No. 13-13397

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT D. FLOYD,

Plaintiff-Appellant,

v.

SALLIE MAE, INC.,

Defendant-Appellee.

On Appeal from a Final Order of the
United States District Court for the Southern District of Florida
No. 1:12-cv-22649-MGC, Hon. Marcia G. Cooke, U.S.D.J.

APPELLANT'S REPLY BRIEF

Scott L. Nelson
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000
202-588-7795 (Fax)
snelson@citizen.org

Donald A. Yarbrough
Post Office Box 11842
Fort Lauderdale, FL 33339
954-537-2000
954-556-2235 (Fax)
don@donyarbrough.com

Attorneys for Appellant

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INTRODUCTION AND SUMMARY OF ARGUMENT

As Justice Kagan convincingly demonstrated in her opinion in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, __, 133 S. Ct. 1523, 1532 (2013) (Kagan, J., dissenting), the proposition that an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 can moot a plaintiff's claims is at odds with the fundamental principles underlying the mootness doctrine. Unable to contest Justice Kagan's analysis, Sallie Mae asks this Court to disregard it on the ground that Mr. Floyd waived the issue. But Mr. Floyd preserved the position that his claim is not moot, and he may rely on Justice Kagan's *Symczyk* reasoning on appeal to support that position. Once Sallie Mae's waiver argument is set aside, its reliance on precedents that do not address Justice Kagan's analysis, on policy arguments, and on an inapplicable "presumption" against federal jurisdiction provide no convincing basis for holding that an unaccepted Rule 68 offer has mootness consequences.

Even if a Rule 68 offer that fully satisfied a plaintiff's demands could moot his claims, the district court's decision here could not be sustained. The district court's orders rest on the erroneous view that the court has the power to decide the merits of the plaintiff's claims in order

to determine the adequacy of a Rule 68 offer—a view that, as the Sixth Circuit explained in *Hrivnak v. NCO Portfolio Management., Inc.*, 719 F.3d 564 (6th Cir. 2013), disregards the axiom that the existence of a case or controversy does not turn on whether a plaintiff's claims are meritorious. Sallie Mae's reliance on the proposition that a district court may find jurisdictional facts is therefore unavailing, because the merits of a plaintiff's claims are not jurisdictional facts.

Finally, Sallie Mae's assertion that the district court's actions can, in the alternative, be sustained as a proper grant of summary judgment flies in the face of the district court's own recognition that its decision reflected a weighing of the evidence to resolve a material dispute of fact over the relief to which Mr. Floyd is entitled. Even had Sallie Mae sought summary judgment below—and it did not—summary judgment may not be granted in the face of disputed factual issues, nor may it be based on a judge's weighing of the parties' conflicting evidence.

ARGUMENT

I. Mr. Floyd's Arguments That His Claims Are Not Moot Are Properly Before This Court.

Sallie Mae's principal response to Mr. Floyd's demonstration that an unaccepted Rule 68 offer of judgment does not moot a claim, regard-

less of the offer's sufficiency, is that the argument is waived. Thus, according to Sallie Mae, even if Justice Kagan's opinion in *Symczyk* and the Ninth Circuit's recent opinion in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), are correct in maintaining that Rule 68 cannot serve as a vehicle for mooting actions, this Court must nonetheless decide this case on an erroneous legal premise and hold Mr. Floyd's claim moot if the Court agrees with the district court that the Rule 68 offer would have fully satisfied his claims. Sallie Mae's waiver argument fails for several reasons.

To begin with, even Sallie Mae does not contest that Mr. Floyd unequivocally argued below that his claims were not moot; it merely asserts that he failed to make a particular argument in support of that position. But this Court has recognized that "[a]lthough though new claims or issues may not be raised, new *arguments* relating to preserved claims may be reviewed on appeal." *Pugliese v. Pukka Dev., Inc.*, 550 F. 3d 1299, 1304 n.3 (11th Cir. 2008) (emphasis in original); *see also United States v. Madera*, 528 F.3d 852, 854 n.1 (11th Cir. 2008). This Court's view follows the holding of the Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 1532 (1992), that "[o]nce a federal claim is

properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Thus where a party has preserved his position in the district court—here, the position that his claims are not moot—he is "free to expand on that position on appeal." *United States v. Powell*, 417 F. Appx. 926, 927 n.3 (11th Cir. 2011).

In this respect, Mr. Floyd's position is different from that of the individual plaintiff in *Symczyk*, who waived the argument that the Rule 68 offer of judgment did not moot her individual claim by conceding below that her individual claim was moot. *See Symczyk* __ U.S. at __, 133 S. Ct. at 1529. Mr. Floyd, by contrast, not only did not concede that his claim was moot, but vigorously contested mootness. He is, therefore, free to expand on the arguments in support of that consistently maintained position on appeal.

Moreover, the issue whether an unaccepted Rule 68 offer of judgment can *ever* moot a claim is logically antecedent to whether a particular offer of judgment is *sufficient* to moot a specific claim because it (supposedly) would have fully satisfied the claim if accepted. It would make little sense to decide the second issue if, as Mr. Floyd argues, even a Rule

68 offer that would, if accepted, have fully satisfied his claims cannot moot those claims. Thus, resolution of the issue whether unaccepted Rule 68 offers have mootness consequences at all is "predicate to an intelligent resolution" of the issues here. *Vance v. Terrazas,* 444 U.S. 252, 258–259 n.5, 100 S. Ct. 540, 544–545 n.5 (1980). Failing to address that antecedent question would create the possibility that this Court might render an opinion based on an assumption that ultimately proves false—"a risk that ought to be avoided." *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 382, 115 S. Ct. 961, 966 (1995).

Sallie Mae invokes considerations of judicial economy, but avoiding the fundamental question here would be a false economy. The issue of the possible mootness consequences of Rule 68 offers of judgment is a pure question of law that this Court can readily resolve. It is also, to an ever-increasing extent, a recurring question in the district courts of this Circuit and is also the subject of at least one other pending appeal in this Court, *Keim v. ADF Midatlantic, LLC*, No. 13-13619 (argument tentatively calendared for week of April 21, 2014), which presents the mootness issue in the context of a putative class action. Addressing the Rule 68 mootness question in the context of the purely individual claim here

as well as in *Keim* would help ensure that this important issue is settled, because of the possibility that resolution of the mootness issue in *Keim* may turn on considerations specific to the class action setting (for example, the possibility that class claims remain live even if individual claims are moot.).

II. Rule 68 Offers Do Not Moot Claims.

Beyond offering a string-cite of decisions of other circuits predating *Symczyk*, Sallie Mae offers virtually no analysis to counter Justice Kagan's convincing demonstration in her *Symczyk* opinion that an unaccepted Rule 68 offer of judgment does not moot an individual's claim, regardless of how adequate it might be to satisfy that claim if it were accepted. By the express terms of the Rule, an unaccepted offer is a nullity, and it provides the plaintiff with no relief. It thus does nothing to impair the power of a court to provide the plaintiff with effectual relief, and hence does not moot the case or controversy presented by the plaintiff's claims. *See Symczyk*, __ U.S. at __, 133 S. Ct. at 1533 (Kagan, J., dissenting).

Sallie Mae wrongly contends (at 20) that the majority opinion in *Symczyk* "implicitly accepts that offers of judgment may moot claims."

The majority, however, could not have been more explicit in saying that it did not address the question whether an unaccepted Rule 68 offer of judgment renders a claim moot and that its decision did *not* resolve the issue. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1528–29. The Court merely "assume[d], *without deciding*," that the individual claim was moot because the plaintiff had conceded as much below. *Id*. at __, 133 S. Ct. at 1529 (emphasis added). To ensure that the point was not lost, the Court cited its decision in *Baldwin v. Reese*, 541 U.S. 27, 34, 124 S. Ct. 1347, 1352 (2004), which explains that, in such circumstances, the Court does not "express[] any view on the merits of the [waived] issue." *See Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529. Thus, as a panel of this Court already recognized in *Wolff v. Royal Am. Mgmt., Inc.*, __ F. Appx. __, __, 2013 WL 5433773, at *4 (11th Cir. Oct. 1, 2013), *Symczyk* "explicitly said" it did not decide whether an unaccepted Rule 68 offer moots a claim, and that question remains open.

Sallie Mae also misleadingly relies on an out-of-context quotation of this court's statement in *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 166 (11th Cir. 2013) that "[o]ffers for the full relief requested have been found to moot a claim." That statement merely reflected *Zinni*'s ac-

knowledgment that *other* appellate courts (all without the benefit of Justice Kagan's reasoning) had held that Rule 68 offers of full relief can moot claims. *See id*. at 1166–67. But *Zinni* also pointed out that there was substantial disagreement on the point, and it expressly stated that "[w]e need not decide whether an offer for full relief, even if rejected, would be enough to moot a plaintiff's claims." *Id*. at 1167 n.8. Thus, in this Court—as in the Ninth Circuit until its recent decision in *Diaz*—the question remains open, and this Court is free to adopt Justice Kagan's compelling reasoning, as did the court in *Diaz*.

Moreover, *Zinni*'s actual holding was that, even if an offer for full relief could moot a claim, the offers in that case did not do so because they did not offer all the relief that the plaintiffs would obtain if they litigated their cases to a favorable judgment. That decision does not imply that an offer of judgment *would* moot a claim. On the contrary, the contention that an offer of judgment moots a claim is at odds with the basic understanding of mootness reflected in *Zinni*—that a case is moot only "when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Id.* at 1166 (quoting *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir.

2009)). That is exactly the criterion that an unaccepted Rule 68 offer does *not* satisfy.

Sallie Mae also points to the Second Circuit's recent decision in *Cabala v. Crowley*, 736 F.3d 226 (2d Cir. 2013), but that decision provides no more support for its position than does *Zinni*. Like *Zinni*, *Cabala* held that a settlement offer that does *not* contemplate entry of judgment (and that leaves open substantive issues for litigation) does not moot a case. *See id.* at 228–29. But the court noted expressly that the case did not require it to determine whether a Rule 68 offer (or an equivalent offer of judgment even if not expressly invoking Rule 68) can moot a case. *See id.* at 230 & n.4. Nor did *Cabala* consider the validity of Justice Kagan's reasoning, though it noted her position and that of the Ninth Circuit in *Diaz*. *See id.* at 228 n.2.

Since *Symczyk*, no federal appellate court has addressed and rejected Justice Kagan's analysis. Not only the Ninth Circuit in *Diaz*, but other courts as well have recognized the force of Justice Kagan's analysis and adopted it where not foreclosed by circuit precedent. *See Bais Yaakov of Spring Valley v. ACT, Inc.*, __ F. Supp. 2d __, 2013 WL 6596720, at *4 (D. Mass. Dec. 16, 2013) ("With no controlling precedent in the First

Circuit, this Court has looked to the reasoning expressed by other courts on this issue, and is persuaded by that expressed [by] the Ninth Circuit in *Diaz* and by Justice Kagan's dissent in *Genesis Healthcare.*").

Indeed, even one of the decisions that Sallie Mae touts in its brief "finds Justice Kagan's view persuasive." *Silva v. Tegrity Personnel Servs., Inc.*, __ F. Supp. 2d __, 2013 WL 6383030, at *6 (S.D. Tex. Dec. 5, 2013). The district court in *Silva*, however, held that it could not follow Justice Kagan's recommendation that courts not "try this at home," *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting), because the Fifth Circuit, prior to *Symczyk*, had "already 'tried this at home'" in *Sandoz v. Cingular Wireless LLC,* 553 F.3d 913 (5th Cir. 2008), which held that a Rule 68 offer may moot an individual's claim. *Silva*, __ F. Supp. 2d at __, 2013 WL 6383030, at *6. This Court, unlike the district court in *Silva*, is free to consider the question without the constraint of a binding precedent on point, and Sallie Mae offers no reason for rejecting Justice Kagan's analysis.

Nor does Sallie Mae provide any way out of the paradoxes created by the district court's actions in this case, which first dismissed this action for lack of subject-matter jurisdiction, and then purported to enter a

judgment on the merits in the case over which it just held it had no jurisdiction, in contradiction of the fundamental principle that a court may not grant a judgment or any other form of relief in a case over which it lacks jurisdiction. *See White v. Comm'r of Internal Revenue*, 776 F.2d 976, 977 (11th Cir. 1985); *Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1277 (11th Cir. 2010). Sallie Mae now asserts that there is no contradiction between these actions, because it was the entry of judgment itself that mooted the claim. Appee. Br. 21, n.3. But Sallie Mae's attempt to reconcile the irreconcilable fails.

Sallie Mae ignores the chronology of the court's actions, in which the dismissal *preceded* the entry of judgment. Likewise, Sallie Mae ignores that its explanation contradicts its own theory, accepted by the district court, that it was the *offer* that mooted the claim when it was made, not the subsequent entry of judgment. The court purported to enter its final orders because the claims were in its view already moot; it did not dismiss the claims because it entered judgment.

Moreover, if, as Sallie Mae now asserts, it is only the actual entry of judgment, and not the offer itself, that moots the claim, then an unaccepted Rule 68 offer cannot have mootness consequences, because Rule

68 not only does not *permit* the entry of judgment on an unaccepted offer, it *prohibits* it outright. See Fed. R. Civ. P. 68(a) (requiring entry of judgment on an *accepted* Rule 68 offer); 68(b) (*unaccepted* offer is withdrawn and inadmissible except in a proceeding to determine costs). The offer, by itself, neither moots the case by preventing the court from granting effectual relief nor authorizes the Court to terminate the action by entering judgment if the offer is not accepted.

Most fundamentally, Sallie Mae's explanation overlooks that the entry of a judgment on the merits is not an action that deprives a court of subject-matter jurisdiction; it is an *exercise* of jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012 (1998) ("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."). If entry of judgment deprived a court of subject-matter jurisdiction, then all entries of judgment would have to be accompanied by dismissals for want of jurisdiction that would in turn deprive the judgments of preclusive effect. That could not possibly be the law.

Sallie Mae insists, however, that this Court should hold that an unaccepted Rule 68 offer moots a claim because "federal courts are courts of limited jurisdiction and there is a presumption that a court lacks subject matter jurisdiction." Appee. Br. 21 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994)). Sallie Mae does not explain how such a general "presumption" can lend support to a legal theory of mootness that is fundamentally incoherent.

In any event, the presumption Sallie Mae cites is not even *applicable* to issues of mootness. *Kokkonen* holds that there is a presumption that a case falls outside a statutory grant of jurisdiction, *see* 511 U.S. at 377–81, 114 S. Ct. at 1675–77, but the Supreme Court has squarely held that the presumption with respect to mootness runs the other way:

> [W]e have held that the party who alleges that a controversy before us has become moot has the "heavy burden" of establishing that we lack jurisdiction. *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979). That is, *we presume in those circumstances that we have jurisdiction until some party establishes that we do not for reasons of mootness*.

Michigan v. Long, 463 U.S. 1032, 1042 n.8, 103 S. Ct. 3469, 3477 n.8 (1983) (emphasis added); *accord*, *e.g.*, *Already, LLC v. Nike, Inc.*, __ U.S. __, __, 133 S. Ct. 721, 727 (2013) (party asserting mootness bears "formidable burden"); *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98,

113 S. Ct. 1967, 1975–76 (1993) (courts presume that jurisdiction continues, and party asserting mootness bears burden of establishing it).

Finally, Sallie Mae asserts that attaching mootness consequences to unaccepted Rule 68 offers of judgment is appropriate because doing so will serve the Rule's purpose of encouraging settlement. Sallie Mae does not explain, however, how such policy concerns can support the manipulation of jurisdictional concepts. If an unaccepted Rule 68 offer does not deprive a court of the ability to grant relief as between the parties, it does not render a case moot, *see Knox v. Serv. Employees Int'l Union,* 567 U.S. __, __, 132 S. Ct. 2277, 2287 (2012), no matter how desirable it may be to encourage settlement.

In any event, entangling Rule 68 with inapplicable concepts of mootness is not only unnecessary to serve the purposes of the rule, but would be contrary to the way the rule is crafted to achieve its purpose of fostering settlements. As its unambiguous terms show, Rule 68 fosters settlement in a very specific way. It attaches a single, important consequence to a plaintiff's rejection or failure to accept a Rule 68 offer: The plaintiff is liable for costs incurred after the date of the offer if the judgment he finally obtains is not more favorable than the offer. Fed. R. Civ.

P. 68(d). The offer is otherwise a nullity and may not be considered by the court for any other purpose. Fed. R. Civ. P. 68(b). As the Supreme Court concluded in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146 (1981), attaching any consequences to an unaccepted Rule 68 offer beyond those set forth expressly in Rule 68 is *contrary* to the rule-makers' intent. *See id*. at 352–56, 101 S. Ct. at 1150–52. The rule itself provides the "additional inducement to settle" that the rulemakers found sufficient to serve their policy goals, *id*. at 352, 101 S. Ct. at 1150; it does not require the further sanction of dismissal for failure to accept an offer to achieve its purposes.

III. The District Court Improperly Found That Sallie Mae Offered Complete Relief.

Sallie Mae argues that the district court's resolution of factual disputes over the amount of its liability to Mr. Floyd was permissible because courts can resolve jurisdictional facts on motions to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). That courts have power to find jurisdictional facts is true as far as it goes, but if fails to answer the basic point that the amount of the defendant's liability to the plaintiff is not a *jurisdictional* fact, but a merits issue.

Sallie Mae's argument, of course, presupposes that an offer that would fully satisfy a plaintiff's claim moots it, and thus that whether the offer would provide full satisfaction is a jurisdictional fact. The argument is incorrect on two levels. First, as demonstrated above and in Mr. Floyd's opening brief, a Rule 68 offer of judgment does not moot a claim even if the offer would provide the plaintiff with full relief.

Second, even if an offer of full relief could moot a plaintiff's claim, the only jurisdictional fact for consideration by the court on a motion to dismiss would be whether the offer provided all the relief the plaintiff *sought*, not whether it provided all the relief to which the plaintiff could *prove he was entitled*. The latter is a merits question, not a jurisdictional one. *See Hrivnak*, 719 F.3d at 568.

As the Sixth Circuit explained in *Hrivnak*, the argument that a court may consider the validity of and evidentiary support for a plaintiff's claims for relief in the guise of determining whether those claims are moot disregards the fundamental principle that "[t]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89, 118 S. Ct. at 1010(1998);

accord, *Bell v. Hood,* 327 U.S. 678, 682, 66 S. Ct. 773, 776 (1946) ("Jurisdiction … is not defeated … by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.").

In particular, the Supreme Court has squarely rejected the argument that a plaintiff's claim is rendered moot by the possibility that he is not entitled to the relief he seeks. For example, in *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944 (1969), the Supreme Court rejected the argument that Representative Powell's case challenging his exclusion from the House of Representatives in the 90th Congress was moot because he would not be entitled to either the injunctive relief or the damages his complaint sought in the district court. "The short answer to this argument," the Court stated, "is that it confuses mootness with whether Powell has established a right to recover …." *Id*. at 500, 89 S. Ct. at 1953. And only last year, in *Chafin v. Chafin*, __ U.S. __, 133 S. Ct. 1017 (2013), the Supreme Court again rejected the argument that a case should be held moot because the plaintiff arguably could not succeed on a claim for relief. The Court emphasized that such an argument "confuses

mootness with the merits" and that "prospects of success are … not pertinent to the mootness inquiry." *Id*. at __, 133 S. Ct. at 1024.

Sallie Mae's argument that Mr. Floyd's claims are moot because it supposedly offered him all the relief to which he could prove he was entitled likewise confuses mootness with the merits. Because the extent of Sallie Mae's *actual* liability is not relevant to jurisdiction even under the (erroneous) view that an action is mooted by a Rule 68 offer of judgment that would completely satisfy a plaintiff's *claims*, the district court's power to make findings of jurisdictional fact could not authorize it to make the findings it made concerning the merits of Mr. Floyd's claims.

Citing the district court's opinion in the *Silva* case, Sallie Mae asserts that the consequence of not allowing the district court to resolve the merits of the plaintiff's case as part of a mootness inquiry would be that a plaintiff could avoid mootness merely by refusing an offer and asserting that he "want[s] a jury, not the defendant, to decide what [he is] owed" based on "an unsupported contention that [he] might recover more at trial than what was included in the Rule 68 offer of judgment." *Silva*, __ F. Supp. 2d at __, 2013 WL 6383030, at *11.

But that is not what happened here. Mr. Floyd did not simply offer unsupported speculation that a jury might award more than the offer; he articulated legally cognizable grounds, supported by his testimony, for a higher award—namely, that there were more calls than the number that formed the basis for Sallie Mae's offer, and that Sallie Mae engaged in willful or knowing violations (entitling him to up to $1,500 per call) by continuing to call his number after he informed Sallie Mae that the number did not belong to the alleged student-loan debtor. The district court's findings against Mr. Floyd on both points was not based on the conclusion that he had not supported them with any evidence, but on the district court's *weighing* of that evidence against Sallie Mae's to resolve what the court acknowledged were "disputed material facts." App. Tab 74, at 6. In other words, although Mr. Floyd had a case on the merits sufficient to go to a jury, the judge purported to decide it against him on the ground that the issue was one of mootness. Whatever the scope of a judge's authority to find jurisdictional facts, it does not permit the court to decide disputed merits issues under the rubric of mootness. *See Hrivnak*, 719 F.3d at 570.

In any event, the concern that plaintiffs will be able to present unsupported cases to juries unless judges are empowered to decide the value of their claims in response to motions to dismiss based on unaccepted Rule 68 offers is chimerical. As *Hrivnak* points out, "[t]o the extent some of [a plaintiff's] claims lack merit, ample mechanisms exist to force the issue …." *Id*. Legally unfounded claims can be the subject of motions to dismiss under Rule 12(b)(6) or for judgment on the pleadings under Rule 12(c), while claims that lack sufficient factual support to create a triable dispute of material fact may be tested "by way of a motion for summary judgment." *Id*. A plaintiff who has no triable claims that exceed whatever liability a defendant is willing to admit will thus be unable to reach a jury, let alone prevail. The problem with such a plaintiff's claims, however, is not that they are moot; it is that they lack merit. And a case that lacks merit—like one that has merit—should lead to a judgment on the merits, not a jurisdictional dismissal. As the court in *Hrivnak* put it, "Plaintiffs have the right to win—and lose—cases, and we have jurisdiction to make the call. To rule on whether [the plaintiff] is entitled to a particular kind of relief is to decide the merits of the case." *Id*.

IV. The Judgment Below Cannot Be Treated as a Proper Grant of Summary Judgment.

Sallie Mae argues that even if the lower court erred in dismissing the case as moot and entering judgment based on the unaccepted Rule 68 offer of judgment, the judgment below can be affirmed on the alternative ground that summary judgment was appropriate. In no way, however, can the district court's action be sustained as an exercise of the power to grant summary judgment.

Sallie Mae never moved for summary judgment below, nor did it argue for summary judgment. Its position was that Mr. Floyd's claim was subject to dismissal as moot. By raising only the issue of mootness and not presenting any claim of entitlement to summary judgment, Sallie Mae waived any argument on appeal for summary judgment, as issues not presented to the district court are generally forfeited on appeal (as Sallie Mae itself insists). *See FDIC. v. Verex Assur., Inc.,* 3 F.3d 391, 395 (11th Cir. 1993).

Leaving aside the question of waiver on appeal, Sallie Mae's failure to move for summary judgment is itself a reason why this Court may not affirm the district court on the ground that it could properly have granted summary judgment here. In general, a "district court may grant

summary judgment on an issue only if a party moves for summary judgment on that issue." *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1556 (11th Cir. 1991), *aff'd*, 507 U.S. 658, 113 S. Ct. 1732 (1993). Sua sponte grants of summary judgment are appropriate only under limited circumstances, *see* Fed. R. Civ. P. 56(f); *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417–18 (11th Cir. 1997). Sallie Mae makes no attempt to argue that the conditions under which a district court may permissibly grant summary judgment sua sponte were present here.

Moreover, as a substantive matter, the district court could not properly have granted summary judgment, for two reasons. First, summary judgment is appropriate only if there is no genuine dispute of material fact; if there is such a dispute, a district judge may not grant summary judgment based on her own weighing of the evidence. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986); *Avenue CLO Fund, Ltd. v. Bank of Am., NA*, 723 F.3d 1287, 1294 (11th Cir. 2013). Here, the district court made clear that it had determined that there *was* a dispute of material fact over the number of calls Mr. Floyd received, and the court's decision rested on the judge's own weighing of the evidence (which the judge believed appropriate because she er-

roneously thought the question of the extent of Sallie Mae's liability was one of subject-matter jurisdiction). App. Tab 74, at 6. Such a decision cannot be sustained as an exercise of the power to grant summary judgment.

Second, summary judgment could not have been granted here because Sallie Mae itself continued to contest its liability on the merits even for the amount in which judgment was entered for Mr. Floyd. The judgment entered by the district court not only *denied* Mr. Floyd a recover *greater* than $500 per call for 28 calls, but also *granted* him recovery of statutory damages of $500 per call for 28 calls. That judgment could only be sustained as a summary judgment if it rested on an admission by Sallie Mae or a determination by the court that there was no material dispute of fact and that Sallie Mae was, as a matter of law, liable for those 28 calls. But Sallie Mae made no such admission, and the court made no such determination. Rather, Sallie Mae insisted that it was not liable at all because a third party had consented to the calls, App. Tab. 56, at 5, and the district court's order did not address that issue. Without addressing Sallie Mae's insistence that it had no liability at all, the district court could not have entered summary judgment imposing such liability, and

hence the judgment here cannot be affirmed as a proper entry of summary judgment.

Sallie Mae's argument that summary judgment would have been appropriate, moreover, rests to a large extent on its contention that Mr. Floyd's testimony as to the number of calls her received, and when he told Sallie Mae that it was calling the wrong number, should have been disregarded as a sanction for supposed spoliation (that is, for Mr. Floyd's discarding his cell phone after discontinuing service on it). But the district court *denied* Sallie Mae's request that it sanction Mr. Floyd for spoliation because it lacked a sufficient basis for declaring "that Plaintiff's recycling of his cellular telephone when he switched cellular providers cannot be credibly explained without the presence of bad faith." App. Tab 74, at 6. A district court's decision not to sanction a party for alleged spoliation is reviewed by this Court only for abuse of discretion. *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009). Sallie Mae did not cross-appeal from the denial of its request for sanctions, nor does it argue that the district court's refusal to impose sanctions for spoliation was such a manifest error as to constitute an abuse of discretion. Sallie Mae's

extensive discussion of the supposed spoliation is thus entirely irrelevant to the proper disposition of this appeal.

Once Sallie Mae's spoliation smokescreen is dispersed, it is evident that the district court was correct in perceiving that the case presents a dispute of material fact and that, therefore, summary judgment would not have been proper even if Sallie Mae had sought it. Sallie Mae's evidence establishes that 28 calls were made from numbers associated with Sallie Mae, but it does not rule out the possibility that Sallie Mae made calls from additional numbers, *see* App. Tab 56, at 4–5, ¶¶ 6(A), (F), and Mr. Floyd's testimony, if credited, thus could support a jury finding that Sallie Mae made additional calls. Likewise, Sallie Mae's documentary evidence suggests that it knew by May 2012 that it had been calling the wrong number but does not exclude the possibility that Mr. Floyd, as he testified, had given it that information months before and not in May 2012, when he was no longer even using the phone in question. *See* App. Tab. 56, at 4, ¶ 6(B); App. Tab 47-1, at 35 (Tr. 53). Again, therefore, a jury crediting Mr. Floyd's testimony could find that Sallie Mae had acted knowingly or willfully in calling Mr. Floyd, potentially entitling him to enhanced statutory damages.

The district court's decision in this case thus must stand or fall on the strength of its mootness analysis. The district court did not consider summary judgment; its own findings were inconsistent with the award of summary judgment; and summary judgment would in any event not be appropriate on this record. Summary judgment cannot now be offered as a fig leaf to cover the district court's erroneous mootness analysis.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court and remand for reinstatement of the complaint and further proceedings on the merits.

Respectfully submitted,

s/ Scott L. Nelson

Donald A. Yarbrough
Post Office Box 11842
Fort Lauderdale, FL 33339
954-537-2000
954-556-2235 (Fax)
don@donyarbrough.com

Scott L. Nelson
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-7724
202-588-7795 (Fax)
snelson@citizen.org

Attorneys for Appellant

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant 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 5,651 words.

s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that, on January 23, 2014, this Brief for Appellant was served through the court's ECF system on counsel for defendants-appellees, as follows:

Brian C. Frontino
bfrontino@stroock.com
Brendan S. Everman
beverman@stroock.com
Stroock & Stroock & Lavan, LLP
200 S. Biscayne Blvd., Suite 3100
Miami, FL 33131

s/ Scott L. Nelson
Scott L. Nelson