15-4003(L)

17-1134 (CON)

In the

United States Court of Appeals

For the Second Circuit

GILBERTO FRANCO, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

ALLIED INTERSTATE LLC, FKA ALLIED INTERSTATE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

STERN THOMASSON LLP
Attorneys for Plaintiff-Appellant
150 Morris Avenue, 2nd Floor
Springfield, New Jersey 07081
(973) 379-7500

PUBLIC CITIZEN LITIGATION GROUP
Attorneys for Plaintiff-Appellant
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

APPELLATE INNOVATIONS
(914) 948-2240
10987

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Rules, Laws and Statutes:

INTRODUCTION

This case asks the Court to once again correct a district court's use of an unaccepted Rule 68 offer of judgment to erroneously dismiss (as moot), or enter judgment on, the named-plaintiff's *individual* claim without first considering whether to certify the class. Most recently, this Court explained that an unaccepted Rule 68 offer cannot moot a claim because it is "a legal nullity," and a district court cannot "giv[e] effect to the unaccepted offer … by entering a judgment effectuating [the] otherwise precluded dismissal." in its most recent published decision in this line of cases, *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 850 F.3d 507, 509, 513 (2d Cir. 2017) (*Geismann*). The district court's entry of judgment under such circumstances imbues the offer "with a power it did not possess." *Id*. at 512.

In this case, after named plaintiff Gilberto Franco timely moved for class certification, the district court dismissed his case as moot based on an unaccepted Rule 68 offer to Mr. Franco. This Court vacated and remanded based on its decision in *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015). *See* Joint Appendix (JA) 44-46. Without considering the merits of his class certification motion, the district court then entered judgment under Rule 68 in Mr. Franco's favor on the terms of the unaccepted offer and dismissed his case.

This Court should once again vacate and remand. As in *Geismann*, "the basis upon which the district court entered judgment did not exist." 850 F.3d at 513. An unaccepted Rule 68 offer "is considered withdrawn" and has "no continuing efficacy." *Id.* at 512 (citations omitted). Moreover, after the district court had entered judgment in this case, the Supreme Court explained that a would-be class representative with a live claim "must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Mr. Franco was denied that fair opportunity.

Defendant-Appellee Allied Interstate's post-judgment deposit of funds with the district court in satisfaction of the judgment can neither support a finding of mootness nor sustain the judgment. As in *Geismann*, the deposit "was made pursuant to and in furtherance of a judgment that should not have been entered in the first place." 850 F.3d at 514. Accordingly, upon vacatur of the judgment, the order allowing the deposit should be vacated, and the district court should return the deposited money.

Finally, regardless of the status of Mr. Franco's individual claim, the class claims are live and should be allowed to proceed.

This case is now on its second appeal based on Allied Interstate's attempts to avoid class-wide liability by depriving the courts of subject-matter jurisdiction. The Court should reject Allied Interstate's efforts to "place [itself] in the driver's

seat," *Campbell-Ewald*, 136 S. Ct. at 672, and should vacate the judgment below and remand for the district court to decide the class certification motion on the merits.

STATEMENT OF JURISDICTION

This case was brought as a class action under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq*. The district court had jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331. On November 30, 2015, the district court granted defendant Allied Interstate's motion to enter judgment for Gilberto Franco on his individual claim, entered a final judgment for Mr. Franco on his individual claim, and terminated the action. JA 58-59. Mr. Franco filed a timely notice of appeal on December 13, 2015. *Id*. at 60.

On April 13, 2017, the district court granted a letter-motion filed by Allied Interstate, seeking leave to deposit $2,501 in satisfaction of the judgment. *Id*. at 66. Mr. Franco filed a timely notice of appeal of that order on April 17, 2017. *Id*. at 67. That appeal was consolidated with the earlier appeal.

This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err in entering judgment for Mr. Franco on his individual claim under Rule 68, over his objections, without first considering whether class certification was warranted?

2. Does the district court's order allowing the deposit of funds in satisfaction of the judgment support the judgment or affect the courts' subject-matter jurisdiction?

3. Did the district court err in holding that its entry of an unwanted judgment on Mr. Franco's individual claim rendered the class action moot?

STATEMENT OF THE CASE

This appeal arises from a decision of the district court, the Honorable Katherine B. Forrest presiding, granting Allied Interstate's motion to enter judgment on Mr. Franco's individual claim, entering judgment for Mr. Franco pursuant to Federal Rule of Civil Procedure 68, and terminating the action as moot, without first considering whether class certification was warranted. JA 47-57.

A. The Complaint and Rule 68 Offer

Gilberto Franco filed this case on June 13, 2013, alleging Allied Interstate used false, deceptive, and misleading tactics in connection with its attempts to collect defaulted debts in violation of the FDCPA. JA 3. Specifically, the complaint alleged Allied Interstate mailed collection letters to consumers threatening to garnish up to 15% of their income, when only 15% of their *disposable* income was legally subject to garnishment. *See id*. at 23. Mr. Franco brought the case as a class action on behalf of himself and other similarly situated

people, seeking both damages and entry of judgment in his own favor and in favor of the class. *See id*. at 29.

On September 10, 2013, Allied Interstate made an offer of judgment to Mr. Franco pursuant to Federal Rule of Civil Procedure 68, offering to allow judgment to be taken against it as to Mr. Franco's individual claim for $1,501, plus reasonable costs and attorney's fees to be determined by the district court. The offer stated, "[a]ny judgment entered pursuant to this offer will be in full satisfaction of Plaintiff's individual claims under the FDCPA." JA 18. Although $1,501 represented more than Mr. Franco could recover in statutory damages on his individual claim, the offer did not include any relief for the rest of the class. Mr. Franco did not accept the offer, explaining he would only settle on a class-wide basis. By its own terms, and by the terms of Rule 68, the offer expired fourteen days after it was made, on September 24, 2013. *See id*.; Fed. R. Civ. P. 68(a).

B. The First District Court Decision and Appeal

On December 2, 2013, in accordance with a briefing schedule entered by the district court, Mr. Franco moved for class certification. *See* JA 9, 19.[1] Allied Interstate opposed the motion for class certification and moved to dismiss, arguing

[1] The class certification motion sought to certify a class of consumers in Massachusetts. In January 2014, Mr. Franco was granted permission to file, and did file, an amended complaint that likewise limited the proposed class definition to Massachusetts consumers. *See* JA 9-10.

its expired offer of judgment mooted Mr. Franco's individual claim and deprived the court of subject-matter jurisdiction over his case.

The district court granted the motion to dismiss, denied Mr. Franco's motion for class certification, and terminated the action. *Id*. at 33-42. The district court first held that, although Mr. Franco had rejected the offer of judgment, and although he never received any relief on his claim, the offer had rendered his claim moot. *Id*. at 36-37. The court then held that, because Mr. Franco's individual claim had been rendered moot, it lacked subject-matter jurisdiction over the case "notwithstanding the pending class certification motion." *Id*. at 41. Finally, the district court denied the motion for class certification stating, "In the absence of a claim against defendant, plaintiff cannot adequately represent the purported class." *Id*.

On appeal, this Court vacated the district court's judgment in light of its decision in *Tanasi*, 786 F.3d 195. In *Tanasi*, the defendant made a Rule 68 offer to the plaintiff for an amount greater than the statutory damages to which the plaintiff was entitled on his individual claims, and then argued the unaccepted offer rendered the individual claims and entire class action moot. This Court rejected that argument, holding that a "'rejected settlement offer [under Rule 68], by itself, [cannot render] moot[ ] [a] case.'" *Id*. at 200 (alterations in original) (citation omitted). The Court explained that "[i]f the parties agree that a judgment should be

entered against the defendant, then the district court should enter such a judgment. Then, *after* judgment is entered, the plaintiff's individual claims will become moot for purposes of Article III." *Id*. "Absent such agreement, however, the district court should not enter judgment against the defendant if it does not provide complete relief." *Id*.

In its decision in this case, this Court explained, "*Tanasi* makes clear that Franco's individual claim was not mooted by defendant's Rule 68 offer, which did not result in the entry of any judgment against the defendant." JA 45-46. "Because Franco's individual claim was not moot," the Court did not "address whether, had his claims been moot, the class action also would have been moot." *Id*. at 46.

C. The Second District Court Decision and Appeal

On the same day this Court issued its decision, Allied Interstate tried again to moot Mr. Franco's case. This time, Allied Interstate moved the district court for entry of judgment in Mr. Franco's favor in accordance with the terms of its same expired Rule 68 offer. Allied Interstate argued entry of the judgment it sought would deprive the court "of subject-matter jurisdiction over Mr. Franco's individual and putative class claims," and that, once judgment was entered, "the remaining class claims should be dismissed for want of jurisdiction." *See* Def.'s Memo. of Law in Support of Its Mot. for Entry of J., D. Ct. Doc. 84 (May 18,

2015), at 1. Mr. Franco opposed the motion, explaining the district court should first decide his pending motion for class certification.

Once again, the district court granted Allied Interstate's motion. JA 47-57. The district court stated it "should determine if [the] offer provides plaintiff complete satisfaction of the relief he seeks in his Complaint" when considering whether to enter judgment pursuant to Rule 68. *Id*. at 51. If the offer provided such relief, the court concluded it "'should (absent additional procedural complications) enter judgment pursuant to the terms of that offer, with or without the plaintiff's consent.'" *Id*. (quoting *Hepler v. Abercrombie & Fitch Co.*, 607 F. App'x 91, 92 (2d Cir. 2015) (summary order)). "This is because '[a] defendant offering judgment for complete relief is, in essence, submitting to the entry of default judgment. Just as a defendant may end the litigation by allowing default judgment, a defendant may always end the litigation by offering judgment for all the relief that is sought.'" *Id*. (quoting *Hepler*, 607 F. App'x at 92).

Allied Interstate's offer did not offer all the relief sought in the complaint because it did not offer relief on the class claims. Without acknowledging that fact and without examining how defaults are treated in class actions, the district court erroneously concluded, "Defendant has now offered judgment referencing 'unconditional surrender' and affording complete relief to plaintiff." *Id*. at 48. Hence, the district court granted Allied Interstate's motion to enter judgment in

accordance with the terms of the expired Rule 68 offer and ordered judgment entered against Allied Interstate "under Rule 68." *Id*. The court then stated, "An entry of judgment for plaintiff following a Rule 68 offer moots the plaintiff's claim." *Id*. at 51.

The district court noted this Court had not ruled on whether, "upon entry of judgment that renders moot plaintiff's individual claim, the class action is also moot." *Id*. at 55. However, the district court found "no reason to disturb its determination" in its first decision that rendering the named plaintiff's individual claim moot mooted the entire action. *Id*. In a footnote, the court addressed Mr. Franco's argument that he maintained a personal stake in class certification under *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). In *Geraghty*, the Supreme Court held that a named plaintiff whose individual claim became moot while the case was on appeal from a denial of class certification maintained a sufficient interest in the class claims to satisfy Article III. The district court sought to distinguish *Geraghty* because it "involved a plaintiff whose individual claim became moot via expiration rather than judgment, and who sought to appeal a prior denial of class certification on the merits." JA 55-56. Without explaining why those facts would affect whether a named plaintiff has a continuing personal stake in class claims, the district court stated "[n]either situation applies to plaintiff in this case." *Id*. at 56.

In addition, although it did not purport to consider class certification on the merits, the district court stated Mr. Franco could not "nominally continue in some capacity as class representative as he would definitionally be atypical and not an adequate representative." *Id*. at 48. The court concluded by making clear its decision was based on Rule 68, stating it was following "the intentions of the drafters of the Federal Rules, that 'Rule 68 [is] to have a uniform, consistent application in *all* proceedings in federal court.'" *Id*. at 56 (quoting *Marek v. Chesny*, 473 U.S. 1, 23 (1985)).

The district court entered judgment in Mr. Franco's favor in the amount of $1,501, plus any post-judgment interest, ordered payment to be rendered to Mr. Franco within 30 days, directed the parties to confer about attorney's fees and costs and submit motions to the court, and terminated the action. *Id*. at 58.

Pursuant to the judgment, Allied Interstate sent Mr. Franco a check for $1,516, which Mr. Franco returned to Allied Interstate. JA 65. On December 16, 2015, the district court postponed the deadline for Mr. Franco to move for attorney's fees and costs until after this appeal is resolved. *See id*. at 14.

D. *Campbell-Ewald*, *Geismann*, and *Lary*

On January 20, 2016, while this appeal was pending, the Supreme Court held in *Campbell-Ewald Co. v. Gomez* that "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." 136 S. Ct. at 672. In so holding, the

Supreme Court adopted the analysis in Justice Kagan's dissent in *Genesis Healthcare Corp v. Symczyk*:

> When a plaintiff rejects [a Rule 68] 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, 30 L.Ed. 376] (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.

Campbell-Ewald, 136 S. Ct. at 670 (quoting *Genesis Healthcare Corp v. Symczyk*, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting)). The Supreme Court's decision confirmed this Court's first decision in this case was correct—namely, that Allied Interstate's unaccepted Rule 68 offer did not moot Mr. Franco's claim.

Campbell-Ewald also made clear courts should not terminate a named plaintiff's live claim without first providing the plaintiff a meaningful chance to move for class certification. After holding the unaccepted offer did not moot the named plaintiff's individual claim, the Court instructed: "[A] would-be class representative with a live claim of her own *must* be accorded a fair opportunity to show that certification is warranted." *Id.* at 672 (emphasis added).

On March 9, 2016, this Court granted Allied Interstate's motion to hold this case in abeyance pending the Court's decisions in *Geismann*, No. 14-3708, and *Lary v. Rexall Sundown, Inc.*, No. 15-601. JA 14. In those appeals, the parties filed supplemental briefs regarding *Campbell-Ewald*. In both cases, the district courts had held unaccepted offers of judgment to named plaintiffs on their individual claims rendered the individual claims moot, entered judgment in the named plaintiffs' favor on their individual claims, and dismissed for lack of subject-matter jurisdiction.

On March 9, 2017, this Court decided *Geismann*. Explaining that *Campbell-Ewald* "controls our review and is dispositive of the case," the Court held the case "was not and is not 'moot.'" 850 F.3d at 509, 512. "An unaccepted Rule 68 offer of judgment is, regardless of its terms, a legal nullity." *Id*. at 509.

The Court rejected defendant ZocDoc's attempts to distinguish *Campbell-Ewald* on grounds that, in *Geismann*, the district court entered judgment on the terms of the unaccepted offer: It found the distinction immaterial "because the judgment should not have been entered in the first place." *Id*. at 513. "The result in *Campbell-Ewald*," it explained, "cannot be avoided simply by entering a judgment effectuating an otherwise precluded dismissal." *Id*. The Court noted that, although it had "recognized prior to *Campbell-Ewald* that a judgment entered pursuant to an offer can render an action moot where 'the parties *agree* that a judgment should be

entered against the defendant,' the offer of judgment alone does not have the same or a similar effect," and *Geismann* was "neither a case in which the parties agreed to the entry of a particular judgment, nor one in which an *accepted* offer rendered the plaintiff's claim moot." *Id*. at 514 (quoting *Tanasi*, 786 F.3d at 200 (emphasis added in *Geismann*)) (internal citations omitted).

The Court also held that ZocDoc's post-judgment actions—which, like here, included sending a check to the plaintiff that was rejected and depositing a check with the district court clerk in satisfaction of the judgment—moved ZocDoc "no closer to its goal." *Id.* at 514. The district court's order granting ZocDoc leave to deposit the check, the Court explained, "was made pursuant to and in furtherance of a judgment that should not have been entered in the first place." *Id*.

The Court concluded that the "district court should not have entered judgment on the basis of ZocDoc's offer, nor therefore should it have dismissed Geismann's action." *Id*. Moreover, because the named plaintiff's claim remained in the action, "the dismissal of the class claim was also in error." *Id*. The Court vacated and remanded for further proceedings.

On April 10, 2017, the Court issued its opinion in *Lary*. *See Lary v. Rexall Sundown, Inc.*, __ F. App'x __, 2017 WL 1314878 (2d Cir. Apr. 10, 2017) (summary order). The Court held the facts of *Lary* were "largely indistinguishable from *Geismann*" and the district court's dismissal of the case "was based on an

error of law since [the plaintiff's] claim was not mooted by [the defendant's] offer of judgment" and, accordingly, "judgment should not have been entered in his favor." *Id*. at *2.

E. Allied Interstate's Motion to Deposit Funds

On the evening of April 12, 2017, two days after this Court decided *Lary*, Allied Interstate filed a letter-motion with the district court requesting permission to deposit funds in the amount of $2,501 with the district court clerk's office "in full satisfaction of the judgment" including "fees and interest." JA 63-64. The district court summarily granted the letter-motion the following afternoon, before Mr. Franco had an opportunity to respond. *Id*. at 65-66.

On April 14, 2017, Allied Interstate deposited $2,501 with the district court. *See id*. at 14. On April 17, 2017, Mr. Franco filed a notice of appeal of that order to ensure this Court could consider Allied Interstate's post-judgment actions at the same time it considered the judgment, as it had in *Geismann*. *Id*. at 67. This Court consolidated the appeal of the summary order with the appeal of the judgment.

SUMMARY OF ARGUMENT

Two cases decided during the pendency of this appeal—*Campbell-Ewald* and *Geismann*—make clear that the district court erred in entering judgment on Mr. Franco's individual claim.

In *Campbell-Ewald*, the Supreme Court held that an unaccepted Rule 68 offer has "no continuing efficacy" and cannot moot a plaintiff's claim. 136 S. Ct. at 670. In *Geismann*, this Court held that, in light of *Campbell-Ewald*, a district court should not enter judgment on a named plaintiff's claim in a putative class action "giving effect" to an unaccepted Rule 68 offer. 850 F.3d at 513. That holding applies directly here. A rejected Rule 68 offer "is a legal nullity" whose rejection "leaves the matter as if no offer had ever been made." *Id.* at 512, 513 (citation omitted). Accordingly, the district court "should not have entered judgment on the basis of [Allied Interstate's] offer," *id.* at 515, and the judgment should be vacated.

The Supreme Court also instructed in *Campbell-Ewald* that a would-be class representative with a live claim "must be accorded a fair opportunity to show that certification is warranted." 136 S. Ct. at 672. Here, by entering judgment for Mr. Franco on his live individual claim, the district court deprived him of that fair opportunity. For this reason too, the district court's judgment should be vacated. In the context of a class action, a judgment only on the named plaintiff's individual claims does not provide complete relief, and absent an agreement between the parties, "the district court should not enter judgment against the defendant if it does not provide complete relief." *Tanasi*, 786 F.3d at 200.

Allied Interstate's post-judgment actions—which, like ZocDoc's actions, include sending a check to Mr. Franco that was returned and, later, depositing

funds with the district court in satisfaction of the judgment—can neither salvage the judgment below nor independently moot Mr. Franco's claim. As in *Geismann*, these actions were taken "pursuant to and in furtherance of a judgment that should not have been entered in the first place." 850 F.3d at 514. Upon vacatur of the judgment, the basis for the district court's order allowing the deposit will vanish, and the Court should order the return of Allied Interstate's deposited funds.

Finally, the class claims are not moot regardless of whether the district court erred in entering judgment on Mr. Franco's individual claim. Under the circumstances of this case, in which Mr. Franco rejected the Rule 68 offer and objected to the motion to enter judgment, Mr. Franco maintains a personal stake in the class allegations sufficient to satisfy Article III.

STANDARD OF REVIEW

This case presents legal questions, which the Court reviews de novo. *United States v. Rajaratnam*, 719 F.3d 139, 153 (2d Cir. 2013) ("It is an axiom of appellate procedure that we review legal questions *de novo*[.]"). The Court reviews de novo both "a district court's interpretation of the Federal Rules of Civil Procedure," *Reiter v. MTA N.Y. City Transit Auth.*, 457 F.3d 224, 229 (2d Cir. 2006), and "questions of mootness," *Amador v. Andrews*, 655 F.3d 89, 94-95 (2d Cir. 2011). "[T]he party seeking to have the case dismissed bears the burden of

demonstrating mootness and that burden is a heavy one." *Etuk v. Slattery*, 936 F.2d 1433, 1441 (2d Cir. 1991) (internal quotations marks and citation omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT ON MR. FRANCO'S INDIVIDUAL CLAIM.

A. The District Court Should Not Have Entered Judgment Based on an Unaccepted Offer of Judgment.

The district court entered judgment on Mr. Franco's individual claim "under Rule 68" in accordance with the terms of a rejected Rule 68 offer. JA 48. Both the Supreme Court (in *Campbell-Ewald*) and this Court (in *Geismann*) have explained, however, that a rejected offer "is a legal nullity, with no operative effect," and that "the recipient's rejection of an offer leaves the matter as if no offer had ever been made." *Geismann*, 850 F.3d at 512, 513 (quoting *Campbell-Ewald*, 136 S. Ct. at 670, 672 (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting))) (internal quotation marks omitted in *Geismann*). These cases establish that Allied Interstate's unaccepted offer must be treated as though it had never existed and, accordingly, "[t]he basis upon which the district court entered judgment did not exist." *Id.* at 513.

The terms of Rule 68 confirm the district court erred in entering judgment under that rule. Rule 68 authorizes courts to enter judgment only on an *accepted* offer. Fed. R. Civ. P. 68(a). Nothing in the rule allows entry of judgment if an offer

is rejected. To the contrary, the rule expressly provides that an "unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b); *see Geismann*, 850 F.3d at 512. The effect of the withdrawn offer is narrowly circumscribed: If "the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d). Evidence of the rejected offer is not even "admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b). Accordingly, the terms of the rejected offer should not even be presented to the Court until after a decision on the merits.

Thus, Rule 68 does not "authorize[]—much less require[]"—the district court to "enter[] judgment for [the plaintiff] just as it would have had [the plaintiff] accepted the offer." *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 52 (1st Cir. 2015). "The Rule provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent." *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *see id.* ("Rule 68 precludes a court from imposing judgment for a plaintiff … based on an unaccepted settlement offer made pursuant to its terms.").

In *Geismann*, after holding the Rule 68 offer did not moot the plaintiff's claim, this Court rejected the defendant's attempts to distinguish *Campbell-Ewald* on grounds the district court had entered judgment on the terms of the unaccepted offer. "We do not find this distinction meaningful," the Court explained, "because

the judgment should not have been entered in the first place." 850 F.3d at 513. "The result in *Campbell-Ewald* cannot be avoided simply by entering a judgment effectuating an otherwise precluded dismissal." *Id.*; *see also Fulton Dental, LLC v. Bisco, Inc.*, __ F.3d __, 2017 WL 2641124 (7th Cir. June 20, 2017) (reversing judgment in named plaintiff's favor upon holding the district court erred in concluding that deposit mooted claim). Likewise, here, after this Court determined the district court could not moot Mr. Franco's claim based on an unaccepted Rule 68 offer, the district court could not moot that claim by entering a judgment on the same terms as that Rule 68 offer. Instead, the case should have "carrie[d] on, unmooted." *Geismann*, 850 F.3d at 513 (citation omitted).

Like *Geismann*, this is "neither a case in which the parties agreed to the entry of a particular judgment, nor one in which an *accepted* offer rendered the plaintiff's claim moot." *Id.* at 514 (citing *Tanasi*, 786 F.3d at 200, and *Bank v. Alliance Health Networks, LLC*, 669 F. App'x 584 (2d Cir. 2016) (summary order)); *see also, id.* ("[The plaintiff] has not been compensated in satisfaction of its claim, which would require, at a minimum, its acceptance of a valid offer."). Rather, Mr. Franco rejected the Rule 68 offer and objected to the entry of judgment on his claim. *Geismann* and *Campbell-Ewald* have now "ma[d]e clear that [a rejected] offer 'ha[s] no continuing efficacy,'" *Geismann*, 850 F.3d at 512 (quoting *Campbell-Ewald*, 133 S. Ct. at 670), and thus that a Rule 68 offer does not, as the

district court held, authorize entry of judgment giving effect to such an offer. *See Kirkland v. Speedway LLC*, No. 5:15-CV-1184, 2017 WL 2198963, at *5 n.2 (N.D.N.Y. May 18, 2017) ("[*Geismann*] clearly holds that the Court is powerless to [enter judgment] after a Rule 68 offer is declined or expires."). The district court's entry of judgment imbued Allied Interstate's "offer with a power it did not possess," *Geismann*, 850 F.3d at 512, and that judgment should be vacated.

B. The District Court Should Not Have Entered Judgment Without First Considering Class Certification.

The district court also erred in entering judgment without first considering the merits of Mr. Franco's class certification motion. In *Campbell-Ewald*, after holding an unaccepted offer of judgment does not moot a claim, the Supreme Court made clear that, in cases brought as class actions, district courts should not act to end named plaintiffs' live claims without providing those plaintiffs a fair chance to show the case should be litigated as a class action. The Supreme Court explained that because the "individual claim was not made moot by the expired settlement offer, that claim would retain vitality during the time involved in determining whether the case could proceed on behalf of a class." 136 S. Ct. at 672. "While a class lacks independent status until certified, ... a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* (citation omitted).

When the district court considered Allied Interstate's motion to enter judgment, Mr. Franco indisputably had a live claim under both *Campbell-Ewald* and this Court's first opinion in his case. Accordingly, the district court should not have entered judgment on Mr. Franco's claim without first providing him "a fair opportunity to show that certification is warranted." *Id.*; *see also*, *e.g.*, *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1147 (9th Cir. 2016) ("[W]hen a defendant consents to judgment affording complete relief on a named plaintiff's individual claims before certification, but fails to offer complete relief on the plaintiff's class claims, a court should not enter judgment on the individual claims, over the plaintiff's objection, before the plaintiff has had a fair opportunity to move for class certification."); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, 167 F. Supp. 3d 582, 584 (S.D.N.Y. 2016) ("With a live claim remaining, this Court is bound by *Campbell-Ewald* to afford Plaintiff a fair opportunity to show that class certification is warranted."); *Brady v. Basic Research, LLC*, No. 13-CV-7169, 2016 WL 1735856, at *1 (E.D.N.Y. May 2, 2016) ("Entering judgment against Defendants over Plaintiffs' objections before Plaintiffs have had the opportunity to file a class certification motion as Defendants request would ignore the Supreme Court's holding.").

However, rather than provide Mr. Franco with the "fair opportunity to show that certification is warranted" that he "must be accorded," the district court

resolved the merits of his individual claim, entering judgment in his favor and terminating the case without considering the merits of his timely filed and fully briefed class certification motion. Because *Campbell-Ewald* directs that a plaintiff in Mr. Franco's situation be provided with the opportunity to show that class certification is warranted, this Court should vacate the district court's entry of judgment and remand for the district court finally to consider class certification.

The district court's entry of judgment for Mr. Franco without first considering the merits of his class certification motion cannot, as the district court thought, be justified as merely giving effect to a defendant's "unconditional surrender." JA 48. If the district court's reasoning were valid, it would have called for a different result in *Geismann*. In both this case and *Geismann*, however, the defendants did *not* unconditionally surrender: They simply sought to terminate class actions by surrendering only to the plaintiffs' *individual* claims on condition that the rest of the case be dismissed.

The idea that a court may enter judgment if a defendant consents to the award of all relief sought in a case is based on the recognition that "a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting). If the defendant has "thrown in the towel there is nothing left for the

district court to do except enter judgment," the plaintiff "is not entitled to keep litigating his claim simply because [the defendant] has not admitted liability." *McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (quotation marks and citation omitted).

In a proposed class action, however, a named plaintiff who rejects an offer of judgment that ignores the class claims is not being obstinate or mad or insisting on a trial that can have no effect on the final judgment. Rather, the plaintiff in a class action has an excellent reason for objecting to resolution of his individual claims prior to class certification: Such a resolution fails to satisfy a legitimate objective for which he has brought the action—obtaining relief for the injured class. *See Chen*, 819 F.3d at 1147 ("A named plaintiff exhibits neither obstinacy nor madness by declining an offer of judgment on individual claims in order to pursue relief on behalf of members of a class. … [The] named plaintiff acts sensibly by pursuing all of the relief sought in the complaint[.]").

Likewise, a defendant who offers only individual relief to the named plaintiff while ignoring the class claims has not offered "complete relief," *see Tanasi*, 786 F.3d at 200 ("[T]he district court should not enter judgment against the defendant if it does not provide complete relief."), nor has such a defendant "thrown in the towel," *McCauley*, 402 F.3d at 342 (citation omitted). To the contrary, defendants who offer relief only to the named plaintiff are conceding

only a fraction of the case. Instead of agreeing to fully satisfy *all* claims in the complaint, the defendant seeks "to *avoid* a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid [the plaintiff] declined to accept." *Campbell-Ewald*, 136 S. Ct. at 672 (emphasis added).

As then-Justice Rehnquist explained in his concurrence in *Deposit Guaranty National Bank v. Roper*, there is no rule of law "that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims." 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring). "Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable." *Id.*; *see also Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (explaining that, although a court may enter judgment when a defendant unconditionally surrenders, "it may not take that tack when the supposed capitulation in fact fails to give the plaintiff all the law authorizes and she has sought," and "a judgment satisfying an individual claim does not give a [named plaintiff], exercising her right to sue on behalf of [a class], 'all that [she] has ... requested in the complaint'" (quoting *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring))).

In *Hepler*, the Court analogized a "defendant offering judgment for complete relief" to a defendant "submitting to the entry of default judgment." 607 F. App'x at 92; *see also* JA 51. That analogy helps demonstrate why a court should not enter judgment on a named plaintiff's claim based on an unaccepted offer prior to considering class certification. When a case is brought as a class action, a defendant cannot avoid class-wide liability simply by defaulting. If it could, defendants would have "an incentive to default in situations where class certification seems likely." *Leider v. Ralfe*, No. 1:01-CV-3137, 2003 WL 24571746, at *8 (S.D.N.Y. Mar. 4, 2003) (report and recommendation). Rather, "in cases where a defendant failed to appear, an entry of default by the clerk of the court has not prevented district courts from considering whether to certify a class prior to the entry of a default judgment against a defendant." *Skeway v. China Natural Gas, Inc.*, 304 F.R.D. 467, 472 (D. Del. 2014); *see, e.g.*, *Acticon AG v. China N. E. Petroleum Holdings Ltd.*, __ F. App'x __, 2017 WL 1363868, at *1 (2d Cir. Apr. 12, 2017) (summary order) (holding that district court abused its discretion in denying as moot motion for class certification where motion was made after certificate of default was obtained but before entry of default judgment).

Although this Court has either affirmed entry of judgment in favor of the plaintiff or remanded for the district court to enter judgment when the defendant

unconditionally consents to entry of judgment for the plaintiff's maximum recoverable damages, it has never done so in the context of a certifiable class action. *McCauley*, 402 F.3d 340, was not a class action. In *Abrams v. Interco Inc.*, 719 F.2d 23 (2d Cir. 1983), and *Leyse v. Lifetime Entertainment Services, LLC*, __ F. App'x __, 2017 WL 659894 (2d Cir. Feb. 15, 2017) (summary order), the district courts were held to have properly denied class certification on the merits before entering judgment on the individual claims.[2] And in *Hepler*, 607 F. App'x 91, the Court did not order judgment be entered for the plaintiffs, but rather vacated the district court's dismissal of the case as moot, set forth general guidelines—including that judgment should not be entered on an unaccepted offer that offers less than complete relief—and remanded. In contrast, in *Kline v. Wolf*, 702 F.2d 400 (2d Cir. 1983), the Court vacated an entry of judgment that had been entered based on the defendants' offer to pay the plaintiffs all the money to which they claimed to be entitled in their individual suits, where the plaintiffs, who had been deemed inadequate class representatives, would have been entitled to reconsideration of their adequacy as class representatives if they established the defendants' liability at trial.

[2] Similarly, in *Bank v. Carribean Cruise Line, Inc.*, 606 F. App'x 30 (2d Cir. 2015) (summary order), the district court properly denied class certification before it entered judgment on the plaintiff's individual claim.

In the class-action context, once one puts aside the fallacy that the offer moots the plaintiff's claim, there is no basis for allowing a defendant to compel entry of a judgment in favor of an individual plaintiff as a means of terminating prosecution of claims on behalf of a class. *See Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting) ("[Courts do not] have inherent authority to enter an unwanted judgment for [a plaintiff] on her individual claim, in service of wiping out her proposed [class] action."). To the contrary, a district court's decision to enter judgment in a named plaintiff's favor, over his objections and without considering class certification, is contrary to Rule 23, which "creates a categorical rule *entitling* a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (emphasis added), and calls for class certification to be decided at "an early practicable time after a person sues or is sued as a class representative," Fed. R. Civ. P. 23(c)(1)(A). Because nothing allows a court, "prior to certification, [to] eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole," *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting), the district court erred in entering judgment on Mr. Franco's claim without first considering class certification, and its decision should be vacated.

C. Allied Interstate's Post-Judgment Actions Can Neither Sustain the Judgment nor Independently Support a Finding of Mootness.

On the evening of April 12, 2017, two days after this Court's decision in *Lary* (the later of the two decisions that held this case in abeyance), Allied Interstate filed a letter-motion with the district court seeking leave to deposit $2,501 with the district court clerk's office "in full satisfaction of the Judgment." JA 63. The motion did not mention the decisions in *Geismann* and *Lary*. The district court granted the motion the following day, before Mr. Franco had an opportunity to respond. *Id*. at 65-66.[3]

The district court's order and Allied Interstate's deposit of funds can neither salvage the judgment nor independently affect subject-matter jurisdiction. As in *Geismann*, the "order granting leave to deposit [funds] with the clerk of the district court in satisfaction of judgment was made pursuant to and in furtherance of a judgment that should not have been entered in the first place." 850 F.3d at 514. Unless the effects of compliance cannot be undone, a party's compliance with a judgment does not render an appeal moot. *See generally* 13B Fed. Prac. & Proc. Juris. § 3533.2.2 (3d ed.) ("The general rule is now well settled: [when a party

[3] The letter-motion stated it was intended to satisfy the judgment "along with fees and interest," but did not specify which fees it intended to satisfy. JA 64. To the extent "fees" included attorney's fees, the amount deposited is less than the total amount in damages and fees Mr. Franco is seeking as an individual. Moreover, the district court had already postponed the deadline for Mr. Franco to move for attorney's fees and costs until after this appeal is resolved. *See id*. at 14.

complies with a judgment,] the case is not moot unless the parties intended to settle, or unless it is not possible to take any effective action to undo the results of compliance."). Accordingly, the deposit moves Allied Interstate "no closer to its goal." *Geismann*, 850 F.3d at 514.

Once this Court vacates the judgment, the basis for the district court's order granting permission to deposit funds in satisfaction of that judgment will have been eliminated. Therefore, upon vacatur of the judgment, the Court should vacate the deposit order and order the return of Allied Interstate's deposited funds. *Cf. Nelson v. Colorado*, 137 S. Ct. 1249, 1259 (2017) (Alito, J., concurring) ("American law has long recognized that when an individual is obligated by a civil judgment to pay money to the opposing party and that judgment is later reversed, the money should generally be repaid.").[4]

Like the deposit, the check Allied Interstate sent Mr. Franco after the district court entered judgment, which Mr. Franco returned to Allied Interstate, has no continuing effect. The defendant in *Geismann* similarly sent a post-judgment check to the plaintiff, which the plaintiff returned, *see* Order for Deposit in Interest

[4] The Court may vacate the order and order the funds returned either in the appeal of the order (No. 17-1134) or as part of the relief in the appeal of the judgment (No. 15-4003), since vacating the order is a necessary consequence of resolving the appeal of the judgment. If the Court chooses the latter course, it may dismiss the appeal of the order. *See Geismann*, 850 F.3d at 511 n.5 (addressing deposit order in appeal of judgment and dismissing appeal of deposit order as duplicative).

Bearing Account, *Geismann*, Civil Case No. 14-7009 (S.D.N.Y., entered Feb. 3, 2016), at 1-2. Yet this Court held "that the action was not and is not 'moot.'" 850 F.3d at 509. And in *Lary*, the Court rejected the argument that the case's outcome should be different based on a post-judgment certified check sent to the plaintiff by the defendant. 2017 WL 1314878, at *2. This Court should reverse the judgment pursuant to which Allied Interstate sent the check and should remand for the district court to consider class certification. [5]

II. MR. FRANCO HAS A PERSONAL STAKE IN THE CLASS CLAIMS SUFFICIENT TO CREATE A JUSTICIABLE CONTROVERSY EVEN IF JUDGMENT IS ENTERED ON HIS INDIVIDUAL CLAIM.

Because the district court erred in entering judgment on Mr. Franco's individual claim—and because that entry of judgment was the district court's basis for holding the class action was moot—this Court need not address whether entering judgment on Mr. Franco's individual claim mooted the class action. If it reaches the issue, however, the Court should hold the class action is not moot regardless of the status of Mr. Franco's individual claim.

[5] Even if the check and deposit had preceded judgment in this case, they would not have mooted Mr. Franco's claim. A rejected check is no different than any other rejected offer, and *Campbell-Ewald* makes clear a rejected offer cannot moot a claim. *See*, *e.g.*, *Ung v. Universal Acceptance Corp.*, 190 F. Supp. 3d 855, 860 (D. Minn. 2016) ("[T]here is no principled difference between a plaintiff rejecting a *tender* of payment and an *offer* of payment. … Indeed, other than their labels, the two do not differ in any appreciable way once rejected."). Likewise, a defendant's deposit of funds does not prevent the court from being able to grant effectual relief and does not moot the plaintiff's claim. *See Fulton Dental*, 2017 WL 2641124 (holding that deposit did not moot named plaintiff's claim).

A named plaintiff's effort to represent a class can present a live case or controversy even if the plaintiff's individual claim has been rendered moot. As this Court has noted, "Where the claims of the named plaintiffs become moot prior to class certification, there are several ways in which mootness is not had." *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994).

First, the Supreme Court recognized in *United States Parole Commission v. Geraghty* that plaintiffs can have a "personal stake" in "the right to represent a class" sufficient to keep a class action from being moot. 445 U.S. at 402. In *Geraghty*, the Supreme Court held that a denial of class certification could be reviewed on appeal after the named plaintiff's personal claim became moot. The Court explained that "determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires,' … requires reference to the purposes of the case-or-controversy requirement." *Id.* at 402. "[T]he purpose of the 'personal stake' requirement," it determined, "is to assure that the case is in a form capable of judicial resolution," with "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* at 403. The Court concluded that these requirements could be met "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* Even if his individual claim

is moot, a named plaintiff can retain "a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id*. at 404.

Here, although Mr. Franco would have received the maximum statutory damages he could obtain as an individual if he had accepted the Rule 68 offer, he rejected it because it did not offer relief to the class. Likewise, although he would have received his maximum statutory damages if the court entered judgment on his individual claim, he opposed Allied Interstate's motion to enter judgment so he could continue seeking to represent the class. Under these circumstances, where Mr. Franco has consistently sought to keep his interests aligned with the class, the purposes of the personal stake requirement are met. "The question whether class certification is appropriate remains as a concrete, sharply presented issue," and Mr. Franco retains a sufficient "'personal stake' in obtaining class certification" for the case to continue. *Id*. at 403-04.

Below, the district court distinguished *Geraghty* on grounds that, there, the plaintiff's claim became moot while a class certification denial was on appeal. JA 52-53. But there is no reason why a named plaintiff's personal stake in class certification would differ based on whether the case became moot before the district court considered class certification or while a denial of class certification was on appeal. *See*, *e.g.*, *Wilkerson v. Bowen*, 828 F.2d 117, 121 (3d Cir. 1987) ("It would seem to us that the principle espoused in *Geraghty* is applicable whether the

particular claim of the proposed class plaintiff is resolved while a class certification motion is pending in the district court (as in the present case) or while an appeal from denial of a class certification motion is pending in the court of appeals (as in *Geraghty*)." (quoted in *Amador*, 655 F.3d at 101)). Accordingly, in *Ellis v. Blum*, 643 F.2d 68, 85 (2d Cir. 1981), this Court cited *Geraghty* in explaining the Court "fore[saw] no mootness barrier to adjudication of the class claims" for declaratory and injunctive relief alongside the named plaintiff's damages claim, where the named plaintiff's individual claim for injunctive and declaratory relief became moot *before* the court considered class certification.

In any event, even if *Geraghty* were limited to cases in which class certification was denied before an individual's claim became moot, *Geraghty* would apply here because, in its first decision, the district court denied Mr. Franco's motion for class certification. *See* JA 33 ("[P]laintiff's motion for class certification is DENIED."). Mr. Franco successfully appealed that denial, *see* Appellant's Brief, *Franco v. Allied Interstate LLC*, No. 14-1464 (2d Cir. Aug. 11, 2014), at x (presenting the issue "[w]hether the district court erred in denying Plaintiff's Motion for Class Certification"), and this Court vacated the district court's prior judgment, including its denial of class certification, and remanded to the district court for further proceedings. JA 46.

The district court also distinguished *Geraghty* on grounds that, there, the named plaintiff's claim "became moot via expiration rather than entry of judgment," and the district court denied class certification on the merits rather than due to a mistaken jurisdictional determination. *Id*. at 55-56. The district court did not explain why either distinction makes a difference, and neither affects Mr. Franco's personal stake in class certification.

Second, in addition to the personal stake identified in *Geraghty*, a putative class representative retains a personal stake in litigation, even if his individual claim is moot, if he has "an economic interest in class certification." *Roper*, 445 U.S. at 333. In *Roper*, for example, the Court noted the individual plaintiffs had an interest in their desire to shift to the class the attorney's fees and expenses they had incurred. *See id*. at 334 n.6. Here, Mr. Franco retains an individual interest in the prospect of receiving an incentive award for his efforts on behalf of the class. *See Aramburu v. Healthcare Fin. Servs., Inc*., No. 02-CV-6535, 2009 WL 1086938, at *5 (E.D.N.Y. Apr. 22, 2009) (determining that plaintiff in FDCPA class action was "entitled to some incentive award"); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874-75 (7th Cir. 2012) (holding that possibility of incentive award provided standing to appeal denial of certification where individual claims were settled). Although this Court held in a non-precedential order that the possibility of receiving an incentive award was not sufficiently concrete to satisfy Article III

because such awards are discretionary, *see Bank v. Alliance Health Networks,* 669 F. App'x at 586, economic relief does not need to be guaranteed for plaintiffs to have an economic interest. *See Espenscheid*, 688 F.3d at 875 ("[T]he prospect of such a payment, though probabilistic rather than certain, suffices to confer standing.").

Third, the certification of a class creates an entity with "a legal status separate from the interest" of the named plaintiff. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Under appropriate circumstances, a certification decision may relate back to the filing of the class complaint, and thus enable the court to consider class certification even after the named plaintiff's claim is moot. *Id.* at 402 n.11. Appellate decisions following *Sosna*'s reasoning have held that, where a defendant seeks to "'pick[] off' lead plaintiffs with a Rule 68 offer to avoid a class action," the possible certification of a class should be deemed to relate back to the filing of the complaint, permitting class claims to continue even if the individual plaintiff's claim has become moot. *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004); *see also Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 705-07 (11th Cir. 2014); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011); *cf. Unan v. Lyon*, 853 F.3d 279, 285 (6th Cir. 2017) (recognizing a "'picking off' exception [to mootness] … to prevent defendants from strategically avoiding litigation by settling or buying off individual named plaintiffs").

Because of class actions' special features, all federal appellate courts that have decided the issue have concluded the mooting of a named plaintiff's individual claim through an offer of full statutory damages prior to class certification does not moot the class action, at least where (as here) a class certification motion was filed before the individual claim was rendered moot. *See Stein*, 772 F.3d at 704-09; *Pitts*, 653 F.3d at 1091-92; *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011); *Weiss*, 385 F.3d at 348; *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003); *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1051 (5th Cir. 1981).

Genesis Healthcare v. Symczyk, which held that a Fair Labor Standards Act (FLSA) collective action is moot once the individual plaintiff's claim is moot (if no other plaintiff with a live claim has yet opted into the action), does not alter the conclusion that entry of judgment in a named plaintiff's favor on his individual claim, over his objection, does not moot a class action. As the Supreme Court explained in *Genesis*, "Rule 23 actions are fundamentally different from collective actions under the FLSA," in large part because of the "unique significance of certification decisions in class-action proceedings." 133 S. Ct. at 1529, 1532. "[A] putative class acquires an independent legal status once it is certified under Rule 23." *Id.* at 1530. As a result, members of the class are bound by the resolution of certified class actions unless they have *opted out*. By contrast, a collective action

under the FLSA is merely a procedural device by which persons with claims similar to the FLSA plaintiff's may receive notice of the pendency of the action and *opt in* as additional individual parties. "Under the FLSA, … 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action." *Id.*

The differences in significance of certification in class and collective actions cause named plaintiffs in the two types of cases to have different interests in certification, and thus cause mootness principles to apply differently. Because "certification" of a collective action does not produce a binding class, the named plaintiff in a collective action "has no right to represent" anyone else. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003). Thus, a named plaintiff has no "personal stake" in whether an FLSA case proceeds as a collective action, *id.* at 1247, and an FLSA action does not result in the creation of a class with live interests of its own that can create a case or controversy irrespective of the mootness of any one individual's claims. The opposite is true in class actions.

Recognizing the differences between class and collective actions, courts of appeals continue to hold, after *Genesis*, that mooting a named plaintiff's individual claim through an offer of full statutory damages prior to class certification does not moot the class action. *See Chen*, 819 F.3d at 1142-43; *Stein*, 772 F.3d at 704-09;

Mabary v. Home Town Bank, N.A., 771 F.3d 820, 824-25 (5th Cir. 2014) (opinion withdrawn based on motion by parties, Jan. 8, 2015); *see also Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013), *vacated and remanded on other grounds*, 134 S. Ct. 2899 (2014). If it reaches the issue, this Court should join its sister circuits and similarly hold Mr. Franco's class claims are not moot.

Finally, the district court did not decide the merits of Mr. Franco's motion for class certification and thus the merits of that motion are not before this Court. Nonetheless, it is worth noting the district court was wrong in stating a class representative whose individual claim is moot cannot "continue in some capacity as class representative as he would definitely be atypical and not an adequate representative." JA 48. The Supreme Court recognized over forty years ago that a class representative whose individual claim has become moot can meet "the test of Rule 23(a)." *Sosna*, 419 U.S. at 403. And in *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993), in which the named plaintiffs' claims became moot prior to certification, this Court determined that the "class should be certified on remand," demonstrating that Rule 23's requirements, including those of typicality and adequacy of representation, may be met even where a named plaintiff's claim is moot. Accordingly, irrespective of whether this Court vacates the entry of judgment on Mr. Franco's individual claim, that judgment should not keep Mr. Franco from meeting the criteria of Rule 23 and serve as a class representative.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's entry of judgment in favor of Mr. Franco, reinstate his class claims, vacate the order permitting Allied Interstate to deposit funds, order the deposited funds be returned, and remand for consideration of class certification.

Dated: June 23, 2017

Respectfully submitted,

/s/ Andrew T. Thomasson
Andrew T. Thomasson, Esq.
Philip D. Stern, Esq.
STERN THOMASSON LLP
150 Morris Avenue, 2nd Floor
Springfield, New Jersey 07081
(973) 379-7500

Adina Hyman Rosenbaum, Esq.
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed.R.App.P.32(a)(7)(B) because:

   This brief contains 9,519 words, excluding the parts of the brief exempted by Fed.R.App.32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P32(a)(6) because:

   This brief has been prepared in Proportionally-Space typeface using Microsoft Word, in Times New Roman, Font Size 14.