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.

BRIEF FOR APPELLANT

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October 31, 2013

No. 13-13397, *Floyd v. Sallie Mae, Inc.*

APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-2, appellant provides the following list of persons who may have an interest in the outcome of this appeal:

Cooke, Marcia G., U.S.D.J.

Everman, Brendan S.

Floyd, Robert D.

Frontino, Brian C.

Nelson, Scott L.

Public Citizen Foundation, Inc. (Public Citizen Litigation Group)

Public Citizen, Inc.

Rosenbaum, Adina H.

Sallie Mae, Inc.

Simonetti, Lisa M.

SLM Corporation

Strauss, Scott R.

Stroock & Stroock & Lavan LLP

Turnoff, William C., U.S.M.J.

Yarbrough, Donald A.

2. Appellant is not a corporation, and so no corporate disclosure is required by FRAP or the Rules of this Court.

s/ Scott L. Nelson
Scott L. Nelson

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument. This appeal involves important and unresolved questions in the wake of the decisions of the Supreme Court in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 133 S. Ct. 1523 (2013), and this Court in *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 (11th Cir. 2012): whether, or under what circumstances, an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 can moot a plaintiff's claim and require dismissal of an action for lack of subject-matter jurisdiction and/or entry of judgment. Appellant submits that oral argument would assist the Court in resolving these issues.

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JURISDICTION

This action was filed by plaintiff-appellant Robert D. Floyd against Sallie Mae, Inc., in the United States District Court for the Southern District of Florida, asserting claims under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The district court had jurisdiction under 28 U.S.C. § 1331.

On June 26, 2013, the district court entered an order dismissing the complaint with prejudice for lack of subject-matter jurisdiction, based on an offer of judgment under Federal Rule of Civil Procedure 68 that Mr. Floyd had rejected. App. Tab 74.[1] On the same day as its order dismissing the action for lack of subject-matter jurisdiction, the court also issued a final judgment in the action in favor of Mr. Floyd, in accordance with the terms of the rejected offer of judgment, for statutory damages in the amount of $14,000, an additional $1.00, court costs, and an injunction against the placement of calls to Mr. Floyd using an automatic dialer or prerecorded voice. App. Tab 75. The dismissal of the complaint for

[1] In this brief, "App." refers to the Appendix, and materials in the Appendix are cited by tab number and page or paragraph number within the item cited. "Doc." refers to docket entries listed in the district court docket found at App. Tab A.

lack of subject-matter jurisdiction and the final judgment are final appealable orders under 28 U.S.C. § 1291.

On July 26, 2013, Mr. Floyd filed a timely notice of appeal from the district court's final orders in the form prescribed by Federal Rule of Appellate Procedure 4(a)(1). Doc. 77. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

(1) Whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 moots a plaintiff's claims by depriving the court of the ability to provide effectual relief.

(2) Whether an unaccepted Rule 68 offer of judgment authorizes a court to enter judgment in the amount offered.

(3) Whether a Rule 68 offer of judgment that, even if accepted, would not provide all the relief sought by the plaintiff moots the plaintiff's claim or otherwise supports the entry of judgment for less than the relief sought.

STATEMENT OF THE CASE

Course of the Proceedings and Disposition Below

Plaintiff-appellant Robert D. Floyd filed his complaint in this action on July 18, 2012, alleging that defendant-appellee Sallie Mae, Inc., had committed multiple willful or knowing violations of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), by placing non-emergency calls to his cell phone using an automatic dialer or a prerecorded or artificial voice. App. Tab 1. The complaint requested damages as well as declaratory and injunctive relief and requested a jury trial. *Id*. at 3.

The case was assigned to Judge Marcia G. Cooke, who set a fact discovery cutoff date of February 19, 2013, and a trial date of July 1, 2013. Doc. 13, 15. On February 4, 2013, while discovery was ongoing, Sallie Mae served Mr. Floyd with an offer of judgment pursuant to Federal Rule of Civil Procedure 68. *See* App. Tab. 74, at 2. The offer included: damages under the TCPA of $14,000, reflecting the minimum $500 statutory damages available under 47 U.S.C. § 227(b)(3)(B) for each of 28 telephone calls placed by Sallie Mae to Mr. Floyd's cell phone; an additional $1.00; court costs; and an agreement to entry of an order barring any further calls from Sallie Mae to Mr. Floyd's phone. See App. Tab 74,

at 2. Mr. Floyd did not accept the offer, which lapsed under its own terms and the provisions of Rule 68 on February 18, 2013. *Id*.

Thereafter, on March 18, 2013, Mr. Floyd filed a motion to compel discovery, seeking, among other things, a list of all telephone numbers from which Sallie Mae could have placed calls to his phone, in order to contest Sallie Mae's contention that its records showed that only 28 calls had been placed. App. Tab. 46. Magistrate Judge William C. Turnoff, to whom the case had been assigned for pretrial purposes, denied the motion to compel on April 12, 2013, for reasons he had stated at the hearing on the motion. App. Tab. 54. In particular, Magistrate Judge Turnoff had stated that the discovery was unnecessary because Mr. Floyd could testify at trial that he had received more calls than the records produced by Sallie Mae indicated. *See* App. Tab. 72-1, at 3–4.

Following Magistrate Judge Turnoff's ruling, the parties proceeded toward trial, submitting a joint pretrial stipulation (App. Tab 56), as well as motions in limine, witness lists, voir dire questions, and jury instructions. *See* Doc. 55, 61, 62, 63, 64, 65. On June 10, 2013, Sallie Mae filed a motion to dismiss for lack of subject-matter jurisdiction, contending that

its unaccepted Rule 68 offer four months earlier had mooted the case by offering Mr. Floyd complete relief on his claims. App. Tab. 66.

On June 26, 2013, Judge Cooke granted Sallie Mae's motion and entered an order dismissing Mr. Floyd's complaint with prejudice for lack of subject-matter jurisdiction. App. Tab 74, at 11. The court's order was premised on the view that an offer of judgment that "provides all of the relief Plaintiff could obtain" renders a case "moot," *id*. at 10, because it deprives the plaintiff of the "legally cognizable interest in the outcome" necessary for a "live" case or controversy. *See id*. at 8. The court's conclusion that the Rule 68 offer in this case offered complete relief rested on its determination that Mr. Floyd had received only the 28 calls on which the Rule 68 offer was based and its rejection of his testimony to the contrary, *see id*. at 9–10, as well as on its determination that Sallie Mae had "mistakenly" placed the calls and had ceased calling Mr. Floyd as soon as it learned that it was "erroneously" calling him. *Id*. at 7. Thus, the court concluded that the treble statutory damages available under the TCPA for willful or knowing violations, *see* 47 U.S.C. § 227(b)(3), could not be awarded, and that Mr. Floyd was entitled to recover no more than $500 in statutory damages for 28 calls. Based on these determina-

tions, the court concluded that the $14,000 in statutory damages offered by Sallie Mae constituted "the maximum relief affordable under the TCPA, resulting in a lack of 'case' or 'controversy' going forward," and that dismissal, with prejudice, for lack of subject-matter jurisdiction was "legally mandated by Article III of the United States Constitution." App. Tab. 74, at 11.

Immediately after dismissing the action with prejudice for lack of subject-matter jurisdiction, the order went on to say that "[a] separate judgment in favor of Plaintiff Robert D. Floyd and against Defendant Sallie Mae, Inc., shall issue contemporaneously pursuant to Federal Rule of Civil Procedure 58." *Id*. Shortly after entering the order of dismissal, the court issued such a judgment. App. Tab. 75. Entitled "FINAL JUDGMENT," this document states that "it is hereby ORDERED and ADJUDGED that judgment is entered in this matter in favor of the Plaintiff, Robert D. Floyd, and against the Defendant, Sallie Mae, Inc. in accordance with the terms of Sallie Mae, Inc.'s Rule 68 Offer, which provides for $14,000 in statutory damages, an additional $1, and court costs." *Id*. at 1. The judgment further provides "that Defendant Sallie Mae, Inc. is permanently enjoined from placing any non-emergency calls

to Plaintiff Robert D. Floyd … using an automatic telephone dialing system or pre-recorded or artificial voice." *Id*.

Statement of the Facts

Many of the facts in this case are undisputed and have been established by a pretrial stipulation of the parties. App. Tab 56. Sallie Mae, which provides, services, and attempts to collect student loans, had a student loan borrower who provided it with a telephone number with a 954 area code on June 15, 2010. *Id*. at 2, ¶ 5(A). Thereafter, that telephone number was assigned to Robert Floyd by his then-cell-phone carrier, MetroPCS, on October 19, 2011. Between that date and June 20, 2012, Sallie Mae acknowledges placing 28 telephone calls using an automatic telephone dialing system to Mr. Floyd's number in an effort to collect the debt owed by its student loan borrower, who is unrelated and unknown to Mr. Floyd. *Id*. at 3, ¶¶ 5(C), (D), (I). Mr. Floyd himself is not indebted to Sallie Mae, did not give Sallie Mae his telephone number, and did not consent to Sallie Mae's calling the number. *Id*. at 3, ¶¶ 5(F), (G), (H). Sallie Mae did not make the calls for emergency purposes. *Id*. at 3, ¶ 5(E).

Around April 19, 2012, Mr. Floyd obtained a new cell phone from AT&T and stopped making use of the MetroPCS phone to which Sallie Mae was making its calls. *Id*. at 3, ¶¶ 5(J), (K). Mr. Floyd's cell phone service with MetroPCS ended on June 20, 2012, and he recycled the phone on which he had received calls from Sallie Mae in August 2012. *Id*. at 3, ¶¶ 5(L), (N).

At that point, the parties' agreement about the facts largely ends. Mr. Floyd's telephone company had no records of the number of times Sallie Mae called him. *Id*. at 3, ¶ 5(O). Mr. Floyd alleges that the 28 calls that Sallie Mae acknowledges it made were not the only calls, and that he received more than 100 calls and prerecorded messages from Sallie Mae during the period when he had his MetroPCS cell phone. *See* App. Tab 1, at 2, ¶ 6; App. Tab 56, at 4, ¶ 6(A). Indeed, Mr. Floyd testified at his deposition that he had received multiple calls per week during that period. App. Tab 47-1, at 32 (Tr. 24); App. Tab 74, at 10–11, n.4. Mr. Floyd also testified that he had informed Sallie Mae in December 2011 that he was not the person they were attempting to reach, and that the calls had continued. App. Tab 56, at 4, ¶ 6(B).

Sallie Mae, by contrast, contended that it had made only 28 calls, and sought to support its claim by relying on records produced by its long distance carrier, CenturyLink, showing 28 calls to Mr. Floyd from numbers assigned to Sallie Mae. *Id*. at 5, ¶ 6(F). Sallie Mae also claimed that notes in its file indicated that Mr. Floyd had not informed it that it was calling the wrong number until May 2012. *Id*. at 4, ¶ 6(B).

Mr. Floyd vigorously contested Sallie Mae's arguments concerning the significance of the records on which it relied. Mr. Floyd contended that the CenturyLink records did not include all numbers from which Sallie Mae originated calls, *see* App. Tab. 56, at 5, ¶ 6(F)—an issue that was the subject of an evidentiary gap because Mr. Floyd had been denied discovery on the point, based on the premise that he was not precluded from countering Sallie Mae's documentary evidence with his own testimony that he had received many more calls than the records suggested. *See* App. Tab 54; App. Tab 72-1, at 3–4. Moreover, Mr. Floyd challenged the credibility of Sallie Mae's claim that it had learned of its wrong number only in May 2012, insisting that he had spoken to Sallie Mae in December, not May, and pointing out that he had ceased using his MetroPCS phone by May. App. Tab 47-1, at 35 (Tr. 53).

These disputes were critical because each non-emergency call made without consent to a cell phone using an auto-dialer or a prerecorded or artificial voice is a separate violation of the TCPA. 47 U.S.C. § 227(b)(1)(A)(iii). In a private right of action under the TCPA, a plaintiff is entitled to a minimum of $500 in statutory damages for each such violation, *id*. § 227(b)(3)(B), and up to $1,500 per call for knowing or willful violations. *Id*. § 227(b)(3). The number of calls placed by Sallie Mae, and the date when Sallie Mae learned that it was calling someone with whom it had no relationship and who had not consented to its calls, are thus the key facts on which the amount of Sallie Mae's liability turns. Those facts determine both the number of violations for which statutory damages are owed, and whether the violations were knowing or willful and potentially subject to treble damages.

In its order dismissing this action as "moot" because the relief offered by Sallie Mae's Rule 68 offer was complete, the district court purported to resolve these critical factual questions on which the merits of Mr. Floyd's claims depend, and it did so without a jury trial and without hearing the witnesses on whose credibility the issues turned. Specifically, the court's determination that Mr. Floyd had no entitlement to treble

statutory damages under the TCPA rested on its conclusion that Sallie Mae had not acted knowingly or willfully, which was based in turn on the court's statements that Mr. Floyd did not tell Sallie Mae it was calling the wrong number until May 24, 2012, and that "[o]nce [Sallie Mae] had notice that it was erroneously calling Plaintiff, [it] did not dial the number again while it was associated with the Plaintiff." App. Tab 74, at 7. The court did not acknowledge Mr. Floyd's testimony that he had told Sallie Mae in December that it was calling the wrong number.

The court's determination that Sallie Mae had made only 28 calls likewise rested on its choice to credit Sallie Mae's claim that the records obtained from its carrier definitively established that it made only 28 calls. App. Tab 74, at 10. The court did not address the possibility that the records did not cover all numbers from which Sallie Mae called Mr. Floyd, and it discounted as not credible his testimony that he had received many more calls than 28, *see id*. at 9–11 & n.4, notwithstanding Magistrate Judge Turnoff's earlier decision to limit discovery concerning the phone lines from which Sallie Mae placed calls precisely because Mr. Floyd would not be "precluded" from offering testimony that there were

more calls than indicated by the records relied on by Sallie Mae. App. Tab 72-1, at 4.[2]

Standard of Review

The correctness of a district court's dismissal of a complaint for lack of subject-matter jurisdiction (including dismissal on justiciability grounds such as mootness) is a question of law that this Court reviews *de novo*. *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1166 (11th Cir. 2012); *see also Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006) (applying *de novo* review to a dismissal based on ripeness and standing).

SUMMARY OF ARGUMENT

The district court erred in two fundamental respects. *First*, the court erred in concluding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claim, and provides a basis for ending the case and entering judgment in accordance with the offer, if the offer would have fully satisfied the plaintiff's claim had it been accepted. Rule 68, however, is

[2] The court also stated that Mr. Floyd "conceded" in the pretrial stipulation that Sallie Mae had made 28 calls, *see* App. Tab 74, at 9, but the stipulation contained no admission that *only* 28 calls had been made. Rather, it unambiguously reflected the parties' agreement that there were 28 "undisputed" calls, *see* App. Tab 56, at 3, ¶ 5(E) (referring to "the 28 undisputed calls"), while explicitly acknowledging that the parties did *not* agree that there were *only* 28 calls. *See id*. at 4, ¶ 6(A).

only a mechanism by which a defendant can *offer* to have judgment entered against it. If the offer is not accepted, it is a nullity except for purposes of determining whether the defendant is entitled to costs at the conclusion of the case. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146 (1981). An unaccepted offer neither moots a claim nor otherwise authorizes the entry of judgment over the plaintiff's objection.

In its recent decision in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 133 S. Ct. 1523 (2013), the Supreme Court expressly declined to rule that a Rule 68 offer of judgment for full relief moots a plaintiff's claim (because it found the issue waived). Justice Kagan's dissent, joined by three other Justices, made clear why the Court could not have issued such a ruling had it chosen to reach the issue: The theory that a Rule 68 offer of judgment 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." *Id*. at __, 133 S. Ct. at 1533 (Kagan, J., dissenting) (quoting *Chafin v. Chafin,* 568 U.S. __, __, 133 S. Ct. 1017, 1023 (2012)). Moreover, Justice Kagan pointed out, Rule 68 provides absolutely no authorization for a court to terminate the case of

a plaintiff who does not accept the offer. *Id*. at __, 133 S. Ct. at 1536. As the U.S. Court of Appeals for the Ninth Circuit recently recognized, 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 Diaz v. First Am. Home Buyers Protection Corp.*, __ F.3d __, 2013 WL 5495702 (9th Cir. Oct. 4, 2013).

This case vividly illustrates the paradoxical consequences of the theory that a Rule 68 offer of judgment moots a case. If a Rule 68 offer indeed mooted a case and deprived the court of subject-matter jurisdiction over it, the court would have no authority to enter judgment on the offer, whether it was accepted or not, because a court cannot grant a party relief in a case in which it has no jurisdiction. *See Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1277 (11th Cir. 2010). Yet that is exactly what the district court purported to do in this case when, after dismissing the case with prejudice for lack of subject-matter jurisdiction, it entered a judgment in favor of the plaintiff for some of the relief he sought in the case. The district court's action—taken to avoid the equally strange consequence of saying that the plaintiff no longer had a live interest in his claims even while leaving those

claims unsatisfied—exposes the absurdity of the idea that a Rule 68 offer moots a case. The court's entry of judgment also violates the terms of Rule 68 itself, which do not authorize entry of judgment on an unaccepted offer.

Second, even if a Rule 68 offer of *complete* relief could moot a plaintiff's individual claim, the offer in this case did not provide all the relief sought by the plaintiff. The judge's determination that the offer mooted this case rested on purported findings that Mr. Floyd's claims for greater relief were not *meritorious*. But a case is not moot when, to resolve it, a court must address the *merits* of a party's claims. *See Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 570 (6th Cir. 2013). That is exactly what the district court did when, without a trial and without applying the standards applicable to motions for summary judgment under Federal Rule of Civil Procedure 56, it summarily decided that Mr. Floyd was entitled to no more than Sallie Mae had offered him.

A court cannot, in the guise of a jurisdictional ruling under Rule 12(b)(1), resolve merits issues in a way that short-circuits a party's entitlement to a jury trial (or to a determination that a trial is unnecessary because there are no disputed issues of material fact and that summary

judgment is appropriate under Rule 56). That the district court's mootness determination actually rested on a premature and procedurally defective resolution of the merits of Mr. Floyd's claims underscores the court's basic error in holding that an unaccepted Rule 68 offer presents a question of mootness and subject-matter jurisdiction.

ARGUMENT

I. An Unaccepted Rule 68 Offer of Judgment Does Not Moot a Plaintiff's Claims or Authorize Entry of Judgment over the Plaintiff's Objection.

The district court erred in holding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claims and deprives the court of subject-matter jurisdiction. A Rule 68 offer of judgment does no such thing: It does not deprive the plaintiff of a concrete interest in obtaining a judgment or render the court incapable of providing relief between the parties. If it did so, Rule 68 would become self-defeating, as the defendant's mere offer of judgment under its terms would deprive the court of jurisdiction and, therefore, of the power to enter the very judgment contemplated by the offer. Indeed, the district court's action in this case in entering judgment on the unaccepted Rule 68 offer, besides violating the

terms of Rule 68 itself, contradicts its own dismissal of the case for lack of subject-matter jurisdiction.

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 provide that "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin*, 568 U.S. at __, 133 S. Ct. at 1023 (quoting *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477, 110 S. Ct. 1249, 1253 (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 477–78, 110 S. Ct. at 1254 (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.,* 568 U.S. __, __, 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 ef-

fectual relief whatever to the prevailing party." *Knox v. Serv. Employees Int'l Union*, 567 U.S. __, __, 132 S. Ct. 2277, 2287 (2012) (emphasis added; citations and internal quotation marks omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*. (citation omitted); *accord Chafin*, 568 U.S. at __, 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*, 570 U.S. __, __, 133 S. Ct. 2675, 2685 (2013).

A Rule 68 offer of judgment that has not been accepted does not meet the criteria for rendering a case moot: It does not, in itself, provide redress for the plaintiff's grievance or make it impossible for a court to grant effectual relief. As the Supreme Court has explained, Rule 68 is merely a procedural device that "prescribes certain consequences for formal settlement offers made by 'a party defending against a claim.'" *Delta Air Lines v. August*, 450 U.S. at 350, 101 S. Ct. at 1149. Specifically, the rule permits judgment to be entered in the plaintiff's favor on the offered terms if, but only if, the plaintiff accepts the offer in writing within 14 days of being served with it. *See id.*; Fed. R. Civ. P. 68(a). On the

other hand, "[i]f the offer is not accepted, it is deemed withdrawn 'and *evidence thereof is not admissible except in a proceeding to determine costs*.'" *Delta Air Lines*, 450 U.S. at 350, 101 S. Ct. at 1149 (emphasis added; quoting former Fed. R. Civ. P. 68).[3]

Under the Rule, the plaintiff's rejection of an offer only "becomes significant in … a [post-judgment] proceeding to determine costs." *Id*. 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); *Delta*, 450 U.S. at 351–52, 101 S. Ct. at 1149–50. Thus, what the Rule establishes is 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, 101 S. Ct. at 1150.

Notably, nothing in the Rule *requires* acceptance of an offer under any circumstances. Nor does the Rule suggest that it is in any way intended to divest courts of their ability to entertain a claim. Indeed, the

[3] Since *Delta*, the Rule has been amended slightly for stylistic purposes and to extend its time frames from 10 to 14 days. Rule 68(b) now provides: "An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs."

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), the Rule authorizes entry of judgment on the offer. Fed. R. Civ. P. 68(a). In cases where an offer is not accepted within the time set by the Rule, the Rule provides that the offer is withdrawn, and it anticipates that the case will then be litigated to judgment—after which the unaccepted offer may become relevant, but only to the issue of costs. Fed. R. Civ. P. 68(d).

Thus, an unaccepted offer—even one that, if accepted, would have resulted in a judgment that fully satisfied a plaintiff's claim—neither redresses the plaintiff's injury nor makes it impossible for the court to provide redress. Because the parties retain concrete interests that will be affected by a judicial resolution of the case, the offer does not moot the case. *See Windsor*, 570 U.S. at__, 133 S. Ct. at 2685; *Chafin*, 568 U.S. at __, 133 S. Ct. at 1023; *Knox*, 567 U.S. at __, 132 S. Ct. at 2287. Decisions holding that an offer of judgment that would fully satisfy a plaintiff's claim moots that claim, *see*, *e.g.*, *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011)), are untenable in light of the reasoning of the Su-

preme Court's decisions in *Windsor*, *Chafin*, and *Knox* emphasizing the limited scope of the mootness doctrine.

B. The Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk* pointed out that the Court has never specifically addressed the question whether an unaccepted Rule 68 offer of judgment moots a plaintiff's individual claim. 569 U.S. at __, 133 S. Ct. at 1528–29. The majority in *Symczyk* expressly declined to reach that question. *Id*. At issue in *Symczyk* was whether a plaintiff whose individual claim was moot could continue to pursue an opt-in collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b). The lower courts had held that the individual claim was moot because of an unaccepted Rule 68 offer of judgment. 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.[4] The *Symczyk* majority, however, held that that Rule 68 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

[4] *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.

claim was moot. *See Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529. The majority therefore merely "assume[d], without deciding," that the individual claim was moot. *Id*.

Justice Kagan, joined by Justices Ginsberg, Breyer, and Sotomayor, dissented from the majority's decision not to reach the issue whether a 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 __, 133 S. Ct. at 1532–37 (Kagan, J., dissenting). Turning to 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 __, 133 S. Ct. at 1532. As she explained, even a Rule 68 offer that would "provide complete relief on [the plaintiff's] individual claim," *id* at __, 133 S. Ct. at 1532, does not deprive the plaintiff of a concrete interest in the outcome of a 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, 7 S. Ct. 168 (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 __, 133 S. Ct. at 1533–34.

Importantly, the *Symczyk* majority breathed not a word of disagreement, either express or implied, with Justice Kagan's analysis. As Justice Kagan herself emphasized, "what 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." *Id*. at __, 133 S. Ct. at 1534.

C. Here, in the wake of Justice Kagan's unrebutted demonstration (backed by the Solicitor General of the United States) that it is a "fallacy" to suppose that Rule 68 offers can moot individual claims, *id*. at __, 133 S. Ct. at 1537, the district court proceeded on exactly the premise that Justice Kagan had exposed as erroneous. Of course, the district

court might have been required to ignore Justice Kagan's reasoning if a precedent of this Court demanded a finding that a Rule 68 offer mooted a plaintiff's claims. But this Court's decisions by no means support the result below. This Circuit has not decided whether a Rule 68 offer has mootness consequences, but its reasoning in *Zinni v. ER Solutions*, 692 F.3d 1162, strongly suggests that an unaccepted (and therefore lapsed) Rule 68 offer cannot moot a case.

In *Zinni*, the Court held that an informal settlement offer that was made outside Rule 68 and did not include an offer to have judgment entered against the defendant could not moot a plaintiff's claim because a "mere promise to pay" did not eliminate a "live controversy" over whether the plaintiff was entitled to a judgment on his claims. 692 F.3d at 1167–68. *Zinni* noted that some appellate courts had held that an offer of judgment that would provide a plaintiff with full relief could moot his claims, while others had disagreed, *see id.* at 1166–67 & n.8. The Court, however, had no need to resolve that issue, *see id.* at 1166 n.8, because under any view of the matter, an offer that did *not* provide full relief, but merely offered something less valuable to the plaintiff than the enforceable judgment sought, could not moot anything. *See id.* at 1166–68.

Although *Zinni* did not reach the issue, its reasoning is consistent with the view later expressed by Justice Kagan in *Symczyk*. *Zinni*, like Justice Kagan's *Symczyk* opinion, is grounded on the principle that "[a]n issue is moot 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)). An unaccepted Rule 68 offer of judgment no more deprives a court of the ability to grant meaningful relief than did the informal settlement offers at issue in *Zinni*. Like those settlement offers, the unaccepted Rule 68 offer here, which is "considered withdrawn" by operation of Rule 68(b) and cannot be offered in evidence as an admission of liability of the defendant or for any other purpose (other than to establish an entitlement to costs in the circumstances described in Rule 68(d)), does not redress the plaintiff's injury or stand as an obstacle to the court's resolution of the question of the defendant's liability and entry of an effectual judgment satisfying the plaintiff's claims. It therefore cannot moot anything.

D. Like this Court, the Ninth Circuit had, before *Symczyk*, never squarely held that an unaccepted Rule 68 offer of judgment could moot a

claim. It had, however, issued opinions that *assumed* that a Rule 68 offer for complete relief would moot a plaintiff's claim. *See*, *e.g.*, *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090–92 (9th Cir. 2011) (holding that even if such an offer mooted a putative class representative's individual claim, it did not moot the class action). Following *Symczyk*, however, the Ninth Circuit recognized that that assumption had become untenable in the face of Justice Kagan's convincing demonstration to the contrary in her *Symczyk* opinion. *See Diaz v. First Am. Home Buyers Protection Corp.* __ F.3d at __, 2013 WL 5495702 at *5.

In *Diaz*, as in this case, the defendant made a Rule 68 offer of judgment including an amount of damages that, according to the defendant, represented the maximum amount that the plaintiff could recover at trial. *See id*. at *1, n.2. When the plaintiff did not accept the offer, the defendant moved for dismissal for lack of subject-matter jurisdiction, contending that the offer mooted the claim (even though, like the Rule 68 offer in this case, its terms mirrored the Rule and provided that it was withdrawn and became null and void once the time for its acceptance expired). The district court granted the motion to dismiss.

The Ninth Circuit reversed. The court held that, even assuming that the Rule 68 offer would have completely satisfied the plaintiff's claims if it had been accepted, it did not moot them. Quoting at length from Justice Kagan's opinion (*see id.* at *4–*5), the court in *Diaz* stated that "[w]e are persuaded that Justice Kagan has articulated the correct approach." *Id*. at *5. Based on "the language, structure and purposes of Rule 68" and "fundamental principles governing mootness," the court held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Id*. Such an offer, once it lapsed, "was, by its own terms and under Rule 68, a legal nullity," and thus it did not render it "impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Id*. at *5 (quoting *Knox*, 567 U.S. at __, 132 S. Ct. at 2287 (citation omitted)). Rather, the plaintiff's "individual stake in the lawsuit … remained what it had always been, and dit-to the court's capacity to grant her relief. After the offer lapsed, just as before, [she] possessed an unsatisfied claim, which the court could redress by awarding her damages. As long as that remained true, [her] claim was not moot …." *Id*. (quoting *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting). Exactly the same is true here.

E. The district court's contrary view would have perverse consequences. If an unaccepted Rule 68 offer moots a claim, it necessarily follows that the same is true of an offer that is *accepted*, for the latter much more clearly signals the supposed lack of adversity that has been thought by some courts to render cases involving Rule 68 offers moot. But if the making of an offer by itself renders the plaintiff's claim moot, Rule 68 is self-defeating, for the judgment whose entry the rule calls for if the offer is accepted *could never be entered*. 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: "A federal court must have subject matter jurisdiction to grant a party the relief it seeks." *Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co.*, 607 F.3d at 1277. Thus, "[a] district court must always dismiss a case upon determining that it lacks subject matter jurisdiction," and must do so "'without reaching the merits.'" *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001) (citation omitted); *accord*, *e.g.*, *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409–10 (11th Cir. 1999). A court that lacks jurisdiction may not enter a judgment even with the consent of

the parties. *See White v. Comm'r of Internal Revenue*, 776 F.2d 976, 977 (11th Cir. 1985).

As the Supreme Court has put it, "[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, 118 S. Ct. 1003, 1012 (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."). The Supreme Court's promulgation of a rule contemplating the entry of a judgment on an accepted Rule 68 offer thus quite evidently reflects the view that the offer itself does not deprive the court of jurisdiction.

The notion that a Rule 68 offer moots a case has equally bizarre consequences in a case, like this one, where the offer is not accepted. In such a case, the plaintiff's claim has *not* been redressed, and the Rule 68 offer has lapsed and is a nullity. Nonetheless, the theory that the mere offer of judgment under Rule 68 renders a case moot would, taken seriously, seemingly require the court to dismiss the case without providing

any redress—because, for the reasons just discussed, a court cannot grant relief in a case in which it lacks jurisdiction. Such a dismissal, however, would contradict the basis for the theory that the case is moot—that is, that the plaintiff has no live claim because he has received full redress—because it would effectively deny the plaintiff any means of redress.

A court cannot declare a claim for damages and injunctive relief moot while at the same time "send[ing] [the plaintiff] away empty-handed." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting). But that is exactly the logical consequence of the view that an unaccepted Rule 68 offer that would have provided full relief moots a claim: The plaintiff's claim is moot, so the theory goes, because "[y]ou cannot persist in suing after you've won," but the plaintiff who supposedly "won" gets nothing. *See Greisz v. Household Bank (Ill.)*, 176 F.3d 1012, 1015 (7th Cir. 1999). That theory makes no sense because, in such a situation, the plaintiff's "individual stake in the lawsuit … remain[s] what it ha[s] always been, and ditto the court's capacity to grant her relief." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting). Dismissing the claim of a plaintiff who does not accept a Rule 68 offer thus

does not reflect genuine mootness concerns, but simply "imposes dismissal as a litigation penalty for persisting with a claim notwithstanding the offer." Br. for United States 12, *Symczyk*. Neither Rule 68 itself nor any other law or rule authorizes such a penalty. *See id.* at 12–13.

F. The incongruity of leaving a plaintiff with an unredressed claim while declaring that claim to be moot has led some courts, like the district court below, to perform considerable legal and mental gymnastics to avoid that obviously incorrect result. Thus, the Sixth Circuit held in *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567 (6th Cir. 2009), that although the unaccepted offer moots the plaintiffs' claim, "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *Id*. at 575.

That approach is better for the individual plaintiff than getting nothing, but it is no better jurisprudentially, for two reasons. First, Rule 68's own terms do not even authorize the court to award redress on the basis of an unaccepted offer. As Justice Kagan's *Symczyk* opinion explains,

> Rule 68 precludes a court from imposing judgment for a plaintiff … based on an unaccepted settlement offer made pursuant to its terms. The text of the Rule contemplates that a court will enter judgment only when a plaintiff accepts an offer. … And the Rule

> prohibits a court from considering an unaccepted offer for any purpose other than allocating litigation costs—including for the purpose of entering judgment for either party.

569 U.S. at __, 133 S. Ct. at 1536 (Kagan, J., dissenting). Second, if the unaccepted offer truly divested the court of jurisdiction by mooting the case, the court would lack authority to render a judgment in the plaintiff's favor on the unaccepted offer even if the Rule permitted it to do so, for a court has no power to enter judgment in a moot case. *See Steel Co.*, 523 U.S. at 94, 118 S. Ct. at 1012..

Adopting a variant of *O'Brien*'s "better approach," the district court here granted the defendant's motion to dismiss for lack of subject-matter jurisdiction, stating unequivocally that the action was "DISMISSED *with prejudice* for lack of subject matter jurisdiction." App. Tab 74, at 11.[5] The court, however, then immediately entered *judgment* in Mr. Floyd's favor for statutory damages in the amount of the Rule 68 offer, as well as permanent injunctive relief, in the very action that it had just dismissed with prejudice as moot! App. Tab 75. The court's contradictory actions strikingly illustrate the absurd consequences of calling a

[5] The court evidently overlooked that a jurisdictional dismissal, by definition, cannot be "with prejudice." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008).

case moot when the plaintiff has not yet obtained redress. If a court genuinely lacks subject-matter jurisdiction because of the absence of a case or controversy, entering a judgment is the last thing it should be doing. *See White* 776 F.2d at 977. When a court feels compelled to resort to the through-the-looking-glass device of *exercising* the jurisdiction it has just said it lacks in order to do something that would be manifestly improper if it actually lacked jurisdiction, that is a strong indication that the court's jurisdictional theory is fundamentally flawed.

The theory that unaccepted Rule 68 offers can moot a case fails to recognize that a case is not moot as long as a plaintiff has an injury that a court can redress through a judgment against the adverse party. *Windsor*, 570 U.S. at__, 133 S. Ct. at 2685. In such circumstances, an adverse party's failure to contest a claim, or even its concession that it is liable, may be a basis for a judicial resolution of the case in favor of the plaintiff, but it is not a basis for dismissing the case as outside the court's jurisdiction. If the law were otherwise, a defendant could, by conceding liability, paradoxically either *avoid* an adverse judgment or, as here, prompt a court to enter a judgment in a case in which it has just held it lacks jurisdiction to do so. Neither alternative makes sense.

G. As Justice Kagan explained in *Symczyk*, the recognition that a claim is not mooted by an unaccepted offer of judgment does not mean that a court must allow a case to proceed where a plaintiff perversely refuses to take yes for an answer: "[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." *Symczyk*, 569 U.S. at__, 133 S. Ct. at 1536 (Kagan, J., dissenting); *accord*, *Diaz*, __ F.3d at __, 2013 WL 5495702 at *6; *see*, *e.g.*, *Husain v. Springer*, 691 F. Supp. 2d 339, 341–42 (E.D.N.Y. 2009) (citing *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.,* 485 F.3d 85, 93 (2d Cir. 2007)). Even so, an unaccepted Rule 68 offer does not authorize a court to enter judgment for the individual plaintiff. A Rule 68 offer of judgment is not an "unconditional surrender"; it becomes a nullity if not accepted within 14 days, and thereafter it cannot be treated as a concession of liability or as the basis for entry of judgment in favor of the plaintiff. *See* Fed. R. Civ. P. 68.

Thus, a Rule 68 offer is fundamentally different from an admission of liability or consent by the defendant to entry of judgment if the offer is not accepted, and unlike such an admission or consent it provides no ba-

sis for entry even of a partial judgment in favor of the plaintiff. And certainly, "[t]he Rule provides no appropriate mechanism for a court to *terminate* a lawsuit without the plaintiff's consent." *Symczyk*, 569 U.S. at__, 133 S. Ct. at 1536 (Kagan, J., dissenting) (emphasis added). Accordingly, even if the district court had not improperly labeled the case moot, Sallie Mae's mere offer of judgment, which had lapsed by its own terms in February 2013, would have provided no basis for the entry of judgment on Mr. Floyd's claims over his objection four months later.

Nor had Sallie Mae otherwise conceded any liability or consented to the entry of judgment against it in any amount: The pretrial stipulation made clear that, while Sallie Mae admitted making some non-emergency calls to Mr. Floyd's cell phone using an automatic dialer without his personal consent, it still contended that the consent of the unrelated student-loan debtor to receive calls on that number constituted consent to Sallie Mae's calling the number even after it belonged to Mr. Floyd, and thus Sallie Mae *disputed* that its actions violated the TCPA. App. Tab 56, at 5, ¶ 6(E); *id*. at 6, ¶ 8(A). Therefore, even if the district court had not erred in dismissing the claims as moot, it still would have been without authority to enter judgment, even partial judgment, on the basis of the

Rule 68 offer or Sallie Mae's other admissions without resolving disputed legal issues as to Sallie Mae's liability.

In sum, the theory that unaccepted Rule 68 offers of judgment moot or otherwise authorize entry of judgment on claims for which, if accepted, they would have provided complete relief has no basis in any accurate understanding of the meaning of mootness or the terms of the Rule. Rather, dismissing claims based on such offers serves only to terminate actual cases or controversies in ways that are unauthorized by any rule of law. As Justice Kagan advised in *Symczyk*, courts that have adopted the view that Rule 68 offers can moot claims should "[r]ethink" that position, while those that—like this Court—have not yet taken a position on the issue should heed her caution: "Don't try this at home." *Symczyk*, 569 U.S. at__, 133 S. Ct. at 1534 (Kagan, J., dissenting).

II. Even If an Unaccepted Rule 68 Offer of Judgment for Full Relief Could Moot a Plaintiff's Claims, an Offer That Does Not Provide All the Relief Sought by the Plaintiff Cannot Moot His Claims or Authorize Entry of Judgment for Less than He Seeks.

A. Sallie Mae's Rule 68 offer did not provide complete relief because it did not offer everything that Mr. Floyd sought in this action. First, the offer provided statutory damages based on the premise that

exactly 28 calls violating the TCPA had been made by Sallie Mae to Mr. Floyd's cell phone. Yet Mr. Floyd's complaint did not allege that he had received only 28 calls, but claimed that he had received over 100. App. Tab 1, at 2, ¶ 6. Likewise, Mr. Floyd testified at his deposition that he had received many more calls than 28, and the pretrial stipulation made clear that Mr. Floyd contended he had received more than 100 calls. App. Tab 56, at 4, ¶ 6(A). Thus, even if he were limited to the statutory minimum of $500 per violation, 47 U.S.C. § 227(b)(3)(B), Mr. Floyd sought well in excess of the $14,001 offered by Sallie Mae. Second, Mr. Floyd alleged that Sallie Mae's actions were willful, App. Tab 1, at 2, ¶ 9, and he sought the treble damages—$1,500 per call—permitted by the statute for willful violations. *See* 47 U.S.C. § 227(b)(3); App. Tab 56, at 6, ¶¶ 8(C), (D). The Rule 68 offer, however, included only $500 each for 28 calls.

Even if a Rule 68 offer that included all the relief sought by a plaintiff would suffice to moot the plaintiff's claims, an offer that provides less than he seeks, and is premised on the defendant's view that the plaintiff is *entitled to less* than he seeks, could not do so. Thus, even courts that (wrongly) accept the proposition that a Rule 68 offer of judgment that provides complete relief to the plaintiff can moot his claims require that

the offer ensure that the plaintiff receive "every form of individual relief the claimant seeks in the complaint." *Hrivnak v. NCO Portfolio Mgmt.*, 719 F.3d at 568. This Court, while reserving opinion on whether a Rule 68 offer of judgment that would provide complete relief can ever moot a claim, has likewise held unequivocally that an offer that *fails* to provide for "the full relief requested" on a claim does *not* give rise to mootness. *Zinni*, 692 F.3d at 1167.

As Judge Sutton of the Sixth Circuit explained in *Hrivnak*, an offer that provides only that relief to which the defendant (or the court) believes the plaintiff is *legitimately* entitled—and that requires the court to determine whether the plaintiff is entitled to more in order to resolve the defendant's claim that the case should be dismissed for lack of subject-matter jurisdiction—cannot suffice to moot a claim. *Hrivnak*, 719 F.3d at 568–70. Such an offer only emphasizes that a live case or controversy remains, for "[t]o rule on whether [the plaintiff] is entitled to a particular kind of relief is to *decide the merits of the case*." *Id.* at 570 (emphasis added). Thus, by requiring the court to determine merits issues—specifically, how many calls Mr. Floyd received, and whether the defendant's conduct justified treble damages—Sallie Mae's motion to dismiss

actually made clear that the parties retained concrete interests in a judicial resolution of the case and that it *was* possible for the court to provide effectual relief as between the parties.

In *Hrivnak*, as in this case, the offer of judgment did not include all the relief sought by the plaintiff. There, the plaintiff had sought damages in excess of $25,000, declaratory and injunctive relief, and attorney's fees and costs. The defendants, like Sallie Mae here, offered less: no declaratory or injunctive relief, and only $7,000 in damages, plus fees and costs. *Id*. at 568. As in this case, the defendants contended that offer mooted the claim because the plaintiff could not succeed on any claim for more than they had offered. Specifically, the defendants in *Hrivnak* argued that the damages and declaratory and injunctive relief requested were unavailable as a matter of law on the claims asserted by the plaintiff.

The court of appeals flatly rejected the claim of mootness, holding that "[a]n offer limited to the relief the defendant believes is appropriate does not suffice." *Id*. at 567. When a defendant moves for dismissal based on such an offer, it asks the court to determine on legal or factual grounds that the plaintiff's claim for more is unfounded—a quintessential *merits* determination. Couching that request in terms of mootness

and subject-matter jurisdiction reflects a misunderstanding of "the distinction between the merits of a claim and the existence of a live controversy." *Id*. at 568. The assertion that the plaintiff's claims for more than the Rule 68 offer are "moot" reflects the view that "claims with little to no chance of success should be dismissed as moot whenever they are mixed in with promising claims that a defendant offers to compensate in full." *Id*. But, as Judge Sutton observed, "[t]hat is not how it works," *id*., because "[i]t is firmly established … that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 89, 118 S. Ct. at 1010.

For like reasons, the Fourth Circuit has twice rejected the proposition that a case can be mooted by an offer that leaves the amount of damages subject either to the submission of further information by the plaintiff or to determination by the court. *See Simmons v. United Mortgage & Loan Inv., LLC*, 634 F.3d 754 (4th Cir. 2011); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365. In *Simmons*, which this Court cited approvingly in *Zinni*, *see* 692 F.3d at 1167, the defendant offered to "com-

pensate[] fully" each plaintiff "upon receipt of an affidavit" justifying his or her claim for overtime. *See* 634 F.3d at 760–61. The court found the offer "ineffective at mooting the Plaintiffs' … claims" because "the parties still had work to do in order to figure out what amounts the plaintiffs were allegedly owed"—work that "raised many unanswered questions" and created the possibility of further disputes between the parties. *Id*. at 766. The same is true of the offer in this case: It did not moot the case because it left "work" to be done by both the parties and the court before the court could determine whether it provided full relief: Sallie Mae's motion to dismiss based on the offer required the parties to litigate, and the court to prognosticate, whether Mr. Floyd plaintiff would succeed on a claim for greater relief than Sallie Mae offered.

The Fourth Circuit's subsequent decision in *Warren* is equally pertinent. There, the offer stated that the plaintiff would receive $1001 in statutory damages plus actual damages of $250 "or an amount determined by the Court upon Plaintiff's submission of affidavits or other evidence of actual damage." 676 F.3d at 369. The court held that the provision calling for the court to determine an unresolved issue of damages created an "inherent flaw" in the defendant's claim of mootness, because

the offer was "predicated on what the district court as fact finder might or might not do" and created the possibility of litigation over the plaintiffs' damages calculation. *Id*. at 372–73. The same is true of the offer in this case, which, as the district court made clear, required the court to make findings about Mr. Floyd's entitlement to damages in order to determine whether Sallie Mae had offered full relief. App. Tab 74, at 6–7, 9.

B. *Warren* points to another difficulty created by treating an offer for less than the plaintiff's demand as mooting a case and depriving the court of subject-matter jurisdiction: It deprives the plaintiff of the "right to have a jury determine disputes of fact" over damages. *Warren*, 676 F.3d at 373. The district court's order in this case had precisely that effect. By erroneously treating the issue of the offer's adequacy as one of mootness (and hence subject-matter jurisdiction) and dismissing Mr. Floyd's action based on its own findings concerning such disputed issues as the number of calls and Sallie Mae's good faith in placing them, the court substituted its own summary factfinding process (premised on the idea that the court may make findings of fact when there is a fact-based *jurisdictional* challenge, *see* App. Tab 74, at 3), for the procedural entitlements, including the entitlements to a trial and to jury factfinding, of

a litigant who seeks to have a contested *merits* issue resolved in an action proceeding under the Federal Rules of Civil Procedure.[6]

Those entitlements include the right to proceed to trial absent a determination by the court, made in response to a properly supported motion under Federal Rule of Civil Procedure 56, that there are no disputed issues of material fact. *See* Fed. R. Civ. P. 56(a), (c); *see, e.g., Clark v. Coasts & Clark, Inc.*, 929 F.2d 604, 606–09 (11th Cir. 1991). Here, the defendant never moved for summary judgment, and the district court did not apply the summary judgment standard: It did not conclude that there were no genuine issues of material fact within the meaning of Rule 56 as to the number of calls or when Mr. Floyd first asked Sallie Mae to stop calling him. Instead, the court made findings on those issues based on its own review of the record and its decision to discount Mr. Floyd's testimony. The court acknowledged that, in so doing, it was weighing evidence and *resolving disputed issues of material fact*. App. Tab 74, at 6.

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[6] Federal courts regularly recognize the availability of jury trials in TCPA actions, and the issue of whether the defendant sent particular communications to the plaintiff is treated as a jury issue. *See*, *e.g.*, *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825, 832 (D. Md. 2011); *Mais v. Gulf Coast Collection Bur., Inc.*, __ F. Supp. 2d __, __, 2013 WL 1899616, at *15 (S.D. Fla. May 8, 2013).

Thus, by improperly treating the question whether the defendant's offer provided full relief as "jurisdictional," the court reached a result it could not have reached had it properly recognized that the extent of Sallie Mae's liability to Mr. Floyd was a question of liability on the merits rather than an issue of mootness. The court could not, for example, have denied Mr. Floyd a trial on the question whether Sallie Mae's violations were knowing or willful simply by deciding for itself, in advance of trial, when Mr. Floyd first gave notice to Sallie Mae that it had the wrong number. The conflict between Mr. Floyd's testimony that he gave notice in December 2011 and Sallie Mae's contention, based on a hearsay document, that it first received notice in May 2012 created a sharp factual dispute over that issue. Such an issue, involving quintessential questions of credibility and evidentiary weight, may not be summarily decided, but must be the subject of a trial. *See Reese v. Herbert*, 527 F.3d 1253, 1271 (11th Cir. 2008).[7] Likewise, had the court properly treated the number of calls as a merits rather than jurisdictional issue, it could not have re-

[7] *See also Texas v. Am. Blast Fax, Inc.*, 159 F. Supp. 2d 936, 940 (W.D. Tex. 2001) (holding that disputed fact issues bearing on willfulness in a TCPA case require trial); *Pollock v. Bay Area Credit Serv., LLC*, 2009 WL 2475167, at *7 (S.D. Fla. Aug. 13, 2009) (same).

solved that issue summarily based on its weighing of the evidence and its view that the *quality* and *credibility* of Mr. Floyd's evidence were inferior to Sallie Mae's contested reliance on documentary evidence. The court would have had to recognize that the genuine dispute over that issue of material fact posed a question requiring a trial. *See id*.

As argued above, this Court should lay to rest any notion that an unaccepted Rule 68 offer can moot a claim even if it offers full relief. But even if a Rule 68 offer could ever moot a plaintiff's individual claim, an offer of *less* than what the plaintiff seeks, which requires the court to engage in further factfinding to determine the extent of the plaintiff's legitimate entitlement to damages, could not possibly do so. Such an offer no more moots a case than would a stipulation that the defendant was liable for *some* of the plaintiff's claimed damages coupled with a motion for summary judgment seeking a determination that the plaintiff's claims for more than the stipulated amount presented no triable issue. A stipulation of partial liability combined with a summary judgment motion might obviate the need for a trial—*if* the defendant succeeded in satisfying the summary judgment standard—but no one would seriously suggest that they mooted the case and required its dismissal for lack of sub-

ject-matter jurisdiction. In such a case, the stipulation would simply limit the issues that required judicial resolution. *See*, *e.g.*, *Waldorf v. Shuta*, 142 F.3d 601 (3d Cir. 1998).

A Rule 68 offer that requires the court to decide merits issues involving the evidentiary support for the plaintiff's claims in order to determine whether the offer would provide full relief does even less to moot a case than would such a partial stipulation. Unlike a stipulation, which binds the party who files it (*see id.* at 616–20), an unaccepted Rule 68 offer does not bind the defendant, but is withdrawn by operation of law. *See* Fed. R. Civ. P. 68(b). Such an offer by no means prevents a court from granting effectual relief, and provides neither a basis for dismissing the case as moot nor a justification for sidestepping the requirement that a plaintiff be afforded a trial on his claims absent a proper summary judgment motion and a consequent determination that there are no triable issues of fact.

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,

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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 10,418 words.

s/ Scott L. Nelson
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CERTIFICATE OF SERVICE

I hereby certify that, on October 31, 3013, this Brief for Appellant was served through the court's ECF system on counsel for defendants-appellees, as follows:

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