No. 14-13769

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TAMIKO P. WALKER,

Plaintiff-Appellant,

v.

FINANCIAL RECOVERY SERVICES, INC.,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of Florida
No. 1:13-cv-60230-RNS, Hon. Robert N. Scola, Jr., U.S.D.J.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. This Court's decision in *Stein* does not permit a district court to dismiss a plaintiff's claims on grounds of mootness based on an unaccepted Rule 68 offer of judgment regardless of whether the district court enters judgment for the plaintiff in the amount of the offer.

A. *Stein* holds that it is improper to give controlling effect to an unaccepted offer of judgment.

Defendant-appellant Financial Recovery Services (FRS) does not contest that this Court's decision in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), holds that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's claims, even if it would have provided complete relief if accepted, and that such an offer therefore does not provide a proper basis for dismissing those claims for lack of subject-matter jurisdiction. FRS insists, however, that the district court's order in this case can nonetheless be sustained because, in addition to dismissing the claims for lack of subject-matter jurisdiction on the ground that they became moot the moment FRS made its Rule 68 offer, *see* App. Tab 46, at 5, the district court also entered judgment for Ms. Walker in the amount of the offer—despite its supposed lack of subject-matter jurisdiction over the case.

Stein, however, holds that the entry of judgment on an unaccepted offer is improper because, as *Stein* explicitly states, "[g]iving controlling effect to an unaccepted Rule 68 offer … is flatly inconsistent with the rule." 772 F.3d at 702. *Stein*, moreover, explicitly incorporated Justice Kagan's explanation that an unaccepted Rule 68 offer is "a legal nullity, with no operative effect" both as a matter of elementary contract law and under the terms of the Rule itself, which "specifies that '[a]n unaccepted offer is considered withdrawn.'" *Id*. at 703 (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, __, 133 S. Ct. 1523, 1533–34 (2013) (Kagan, J., dissenting)). *Stein*'s conclusion that an unaccepted Rule 68 offer cannot moot a plaintiff's claims for relief rested critically on the premise that such an offer has no legal effect (outside of a post-judgment proceeding to determine costs), and thus cannot "require the court to enter judgment." *Id*. at 702.

FRS points to *Stein*'s statement that the Court "would be unable to affirm the dismissal of the plaintiffs' claims without the entry of judgment for the amount of the Rule 68 offers," *id*. at 703, and contends that the statement reflects the Court's endorsement of the proposition that a district court may enter judgment on an unaccepted Rule 68 offer. But

FRS ignores the critical language that precedes the words it cites: "*We agree with the Symczyk dissent. But even if we did not*, we would be unable to affirm the dismissal of the plaintiffs' claims without the entry of judgment for the amount of the Rule 68 offers." *Id*. (emphasis added). In other words, the language on which FRS relies was not an explanation of the holding or reasoning of the Court, but was a statement that *even if the Court's holding were different*, it still would not uphold the district court's order in that case.

The context of the dicta FRS invokes makes the Court's point even clearer. Justice Kagan's *Symczyk* dissent, with which the *Stein* court expressed its agreement, explicitly states that "Rule 68 precludes a court from imposing judgment for a plaintiff … based on an unaccepted settlement offer made pursuant to its terms." *Symczyk*, 569 U.S. at __, 133 S. Ct. 1536 (Kagan, J., dissenting). *Stein* contrasted Justice Kagan's view (and that of the Ninth Circuit in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013)) that such an unaccepted offer is a nullity having no mootness consequences with pre-*Symczyk* holdings in two circuits that a Rule 68 offer may moot an individual plaintiff's claims. *Stein*, 772 F.3d at 703. *Stein* pointed out that "even

those decisions" finding mootness in such circumstances required entry of judgment for the plaintiff in the amount of the offer. *Id*. *Stein* then stated unambiguously that it agreed with the Kagan position, and *not* that of those circuits that had held, before *Symczyk*, that a court could treat an unaccepted Rule 68 offer as mooting a plaintiff's claims if it entered judgment in accordance with the offer. Thus, the statement on which FRS relies reflects not *Stein*'s holding, but its recognition that even under reasoning that the Court explicitly *rejected*, the Court would be unable to affirm the order at issue in *Stein*.

FRS's attempt to transform a position *Stein* rejected into the Court's holding also overlooks that the disposition in *Stein* would have been totally different if the Court had in fact accepted the view that the only problem with the order before it in *Stein* was that it failed to enter judgment for the individual plaintiff before dismissing the claims as moot. If that had been *Stein*'s holding, the Court would have remanded for entry of judgment. Instead, however, the Court reversed the dismissal of the plaintiffs' claims outright. *Id*. at 709. Moreover, in the companion case of *Keim v. ADF Midatlantic, LLC*, 586 F. Appx. 573 (11th Cir. 2014), in which the district court's order had dismissed a case as moot in light

of an unaccepted Rule 68 offer but expressly provided in its dismissal order for the entry of judgment in accordance with the offer, *see* 2013 WL 3717737, at *9 (S.D. Fla. July 15, 2013), the same panel that decided *Stein* held that *Stein* "is squarely on point and requires reversal of the district court's order dismissing this case." 586 F. Appx. at 574. That statement would be inexplicable if, as FRS argues, an individual's claims may be dismissed as moot based on an unaccepted Rule 68 offer as long as the district court enters judgment on the terms of the offer.

B. The offer in this case was made under Rule 68 and was not an unconditional consent to entry of judgment.

As just demonstrated, *Stein*'s holding and reasoning are fundamentally incompatible with the idea that a district court may enter judgment on an unaccepted Rule 68 offer and then dismiss a case as moot. FRS therefore attempts to avoid *Stein* by arguing that its offer in this case was not a Rule 68 offer but an unconditional consent to entry of judgment against it in the full amount sought by Ms. Walker. FRS's argument rests on a fundamental mischaracterization of the record, which makes clear that the offer was made under Rule 68 and that FRS's arguments in the district court were at all times based on the position that

the offer was what it said it was—a Rule 68 offer. But even if that were not the case, an unconditional consent to entry of judgment in the individual plaintiff's favor would not authorize the district court to enter judgment on the individual claims before addressing the propriety of the case proceeding as a class action.

FRS's new argument that its offer was not actually a Rule 68 offer flies in the face of the offer itself, which was titled "DEFENDANT'S RULE 68 OFFER OF JUDGMENT," and stated in its opening paragraph that it was made "[p]ursuant to Rule 68 of the Federal Rules of Civil Procedure." App. Tab 32-2, at 9. Under the plain language of the offer, FRS's consent to entry of judgment against it was subject to the terms of Rule 68.

In his declaration supporting FRS's motion to dismiss, FRS's counsel, Matthew Kostolnik, likewise stated under penalty of perjury that FRS's offer was a "Rule 68 Offer of Judgment." App. Tab 32-2, at 1. FRS's motion to dismiss thus did not assert that FRS was unconditionally consenting to entry of judgment against it; rather, it argued that it had "made an offer of judgment to Plaintiff pursuant to Fed. R. Civ. P. 68," App. Tab 32, at 3, and that this "Rule 68 offer of judgment" had had the

immediate effect of "mooting Plaintiff's claims and divesting this Court of subject-matter jurisdiction." App. Tab 32, at 4. FRS's motion did *not* request (or even suggest the possibility) that judgment be entered against it in the amount of Ms. Walker's claims, but only asked the district court to dismiss her complaint "with prejudice." *Id*. at 10. Although FRS says in its appellate brief that it did not treat the offer as having been rejected, that it continued to stand by the offer, and that it kept the offer open (FRS Br. 11–12), those assertions are unsupported by anything FRS said either to Ms. Walker or the court.

FRS suggests that its reply memorandum in support of its motion to dismiss (Doc. 41) somehow transformed its request for dismissal based on an expired Rule 68 offer into an unconditional consent to entry of judgment against it. Indeed, FRS goes so far as to say that the reply "requested" that the court enter judgment against it. FRS Br. 12. But the reply, like the original motion, repeatedly described FRS's position as being that its offer of judgment had mooted Ms. Walker's claims when it was made, and that her "refus[al] to accept her victory" required the court to dismiss her complaint. Doc. 41, at 3. FRS relied heavily on the Seventh Circuit's pre-*Symczyk* decisions in *Greisz v. Household Bank (Il-*

linois), N.A., 176 F.3d 1012, 1015 (7th Cir. 1999), and *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), *see* Doc. 41, at 1–2, both of which indicated that when a plaintiff does not accept an offer of judgment for complete relief, the plaintiff's case is "over" and the plaintiff "loses outright" and is entitled to no relief. *Damasco*, 662 F.3d at 896, 895; *see also Greisz,* 176 F.3d at 1015.

Only as a fallback did FRS suggest that if the district court was "uncomfortable with the prospect of dismissing Plaintiff's claims when Plaintiff has not actually received the relief offered, some courts have determined that judgment can be entered on the terms of the offer of judgment." Doc. 41, at 3. FRS did not, however, actually endorse the position of those courts, request that the court enter judgment against it, or otherwise state that FRS was now replacing its Rule 68 offer with an unconditional consent to entry of judgment. FRS merely stated that "there is authority that would allow the Court to dismiss the complaint but still afford Plaintiff the complete relief that was offered." *Id*. The authority FRS cited, moreover, consisted solely of district court cases that rested on the view that a court could enter judgment on a lapsed *Rule 68 offer*. *Id*. (citing *Young v. AmeriFinancial Solutions, LLC*, 2012 WL 3848574

(S.D. Fla. Sept. 5, 2012); *Mackenzie v. Kindred Hospitals East, L.L.C.*, 276 F. Supp. 2d 1211, 1219 (M.D. Fla. 2003)). Those cases did *not* rest on the theory that the defendant had unconditionally consented to entry of judgment outside of the confines of Rule 68, and citing them therefore could not have signaled that FRS was no longer relying on its expired Rule 68 offer but was now consenting unconditionally to the entry of judgment against it.

Ultimately, FRS's reply in the district court rested on the same grounds as its original motion—that its Rule 68 offer of judgment had mooted Ms. Walker's claims the moment it was made—and sought the same relief: dismissal of Ms. Walker's complaint "with prejudice." Doc. 41, at 10. Only in passing did FRS suggest that the district court might, in the alternative, have the authority under Rule 68 to enter judgment for Ms. Walker. That suggestion hardly constituted "unconditional surrender," FRS Br. 15, and given its explicit reliance on cases involving Rule 68, it did not even remotely suggest that FRS was providing some new consent to entry of judgment separate from its expired Rule 68 offer.

Thus, the district court correctly understood that "FRS did make an offer of judgment against itself to Walker pursuant to Rule 68" and

that "[t]he basis for FRS's [m]otion" to dismiss was "its December 5, 2013, Fed. R. Civ. P. 68 offer of judgment." App. Tab 46, at 4, 1. The district court's actions rested on its view that because that "offer of judgment provided Walker full relief in this case, Walker's federal case was over as soon as the offer was made," *id*. at 5, and that, even though the court ostensibly lacked subject matter jurisdiction as a result, it nonetheless had authority to enter judgment in Walker's favor "[p]ursuant to the terms of" the expired offer. *Id*. Both of those propositions are impossible to square with *Stein*'s holding that an unaccepted offer does not moot a plaintiff's claims and may not be given any "controlling effect." *Stein*, 772 F.3d at 702. FRS cannot now escape *Stein* by a post hoc effort to recharacterize the Rule 68 offer that it actually made and relied on below as something else.

C. Even a defendant's unconditional consent to entry of judgment would not authorize entry of judgment on a plaintiff's individual claims in an action brought on behalf of a class.

Even if FRS had unconditionally consented to entry of judgment in Ms. Walker's favor on her individual claims rather than making a Rule 68 offer that became a legal nullity when it was not accepted within the Rule's timeframe, such consent would not authorize the district court to

enter judgment and terminate the case over Ms. Walker's objection in a matter presenting class as well as individual claims. Of course, a defendant can unconditionally offer to have judgment entered against it without invoking Rule 68, *see Stein*, 772 F.3d at 702, and if a defendant in an individual case consents outright to the entry of a judgment providing all the relief sought by the plaintiff, the court may enter such a judgment. *See Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *see also*, *e.g.*, *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 485 F.3d 85, 93 (2d Cir. 2007).

The court's authority to enter such a judgment, however, does not, as FRS wrongly suggests, rest on the premise that the defendant's consent moots the case or controversy between the parties. Far from it. If there were no case or controversy, the court *could not* enter a judgment, as the entry of judgment, even with consent, is a judicial act that requires that the court possess subject-matter jurisdiction. *See White v. Comm'r of Internal Revenue*, 776 F.2d 976, 977 (11th Cir. 1985); *see also, e.g.*, *Pope v. United States*, 323 U.S. 1, 12, 65 S. Ct. 16, 22 (1944); *SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). Thus, "[i]f the case had truly become moot and the court had lacked subject matter jurisdiction, the

court would have been without power to enter a judgment in plaintiff's favor" and "would have been compelled simply to dismiss, leaving the dispute unadjudicated." *ABN Amro*, 485 F.3d at 94.

A court's authority to enter a judgment based on a defendant's consent thus rests not on the absence of a case or controversy, but on the proposition that consent—like waiver of defenses, stipulation to dispositive facts, or default—is a proper basis for *resolving* a case or controversy by entering judgment on the merits for one of the parties. *See Pope*, 323 U.S. at 12, 65 S. Ct. at 22; *Lawyer v. Dept. of Justice*, 521 U.S. 567, 579–80, 117 S. Ct. 2186, 2194 (1997); *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007) ("The entry of the original consent decree resolved the underlying controversy between the original parties."). Until a judgment has been entered, however, the case or controversy remains unresolved. *See Fla. Wildlife Fed'n v. S. Fla. Water Mgmt. Dist.*, 647 F3d 1296, 1302 (11th Cir. 2011); *see also Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013); *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir. 1987). The court therefore possesses jurisdiction to consider, among other things, whether certification of a class is proper.

In such circumstances, a defendant has no entitlement to insist that a court proceed to adjudicate and render judgment for the named plaintiff on her individual claims, whether by consent of the defendant or by determination of contested issues, before it considers class certification. Rather, the federal rules contemplate that the court should consider class certification before granting a judgment for the individual plaintiff by providing "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). For a court to pretermit the class determination by prematurely entering a judgment for the named plaintiff in a case that otherwise presents a justiciable case or controversy would frustrate the purposes of Rule 23. As Justice Kagan explained in *Symczyk*:

> Nor does a court have inherent authority to enter an unwanted judgment for [the plaintiff] on her individual claim, in service of wiping out her proposed collective action. To be sure, 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. But the court may not take that tack when the supposed capitulation in fact fails to give the plaintiff all the law authorizes and she has sought. And a judgment satisfying an individual claim does not give a plaintiff … "all that [she] has ... requested in the complaint (*i.e.,* relief for the class)." *Deposit*

> *Guaranty Nat. Bank v. Roper,* 445 U.S. 326, 341, 100 S. Ct. 1166, (1980) (Rehnquist, J., concurring).

569 U.S. at __, 133 S. Ct. at 1536 (Kagan, J. dissenting). In short, a court in a class action may not, "prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole." *Id*.

To be sure, it could in some circumstances be an appropriate exercise of the district court's discretion, even in a case where the complaint included class allegations, to enter a consented-to judgment for the named plaintiff only and then terminate the case—for example, where the plaintiff had delayed unduly in seeking class certification or had otherwise made clear that she did not seriously intend to pursue anything more than her individual claims. But although FRS tries to suggest that Ms. Walker did not proceed diligently to pursue class certification, that suggestion is specious: The offer of judgment in the case came only days after the district court had granted Ms. Walker leave to amend her complaint to assert class claims, *see* App. Tab A, at 3 (Doc. 28), and FRS moved for dismissal only a day after the filing of a motion, to which *FRS had consented,* proposing that a motion for class certification be due more than seven months later. *See id.* at 4 (Docs. 31, 32). The court al-

most immediately approved that schedule for the filing of the certification motion. *See id*. (Doc. 34). Ms. Walker cannot be accused of undue delay for abiding by a court-approved schedule to which FRS consented.

In any event, the district court did not purport to be exercising any form of discretion in entering judgment for Ms. Walker before it could consider whether to certify a class: The court believed, erroneously, that it had to enter judgment on FRS's Rule 68 offer and then dismiss the action because it thought that the offer by itself rendered her claims moot. *Stein* demonstrates the fallacy of that ruling, and a ruling that is based on the erroneous assumption that a court *must* do something cannot be sustained merely because, under other circumstances, a court might have *discretion* to take a similar action.

II. *Stein* forecloses the argument that the class claims are moot.

Stein holds in the alternative that even if a putative class representative's individual claim were mooted by an offer of complete relief, such an offer "does not moot a class action … even if the proffer comes before the plaintiff has moved to certify a class." 722 F.3d at 709. *Stein* unambiguously rejects the holding of the district court in this case, which, at FRS's urging, adopted the Seventh Circuit's pre-*Symczyk* hold-

ing in *Damasco* that, to avoid mootness, a plaintiff must move for class certification before receiving an offer of complete relief. *Compare Stein*, 722 F.3d at 708 ("We join the majority of circuits and decline to follow *Damasco*."), *with* App. 46, at 3 ("adopting *Damasco*" and rejecting the approach of the other circuits later adopted by this Court in *Stein*.) *Stein*'s alternative holding thus independently requires reversal of the district court's dismissal of the class claims in this case.

A. FRS's contentions that *Stein* was wrongly decided are unavailing.

FRS characterizes this Court's binding holding in *Stein* as a mere "assert[ion]" that a class action may proceed in the face of an offer of complete individual relief to the named plaintiff. FRS Br. 17. Nonetheless, FRS apparently acknowledges *Stein* is dispositive on this point when it says it "recognizes *Stein* and the impact that it has on this case." *Id*. at 19 n.4. Although FRS is somewhat circumspect in its criticism of *Stein*, the substance of its argument is that *Stein*'s alternative holding that a class action may proceed in these circumstances because its ultimate certification will relate back to the filing of the complaint should be "reconsider[ed] or modifi[ed]," *id*., because it is inconsistent with the Supreme Court's decision in *Symczyk* that a Fair Labor Standards Act

(FLSA) collective action does not survive if the individual plaintiff's claims are moot. *See* FRS Br. 16–21.

In *Stein*, however, this Court already considered and rejected the argument that *Symczyk* forecloses *Stein*'s approach to mootness in the "different setting" of Rule 23 class actions. 722 F.3d at 709. Indeed, *Stein* considered and rejected the precise argument that FRS advances here, which is that *Symczyk*'s discussion of "inherently transitory" claims precludes application of the "relation back" doctrine to a class actions involving claims for statutory damages. *See id*. Even if there were reason to doubt *Stein*'s convincing refutation of FRS's arguments, this Court is bound by *Stein*'s holding absent an en banc decision overruling *Stein*; a panel cannot reconsider or modify *Stein*, as FRS requests. *See Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998).

Of course, an "*intervening* decision of the Supreme Court" can overrule a precedent of this Court if it is "clearly on point." *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292 (11th Cir. 2003) (emphasis added). But *Symczyk* is not an intervening decision: It predated and was thoroughly considered in *Stein*, and this Court has "categorically reject[ed] any exception to the prior panel precedent rule

based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at the time." *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001). A Supreme Court decision that predates one of this Court's precedents "cannot implicitly overrule it" or provide a basis for a subsequent panel's disregard of circuit precedent. *Garrett*, 344 F.3d at 1291 n.6. And where, as in *Stein*, a decision of this Court expressly addresses the assertedly inconsistent Supreme Court authority and holds that it does not command a different result, it is beyond dispute that subsequent panels are "bound by its interpretation and application" of Supreme Court precedent. *Smith*, 236 F.3d at 1304 (quoting *Tucker v. Phyfer*, 819 F.2d 1030, 1036 n.7 (11th Cir. 1987)).

B. FRS's reliance on the Fifth Circuit's holding in *Fontenot* is misplaced.

FRS attempts to side-step *Stein*'s binding effect of by pointing out that *Stein* relied in part on *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981), which, "[a]s a Fifth Circuit decision issued before October 1, 1981, … is binding precedent in the Eleventh Circuit." *Stein*, 722 F.3d at 704. Specifically, *Stein* recognized that *Zeidman* is "law of the circuit" for the proposition that a class action may survive the mootness of the individual named plaintiff's claim not only when the

claims at issue are "naturally transitory," but also when mootness "is caused by the defendant's purposive acts" in seeking to pay off a named plaintiff "to preclude a viable class action from ever reaching the certification stage." *Id.* at 706–07. FRS contends that *Stein*'s reliance on *Zeidman* for this point is no longer entitled to controlling weight in light of a recent Fifth Circuit opinion, *Fontenot v. McCraw*, __ F.3d __, 2015 WL 304151 (5th Cir. Jan. 23, 2015), which, according to FRS, undermines *Zeidman*'s authority.

FRS's argument rests on a fundamental misunderstanding of the precedential nature of decisions of the old Fifth Circuit in the Eleventh Circuit. Those decisions are binding on panels of this Court not because they are precedents of the *current* Fifth Circuit, but because this Court adopted them as *its own* precedents. *Bonner v. City of Prichard*, 661 F.2d 1206, 1210 (11th Cir. 1981). Thus, they are binding on Eleventh Circuit panels "unless modified or overruled by *this Court* en banc." *Allen v. Newsome*, 795 F.2d 934, 938 n.10 (11th Cir. 1986) (emphasis added). This Court has therefore held that the binding effect of former Fifth Circuit precedents in the Eleventh Circuit is unaffected by subsequent case law developments in the current Fifth Circuit: This Court is "not bound by

the Fifth Circuit's construction of former Fifth Circuit cases," *Stovall v. City of Cocoa*, 117 F.3d 1238, 1241 n.2 (11th Cir 1997), nor "by the subsequent development of the law in the new Fifth Circuit." *United States v. Blanton*, 793 F.3d 1553, 1559 n.6 (11th Cir. 1986). Indeed, even former Fifth Circuit decisions that have been overruled en banc by the current Fifth Circuit remain binding precedents of this Court unless and until *this Court* overrules them en banc. *See*, *e.g.*, *United States v. Schultz*, 565 F.3d 1353, 1360 n.4 (11th Cir. 2009); *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1300 n.3 (11th Cir. 2008); *Blanton*, 793 F.3d at 1559 n.6. Thus, the precedents binding on this Court are *Zeidman* and *Stein*, which holds that *Zeidman*'s reasoning is applicable to the circumstances presented here and that *Zeidman*'s applicability has not been undermined by *Symczyk*'s holding concerning FLSA collective actions.

Even if Fifth Circuit law were pertinent, FRS's argument would miss the mark. Current Fifth Circuit law is in full agreement with *Stein* that *Zeidman*'s rationale permits a class action to proceed when a defendant has made an offer of judgment for full relief to the named plaintiff before a motion to certify the class has been filed, and that nothing in *Symczyk* precludes that result. The Fifth Circuit so held in *Mabary v.*

Home Town Bank, N.A., 771 F.3d 820, 824–25 & nn.16 & 17 (5th Cir. 2014). *Mabary* involved circumstances directly analogous to those in *Stein* and this case. To the extent that *Fontenot* and *Mabary* (and *Mabary*'s reliance on *Zeidman*) are inconsistent in any way, the earlier-decided *Mabary* is the binding precedent in the Fifth Circuit. Like this Court, the Fifth Circuit follows the rule that "[w]hen panel opinions appear to conflict, we are bound to follow the earlier opinion." *H&D Tire & Auto.-Hardware, Inc. v. Pitney Bowes Inc.*, 227 F.3d 326, 330 (5th Cir. 2000).

In any event, *Fontenot* does not reject the application of *Zeidman* to the circumstances here. *Fontenot* did not involve a claim of mootness based on an offer of judgment: It concerned putative class plaintiffs who sought injunctive relief against a state officer but whose claims were moot because the state had already irrevocably taken the action they sought. 2015 WL 304151, at *3–*4. Moreover, although the plaintiffs moved for class certification against other defendants, they *expressly excluded* a request for certification of their claims against the state officer. *Id*. at *6. The court declined to "extend" *Zeidman* to those circumstances, in which it was evident that the plaintiffs were not in fact diligently

pursuing class claims against the particular defendant who sought to dismiss their claims as moot. *Id*. Although the Court noted at one point that "[t]he current status of *Zeidman* may be in doubt," *id*., that statement is little different from this Court's acknowledgment in *Stein* that some of the statements in *Symczyk* "create[] tension with *Zeidman*," 722 F.3d at 709, and thus provides no basis for suggesting that this Court reconsider its thorough analysis of whether *Zeidman*'s rationale survives *Symczyk*.

Moreover, *Fontenot* expressly declines to consider whether *Zeidman* has been overruled, and it acknowledges that *Symczyk* "does not foreclose the broader *Zeidman* approach to relation back doctrine" in cases involving attempts to moot class actions with offers of judgment, 2015 WL 304151 at *6. Even if this Court were not bound by *Stein*—and *Zeidman* as construed and applied in *Stein*—*Fontenot* would therefore offer no reason to overturn those decisions.

In any event, FRS's insistence that *Stein* and *Zeidman* are wrong in holding that class claims for statutory damages can be pursued by a plaintiff who has been offered complete individual relief would not suffice to justify a ruling that the class action in this case is moot even if FRS

were correct (and if this Court were not bound by *Stein* and *Zeidman*). The claims here are not limited to damages claims, but also include claims for injunctive relief. Claims for injunctive relief are the classic "inherently transitory" claims that gave rise to the Supreme Court's holdings in cases such as *Sosna v Iowa*, 419 U.S. 393, 95 S. Ct. 553 (1975), and *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975). Nothing in *Symczyk*, or in *Fontenot*, remotely calls into question the continuing vitality of the conclusion that claims for injunctive relief are sufficiently transitory to permit pursuit of a class action by an individual plaintiff with respect to whom the defendant has offered to cease engaging in the challenged conduct.

C. FRS's argument that Ms. Walker must provide evidence of FRS's ability and intent to make similar offers to plaintiffs in future cases is contrary to *Stein*.

FRS also tries to evade *Stein* by suggesting that Ms. Walker did not provide "evidence" that it would be "financially feasible" to use Rule 68 offers to satisfy individual claims of successive plaintiffs with Telephone Consumer Protection Act (TCPA) claims against it, a requirement that FRS considers to be implicit in *Zeidman*'s analysis. FRS Br. 22. *Stein*, however, imposed no requirement that the plaintiff present evidence of

the defendant's "capability or willingness to methodically or repeatedly 'pay off successive named plaintiffs.'" FRS Br. 22. Nowhere in *Stein* does the court consider whether the plaintiff presented any such evidence; rather, it holds unequivocally, as a matter of law, "that a defendant's unaccepted offer of full relief to the named plaintiffs, in circumstances like these, does not, without more, render the case moot." 722 F.3d at 709. The court imposed no requirement that plaintiffs prove the defendant's financial ability or willingness to make like offers to future plaintiffs, but demanded only that they "act[] diligently to pursue the class claims," a requirement satisfied where, as in this case, the "plaintiffs did not miss any deadlines." *Id*. at 707.

Moreover, FRS never suggested below that mootness turned on whether it had the ability or willingness to buy off future plaintiffs, nor did it argue that Ms. Walker's resistance to its motion to dismiss should fail for the lack of presentation of such evidence. Its position was that the class claims were moot merely because it had offered to satisfy her individual claims before she moved for class certification, and the district court accepted that position. If the Court were now to adopt a new principle, unsupported by *Stein* and based on arguments not presented to the

trial court, that such evidence is necessary to invoke *Stein*'s holding, then this case would have to be remanded for discovery into FRS's finances and litigation practices and an evidentiary hearing on those questions.

D. The Supreme Court's decisions in *Geraghty* and *Roper* further support the result commanded by *Stein*.

Ms. Walker's opening brief cited *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202 (1980), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S. Ct. 1166 (1980), as additional support for her position that the class claims are not moot. FRS's responses are largely irrelevant in light of the controlling effect of *Stein*, and they are unconvincing as well.

With respect to *Geraghty*, FRS insists that it provides no support for the view that a plaintiff has an interest in representing a class outside of circumstances where the district court has considered and denied a request for class certification. FRS Br. 23. FRS misreads *Geraghty* by ignoring its recognition that a plaintiff may also have such an interest in a case where "the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's indi-

vidual interest expires," 445 U.S. at 399, 100 S. Ct. at 1210, as well as the Court's lengthy explanation of why a proposed class representative has an ongoing interest in representing a class both where her claim has been satisfied by a judgment and where it has become moot through some other occurrence. *See* 445 U.S. at 401–04; 100 S. Ct. at 1211–12. Moreover, although FRS is correct in pointing out that the specific issue decided in *Geraghty* was whether a plaintiff whose individual claim was moot could appeal the denial of a class certification motion, its reasoning cannot be limited to those circumstances. Indeed, this Court in *Stein* convincingly explained that "[t]he assertion that [the filing of] a [certification] motion fundamentally changes the legal landscape—indeed, that it impacts the constitutional prerequisites to jurisdiction under Article III—makes no sense." 772 F.3d. at 707. The same is necessarily true of the denial of class certification: It is nonsensical to assert that having certification *denied* somehow gives a plaintiff a *greater* interest in maintaining a class than if certification had not yet been ruled upon.

As for *Roper*, FRS contends that it has been "undermined" by more recent cases, FRS Br. 24, but acknowledges that it has not been overruled. *See id*. at 25. This Court therefore remains obligated to follow

Roper. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997). FRS further suggests that its offer actually provided Ms. Walker far more than her individual claims, and thus it is unlikely she would have any economic interest in the attorney-fee sharing that would be made possible by certification of a class. In the district court, however, FRS correctly recognized that the amount of its offer ($1,500 per call) was necessary to ensure that it provided "complete relief" on Ms. Walker's claims, App. Tab 32, at 3 n.2. Her complaint prayed for whatever relief was justified on the facts, App. Tab 29, at 5, which would include enhanced damages if FRS's conduct toward her were found to be willful. FRS's suggestion that its offer was sufficient to eliminate any economic interest Ms. Walker had in class certification is thus unfounded. However, in light of its holding in *Stein*, this Court need not reach the question whether the *Roper* rationale would also justify a holding that the class claims remain live.

E. FRS's appeal to public policy lacks merit.

Finally, FRS contends that public policy supports its argument that the Court should hold the class claims to be moot. FRS invokes both the policy favoring settlement and a purported policy against class actions in

TCPA cases. FRS's appeals to policy run counter to this Court's holding in *Stein*. Although settlements may be favored by the law, there is no policy that favors allowing defendants to evade class actions by buying off individual plaintiffs while leaving class claims wholly unsatisfied. Rather, as *Stein* and *Zeidman* reflect, granting defendants "the option to preclude a viable class action from ever reaching the certification stage" is contrary to the policies incorporated in Rule 23. *Stein*, 722 F.3d at 706 (quoting *Zeidman*, 651 F.2d at 1050).

FRS's suggestion that there should be some special rule disfavoring class actions in TCPA cases is even further from the mark. Rule 23 provides for class actions in any case cognizable in federal court that meets its criteria unless Congress has precluded class actions. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398–400, 130 S. Ct. 1431, 1437–38 (2010). Congress has not precluded class actions in TCPA cases, nor has it limited TCPA cases to "simple, small-claims-court proceedings," as FRS suggests. FRS Br. 27. *See Mims v. Arrow Fin. Servs.*, 565 U.S. __, __, 132 S. Ct. 740, 752 (2012); *Bank v. Indep. Energy Group LLC*, 736 F.3d 660 (2d Cir. 2013). Indeed, *Stein* itself was a TCPA case, so FRS's suggestion that the policies of the TCPA somehow require

allowing defendants to avoid class actions by satisfying the claims of individual TCPA plaintiffs is yet another frontal assault on *Stein*.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court, vacate its judgment and order of dismissal, and remand for further proceedings on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply 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 typeface, Century Schoolbook BT. As calculated by my word processing software (Word 2010), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 6,249 words.

s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that, on February 17. 2015, the foregoing Appellant's Reply Brief was served through the court's ECF system on counsel for defendants-appellees.

s/ Scott L. Nelson
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