No. 14-20496

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID HOOKS,
Plaintiff-Appellant,

v.

LANDMARK INDUSTRIES, INC., doing business as Timewise Food Stores,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR PLAINTIFF-APPELLANT

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September 11, 2014

CERTIFICATE OF INTERESTED PERSONS

No. 14-20496

David Hooks,
Plaintiff-Appellant,

v.

Landmark Industries, Inc., doing business as Timewise Food Stores,
Defendant-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

David Hooks—plaintiff-appellant

All non-customers who made an electronic fund transfer, from an account used primarily for personal or household purposes, between November 12, 2010, through the date on which Defendant came into compliance with the ATM Fee posting requirements of the EFTA, at the ATM operated by Defendant at 1200 League Line Road, Conroe, Texas, and who were charged a "Terminal Fee."— putative class members

Landmark Industries, Inc. d/b/a Timewise Food Stores—defendant-appellee

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Christopher Andrew Verducci—counsel for defendant-appellee

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/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

Attorney of record for Plaintiff-Appellant David Hooks

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant David Hooks requests oral argument. This case presents an important and unresolved question in the wake of the Supreme Court's decision in *Genesis HealthCare v. Symczyk*, 133 S. Ct. 1523 (2013): Whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 can moot a named plaintiff's claim and require dismissal of a class action that has not yet been certified. In the event that these issues are not resolved in *Mabary v. Home Town Bank, N.A.*, No. 13-20211, which was argued before the Court on January 6, 2014, and in which the defendant-appellee argued as an alternative ground for affirmance that a Rule 68 offer rendered the named plaintiff's claims and the class action moot, Plaintiff-Appellant submits that oral argument would assist the Court in resolving these issues.

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STATEMENT OF JURISDICTION

Plaintiff-Appellant David Hooks filed this action on January 18, 2012, asserting claims on behalf of himself and other similarly situated persons under the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* The district court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1693m. On July 1, 2014, the district court entered an order granting Defendant-Appellee's motion to dismiss the action for lack of subject-matter jurisdiction, based on an offer of judgment under Federal Rule of Civil Procedure 68 that Mr. Hooks had not accepted. ROA.1194-1213. On the same day, the court issued a final judgment dismissing the action. ROA.1214. Mr. Hooks filed a timely notice of appeal on July 31, 2014. ROA.1215. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Does an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 to the named plaintiff in a not-yet-certified class action that, if accepted, would have provided the plaintiff the maximum statutory damages he could receive on his individual claim render the plaintiff's individual claim moot?

2. Does an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 to the named plaintiff in a not-yet-certified class action that, if accepted, would have provided attorney's fees only through the date of acceptance of the offer render the plaintiff's individual claim moot?

3. Does an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 to the named plaintiff in a not-yet-certified class action that, if accepted, would have provided the plaintiff the maximum statutory damages he could receive on his individual claim render the class action moot?

STATEMENT OF THE CASE AND OF FACTS

On November 12, 2011, Plaintiff-Appellant David Hooks made a withdrawal from his checking account at an ATM operated by Defendant-Appellee Landmark Industries. ROA.68. At the time of the withdrawal, the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.*, forbade an ATM operator from imposing a fee on a consumer unless the consumer received notice of the fee both "in a prominent and conspicuous location on or at the [ATM]" and "on the screen of the [ATM], or on a paper notice issued from such machine, after the transaction [was] initiated and before the consumer [was] irrevocably committed to completing the transaction." 15 U.S.C. § 1693b(d)(3)(B), (C) (2010).[1] The ATM from which Mr. Hooks withdrew money did not contain a notice "on or at" the machine informing consumers that they would be charged a

[1]This provision has since been amended to remove the on-machine notice requirement. *See* P.L. No. 112-216, 126 Stat. 1590 (Dec. 20, 2012).

fee for using the ATM. ROA.69. Nonetheless, Landmark charged Mr. Hooks a $2.95 "terminal fee" in connection with his withdrawal. ROA.68.

EFTA provides that if any person fails to comply with a provision of the Act with respect to any consumer, that person is liable to the consumer for actual and statutory damages, 15 U.S.C. § 1693m(a)(1) & (2). The Act specifically envisions that such actions may be brought as class actions. *Id*. § 1693m(a)(2)(B). Accordingly, on January 18, 2012, Mr. Hooks filed this lawsuit on behalf of himself and similarly situated ATM users, alleging that the defendant violated EFTA's fee disclosure requirements.[2] On May 4, 2012, the district court held a status conference and established September 7, 2012, as the deadline for Mr. Hooks to file a motion for class certification—a deadline that was later extended to October 17. ROA.261.

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[2]Specifically, in his First Amended Complaint, Mr. Hooks sought certification of a class consisting of:

> All non-customers who made an electronic fund transfer, from any account used primarily for personal or household purposes, between November 12, 2010, through the date on which Defendant came into compliance with the ATM Fee posting requirements of the EFTA, at any of the ATMs operated by Defendant at 1200 League Line Road, Conroe, Texas, and who were charged a "Terminal Fee."

ROA.69.

On June 18, 2012, Landmark Industries made an offer of judgment to Mr. Hooks under Federal Rule of Civil Procedure 68. ROA.135. Landmark offered Mr. Hooks the maximum amount of statutory damages that he could recover in an individual case, but offered no relief to the rest of the class. In particular, the offer stated: "Defendant hereby offers to settle Plaintiff's statutory damage claim against Defendant for $1,000, for which judgment may be entered. Defendant also agrees to pay costs accrued and reasonable and necessary attorney fees, through the date of acceptance of the offer, as agreed by the parties, or to be determined by the court if agreement cannot be reached." *Id*. The offer provided that the "deadline for accepting this offer is 15 days after service." *Id*. "If a written acceptance is not timely served, this offer will be deemed to have been rejected by Plaintiff." *Id*. Mr. Hooks did not accept the offer.

On October 5, 2012, Mr. Hooks moved for class certification. ROA.211-230. Later that same day, Landmark moved to dismiss the case for lack of subject-matter jurisdiction, arguing that its offer of judgment rendered Mr. Hooks's claims moot and that Mr. Hooks lacked standing. ROA.322-346.

On May 31, 2013, the district court ordered the parties to submit briefs addressing whether the December 2012 EFTA amendment that removed the on-machine notice requirement had an effect on the claims of unnamed potential class

members. ROA.926-928. Mr. Hooks submitted a brief explaining that the amendment was not retroactive and did not affect the class members' claims. ROA.929-936. Landmark did not file a brief in response to the district court's order.[3]

On July 11, 2013, U.S. Magistrate Judge Nancy K. Johnson issued a memorandum and recommendation recommending that class certification be granted. ROA.939-955. In addition, because Landmark had conceded that its motion to dismiss should be denied if the court granted the motion for certification, the magistrate judge recommended that the motion to dismiss be denied as moot. ROA.955. The district court adopted the Magistrate Judge's memorandum and certified the class. ROA.956-957.

On December 11, 2013, the parties submitted a status report announcing that they had reached a settlement in principle to resolve the class claims. ROA.1077. The parties explained that they were "drafting and finalizing a settlement agreement and a motion for preliminary approval, which will be filed with this Court as soon as possible." *Id*.

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[3]Because Landmark waived any argument that the 2012 amendment affected the claims in this case, the question in *Mabary*, No. 13-20211, concerning whether the 2012 EFTA amendment operates retroactively is not presented here.

Despite this agreement in principle, on March 25, 2014, Landmark again moved to dismiss the case for lack of subject-matter jurisdiction based on its Rule 68 offer of judgment. ROA.1086-1096. This time, the district court granted the motion. ROA.1194-1213. The court first noted that Mr. Hooks had argued that "an unaccepted offer of judgment cannot moot an action because a plaintiff's interest in a case remains the same before, and after, he rejects the offer to resolve the matter." ROA.1200. It believed, however, that it was bound by this Court's decision in *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008), to hold that an unaccepted Rule 68 offer of judgment that, if entered, would satisfy the named plaintiff's individual claim moots that claim. ROA.1201. It therefore held that Mr. Hooks's "individual claims became moot when the Rule 68 offer of judgment expired." *Id*. The court then decided that Mr. Hooks did not have a sufficient personal stake in the class action to prevent the entire action, including the class claims, from being moot, and that the relation-back doctrine—under which class certification relates back to the filing of the complaint in certain circumstances so that the mooting of a named plaintiff's claim prior to class certification does not moot the class action—did not apply here. The court concluded that "[b]ecause there was neither a pending motion for certification nor a certified class when the named Plaintiff's claim became moot, this action must

be dismissed for lack of jurisdiction because it is moot." ROA.1213. It granted the motion to dismiss for lack of subject-matter jurisdiction and vacated its order certifying the class. *Id*.

In accordance with its opinion and order, the district court entered a final judgment, dismissing the action in its entirety for lack of subject-matter jurisdiction, each party to bear its own costs. ROA.1214. As a result, Mr. Hooks's action was dismissed as moot even though he had received no redress for his claims.

SUMMARY OF ARGUMENT

The district court's holding that Landmark's offer of judgment rendered this case moot is wrong for three independent reasons: An unaccepted offer of judgment does not render a claim moot; the offer of judgment did not offer Mr. Hooks his maximum possible relief; and the offer of judgment did not address either the class members' claims or Mr. Hooks's interest in them.

First, the court erred in holding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claim and requires the court to dismiss the claim outright—thereby denying the plaintiff any relief—if the offer would have fully satisfied the plaintiff's claim had it been accepted. Rule 68 is only a mechanism by which a defendant can *offer* to have judgment entered against it. If the offer is

not accepted, it is a nullity except for the purpose of determining whether the defendant is entitled to costs at the conclusion of the case. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). An unaccepted offer neither moots a claim nor otherwise authorizes termination of a lawsuit over the plaintiff's objection.

Even more fundamentally, the theory that a Rule 68 offer moots a claim is directly contrary to limits on the mootness doctrine repeatedly stated by the Supreme Court, under which a claim is not moot unless "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013); *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013); *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quotation marks and citations omitted from all three citations). The tendering of a Rule 68 offer does not deprive a court of the ability to grant effectual relief and therefore cannot moot a claim.

As Justice Kagan, joined by three other justices, explained in her dissent in *Genesis HealthCare Corp. v. Symczyk*, "[w]hen a plaintiff rejects [an offer of judgment]—however good the terms—her interest in the lawsuit remains just what it was before. . . . [and] the litigation carries on, unmooted." 133 S. Ct. 1523, 1533-34 (2013) (Kagan, J., dissenting). The majority in *Genesis* did not dispute Justice Kagan on this point. As the Ninth Circuit has recognized, Justice Kagan's

reasoning is compelling and requires the conclusion that a Rule 68 offer cannot moot a claim because it does not deprive a court of the ability to grant effectual relief. *See Diaz v. First Am. Home Buyers Prot. Corp*., 732 F.3d 948 (9th Cir. 2013). And contrary to the district court's opinion, this Court's precedents do not require it to hold otherwise. Although *Sandoz,* 553 F.3d 913*,* assumed that an unaccepted offer could moot a claim, none of the parties in that case argued otherwise, and this Court has since treated the issue as an open question. *See Payne v. Progressive Fin. Servs. Inc.*, 748 F.3d 605, 608 n.1 (5th Cir. 2014).

Second, even if an offer of judgment for a plaintiff's maximum possible relief could moot a claim, the offer here would not have mooted Mr. Hooks's claim because it did not offer him all the relief he could have received. EFTA specifically provides that, in a successful action, the defendant will be liable to the plaintiff for "a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1693m(a)(3). Reasonable attorney's fees include fees incurred in litigating over the issue of fees. Landmark's offer of judgment, however, capped fees at "the date of acceptance of the offer," thereby excluding fees-on-fees. ROA.135. The offer thus did not include the full amount for which Landmark could have been liable under the Act and was not a "complete" offer of relief.

Third, even if the offer of judgment could be deemed to have mooted Mr. Hooks's individual claim, it would not have mooted those of the class nor barred the court from exercising subject-matter jurisdiction over a class action brought by Mr. Hooks. Under the circumstances of this case, in which Mr. Hooks rejected the offer of judgment in order to keep himself aligned with the class, Mr. Hooks maintains a personal stake in the class allegations sufficient to satisfy Article III. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). The Supreme Court's recent decision in *Genesis*, which declined to extend the principles of *Roper* and *Geraghty* to collective actions under the Fair Labor Standards Act (FLSA), does not govern the issue of mootness here because, as this Court has recognized, "there is a difference between when a Rule 23 class action and a FLSA collective action can become moot." *Sandoz*, 553 F.3d at 919.

ARGUMENT

I. Standard of Review

This Court "review[s] de novo a district court's ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001).

II. An Unaccepted Offer of Judgment Does Not Moot an Individual Claim.

A. An Unaccepted Offer of Judgment Does Not Deprive the Court of the Ability To Grant Relief.

1. The doctrine of mootness, together with the related standing and ripeness doctrines, ensures that the federal courts adhere to the fundamental command of Article III that federal jurisdiction be limited to "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1. The three justiciability doctrines ensure that "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin*, 133 S. Ct. at 1023 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). In particular, the mootness doctrine requires that parties "continue to have a personal stake in the outcome of the lawsuit" throughout its existence, *Lewis*, 494 U.S. at 478 (internal quotation marks and citations omitted), by requiring dismissal "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (citation omitted).

A court may not, however, lightly conclude that a case is moot. "A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 132 S. Ct. at 2287 (emphasis added; citations and internal quotation marks omitted). "As long as the parties have a

concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*. (citation omitted); *accord Chafin*, 133 S. Ct. at 1023. Thus, even a defendant's agreement on the merits with a plaintiff's claim does not moot a case or controversy if the plaintiff's injury remains "concrete, persisting, and unredressed." *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013).

An offer of judgment that has not been accepted does not meet the criteria for rendering a case moot: The offer does not, in itself, provide redress for the plaintiff's grievance or make it impossible for a court to grant effectual relief. Likewise, neither a plaintiff's decision not to accept an offer of judgment nor the expiration of the offer makes it impossible for the court to grant relief. The court retains the ability to grant the plaintiff all the relief requested, and the plaintiff's claims thus are not moot.

2. Rule 68 and the procedures it establishes underscore that offers of judgment do not render claims moot. As the Supreme Court has explained, Rule 68 is a procedural device that "prescribes certain consequences for formal settlement offers made by 'a party defending against a claim.'" *Delta*, 450 U.S. at 350. Specifically, the rule permits judgment to be entered in the plaintiff's favor on the offered terms if the plaintiff accepts the offer in writing within 14 days of being served with it. Fed. R. Civ. P. 68(a). On the other hand, "[if] the offer is not

accepted, it is deemed withdrawn 'and evidence thereof is not admissible except in a proceeding to determine costs.'" *Delta*, 450 U.S. at 350 (quoting former Fed. R. Civ. P. 68).[4]

Under the Rule, the plaintiff's rejection of an offer only "becomes significant in . . . a [post-judgment] proceeding to determine costs." *Id*. Specifically, if a plaintiff wins a judgment, but that judgment is not more favorable than the unaccepted Rule 68 offer, the plaintiff is liable for the defendant's "costs incurred after the offer was made." Fed. R. Civ. P. 68(d). Thus, the Rule establishes a cost-shifting mechanism designed to "encourage the settlement of litigation" by providing plaintiffs "an additional inducement to settle." *Delta*, 450 U.S. at 352.

Notably, nothing in the Rule *requires* acceptance of an offer under any circumstances. Nor does the Rule suggest that it is in any way intended to divest courts of their ability to entertain a claim. Indeed, the Rule presupposes otherwise, for it contemplates a case proceeding to judgment, whether an offer is accepted or rejected. In the case of acceptance (and only in that case), the Rule authorizes entry of judgment on the offer. Fed. R. Civ. P. 68(a). In cases where an offer is

[4] Since *Delta*, Rule 68 has been amended slightly for stylistic purposes and to extend its time frames from 10 to 14 days. Rule 68(b) now provides: "An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

not accepted within the Rule's time-frame, the Rule provides that the offer "is considered withdrawn," Fed. R. Civ. P. 68(b), and it anticipates that the case will then be litigated to judgment—after which the unaccepted offer may become relevant, but only to the issue of costs. Fed. R. Civ. P. 68(d).

Thus, under the terms of Rule 68, an unaccepted offer of judgment is merely a rejected settlement offer—one that has been withdrawn and is not admissible except to determine costs once the case has ended. Such an offer does not affect the court's ability to grant relief and cannot logically be held to moot a case.

B. Justice Kagan's Dissent in *Genesis HealthCare v. Symczyk* Articulates Why an Unaccepted Offer of Judgment Does Not Moot an Individual Claim.

The Supreme Court's recent decision in *Genesis HealthCare Corp. v. Symczyk* pointed out that the Court has never specifically addressed whether an unaccepted offer of judgment moots a plaintiff's individual claim, and the majority expressly declined to reach that question. 133 S. Ct. at 1528-29. At issue in *Genesis* was whether a plaintiff whose individual claim was moot could continue to pursue an opt-in collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). The lower courts had held that the individual claim was moot because of an unaccepted Rule 68 offer. Before the Supreme Court, the plaintiff, supported by the Solicitor General of the United States, argued that a Rule 68 offer

cannot moot a claim.[5] The *Genesis* majority, however, held that that argument was not properly before it because it had not been presented in a cross-petition and because the plaintiff had conceded below that her claim was moot. *See Genesis*, 133 S. Ct. at 1529. The majority therefore "assume[d], without deciding," that the individual claim was moot. *Id*.

Justice Kagan, joined by Justices Ginsberg, Breyer, and Sotomayor, dissented from the majority's decision not to reach the issue whether a Rule 68 offer mooted the individual claim (and from the disposition of the case that resulted from the unexamined premise that the individual claim was moot). *See id*. at 1532-37 (Kagan, J., dissenting). Turning to the issue that the majority did not address, Justice Kagan demonstrated that the view that an unaccepted Rule 68 offer moots a plaintiff's claim is "bogus." *Id*. at 1532. As she explained, even a Rule 68 offer that would provide complete relief on the plaintiff's individual claim does not deprive the plaintiff of a concrete interest in the outcome of a case or the court of the ability to grant effectual relief:

> We made clear earlier this Term that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. __, __,

[5] *See* Br. for the United States as Amicus Curiae Supporting Affirmance 10-15, *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059 (U.S. filed Oct. 17, 2012), *available at* http://www.justice.gov/osg/briefs/2012/3mer/1ami/2011-1059.mer.ami.pdf.

> 133 S. Ct. 1017, 1023 (2012) (internal quotation marks omitted). "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Ibid*. (internal quotation marks omitted). By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first year law student learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 151, 7 S. Ct. 168 (1886). Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.

Id. at 1533-34. Importantly, the *Genesis* majority did not disagree with Justice Kagan's analysis. *See id*. at 1534 (Kagan, J., dissenting) ("[W]hat I have said conflicts with nothing in the Court's opinion. The majority does not attempt to argue . . . that the unaccepted settlement offer mooted [the plaintiff's] individual damages claim.").

Since *Genesis*, the Ninth Circuit, which had previously assumed that an offer of all recoverable relief could moot a claim, has adopted Justice Kagan's approach and held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Diaz*, 732 F.3d at 954-55. As that Court explained, "[t]his holding is consistent with the language,

structure and purposes of Rule 68 and with fundamental principles governing mootness." *Id*. at 955. Once an offer of judgment lapses, it is, "by its own terms and under Rule 68, a legal nullity." *Id*.

C. *Sandoz* Does Not Compel This Court To Hold That an Unaccepted Offer of Judgment Moots an Individual Claim.

In the wake of Justice Kagan's unrebutted demonstration (backed by the Solicitor General of the United States) that it is a "fallacy" to suppose that Rule 68 offers can moot individual claims, *Genesis*, 133 S. Ct. at 1535 (Kagan, J., dissenting), the district court proceeded on exactly that premise and held that the Rule 68 offer here mooted Mr. Hooks's claim. ROA.1201. In support of this holding, it cited *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913. *Sandoz*, however, does not compel the conclusion that an unaccepted offer of judgment for a plaintiff's maximum recoverable damages renders that plaintiff's claims moot.

Sandoz was a collective action under the FLSA in which the defendant offered the plaintiff her full individual damages before she moved for conditional certification. The question before the Court was whether that offer rendered the collective action moot. *Id*. at 914. In her brief to the Court, the plaintiff did not argue that an unaccepted offer of judgment could not render individual claims moot; instead, her argument was that the court maintained jurisdiction over the

claims of the class. Accordingly, and unsurprisingly, the Court accepted the uncontested premise that a Rule 68 offer that offered all recoverable damages could moot a claim and focused instead on the question whether the class claims were moot. The Court explained that because the named plaintiff in a FLSA collective action, unlike a Rule 23 class action, does not represent the interests of other employees until they affirmatively opt in, the plaintiff did not have a claim that she represented a class and could not avoid mootness on that ground. *Id*. at 919. However, it determined that the relation-back doctrine—under which class certification may relate back to the filing of a complaint if the named plaintiff's claim becomes moot before the district court can reasonably be expected to rule on certification—applied "to ensure that defendants cannot unilaterally 'pick off' collective action representatives." *Id*. at 922. It concluded that

> [W]hen a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment. If the court ultimately grants the motion to certify, then the Rule 68 offer to the individual plaintiff would not fully satisfy the claims of everyone in the collective action; if the court denies the motion to certify, then the Rule 68 offer of judgment renders the individual plaintiff's claims moot.

Id. at 920-21. The Court remanded for the district court to determine whether the plaintiff had made a timely motion for certification.

Because none of the parties in *Sandoz* challenged the premise that an unaccepted offer of judgment could moot a claim and because the Court therefore focused primarily on whether the collective action claims were moot, *Sandoz* is best read to hold that the relation-back doctrine applies in FLSA cases (a holding that has since been overruled by the Supreme Court in *Genesis*), not that an unaccepted offer can render claims moot. The case should not be considered binding precedent on the question whether unaccepted offers can moot claims. In this regard, *Sandoz* is similar to *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), and this case is similar to *Diaz*, 732 F.3d 948. In *Pitts*, the defendant in a putative class action made an offer of judgment to the named plaintiff for the full amount she was owed on her individual claims, and the question before the court was whether the offer mooted the class claims. Like this Court in *Sandoz*, the Ninth Circuit held that the relation-back doctrine applied, accepting the premise, in the process, that an unaccepted offer of judgment could moot a claim. Citing *Sandoz*, the Ninth Circuit concluded that if the named plaintiff could file a timely motion for class certification and if the motion were granted, certification would relate back to the filing of the complaint, but that if certification were ultimately denied, the defendant's offer would moot the case. *Pitts*, 653 F.3d at 1092.

Two years later, in *Diaz*, the Ninth Circuit addressed the question whether an "unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim is sufficient to render the claim moot." 732 F.3d at 952. In considering the issue, the court held that *Pitts* did not require it to hold that an unaccepted offer of judgment could moot claims. "In *Pitts*," the Ninth Circuit explained, "[w]e *assumed* that an unaccepted offer for complete relief will moot a claim, but we neither held that to be the case nor analyzed the issue." *Id*. "We therefore treat this as an open question in this circuit." *Id*. Likewise, the question whether an unaccepted offer of judgment can moot a claim is an open question in this Circuit.

Indeed, this Court has recently stated that it considers the question unresolved. *See Payne*, 748 F.3d 605. In *Payne*, the district court dismissed the plaintiff's claim on the ground that an unaccepted Rule 68 offer had rendered the claim moot. This Court reversed, explaining that an incomplete offer—an offer that does not offer all requested relief—does not render claims moot and that the defendant's offer was incomplete because it did not include actual damages. *Id*. at 607. The Court then noted that because it found the offer incomplete, it did not need to "decide whether a complete offer of judgment would have rendered [the plaintiff's] claims moot." *Id*. at 608 n.1. In other words, the Court recognized that whether a complete offer of judgment can moot a claim is an issue that is still

undecided in this Court. The Court cited conflicting opinions from other circuits on this issue, but did not cite *Sandoz* or otherwise give any indication that *Sandoz* (or any other case) resolved the issue. *See id.*

Finally, since *Sandoz*, the Supreme Court has repeated multiple times that a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker*, 133 S. Ct. at 1335; *Chafin*, 133 S. Ct. at 1023; *Knox*, 132 S. Ct. at 2287 (quotation marks and citations omitted from all three citations). Moreover, Justice Kagan has now thoroughly explained why an unaccepted Rule 68 offer does not make it impossible to grant relief and therefore cannot satisfy the Supreme Court's formulation of the mootness doctrine. In light of these developments, to the extent *Sandoz* may be read to hold that an unaccepted Rule 68 offer can moot a claim, this Court should follow Justice Kagan's suggestion to "[r]ethink [the] mootness-by-unaccepted-offer theory." *Genesis*, 133 S. Ct. at 1534 (Kagan, J., dissenting). To ensure consistency between this Court and the Supreme Court's mootness principles, the Court should clarify that an offer of judgment does not affect subject-matter jurisdiction and should hold that a Rule 68 offer cannot moot a case.

D. If an Offer of Judgment Mooted a Claim, the Offer Would Be Self-Defeating.

The district court's view that an unaccepted offer of judgment can render a case moot would have perverse consequences. If an unaccepted Rule 68 offer moots a claim, it necessarily follows that the same is true of an offer that is accepted, for the latter much more clearly signals the supposed lack of adversity that has been thought by some courts to render cases involving Rule 68 offers moot.[6] But if the making of an offer by itself renders the plaintiff's claim moot, Rule 68 is self-defeating, for the judgment whose entry the rule calls for if the offer is accepted could never be entered. No proposition is more fundamental than that a court cannot enter an enforceable judgment in a case over which it has no subject-matter jurisdiction. "A federal district court is under a mandatory duty to dismiss a suit over which it has no jurisdiction. When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim." *Stanley v. CIA*, 639 F.2d 1146, 1157 (5th Cir. 1981) (internal citations omitted).

As the Supreme Court has explained, "[w]ithout jurisdiction the court

[6]The district court specifically held that Mr. Hooks's claim became moot when the offer of judgment *expired*, ROA.1201, but provided no explanation why expiration of the offer was the important moment for jurisdictional purposes. It would be strange if the expiration of the offer—after which, under Rule 68, it is considered withdrawn, *see* Fed. R. Civ. P. 68(b)—created a lack of adversity, but the tendering of the offer did not.

cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Thus, if a Rule 68 offer that offered all recoverable relief mooted the claim, the court could not enter judgment on the offer, even if the plaintiff accepted it.

The notion that a Rule 68 offer moots a case has equally bizarre consequences in a case, like this one, where the offer is not accepted. In such a case, the plaintiff's claim has not been redressed, and the Rule 68 offer has lapsed and is a nullity. Yet, the theory that the mere offer of judgment under Rule 68 renders a case moot once the offer expires, would, taken seriously, seemingly require the court to dismiss the case without providing any redress—because, for the reasons just discussed, a court cannot grant relief in a case in which it lacks jurisdiction. Such a dismissal, however, would contradict the basis for the theory that the case is moot—that is, that the plaintiff has no live claim because he has received full redress—because it would effectively deny the plaintiff any means of redress.

A court cannot declare a claim for damages and injunctive relief moot while at the same time "send[ing] [the plaintiff] away empty-handed." *Genesis*, 133 S. Ct. at 1534 (Kagan, J., dissenting). But that is exactly the logical consequence of the view that an unaccepted Rule 68 offer that would have provided full relief moots a claim: The plaintiff's claim is moot, so the theory goes, because "[y]ou cannot persist in suing after you've won," but the plaintiff who supposedly "won" gets nothing. *See Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999). That theory makes no sense because, in such a situation, the plaintiff's "individual stake in the lawsuit . . . remain[s] what it ha[s] always been, and ditto the court's capacity to grant her relief." *Genesis*, 133 S. Ct. at 1534 (Kagan, J., dissenting).

Recognition of the incongruity of leaving a plaintiff with an unredressed claim while declaring that claim to be moot has led some courts to perform considerable legal and mental gymnastics to avoid that obviously incorrect result. Thus, the Sixth Circuit held in *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009), that although the unaccepted offer moots the plaintiffs' claim, "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." Although the Sixth Circuit's approach is certainly better for the individual plaintiff than getting nothing, it is little better jurisprudentially, for it ignores the point that if a case truly is moot, a

court has no power to enter judgment. *See Steel Co.*, 523 U.S. at 94. The correct approach is to recognize that Rule 68 offers have no effect on subject-matter jurisdiction. This Court should hold that the Rule 68 offer of judgment did not moot Mr. Hooks's claim and remand for this case to proceed on the merits.

III. Even If an Unaccepted Rule 68 Offer of Judgment for Full Relief Could Moot a Plaintiff's Individual Claim, the Offer Here Would Not Because It Did Not Offer Complete Fees.

Even if an unaccepted offer of judgment could moot a claim, Landmark's offer to Mr. Hooks would not have rendered his claims moot. The question whether an unaccepted offer of judgment on a named plaintiff's individual claims moots those claims only arises if the offer, if entered, would provide "complete" relief on the individual claims—that is, if it "offer[s] to meet the plaintiff's full demand for relief." *Payne*, 748 F.3d at 607; *see also id.* at 608 n.1 (noting that the Court did not have to decide whether a complete offer of judgment would moot the plaintiff's claim because the offer was not complete). Here, the offer was not complete because it did not offer full attorney's fees. The offer included only attorney's fees accrued "through the date of acceptance of the offer." ROA.135. At the same time, however, the offer stated that the amount would be "determined by the court if agreement cannot be reached," *id.*, thereby contemplating that there could be future proceedings to determine the fee amount. A party to whom fees

are being awarded is entitled to fees for time spent "establishing and litigating a fee claim." *Cruz v. Huack*, 762 F.2d 1230, 1233 (5th Cir. 1985). Accordingly, Mr. Hooks would be entitled to fees incurred during the proceeding to determine the amount of fees accrued to the date of acceptance of the offer. "[B]ecause the offer of judgment excluded post-offer attorney's fees that Plaintiff would otherwise be entitled to receive," it "did not offer complete relief to the Plaintiff." *Lobianco v. John F. Hayter, Attorney at Law, P.A.*, 944 F. Supp. 2d 1183, 1187 (N.D. Fla. 2013); *see also, e.g.*, *Andrews v. Prof'l Bur. of Collections of Md., Inc.*, 270 F.R.D. 205, 208 (M.D. Pa. 2010) ("It is not unreasonable to assume that counsel may accrue additional fees after the offer is accepted . . . . Therefore, the instant offer of judgment, by imposing an end date upon which reasonable attorney's fees can be collected, does not render the claim moot[.]").

IV. Even If Mr. Hooks's Individual Claim Were Moot, the Action Would Not Be Subject to Dismissal Because the Class Claims Are Not Moot.

The district court erred not only in holding that Mr. Hooks's individual claim was mooted by the Rule 68 offer, but also in holding that mootness of Mr. Hooks's individual claim would require dismissal of this action, in which Mr. Hooks also asserted claims on behalf of a class.

A. Federal Rule of Civil Procedure 23(a) allows "members of a class [to]

sue or be sued as representative parties on behalf of all members." "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted). Rule 23 allows for the aggregation of small claims, *id.*, deters wrongdoing through the vindication of legal rights, *see Roper*, 445 U.S. at 338, and furthers "efficiency and economy of litigation." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556 (1974).

The district court held that Landmark's Rule 68 offer to Mr. Hooks required dismissal of the class claims. ROA.1213. If that were the case, however, defendants would be able to undermine Rule 23 by making offers of judgment for each class representative's (often small) claims, thereby preventing a class from being certified. Instead of being a means of "encourag[ing] the settlement of litigation," *Delta*, 450 U.S. at 352, Rule 68 would become a tool for cutting off class actions.

In *Roper*, the Supreme Court warned of the dangers of allowing defendants to evade class actions by using offers of judgment to "pick off" class representatives. 445 U.S. at 339. There, the Court held that an offer of judgment to named plaintiffs of the maximum amount they could receive in their individual

capacities, tendered after class certification was denied, did not moot the case or terminate the plaintiffs' right to appeal the denial of class certification. In the course of so holding, the Court explained (in dicta) that denying a decision on class certification "simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration." 445 U.S. at 339. "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions" and would "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Id*.

Treating offers of judgment as mooting putative class actions would undermine Rule 23 and class actions by "contraven[ing] one of the primary purposes of class actions—the aggregation of numerous similar (especially small) claims in a single action." *Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004). Each time a plaintiff sought to bring a class action complaint, the defendant could "moot the named plaintiffs' claims before a decision on certification is reached." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1050 (5th Cir. 1981). "And so it would go, with the defendants avoiding

class-wide liability, and steadily dampening the interest of putative class representatives in bringing such suits." *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 386 (S.D. Ohio 2008).

This circumvention of the class-action device would be particularly problematic in cases arising under EFTA and similar statutes. Because individual claims under EFTA might be small and statutory damages are capped, class actions are a crucial means by which consumers hold electronic-fund-transfer-system participants who violate the law accountable for their actions. Indeed, Congress specifically envisioned that EFTA claims would be brought as class actions. *See* 15 U.S.C. § 1693m(a)(2)(B) (providing for class damages). Because individual EFTA damages are often small, however, it would be particularly "financially feasible [for defendants] to pay off successive named plaintiffs" and thereby "preclude a viable class action from ever reaching the certification stage." *Zeidman*, 651 F.2d at 1050.

Moreover, allowing defendants to unilaterally moot class actions through offers of judgment would result "in sweeping changes to accepted norms of civil litigation in the Federal Courts." *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108, 112 (S.D.N.Y. 2001). Plaintiffs would "be forced to swiftly file their certification motions, possibly before completing class-related discovery, in order

to maintain their claims." *Stewart*, 252 F.R.D. at 386. This need to rush would be "inconsistent with the procedure set forth by Rule 23, which contemplates that parties have a reasonable opportunity to conduct discovery and develop the facts needed for a certification determination." *Clausen Law Firm, PLLC v. Nat'l Acad. of Continuing Legal Educ.*, 827 F. Supp. 2d 1262, 1272-73 (W.D. Wash. 2010); *see* Fed. R. Civ. P. 23(c)(1)(A) (requiring only that a determination of whether to certify a class occur at "an early practicable time"); *id.* 2003 Amendments Advisory Committee Notes (explaining that the "early practicable time" language was chosen because of "the many valid reasons that may justify deferring the initial certification decision"). While plaintiffs rushed to file class certification motions, defendants would "race to make their settlement offers before plaintiffs file[d] their certification motions." *Stewart*, 252 F.R.D. at 386. In the end, whether class actions could proceed would be governed by who happened to file first, instead of by the merits of the class certification motion.

In short, if Rule 68 offers to class representatives could moot putative class actions, defendants would be able "to use Rule 68 as a sword, 'picking off' representative plaintiffs and avoiding ever having to face a [class] action." *Sandoz*, 553 F.3d at 919. Such a result would place Rules 23 and 68 at odds, undermining Rule 23's careful delineation of the requirements for maintaining a

class action.

B. Fortunately, mootness principles do not require "this anomol[ous]" result. *Id.* The features of Rule 23 class actions give rise to a number of reasons for recognizing that a named plaintiff's effort to represent a class creates a live case or controversy even if the plaintiff's purely individual claim is moot.

First, as the Court recognized in *Geraghty*, plaintiffs can have a "personal stake" in "the right to represent a class." 445 U.S. at 402. In *Geraghty*, the Supreme Court considered whether a prisoner who brought a class action challenging parole release guidelines could appeal the denial of class certification after he was released from prison. The Court concluded that he could, holding that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id*. at 404.

The Supreme Court explained that "determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires,' . . . requires reference to the purposes of the case-or-controversy requirement." *Id*. at 402. "[T]he purpose of the 'personal stake' requirement," it determined, "is to assure that the case is in a form capable of judicial resolution," with "sharply presented issues in a concrete factual setting and self-interested

parties vigorously advocating opposing positions." *Id*. at 403. The Supreme Court concluded that these requirements could be met "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* Even if his individual claim is moot, a named plaintiff can retain "a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404.

Here, although Mr. Hooks would have received the maximum statutory damages he could obtain as an individual if he had accepted the Rule 68 offer, he chose not to accept it. Under circumstances such as these, where the named plaintiff seeks to keep his interests aligned with those of the class so that he can move for class certification, the purposes of the personal stake requirement are met. The case is not "moot under Article III . . . because, notwithstanding the rejected offer of judgment, the proposed class action continues to involve 'sharply presented issues in a concrete factual setting' and 'self interested parties vigorously advocating opposing positions,'" sufficient to constitute a personal stake in the result. *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011) (quoting *Geraghty*, 445 U.S. at 403); *cf. Zeidman*, 651 F.2d at 1043 (explaining that plaintiffs who refused tender of full relief had "vigorously advocated their right to class certification, . . . in a concrete factual setting capable

of judicial resolution," and therefore had Article III standing to appeal post-tender denial of class certification).

Relying on a footnote in *Geraghty*, the district court held that case inapplicable because Mr. Hooks had not yet filed his motion for class certification when Landmark made its offer of judgment. ROA.1203. In that footnote, the Supreme Court provided a narrower basis for its holding—namely, a "relation back" analysis applicable where a district court erroneously denied certification before the individual claim became moot, 445 U.S. at 404 n.11. The district court is correct that, because there had been no certification decision before the Rule 68 offer was tendered, the footnote's analysis would not provide a basis for jurisdiction if the offer had rendered Mr. Hooks's individual claim moot. However, the fact that there had been no certification decision at the time of the Rule 68 offer does not prevent the personal-stake analysis in *Geraghty*'s main text from applying. Indeed, in its main text, *Geraghty* recognized that "timing is not crucial" to the mootness determination. 445 U.S. at 398.

Although this Court has held class actions moot where the named plaintiff did not move for certification prior to the mootness of his individual claims, *see, e.g.*, *Rocky v. King*, 900 F.2d 864 (5th Cir. 1990), in none of those cases was the mootness the result of the plaintiff's rejection of an offer of judgment that would

have provided him full relief on his individual claims. Even if it were correct that Mr. Hooks's rejection of the offer in this case technically mooted his individual claim, his rejection of the offer ensured that he remained a "'self interested part[y] vigorously advocating [an] opposing position[]," *Geraghty*, 445 U.S. at 403. It kept him aligned with the rest of the class and meant that he could only recover if the class prevailed. By contrast, in *Rocky*, 900 F.2d 864, in which the Court held that a putative class action seeking injunctive relief on behalf of inmates who worked in the fields at a state penitentiary was moot where the named plaintiff was permanently removed from field work before he moved for class certification, the plaintiff's interests were no longer aligned with the class's and he had no similar concrete interest at issue: the challenged practices no longer applied to him and regardless of the outcome of the class action, he would receive no additional relief.

In short, like the plaintiff in *Geraghty*, Mr. Hooks seeks to represent a class of people with live claims who will be part of a certified class if a court ultimately determines that Rule 23's requirements are met. And like the plaintiff in *Geraghty*, Mr. Hooks can continue "vigorously to advocate his right to have a class certified." 445 U.S. at 404. Mr. Hooks retains as strong a personal stake in representing a class as did the plaintiff in *Geraghty*—a personal stake that is "sufficient to assure that Art. III values are not undermined." *Id*.

The named plaintiff's interest in representing the class, together with the interests of the class as a potential juridical entity, provides an additional reason why this case is not moot: Because this case was brought as a class action, even if the offer had been for complete individual relief to Mr. Hooks, it would not have satisfied all the demands in the complaint. As Justice Rehnquist explained in his concurrence in *Roper*, "The distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim." 445 U.S. at 341. "Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class). . . ." *Id.*; *cf. Weiss*, 385 F.3d at 347 ("[I]n certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided."). In other words, because the offer did not include relief for the class, it was not a "complete" offer of relief and therefore did not moot Mr. Hooks's or the class's claims.

Furthermore, as the Court recognized in *Roper*, a class representative retains a personal stake in litigation, even if his individual claim is moot, if he has an "an economic interest in class certification." 445 U.S. at 333. In *Roper*, for example,

the court noted that the individual plaintiffs had an interest in the potential ability to shift attorney's fees and expenses they had incurred to the class, *see id.* at 334 n.6. Likewise, here, Mr. Hooks has an interest in the recovery of attorney's fees attributable to his counsel's efforts on behalf of the class. Landmark's offer included only reasonable fees, to be determined by the district court if the parties cannot agree. ROA.135. A court awarding fees in a case brought as a class action, but in which judgment was entered only on individual claims, might not award full fees for time spent on the class allegations, because those allegations were not successful. But if the case proceeded through certification and were successful on behalf of a class, the court would likely award full fees for that time. Thus, the fees awarded for time already spent on the case may be greater if the case proceeds. In addition, district courts in this Circuit have approved incentive awards to representative plaintiffs in class actions. *See, e.g.*, *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 870 (E.D. La. 2007). The potential for Mr. Hooks to receive an incentive award gives him an additional continuing personal stake in the class action. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012) (holding that possibility of incentive award provided standing to appeal denial of certification where individual claim was settled).

Because of the special features of class actions, the plurality of federal

appellate courts to consider the issue have held that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action." *Pitts*, 653 F.3d at 1091-92; *see also Lucero*, 639 F.3d at 1249; *Weiss*, 385 F.3d at 348. Thus, even if the Rule 68 offer is (wrongly) viewed as mooting the named plaintiff's individual claim, the class action may not be dismissed as moot. Rather, "[i]f the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the class certification issue." *Pitts*, 653 F.3d at 1092. Moreover, "[o]nce the class has been certified," as it was here, "the case may continue despite full satisfaction of the named plaintiff's individual claim because an offer of judgment to the named plaintiff fails to satisfy the demands of the class." *Id*.; *accord Lucero*, 639 F.3d at 1249; *Weiss*, 385 F.3d at 348.

C. The special features of class actions continue to provide a basis for continued jurisdiction here after *Genesis*. Although *Genesis* held that an FLSA collective action is moot once the individual plaintiff's claim is moot (if no other plaintiff with a live claim has yet opted into the action), it did so in large part because of the significant differences between FLSA actions and class actions—differences that this Court has recognized are "fundamental" and

"irreconcilable," *Sandoz*, 553 F.3d at 916 (quoting *LaChapelle v. Owens–Illinois, Inc.*, 513 F.2d 286, 287 (5th Cir. 1975) (per curiam)), and have important consequences in determining whether a case is moot. *Id*. at 919.

As the Supreme Court explained in *Genesis*, "Rule 23 actions are fundamentally different from collective actions under the FLSA," in large part because of the "unique significance of certification decisions in class-action proceedings," 133 S. Ct. at 1529, 1532. "[A] putative class acquires an independent legal status once it is certified under Rule 23." *Id*. at 1530. As a result, members of the class are bound by the resolution of certified class actions unless they have opted out. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011).

By contrast, a collective action under the FLSA is merely a procedural device by which persons with claims similar to the FLSA plaintiff's may receive notice of the pendency of the action and opt in as additional individual parties. "Under the FLSA, . . . 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action." *Genesis*, 133 S. Ct. at 1530. Because "certification" of a collective action does not produce a binding class with its own legal status, the named plaintiff in a collective action, unlike a class action, "has no right to represent" anyone else. *Cameron-Grant v.*

Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1249 (11th Cir. 2003); *accord Sandoz*, 553 F.3d at 919 (agreeing with analysis of *Cameron-Grant*). Thus, the named plaintiff has no "personal stake" in an FLSA collective action, *Cameron-Grant*, 347 F.3d at 1247, nor does an FLSA action result in the creation of a class with live interests of its own that can create a case or controversy irrespective of the mootness of the claims of any one individual.

In sum, "because, unlike in a Rule 23 class action, in a FLSA collective action the plaintiff represents only him– or herself," "there is a difference between when a Rule 23 class action and a FLSA collective action can become moot." *Sandoz*, 555 F.3d at 919. Because of this difference, *Genesis* does not control the outcome of a class action.

Accordingly, since *Genesis* was decided, several courts, including the Sixth Circuit, have held its holding and reasoning inapplicable to class actions. *See, e.g.*, *Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013), *vacated and remanded on other grounds, Schlaud v. Snyder*, 134 S. Ct. 2899 (2014); *Weitzner v. Sanofi Pasteur, Inc.*, __ F. Supp. 2d __, 2014 WL 956997 (M.D. Pa. Mar. 12, 2014), *interlocutory appeal pending*, No. 14-3423 (3d Cir.); *March v. Medicredit, Inc.,* 2013 WL 6265070 (E.D. Mo. Dec. 4, 2013); *Sandusky Wellness Ctr. LLC v. Medtox Scientific, Inc.*, 2013 WL 3771397 (D. Minn. July 18, 2013); *Ramirez v.*

Trans Union, LLC, 2013 WL 3752591 (N.D. Cal. July 17, 2013); *Craftwood II, Inc. v. Tomy Int'l, Inc.*, 2013 WL 3756485 (C.D. Cal. July 15, 2013); *Chen v. Allstate Ins. Co.*, 2013 WL 2558012 (N.D. Cal. June 10, 2013), *interlocutory appeal pending*, No. 13-16815 (9th Cir.); *Canada v. Meracord, LLC*, 2013 WL 2450631 (W.D. Wash. June 6, 2013). As these courts have concluded, even if an offer of judgment could be said to moot the individual claims of a class action plaintiff, it would not require dismissal of the class action. Thus, regardless of the effect of the Rule 68 offer on Mr. Hooks's individual claim, this case is not moot.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of the suit, reinstate the order certifying a class, and remand to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14-point Times New Roman.

/s/ Adina H. Rosenbaum
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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2014, I am causing two copies of the foregoing Brief for Plaintiff-Appellant to be served by first-class mail, postage pre-paid, upon counsel for Defendant-Appellee as follows:

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