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No. _____

Supreme Court, U.S. FILED DEC 29 2015 OFFICE OF THE CLERK
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IN THE
Supreme Court of the United States

EWING INDUSTRIES CORPORATION, individually and as
the representative of a class of similarly-situated
persons,

Petitioner,

v.

BOB WINES NURSERY, INC. AND ROBERT L. WINES, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Phillip A. Bock
Counsel of Record
BOCK & HATCH, LLC
134 N. La Salle Street, Ste. 1000
Chicago, IL 60602
Telephone: (312) 658-5500
Facsimile: (312) 658-5555
phil@bockhatchllc.com

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QUESTION PRESENTED

Does the prior pendency of a class action that was dismissed before reaching the merits of class certification toll the statute of limitations for absent class members to bring a subsequent *class* action?

The Eleventh Circuit below answered no, but every other United States Court of Appeals that has addressed the same issue has answered yes. *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. July 7, 2015), *petition for cert. filed*, 84 U.S.L.W. 3278 (U.S. Nov. 6, 2015) (No. 15-597); *In re Vertrue Inc. Mktg. and Sales Metal Works, Inc.*, 719 F.3d 474 (6th Cir. 2013); *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011); *Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007); *Yang v. Odom*, 392 F.3d 97, 105 (3d Cir. 2004); *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2001); *Catholic Soc. Servs. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000).

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Court's Rule 29.6, undersigned counsel states that Petitioner, Ewing Industries Corporation, has no parent corporation and that no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Ewing Industries Corporation (“Ewing”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit below (App., *infra*, 1a-10a) is reported at 795 F.3d 1324. That court’s order granting interlocutory appeal (App., *infra*, 18a) is unreported. The opinion of the district court (App., *infra*, 11a - 17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2015. Eighteen days later, Ewing timely filed its petition for rehearing en banc. 11th Cir. Rule 35-2. The court of appeals denied Ewing’s petition on October 5, 2015. App., *infra*, 19a-20a.

This petition is timely because it is being filed within 90 days of the Eleventh Circuit’s denial of Ewing’s petition for rehearing en banc. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5. This Court has jurisdiction to hear this petition under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Telephone Consumer Protection Act ("TCPA") 28 U.S.C. § 227.

Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person ...

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement ...

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission . . .

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if –

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes –

- (I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and
- (II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement . . .;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set fort pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(3) Private right of action

A person or entity may . . . bring . . .

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

STATEMENT OF THE CASE

I. Introduction.

Believing itself bound by its own prior precedent in *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994), the Eleventh Circuit held below that the prior pendency of a class action dismissed before reaching the merits of class certification can never toll the statute of limitations for absent class members to maintain a subsequent *class* action. App., *infra*, 9a-10a. In other words, there can never be “class tolling” even if class certification is never reached in the prior case. This means that absent class members must bring their own class actions within the statute of limitations while the prior case is still pending, or they will be forever barred from any collective remedy. This is contrary to every other decision by the other U.S. Courts of Appeals, and should now be reviewed and reversed by the Court.

In *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354, 103 S. Ct. 2392, 2398 (1983), and *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552, 94 S. Ct. 756, 766 (1974), the Court established that the pendency of a class action tolls the running of the statute of limitations for all absent class members until class certification is “denied.” These seminal decisions reasoned that an essential purpose of Rule 23 was to avoid a “multiplicity” of actions and to encourage efficient and uniform resolution of the entire class’s claims in one proceeding. *Crown*

Cork, 462 U.S. at 351, 103 S. Ct. at 2396; *Am. Pipe*, 414 U.S. at 551, 94 S. Ct. at 765. These opinions did not reach the precise question raised by this petition, however, because they considered subsequent individual actions after class certification was denied, not subsequent class actions when class certification had never been addressed.

Nevertheless, the rationale underlying both decisions is defeated by Eleventh Circuit's decision below. In many class actions, the only practical remedy is a collective remedy. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365, 131 S. Ct. 1740, 1761 (2011) (Breyer, J. concurring) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)). If class members cannot be rely on tolling while they await a decision on class certification in the pending class action, they will have no choice to file duplicative class actions to protect their chance for the only practical remedy available – a collective one.

The Eleventh Circuit's decision below is not only contrary to the rationale of *American Pipe* and *Crown, Cork*, but it is also "in conflict with the decision[s] of [all other] United States Court[s] of appeals on the same important matter." Sup. Ct. R. 10(a); *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W.

3278 (U.S. Nov. 6, 2015);¹ *In re Vertrue Inc. Mktg. and Sales Metal Works, Inc.*, 719 F.3d 474 (6th Cir. 2013); *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011); *Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007); *Yang v. Odom*, 392 F.3d 97, 105 (3d Cir. 2004); *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2001); *Catholic Soc. Servs. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000).

These decisions from the other circuits have held “class tolling” is permissible until a prior putative class representative loses class certification on the merits. They reasoned “class tolling” is necessary to allow the class at least one chance to seek class certification and to relieve absent class members of the necessity of filing their own duplicative class actions when no court has yet reached the issue of class certification. They also noted this does not cause endless “piggy-backing” of one class action upon another, forever tolling the running of limitations, because it recognizes that there can be no further class tolling once class certification has been denied on the merits. *Yang*, 392 F.3d at 112. This one-bite rule is a sensible and practical

¹ The petition for certiorari filed by defendant Wal-Mart Stores, Inc. in *Phipps* does not raise the same question presented as this petition. In *Phipps*, the Sixth Circuit allowed class tolling after this Court had reached the question of class certification and denied it on the merits. *Wal-mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011).

approach that properly balances the interests of defendants and absent class members while furthering the purposes of Rule 23. *See Newberg on Class Actions* § 9:64 (5th ed.) (“Thus, despite the general acceptance of the nonpiggyback rule, policy considerations militate strongly toward a narrow carve-out: extending the *American Pipe* doctrine to subsequent class claims when the district court denied class certification in the original action based solely upon Rule 23 deficiencies in the putative class representative but not in the class itself.”)

The Court should grant Ewing’s petition. The Court should resolve the conflict between the Eleventh Circuit and all other Circuits and hold that the rationale underlying *American Pipe* and *Crown Cork* allows for class tolling up to the time when class certification is denied on the merits.

II. Basis for Federal Jurisdiction in the District Court.

Ewing sued Bob Wines Nursery, Inc. and Robert L. Wines Jr.’s (“Defendants”) for sending unsolicited faxes ads to Ewing and a class in violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, App., *infra*, 21a-41a. The district court had original subject matter jurisdiction over the complaint because it alleged a violation of the TCPA. *Mims v. Arrow Fin. Servs., LLC*, __ U.S. __, 132 S. Ct. 740 (2012); 28 U.S.C. § 1331.

III. Statement of Facts.

Defendants own and operate a Florida nursery business. App., *infra*, 24a. On December 15, 2006, Defendants sent unsolicited fax ads promoting their business to Ewing and the other class members. *Ibid.*, 25a-26a, 34a. The TCPA provides a remedy of \$500 in statutory damages for the sending of an unsolicited fax advertisement. 47 U.S.C. § 227(b)(3).

IV. Course of Proceedings.

On January 12, 2010, Aero Financial, Inc. filed a class action against Defendants for violating the TCPA by conducting a fax advertising campaign to promote their businesses. App., *infra*, 2a. A four-year statute of limitations governs TCPA claims. 28 U.S.C. § 1658. The *Aero* complaint was filed three years and 20 days after Defendants sent their unsolicited fax advertisements to Aero, Ewing, and the other class members. App., *infra*, 2a.

In *Aero*, Defendants moved for summary judgment based on an alleged defect in the assignment of the claim to the named plaintiff (Aero), and the motion was granted. *Ibid.*, 42a-43a.² Neither the merits of the substantive claims nor any issues of class certification were ever ruled on in

² The Florida Circuit Court judgment was affirmed on appeal without opinion. *Aero Fin., Inc. v. Bob Wines Nursery, Inc.*, No. 5D13-2701, 145 So. 2d 859 (TABLE) (Fl. Ct. App. 5th Dist. July 22, 2014) (per curiam).

Aero. Ibid., 3a, 35a.

Ewing filed the present action on August 2, 2013, just 38 days after the *Aero* ended. *Ibid.*, 19a, 35a. Because the *Aero* class action was filed three years and 20 days after Defendants sent the unsolicited faxes, and the present action was filed no more than 38 days after *Aero* was dismissed, Ewing's individuals claims were timely filed. *Crown Cork*, 462 U.S. 345, 103 S. Ct. 2392; *American Pipe*, 414 U.S. 538, 94 S. Ct. 756.

Defendant moved to strike Ewing's class allegations on the theory that *Griffin*, 17 F.3d 356, held the statute of limitations for class claims, as opposed to individual claims, can never be tolled by a prior pending class action. The district court agreed, and on June 26, 2014, struck the class allegations from Ewing's complaint and denied Ewing's motion for class certification with prejudice. App., *infra*, 13a-15a.

Ewing petitioned for interlocutory review under Fed. R. Civ. P. 23 (f), and it was granted. *Ibid.*, 18a. The panel decision affirmed the district's court's order on August 3, 2015, finding it was bound by *Griffin* but acknowledging the many consistent and contrary decisions by its sister-circuits. *Ibid.*, 1a-10a. Ewing timely filed a petition for rehearing *en banc*, which was denied without opinion on October 25, 2015. *Ibid.*, 19a-20a; 11th Cir. R. 35-2.

REASONS FOR GRANTING THE PETITION

This petition raises a discrete but important question of class action law – whether the prior pendency of a class action that was dismissed before reaching the merits of class certification tolls the statute of limitations for absent class members to bring a subsequent *class* action.

American Pipe and *Crown Cork* established that the pendency of a class action tolls the running of the statute of limitations as to the claims of all absent class members until denial of class certification. The purpose of this rule is to discourage class members from having to intervene or file their own actions to preserve their rights by encouraging them to rely on the pending class action. *Am. Pipe*, 414 U.S. at 553; *Crown Cork*, 462 U.S. at 352-353. The policy inherent in Rule 23 is to avoid a “multiplicity of activity” and promote the “fair and efficient adjudication of common claims aggregated in one suit.” *Am. Pipe*, 414 U.S. at 551. This would be lost if absent class members must file their own suits while the first class action is still pending. *Am. Pipe*, 414 U.S. at 553; *Crown Cork*, 462 U.S. at 352-353. In light of this purpose, class members who refrain from filing their own claims should not lose their rights by their reliance on a pending class action. *Crown Cork*, 462 U.S. at 352-353.

The Third, Sixth, Seventh, Eighth, and Ninth Circuits have recognized that this purpose

underlying *American Pipe* tolling requires that absent class members get the benefit of “class tolling” where the first class action is dismissed before the merits of class certification are resolved. *Phipps*, 792 F.3d at 652; *In re Vertrue*, 719 F.3d 474; *Sawyer*, 642 F.3d 560; *Great Plains*, 492 F.3d at 997; *Yang*, 392 F.3d at 105; *McKowan*, 295 F.3d 380; *Catholic Soc. Servs. v. INS*, 232 F.3d at 1149.

These courts have reasoned that if absent class members are not assured of at least one bite of the class certification apple, they will have no choice but to file their own duplicative class actions while the first one is still pending, or risk losing their chance ever to pursue a collective action. This problem is particularly acute where, as here, the claims are small and individual actions are impractical and cost-prohibitive. *Sawyer*, 42 F.3d at 562.

As these courts have noted, the Eleventh Circuit’s rule as articulated in this case is directly contrary to the purpose of *American Pipe* and *Crown Cork* to discourage absent class members from filing their own duplicative claims. *Yang*, 392 F.3d at 106. Moreover, so long as the merits of class certification were not decided adversely to the plaintiff in the first class action, there is no prospect of endless tolling of the statute of limitations by the filing of successive class actions. *Yang*, 392 F.3d at 112.

The purpose underlying *American Pipe* thus can best be advanced by giving the class one bite at the

class certification apple and allowing “class tolling” subject to this one bite – as all the other Circuits to have addressed this have now held. *Phipps*, 792 F.3d at 647 (citing *In re Vertrue Mktg. & Sales Litig.*, 719 F.3d 474, 480 n.2 (6th Cir. 2013) (class tolling allowed where prior class action did not reach the “validity of the class”); *Sawyer*, 642 F.3d at 564 (class tolling allowed where prior class action did not find “the other criteria of Rule 23(a) and (b) could not be met”); *Great Plains*, 492 F.3d at 997 (class tolling allowed where prior case did not reach class certification); *Catholic Soc. Servs.*, 232 F.3d at 1149 (class tolling allowed where plaintiff is “not attempting to relitigate an earlier denial of class certification”); *Yang*, 392 F.3d at 104 (class tolling allowed where first class action did not deny class certification “based on a Rule 23 defect in the class itself”); see also *Newberg on Class Actions* § 9:64 (5th ed.). The “one bite” rule preserves the purpose of *American Pipe* by relieving absent class members of the need to file defensive, duplicative class actions while protecting against the prospect of endless tolling by recognizing that where the first class action reaches the merits of class certification and denies class treatment, “class tolling” ends.

The Eleventh Circuit is the only United States Court of Appeals to have established a rule contrary to the above cases and their “one bite” rule. But neither *Griffin* nor the decision Ewing now seeks to appeal addressed the soundness of the rationale underlying the decisions of the other Circuits.

The decision below merely concluded it was bound by *Griffin* and must follow it, “[T]he merits of the holding in *Griffin* are not before us. Under our prior precedent rule, a panel cannot overrule a prior panel’s holding.” App., *infra*, 9a-10a. And the only rationale articulated in *Griffin* itself was the prospect of endless tolling by successive class actions:

The *Platt* appellants contend that the district court erred in denying their motions to certify class actions. The district court held that “Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely.” We agree. “The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does *not* toll the limitations period for additional class actions by putative members of the original asserted class.” *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) (emphasis added) (citing *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass’n*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), and *cert. denied*, 493 U.S. 821 (1989); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987)). The plaintiffs may not “piggyback one class action onto another,” *Salazar-Calderon*, 765 F.2d at 1351, and thereby engage in endless rounds of litigation in the district court and in

this Court over the adequacy of successive named plaintiffs to serve as class representatives. This case illustrates the wisdom of the rule against piggybacked class actions. Fifteen years after the *Griffin* lawsuit was filed, the class action issues are still being litigated, and we decline to adopt any rule that has the potential for prolonging litigation about class representation even further.

17 F.3d at 359. But the “one bite” rule eliminates the endless tolling problem, thus eliminating the only rationale supporting the decision in *Griffin*. Furthermore, both *American Pipe* and *Crown, Cork* held that tolling continued until class certification was “denied.” 462 U.S. at 354, 103 S. Ct. at 2398; 414 U.S. at 552, 94 S. Ct. at 766. While *Griffin* was a case where a previously certified class had been decertified, it did not consider the situation where class certification had never even been addressed. 17 F.3d at 359. Thus, *Griffin* did not compel the result below and should have been harmonized with the decisions of the other circuits contrary to the result in the Eleventh Circuit’s opinion below. App., *infra*, 7a-10a; *In re Vertrue*, 719 F.3d at 480 n.2.; *Sawyer*, 642 F.3d at 564. Finally, two of the cases relied on by *Griffin* were from the Sixth and Ninth Circuits, which have since expressly rejected the application of *Griffin* applied below. *Phipps*, 792 F.3d at 647; *Catholic Soc. Servs.*, 232 F.3d at 1149.

The decision below stands alone as the only U.S. Court of Appeals decision that has held that an absent class member must file his own class action within the statute of limitations to preserve his right to obtain resolution of the question of the merits of class certification. In addition, the opinion below did not cite any precedent supporting its holding and it contains no rationale supporting its result either. Under these circumstances, this Court should review the Eleventh Circuit's outlier rule barring class tolling where the first class action never reaches the merits of class certification to bring the circuits into harmony and reaffirm the purpose underlying *American Pipe* and *Crown, Cork* to avoid an unnecessary "multiplicity" of actions when a class action is filed.

CONCLUSION

The Court should grant Plaintiff's petition so the Court can resolve the conflict between the Eleventh Circuit's holding barring all class tolling and the contrary holdings of all of the other circuits to have addressed the issue and permitting tolling.

Respectfully submitted,

Phillip A. Bock

Counsel of Record

BOCK & HATCH, LLC

134 N. LaSalle Street, Ste. 1000

Chicago, IL 60602

Telephone: (312) 658-5500

Facsimile: (312) 658-5555

phil@bockhatchllc.com