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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

UPDATED ORAL ARGUMENT STATEMENT

In his opening brief, Plaintiff-Appellant David Hooks requested oral argument in the event the question in this case was not decided by *Mabary v. Home Town Bank, N.A.*, No. 13-20211, which, at that time, was pending before this Court. Since Mr. Hooks filed his opening brief, the Court has issued an opinion in *Mabary*, holding that, due to the relation-back doctrine, an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 to the named plaintiff in a putative class action does not moot the named plaintiff's claim and require dismissal of the class action. *See Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824-25 (5th Cir. 2014). Because *Mabary* directly and conclusively answers the question in this case, oral argument is no longer necessary.

INTRODUCTION

This case presents the question whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 to the named plaintiff in a not-yet-certified class action renders the plaintiff's claim and the class action moot, if acceptance of the offer would have provided the named plaintiff the maximum statutory damages he could receive on his individual claim. Since Plaintiff-Appellant David Hooks filed his opening brief, this Court has conclusively resolved that question, *see Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824-25 (5th Cir. 2014), and held that, because of the relation-back doctrine, such a Rule 68 offer does not moot the plaintiff's claims or deprive the Court of subject matter jurisdiction over the class action. *Mabary* is binding precedent in this Circuit and compels a holding in Mr. Hooks's favor.

Even apart from *Mabary*, however, the Rule 68 offer did not moot this case because an unaccepted Rule 68 offer does not deprive the court of the ability to grant relief; the offer here was not complete; and Mr. Hooks maintains a personal stake in class certification.

ARGUMENT

I. The Court's Decision in *Mabary v. Home Town Bank* Resolves This Case.

A. Since Mr. Hooks filed his opening brief, this Court decided *Mabary*, 771 F.3d 820. That decision requires a holding for Mr. Hooks here.

Like this case, *Mabary* was brought as a class action, alleging that an ATM operator violated the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.*, when it failed to provide a notice that it would be charging a fee in a "prominent and conspicuous location on or at" the ATM, as required by EFTA at the time of the ATM transactions at issue. 15 U.S.C. § 1693b(d)(3)(B)(i) (2010). As in this case, before the class was certified, the defendant made a Rule 68 offer solely to the named plaintiff for $1,000 plus costs and attorney's fees. As in this case, the named plaintiff did not accept the offer. And, as in this case, the defendant contended that the unaccepted Rule 68 offer rendered the named plaintiff's individual claim and the entire class action moot.

This Court rejected that argument, holding that "these circumstances fit within the 'relation back' exception" to mootness. *Mabary*, 771 F.3d at 824. The relation-back doctrine, the Court explained, "prevents a defendant from 'picking off' a named plaintiff by mooting her individual claim before the court has an opportunity to rule on the question of class certification, if the plaintiff has timely and diligently pursued a motion for class certification that actually results in a class being certified." *Id.* The relation-back doctrine "allows certification to 'relate back' to the filing of the complaint, when the plaintiff's claims presented a live controversy, such that class members 'take the place of the named plaintiff(s) for Article III purposes while the plaintiff(s) still possessed live claims.'" *Id.* (citing

Mabary v. Hometown Bank, N.A., 276 F.R.D. 196, 202 (S.D. Tex. June 27, 2011)).

The Court rejected the defendant's argument that the relation-back doctrine did "not survive the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*," 133 S. Ct. 1523 (2013). *Mabary*, 771 F.3d at 824. *Genesis*, *Mabary* explained, did not resolve the question "'whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot' when the collective action class has not yet been certified," and *Genesis* "rejected the plaintiff's reliance on Rule 23 class action cases, explaining that 'Rule 23 actions are fundamentally different from collective actions under the [Fair Labor Standards Act (FLSA)].'" *Id.* at 825 (quoting *Genesis*, 133 S. Ct. at 1528-29).

The Court explained that "Mabary did not voluntarily accept a full settlement offer before filing a motion for class certification, a scenario [this Court has] identified as being outside the scope of the 'relation back' doctrine." *Id.* "Nor," it continued, "did [the defendant's] offer of judgment satisfy both the individual and class-wide statutory maximum claims." *Id*. Accordingly, the Court held that the defendant's "attempt to 'pick off' Mabary's claim before the court could decide the issue of class certification fits squarely within the 'relation back' doctrine, which saves her claim from mootness at this stage." *Id*. The Court remanded to the district court to determine whether the class should be certified.

B. This case is identical to *Mabary* with regard to application of the

relation-back doctrine. As in *Mabary*, Landmark Industries has attempted to "'pick[] off' [the] named plaintiff by mooting [his] individual claim before the court has an opportunity to rule on the question of class certification." *Id*. at 824. As in *Mabary*, Mr. Hooks "did not voluntarily accept a full settlement offer before filing a motion for class certification." *Id*. at 825. And, as in *Mabary*, Landmark's offer did not "satisfy both the individual and class-wide statutory maximum claims." *Id*. Accordingly, as in *Mabary*, the relation-back doctrine applies and this case is not moot.

Landmark attempts to distinguish *Mabary* by noting that, unlike in *Mabary*, Mr. Hooks "did not file a motion to certify prior to the time the offer of judgment expired." Landmark Br. 28. But under the relation-back doctrine, as long as the plaintiff is diligently pursuing class certification, the exact timing of the motion for certification is irrelevant. The relation-back doctrine provides that the certification that brings a class into existence relates back to the date of the filing of the complaint. *See Mabary*, 771 F.3d at 824. Because it is class *certification*, not the filing of the certification *motion*, that brings the class into existence, it does not matter for purposes of the doctrine whether the motion was filed before the offer, or while the offer was pending, or after the offer expired. As long as the motion was timely, the certification relates back to the filing of the class action complaint.

As the Eleventh Circuit recently explained, "[w]hat matters is that the named

plaintiff acts diligently to pursue the class claims. . . . But to act diligently, a named plaintiff need not file a class-certification motion with the complaint or prematurely." *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 707 (11th Cir. 2014); *see Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 (5th Cir. 2008) (where plaintiff did not move for certification until nine months after offer of judgment, holding that relation-back doctrine would apply if district court determined the motion was timely). Here, Mr. Hooks filed his motion for class certification within the district court's extended deadline for filing such a motion, and neither the Magistrate Judge's Memorandum and Recommendation recommending that a class be certified nor the district court order certifying the class suggested that Mr. Hooks had been lax in pursuing class certification. Mr. Hooks "timely and diligently pursued a motion for class certification," *Mabary*, 771 F.3d at 824, and the relation-back doctrine applies.

C. Unable to distinguish *Mabary*, Landmark argues that this case should instead be governed by *Sandoz*, in which this Court applied the relation-back doctrine to a FLSA collective action. According to Landmark, because *Sandoz* is the prior opinion, it "controls over *Mabary* on the issue of whether this Court's 'relation back' rationale as applied to damages claims survived *Genesis*." Landmark Br. 23. But *Sandoz* was decided years before *Genesis*, and thus has nothing to say about what claims survive that decision.

Although difficult to follow, Landmark's argument is evidently as follows: In *Sandoz*, this Court determined that the relation-back doctrine applied equally to collective actions and class actions. In *Genesis*, the Supreme Court held that the relation-back doctrine does not apply to collective actions. "Because one panel cannot overrule another," Landmark Br. 25, the Court must continue to follow *Sandoz*'s determination that the relation-back doctrine applies equally to Rule 23 and FLSA actions, and *Mabary* thus "improperly purports to overrule *Sandoz*" in holding that the relation-back doctrine continues to apply to class actions when, under *Genesis*, it does not apply to collective actions. *Id*. at 24-25.

Although creative, Landmark's argument does not hold up. It is the Supreme Court's decision in *Genesis*, not this Court's decision in *Mabary*, that overruled *Sandoz*, as Landmark concedes elsewhere in its brief. *See id.* at 21 ("[T]he Supreme Court in *Genesis* has since overruled [*Sandoz*'s] reasoning, and the resultant holding[] . . . ."). In *Sandoz*, this Court extended the relation-back doctrine, which it had previously applied to class actions, to FLSA collective actions. In *Genesis*, the Supreme Court made clear that the Court had erred in doing so, explaining that "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis*, 133 S. Ct. at 1529. Thus, by the time this Court decided *Mabary*, the Supreme Court had already overruled *Sandoz*'s holding that, due to similarities between class and collective actions, the relation-

back doctrine applies equally to the two types of proceedings. Landmark suggests that although *Genesis* overturned *Sandoz*'s conclusion that the relation-back doctrine applies to collective actions, this Court remains bound to *Sandoz*'s *reasons* for reaching that conclusion. But in overruling *Sandoz*'s holding, the Supreme Court made clear that *Sandoz*'s reasoning had been incorrect on the precise point that Landmark claims controls here. Thus, this Court is not bound to *Sandoz*'s holding that the relation-back doctrine applies equally to class and collective actions, and *Mabary* did not improperly overrule *Sandoz* in holding that the application of the relation-back doctrine to class actions survives *Genesis*.

In holding that the relation-back doctrine continues to apply to class actions after *Genesis*, the Fifth Circuit is joined by both of the other circuits to have considered the issue: the Eleventh Circuit and the Ninth Circuit. *See Stein*, 772 F.3d at 704-09; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875-76 (9th Cir. 2014) (Benavides, J.). In contrast, no court of appeals has held that its circuit precedent on applying the relation-back doctrine to class actions was overturned by *Genesis*. The Court's holding in *Mabary* is correct, is binding law in this Court, and is dispositive of this case.

II. Even Apart From *Mabary*, This Case Is Not Moot.

Because this Court decided *Mabary* while this case was being briefed, and thereby conclusively resolved the issues in this case, this Court need not look

beyond *Mabary* to hold for Mr. Hooks here. Even without *Mabary*, however, and even apart from the relation-back doctrine, this case is not moot because an unaccepted Rule 68 does not deprive a court of the ability to grant relief, the Rule 68 offer here was not complete, and Mr. Hooks maintains a personal stake in the class action claims.

A. An Unaccepted Rule 68 Offer Does Not Deprive a Court of the Ability to Grant Relief.

1. As Mr. Hooks explained in his opening brief, it is well-established that a "case becomes moot only when 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). A Rule 68 offer does not deprive a court of the ability to grant relief and therefore cannot moot a case.

Landmark attempts to avoid this established mootness doctrine by arguing that *Knox*, one of the cases Mr. Hooks cited, is about voluntary cessation of challenged conduct. *See* Landmark Br. 8. But *Knox*'s discussion of effectual relief is distinct from its discussion of voluntary cessation. In *Knox*, a union that was sued over certain dues argued that the case was moot after it offered a refund of the challenged dues to its members. The Court rejected the mootness argument, noting that voluntary cessation of challenged conduct does not ordinarily moot cases. 123

S. Ct. at 2287. The union argued that concerns about voluntary cessation were inapplicable because the union members did not seek prospective relief. The Court responded that "even if that is so"—that is, even if the voluntary cessation doctrine did not apply—the union's argument failed because there was still a live controversy about the adequacy of the refund and a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* (internal quotation marks and citations omitted). Thus, *Knox*'s discussion of effectual relief presumed that the voluntary cessation doctrine did not apply and cannot be limited to that context. In any event, *Knox* is only one of several cases that set forth the rule that a case only becomes moot when it is impossible for a court to grant any effectual relief, *see also Decker*, 133 S. Ct. at 1335, *Chafin*, 133 S. Ct. at 1023, and Landmark makes no attempt to distinguish these other cases.

2. Landmark insists that it is "incorrect as a matter of law" that a court can still grant effectual relief after a plaintiff rejects a Rule 68 offer for complete relief on his individual claim. Landmark Br. 8. Yet Landmark does not even try to explain how such a Rule 68 offer would deprive a court of the ability to grant effectual relief. Certainly, the tendering of the offer cannot deprive a court of the ability to grant relief; if that were so, the court would not be able to enter the offer

if it were accepted.[1] Neither does the plaintiff's refusal of the offer deprive the court of the ability to grant relief. In that circumstance, the offer is "considered withdrawn" and is "not admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b). If the plaintiff eventually obtains a judgment that is not more favorable than the offer, he must pay costs incurred after the offer, *id*. 68(d), but in all other respects the decision not to accept the offer leaves the parties in the exact position they were in before the offer was made: The plaintiff still has not received any relief, the defendant still has not provided any relief, and the court still has the ability to grant all relief. As the Eleventh Circuit recently explained, in rejecting an argument identical to Landmark's argument here:

[1] In his opening brief (at 22-23), Mr. Hooks pointed out that, if taken to its logical conclusion, Landmark's position would deprive courts of the ability to enter judgment on accepted offers of judgment that offer the plaintiff the maximum he could recover as an individual. He explained that because the acceptance of an offer of judgment much more clearly signals a lack of adversity between the parties than the rejection of an offer, if the rejection of an offer destroys adversity and thereby renders the case moot, the acceptance of the offer would likewise destroy adversity and render the claim moot, and courts would not be able to enter judgment because a court cannot enter judgment on the merits of a moot claim. Rather than address this reasoning on its merits, Landmark claims this argument was waived. But the fact that Rule 68 offers would be self-defeating if they mooted claims is not a new argument; it is further explanation why Landmark's position cannot be correct. Landmark also asserts that Mr. Hooks lacks support for the point, but Mr. Hooks's opening brief cited multiple cases for the well-established proposition that a court cannot enter judgment on the merits of a moot claim. *See* Hooks Br. 22-23 (citing, *e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). That proposition demonstrates that if the tender of an offer of judgment mooted a claim, the Court would not be able to enter the judgment if the offer were accepted.

> Giving controlling effect to an unaccepted Rule 68 offer—dismissing a case based on an unaccepted offer as was done here—is flatly inconsistent with the rule. When the deadline for accepting these offers passed, they were "considered withdrawn" and were "not admissible." *See* Fed.R.Civ.P. 68(b). The plaintiffs could no longer accept the offers or require the court to enter judgment. In short, the plaintiffs still had their claims, and [the defendant] still had its defenses. [The defendant] had not paid the plaintiffs, was not obligated to pay the plaintiffs, and had not been enjoined from sending out more faxes. The named plaintiffs' individual claims were not moot.

Stein, 772 F.3d at 702.

As Justice Kagan explained in her dissent in *Genesis*, "[a]n 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.'" *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting) (*quoting Minn. & St. Louis R. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 151 (1886)). Landmark contends that Justice Kagan was wrong on this point, arguing that an unaccepted offer of judgment "is not a legal nullity for purposes of Article III because it eliminates any concrete adversity between the plaintiff and defendant, and renders the underlying dispute moot by negating the plaintiff's personal stake in the dispute." Landmark Br. 14. But Landmark provides no reason why a settlement offer that was withdrawn both by force of law and its own terms, that could not after that point be accepted by the plaintiff, that was never entered as a judgment, and whose terms were never

enforced removes adversity between the parties or deprives the plaintiff of a personal stake in the case. As Justice Kagan explained: "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. . . . So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted." *Genesis*, 133 S. Ct. at 1533-34 (Kagan, J., dissenting).

3. Instead of trying to explain how an unaccepted offer could deprive the court of the ability to grant relief, Landmark insists that the issue is "well-settled" in the Fifth Circuit, relying primarily on *Sandoz*. Landmark Br. 6-7. As Mr. Hooks explained in his opening brief (at 17-20), however, the plaintiff in *Sandoz* did not argue that an unaccepted offer could not render individual claims moot, instead focusing on whether the collective action claims were moot, and the Court likewise focused on whether the collective actions claims were moot, not on whether an unaccepted offer can moot an individual claim. *Sandoz* is accordingly best read as holding that the relation-back doctrine applies to collective actions (a holding that has since been overturned by *Genesis*), not that an unaccepted offer can moot a claim, and should not be considered binding precedent on the question whether unaccepted offers can moot cases. And, indeed, *Payne v. Progressive Financial Services, Inc.*, 748 F.3d. 605 (5th Cir. 2014), which the Court decided

several years after *Sandoz*, confirms that *Sandoz* did not resolve the issue. In *Payne*, the Court explained that because the offer before it was incomplete, it "need not decide whether a complete offer of judgment would have rendered [the plaintiff's] claims moot." *Id.* at 608 n.1. By treating the issue as an open question, *Payne* demonstrates that the Court did not consider *Sandoz*, or any other case, to have decided the issue.

Mabary likewise did not resolve the issue. Although *Mabary* stated that "an offer of complete relief (even an unaccepted one) will generally moot a plaintiff's claim," it also acknowledged that the Supreme Court, in *Genesis*, "expressly did not decide . . . 'whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot' when the collective action class has not yet been certified." *Mabary*, 771 F.3d at 825 (quoting *Genesis*, 133 S. Ct. at 1528). Because the Court found the claims in *Mabary* not moot due to the relation-back doctrine, its statements concerning whether an unaccepted offer of complete relief can moot a claim are not part of the Court's holding in that case. And although Landmark asserts that the view that an unaccepted offer of judgment can moot a claim "still represents the majority view of the circuits," Landmark Br. 11, its assertion relies on pre-*Genesis* cases. Landmark cites no case from another circuit that has considered Justice Kagan's dissent in *Genesis* and nonetheless held that an unaccepted offer moots a case. In contrast, after considering Justice Kagan's

reasoning, both the Eleventh and Ninth Circuits have held that an unaccepted offer of judgment cannot moot a claim. *See Stein*, 772 F.3d at 703, 709 ("We agree with the *Symczyk* dissent. . . . [A] plaintiff's individual claim is not mooted by an unaccepted Rule 68 offer of judgment."); *Diaz v. First Am. Home Buyers Protection Corp.*, 732 F.3d 948, 954-55 (9th Cir. 2013) ("We are persuaded that Justice Kagan has articulated the correct approach. We therefore hold that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."). As the Ninth Circuit has explained, the holding that an unaccepted Rule 68 offer cannot moot a claim "is consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness." *Diaz*, 732 F.3d at 955. This Court should likewise recognize that an unaccepted Rule 68 offer cannot deprive a court of subject matter jurisdiction over a case and hold that the Rule 68 offer here did not moot Mr. Hooks's claim.

B. Landmark's Offer of Judgment Was Not Complete.

Mr. Hooks's claim is also not moot because Landmark's offer of judgment was not complete, even on Mr. Hooks's individual claim. Although the offer envisioned that there could be litigation over fees after the offer was accepted, and although litigants are entitled to fees for litigating a fee motion, the offer included only attorney's fees accrued "through the date of acceptance of the offer."

ROA.135. Thus, had Mr. Hooks accepted the offer, he would have been deprived of fees to which he was legally entitled.

Landmark's primary response is to argue that Mr. Hooks waived this argument. Mr. Hooks's argument about completeness, however, is simply an additional angle of an argument he has been making throughout this litigation—that Landmark's offer of judgment did not moot his claims. *See Bridges v. City of Bossier*, 92 F.3d 329, 335 (5th Cir. 1996) (holding that variation of argument was not waived to extent it presented a purely legal question). In any event, this Court will consider arguments not made below "when the issue involved is a pure question of law and a miscarriage of justice would result from [the Court's] failure to consider it." *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009) (citation omitted). Here, the question whether an offer is complete when it fails to include post-offer fees is a pure question of law, and failing to consider it could lead to a miscarriage of justice: the court's dismissal of a party's claim for lack of subject matter jurisdiction—and denial to that party of any relief—on the ground that he failed to accept an offer of everything he sought when, in fact, he was never tendered such an offer.

Landmark claims that "the completeness of Landmark's offer is apparent on its face." Landmark Br. 36. But the face of the letter clearly shows that it included attorney's fees only "through the date of acceptance of the offer," ROA.135,

thereby failing to offer fees-on-fees to which Mr. Hooks would be entitled. Landmark also argues that the "district court necessarily made the factual determination that Landmark's offer of judgment offered full relief to Appellant, which determination is reviewed for clear error." Landmark Br. 37. There is no dispute, however, over what the offer included, only over the legal effect of such an offer. Accordingly, the question whether the offer was complete presents a purely legal question that is reviewed de novo: whether an offer of judgment is complete if it fails to include post-acceptance fees.

If such an offer could moot a claim, plaintiffs would be faced with a catch-22. Either the plaintiff could accept the offer and sign away the right to fees to which he was legally entitled, or he could reject the offer and have his case dismissed because he had rejected an offer for everything to which he was potentially entitled. Plaintiffs should not have to choose between signing away rights and having their cases dismissed out of hand. This Court should hold that complete relief "includes attorney's fees expended after the [acceptance] of a Rule 68 offer," *Hernandez v. Asset Acceptance, LLC*, 279 F.R.D. 594, 597 (D. Colo. 2012), and that Landmark's offer to Mr. Hooks was not complete.

C. Mr. Hooks Maintains a Personal Stake in the Class Claims.

1. This case is not moot for the additional reason that Mr. Hooks maintains a personal stake in the class action allegations. In *United States Parole Commission*

v. Geraghty, 445 U.S. 388, 404 (1980), the Supreme Court explained that a named plaintiff whose individual claim has become moot can "retain[] a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." In his opening brief (at 31-34), Mr. Hooks demonstrated that he has as strong a personal stake in the class allegations as the plaintiff in *Geraghty* and that, therefore, under the personal-stake analysis set forth in that case, this case is not "moot under Article III." *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011).

Landmark argues that *Geraghty* applies only to cases in which individual claims are mooted after class certification is denied and therefore does not apply here, where Landmark made its Rule 68 offer before Mr. Hooks moved for certification. In particular, it quotes a sentence in *Geraghty* stating that the case's "holding is limited to the appeal of the denial of the class certification motion." *Geraghty*, 445 U.S. at 404. Read in context, however, it is clear that the Court, in that sentence, was not making distinctions based on *when* the named plaintiff's claim expired (before or after the district court decided a class certification motion), but based on *what issues* the named plaintiff wanted to appeal. The next sentence reads: "A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." *Id*. Thus, in saying its holding was "limited to the appeal of the denial of the class certification

motion," *id*., *Geraghty* was saying that although a named plaintiff whose claim on the merits becomes moot has a continuing personal stake in whether the class gets certified (and thus may appeal a denial of class certification), if certification is properly denied he does not have a continuing personal stake in the merits of the claim (and thus may not appeal the merits separately from an appeal of the denial of class certification).

Landmark also quotes from a footnote in *Geraghty* in which the Court set forth a narrower basis for its holding—that "when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial," *Id*. at 404 n.11—and from *Genesis*'s discussion of *Geraghty*, which, quoting that footnote, stated that *Geraghty* "explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the district court denies class certification." *Genesis*, 133 S. Ct. at 1530. As Mr. Hooks explained in his opening brief (at 33), the fact that the footnote's analysis does not apply here does not lessen the applicability of the personal-stake analysis in *Geraghty*'s main text. And, after explaining why the analysis in the *Geraghty* footnote did not apply, *Genesis* described the "more fundamental[]" difference between *Genesis* and *Geraghty* as being that *Geraghty* involved a class action, under which "a putative class acquires an independent

legal status once it is certified," whereas *Genesis* involved a FLSA collective action, under which "'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action.'" *Id*. Because this case involves a class action, like *Geraghty*, rather than a collective action, like *Genesis*, that distinction does not apply here. The personal-stake analysis in *Geraghty*'s main text is as applicable here as it was in *Geraghty*, and this Court should hold that Mr. Hooks has "a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." 445 U.S. at 404.

2. As Mr. Hooks's opening brief explained, the named plaintiff's interest in representing a class, together with the interests of the class as a potential juridical entity, provide an additional reason why this case is not moot. Because of these interests, an offer of judgment that offers relief only on a named plaintiff's individual claim is not a "complete" offer of relief. In support, Mr. Hooks cited then-Justice Rehnquist's concurrence in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 341 (1980), in which Justice Rehnquist explained that acceptance of an offer "need not be mandated . . . [when] the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class) . . . ." Landmark notes that concurrences are not binding and contends that, in this Circuit, a defendant does not need to offer relief to a class as a condition for completeness, citing a sentence from *Sandoz* stating that if "the court denies the certification

motion, then Sandoz still represents only herself, and Cingular's Rule 68 offer of judgment rendered the case moot." Landmark Br. 35 (quoting *Sandoz*, 553 F.3d at 921). Whether an offer of judgment that offers relief only to an individual plaintiff offers all possible relief in a case in which class certification has been denied, however, is far different from whether it offers all possible relief when a class *may yet still be certified*. Accordingly, *Sandoz*'s statement does not speak to whether an offer of judgment that offers relief only to a named plaintiff can offer "complete" relief when class certification has not been resolved.

More fundamentally, in *Sandoz*, the Court determined that, "in a FLSA collective action the plaintiff represents only him- or herself until similarly-situated employees opt in," *Sandoz*, 553 F.3d at 919, a situation that *Sandoz* specifically described as being "unlike . . . a Rule 23 class action." *Id*. By recognizing that collective actions and class actions are *different* in this respect—a recognition supported by *Genesis*'s explanation that class and collective actions are fundamentally different—*Sandoz* supports the proposition that a named plaintiff in a Rule 23 class action has a representative interest in other members of the class before the class is certified. Because the named plaintiff has such an interest, an offer of judgment to the named plaintiff alone is not a "complete" offer of judgment and does not render a case moot.

3. Finally, as Mr. Hooks's opening brief explained (at 35-36), in addition to the interest in representing the class, Mr. Hooks maintains an economic interest in class certification sufficient to satisfy Article III. *See Roper*, 445 U.S. at 333 (holding that a named plaintiff whose individual claim is moot has a personal stake in class certification "so long as [he] retained an economic interest in class certification"). Specifically, he maintains an economic interest in the potential for an incentive award and for increased fees for work already done on the class claims if the case proceeds through certification.[2]

Landmark argues that Mr. Hooks waived his *Roper*-based arguments. As with the argument about completeness above, however, Mr. Hooks's explanation of how he maintains an economic interest similar to the plaintiffs in *Roper* merely provides an additional angle of the argument that he has been making all along—that the Rule 68 offer did not moot this case. Moreover, the argument is purely legal and a miscarriage of justice would result from the Court's failure to consider it: The Court could end up dismissing a class action for lack of subject matter when, in fact, the Court had jurisdiction to consider the case all along.

[2] Landmark describes Mr. Hooks as claiming an interest in "fees incurred after a plaintiff spurns an award of complete satisfaction." Landmark Br. 34. Indeed, it claims that Mr. Hooks "admit[ted]" to refusing the Rule 68 offer "simply to ratchet up attorney's fees . . . that his counsel might receive by spending more time on this case." *Id*. 13. Landmark misunderstands Mr. Hooks's argument. In arguing that he maintains a *Roper*-like interest in the class claims, Mr. Hooks is not claiming a continuing economic interest in fees incurred *after* the offer of judgment was withdrawn, but in fees that had *already been incurred* at the time of the offer.

Landmark asserts that Mr. Hooks has not offered authority for the argument that he maintains an economic interest in this case. However, *Roper* itself provides sufficient support. In *Roper*, the economic interest claimed by the named plaintiffs—which the Court found sufficient to maintain jurisdiction over the class action—was an interest in shifting parts of the fees and expenses of the litigation to the rest of the class. *See Roper*, 445 U.S. at 334 n.6, 336. In other words, the Court found that the plaintiffs had an economic interest in the possibility of receiving reimbursement for costs they had already incurred in the case. Likewise, here, Mr. Hooks has demonstrated that, if the case proceeds to certification, he could receive additional reimbursement for fees already incurred in litigating this case.

In *Roper*, the Supreme Court discussed the dangers of allowing defendants to "pick[] off" named plaintiffs in class actions before a class can be certified. "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," it explained. 445 U.S. at 339. "[M]oreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Id.*; *see also Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1050 (5th Cir. 1981) (noting that although "this tactic would not work for all

defendants in all suits brought as class actions," the "difficulty inherent in any use of this tactic does not make it acceptable"). Here, faced with a case brought as a class action on behalf of numerous people whose rights were violated, Landmark sought to have the entire case dismissed through an unaccepted offer of judgment to only one plaintiff. Under this Court's precedent and established mootness principles, such an offer does not render a class action moot. This Court should reverse the district court and allow this case to proceed.

CONCLUSION

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 5,866 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 Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2014, the foregoing brief has been served through this Court's electronic filing system upon counsel for the defendant-appellee:

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