimicable to those for which it was created*.

Id. at 254 (emphases added). Accordingly, the court rejected the appellee's request for sanctions, explaining: "we cannot say for a certainty that [the appellant] or its counsel acted in subjective bad faith in bringing or maintaining this lawsuit, or that its actual motive was to harass the [appellee]. After [the

appellant's] travails of the preceding decade, [the appellant] might just as well have been acting out of frustration or desperation." *Id.*

As observed in *Hunter v. Williams*, 281 F.3d 144 (4th Cir. 2002): "if it were forbidden to argue a position contrary to precedent, the parties and counsel who in the early 1950s brought the case of *Brown v. Board of Ed.*, 347 U.S. 483 (1954), might have been thought by some district court to have engaged in sanctionable conduct for pursuing their claims in the face of the contrary precedent of *Plessy v. Ferguson*, 163 U.S. 537 (1896). The civil[-]rights movement might have died aborning." *Id.* at 156 (citation and quotation marks omitted). More recent examples include *Pearson v. Callahan*, 555 U.S. 223 (2009), overruling, in part, *Saucier v. Katz*, 533 U.S. 194 (2001); *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986); and *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (*en banc*), overruling *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002).

Perhaps the paradigmatic instance of counsel's successfully prevailing in the face of overwhelming contrary case law occurred when the Supreme Court, in a 5-4 decision, disagreed with, and therefore abrogated (or reversed), the rulings "by *all 11 Courts of Appeals* to have considered the question" at issue. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 192 (1994) (Stevens, *J.*, conc.) (emphasis added; footnote omitted).

[p.49] *Bank v. Independence Energy Group LLC*, 736 F.3d 660 (2d Cir. 2013), is also a case in point. There, the defendants had argued, before the district court, that Second Circuit case law, which had held that TCPA class actions in New York federal courts were prohibited by a New York law that did not permit class actions predicated on statutory damages, remained binding law, *see* Appellees' Brief, *passim* (2d Cir. No. 13-1746, Doc. 39), with which the district court had agreed. *See Bank v. Independence Energy Group LLC*, 942 F. Supp. 2d 321, 326 (E.D.N.Y. 2013). However, as noted in Point I(A), *supra*, the Second Circuit reversed the district court and overruled the prior case law.

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[p.55] CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that this Court deny Defendant's motions in their entirety and grant Plaintiff any appropriate relief that is authorized by law.

Dated: July 28, 2017

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APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-1149
[Doc. No. 48]

Kevin McCabe,

Plaintiff-Appellant,

TODD C. BANK,

Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

PRINCIPAL BRIEF OF PLAINTIFF-APPELLANT

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[p.5] SUMMARY OF THE ARGUMENT

Numerous courts have found, as McCabe argues, that the two rationales of *American Pipe* tolling continue to apply through the appeal of the denial of class certification by a district court. Those rationales are, first, that the commencement of a putative class action satisfies the purposes of statutes of limitations by notifying the defendant of the *claims* against it and the general identities of the *claimants*; and, second, that tolling furthers the *key purpose* of Rule 23 of the Federal Rules of Civil Procedure, which is to promote judicial efficiency by discouraging the commencement of numerous individual lawsuits where a dispute involves a large number of claimants, and, instead, resolving such dispute in one lawsuit.

Absent *American Pipe* tolling, putative class members whose statute-of-limitations periods expire before a district court's ruling on class certification would be forced to bring their own protective, duplicative actions in order to ensure that their rights will not be lost in the event that certification is denied, whereas the *granting* of certification would render those actions as having been unnecessary and thus a waste of the time and resources of the plaintiffs, the defendant, and the judicial system.

Neither of the rationales of *American Pipe* tolling ceases when a district court denies certification. First, it remains that the commencement of the putative class action will have notified the defendant of the claims against it and the general identities of the

claimants.

[p.6] Second, judicial efficiency would be furthered by discouraging the commencement of protective actions by putative class members whose claims become untimely before an appeal is resolved, as such actions will have been rendered wasteful if the denial is reversed.

With respect, in the present litigation, to recognizing the continuation of tolling until the resolution, in the prior action at issue, of the appeal of the district court's denial of class certification, the argument in favor thereof is particularly strong, because the plaintiff had attempted to bring an interlocutory appeal of the district court's class-certification denial, and therefore the putative class members had "no reason . . . to suppose that [the plaintiff] would not later take a[] [post-judgment] appeal." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Accordingly, the *McDonald* Court held, with respect to a putative class member's motion to intervene in order to bring a post-judgment appeal of the class-certification denial, that *American Pipe* tolling had continued during the period from that denial until, "[a]fter [the putative class member] learn[ed] that a final judgment had been entered in the [prior] suit, and that[,] despite their earlier attempt to do so[,] the plaintiffs did not . . . intend to file an appeal . . . [of the] denial." *Id.* at 390. Although *McDonald*, a pre-*American Pipe* case, concerned intervention as did *American Pipe* itself, the Supreme court, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S.

345 (1983), put, on par with putative class members who intervene, those who, like McCabe, bring new actions.

[p.7] In *Giovanniello v. ALM Media, LLC*, 726 F.3d 106 (2d Cir. 2013), this Court held that *American Pipe* tolling did not continue through the appeal in a prior action, which was a putative class action that had been dismissed without the plaintiff's having yet moved for class certification. However, the factual context at issue in the present case, *i.e.*, the denial of certification, in a prior action, by the district court, differed from the factual context at issue in *Giovanniello*, because the amount of tolling that would result from the adoption of McCabe's position, *i.e.*, between a class-certification denial and the resolution of a post-judgment appeal thereof, is substantially shorter than the amount of tolling that would have ensued if *Giovanniello* had ruled in favor of the plaintiff's requested continuation of tolling. In the latter, there would have thereby 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 remanded, from the resolution of the post-judgment appeal until the district court's subsequent ruling (if negative) on class certification.

Although *Giovanniello* did not focus on the distinctions described in the preceding paragraph, it remains that the factual context at issue in the present case was not before the Court in *Giovanniello* (and

was, therefore, not briefed before that Court), as a result of which *Giovanniello*, although available as persuasive authority, was not binding on the District Court and is not binding in the instant appeal. In the **[p.8]** event, however, that this Court finds, as did the District Court, that *Giovanniello* is binding with respect to the present litigation, McCabe, in presenting his arguments concerning the reasoning of *Giovanniello*, thereby preserved those arguments, as a matter of right, for further review by this Court *en banc* and/or the Supreme Court.

Finally, Judge Bulsara, in recommending the denial of McCabe's motion for sanctions against Lifetime's counsel, provided no substantive explanation, but, instead, recommended the denial "in light of the decision [sic] to grant Lifetime's sanctions motion [against Bank]." R&R at 39 (A-157). However, McCabe's motion, which set forth numerous blatant misrepresentations in Lifetime's motion, should have been addressed.

ARGUMENT

POINT I

AMERICAN PIPE TOLLING SHOULD APPLY DURING THE PENDENCY OF A PLAINTIFF'S EFFORTS TO CONTINUE TO SEEK CLASS CERTIFICATION FOLLOWING A DISTRICT COURT'S INITIAL DENIAL

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[p. 13]

B. The Facts at Issue in *Giovanniello* Were Sufficiently Different Than the Facts at Issue in the Lower-Court Action, Thus Rendering *Giovanniello* Non-Binding

Judge Bulsara contended:

> Mr. Bank advanced *another* distinction at the hearing [on Lifetime's motions for dismissal and for sanctions. (Transcript of Oral Argument before Magistrate Judge Sanket J. Bulsara, dated December 12, 2017] at 30:15-31:3 [(A-189 - A-190)]. He argued that in *Giovanniello* because the earlier class was dismissed at the outset of the case, extending tolling through an appeal would create *too long a tolling period*. *In contrast*, *in this case, the tolling period following a denial of a Rule 23 motion and after the close of discovery through an appeal*, would be *shorter*. That is a *distinction without a difference*: no court (and certainly not the Second Circuit) has suggested that the availability of *American Pipe* tolling depends on or should depend on the length of the potential tolling period.

R&R at 20, n.8 (A-138) (emphases added). First, rather than "another distinction," the *only* distinction that McCabe drew with *Giovanniello* was the difference in the amount of tolling for which McCabe argued in the

District Court as compared to the amount of tolling that would have resulted if this Court, in *Giovanniello*, had held in favor of the plaintiff. *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motions for Dismissal and for Sanctions ("Pl. Opp. Mem."; Dkt. No. 20), 2-4, 8-9. In addition, McCabe did not characterize the latter as "too long." (R&R at 20, n.8 (A-138)). In any event, the distinction that McCabe drew is not meaningless, as Judge Bulsara claimed: the amount of tolling that would result from the adoption of McCabe's position, *i.e.*, during the period between a class-certification denial and a **[p.14]** post-judgment appeal thereof, is substantially shorter than the amount of tolling that would have resulted from a ruling in *Giovanniello* in favor of the plaintiff, for there would have thereby 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 remanded, from the resolution of the post-judgment appeal until the district court's subsequent ruling (if negative) on class certification.

McCabe argued that, "[t]he differences between [*Giovanniello I*] and the prior action at issue in the present case . . . are significant," Pl. Opp. Mem. at 3, and explained that, "[if] those difference[s] are material, . . . *Giovanniello* would not bind th[e] [District] Court, but would, instead, be available only as persuasive authority; [but if], by contrast, the differences in the two contexts are merely 'irrelevant factual distinctions,' . . . th[e] [District] Court would be bound to apply *Giovanniello*." Pl. Opp. Mem. at 4,

quoting *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013).

The remainder, *i.e.*, the bulk, of McCabe's *Giovanniello*-related arguments were made with regard to the possibility that the District Court *would* find *Giovanniello* to be binding. Accordingly, McCabe presented those arguments in order to preserve them for appellate review. As McCabe explained: "[i]f th[e] [District] Court were to . . . find that *Giovanniello* is a binding precedent that precludes McCabe's claims, McCabe would, *by filing this action and making his arguments herein*, have *preserved* **[p.15]** *the right to present those arguments for review by the Second Circuit and/or the Supreme Court*." Pl. Opp. Mem. at 47 (emphasis added). The same is true of the instant appeal, through which McCabe would be preserving his right to seek further review by this Court *en banc* and/or the Supreme Court if this Court finds that *Giovanniello* is binding and fatal to McCabe's claims. *See also id.* at 47-50 (addressing the right to preserve arguments for appellate review).

[p.41] CONCLUSION

The following should be vacated: (i) that part of the Order of District Judge Edward R. Korman of the Eastern District of New York, dated, and entered with the clerk on, March 26, 2018, that adopted the recommendation, issued by Magistrate Judge Sanket J. Bulsara in a Report and Recommendation, to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and (ii) that part of

the Order that adopted the Magistrate Judge's recommendation to deny Plaintiff-Appellant's motion for sanctions against counsel to Defendant-Appellee; (iii) that part of the Judgment, dated and entered with the clerk on March 27, 2018, that ordered and adjudged that Defendant-Appellee's motion to dismiss the Complaint is granted; and (iv) that part of the Judgment that ordered and adjudged that Plaintiff-Appellant's motion for sanctions against counsel to Lifetime is denied.

Further, Plaintiff-Appellant should be granted such other and further relief as authorized by law.

Dated: May 30, 2018

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APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 18-1149
[Doc. No. 49]

Kevin McCabe,

Plaintiff-Appellant,

TODD C. BANK,

Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

PRINCIPAL BRIEF OF TODD C. BANK

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[p.1] PRELIMINARY STATEMENT

This appeal is taken by Todd C. Bank ("Bank"), who served as counsel to Plaintiff-Appellant, Kevin McCabe ("McCabe"), in the District Court action, from: (i) that part of the Order of District Judge Edward R. Korman of the Eastern District of New York, dated, and entered with the clerk on, March 26, 2018 (the "Order"; A-260), that adopted the recommendation, issued by Magistrate Judge Sanket J. Bulsara in a Report and Recommendation (the "R&R"; A-119 - A-158), to impose sanctions upon Bank; (ii) any part of the Order that this Court interprets as having adopted the recommendation, in the R&R, to impose costs upon Bank; (iii) that part of the Judgment (the "Judgment"; A-261) that ordered and adjudged that sanctions upon Bank are granted; and (iv) any part of the Judgment that this Court interprets as having ordered and adjudged that costs upon Bank are granted.

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[p.7] ARGUMENT

POINT I

THE MAGISTRATE JUDGE COMPLETELY MISUNDERSTOOD THE RIGHT OF A PARTY TO PRESERVE, FOR APPELLATE REVIEW, ARGUMENTS THAT ARE FORECLOSED BY BINDING PRECEDENT

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[p.11] That McCabe cited two cases that had been "abrogated," R&R at 16 (A-134) (or what Judge Bulsara later incorrectly described as "overruled," R&R at 29 (A-147)), as well as a case that Judge Bulsara described as being "no longer good law" (R&R at 17, n.6 (A-135)) due to *Giovanniello*, did not preclude McCabe's discussion **[p.12]** of those cases. Even assuming, *arguendo*, that Judge Bulsara correctly characterized the status of the last of these cases, that status, and the status of the two abrogated cases, do not *ipso facto* render their *reasoning* so flawed as to make it *frivolous* to argue in favor of it, but merely reflect the fact that a higher court *disagreed* with the reasoning of those cases. Indeed, "a judge can cite as persuasive *anything* that *in fact persuades* her: a novel, a movie, an op-ed, a blog, or perhaps even an obscure law-review article[,] [and it thus] follows that such a judge could cite a *vacated or reversed opinion*," Charles A. Sullivan, *On Vacation*, 43 Houston L. Rev. 1143, 1171 (2006) (emphases added); *see also 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 added)); *IBM Credit Corp. v. United Home for Aged Hebrews*, 848 F. Supp. 495, 497 (S.D.N.Y. 1994) ("[o]nce a decision has been filed and [is] in the public domain, its influence . . . is based *solely upon future readers' views of its merits*, whether *vacated* . . . *or not*." (emphases added)); Frank B. Cross *et al.*, *The Reagan Revolution in the Network of Law*, 57 Emory L.J. 1227, 1250 (2006) ("*overruled decisions* remain in the [legal] network and may be cited even *after being overruled*."

(emphases added)); *Local 348-S, UFCW, AFL-CIO v. Meridian Mgmt. Corp.*, 583 F.3d 65, 78 (2d Cir. 2009) ("[w]e agree with the *dissent* in [a Third Circuit opinion] and will *not adopt the majority's reasoning* in that case." (emphases added)); *United States v. Aiello*, 912 F.2d 4, 6 (2d **[p.13]** Cir. 1990) ("[w]e think the *dissenters* in [an Eleventh Circuit *en banc* opinion] have the *better of the argument*." (emphases added)).

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[p.14] During the oral argument in the District Court, Judge Bulsara appeared to recognize that the *merits* of McCabe's arguments were *not* frivolous:

> **MR. BANK:** I've discussed three rationales for tolling. All of those rationales apply and continue to apply . . . when there's an appeal of a class-certification denial. . . .
>
> **THE COURT:** But Mr. Bank, here's the issue, right? The legal world is not just determined by rationales. It's determined by legal principles and *these arguments may have had some force, some persuasiveness, some utility before Giovanniello came out* but the Second Circuit ruled on this point and said class -- *American Pipe* tolling ends when class cert is denied for whatever reason.

Transcript of Oral Argument before Magistrate Judge

Sanket J. Bulsara, dated **[p.15]** December 12, 2017 ("*McCabe* Tr."), at 22:25 - 23:13 (A-181 - A-182) (emphasis added). If, as Judge Bulsara acknowledged, McCabe's "arguments may have had some force, some persuasiveness, some utility before *Giovanniello*," the notion that such arguments may not be presented in order to *preserve* them for review by this Court and/or the Supreme Court perfectly ignores the axiomatic right to preserve foreclosed arguments for appellate review.

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[p.16] POINT II

THE MAGISTRATE JUDGE RESPONDED TO MANY OF PLAINTIFF'S ARGUMENTS BY EITHER MISCHARACTERIZING THEM OR BY REJECTING THEM WITHOUT EXPLANATION

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[p.21]

B. Plaintiff's Descriptions of Cases of Out-of-Circuit Courts of Appeals

Judge Bulsara asserted that, "[e]ight other circuits reached the same conclusion prior to this Court's decision in *Giovanniello*," R&R at 12, n.4 (A-130), but that:

> Plaintiff spends significant time attempting to *distinguish these cases* and

> *impugn* [*Giovanniello*]'s *reliance upon them*. (*See* Pl. [Opp. Mem.] at 7-8). Whatever the merits of these arguments—and none are apparent—the Second Circuit, whose decisions control cases filed in this Court, was definitive in its holding that tolling does not extend **[p.22]** beyond the initial decision to deny class status. And that ruling was not dependent upon the rulings of sister circuits, but the Second Circuit's independent determination that such a result was "consistent with the reasoning underlying *American Pipe* tolling." 726 F.3d at 116-18 ("If the [Supreme] Court had contemplated that tolling continued through the pendency of reconsideration or through appeal, there would be no need for class members to take action to protect their rights[.]").

R&R at 12-13, n.4 (A-130 - A-131) (emphases added). First, the Supreme Court has simply not been presented with the issue of *whether, or when,* tolling continues *during the pendency of an appeal* of a *class-certification denial*. *See Collins*, *supra*, 875 F.3d at 843.

Second, McCabe, in his Opposition Memorandum, explained that, in five of the eight circuit cases to which Judge Bulsara referred, the courts had likewise not been presented with that issue. *See* Pl. Opp. Mem. at 7-8. Therefore, argued McCabe, the statements by

those five courts that *American Pipe* tolling ends upon a district court's denial of class certification were dicta. *See In re Indu Craft, Inc.*, 749 F.3d 107, 116, n.12 (2d Cir. 2014) ("a statement that is not essential to the ... holding is non-binding *dicta*[;] *see also Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ('[w]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.')" (additional citation and quotation marks omitted)); *Chem One, Ltd. v. M/V Rickmers Genoa*, 660 F.3d 626, 640 (2d Cir. 2011) ("discussing a legal issue that is not necessary to decide the case is mere dicta and should not be treated as binding on **[p.23]** future panels" (citation and quotation marks omitted)). Indeed, Judge Bulsara did not refute McCabe's accurate characterization of the five circuit cases.

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[p.39] POINT VI

THE FACT THAT A DIFFERENT PLAINTIFF BROUGHT A SECOND ACTION HAS NO RELEVANCE TO THE PRESENT CASE

Judge Bulsara contended that, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 17-cv-1212 (S.D.N.Y.) ("*Leyse II*"), District Judge William H. Pauley, III, "held a conference with the parties," R&R at 7 (A-125), during which Judge Pauley expressed the "view [that], because the Second Circuit was considering (on the pending motion for rehearing en banc [in *Leyse I*]) issues related to . . . [the] complaint

[in *Leyse I*], there was no viable case or controversy for another complaint [(*i.e.*, the complaint in *Leyse II*)] that was identical to the first [(*i.e.*, the complaint in *Leyse I*)]." R&R at 8 (A-126). Rather, Judge Pauley reasoned that the plaintiff in *Leyse I* had a judgment. *See* Transcript of conference in *Leyse II*, dated March 30, 2017 ("*Leyse II* Tr."), 5:17 - 7:9 (A-103 - A-105); 18:6-11 (A-116). Furthermore, Judge Pauley did not **[p.40]** indicate *any* opinion regarding the issues in the present case.

Judge Bulsara also found that: "Judge Pauley suggested that bringing the identical claim after the Second Circuit affirmed the class certification denial in *Leyse I* and while moving for rehearing by the Second Circuit in *Leyse I* was sanctionable . . . . Presumably to avoid such a sanctions motion, he voluntarily dismissed the *Leyse II* complaint." R&R at 35, 36 (A-153, A-154). In light of the plaintiff's judgment in *Leyse I*, the plaintiff, in *Leyse II*, represented that he intended to seek a stay pending the resolution of the appellate process in *Leyse I*. *See* Letter from Todd C. Bank to Judge Pauley dated March 17, 2017 (A-38); *Leyse II* Tr. at 2:14 - 3:6 (A-100 - A-101); *id.* at 5:21 - 7:9 (A103 - A-105). Judge Pauley stated, during the parties' conference, that "I am not granting a stay in the case," *Leyse II* Tr. at 18:6 (A-116). In any event, regardless of Judge Bulsara's surmising as to why *Leyse II* was withdrawn, that withdrawal is not relevant in the present case. As Judge Bulsara recognized, sanctions under Rule 11 (as well as 28 U.S.C. § 1927) are limited to conduct that occurs in the course of the action *sub judice*. *See* McCabe Tr. at

90:14-15 (A-249) (Judge Bulsara: "I don't think there's a basis to sanction for bringing *Leyse II*."); *see also id.* at 14:20-25 (A-173) (Judge Bulsara: "I don't think this Court has the ability to sanction on conduct in another court."); *accord*, Plaintiff's Reply Memorandum of Law in Further Support of Plaintiff's Motion for Sanctions (Dkt. No. 29) at 4-5.

[p.41] CONCLUSION

The following should be vacated: (i) that part of the Order of District Judge Edward R. Korman of the Eastern District of New York, dated, and entered with the clerk on, March 26, 2018, that adopted the recommendation, issued by Magistrate Judge Sanket J. Bulsara in a Report and Recommendation, to impose sanctions upon Todd C. Bank; (ii) any part of the Order that this Court interprets as having adopted the Magistrate Judge's recommendation to impose costs upon Todd C. Bank; (iii) that part of the Judgment, dated, and entered with the clerk on, March 27, 2018, that ordered and adjudged that sanctions upon Todd C. Bank are granted; and (iv) any part of the Judgment that this Court interprets as having ordered and adjudged that costs upon Todd C. Bank are granted.

Further, Todd C. Bank should be granted such other and further relief as authorized by law.

Dated: May 30, 2018

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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 18-1149
[Doc. No. 69]

Kevin McCabe,

Plaintiff-Appellant,

TODD C. BANK,

Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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[p.1] ARGUMENT

POINT I

CHINA AGRITECH, INC. v. RESH DID NOT CHANGE ANY PRINCIPLES WITH RESPECT TO THE APPLICATION OF *AMERICAN PIPE* TOLLING TO INDIVIDUAL CLAIMS

Defendant-Appellee, Lifetime Entertainment Services, LLC ("Lifetime"), contends, with respect to *China Agritech, Inc. v. Resh*, --- U.S. ---, 138 S. Ct. 1800 (2018), that "the *China Agritech* decision . . . undermines the policy arguments that underlie [the] insistence [of Plaintiff-Appellant, Kevin McCabe ('McCabe')] that *Giovanniello* [*v. ALM Media, LLC*, 726 F.3d 106 (2d Cir. 2013)] should have come out the other way or should somehow not apply to this case," Def. Br. at 32, and that, "in particular, to the extent [that] Mr. McCabe's argument relies on the 'rationale' behind *American Pipe* [*& Constr. Co. v. Utah*, 414 U.S. 538 (1974)] tolling of avoiding 'a needless multiplicity of actions' from class members seeking to preserve their *individual* claims with 'protective' filings, that argument was *squarely rejected by the Court*." *Id.* at 32-33 (emphasis added). However, Lifetime then belies (or, at least, hints at) the plain dishonesty of its argument by noting that, "[s]pecifically," *id.* at 33, the Court was focused on "'successive *class* suits.'" *Id.*, quoting *China Agritech*, 138 S. Ct. at 1810 (emphasis added).

China Agritech, of course, concerned the invocation

of *American Pipe* tolling in the asserting of *class claims only*. If, as Lifetime contends, the reasoning of *China* **[p.2]** *Agritech* were applicable to *individual* claims, then *China Agritech* would thereby have rescinded *American Pipe* tolling altogether, for there would then have been nothing left of it. Of course, as Lifetime surely knows, *China Agritech* did no such thing. *See Practice Mgmt. Support Services, Inc. v. Cirque du Soleil Inc.*, No. 14-cv-2032, 2018 WL 3659349, *3 (N.D. Ill. Aug. 3, 2018) ("*China Agritech* . . . dr[e]w[] a *clear distinction* between successive *individual* suits and successive *class* actions" (emphases added)); *Lindblom v. Santander Consumer USA, Inc.*, No. 15-cv-00990, 2018 WL 3219381, *3 (E.D. Calif. June 29, 2018) ("*China Agritech* leaves *undisturbed* the proposition that [putative class members] may still benefit from *American Pipe* tolling in pursuit of their *individual* claims" (emphases added)); *Dormani v. Target Corp.*, No. 17-cv-4049, 2018 WL 3014126, *2 (D. Minn. June 15, 2018) ("[a]s . . . made clear in *China Agritech*, . . . the efficiency rationale for tolling a limitations period in individual actions—namely, *to reduce unnecessary filings—does not translate* to *class* claims" (emphases added)).

Lifetime, apparently not content with its blatantly transparent attempt to deceive this Court as shown above, inexplicably (or, at least, inexcusably) continues its line of attack in a footnote, claiming, in support of its contention that *China Agritech* bears on *American Pipe* tolling with respect to *individual* claims, that, "*China Agritech* undermines [the] argument [by Plaintiff-Appellant, Kevin McCabe ('McCabe')] . . . that

'Reliance is Not a Condition of *American Pipe* Tolling' . . . [and] [McCabe's] **[p.3]** criticizing *Giovanniello*'s discussion of class members' 'objectively reasonable reliance' on a lead plaintiff to represent their interests until class status is denied." Def. Br. at 33, n.15.

According to Lifetime, McCabe's "reliance" argument has been undermined because: first, *China Agritech* explained that, "'to *benefit from equitable tolling*, plaintiffs must *demonstrate* that they have been *diligent* in pursuit of their claims,'" Def. Br. at 33, n.15, quoting *China Agritech*, 138 S. Ct. at 1808 (emphases added); second, *China Agritech* noted that "the *American Pipe* Court 'observed that tolling was permissible in the circumstances because plaintiffs who later intervened to pursue *individual* claims *had not slept on their rights*,' and had '*reasonably relied* on the *class representative*, who *sued timely*, to *protect their interests in their individual claims*,'" *id.*, quoting *China Agritech*, 138 S. Ct. at 1808 (emphases added); and, third, "*China Agritech* observed that '[a] *would-be class representative*' who, like Mr. McCabe here, 'commences suit *after expiration of the limitation period* … can *hardly qualify as diligent* in *asserting claims and pursuing relief*,' and therefore *could not benefit from tolling*." *Id.*, quoting *China Agritech*, 138 S. Ct. at 1808 (emphases added; ellipsis by Lifetime).

China Agritech, in making the points that Lifetime claims to have undermined McCabe's "reliance" argument, cited to the very case, *i.e.*, *American Pipe*, that was the source of that argument; and the entire quotation from *China Agritech* (rather than **[p.4]** the

partial quotation that Lifetime provides) is as follows:

> *Ordinarily*, to benefit from *equitable tolling*, plaintiffs must demonstrate that they have been *diligent* in pursuit of their claims. Even *American Pipe*, which did not analyze criteria of the formal doctrine of equitable tolling in any direct manner, observed that tolling was permissible in the circumstances because plaintiffs who *later* intervened to pursue individual claims *had not slept on their rights*, *American Pipe*, 414 U.S., at 554-555. Those plaintiffs *reasonably relied on the class representative*, who sued timely, to protect their interests in their individual claims. *See Crown, Cork* [*& Seal Co. v. Parker*], 462 U.S. [345] at 350 [(1983)]. A *would-be class representative* who commences suit after expiration of the limitation period, however, can *hardly qualify as diligent* in asserting claims and pursuing relief. Her interest in *representing the class as lead plaintiff*, therefore, *would not be preserved by the prior plaintiff's timely filed class suit*.

China Agritech, 138 S. Ct. at 1808 (emphases added; citations and quotation marks omitted). *See also id.* at 1810-1811:

> Any plaintiff whose *individual claim* is worth litigating on its own *rests secure in*

> *the knowledge* that she *can avail herself* of *American Pipe* tolling *if certification is denied to a first putative class*. The plaintiff who seeks to preserve the ability to *lead the class*—whether because her claim is too small to make an individual suit worthwhile or because of an attendant financial benefit—has every reason to file a *class* action *early*, and *little reason to wait in the wings*, giving *another plaintiff* first shot at *representation*.

(emphases added; footnote omitted).

Notwithstanding that Lifetime pretends that, with respect to diligence in the sense of a requirement to file an action within the *original*, *i.e.*, *non-tolled*, statute-of-**[p.5]**limitations period, *China Agritech* indicated that such requirement applies to *individual* claims, Lifetime itself acknowledges that *China Agritech* "held that '*American Pipe* does not permit the maintenance of a follow-on *class action* past expiration of the statute of limitations'— . . . regardless of the basis for denying certification." Def. Br. at 3, quoting *China Agritech*, 138 S. Ct. at 1804 (emphasis added); *see also id.* at 31-32 ("*China Agritech* . . . held that '*American Pipe* does not permit a plaintiff who waits out the statute of limitation to piggyback on an earlier, timely filed *class action*,'" quoting *China Agritech*, 138 S. Ct. at 1804 (emphasis added)).

China Agritech did not change the principle, with

respect to the requirement that a putative class member be "diligent" (instead of "sleeping on his rights") by "relying" upon the putative class action in order to bring an action on his *individual* claims pursuant to *American Pipe* tolling, that such requirement is *ipso facto* satisfied by the commencement of the putative class action *regardless* of whether the putative class member is *even aware* of that action. In this sense, the "diligence," or "reliance," requirement is, in effect, an irrebutable presumption. Were this requirement to apply to the *actions* of a putative class member (as opposed to applying to matters of timing only), one might wonder how a district court would determine, with regard to multiple plaintiffs who sought to invoke *American Pipe* tolling in filing individual actions, who among such plaintiffs had satisfied the requirement and were therefore entitled to benefit from *American Pipe* tolling, and who among them had not satisfied the **[p.6]** requirement and were therefore *not* entitled to so benefit. Unsurprisingly, Lifetime cites not a single case giving any indication that such a determination is required, much less how it might be made.

POINT II

PLAINTIFF'S RELIANCE UPON VARIOUS CASES WAS WELL FOUNDED

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[p.8]
D. *Jimenez v. Weinberger*,

Lifetime seeks to undermine McCabe's discussion of *Jimenez* by claiming that "the Seventh Circuit just last year reaffirmed its 'emphatic' *holding* that 'the limitations clock immediately'—and 'automatic[ally]'—'starts ticking' when the district court denies certification." Def. Br. at 27, n.13, quoting *Collins v. Village of Palatine*, 875 F.3d 839, 843-844 (7th Cir. 2017) (emphasis added). First, "[t]he question [in *Collins* was] whether a dismissal with prejudice . . . strips a case of its class-action character," *Collins*, 875 F.3d at 841; the question was *not* whether *American Pipe* tolling continues during the pendency of an appeal. Thus, the supposed "holding" of *Collins* was not a holding, but dicta. Indeed, the sole source that *Collins* cited in support of that dicta was also dicta. That is, *Collins*, in stating that "'[r]esumption is automatic,'" *id.* at 844, was quoting *Lewis v. City of Chicago*, 702 F.3d 958, 961 (7th Cir. 2012); and, in *Lewis*, as in *Collins*, the issue was not whether *American Pipe* tolling continues during the pendency of an appeal. Indeed, the issue in *Lewis* did not even concern the statute of **[p.9]** limitations, but, rather, "the *discretionary* standard for timely *intervention*," *Lewis*, 702 F.3d at 961 (emphases added); and the court found as follows: "although the district judge stated that the class had been modified in 2007, we cannot find an order modifying the class definition. More than that, we cannot find an order defining the class in the first place." *Id.* at 962.

Second, in dicta, *Lewis* stated:

> *If* the class definition *had been* modified in 2007, *then* the right question to ask would concern the *statute of limitations*, not the *discretionary standard for timely intervention*. Once a suit is filed as a class action, the statute of limitations is tolled until the district judge declines to certify a class, or certifies a class that excludes particular persons. *A decision against certification, or a limited certification, ends the tolling and the time resumes running*. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). *Resumption is automatic*; neither *American Pipe* nor *Crown, Cork & Seal* suggested that it depends on *anyone's knowledge* that class certification had been denied or the scope of a class limited.

Id. at 961 (emphases added). Not only was *Lewis* without occasion to address the question of whether *American Pipe* tolling continues during the pendency of an appeal, but even the dicta concerned a different issue, *i.e.*, whether *American Pipe* tolling ceases with respect to only those putative class members who are aware of the denial of class certification. Moreover, the same court, in *Collins*, recognized that neither *American Pipe* nor *Crown, Cork & Seal* "'addresses whether tolling continues during the *pendency of an appeal* after the suit is *dismissed or class certification*

is denied.'" **[p.10]** Bank Br. at 9-10, quoting *Collins*, 875 F.3d at 843 (7th Cir. 2017) (emphases by Bank).

POINT III

DEFENDANT'S COUNSEL SHOULD BE SANCTIONED FOR MAKING, IN DEFENDANT'S MOTION FOR SANCTIONS, NUMEROUS MISREPRESENTATIONS AND UNFOUNDED ATTACKS AGAINST PLAINTIFF AND HIS COUNSEL

Lifetime contends: "[a]lthough Mr. McCabe claims [that] the record is replete with Lifetime's misstatements and mischaracterizations of the record, his brief on this appeal does not point to a single one. And his motion below was based largely (if not entirely) on the reasons [that] Mr. McCabe believed [that] sanctions against his counsel were not warranted." Def. Br. at 46.

First, far from McCabe's "motion [having been] based largely (if not entirely) on the reasons [that] Mr. McCabe believed [that] sanctions against his counsel were not warranted," Def. Br. at 46, it was based largely upon the blatant misrepresentations that Lifetime made in seeking sanctions, in *addition* to McCabe's argument that Lifetime's request for sanctions was *itself* frivolous (which is why, with respect to those misrepresentations, McCabe argued that they should be addressed on remand in view of Judge Bulsara's having not addressed them, *see* McCabe Br. at 40). In McCabe's memorandum of law in

support of his motion (Dkt. No. 26), *each* of the reasons why McCabe argued that "Defendant's Counsel Should Be Sanctioned for Making a Frivolous Request for Sanctions Against Plaintiffs's Counsel" (Point I **[p.11]** heading at 1 (original in all capitals)) concerned Lifetime's multitude of false and misleading representations, rather than Lifetime's request for sanctions *itself*. The same is true of most of McCabe's reply memorandum of law (Dkt. No. 29).

Lifetime notes that McCabe stated that "'*[m]any* of the reasons why Lifetime's motion for sanctions should be denied also supported sanctions *against* [(emphasis by McCabe)] Lifetime,'" Def. Br. at 46, quoting McCabe's reply at 1-2 (emphasis added): *many*, not *most*. Thus, Lifetime's critique that, "Mr. McCabe offers no basis to find that the district court abused its discretion in denying a motion for sanctions that was based on the supposed frivolousness of a motion that the court granted," Def. Br. at 46, is misleading because it ignores the fact that Judge Bulsara clearly did not address the many points that McCabe made that were *not* based upon the notion that Lifetime's request for sanctions was *itself* frivolous.

Lifetime does not, and cannot, cite to any portions of the oral-argument transcript showing that Judge Bulsara addressed any of Lifetime's many misrepresentations, which McCabe addressed during that hearing. *See*, *e.g*, Transcript of Oral Argument before Magistrate Judge Sanket J. Bulsara, dated December 12, 2017 ("*McCabe* Tr."), at 96:19-25 (A-255) (Mr. Bank: . . . I would ask at least rhetorically if there

was anything in [McCabe's] 70 or 80 or 90 pages of briefs . . . that is even arguably false or misleading or less than completely forthright. The defendant's papers are chock-full of those kinds of remarks and incorrect descriptions of case law. Blatantly false descriptions of facts.").

[p.12] CONCLUSION

The following should be vacated: (i) that part of the Order of District Judge Edward R. Korman of the Eastern District of New York, dated, and entered with the clerk on, March 26, 2018, that adopted the recommendation, issued by Magistrate Judge Sanket J. Bulsara in a Report and Recommendation, to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and (ii) that part of the Order that adopted the Magistrate Judge's recommendation to deny Plaintiff-Appellant's motion for sanctions against counsel to Defendant-Appellee; (iii) that part of the Judgment, dated and entered with the clerk on March 27, 2018, that ordered and adjudged that Defendant-Appellee's motion to dismiss the Complaint is granted; and (iv) that part of the Judgment that ordered and adjudged that Plaintiff-Appellant's motion for sanctions against counsel to Lifetime is denied.

Further, Plaintiff-Appellant should be granted such other and further relief as authorized by law.

Dated: September 7, 2018

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 18-1149
[Doc. No. 70]

Kevin McCabe,

Plaintiff-Appellant,

TODD C. BANK,

Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

REPLY BRIEF OF TODD C. BANK

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[p.1] ARGUMENT

POINT I

THE DISTRICT COURT ABUSED ITS DISCRETION

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[p.7]
D. Plaintiff Cited Numerous Authorities in Support of His Position, But a Party That Presents Reasonable, *i.e.*, Non-Frivolous, Arguments, Especially, and Indisputably, When Those Arguments Have Not Been Foreclosed, or Even Addressed, by the Supreme Court, is Not Precluded From Making Such Arguments Even in the Absence of Supportive Authority

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[p.9] . . . McCabe explicitly stated that his arguments were presented in order that they would be preserved for appellate review in the event that the District Court were to find that *Giovanniello* is a binding precedent that precludes McCabe's claims. *See* Bank Br. at 8-9; McCabe Br. at 14-15 (Lifetime repeats the incorrect assertion that "Mr. McCabe's counsel 'conceded at oral argument' . . . [that] this Court's decision in *Giovanniello*[] . . . 'forecloses any tolling after the denial of certification.'" Def. Br. at 11, quoting R&R at 15 (A-133). *See* Bank Br. at 28-30 (Bank's refutation, the points of which Lifetime does not

address).

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[p.12] Given the reasonableness of McCabe's arguments, Lifetime's claim that McCabe did not make any "'nonfrivolous . . . arguments for extensions, modifications, or reversals of existing law,'" Def. Br. at 43, quoting *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994), reflects a gross (or, it seems more likely, feigned) misunderstanding of the nature of a frivolous argument and ignores a party's rights to preserve arguments for appellate review before courts that have *not* foreclosed, or even addressed, those arguments. Indeed, a party is not even precluded from asserting arguments against *contrary Supreme Court precedent*, as explained in *Holmes v. F.E.C.*, 823 F.3d 69 **[p.13]** (D.C. Cir. 2016), which, in addressing the certification of certain cases to circuit courts, discussed Rule 11 using reasoning that is applicable here:

> [W]hat may appear to be "settled" Supreme Court constitutional law sometimes turns out to be otherwise. *McCutcheon* [*v. F.E.C.*, 572 U.S. 185 (2014)] and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), may be seen as examples of the Court disagreeing with "settled law" in the context of federal[-]campaign[-]finance law. The dissenters in both cases certainly thought so. *See McCutcheon*, 572 U.S. at 233 (Breyer, *J.*, dissenting)

("Today a majority of the Court overrules [the Court's previous] holding."); *Citizens United*, 558 U.S. at 394 (Stevens, *J.*, concurring in part and dissenting in part) ("The majority's approach to corporate electioneering marks a dramatic break from our past."). These cases, and others, illustrate an important point not captured in the "settled law" idea: it is *entirely possible to mount a non-frivolous argument against what might be considered "settled" Supreme Court constitutional law*. The Federal Rules of Civil Procedure specifically recognize such a prospect. Under *Rule 11(b)(2)*, attorneys may not be sanctioned for presenting a "*nonfrivolous argument* for *extending*, *modifying*, or *reversing* existing law...." . . . .

We therefore do not think [that] a district court may decline to certify a constitutional question simply because the plaintiff is arguing against Supreme Court precedent *so long as the plaintiff mounts a non-frivolous argument in favor of overturning that precedent*. That the plaintiff will be fighting a *losing battle in the lower courts* does *not necessarily make the question* "*obviously frivolous*," *or* "*wholly insubstantial*," or "*obviously without merit*." *Shapiro* [*v. McManus*,] --- U.S. ---, 136 S.Ct. [450] at 456 [(2015)].

> The plaintiff *has to raise the question to ensure that it is preserved for Supreme Court review*. *See Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

Id. at 73-74 (emphases added; footnote omitted).

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[p.22] . . . Lifetime also claims that, "[t]he message at issue, which lasted a mere twenty seconds, was intended to inform then-current Time Warner Cable subscribers in New York City that the Lifetime television network was moving to a new position in the Time Warner Cable channel line-up," Def. Br. at 1, adding that, in *Leyse I*, "[t]he district court denied class certification," *id.* at 1-2, but, again, not noting that the ruling also denied Lifetime's motion for summary judgment. *See Leyse*, 2015 WL 5837897, *3-*5. Moreover, although Lifetime might have **[p.23]** *intended* to reach Time Warner Cable customers, calls to whom were not lawful in any event (*see Leyse I*, Pl. Reply Br. (2d Cir. No. 16-1133, Doc. No. 105) at 63-64, n.7), Lifetime called random households all throughout New York City, where Time Warner provides service, without taking any measures to ensure that the calls were made to households that subscribed to Time Warner Cable service, *see id.* at 58-62, nor that those among such households received the Lifetime television network (*see Leyse I*, Pl. Mem. in Opp. to Mtn. for Summary Judgment (Dkt. No. 76) at 21); for example, neither the plaintiff in the *Leyse* actions, nor his household, subscribed to (or otherwise received)

Time Warner Cable service. *See Leyse I*, Pl. Reply Br. at 45; *Leyse I*, Exh "A" to Declaration of Sharon L. Schneier in support of Lifetime's Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification (Dkt. No. 78-1) at 11)).

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[p.25]

I. As Before the District Court, Defendant Makes Blatant Misrepresentations to This Court

Lifetime claims that this Court "gave Mr. Bank considerable leeway . . . in allowing Mr. Bank to file multiple briefs[] to assert and justify his position." Def. Br. at 40 (emphasis added). It is incredible that Lifetime makes this claim despite Bank and McCabe's having very clearly explained that each had the *right* to submit his own brief, *see* Motion dated June 5, 2018 (Doc. No. 32), an explanation with which this Court, in granting the Motion, presumably agreed. *See* Order dated June 21, 2018 (Doc. No. 41).

Lifetime also claims that, "[t]he [District] Court gave Mr. Bank considerable leeway . . . to assert and justify his position, both through submission of *overlong briefs* and oral argument at an extended hearing." Def. Br. at 40 (emphasis added). This is not the first time that Lifetime has falsely stated that McCabe submitted an oversized brief in the District Court. *See* McCabe's Reply Memorandum of Law in Support of McCabe's Motion for Sanctions ("Pl.

Sanctions Reply Mem."; Dkt. No. 29) at 2. Thus, Lifetime's counsel would apparently have this Court believe that they neither read Judge Korman's individual rules nor McCabe's refutation of their same false accusation before the District Court. Neither of these omissions, of course, is plausible or defensible.

[p.26] Judge Bulsara, for his part, disapproved of the length of McCabe's brief in opposition to Lifetime's motion for dismissal and for sanctions ("Pl. Opp. Mem."; Dkt. No. 20), perhaps reflecting the fact that, at the time of the oral argument before Judge Bulsara, his own rules contained an unusually strict page limit, *i.e.*, 20 pages (since changed to 25). *See* Transcript of Oral Argument before Magistrate Judge Sanket J. Bulsara, dated December 12, 2017 ("*McCabe* Tr."), at 86:15-16 (A-245) ("I can't say you violated any rule *but why* [did] you file[] *65, 70-page briefs* in this case?" (emphases added)). McCabe, however, had filed only *one* brief, not *multiple* briefs, that was longer than *18 pages* (the 18-page brief having been McCabe's Reply Memorandum of Law in Support of Motion for Sanctions), and that brief, *i.e.*, McCabe's Opposition Memorandum of Law, was 55 pages, not "65 [or] 70 page[s]."

[p.27] CONCLUSION

The following should be vacated: (i) that part of the Order of District Judge Edward R. Korman of the Eastern District of New York, dated, and entered with the clerk on, March 26, 2018, that adopted the recommendation, issued by Magistrate Judge Sanket

J. Bulsara in a Report and Recommendation, to impose sanctions upon Todd C. Bank; (ii) any part of the Order that this Court interprets as having adopted the Magistrate Judge's recommendation to impose costs upon Todd C. Bank; (iii) that part of the Judgment, dated, and entered with the clerk on, March 27, 2018, that ordered and adjudged that sanctions upon Todd C. Bank are granted; and (iv) any part of the Judgment that this Court interprets as having ordered and adjudged that costs upon Todd C. Bank are granted.

Further, Todd C. Bank should be granted such other and further relief as authorized by law.

Dated: September 7, 2018

s/ *Todd C. Bank*
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APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-1149

Kevin McCabe,

Plaintiff-Appellant,

TODD C. BANK,

Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

TRANSCRIPT OF ORAL ARGUMENT

January 9, 2019, at 40 Foley Square,
New York, New York 10007, Room 1703

JUDGE POOLER: The next case on our calendar is Todd C. Bank and Kevin McCabe versus Lifetime Entertainment Services. Thank you. Mr. Bank.

MR. BANK: Good morning. The bulk of McCabe's *Giovanniello*-related arguments concern the reasoning

of *Giovanniello*, and thereby preserved those arguments for appellate review before this Court and/or the Supreme Court, in the event that the District Court found that *Giovanniello* foreclosed McCabe's claims. And if this panel were to find that *Giovanniello* foreclosed McCabe's claims, then McCabe, having made those arguments again in his briefs before this Court, would thereby have preserved those arguments for review by an *en banc* panel of this Court, or the Supreme Court, neither of which wd be bound by *Giovanniello*.

JUDGE POOLER: He'll be bound by *American Pipe*, though.

MR. BANK: They would be bound by *American Pipe*.

JUDGE POOLER: Isn't that the dispositive answer to this question?

MR. BANK: No. As the Seventh Circuit recognized in the *Collins* case of 2017, *American Pipe* and *Crown, Cork* - neither of those two cases addressed the issue of whether *American Pipe* tolling continues, or may continue, after a district court's initial denial of certification. Those courts dealt with initial denials of certification by a district court, but the issue as to whether, as to whether such tolling continues, or, again, may continue, after that denial simply wasn't before the court. Again, *Collins* explicitly stated that issue had not been resolved in either *American Pipe* or by *Crown, Cork*. Now, Judge Bulsara stated that, quote, all Mr. Bank does is argue that *Giovanniello*

does not apply to this case, which is simply not true. That was actually a small portion of the arguments that I presented on behalf of Mr. McCabe, drawing distinctions or, I should say, one distinction, which is in the briefs, between the facts at issue here and the facts at issue in *Giovanniello* Judge Bulsara stated that I - referring to me - that I simply argued - was arguing and rearguing on the basis of irrelevant, immaterial, and baseless distinctions as to why the case should not apply to me, even though he should have said McCabe, being that McCabe was the plaintiff. And Judge Bulsara said that no reasonable attorney could find any room in *Giovanniello*'s bright-line test, and added that Mr. Bank also just rehashes arguments that he made when arguing *Giovanniello*, and that you simply cannot - Judge Bulsara stated - you simply cannot, under the guise of preserving arguments, reargue the same position over and over again. But the making of arguments that were presented to the *Giovanniello* panel and rejected by that panel is the very essence of preserving arguments for review. The very purpose - the very nature - of preserving arguments for review is that those arguments have already been rejected; that's by definition - there wouldn't be anything to preserve otherwise. But Judge Bulsara made - it simply didn't make any sense. He did not say - in fact quite the opposite - he did not say that the arguments that McCabe, or if you want to say I, made were substantively frivolous, which I addressed during the oral argument using an extreme hypothetical, just to make my point, mind you. He said - he actually - Judge Bulsara actually stated the opposite. He said, but for

Giovanniello, the arguments that I presented would have had, or likely would have had, some merit - I forget the exact words - some merit, some utility, some, some other similar word. He did not address the substance of my arguments; and, again, he acknowledged that the arguments were meritorious. Well, if that's the case, how is it even logical, how is it even logical that Judge Bulsara can say you've made intellectually decent arguments - whether he might - I don't know - I don't know if he even agreed with me. Maybe he did. I really don't know. He didn't say. You've made intellectually respectable arguments the *en banc* Court here, and the Supreme Court, have never addressed, much less rejected those arguments, but you can't make them. That's - essential he ruled that McCabe - and, again, he seems to focus on me, Judge Bulsara did - that McCabe and I simply did not have a right to preserve arguments; but he never gave a reason. Yes, *Giovanniello* rejected the arguments. That's why we had to preserve them. And, again, most of the briefs before the District Court and this Court were for that exact purpose. And we cited numerous cases that supported our position, some of those cases which were exactly on point, saying that, by logic - by the logic of - *American Pipe* and the purposes of *American Pipe* tolling, that it doesn't make any sense to say that tolling stops upon an initial denial of certification. And the reasoning made sense - why would. Just like - just like tolling initially, let's say tolling up to the initial denial of certification, as opposed, as opposed to no tolling at all. Well, let's say there were no tolling at all. Now, now, putative class members bring claims, and, if certification is granted,

they've wasted their time. Well, isn't that the same vis-à-vis an appeal? If a person - if a putative class member - say, a week after a district court denies certification, brings his own action; well, if there's now an appeal, and that appeal reverses the denial, then the action was just a waste of everybody's time: the defendant, the plaintiff, and the court. And, and that's why, in one of the cases that we cited - *Davis* - the court specifically said that the defendant argues that tolling should continue only on appeal - only if the court reverses the denial. The court said, quote, that argument has no merit. Well, that's what I've argued. And, again, the fact that *Giovanniello* - or assuming it to be a fact - rejected that argument just goes back to the question of whether Judge Bulsara was correct in saying that he - I or McCabe - did not have the right to preserve arguments that, in substance, were not frivolous - even debatably frivolous. And one of - the only retort, I guess - to our distinction between the facts at issue here and in *Giovanniello* is that Judge Bulsara stated that the denial of certification would more strongly serve to notify putative class members that they would need to file their own actions. And my response to that is: why would a denial of certification more strongly serve that purpose, than, as in *Giovanniello* a case that was dismissed outright? In any event, we didn't focus on that. We focused on the fact that, had *Giovanniello* been decided the other way, the result would have been not one tolling period, but two - two tolling periods: one from the decision - from the initial denial, I'm sorry - from the dismissal, a little confusing, these cases - from the dismissal of the action all the way through the appeal; and then, if the appeal

is successful and the case is remanded, from that time, again, until the initial - or an initial - denial of certification. It's fine that Judge Bulsara didn't agree with that reasoning, but there is case law that supports it, some of which Judge Bulsara said incorrectly, in our view, was abrogated. But again, that goes back to one of Judge Bulsara's very clear misunderstandings. He said we didn't have the right to cite what he referred to as no longer - 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.

JUDGE POOLER: What if it's been abrogated? How could it be cited for the--

MR. BANK: For its - I'm sorry - for its reasoning. Yes, I have - in the briefs, we talk about that a case that has been overruled or abrogated, or what have you - unless it's a binding case, of course. If it's from the Eighth Circuit, for example, it can be cited. This Court has, many times - and we cite examples in the brief of saying we disagree with our sister circuit; we actually agree with the district-court decision that that circuit overturned and we will follow the district-court decision. I mean, again, I don't know - I don't have memorized all the citations in the brief, but, yes, persuasive authority is authority or reasoning, it could be a law-review article, which is not even authoritative in any legalistic sense. It's just some somebody's opinion. One can cite anything for its reasoning. That fact that it --

JUDGE POOLER: But you can't make up authority if it doesn't exist.

MR. BANK: No, again, well, we're talking about non-binding - non-binding authority. The term - the very term authority is really a term of art. What the Eighth Circuit does in this - I'm using the Eighth Circuit as an example - does - as for this Court, it's not authoritative either way. It might be influential, and that's the key: influential. If this - like I - like I said a moment ago--

JUDGE RAGGI: I'm saying, we can't rely, or you couldn't rely, on a Southern District case that had been abrogated or reverse by this Court, but you can rely on a Northern District of Ohio case that's been reversed by the Sixth Circuit.

MR. BANK: Well, absolutely, yes to the latter; and, to the former, yes in the context of preserving an argument for further review. Obviously, the reason I did not ask - or that McCabe did not ask- the District Court to overturn *Giovanniello* - and it's the same reason why I'm not standing here asking this panel to overturn *Giovanniello* - is because we can't. The District Court and this panel is bound by *Giovanniello*. To the extent that our arguments challenge *Giovanniello*, I recognize that it would be futile to ask this Court or the District Court --

JUDGE RAGGI: I'm not sure about that. I mean, once a case has been abrogated or reversed by a circuit, it basically has no life. You can make the argument if you want. You can adopt their reasoning. But the fact

that a reversed decision, or an aggregated decision, was once out there - I don't think gives you any good-faith basis to think that your - your position is plausible.

MR. BANK: Again, this - are you referring to courts within this circuit or outside?

JUDGE RAGGI: No, you're here challenging the fact that you got sanctioned, right?

MR. BANK: Right.

JUDGE RAGGI: And that's what this argument is about - that you had a good-faith basis for making these arguments because there were these lower-court cases, even though they've gotten reversed or abrogated.

MR. BANK: Not - not all. But okay. But let's say they did for the sake of discussion. Okay. JUDGE RAGGI: Right. And I'm suggesting to you that I don't see where an attorney has a good-faith basis in law for a particular position based on a lower-court decision that was abrogated or reversed by a different circuit.

MR. BANK: OK. I'll --

JUDGE RAGGI: You - as I said, you can make the argument. I mean, if you want to adopt the rationale of any number of reversed cases, but I don't think you can say, well, I - I have a good-faith basis to think there's legal support for this position.

MR. BANK: Because - because, again, and I think that's where the confusion is. I want to be - I want to be as precise as I can, because this is such a - a - to me, a very fundamental issue of how the whole system works, which is this: an out-of-circuit decision, be it one that's currently good law within that circuit, or that's been abrogated or overturned in that circuit - it's not, in any way, the law in this circuit. It's the reasoning. And, again, I gave - I provide examples in the brief where this Court followed district courts in other circuits that had been abrogated. This - how can I not cite them?

JUDGE LIVINGSTON: Looking at one particular sentence or two in the magistrate judge's opinion, you keep referring to preserving argument for further review and persuasive authority. I agree with you. You can cite persuasive authority, you can argue for a change in the law. But what's the basis - I think the magistrate judge pointed out there's no dissent in *Giovanniello*. No circuit has a contrary rule. No scholar is cited who disagrees with its principle. So I think the judgment is made that you could preserve an argument for further review, but what's the basis for thinking - you only do that if you think you're going to - you have some basis for believing you might prevail.

MR. BANK: Again, there are a number of cases that we talked about - *Davis* just a top-of-my-head example - that have held the other way. Not all those cases, by the way, were abrogated. Judge Bulsara, and this Court in *Giovanniello*, said that eight other circuits agree with *Giovanniello* when the answer was only

three of them, and five of them dealt with it in dicta. But again, let's say, like in the *Central Bank of Denver* case, when every single circuit had ruled a certain way in whatever the issue was - I think was 11 out of 11 circuit had addressed the issue ruled a certain way, and the Supreme Court went the opposite way. But again, we have a history of cases, not all of which were abrogated. But even if they had been, unless, unless the - it - to me it makes no sense to say that the law - and, and again, we - I cited a Southern District case, I think, from 2017, *Rubenstein*, when the judge said the plaintiff, or one of the parties, was making an argument that was defeated all over the country, different circuits, what have you, but the argument was not - I don't know the exact wording - but the arguments were not substantively frivolous, and, therefore, even though it's a long shot, and even though - even though - pardon me - even though those arguments were foreclosed in the district court, they can still be made. How - how does it --

JUDGE POOLER: You've reserved three minutes for rebuttal?

MR. BANK: Yes.

JUDGE POOLER: You can use it now or you can preserve it.

MR. BANK: I'll wait. Thank you.

JUDGE POOLER: Okay, thank you. We'll hear from Lifetime Entertainment.

MS. SCHNEIER: Thank you, your honor. Sharon Schneier for the Appellee, Lifetime Entertainment. I think it - it bears re-emphasizing what this Court said in *Giovanniello*. In *Giovanniello*, the Court was very clear that it established a bright-line rule that applies regardless of the basis for the denial of certification; and even, as in that case, if certification had not been reached. Frankly, I'm not sure I quite understand Mr. Bank's efforts to distinguish this situation - the McCabe situation - from *Giovanniello*. His claim - his individual claim - is clearly time-barred. And by the way, under *China Agritech*, there's no question that the class claim is time-barred. So the only thing we're talking about is whether *Giovanniello* applies in this case. And, I think as Judge Bulsara found, and as this Court made very clear in *Giovanniello*, which Mr. Bank argued - and, as he conceded before Judge Bulsara, he made the same arguments before the Court here as he made before this circuit. The judge - and Judge Raggi - sat on that panel in 2013, when this Court applied the bright-line rule. Mr. Bank had every opportunity then to appeal the decision and sought *en banc* review. This court denied *en banc* review; he had the opportunity to seek cert in that case as well. I don't understand how he could claim that that case is not completely applicable here. And what Judge Bulsara found, correctly, is that Rule 11, by its terms, provides a litigant the opportunity to argue that there should be a change or reversal in the law, but the statute - but the rule itself provides that that argument has to be a non-frivolous argument, and that is an objective standard of reasonableness. There is nothing that Mr. McCabe presented below that was not considered and

argued before this panel - this Court in *Giovanniello*. He conceded that it was the same arguments that had been made before that were being presented here. So Rule 11's frivolous standard at which, as I said, is an objective one, has to have some meaning. Otherwise, sanctions can never be appropriate. You're giving a lawyer the opportunity in the face of binding clear, bright-line precedent to say: I know I lost below; I know the Second Circuit didn't grant *en banc* review, but I'm still entitled to make the exact same arguments when there has been no change in the law. And, in fact, to the extent he points to the Seventh Circuit, the Seventh Circuit couldn't have been clearer. It says, as a general manner - matter - the consensus view among the circuits is that once certification is denied, the limitations clock immediately - and the Seventh Circuit provides emphasis there - starts ticking again; we've been emphatic on this point. So there has been nothing since *Giovanniello* that would give Mr. McCabe the opportunity to come back to this Court and say, hey, *Giovanniello* was wrongly decided. Essentially, you should, you know, not - it should not be applying to Mr. McCabe in this case, and that we are making non-frivolous, objective reasons why that - that case - doesn't apply.

JUDGE POOLER: And, yet, sometimes, we revisit our precedents. We have a procedure called a mini *en banc*, which you may know about, where a new case decides that a previous case of this circuit was wrongly decided. We circulate that opinion to all active judges on the Court and announce that we're changing the rule. So how does Mr. Bank get access to that process

if he can't even apply?

MS. SCHNEIER: Well, he did not seek *en banc* review. He did not argue below, and is not arguing here, that that is what he's seeking - a reversal of *Giovanniello*. He's arguing that, as I understand it, that either it doesn't apply here, and he has not cited anything since this Court's decision. And I would say that *China Agritech*, if anything, which is the Supreme Court's latest pronouncement on *American Pipe* and - and tolling in this circumstance - if anything, reaffirms the correctness of *Giovanniello* because it reaffirms in that context that there's no class action that could - that - that Mr. McCabe could file in this case - that regardless of why certification was denied below, there is no tolling. So, yes, there's always the theoretical possibility that you could argue to a circuit court that their decision from four years ago was incorrectly decided and they incorrectly did not grant *en banc* review, even though there has been nothing and Mr. - Mr. McCabe cites to nothing that would leave this Court to - to conclude that, since 2013, there has been any change in the law. And, in fact, as I said, the Supreme Court's latest pronouncement reaffirms the correctness of *Giovanniello*. And as I said, Rule - you know, in theory, you could always argue that, you know, a prior case was wrongly decided. But the standard in Rule 11, as I said, is an objective one. You have to put forth a non-frivolous argument, and the only arguments that he makes are arguments that were presented to this Court in *Giovanniello* were rejected. And there has been nothing since then that would question the objective, the objective

reasonableness, of that prior holding. And I think Judge Bulsara, you know, exercised his discretion appropriately. Judge Korman appropriately affirmed that - that finding, that in this case - the - Mr. McCabe, or Mr. Bank had provided no reasonable arguments for a change in the law. While this circuit recognizes that possibility, and I'm citing to the *Eastway Construction* case, there has to be a - a reasonable argument that can be advanced for the change in the law. And here, no such argument has been presented.

JUDGE POOLER: Thank you.

MS. SCHNEIER: Thank you.

JUDGE POOLER: Mr. Bank, what is the base - what reasonable argument can you make that *Giovanniello* was wrongly decided or that there's any basis to believe that this circuit wants to revisit that precedent?

MR. BANK: Well, the arguments about *Giovanniello* are basically that the rationales of *American Pipe* tolling don't end upon an initial denial of certification; and, again, one of the reasons, or the reason, why *en banc* review wasn't sought from the outset here - although we certainly have preserved the right to do so, which I emphasize - is because we did make a distinction between the facts in *Giovanniello*.

JUDGE POOLER: *En banc* review of *Giovanniello*?

MR. BANK: Yes, we did.

JUDGE POOLER: And it was denied?

MR. BANK: It was denied.

JUDGE POOLER: Did you seek cert?

MR. BANK: We did.

JUDGE POOLER: And it was denied also?

MR. BANK: Denied. And -and - as I'm sure this Court is well aware, denials of those two types of petitions have no meaning or no, no bearing, I should say, on the merits. I know that's one of the arguments that Lifetime emphasized, and I think Judge Bulsara as well, that those petitions were denied; but, again, and we cited in the briefs, it's black-letter law that one cannot use the denial of those petitions to - to - have any meaning whatsoever. Okay; it does not necessarily reflect on the merits - or lack thereof, if that's the case - of our arguments. But again, your honor made a point - essentially, Judge Bulsara is saying that, in light of *Giovanniello*, the - an- *en banc* panel of this Court, nor the Supreme Court in a case that began within this circuit - can never be presented. Somebody else has to take the lead.

JUDGE RAGGI: Did you present - did 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*.

MR. BANK: No, I disagree entirely, because, again, and this is - I'm frustrated because, with all due respect, it's a black-letter principle, and we cite it in the briefs - the denial of petitions for *en banc* review and *certiorari* are not to be interpreted to have any meaning whatsoever. There are - there are numerous reasons separate from the merits of - of - a position - there are numerous reasons why an *en banc* panel might, as it usually does, reject a petition. Same with the Supreme Court - that. If the Supreme Court, or this Court --

JUDGE LIVINGSTON: Your adversary says that, if we accept the implications of your argument, it amounts to saying that a position - an argument that a lawyer makes in court is never objectively unreasonable unless the Supreme Court has held precisely to the contrary, and I think you might even say, even then maybe the Supreme Court changes its mind.

MR. BANK: Well, I do cite a case in one of the briefs that says exactly that, but that's not the situation here. Again, this Court *en banc* and the Supreme Court - neither have even been presented with these arguments other than through the petitions, which

again, to use it loosely, don't count as far as this goes. I don't understand, given that we cited numerous cases and reasoning - not all of which were abrogated - but again, and I'm, I'm frustrated, your honor, with all due respect - and I mean that - I'm frustrated because this notion that - and, and again, it's right here on page 12 of - I'll call it mine, since it's my, my opening brief - on page 12, quote from Southern District court: once the decision has been filed, it's in the public domain, its influence is based solely upon readers' view of - readers' views of its merits, whether vacated or not. So let's say just for example's sake, okay, for the sake of example, let's suppose I cited a case from another circuit, a district-court case that we all agree - we might not agree - but let's say we agree that that case in that circuit is, quote, no longer good law, and this Court - or this Court, let's say, sitting *en banc* - agreed, found that - we think the - as has happened, we gave - I gave examples - this Court found that, we think that the - the Southern District of Iowa, for example, was correct, and that - I think that's in the Sixth Circuit, I think - that the Sixth 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? I included - what was reasonable today is no longer reasonable. Again, we're talking about reason, not authoritative in this - in the binding sense or even in the legalistic sense. A law-review - a law-review article is not binding in any sense. It's just someone's opinion, but if the opinion is reasonable and I quote it - I'm allowed to do that. It doesn't matter - it doesn't matter

whether nine other professors follow and they think professor number one is wrong. If the argument is substantively reasonable, then it's reasonable. And again, here - and I know your honor mentioned with the Supreme Court - yes, even a Supreme Court case, the mere existence of it - and, again, we cite examples of that, too - does not preclude someone from challenging it, but we're not even doing that. How it - to me it just makes no sense whatsoever that - that - that sanctions are even even debatable when we - when Judge Bulsara acknowledged that we have good arguments. Yes, we acknowledge, some of those arguments - the bulk - were precluded by a panel of this Court, *i.e.*, *Giovanniello*. But this notion - and, again, I - I - I'm frustrated with this.

JUDGE RAGGI: Would you --

MR. BANK: I'm sorry?

JUDGE RAGGI: Would you remind me how many of the cited cases you have post-date both *American Pipe* and *Giovanniello*? I'm just --

MR. BANK: Sure.

JUDGE RAGGI: Awful lot of them are pre-*Giovanniello* cases.

MR. BANK: Yes, I think most if not - most if not all of them are. I have --

JUDGE RAGGI: To the extent they were out there

when *Giovanniello* was decided, the time to bring them to this Court's attention was in *Giovanniello*, which I assume you did.

MR. BANK: We did.

JUDGE RAGGI: And the Court was not persuaded. So once - once you've presented your arguments to a panel of this Court and it has rejected them, I'm not sure you get to keep coming back to other panels with the same cases that are not persuaded.

MR. BANK: But again, Judge, and, and I'm frustrated because this, this is - I mean, I don't mean any disrespect - this is an absolute black - we're dealing with black-letter issues. Again - and again, I mean I don't have the citations memorized, but they're in the briefs - there is nothing to be interpreted or assumed from the denial of an *en banc* petition. If this - I suppose - I suppose if this Court - had the *en banc* - had wanted to say we think any similar application in the future would be frivolous, and *Giovanniello* is so overwhelmingly logical that it can dare not be challenged, I suppose they could have said that, but it's just - simply was - a short-order form saying we deny it, which a - this Court probably does in 99 percent of - of similar petitions. It - so , are you saying, your honor, is that - that something ought to be assumed or read from that denial and/or the Supreme Court's - okay. And the - and, and again, I'm frustrated because I've absolutely done - absolutely nothing that, in my view, is even remotely sanctionable. Judge Bulsara never said that my arguments, in substance, were frivolous.

Those arguments were never even presented to, much less rejected by, the *en banc* Court in this circuit or by the Supreme Court. I'm not allowed to make arguments that have been accepted by courts throughout the country, not all of which were - have - been abrogated? But so what even if they had been. It's the reasoning. It's the reasoning that counts. This whole system's supposed to be based on reasoning, at least when it's not - when that reasoning does not come into contact as - as binding precedent. That part I understand. But any district court or - or circuit court - like the Seventh Circuit in the *Jimenez* case, that said that tolling would have continued if there was an appeal of the cert denial; how is it even possible that I'm not allowed to cite those cases? This Court has the right to agree with them, but I - I can't cite them?

JUDGE POOLER: I see your time has long expired.

MR. BANK: Yes, I see that.

JUDGE POOLER: Thank you both.

MR. BANK: Thank you.

JUDGE POOLER: We'll reserve decision.

MR. BANK: Thank you.