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ORAL ARGUMENT NO LONGER REQUESTED

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Nos. 14-1425, 14-1454

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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ROSE JACOBSON,

*Plaintiff-Appellant/Cross-Appellee,*

v.

CREDIT CONTROL SERVICES, INC.

*Defendant-Appellee/Cross-Appellant.*

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On Appeal from a Final Order and Judgment of the  
United States District Court for the District of Colorado,  
No. 1:13-cv-3307-WYD-MJW, Hon. Wiley Y. Daniel, U.S.D.J.

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**SUPPLEMENTAL MEMORANDUM BRIEF FOR  
APPELLANT/CROSS-APPELLEE**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has directed the parties to file supplemental briefs addressing the impact of the Supreme Court's opinion in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), on the issues in these appeals. *Gomez*'s holding that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's case establishes that the district court's sole basis for dismissing this action was erroneous. This Court should therefore reverse the district court's decision and vacate the dismissal order and judgment (which includes a cost award). The Court should dismiss the defendant's cross-appeal, which assumes that the district court's mootness ruling was correct but argues that the dismissal should have been with prejudice. *Gomez* moots the cross-appeal by negating its premise.<sup>1</sup>

## ARGUMENT

- 1. The district court's dismissal rested solely on the holding that an unaccepted Rule 68 offer of judgment rendered the action moot.**

In this action under the Fair Debt Collection Practices Act, the plaintiff, Rose Jacobson, originally sought both actual and statutory

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<sup>1</sup> As this Court ordered, this brief addresses the impact of *Gomez*, not the potential impact of *Spokeo, Inc. v. Robins*, No. 13-1339, which involves a standing issue not addressed below or raised in these appeals.

damages. The defendant, Credit Control Services, Inc. (CCS), made an offer of judgment under Federal Rule of Civil Procedure 68 in the amount of \$1,001.00, plus attorney's fees and costs. Ms. Jacobson did not accept the offer, which lapsed after 14 days under the express terms of Rule 68(b).

Several months later, Ms. Jacobson filed a notice waiving her claim for actual damages. CCS then moved to dismiss the action for lack of subject-matter jurisdiction on the ground that it was moot because CCS's lapsed offer of judgment would have provided her the full amount of relief she could recover once she waived her claim for actual damages.

The district court granted the motion and dismissed the action without prejudice. The court held:

[W]hen an Offer of Judgment unequivocally offers a plaintiff all the relief she sought to obtain, the offer renders the action moot. Here, because Plaintiff waived her claim for actual damages, I find that Defendant's unequivocal Offer of Judgment of \$1001.00 plus reasonable attorney's fees and costs offered Plaintiff an amount that exceeds what she can recover pursuant to 15 U.S.C. § 1692k(a). Thus, Plaintiff's action is moot and must be dismissed for lack of subject matter jurisdiction.

App. 66a (citations omitted). The district court's conclusion that the offer of judgment mooted Ms. Jacobson's claims was the sole basis for its dismissal order, and that order in turn was the sole basis for the final judg-

ment entered by the district court clerk dismissing the action without prejudice and awarding costs to CCS.

**2. *Gomez* holds that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's claims.**

In *Gomez*, the defendant in an uncertified class action had made a Rule 68 offer purporting to be for complete individual relief on the claims of the named plaintiff. Rejecting the defendant's argument that the offer mooted the named plaintiff's individual claim, and thus precluded him from seeking to represent a class, the Supreme Court held that an unaccepted Rule 68 offer of judgment or other settlement offer is not "sufficient to render a case moot," regardless of whether it would have satisfied the plaintiff's claim if accepted. *Gomez*, 136 S. Ct. at 666.

Unlike this Court's decision in *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011), which held that a named plaintiff could assert *class* claims even assuming an offer of judgment might moot his individual claims, *see id.* at 1243, *Gomez* squarely held that such an offer does not moot the plaintiff's *individual* claims, *see* 136 S. Ct. at 669–72—a holding applicable to both class and non-class actions. The Court summarized its reasoning as follows (*id.*):

We hold today, in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists.

The Court explained that a case becomes moot “only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Id.* at 669 (citation omitted). An unaccepted Rule 68 offer or other settlement offer, “however good the terms,” does not moot a case because it is “a legal nullity, with no operative effect”; thus, when a plaintiff declines such an offer, “her interest in the lawsuit remains just what it was before.” *Id.* at 670 (citation omitted). In such a case, the plaintiff has received no relief, and the court still has the ability to grant effectual relief by awarding the damages she seeks. *See id.* at 670–72. “In sum,” the Court concluded, “an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case.” *Id.* at 672.

**3. *Gomez* resolves the issues in Ms. Jacobson's appeal in her favor.**

Ms. Jacobson's appeal contests the dismissal of her action as moot, together with the clerk's inclusion of an award of costs to CCS in the judgment incorporating the dismissal order. Her principal argument on

appeal is that the dismissal was improper because an unaccepted offer of judgment, whether for complete relief or not, cannot moot a plaintiff's claims. *See Jacobson Br. 12-32*. Her opening and reply briefs also argued in the alternative that the offer of judgment was not for complete relief at the time it was made, *see id.* at 32–35; that even if the unaccepted offer were a proper basis for terminating her action it would be improper for the district court to deny her recovery in the amount of the offer while premising its dismissal on the view that the offer satisfied her claims, *see id.* at 35–36; and that the clerk's issuance of a judgment awarding costs was improper under 28 U.S.C. § 1919, even if the dismissal could be sustained, *see id.* at 36–38.

*Gomez* completely vindicates Ms. Jacobson's principal argument and makes it unnecessary to reach the other issues presented by her appeal. Under *Gomez's* unambiguous holding, the unaccepted Rule 68 offer Ms. Jacobson received does not moot her claims because the offer became a nullity once it lapsed and afforded her no relief, even if it would have provided her complete relief had she accepted it. Like the plaintiff in *Gomez*, Ms. Jacobson "remained emptyhanded" following the offer, and her claims "stood wholly unsatisfied." 136 S. Ct. at 672. Because the dis-

strict court still could have provided her effectual relief, the court erred in dismissing her claims as moot based on its view that the offer *would have* provided her complete relief. And because the sole basis for the clerk’s award of costs to CCS was that the dismissal made CCS a prevailing party under Rule 54(d), vacatur of the cost award necessarily follows from the reversal of the dismissal order.

*Gomez* left open the issue “whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.” *Id.* at 672. That question is as “hypothetical” (*id.*) here as it was in *Gomez*, as are the issues that might be posed by other scenarios involving actual payment to a plaintiff, as discussed in the *Gomez* dissents. *See, e.g., id.* at 683 (Roberts, C.J., dissenting); *id.* at 684–85 (Alito, J., dissenting). Here, Ms. Jacobson received no payment from CSS. The sole basis for the claim of mootness was her failure to accept an offer of judgment, and *Gomez* definitively rejected that theory of mootness.

**4. *Gomez* requires dismissal of CSS’s cross-appeal.**

The only issue raised by CSS’s cross-appeal is whether the district court should have dismissed the action with prejudice upon finding it moot. See CSS Br. 2, 11, 42–45. CSS has not argued that some alternative, non-jurisdictional basis for dismissal would justify dismissal with prejudice. Rather, it contended in its briefs that although “[a] dismissal based upon the lack of jurisdiction [is] ordinarily without prejudice,” *id.* at 44, a mootness dismissal based on an offer of judgment for complete relief should be with prejudice because a plaintiff who “had been offered more than she could hope to recover and no longer had a personal stake in the outcome” should not be given an opportunity to refile. *Id.* at 45. In other words, CSS’s position was that dismissal with prejudice was “appropriate due to the fact that the case had been rendered moot.” *Id.*

*Gomez*’s holding that an offer of judgment does not moot a plaintiff’s claim disposes of CSS’s contention that a mootness dismissal in such circumstances should be with prejudice. *Gomez* establishes that it was not proper to dismiss the action for mootness at all. Whether an erroneous dismissal should have been with or without prejudice is a moot point, and CSS’s cross-appeal should therefore be dismissed.

## CONCLUSION

For the foregoing reasons, this Court should resolve Ms. Jacobson's appeal by reversing the district court's decision to dismiss the action for lack of subject-matter jurisdiction, vacating the dismissal order and the judgment entered by the clerk of the court (including the cost award it incorporates), and remanding for further proceedings. The Court should dismiss CSS's cross-appeal.

Respectfully submitted,

/s/ Scott L. Nelson

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February 12, 2016

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS OF FED. R. APP. P. 32(A) AND WITH THIS COURT'S ELECTRONIC FILING REQUIREMENTS**

1. This brief is not subject to the type-volume limitations of Fed. R. App. P. 32 because it is filed pursuant to an order of the Court directing the filing of a brief of no more than 10 pages. The brief complies with the page limitation specified in the Court's order.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Century Schoolbook BT.

3. This brief complies with the requirements for redaction of private information; it is identical to any required paper copy of the brief because, in this case, the Court's order directed that no paper copy be filed; and the electronic file containing it has been scanned for viruses with an updated version of a commercial virus scanning program (Windows Defender) and is free from viruses.

/s/ Scott L. Nelson

February 12, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2016, the foregoing Brief for Plaintiff-Appellant/Cross-Appellee has been served through this Court's electronic filing system upon counsel for the defendant-appellee.

/s/ Scott L. Nelson