No. 14-2574

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIANA MEY,

Plaintiff-Appellant,

v.

NORTH AMERICAN BANCARD, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

APPELLANT'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, plaintiff-appellant Diana Mey states that she is not a subsidiary or affiliate of a publicly owned corporation and that no publicly owned corporation has a financial interest in the outcome that is aligned with her interest.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant Diana Mey respectfully 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 a rejected offer of judgment under Federal Rule of Civil Procedure 68 can moot a named plaintiff's individual claim and require dismissal of a class action that has not yet been certified. Ms. Mey submits that oral argument would assist the Court in resolving this issue.

STATEMENT OF JURISDICTION

Plaintiff-Appellant Diana Mey filed this action in the United States District Court for the Eastern District of Michigan on March 31, 2014, asserting claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of herself and all persons or entities similarly situated. *See* Complaint, RE 1, Page ID # 1-10. The district court had jurisdiction under 28 U.S.C. § 1331. On November 26, 2014, the district court entered an order and accompanying judgment dismissing the class action claims without prejudice and entering judgment on Ms. Mey's individual claim in accordance with the terms of an offer of judgment that the defendant-appellee had tendered to Ms. Mey under Federal Rule of Civil Procedure 68, but that Ms. Mey had rejected. *See* Order, RE 36, Page ID #503-509; Judgment, RE 37, Page ID #510. Ms. Mey filed a timely notice of appeal on December 8, 2014. *See* Notice of Appeal, RE 38, Page ID # 511-12. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Where the named plaintiff in a not-yet-certified class action rejects a Rule 68 offer that would have provided her with the maximum damages she could receive on her individual claim, does the offer render her individual claim moot and require entry of judgment in her favor?

2. Where the named plaintiff in a not-yet-certified class action rejects a Rule 68 offer that would have provided her with the maximum damages she could receive on her individual claim, does the offer deprive the court of subject-matter jurisdiction over claims asserted on behalf of a class?

STATEMENT OF THE CASE AND FACTS

The Supreme Court has explained that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). This case presents the question whether a defendant can unilaterally defeat a class action by making an offer of judgment to a class representative before the court certifies a class.

A. Factual Background and Motion for Class Certification

In 1991, recognizing that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy," Congress enacted the Telephone Consumer Protection Act (TCPA), Pub. L. No. 102-243, § 2(5), 105 Stat. 2394 (December 20, 1991). "Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012). Among its provisions, the TCPA prohibits people from making calls

through an "automatic telephone dialing system" to a phone number assigned to a cellular telephone service. 47 U.S.C. § 227(b)(1)(A).

Despite that prohibition, on January 21, 2014, plaintiff-appellant Diana Mey received an autodialed call on her cell phone from defendant-appellee North American Bancard (NAB), during which a sales representative tried to sell her NAB's credit-card merchant-processing service. *See* Complaint ¶¶ 13-18, RE 1, Page ID # 4. On March 31, 2014, Ms. Mey filed this action, alleging that NAB violated the TCPA. *Id.* ¶ 2, Page ID # 2. Because the call was transmitted using technology capable of generating hundreds of thousands of telemarketing calls per day, and because telemarketing campaigns generally place calls to hundreds of thousands or even millions of potential customers en masse, Ms. Mey filed the action both as an individual and on behalf of a proposed nationwide class of persons whom NAB called on their cell phones using an automatic telephone dialing system without receiving express consent. *Id.* ¶ 3, Page ID # 2.

Along with her complaint, Ms. Mey filed a motion for class certification. *See* Motion for Class Certification, RE 5, Page ID # 65-83. The motion noted that Ms. Mey was filing it at that time, without the benefit of discovery, to ensure that she would not be "'picked off' through a Rule 68 offer of judgment or individual settlement offer." *Id.* at 2, Page ID # 70 (citing *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011)). In other words, Ms. Mey was concerned that NAB

would seek to avoid class-wide liability by making an offer of judgment just to her and then arguing that the offer deprived the court of subject-matter jurisdiction over the entire case. Although most circuits to consider the issue had held that an offer of full relief to a named plaintiff before she moved for class certification would not moot a class action, the Seventh Circuit had held in *Damasco* that it could. The Seventh Circuit had explained, however, that named plaintiffs could avoid mootness by "mov[ing] to certify the class at the same time that they file their complaint" and then "ask[ing] the district court to delay its ruling to provide time for additional discovery or investigation." 662 F.3d at 896. Accordingly, Ms. Mey filed the motion for class certification as a protective measure because, even in the Seventh Circuit (the one Circuit that had held that an unaccepted offer of full relief to a named plaintiff before she moved for certification rendered a class action moot), filing a motion to certify with the complaint would "protect[] a putative class from attempts to buy off the named plaintiffs." *Id*. Because discovery had not yet commenced, Ms. Mey asked that the Court stay briefing and allow her to engage in discovery to support the motion. *See* Motion for Class Certification at 2, RE 5, Page ID # 70.

On April 3, 2014, the district court denied Ms. Mey's motion to certify a class without prejudice. *See* Order Denying Motion to Certify, RE 7, Page ID # 86-87. The court declared that "Plaintiff is not prejudiced by waiting until a

scheduling order is issued since Plaintiff herself seeks a stay in the briefing of the motion until discovery is complete." *Id*. at 2, Page ID # 87.

B. The Rule 68 Offer

As Ms. Mey had anticipated, on May 7, 2014, NAB made her an offer of judgment pursuant to Federal Rule of Civil Procedure 68. *See* Rule 68 Offer, RE 11-1, Exh. A, Page ID # 119-124. The terms of the offer made clear that NAB was attempting to moot the individual claims of Ms. Mey and any other potential named plaintiffs, and thereby to avoid being subject to class-wide liability for its violations of the TCPA.

First, NAB offered Ms. Mey $1,500 for the January 21, 2014 call discussed in her complaint. *Id*. at 2, Page ID # 121. Because the TCPA authorizes up to $500 in statutory damages per violation, but allows the court to triple that amount under certain circumstances, *see* 47 U.S.C. § 227(b)(3)(B), this offer represented the most Ms. Mey could receive in statutory damages for the January 21 call.

Second, the offer provided that "[i]f Mey's Class Action Complaint alleges that NAB made more than one telephone call to Mey in violation of the TCPA," NAB offered her $1,500 "for each and every telephone call made by NAB and received by Mey in violation of the TCPA." Rule 68 Offer at 2, RE 11-1, Exh. A, Page ID # 121.

Third, NAB offered Ms. Mey accrued costs and expenses and reasonable attorneys' fees in an amount to be determined by the Court. *Id.*

Fourth, the offer stated that NAB "agree[d] to the entry of a stipulated injunction against it as requested in the Class Action Complaint." *Id.* Specifically, it provided that NAB would "stipulate to an injunction prohibiting it from making telemarketing calls in violation of the TCPA" and would "further stipulate to implement and enforce internal compliance procedures to prevent future TCPA violations by NAB with regard to telemarketing calls." *Id.* at 2-3, Page ID #121-22.

Fifth, the offer stated that "NAB extends the identical offer," with the exception of taxable costs, to any other person or entity represented by Mey's counsel "who, as of the date of this offer, also received a telephone call from NAB alleged to be in violation of the TCPA, and who contacted . . . Mey's counsel on or before the date of this offer regarding a potential claim against NAB for making such telephone calls." *Id.* at 3, Page ID # 122. The offer limited this "offer to persons other than Mey . . . to a total of ten (10) persons." *Id.*

Finally, the offer explained that it was "intended to fully satisfy the individual claims of Mey asserted in this action or which could have been asserted in this action, and to satisfy any similar claims of any person or entity to whom this offer is extended." *Id.* "To the extent the offer does not do so," the offer continued, "NAB hereby offers to provide Mey or any other eligible person or entity to whom

this offer is extended, with any other relief which this Court determines is necessary to fully satisfy all of Mey's individual claims in this action, or similar claims of any other person or entity to whom this offer is extended." *Id*.

By letter dated May 13, 2014, Ms. Mey rejected the offer. *See* Letter Rejecting Offer, RE 11-1, Exh. B, Page ID # 126. The letter explained that Ms. Mey rejected the offer because it "fails to offer complete relief to the class she seeks to represent." *Id*.

C. The District Court Decision

Because Ms. Mey did not accept the offer, it was "considered withdrawn" by the terms of Rule 68. Fed. R. Civ. P. 68(b). Nonetheless, on May 28, 2014, NAB moved to dismiss the complaint for lack of subject-matter jurisdiction based on the offer. *See* Notice of Motion and Motion to Dismiss, RE 11, Page ID # 95-114. NAB argued that the offer rendered Ms. Mey's individual claim moot and that, although Ms. Mey had rejected the offer, judgment should be entered in accordance with its terms and the class claims should be dismissed. *See id*. at 2, Page ID # 96.

The district court granted the motion, stating that an "unaccepted Rule 68 offer of judgment . . . moots the class action suit," but that, "instead of dismissing the Rule 68 unaccepted offer case as moot, the better approach is to enter a judgment in favor of the named-plaintiff in accordance with the Rule 68 offer of

judgment." Order at 4, RE 36, Page ID # 506. Although Ms. Mey had rejected the Rule 68 offer, the district court entered judgment on her individual claim in accordance with the offer's terms and dismissed the class claims. *Id*. at 6-7, Page ID # 508-09. The court further ordered that the action be deemed closed and declared various discovery motions moot. *Id*. at 7, Page ID # 509.

SUMMARY OF ARGUMENT

The district court's holding that NAB's offer of judgment required entry of judgment on Ms. Mey's individual claim and dismissal of the class claims was wrong, both because an unaccepted offer of judgment cannot render a claim moot, and because, even if an unaccepted offer could moot a named plaintiff's individual claim, the offer would not deprive the court of jurisdiction over the class claims.

First, the district court erred in concluding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claim and requires entry of judgment in the plaintiff's favor on the terms of the rejected offer. 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. Service Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quotation marks and citations omitted from all three

citations). The district court's entry of a judgment granting relief to Ms. Mey demonstrates that the tendering of the Rule 68 offer did not deprive the court of the ability to grant effectual relief and therefore did not moot her 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. at 1533-34 (Kagan, J., dissenting). The majority in *Genesis* did not dispute Justice Kagan on this point. The Ninth and Eleventh Circuits have since recognized that Justice Kagan's reasoning is compelling and requires the conclusion that a Rule 68 offer cannot moot anything because it does not deprive a court of the ability to grant effectual relief. *See Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 702-03 (11th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 953-55 (9th Cir. 2013).

This Court's precedents do not hold otherwise. Although the Court stated in *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 574 (6th Cir. 2009), that "an offer of judgment that satisfies a plaintiff's entire demand moots the case," it could not have meant that such an offer would render the case moot in the Article III sense of the word. It is a basic rule of jurisdiction that a court cannot enter judgment on a case in which it lacks Article III jurisdiction, but, instead, must

dismiss the case for lack of jurisdiction. Instead of dismissing for lack of jurisdiction, *O'Brien* affirmed entry of judgment in the plaintiff's favor. By doing so, the Court demonstrated that, despite its use of the term "moots," it was not holding that it lacked jurisdiction.

Once the idea that the Rule 68 offer mooted Ms. Mey's claim is dispelled, there is no ground on which the court had authority to enter judgment on the Rule 68 offer over Ms. Mey's objections. Although a court may enter judgment if a defendant unconditionally surrenders, and it is only the plaintiff's obstinacy that prevents her from accepting victory, this case does not present that situation. Ms. Mey did not reject the offer of judgment out of obstinacy, but because the offer did not provide class-wide relief. In the class-action context, a court cannot enter an unwanted judgment on a plaintiff's individual claim as a means of terminating the claims of the class.

Second, even if an offer of judgment could be deemed to moot an individual claim, it would not moot the claims of the class nor bar the court from exercising subject-matter jurisdiction over a class action brought by the named plaintiff. This Court held in *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005), that an offer of full relief to the named plaintiff in a putative class action that was tendered while a motion for class certification was pending did not moot the case. Nothing about this case warrants a different result. Thus, as every

Circuit to have addressed the effect of a Rule 68 offer to the named plaintiff in a not-yet-certified class action agrees, the district court retains jurisdiction under the circumstances presented here. *See Stein*, 772 F.3d at 700; *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824 (5th Cir. 2014); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014); *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011); *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004).

The Supreme Court's decision in *Genesis*, which held that a Fair Labor Standards Act (FLSA) collective action became moot when the named plaintiff's individual claim became moot before other plaintiffs opted in, does not alter this conclusion. As this Court explained in *Schlaud v. Snyder*, 717 F.3d 451 (6th Cir. 2013), *vacated and remanded on other grounds*, 134 S. Ct. 2899 (2014), *Genesis* did "not involve class certification under Rule 23, which is 'fundamentally different from collective actions under the FLSA.'" 717 F.3d at 456 n.3 (quoting *Genesis*, 133 S. Ct. at 1529).

STANDARD OF REVIEW

This Court reviews de novo a district court's decision regarding mootness. *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001). "The heavy burden of demonstrating mootness rests on the party claiming mootness." *Id*.

ARGUMENT

I. An Unaccepted Rule 68 Offer Does Not Moot a Claim or Otherwise Authorize Entering Judgment on It.

The district court entered judgment on Ms. Mey's individual claim and dismissed the class claims because it determined that the Rule 68 offer had rendered Ms. Mey's individual claim moot. A rejected offer of judgment, however, neither moots a claim nor otherwise authorizes entering judgment on a class representative's claim over her objections. Accordingly, Ms. Mey's individual claim should have been allowed to proceed, and the question whether the class claims were subject to dismissal never should have arisen.

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

An unaccepted Rule 68 offer, like all other rejected settlement offers, is a legal nullity, relevant only for the purpose of determining costs at the end of a case. It does not deprive the plaintiff of a concrete interest in the case or render the court incapable of providing relief and therefore does not moot the case.

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

a. 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 federal courts

do 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); *see also*, *e.g.*, *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 406 (6th Cir. 2013) (same) (quoting *Decker*, 133 S. Ct. at 1335). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 132 S. Ct. at 2287 (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).

A rejected offer of judgment does not meet the criteria for mooting a case. Neither the offer itself, nor the plaintiff's decision not to accept it, provides redress for the plaintiff's grievance or makes it impossible for a court to grant effectual relief. This case demonstrates this fact perfectly: After Ms. Mey rejected the offer, the district court entered judgment on her claim in her favor, awarding her the relief offered in the Rule 68 offer. That the court was able to award such relief demonstrates that neither the offer of judgment nor Ms. Mey's rejection of it deprived the court of the ability to award relief. Because the Rule 68 offer did not deprive the court of the ability to award Ms. Mey effectual relief, the offer did not moot her claim.

b. Rule 68 and the procedures it establishes underscore that an offer of judgment does not moot a case. 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 Air Lines, Inc. v. August*, 450 U.S. 346, 350 (1981). The rule provides that judgment will 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). The rule also expressly provides what happens if the offer is rejected: "An unaccepted offer is considered withdrawn." *Id*. 68(b). In that case, the offer only "becomes significant in . . . a [post-judgment] proceeding to determine costs." *Delta*, 450 U.S. at 350.

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 Rule 68 *requires* acceptance of an offer under any circumstances. Nor does the Rule suggest that it is in any way intended to divest courts of jurisdiction. 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), judgment will be entered on the offer, and in the case of rejection, the case will be litigated to judgment.

Thus, under the terms of Rule 68, a rejected offer of judgment is merely a rejected settlement offer—one that has been withdrawn and is only admissible for the purpose of determining costs once the case has ended. Once the offer was rejected, "the plaintiff[] still had [her] claims, and [the defendant] still had its defenses." *Stein*, 772 F.3d at 702. The offer did not affect the court's ability to grant relief and therefore did not moot the claim.

2. Justice Kagan's Dissent in *Genesis Healthcare v. Symczyk* Articulates Why an Unaccepted Offer of Judgment Does Not Moot a Claim.

In holding Ms. Mey's claim moot, the district court cited *Genesis Healthcare Corporation v. Symczyk*, 133 S. Ct. 1523, for the proposition that the Supreme Court has "determined that a Rule 68 offer of judgment that satisfies a named plaintiff's requested relief prior to the certification of a motion moots the plaintiff's claims." Order at 2, RE 36, Page ID # 504. That is incorrect: The majority in *Genesis* explicitly *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 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.[1] 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.*

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[1] *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.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented from the majority's decision not to reach the issue whether the 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). Analyzing 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 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. __, __, 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 (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*, both the Ninth and Eleventh Circuits have 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; *see Stein*, 772 F.3d at 700, 703 (agreeing "with the *Symczyk* dissent" and holding that a defendant may not "moot a class action through an unaccepted Federal Rule of Civil Procedure 68 offer of complete relief to the named plaintiffs—but not to class members—before the named plaintiffs move to certify the class"). As the Ninth Circuit explained, "[t]his holding is consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness." *Diaz*, 732 F.3d at 955. Once an offer of judgment lapses, it is "by its own terms and under Rule 68, a legal nullity." *Id*.

3. *O'Brien* Does Not Compel this Court To Hold that an Unaccepted Offer of Judgment Deprives a Court of Article III Jurisdiction.

Notwithstanding Justice Kagan's explanation that a Rule 68 cannot moot a claim, the district court held that the Rule 68 offer mooted Ms. Mey's claim, citing

O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567. *See* Order at 4, RE 36, Page ID # 506. *O'Brien* does not compel the lower court's conclusion.

O'Brien began as a collective action by former employees of two McDonald's franchises, alleging that their employer paid them less than they had earned, in violation of the FLSA and state law. The district court conditionally certified a class but, after discovery, determined that the opt-in plaintiffs were not similarly situated and decertified the class, dismissing the opt-in plaintiffs' claims without prejudice. Six of those plaintiffs then filed *individual* actions. The defendant made a Rule 68 offer to the six plaintiffs on two of the three counts in their complaints and then moved to dismiss those counts for lack of subject-matter jurisdiction. The district court stated that the claims in those two counts were moot but, rather than dismissing the counts as moot, entered judgment in favor of the plaintiffs. The plaintiffs then appealed to this Court, which "affirm[ed] the district court's entry of judgment pursuant to the defendants' Fed.R.Civ.P. 68 offer of judgment." *O'Brien*, 575 F.3d at 572.

In affirming the entry of judgment in the plaintiffs' favor, this Court stated that "a Rule 68 offer can be used to show that the court lacks subject-matter jurisdiction" and that "an offer of judgment that satisfies a plaintiff's entire demand moots the case." *Id.* at 575. However, although it used the words "jurisdiction" and "moots," *O'Brien* could not have held that an offer of judgment

that satisfies a plaintiff's entire demand renders the case moot in the Article III sense—that is, that it deprives the court of jurisdiction. 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. As the Supreme Court has explained, "[w]ithout jurisdiction the court 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."). *O'Brien*, however, specifically *rejected* the "view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand," as would be true if the offer truly mooted the case in the jurisdictional sense. 575 F.3d at 575. The Court held instead that "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *Id*. By stating that the court should enter judgment for plaintiffs, *O'Brien* implicitly recognized, despite its use of mootness language, that an offer of judgment does not deprive the courts of jurisdiction.

In other words, if *O'Brien* were understood to hold that a Rule 68 offer of complete relief could moot a case in the constitutional sense, that decision would

be nonsensical, because the Court affirmed entry of judgment in favor of the plaintiff, but if a case truly is moot, a court has no power to enter judgment. *See Steel Co.*, 523 U.S. at 94. Indeed, if a Rule 68 offer of complete relief actually rendered the plaintiff's claim moot, a court would be without power to enter a judgment even if the offer were *accepted*, negating the Rule's express authorization for entry of judgment on offers accepted within the Rule's timeframe. For similar reasons, the district court's decision in this case cannot be correct, because if the Rule 68 offer had in fact mooted the case, the district court would not have been able to enter judgment in Ms. Mey's favor. As discussed above (at 17), that the district court was able to enter judgment and award relief demonstrates that the Rule 68 offer did not in fact moot the case. And that the Court affirmed entry of judgment in *O'Brien* demonstrates that, despite that case's use of mootness language, the Court was not in fact holding that an unaccepted Rule 68 offer can deprive a court of subject-matter jurisdiction over a case. *O'Brien* is better read to hold that, in circumstances like those in that case, in which the plaintiffs brought only individual actions, *see* 575 F.3d at 575, the district court can enter judgment in favor of a plaintiff when the defendant unconditionally consents to entry of judgment for the plaintiff's entire demand.[2]

[2] Because courts cannot enter judgment on a moot claim, some courts have held that the proper response to a Rule 68 offer of complete relief is to dismiss the case as moot, without the plaintiff receiving any of the offered relief. *See*, *e.g.*, *Greisz v.*

In any event, since *O'Brien*, 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 (citations and quotations marks omitted from all three citations). Moreover, Justice Kagan has now thoroughly explained why an unaccepted Rule 68 offer cannot satisfy the Supreme Court's formulation of the mootness doctrine and invited courts 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.

B. An Offer of Judgment Does Not Justify Entering Judgment in a Class Representative's Favor Over Her Objections.

Although an unaccepted offer of judgment does not moot a claim, a court need not allow a case to proceed whenever a plaintiff perversely refuses to take yes

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*Household Bank (Ill.), N.A.,*176 F.3d 1012 (7th Cir. 1999). This Court specifically rejected that approach in *O'Brien*, 575 F.3d at 575, and correctly so, given the approach's lack of logic: The plaintiff's claim should be dismissed as moot, so the theory goes, because "[y]ou cannot persist in suing after you've won," *Greisz*, 176 F.3d at 1015, but the plaintiff who supposedly "won" gets nothing; the case is dismissed on the theory that there is no controversy because the plaintiff has received everything she asked for, when, in fact, the plaintiff has received nothing at all.

for an answer. As Justice Kagan explained in *Genesis*, when a case presents only individual claims, "a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *see also ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.*, 485 F.3d 85, 93 (2d Cir. 2007) ("Where a defendant has consented to judgment for all the relief the plaintiff can win at trial (according to the trial court's determination), the defendant's refusal to admit fault does not justify a trial to settle questions which can have no effect on the judgment."). Thus, in *O'Brien*, this Court held that the best approach when an individual plaintiff "refuses an offer of judgment that would satisfy his entire demand" is to "enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." 575 F.3d at 575.

Nonetheless, the rejected offer here did not justify entering judgment in Ms. Mey's favor, because Ms. Mey brought this case as a class action. In a case brought on behalf of a class, neither Rule 68 nor any other source of law permits a district court to enter judgment solely for the class representative, over her objection, before considering class certification. A court does not "have inherent authority to enter an unwanted judgment for [a plaintiff] on her individual claim, in

service of wiping out her proposed [class] action." *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting).

Indeed, in *O'Brien*, the Court entered judgment in favor of the plaintiffs (who had filed individual actions) only after specifically noting that the case did not implicate the concerns raised by cases brought as collective actions. Because "plaintiffs did not purport to bring a collective action," the Court explained, "we are not concerned that the . . . plaintiffs have been picked off by defendants to avoid the onslaught of a putative collective action." 575 F.3d at 575.

In the context of a case brought only on behalf of an individual, if the defendant unconditionally consents to the entry of a merits judgment against it even after an offer of judgment has been rejected, judgment in the plaintiff's favor is appropriate, not because the court lacks jurisdiction, but because the court *has* jurisdiction and there is no contest over whether judgment should be entered fully resolving plaintiff's claims. However, once the fallacy that the offer of judgment presents a jurisdictional basis for dismissal that must necessarily be resolved before consideration of other issues is put aside, there is no basis for allowing a defendant to compel entry of a judgment in favor of an individual plaintiff as a means of terminating prosecution of claims on behalf of a class. Rather, allowing the defendant to do so would distort the proper functioning of the judicial process:

> To deny the right to [proceed with a class action] simply because the defendant has sought to "buy off" the individual private claims

> of the named plaintiffs would be contrary to sound judicial administration. 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; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Roper, 445 U.S. at 339.

The plaintiff in a class action has an excellent reason for objecting to the court's resolution of her individual claims prior to class certification: Such a resolution fails to satisfy the legitimate objective for which she has brought the action—obtaining relief for the class. As then-Justice Rehnquist pointed out in his concurring opinion in *Roper*, there is no rule of law "that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims." *Id.* at 341 (Rehnquist, J., concurring). Rather, "[a]cceptance 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) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable." *Id.*

In sum, in a class action, a court many not, "prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole." *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting). The court

below erred in entering judgment in Ms. Mey's favor over her objection, and this case should be allowed to proceed.

II. Even If a Rule 68 Offer Could Moot an Individual Claim, the Lawsuit Would Not Be Subject to Dismissal Because the Class Claims Are Not Moot.

The district court erred not only in holding that Ms. Mey's individual claim was rendered moot by the Rule 68 offer, but also in holding that the unaccepted Rule 68 offer required dismissal of this action, in which Ms. Mey also asserted claims on behalf of a class. Because a class action (unlike the FLSA collective action addressed by the Supreme Court in *Genesis*) is not just a collection of plaintiffs pursuing individual claims but involves the creation of an entity with "an independent legal status," 133 S. Ct. at 1530, whether class claims present a live controversy does not depend on the status of the claims of any one individual. For this reason, every court of appeals that has addressed the issue has recognized that class claims remain justiciable under circumstances similar to those in this case.

A. If Unaccepted Offers of Judgment Could Require Dismissal of Class Actions, Defendants Would Be Able to Avoid Class-Wide Liability.

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, deters wrongdoing through the vindication of legal rights, and furthers "efficiency and economy of litigation," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

The district court held that NAB's Rule 68 offer to Ms. Mey required dismissal of the class claims. 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. 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), forcing other members of the class to file new complaints if they wanted to seek relief. The defendants could then pay off the new class representatives as well, "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). In short, as another district court in this Circuit explained last year, defendants would be able "to essentially opt-out of Rule 23." *Family Health Chiropractic, Inc. v. MD*

On-Line Solutions, Inc., 2014 WL 4322552, at *2 (N.D. Ohio Aug. 29, 2014) (quoting *Stewart*, 252 F.R.D. at 386).

This circumvention of the class-action device would "contraven[e] one of the primary purposes of class actions—the aggregation of numerous similar (especially small) claims in a single action," *Weiss*, 385 F.3d at 345, "effectively ensur[ing] that claims that are too economically insignificant to be brought on their own would never have their day in court." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011). Accordingly, it would have disproportionate effects on efforts to enforce the TCPA and similar statutes. Because individual claims under the TCPA are often small, class actions are a crucial means by which consumers hold telemarketers who violate the law accountable for their actions. *See Mims*, 132 S. Ct. at 753 (noting that the federal civil filing fee is $350 and asking: "How likely is it that a party would bring a $500 claim in . . . federal court?").

Dismissing class actions when the defendants make offers of judgment to class representatives before classes are certified would also "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Roper*, 445 U.S. at 339. Although many plaintiffs would likely not be able to pursue their claims individually, particularly when those claims were small, those who did would be filing repetitive suits. This result, as well, would be

contrary to the goals of the class-action device, which is meant to "save[] the resources of both the courts and parties by permitting an issue potentially affecting [a lot of people] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

Moreover, allowing defendants to 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." *Stewart*, 252 F.R.D. at 386. While plaintiffs rushed to file class certification motions, defendants would "race to make their settlement offers before plaintiffs file[d] their certification motions." *Id.* And courts would be deprived of the ability "to set reasonable time frames . . .without fear that [they have] provided a substantial litigation advantage to the defendant by having done so." *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 2010 WL 5392709, *8 (N.D. Ohio Dec. 22, 2010), *aff'd*, 719 F.3d 564 (6th Cir. 2013).

In sum, if Rule 68 offers to class representatives could moot putative class actions, defendants would be able to use Rule 68 offers as a sword "to preclude a viable class action from ever reaching the certification stage." *Zeidman*, 651 F.2d at 1050. Such a result would place Rule 68 and Rule 23 at cross-purposes and

undermine Rule 23's careful delineation of the requirements for maintaining a class action.

B. This Court Has Already Held That a Rule 68 Offer Made Prior to Class Certification Does Not Moot a Class Action.

Fortunately, this Court's case law does not require it to allow defendants to opt out of class actions through Rule 68 offers to individual plaintiffs. In *Carroll*, the Court held that a putative class action did not become moot where the defendant made a Rule 68 offer while the motion for class certification was pending. 399 F.3d at 624. There is no meaningful difference between *Carroll* and this case and thus, like *Carroll*, this class action is not moot.

Carroll involved a class-action complaint alleging Fair Debt Collection Practices Act (FDCPA) violations. While the plaintiffs' motion for class certification was pending, the defendant made a Rule 68 offer of judgment to the named plaintiffs, and the putative class if it was certified, that exceeded the amount to which the plaintiffs were entitled under the FDCPA. The defendant then moved to dismiss the complaint as moot. The district court denied the motion and granted class certification.

On appeal, the defendant argued that because of the Rule 68 offer, the case was moot. This Court disagreed. The Court noted that *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), had broadly stated that where "the named plaintiff's claim becomes moot *before* certification, dismissal of the action is required."

Carroll, 399 F.3d at 625 (quoting *Brunet*, 1 F.3d at 399 (emphasis in original)). The Court explained, however, that despite this broad language, *Brunet* "in fact distinguished between cases that are settled before a motion for class certification is filed and cases where a settlement offer is made to a named plaintiff while a motion for class certification is pending." *Id.*; *see also Brunet*, 1 F.3d at 400 ("If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate." (citation omitted)). Although the class had not yet been certified at the time of the Rule 68 offer, the Court held that the district court properly denied the motion to dismiss the complaint. In other words, the Court held that the Rule 68 offer of full relief, tendered before the court had certified a class, did not moot the case.

Below, the district court distinguished *Carroll* on the ground that, in *Carroll*, the Rule 68 offer was made after discovery took place, the class certification motion was briefed, and a magistrate judge had recommended that a class be certified, whereas here, the Rule 68 offer was made before the Court issued a scheduling order and before discovery and full briefing on class certification. But the district court offered no explanation why the *timing* of the Rule 68 offer relative to a scheduling order, discovery, briefing, or recommendations by the

magistrate judge would have an effect on whether the court maintained subject-matter jurisdiction over the case. The passage of time, taking of discovery, filing of briefs, and issuance of recommendations do not create a case or controversy where none exists. Thus, the Court's finding of subject-matter jurisdiction in *Carroll* could not have depended on any of those facts.

Likewise irrelevant is the fact that, here, the district court denied the certification motion without prejudice pending the issuance of a scheduling order, whereas in *Carroll* the certification motion remained pending at the time of the Rule 68 offer. The denial of a motion (particularly a denial without prejudice) does not extinguish subject-matter jurisdiction that otherwise exists. *Cf. U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) (recognizing that, even where the class representative's individual claim is moot and the class certification motion has been denied, the court retains jurisdiction over the class certification issue). Thus, the fact that the court had not yet ruled on the motion for certification at the time of the offer in *Carroll* cannot be the reason that case was not moot.

Similarly, the facts that the offer of judgment in *Carroll* offered relief to the entire class if it was certified and that the plaintiff in *Carroll* accepted the offer after the motion to dismiss was filed—both of which were cited by NAB below as differences between this case and *Carroll*, *see* Defendant's Reply at 6, RE 20, Page ID # 180—cannot be the reasons that *Carroll* was not moot. Neither making an

offer to a whole class nor the acceptance of an offer would create subject-matter jurisdiction if it did not otherwise exist. Indeed, if anything, the facts that the offer in *Carroll* was made to the whole class and that it was eventually accepted show that there was *less* of a continuing interest in *Carroll* than there is here.

In sum, none of the factual differences between this case and *Carroll* would justify holding that the court had subject-matter jurisdiction in that case, but not in this case.

Moreover, since *Carroll*, this Court has held that even actual mootness of named plaintiffs' claims through a mixture of settlement and acceptance of full relief prior to class certification does not moot a putative class action. *See Schlaud v. Snyder*, 717 F.3d 451, *vacated and remanded on other grounds*, 134 S. Ct. 2899. In *Schlaud*, the plaintiffs sued both state defendants and union defendants. Before the district court addressed class certification, the plaintiffs settled with the state defendants, and the union defendants provided the named plaintiffs with the monetary and nominal damages they had sought. Based on these developments, all parties agreed that the injunctive relief aspects of the case and the individual plaintiffs' damages claims were moot. *See Schlaud v. Snyder*, Case No. 1:10-CV-147, RE 118, Opinion and Order of Dismissal at 2 (W.D. Mich. Aug. 30, 2011). The district court denied class certification because the requirements of Rule 23 were not met and then, with only the individual claims before it, dismissed the case

as moot. *See id*. On appeal, this Court explained that "[a]lthough the district court dismissed this case as moot against the union defendants because defendants tendered monetary and nominal damages to the named plaintiffs," the Court "retain[ed] jurisdiction to consider whether the district court properly denied certification of plaintiffs' proposed class." *Schlaud*, 717 F.3d at 456 n.3. In other words, although the defendants had rendered the named plaintiffs' claims moot prior to the district court's consideration of class certification, the Court retained jurisdiction over the class claims. Likewise, here, even if a Rule 68 offer of full relief could have mooted Ms. Mey's individual claims, the court still had jurisdiction over the class claims.

C. Because of the Special Features of Class Actions, Ms. Mey Retains a Sufficient Personal Stake in the Case for It To Proceed.

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 Supreme 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 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 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 Ms. Mey would have received the maximum statutory damages she could obtain as an individual if she had accepted the Rule 68 offer, she chose to reject it. Under circumstances such as these, where the named plaintiff seeks to keep her interests aligned with those of the class so that she 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*, 639 F.3d at 1249 (quoting *Geraghty*, 445 U.S. at 403).[3]

Second, a putative 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." *Roper*, 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, Ms. Mey has an interest in the recovery of attorney's fees attributable to her counsel's efforts on behalf of the class. NAB's offer included only reasonable fees,

[3] Relying on a footnote in *Geraghty*, *Brunet* stated that the holding in *Geraghty* was "limited to the question of a proposed class representative's right to appeal the denial of class certification." 1 F.3d at 400. In that footnote, the Supreme Court provided a narrower basis for its holding in *Geraghty*—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. It is true that, because there had been no definitive denial of certification in this case before the Rule 68 offer was tendered, *Geraghty*'s holding, as stated in the footnote, might not provide a basis for jurisdiction if the offer had rendered Ms. Mey's individual claim moot. However, the fact that there had been no final 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, as part of that analysis, *Geraghty* recognized that "timing is not crucial" to the mootness determination. 445 U.S. at 398. *Brunet* also stated that the plaintiff in *Geraghty* had "a personal stake in the controversy at the time the court certified the action." 1 F.3d at 400. Because his individual claim had become moot prior to certification, however, the only personal stake the plaintiff in *Geraghty* had at the time of certification was a personal stake in representing the class—a stake shared by Ms. Mey here.

in an amount to be determined by the district court. *See* Rule 68 Offer at 2, RE 11-1, Exh. A, Page ID # 121. 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, a putative class representative such as Ms. Mey retains an individual interest in a possible incentive award for her efforts on behalf of the class. *See Spine & Sports Chiropractic Inc. v. Zirmed, Inc.*, 2014 WL 2946421, *14 (W.D. Ky. June 30, 2014) (recognizing "the possibility of an incentive award" in a TCPA case); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012) (holding that possibility of incentive award provided standing to appeal denial of certification where individual claim was settled).

Third, the ultimate certification of a class creates a juridical entity with "a legal status separate from the interest of [the named plaintiff]." *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Under appropriate circumstances, a certification decision may relate back to earlier events in the case where the named plaintiff indisputably had a live claim, and thus enable the court to consider class certification even after the named plaintiff's claim is mooted. *Id.* at 402 n.11. Appellate decisions

following *Sosna*'s reasoning have held that in circumstances like those in this case, the possible certification of a class should be deemed to relate back to the filing of the class action complaint, permitting class claims to continue even if the individual plaintiff's claim has become moot, in order to "avoid[] the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved." *Pitts*, 653 F.3d at 1090; *see also*, *e.g.*, *Stein*, 772 F.3d at 705-707; *Weiss*, 385 F.3d at 346-48.

Because of the special features of class actions, most federal appellate courts to have considered the issue have held that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim . . . does not moot a class action," even if, unlike in this case, the offer is "made before the named plaintiff files a motion for class certification." *Pitts*, 653 F.3d at 1091-92; *see also Stein*, 772 F.3d at 704-09; *Mabary*, 771 F.3d at 824; *Lucero*, 639 F.3d at 1249; *Weiss*, 385 F.3d at 348. The only court of appeals that has been unwilling to go that far still holds that the case is not moot so long as the plaintiff filed a motion for certification before receiving the Rule 68 offer, as Ms. Mey did in this case. *See Damasco*, 662 F.3d at 896.[4] Thus, the district court in this case adopted a position

[4] Because the filing of a motion does not, in and of itself, affect whether a person has a personal stake in a case sufficient to create a case or controversy, Ms. Mey believes that the Third, Fifth, Ninth, Tenth, and Eleventh Circuits are correct and that this Court should hold that a Rule 68 offer that, if entered, would fully satisfy the named plaintiff's individual claim does not moot a class action regardless of

that has been rejected by all circuits to have considered the issue. All of those circuits would agree that, under the facts here, this case is not moot. Even if the Rule 68 offer is (wrongly) viewed as mooting the named plaintiff's individual claim, "the named plaintiff may continue to represent the class until the district court decides the class certification issue." *Pitts*, 653 F.3d at 1092. "Once the class has been certified, 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*.

D. *Genesis Healthcare v. Symczyk* Does Not Affect the Outcome of this Case.

The Supreme Court's decision in *Genesis* does not alter the conclusion that a Rule 68 offer of full relief to a putative class representative does not moot the class action. *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), but it did so largely based on features of FLSA actions that are different from class actions.

As the Supreme Court explained in *Genesis*, "Rule 23 actions are fundamentally different from collective actions under the FLSA," in large part

whether or not the plaintiff moves for class certification before the offer is extended. However, because Ms. Mey filed a motion for class certification simultaneously with her complaint, this case would not be moot even under the Seventh Circuit's rule in *Damasco*, 662 F.3d at 896.

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). Thus, the named plaintiff has no "personal stake" in an FLSA collective action, *id.* 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.

Because of these differences, mootness principles apply differently to class and collective actions. And, accordingly, *Genesis* does not control the outcome of a

case involving a class action, as this Court recognized in *Schlaud*, 717 F.3d at 456 n.3. In *Schlaud*, the district court held that the named plaintiffs' individual claims had been rendered moot by events that took place before the district court considered class certification. On appeal, this Court determined that, despite that mootness, it retained jurisdiction to consider the denial of class certification. It then explained that the "Court's decision in *Genesis Healthcare Corp. v. Symczyk* [was] not at odds with this determination because [*Genesis* did] not involve class certification under Rule 23, which is 'fundamentally different from collective actions under the FLSA' because 'a putative class acquires an independent legal status once it is certified under Rule 23[, whereas u]nder the FLSA . . . , 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action.'" *Id*. (citing *Genesis*, 133 S. Ct. at 1529-30). "Furthermore," it continued, "plaintiffs in the present case moved for certification prior to defendants' attempt to settle." *Id*.

The three circuits that have specifically considered, after *Genesis*, whether a Rule 68 offer of full relief to the named plaintiff in a putative class action renders the class action moot have all held that it does not. *See Stein*, 772 F.3d at 704, 709 (explaining that "[e]ven if the individual claims are somehow deemed moot, the class claims remain live," and rejecting idea that it should hold otherwise based on *Genesis*); *Mabary*, 771 F.3d at 824-25 (explaining that "these circumstances fit

within the 'relation back' exception" and rejecting the "contention that this Court's 'relation back' rationale does not survive the Supreme Court's recent decision in *Genesis*"); *Gomez*, 768 F.3d at 875-76 (pointing out that *Genesis* "itself emphasizes that 'Rule 23 [class] actions are fundamentally different from collective actions under the FLSA' and, therefore, the precedents established for one set of cases are 'inapplicable' to the other" (quoting *Genesis*, 133 S. Ct. at 1529)). This Court should join these other circuits and hold that, regardless of the effect of the rejected Rule 68 offer on Ms. Mey's individual claim, that offer did not moot this case.

CONCLUSION

For the foregoing reasons, this Court should reinstate the case, vacate the district court's entry of judgment in favor of plaintiff, reverse the district court's dismissal of the class claims, and remand to the district court for further proceedings.

Respectfully Submitted,

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March 4, 2015

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (Microsoft Word 2010), the brief contains 10,305 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, March 4, 2015, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiff-Appellant Diana Mey hereby sets forth her designation of relevant district court documents as required by Sixth Circuit Rule 30(b).

Record Entry Number	Description of Document	Page ID #
1	Class Action Complaint	1-10
5	Plaintiff's Motion for Class Certification and to Stay Briefing Pending Completion of Discovery	65-83
7	Order Denying Without Prejudice Motions to Certify Class and Stay Briefing Pending Completion of Discovery	86-87
11	Notice of Motion and Motion to Dismiss	95-114
11-1	Declaration of Scott M. Pearson in Support of Motion to Dismiss, with Exhibits A (Defendant's Offer of Judgment Pursuant to Rule 68) & B (Letter Rejecting Offer of Judgment)	115-126
17	Plaintiff's Opposition to Defendant's Motion to Dismiss	136-164
20	Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss	171-182
35	Transcript of Motion Hearing	
36	Order Granting Defendant's Motion to Dismiss and to Enter Judgment on Plaintiff's Individual Claim, Order Mooting Motions for Protective Order Staying Discovery and to Compel Discovery Responses and Order Closing Action	503-509
37	Judgment	510
38	Plaintiff's Notice of Appeal	511-513