UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GILBERTO FRANCO, *Plaintiff-Appellant,* v. ALLIED INTERSTATE LLC, *Defendant-Appellee*.	)	No. 14-1464

MOTION BY PUBLIC CITIZEN, INC., FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Pursuant to Federal Rule of Appellate Procedure 29(b), Public Citizen, Inc., moves for leave to file a brief as amicus curiae in support of Plaintiff-Appellant and reversal. Public Citizen has consulted with counsel for the parties concerning this motion. Counsel for Plaintiff-Appellant consents to the motion. Counsel for Defendant-Appellee opposes the motion and intends to file a response.

This case presents the question whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 can moot a named plaintiff's claim and require dismissal of a class action that has not yet been certified. Below, the district court held that a Rule 68 offer that offered the named plaintiff in a putative class action all of the relief he could recover on his individual claim—but offered no relief to the rest of the class—rendered the named plaintiff's claim moot and

required dismissal of the case, even though the named plaintiff did not accept the offer. The outcome of this case will determine the extent to which defendants in class actions that have not yet been certified can avoid the class action mechanism by "pick[ing] off" named plaintiffs through unaccepted Rule 68 offers. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). More generally, it will determine the extent to which defendants can unilaterally deprive courts of subject-matter jurisdiction over claims by making unaccepted offers of judgment. The question whether an unaccepted offer of judgment can moot an individual claim and require dismissal of a putative class action is a recurring one that is also currently before the Court in *Tanasi v. New Alliance Bank*, No. 14-1389 (2d Cir., leave to appeal granted May 7, 2014).

Public Citizen, Inc., is a national consumer-advocacy organization with more than 300,000 members and supporters nationwide that appears on behalf of its membership before Congress, administrative agencies, and courts and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker interests in litigation, including as amicus curiae in cases in the United States Supreme Court and the federal courts of appeals. Public Citizen has a longstanding interest in protecting the right of consumers and workers to access the court system and has fought

overly broad arguments that courts lack subject-matter jurisdiction over consumers' and workers' claims.

Public Citizen lawyers have represented parties in many cases that raise the issue whether an unaccepted offer of judgment can render claims moot, including both class and individual actions. *See, e.g.*, *Genesis HealthCare v. Symczyk*, ___ U.S. ___, 133 S. Ct. 1523 (2013); *Keim v. ADF Midatlantic, LLC*, No. 13-13619 (11th Cir., oral argument held July 30, 2014); *Mabary v. Home Town Bank, N.A.*, No. 13-20211 (5th Cir., oral argument held Jan. 6, 2014); *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564 (6th Cir. 2013); *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 (11th Cir. 2012). Public Citizen believes that its familiarity with the mootness principles at issue may be of assistance to this Court in determining whether an unaccepted Rule 68 offer can moot individual claims and necessitate dismissal of class actions.

Participation by Public Citizen as amicus curiae will not delay the briefing or argument in this case. Public Citizen is filing its brief within the time allowed by Federal Rule of Appellate Procedure 29(e).

Accordingly, Public Citizen respectfully requests that the Court grant its motion for leave to file a brief as amicus curiae in support of Plaintiff-Appellant and reversal and that the Court accept for filing the brief that is being submitted contemporaneously with this motion.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

August 18, 2014

Counsel for Public Citizen, Inc.

14-1464

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 INSTERSTATE, INC.
Defendant-Appellee.

On Appeal from the United States
District Court for the Southern District of New York

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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

August 18, 2014

Counsel for Amicus Curiae
Public Citizen, Inc.

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization with more than 300,000 members and supporters nationwide, appears before Congress, administrative agencies, and the courts to work for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker interests in litigation, including as amicus curiae in the United States Supreme Court and the federal courts of appeals.

Public Citizen has a longstanding interest in protecting the right of consumers and workers to access the court system, and has fought overly broad arguments that courts lack subject-matter jurisdiction over plaintiffs' claims. Public Citizen is filing this brief to address the argument that an unaccepted offer of judgment for a named plaintiff's maximum recoverable damages renders the plaintiff's individual claims moot and necessitates dismissal of a putative class action. Public Citizen believes this argument—which is also before the Court in *Tanasi v. New Alliance Bank*, No. 14-1389 (2d Cir., leave to appeal granted May 7, 2014)—misunderstands fundamental mootness principles, and, if accepted, would

[1] This brief is accompanied by a Motion for Leave to File as required by Federal Rule of Appellate Procedure 29(b). No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

allow defendants to engage in procedural gamesmanship and thwart plaintiff classes from obtaining recoveries to which they are entitled.

BACKGROUND AND SUMMARY OF ARGUMENT

This Fair Debt Collection Practices Act (FDCPA) case was brought by Gilberto Franco on behalf of himself and other similarly situated people, alleging that defendant Allied Interstate used false, deceptive, and misleading tactics in connection with its attempts to collect debts. Before Franco moved for class certification, Allied Interstate made him an offer of judgment under Federal Rule of Civil Procedure 68 that offered him more than he could recover on his individual claim, but did not offer any relief to the rest of the class. Franco did not accept the offer, explaining that he would only settle on a class-wide basis. The Rule 68 offer expired, and Franco moved to certify the class.

Allied Interstate opposed class certification and moved to dismiss, arguing that the unaccepted Rule 68 offer mooted Franco's individual claim, and that because his individual claim became moot prior to class certification, the court lacked subject-matter jurisdiction over the case. The district court agreed, dismissed the complaint, and denied class certification.

Although Franco has good arguments that a Rule 68 offer may not be used to defeat a class action, this Court does not need to reach those arguments to rule in Franco's favor, because a Rule 68 offer of judgment does not render *any* case

moot, whether the case is an individual or class action, and whether the offer is for all requested relief or just a portion thereof. The theory that a Rule 68 offer 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." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013); *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013); *Knox v. Service Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (internal quotation marks and citations omitted from all three citations). The tendering of a Rule 68 offer does not deprive a court of the ability to grant effectual relief and therefore cannot moot a claim.

As Justice Kagan, joined by three other justices, explained in her dissent in *Genesis HealthCare Corp. v. Symczyk*, "[w]hen a plaintiff rejects [an offer of judgment]—however good the terms—her interest in the lawsuit remains just what it was before. . . . [and] the litigation carries on, unmooted." 133 S. Ct. 1523, 1533-34 (2013) (Kagan, J., dissenting). The majority in *Symczyk* did not dispute Justice Kagan on this point. As the Ninth Circuit has 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.*, 732 F.3d 948 (9th Cir. 2013).

Because a Rule 68 offer does not deprive the court of the ability to grant relief, the unaccepted offer in this case did not moot Franco's individual claim. And because it did not moot his individual claim, the question whether the offer affected the class action does not even arise. In any event, even if a Rule 68 offer could moot an individual claim, the Court should reinstate this action and vacate the denial of class certification because, regardless of whether his individual claim is moot, Franco has a personal stake in the class claims sufficient to satisfy Article III's case-or-controversy requirements.

ARGUMENT

I. An Unaccepted Offer of Judgment Does Not Moot an Individual Claim.

A. An Unaccepted Offer of Judgment Does Not Deprive the Court of the Ability To Grant Relief.

1. 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 ensure that "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin*, 133 S. Ct. at 1023 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (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 478 (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.*, 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 effectual relief whatever to the prevailing party." *Knox*, 132 S. Ct. at 2287 (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*, 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*, 133 S. Ct. 2675, 2685 (2013).

An offer of judgment that has not been accepted does not meet the criteria for rendering a case moot: The offer does not, in itself, provide redress for the plaintiff's grievance or make it impossible for a court to grant effectual relief. Likewise, a plaintiff's decision not to accept an offer of judgment does not make it impossible for the court to grant relief. The court retains the ability to grant the plaintiff all the relief he requested, and the plaintiff's claims thus cannot be deemed moot.

2. Rule 68 and the procedures it establishes underscore that offers of judgment do not render claims moot. As the Supreme Court has explained, Rule 68 is 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. 346, 350 (1981). Specifically, the rule permits judgment to be entered in the plaintiff's favor on the offered terms if the plaintiff accepts the offer in writing within 14 days of being served with it. Fed. R. Civ. P. 68(a). On the other hand, "[if] the offer is not accepted, it is deemed withdrawn 'and evidence thereof is not admissible except in a proceeding to determine costs.'" *Delta*, 450 U.S. at 350 (quoting former Fed. R. Civ. P. 68).[2]

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). Thus, the Rule establishes 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.

[2] Since *Delta*, Rule 68 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."

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 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 Rule's time-frame, the Rule provides that the offer "is considered withdrawn," Fed. R. Civ. P. 68(b), 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, under the terms of Rule 68, an unaccepted offer of judgment is merely a rejected settlement offer—one that has been withdrawn and is not admissible except to determine costs once the case has ended. Such an offer does not affect the court's ability to grant relief and cannot logically be held to moot a case.

B. Justice Kagan's Dissent in *Genesis Healthcare v. Symczyk* Articulates Why an Unaccepted Offer of Judgment Does Not Moot an Individual Claim.

1. The Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk* pointed out that the Court has never specifically addressed whether an unaccepted offer of judgment moots a plaintiff's individual claim, 133 S. Ct. at 1528-29, and the majority 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 (FLSA), 29 U.S.C. § 216(b). The lower courts had held that the individual claim was moot because of an unaccepted Rule 68 offer. 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.[3] The *Symczyk* majority, however, held that that 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 claim was moot. *See Symczyk*, 133 S. Ct. at 1529. The majority therefore "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 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 1532. As she explained, even a Rule 68 offer that would provide complete relief on the plaintiff's individual claim does not

[3] *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.

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 1533-34. Importantly, the *Symczyk* majority did not disagree with Justice Kagan's analysis. *See id*. at 1534 (Kagan, J., dissenting) ("[W]hat 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.").

Since *Symczyk*, the Ninth Circuit, which had previously assumed that an offer of all recoverable relief could moot a claim, has adopted Justice Kagan's approach and held that "an unaccepted Rule 68 offer that would have fully satisfied

a plaintiff's claim does not render that claim moot." *Diaz*, 732 F.3d at 954-55. As the Ninth Circuit explained, "[t]his holding is consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness." *Id*. at 955. Once an offer of judgment lapses, it is "by its own terms and under Rule 68, a legal nullity." *Id*.

2. Like Justice Kagan, this Court has "rejected the argument that an unaccepted offer of settlement for the full amount of damages owed 'moots' a case such that the case should be dismissed for lack of jurisdiction if the plaintiff desires to continue the action." *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013) (citing *McCauley v. Trans Union, LLC*, 402 F.3d 340 (2d Cir. 2005)). In *McCauley*, the defendant made an offer of judgment to the plaintiff for everything he could potentially recover in litigation, and the district court dismissed the case, entering judgment in the defendant's favor. This Court vacated the dismissal, explaining that, when judgment was entered in the defendant's favor, it "was relieved of the obligation to pay" damages to the plaintiff, and that, in "the absence of an obligation to pay" the claimed damages, the controversy between the parties was "still alive." *Id*. at 342. The court therefore held that "we cannot conclude that the rejected settlement offer, by itself, moots the case." *Id*. Because the defendant did not contest entry of a default judgment against it for the full amount of the plaintiff's claim, and because the plaintiff conceded that a default judgment would

be satisfactory, the court concluded that, rather than dismissing the case as moot and entering judgment in favor of the defendant, the district court should have entered a default judgment in favor of the plaintiff, and it remanded for the district court to do so. *Id*.

Despite *McCauley*, and in the face of Justice Kagan's *Symczyk* dissent, the district court held that the Rule 68 offer here mooted Franco's claims, stating that a "valid offer of judgment that would satisfy a plaintiff's entire claim for relief by offering the maximum recoverable amount under the statute renders a plaintiff's claim moot, even if plaintiff refuses the offer of judgment." JA 90. In support of this statement, the court cited *Doyle v. Midland Credit Management, Inc.*, 722 F.3d 78, 81 (2d Cir. 2013). In *Doyle*, however, the parties did not challenge the notion that an unaccepted offer of judgment can moot a claim.

In *Doyle*, the defendant, Midland, moved to dismiss for lack of subject-matter jurisdiction after the plaintiff, Doyle, did not accept a Rule 68 offer that offered full statutory damages. At a hearing on the motion, Doyle's counsel explained that he also sought actual damages, and Midland orally offered to pay Doyle an additional amount in such damages. Doyle's counsel agreed that the new offer offered all the relief Doyle sought, but did not accept it, and the district court held the case was moot. *Id*. at 80.

In his briefs before the panel, Doyle did not cite *McCauley* or argue that an unaccepted offer of judgment does not affect subject-matter jurisdiction. Instead, he asserted that the original Rule 68 offer was substantively defective and that, if the offer had deprived the court of jurisdiction, "subject-matter jurisdiction would have been reinstated upon the expiration" of the offer. Pl.-Appellant's Principal Br., *Doyle v. Midland Credit Mgmt., Inc.*, No. 12-4555, 2012 WL 6219030, *8 (2d Cir. filed Dec. 10, 2012). With regard to the offer made at the motion hearing, he contended that "a Rule 68 offer may not be made orally," and that, in any event, Midland would have had to move to compel its acceptance. Pl.-Appellant's Reply Br., *Doyle v. Midland Credit Mgmt., Inc.*, No. 12-4555, 2013 WL 523741, *2 (2d Cir. filed Jan. 22, 2013).

In its opinion, the Court focused on the oral offer, holding that whether it complied with the specific requirements of Rule 68 was irrelevant because "an offer need not comply with Federal Rule of Civil Procedure 68 in order to render a case moot under Article III." 722 F.3d at 81. The Court concluded (without citing either *McCauley* or Justice Kagan's dissent in *Symczyk*) that "Doyle's refusal to settle the case in return for Midland's offer . . . , notwithstanding Doyle's acknowledgment that he could win no more, was sufficient ground to dismiss this case for lack of subject matter jurisdiction." *Id*.

Thus, none of the parties in *Doyle* argued that an unaccepted Rule 68 offer could not render claims moot. Accordingly, although the decision unsurprisingly accepted the defendant's uncontested premise that a Rule 68 offer that offered all recoverable damages could moot a case, it focused on the question whether the offer needed to conform with Rule 68's requirements to moot a case, not on the predicate question of whether a Rule 68 offer could moot a case. Under these circumstances, and in light of *McCauley* and the Supreme Court's decisions in *Windsor*, *Chafin*, and *Knox* emphasizing the mootness doctrine's limited scope, *Doyle* is best read to "hold that an offer of judgment that fails to meet the technical procedural requirements of Rule 68 is nevertheless an offer of judgment," *Cabala*, 736 F.3d at 230—not that an unaccepted offer of judgment can render a claim moot.

Nonetheless, the coexistence of *Doyle* and *McCauley* has led to confusion among courts and commentators about the effect of a Rule 68 offer of judgment on cases in this Circuit. *See Cabala*, 736 F.3d at 230 n.4 (suggesting that *Doyle* and *McCauley* might be inconsistent); *Recent Case*, *Diaz v. First Am. Home Buyers Prot. Corp, 732 F.3d 948*, 127 Harv. L. Rev 1260, 1263 (2014) (noting that "other courts interpreting these opinions have come to opposite views about the Second Circuit's position"). A case from the early 1980s, *Abrams v. Interco Inc.*, 719 F.2d 23 (2d Cir. 1983), contributes to the confusion. In *Abrams*, after the district court

refused to certify a class, the defendant offered to allow entry of judgment for the maximum amount the named plaintiffs could recover, and the district court entered an order purporting to dismiss the case for lack of subject-matter jurisdiction but then ordered the parties to "settle a judgment" and ultimately entered judgment against the defendant. *See id*. at 25-26; *see also Abrams v. Interco Inc.*, 1984 WL 660 (S.D.N.Y. July 25, 1984) (confirming that judgment was entered *against* defendant). This Court then affirmed both the denial of class certification on the merits, *see* 719 F.3d at 28-31—a ruling that presupposed that the issue was not moot—and the dismissal of the individual claims once class certification was denied, *see id*. at 32-34.

Regardless of whether these cases are reconcilable, to the extent the Court's precedents are read to hold that an unaccepted Rule 68 offer can moot a claim, this Court should follow Justice Kagan's suggestion to "[r]ethink [the] mootness-by-unaccepted-offer theory." *Symczyk*, 133 S. Ct. at 1534 (Kagan, J., dissenting). To ensure consistency between this Court and the Supreme Court's mootness principles, the Court should clarify that an offer of judgment does not affect subject-matter jurisdiction and should hold that a Rule 68 offer cannot moot a case.

C. If an Offer of Judgment Mooted a Claim, the Offer Would Be Self-Defeating.

1. The district court's view that an unaccepted offer of judgment can render a case moot 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: "Federal courts are powerless to adjudicate a suit unless they have subject matter jurisdiction over the action." *European Community v. RJR Nabisco, Inc.*, __ F.3d __, 2014 WL 1613878, *10 (2d Cir. Apr. 23, 2014). If a case becomes moot, the court loses "power to enter a judgment in plaintiff's favor" and is "compelled simply to dismiss, leaving the dispute unadjudicated." *ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.*, 485 F.3d 85, 94 (2d Cir. 2007).

As the Supreme Court has explained, "[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 (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."). Thus, if a Rule 68

offer that offered all recoverable relief mooted the claim, the court could not enter judgment on the offer, even if the plaintiff accepted it.

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. Yet, 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*, 133 S. Ct. at 1534 (Kagan, J., dissenting); *see also McCauley*, 402 F.3d at 342 (concluding case was not moot where plaintiff "wound up with nothing"). 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*, 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*, 133 S. Ct. at 1534 (Kagan, J., dissenting).

2. Recognition of the incongruity of leaving a plaintiff with an unredressed claim while declaring that claim to be moot has led some courts 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, 575 (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." This Court at one time seems to have followed that approach, *see Abrams*, 719 F.2d at 26 (affirming district court order that granted defendant's motion to dismiss for lack of case or controversy but then ordered parties to settle a judgment), but has since recognized that if a case has "truly become moot" the court must "leav[e] the dispute unadjudicated." *ABN Amro Verzekeringen BV*, 485 F.3d at 94. Although the Sixth Circuit's approach is certainly better for the individual plaintiff than getting nothing, it is little better jurisprudentially, for it ignores the point that if a case truly is moot, a court has no power to enter judgment. *See Steel Co.*, 523 U.S. at 94. The better approach—

indeed, the correct approach—is to recognize that Rule 68 offers have no effect on subject-matter jurisdiction.

D. An Offer of Judgment Does Not Justify Entering Judgment in a Plaintiff's Favor Over His Objections.

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*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *see also ABN Amro Verzekeringen BV*, 485 F.3d at 93 ("Where a defendant has consented to judgment for all the relief the plaintiff can win at trial (according to the trial court's determination), the defendant's refusal to admit fault does not justify a trial to settle questions which can have no effect on the judgment."). Thus, for example, in *McCauley*, although the Court determined that the case was not moot, it also stated that the plaintiff was "not entitled to keep litigating his claim simply because [the defendant] ha[d] not admitted liability," given that the defendant had unconditionally agreed to have judgment entered against it, and the Court remanded to the district court to enter a default judgment. 402 F.3d at 342.

Nonetheless, an unaccepted Rule 68 offer like the one in this case cannot permit the court to enter judgment for the individual plaintiff (and dismiss a class action) for two reasons. First, although this Court has stated in dicta that "the typically proper disposition" when a defendant makes an offer of judgment for all damages owed "is for the district court to enter judgment against the defendant for the proffered amount and to direct payment to the plaintiff consistent with the offer," *Cabala*, 736 F.3d at 228, Rule 68 "provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent." *Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting). A Rule 68 offer is not an "unconditional surrender"; by the rule's terms, the offer 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(b). Thus, a Rule 68 offer does not constitute consent by the defendant to entry of judgment if the offer is not unaccepted, nor does it permit entry of judgment over the plaintiff's objection. Indeed, although the Court remanded for entry of a default judgment in *McCauley*, it did so only after the parties agreed that such an outcome would satisfactorily resolve the case. 402 F.3d at 342. Moreover, an unaccepted offer is inadmissible in court except in a proceeding to determine costs, Fed. R. Civ. P. 68(b), and therefore should not even be before a court while the merits of the case are pending. Thus, although a court may enter judgment when a defendant fully

surrenders, an unaccepted Rule 68 offer should be entirely irrelevant to that surrender-and-entry-of-judgment process.

Second, in an action brought on behalf of a class, neither Rule 68 nor any other source of law permits a district court to determine the merits of the plaintiff's individual claim (even if it is uncontested) before considering the claim that the case should be given class treatment. On the contrary, the Federal Rules of Civil Procedure call for the issue of class certification to be given priority and decided "[a]t an early practicable time." Fed. R. Civ. P. 23(c)(1)(A).

Although this Court has allowed entry of judgment in favor of the plaintiff 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* was not a class action, and in *Abrams*, the Court affirmed the denial of class certification before addressing the effect of full tender on the individual claims. In the context of a case brought only on behalf of an individual, if the defendant unconditionally consents to the entry of a merits judgment against him even after a conditional offer of judgment has been rejected, judgment in the plaintiff's favor is appropriate, not because the court lacks jurisdiction, but because the court *has* jurisdiction and there is no contest over whether judgment should be entered fully resolving plaintiff's claims. However, once the fallacy that the offer of judgment presents a jurisdictional basis for

dismissal that must necessarily be resolved before consideration of other issues is put aside, there is no basis for allowing a defendant to compel entry of a judgment in favor of an individual plaintiff in order to terminate prosecution of claims on behalf of the class. Indeed, allowing the defendant to do so would distort the proper functioning of the judicial process:

> To deny the right to [proceed with a class action] simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

The plaintiff in a class action has an excellent reason for objecting to the court's resolution of his individual claims prior to consideration of class certification: Such a resolution fails to satisfy the entirely legitimate objective for which he has brought the action—obtaining relief for the class. As then-Justice Rehnquist pointed out in his concurring opinion in *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." *Id*. at 341 (Rehnquist, J., concurring). Rather, "[a]cceptance 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 Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting).

In sum, the unaccepted offer of judgment did not warrant dismissing Franco's claim for lack of subject-matter jurisdiction, nor would it have been appropriate for the court to enter judgment in Franco's favor over his objections. When a plaintiff rejects a Rule 68 offer, "however good the terms," it should leave "the matter as if no offer had ever been made," *id*. at 1533 (citation omitted), and the case should proceed.

II. Franco Has a Personal Stake in the Class Claims Sufficient To Create a Justiciable Controversy.

The district court erred not only in holding that Franco's individual claims were mooted by the Rule 68 offer, but also in holding that mootness of Franco's individual claims would require dismissal of this action, in which Franco also asserted claims on behalf of a class. As the Supreme Court has held, the mootness of a plaintiff's individual claims does not necessarily imply that the plaintiff's effort to represent a class must be rejected on mootness grounds. *See U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980); *Roper*, 445 U.S. 326.

The features of class actions give rise to a number of reasons for recognizing that a named plaintiff's effort to represent a class creates a live case or controversy even if the plaintiff's individual claim becomes moot. First, as the Court

recognized in *Geraghty*, such a plaintiff maintains the "personal stake" required by Article III in "the right to represent a class." 445 U.S. at 402. In *Geraghty*, the Supreme Court considered whether a prisoner who brought a class action challenging release guidelines could appeal the denial of class certification after he was released from prison. The Court concluded that he could, holding that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id*. at 404.

The Supreme 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.

Below, the district court recognized that, under *Geraghty*, if a court has already "denied class certification, mootness of the named plaintiff's personal claim does not render the entire action moot," JA 91, but it did not consider whether *Geraghty*'s personal-stake analysis applies here. *Id*. at 91-95. *Geraghty*'s reasoning cannot, however, be limited to cases in which an individual claim's mootness arises after an initial decision to deny certification. The situation after denial of a motion to certify is exactly the same as if no motion to certify had ever been filed: No class has yet been brought into being. Thus, as *Geraghty* recognized, "timing is not crucial" to the mootness determination, 445 U.S. at 398. What matters is that the individual plaintiff, despite the mootness of his personal claim, retains an interest in representing the legal entity that would come into being if class certification were granted.

Here, Franco, like the plaintiff in *Geraghty*, seeks to represent a class of people with live claims who will be part of a certified class if a court ultimately determines that Rule 23's requirements are met. And like the plaintiff in *Geraghty*, Franco can continue "vigorously to advocate his right to have a class certified." 445 U.S. at 404. In short, Franco retains the same personal stake in representing a class as did the plaintiff in *Geraghty*. "[N]otwithstanding the rejected offer of judgment, the proposed class action continues to involve 'sharply presented issues in a concrete factual setting' and 'self interested parties vigorously advocating

opposing positions,'" sufficient to satisfy Article III. *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011) (quoting *Geraghty*, 445 U.S. at 403).

The Supreme Court's decision in *Symczyk*, which considered mootness in the context of a FLSA collective action, not a Rule 23 class action, does not alter the applicability of *Geraghty*'s personal-stake analysis to this case. As the Court stressed in *Symczyk*, "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 FLSA collective action is merely a procedural device by which persons with claims similar to the 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*. at 1530. Because "certification" of a collective action does not produce a binding class with its own legal status, the named plaintiff in a collective action, unlike a class action, "has no right to represent" anyone else and no "personal stake" in the collective action.

Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1249 (11th Cir. 2003).

The Supreme Court in *Symczyk* considered the differences between collective and class actions to be a "fundamental[]" difference between that case and *Geraghty*, explaining that the fact that a certified class acquires its own legal status was "essential" to its decision in *Geraghty*. 133 S. Ct. at 1529.[4] Because this case involves a class action—like *Geraghty*—rather than a collective action—like *Symczyk*—that distinction between *Symczyk* and *Geraghty* does not apply here. Regardless of whether his individual claim is moot, Franco, like the plaintiff in *Geraghty*, maintains a personal interest in his right to represent the legal entity that will come into being once a class is certified.

In addition to the right to represent a class discussed in *Geraghty*, a putative class representative whose individual claim has become moot may retain "an economic interest in class certification" sufficient to constitute a personal stake in the case. *Roper*, 445 U.S. at 333. In *Roper*, for example, the Court noted that the individual plaintiffs had an interest in the potential ability to shift to the class attorney fees and expenses they had incurred, *see id*. at 334 n.6. Likewise, here,

[4] *Symczyk* also discussed a footnote in *Geraghty* in which the Supreme Court articulated a narrower alternative holding under a "relation back" analysis applicable where a district court erroneously denied certification before the individual claim became moot. The Court held that the footnote's analysis did not apply because there had been no certification decision before the individual's claim became moot. *Id*. at 1530 (citing *Geraghty*, 445 U.S. at 404 n.11).

Franco has an interest in the recovery of attorney fees attributable to his counsel's efforts on behalf of the class. These fees are not covered by the Rule 68 offer, which refers to Franco's *individual* claims, implicitly excluding fees for time spent on the class claims. And even if the offer were read to allow for such fees, a court awarding fees in a case brought as a class action, but in which judgment was entered only on individual claims, might not award as much in fees for time attributable to the class claims as it would if the case had proceeded as a class action. In addition, a putative class representative such as Franco retains an individual interest in a possible incentive award for his efforts on behalf of the class. *See 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 claim was settled); *cf. Aramburu v. Healthcare Fin. Servs., Inc.*, 2009 WL 1086938 (E.D.N.Y. 2009) (approving incentive award to plaintiff in FDCPA case).

In sum, regardless of the effect of the Rule 68 offer on Franco's individual claims, he maintains a personal stake in the class action allegations sufficient to satisfy Article III and allow this case to continue.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court order dismissing the case, vacate the district court order denying class certification, and remand for further proceedings.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen, Inc.

August 18, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,974 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum