No. 11-3142

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTOPHER HRIVNAK,

Plaintiff-Appellee,

v.

NCO PORTFOLIO MANAGEMENT, INC.; NCO GROUP, INC.; NCO PORTFOLIO MANAGEMENT; NCO FINANCIAL SYSTEMS, INC.; JAVITCH, BLOCK & RATHBONE, LLP,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, plaintiff-appellee Christopher Hrivnak states that he is not a subsidiary or affiliate of a publicly owned corporation and that no publicly owned corporation has a financial interest in the outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellee Christopher Hrivnak requests oral argument. The decision in this case could determine whether defendants can unilaterally defeat class actions by tendering Rule 68 offers of judgment to named plaintiffs on their individual claims before they move for class certification. Mr. Hrivnak believes that oral argument would assist the Court in answering this question, which could broadly affect class actions in the Sixth Circuit.

STATEMENT OF JURISDICTION

On March 29, 2010, Javitch, Block & Rathbone, LLP filed a notice of removal, stating that this case could be removed under 28 U.S.C. § 1441, that the federal court had original jurisdiction over some of the claims under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d), and that the court had supplemental jurisdiction over the other claims under 28 U.S.C. § 1367. Record Entry (R.E.) No. 1. Mr. Hrivnak moved to remand, arguing that Javitch and the NCO entities were counterclaim and third-party defendants that cannot remove cases under 28 U.S.C. § 1441. R.E. No. 17. On July 19, 2010, the district court denied Mr. Hrivnak's motion to remand. R.E. 31.

On December 22, 2010, the district court certified for interlocutory appeal its ruling that a Rule 68 offer that was made prior to the filing of a putative class representative's motion for class certification does not moot the putative class representative's claims. R.E. 46. On February 10, 2011, this Court granted appellants' petition to appeal. This Court has appellate jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

I. Does a Rule 68 offer of judgment tendered two days after the defendants removed a putative class action to federal court, and before the named plaintiff had moved for class certification, moot the class action if it offers complete relief on the named plaintiff's individual claims but no relief to the putative class?

II. Did defendants' offer to named plaintiff Christopher Hrivnak offer him complete relief on his individual claims?

STATEMENT OF THE CASE AND FACTS

The Supreme Court has explained that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). This case presents the question whether defendants can defeat class actions by making offers of judgment to putative class representatives before those representatives move for class certification.

A. State Court Proceedings and Removal

This case began as a collection case by NCO Portfolio Management against Christopher Hrivnak. On June 4, 2009, NCO Portfolio Management filed a complaint against Mr. Hrivnak in Bedford County Municipal Court, alleging that

Mr. Hrivnak owed it money under a debt assigned to it by Citibank. R.E. 1-1, pp. 4-5. Along with his answer, Mr. Hrivnak filed counterclaims on behalf of himself and a putative class against NCO Portfolio Management, NCO Portfolio Management, Inc., NCO Group, Inc., NCO Financial Systems, Inc., and Javitch, Block & Rathbone, LLP ("Javitch") (collectively "NCO"). *Id*. at 12-26. The pleading explained that "NCO has filed thousands of unlawful consumer collection lawsuits making false statements, using false documents and with full knowledge that many lawsuits were being filed well beyond the applicable period of limitations." *Id*. at 15.

The case was transferred to Cuyahoga County Court of Common Pleas because the municipal court determined that the counterclaim exceeded the court's monetary jurisdictional limit of $15,000.00. R.E. 1-1, p. 82. NCO then filed a motion to dismiss, which was denied, and discovery commenced. R.E. 1-2, p. 3. On January 8, 2010, NCO Portfolio Management moved to dismiss its complaint against Mr. Hrivnak. The state court granted the motion, leaving only the counterclaims and third-party claims remaining. *Id*. at 158. Javitch then moved to realign the parties so that Mr. Hrivnak would be designated the plaintiff and NCO would be designated the defendants. *Id*. at 179-83. Javitch stated that realignment would enable it to remove the case to federal court, which it wanted to do because

the Rules of Civil Procedure in Ohio do not have an equivalent to Federal Rule of Civil Procedure 68, and it wanted to able to take advantage of that rule. *Id*. at 182. The state court granted Javitch's motion and ordered Mr. Hrivnack to file a complaint asserting his affirmative claims. *Id*. at 232.

On March 15, 2010, Mr. Hrivnak filed the amended pleading, asserting claims under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (FDCPA), the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.01 et seq. (OCSPA), the Ohio Deceptive Trade Practices Act, Ohio Rev. Code 4165.01 et seq. (ODTPA), and common law. R.E. 1-2, pp. 236-52. The pleading alleged both individual claims and class claims on behalf of two classes of consumers. First, it alleged claims on behalf of a class of consumers who were named as defendants in civil actions brought by NCO in which the actions were filed outside the statute of limitations. *Id*. at 243. And, second, it alleged claims on behalf of a class of consumers named in civil actions filed by "NCO Portfolio Management," an alter-ego of NCOP Capital II, LLC, who were outside any of the counties in which "NCO Portfolio Management" had been registered as a fictitious name. *Id*. The complaint sought statutory, compensatory, and punitive damages of over $25,000, along with injunctive and other relief. *Id*. at 252.

On March 29, 2010, Javitch filed a notice of removal, to which the other

NCO parties consented. R.E. 1; R.E. 1-3.

B. The Rule 68 Offer and the District Court Decision

On March 31, 2010, two days after removing the case to federal court, NCO made Mr. Hrivnak an offer of judgment under Federal Rule of Civil Procedure 68. R.E. 18-2. The offer was for $7,000, plus Mr. Hrivnak's reasonable costs and attorney's fees for his claims against NCO. *Id*. It did not contain any relief for the proposed class.

On April 14, 2010, within the time to respond to a Rule 68 offer, Mr. Hrivnak filed a motion to strike the offer, explaining that NCO's offer was inconsistent with Federal Rule of Civil Procedure 23, which authorizes and provides conditions for maintaining class actions. R.E. 18. In the alternative, he moved for class certification, requesting that briefing on that issue be stayed until discovery relevant to class certification could be completed. *Id*.

The district court denied Mr. Hrivnak's motion on the ground that the federal rule discussing the court's power to strike items from the record relates only to pleadings. R.E. 31, pp. 13-14. However, the court recognized that a substantive question remained about the effect of an offer of judgment to a plaintiff in a putative class action before class certification. It proceeded to address that question, holding that "'a settlement offer will not moot the named

plaintiffs' claims so long as the plaintiffs have not been dilatory in bringing their certification motion." *Id*. at 15 (quoting *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 386 (S.D. Ohio 2008)).

The court rejected Javitch's arguments that Mr. Hrivnak had been dilatory in moving for class certification, noting that NCO "tendered their Offer of Judgment *two days* after the case was removed to federal court." *Id*. (emphasis in original). "Hrivnak was not required to have a class certification motion 'at the ready,'" the court explained. "[I]ndeed, . . . the Offer of Judgment was filed even before the Defendants tendered their answers." *Id*.

The court also rejected the suggestion that federal courts lack jurisdiction over a case where an offer of judgment that would provide complete individual relief to the plaintiff has been offered and no class has been certified. It found that if "'putative class representatives' claims could be mooted by a settlement offer tendered before the certification motion is filed,'" parties would race to "'beat the other to the punch'"; defendants would be able to "'essentially opt out of Rule 23'"; plaintiffs would be "'forced to file individual suits to obtain redress . . . thereby wasting judicial resources'"; and putative class representatives' interests would be pitted "'against the interests of the class as a whole.'" *Id*. at 16-17 (quoting *Stewart*, 252 F.R.D. at 386) (citations omitted). Thus, the court

concluded that NCO's offer of judgment was not a valid offer, *id*. at 17, and "is without effect at this time." *Id*. It explained that, accordingly, it "need not consider Hrivnak's alternative Motion for Class Certification (Doc. 18), which is TERMED pending the establishment of a Case Management Plan for this action." *Id*.

C. The District Court's Decision on the Motion for Reconsideration

Javitch moved for reconsideration or, in the alternative, for certification to take an interlocutory appeal. R.E. 33. While that motion was pending, Javitch filed a motion to dismiss for lack of subject matter jurisdiction, which also argued that the offer of judgment mooted the case. R.E. 42. The district court sua sponte suspended Hrivnak's obligation to respond to that motion "because the primary substantive questions posed by th[at] motion[] may be resolved in the Court's forthcoming ruling on Javitch's pending Motion for Reconsideration." R.E. 43.

On December 22, 2010, the district court denied the motion for reconsideration. R.E. 46. The court explained that this Court has already made clear that there are "circumstances in which a Rule 68 offer of judgment cannot moot a putative class action." *Id*. at 6. In particular, the court noted that, under *Carroll v. United Compucred Collections, Inc*., 399 F.3d 620, 624 (6th Cir. 2005), "[o]nce a motion for class certification is pending . . . a defendant may not

subsequently divest a court of subject matter jurisdiction through a Rule 68 offer of judgment." R.E 46, p. 6. The district court noted that it could not "see any conceptual basis for applying a different mootness principle here than was applicable in *Carroll*." *Id*. at 12. "Either there is some doctrine that justifies treating a putative class action plaintiff as representing the entire class before a court has ruled on certification, or there is not such a doctrine; but it does not seem that the applicability of that doctrine should turn solely on whether a motion has been filed." *Id*.

In addition, the court reaffirmed its position that defendants should not be able to "'opt out' of Rule 23." *Id*. at 11. It explained that allowing defendants to "pick off" plaintiffs would waste judicial resources and "'would clearly hamper the sound administration of justice [] by forcing a plaintiff to make a class certification motion before the record for such motion is complete.'" *Id*. (quoting *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108, 112 (S.D.N.Y. 2001)). It would be better, the court noted, to "allow[] the court to set reasonable time frames for the filing of motions for class certification without fear that it has provided a substantial litigation advantage to the defendant by having done so." *Id*. at 12.

The court pointed out that the majority of courts to consider the question

shared its view and concluded that plaintiffs in a putative class action are "part of an indivisible class for purposes of jurisdiction and standing, so long as the plaintiff does not delay in moving for class certification." *Id*. at 7, 11. However, the district court granted Javitch's motion for a certificate to take an interlocutory appeal. *Id*. at 14. On December 27, 2010, NCO filed a petition to appeal with this Court. On January 11, 2011, the district court denied Javitch's motion to dismiss for lack of subject matter jurisdiction "[f]or the reasons more fully articulated in this Court's December 22, 2010 Order (Doc. 46) denying Javitch's Motion for Reconsideration," R.E. 52, and granted Javitch's motion to stay future proceedings pending this Court's ruling on the interlocutory appeal. On February 2, 2011, this Court granted NCO's petition to appeal and took judicial notice of the January 11 ruling.

SUMMARY OF ARGUMENT

In *Deposit Guaranty National Bank v. Roper*, the Supreme Court explained that allowing defendants to use offers of judgment to "pick off" named plaintiffs before a ruling on class certification could be obtained would frustrate the objectives of class actions and invite waste of judicial resources. 445 U.S. at 339. Seeking to do exactly that, NCO argues that its Rule 68 offer of judgment to Mr. Hrivnak—which contained no relief for the class he seeks to represent—mooted

the case. But holding that a pre-certification offer of judgment that provides only individual relief to the named plaintiff moots a putative class action would allow defendants essentially to opt out of the class-action device. NCO should not be permitted to use Rule 68 as a tool against class actions or to undermine Rule 23. This Court should hold, as the court did below, that an offer of judgment that provides only individual relief to the named plaintiff in a putative class action is not a valid Rule 68 offer.

Contrary to NCO's claims, this case is not moot under Article III. This Court has already held that a Rule 68 offer of judgment that provides maximum individual relief to a named plaintiff and that is tendered while the motion for class certification is pending does not moot a putative class action. *Carroll*, 399 F.3d 620. Because filing a motion for class certification has no Article III significance, the conclusion that Article III does not require dismissal of a case if an offer of judgment is made before class certification is granted should apply equally to cases in which the plaintiff did not have the opportunity to timely file a motion for class certification before the offer was made.

Moreover, even putting aside *Carroll*, NCO's offer of judgment did not moot the case. As an initial matter, Mr. Hrivnak may have a sufficient continuing pecuniary interest in the lawsuit to keep it from becoming moot. In addition,

where the named plaintiff has not voluntarily settled his claim, he remains part of an indivisible class that has not been offered full relief and thus retains a personal stake in the case. Furthermore, the Supreme Court has recognized that, under certain circumstances, class certification should be deemed to "relate back" to the filing of the complaint. The relation-back exception to mootness applies here, because the offer of judgment was made before the district court could reasonably have been expected to rule on certification, and because the defendants' ability to pick off the claims makes those claims inherently transitory.

In any event, the offer of judgment made to Mr. Hrivnak should not moot either his individual claims or the class claims because it was not a complete offer of judgment, as it did not include all possible actual damages, punitive damages, and injunctive relief.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision regarding mootness. *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001). "The heavy burden of demonstrating mootness rests on the party claiming mootness." *Id*.

ARGUMENT

I. A Rule 68 Offer of Complete Individual Relief to a Named Plaintiff Does Not Moot a Putative Class Action.

Federal Rule of Civil Procedure 23(a) allows "members of a class [to] sue or be sued as representative parties on behalf of all members." "The policy at the very core of the class-action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted). Rule 23 allows for the aggregation of small claims, *id.*, deters wrongdoing through the vindication of legal rights, *see Roper*, 445 U.S. at 338, and furthers "efficiency and economy of litigation." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

Federal Rule of Civil Procedure 68(a) provides that "a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." If the offeree accepts the offer within 14 days, the clerk must enter judgment. Fed. R. Civ. P. 68(a). If the offeree rejects the offer, and the final judgment obtained is not more favorable than the offer, the offeree must pay costs incurred after the offer was made. *Id.* The purpose of Rule 68 "is to encourage settlement and avoid litigation." *Marek v.*

Chesny, 473 U.S. 1, 5 (1985). In the context of an individual suit, "an offer of judgment that satisfies a plaintiff's entire demand moots the case." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574 (6th Cir. 2009) (noting that its decision did not implicate the effect of Rule 68 offers in collective actions).

NCO contends that a Rule 68 offer that offers complete individual relief to a named plaintiff moots a putative class action if the offer is made before the plaintiff moves for class certification. If that were the case, however, defendants would be able to undermine Rule 23 by making offers of judgment for each class representative's (often small) claims, thereby preventing a class from being certified. As a result, Rule 68 would become a tool used not to encourage voluntary settlements—after all, NCO wishes to impose settlement on Mr. Hrinvak and the proposed class involuntarily—but to cut off class actions.

NCO's view is incorrect. As every federal court of appeals to consider the issue has held, where an unaccepted Rule 68 offer that would satisfy the named plaintiff's individual claim is made prior to a motion for class certification, the putative class action is not moot as long as there has been no undue delay, and the named plaintiff may file a motion for class certification. *See Lucero v. Bureau of Collection Recovery, Inc.*, ___ F.3d ___, 2011 WL 1184168 (10th Cir. March 31, 2011); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004); *cf. Sandoz v.*

Cingular Wireless LLC, 553 F.3d 913, 920-21 (5th Cir. 2008) (holding that a Rule 68 offer that fully satisfies a plaintiff's claim in a Fair Labor Standards Act collective action and that is tendered before the plaintiff moves to certify the collective action does not render the case moot if the plaintiff files a timely motion for certification). *But cf. Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994) (holding moot putative class action challenging city's towing procedures where, as part of an administrative proceeding that had not "run its course" before the suit, the city determined that the towing of the plaintiff's car was improper and instituted proceedings to return the fees he had paid).[1]

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[1]Many district court cases also hold that a Rule 68 offer tendered before a motion for class certification does not moot the case. *See Lamberson v. Fin. Crimes Servs.*, 2011 WL 1990450, at *2 (D.Minn. April 12, 2011) ("A majority of published decisions have concluded that, so long as the representative diligently proceeds with a motion for class certification, the offer does not moot the litigation or deprive the court of subject matter jurisdiction."); *see also, e.g., Clausen Law Firm, PLLC v. Nat'l Acad. of Continuing Legal Educ.*, __F. Supp. 2d __, 2010 WL 4396433 (W.D. Wash. Nov. 2, 2010); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384 (S.D. Ohio 2008); *Harris v. Messerli & Kramer, P.A.*, 2008 WL 508923 (D. Minn. Jan. 2, 2008); *Jenkins v. Gen. Collection Co.*, 246 F.R.D. 600 (D. Neb. 2007); *Jancik v. Cavalry Portfolio Servs., LLC*, 2007 WL 1994026 (D. Minn. July 3, 2007); *McDowall v. Cogan*, 216 F.R.D. 46 (E.D.N.Y. 2003); *Nasca v. GC Servs. Ltd. P'ship*, 2002 WL 31040647(S.D.N.Y. Sept. 12, 2002); *Liles v. Am. Corrective Counseling Servs., Inc.*, 201 F.R.D. 452 (S.D. Iowa 2001); *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108 (S.D.N.Y. 2001); *White v. OSI Collection Servs., Inc.*, 2001 WL 1590518 (E.D.N.Y. Nov. 5, 2001).

A. Rule 68 Should Not Be Read to Thwart Rule 23.

The federal rules should be read in harmony. *See Castro v. United States*, 310 F.3d 900, 902 (6th Cir. 2002). If a Rule 68 offer that provided complete individual relief to a class representative mooted a class action, however, Rule 68 could be used to undermine Rule 23's carefully calibrated system for certifying and maintaining class actions, which would derail class actions, overburden judicial resources, and lead to procedural gamesmanship. In a putative class action in which the named plaintiff has not delayed in moving for class certification, the proposed class should be considered the opposing party for Rule 68 purposes, and an offer that provides relief only to the individual named plaintiff should not moot the plaintiff's claims.

In *Deposit Guaranty National Bank v. Roper*, the Supreme Court warned of the dangers of allowing defendants to evade class actions by using offers of judgment to "pick off" class representatives. 445 U.S. at 339. There, the Court held that an offer of judgment to named plaintiffs of the maximum amount they could receive in their individual capacities, tendered after class certification was denied, did not moot the case or terminate the plaintiffs' right to appeal the denial of class certification. In so holding, the Court pointed out that a "ruling on the class certification issue is often the most significant decision rendered in these

class-action proceedings." *Id*. It explained that denying a decision on class certification "simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration." *Id*. "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." *Id*.

Treating offers of judgment made prior to class certification motions as mooting putative class actions would undermine Rule 23 and class actions by "contravening one of the primary purposes of class actions—the aggregation of numerous similar (especially small) claims in a single action." *Weiss*, 385 F.3d at 345. Each time a plaintiff sought to bring a class action complaint, the defendant would be able to moot the entire case just by satisfying the named plaintiff's individual claims, forcing other members of the class to file new complaints if they wanted to seek relief. The defendants could then pay off the new class representatives as well, "and so it would go, with the defendants avoiding class-wide liability, and steadily dampening the interest of putative class representatives in bringing such suits." *Stewart*, 252 F.R.D. at 386. In short, defendants would be able "to essentially opt-out of Rule 23." *Schaake*, 203 F.R.D.

at 112.

This circumvention of the class-action device would be particularly problematic in cases arising under the FDCPA and similar statutes. In enacting the FDCPA, Congress envisioned that FDCPA claims would be brought as class actions. *See* 15 U.S.C. § 1692k(a)(2)(B) (providing for class damages). Congress intended that "debtors, acting as 'private attorneys general,' w[ould] enforce the FDCPA." *Dowling v. Litton Loan Servicing LP*, 2009 WL 961124, at *4 (6th Cir. 2009). Because individual claims under the FDCPA might be small and statutory damages are capped, class actions are a crucial means by which individual debtors fulfill the role of private attorneys general and bring actions to hold debt collectors who violate the law accountable for their actions. Allowing Rule 68 offers to derail class actions would accordingly undermine both "the goals and enforcement mechanism of the FDCPA." *Weiss*, 385 F.3d at 345.

By allowing defendants essentially to opt out of class actions, holding putative class actions moot when the defendants make offers of judgment to the class representatives before the representatives move for class certification would "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Roper*, 445 U.S. at 339. Although many plaintiffs would likely not be able to pursue their claims individually, particularly when

those claims were small, those who did would be filing repetitive suits. This result, as well, would be contrary to the goals of the class-action device, which is meant to "save[] the resources of both the courts and parties by permitting an issue potentially affecting [a lot of people] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

Moreover, NCO's proposed rule would lead to a race by the parties to file their class certification motions and Rule 68 offers respectively, resulting "in sweeping changes to accepted norms of civil litigation in the Federal Courts." *Schaake*, 203 F.R.D. at 112. Plaintiffs would "be forced to swiftly file their certification motions, possibly before completing class-related discovery, in order to maintain their claims." *Stewart*, 252 F.R.D. at 386. This need to rush would be "inconsistent with the procedure set forth by Rule 23, which contemplates that parties have a reasonable opportunity to conduct discovery and develop the facts needed for a certification determination." *Clausen Law Firm*, 2010 WL 4396433, at *9; *see* Fed. R. Civ. P. 23(c)(1)(A) (requiring only that a determination of whether to certify a class occur at "an early practicable time"); *id.* 2003 Amendments Advisory Committee Notes (explaining that the "early practicable time" language was chosen because of the "the many valid reasons that may justify deferring the initial certification decision"). While plaintiffs rushed to file class

certification motions, "[d]efendants, on the other hand, [would] race to make their settlement offers before plaintiffs file their certification motions." *Stewart*, 252 F.R.D. at 386. And courts would be deprived of the ability "to set reasonable time frames for the filing of motions for class certification without fear that [they have] provided a substantial litigation advantage to the defendant by having done so." R.E. 46, p. 12. In the end, whether class actions could proceed would be governed by who happened to file first, instead of by the merits of the class certification motion.

In response to concerns articulated by the Supreme Court, this Court, and other courts about enabling defendants to pick off putative class representatives, NCO levels invective against class actions generally, asserting that "the class action device breeds injustices to those aggrieved, benefitting only the lawyers who conceive of that action." NCO Br. 48. But the question here is not whether Rule 23 should exist. And to the extent class actions are abused the remedy does "not lie in denying the relief sought here, but with reexamination of Rule 23 as to untoward consequences." *Roper*, 445 U.S. at 339; *see also Schaake*, 203 F.R.D. at 112 ("[T]he defendant offers its own wishful recipe for tort reform, which seeks to utilize judicial activism to bypass the need for legislation by Congress.").

NCO also implies that allowing defendants to opt out of class actions would

not be problematic because, in some cases, defendants might choose to proceed through class actions. NCO Br. 48. Rule 23, however, gives *plaintiffs* the power to decide whether to sue on behalf of a class and *courts* the power to decide whether to certify class actions. Fed. R. Civ. P. 23. NCO's preference that defendants choose whether they want to face "one or many lawsuits," NCO Br. 48, is inconsistent with Rule 23.

In addition, NCO asserts that courts' concerns about defendants using class actions to pick off successive plaintiffs are "nonsensical," claiming that it would not happen in practice. NCO Br. 44. It asks the Court to consider a case in which the maximum recovery was $3.10 for 4,211 class members, noting that it would cost significantly more for defendants to pick off each of the 4,211 class members one by one than to litigate the case as a class. NCO ignores, however, that 4,211 individuals are not each going to go through the trouble of litigating to redress $3.10 in damages. It is precisely when the recoveries are small, and when, accordingly, there will not be "suitor[s] in the wings," NCO Br. 48, that class actions are needed to ensure that wrongdoing does not go unredressed.[2]

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[2]NCO claims that proposed amendments to "to make the rule inapplicable to putative class actions were considered and rejected in 1983 and 1984." NCO Br. 24. In fact, those proposed amendments would have specified that Rule 68 did not apply in any class or derivative action, whether certified or not. *See Proposed Court Rules*, 102 F.R.D. 407, 433 (1984); *Preliminary Draft of Proposed Amendments to the Fed.*

Pre-certification offers that would provide relief only to class representatives pit "the self interests of the named plaintiff . . . against the interests of the class as a whole, as the named plaintiff is forced to weigh their own interest in avoiding personal liability for costs under Rule 68 against the potential recovery of the class." *Clausen Law Firm*, 2010 WL 4396433, at *11. Defendants should not be able to undermine Rule 23 and class actions generally by making Rule 68 offers before the class representative has had the opportunity to move for class certification. Unless the named plaintiff has unduly delayed in seeking class certification, the proposed class should be considered the opposing party for Rule 68 purposes, and this Court should affirm the holding below that a Rule 68 offer of relief only to the putative class representative is not a valid offer and does not moot the case.

B. The Case is Not Moot Under Article III.

NCO argues that a Rule 68 offer that would provide complete individual relief to the named plaintiff and that is tendered before the plaintiff has moved for class certification removes the Article III case or controversy. This Court has

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Rules of Civ. P., 98 F.R.D. 337, 363 (1983). And the "Supreme Court has frequently rejected arguments based on unenacted legislation" because of the difficulty in determining why it prompted objections. *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003).

already held, however, that a Rule 68 offer that provides complete individual relief to a named plaintiff does not moot the case if it is tendered while a motion for class certification is pending, and Article III provides no basis to distinguish between cases where a class certification motion is pending and cases where the plaintiff has not yet filed the motion.

Moreover, when a named plaintiff does not voluntarily accept a Rule 68 offer, the plaintiff retains a sufficient personal stake in the class action for the case to continue. And NCO concedes that "[t]here are circumstances in which the Plaintiff's individual claims will be mooted, but the action for class relief will not for prudential reasons." NCO Br. 35. Such reasons exist here, and the case should be allowed to proceed.

1. This Court Has Already Held That a Rule 68 Offer Made Prior to Class Certification Does Not Moot a Class Action.

In *Carroll*, 399 F.3d 620, this Court held that a putative class action case did not become moot where the defendant made a Rule 68 offer while the motion for class certification was pending. *Id.* at 624. The mootness inquiry is no different here just because the Rule 68 offer was tendered before the plaintiff had the chance to file the motion for class certification, instead of while that motion was pending.

Like this case, *Carroll* involved a class-action complaint alleging FDCPA violations. While the plaintiffs' motion for class certification was pending, the defendant made a Rule 68 offer of judgment to the named plaintiffs and the putative class if it was certified that exceeded the amount to which they were entitled under the FDCPA. The defendant then moved to dismiss the complaint as moot. The district court denied the motion and granted class certification.

On appeal, the defendant argued that because of the Rule 68 offer, the case was moot and the court lacked subject matter jurisdiction. This Court disagreed. The Court noted that *Brunet v. City of Columbus*, 1 F.3d 390, 399 (6th Cir. 1993), had broadly stated that where "the named plaintiff's claim becomes moot *before* certification, dismissal of the action is required." *Carroll*, 399 F.3d at 625 (quoting *Brunet*, 1 F.3d at 399) (emphasis in original). The Court explained, however, that despite this broad language, *Brunet* "suggested that it would be inappropriate to hold that a case was mooted by a settlement offer made to a named plaintiff when a motion for certification was pending." *Id.*; *see also Brunet*, 1 F.3d at 400 ("If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.") (citation omitted).

Although the class had not yet been certified at the time of the Rule 68 offer, the Court held that, under the circumstances, the district court properly denied the motion to dismiss the complaint as moot.

As the district court below explained, there is no conceptual basis for distinguishing between a case in which a motion for certification is pending, but has not yet been granted, and a case in which the plaintiffs had not yet had a chance to file the motion for class certification. "Either there is some doctrine that justifies treating a putative class action plaintiff as representing the entire class before a court has ruled on certification, or there is not such a doctrine; but it does not seem that the applicability of that doctrine should turn solely on whether a motion has been filed." R.E. 46, p. 12; *see also Lucero*, 2011 WL 1184168, at *10 ("We find no authority on which to distinguish the case in which a class certification motion is pending . . . from our case," in which the offer of judgment was made before a motion for class certification); *Harris*, 2008 WL 508923, at *3 ("[T]his Court is unable to discern why the question of mootness should turn on whether a Rule 68 offer is made before or after the putative class representative moves to certify the class.").

NCO argues that the motion for class certification should be the "bright line event" for determining whether a Rule 68 offer moots the case because, once such

a motion is filed, "the judicial power to bring the class into existence has been called upon, seeking recognition of the rights and interests of the absent class members, whose interests are then injected into the fray." NCO Br. 42-43. But the motion for class certification does not itself alter the status of the absent class members. It is certification of the class, not filing the motion for certification, that brings the class fully into existence. Thus, for example, the requirements of notice in Rule 23(c)(2) only apply to a certified class. And where (as here) the complaint is styled as a class action, the court and defendants know, even before the motion for class certification is filed, that the named plaintiff is seeking vindication of the class members' rights along with his own. Moreover, Mr. Hrivnak filed a motion for class certification before the time to respond to the Rule 68 offer had passed, so a class certification motion was pending at the time the offer expired.

In short, any Article III interest that a class that is not yet certified "may or may not have in a case is or is not present from its inception." *Lucero*, 2011 WL 1184168, at *10. There is no reason why a Rule 68 offer should have a different effect if the defendants tender it the day before the named plaintiff moves for class certification as opposed to the day after. Given that a Rule 68 offer does not moot a putative class action where the motion for class certification is pending, *see Carroll*, it should not moot a putative class action where, such as here, the plaintiff

had not yet moved for class certification, but had not unduly delayed in doing so.

2. Where the Named Plaintiff Does Not Accept the Rule 68 Offer, There Is a Sufficient Personal Stake in the Case for It to Proceed.

a. In *Roper*, 445 U.S. 326, the Supreme Court considered the effect of a rejected offer of judgment made to the named plaintiffs for the maximum amount that they could have recovered individually. The offer was made after class certification was denied, and the district court entered judgment against the plaintiffs. The question before the Court was whether the named plaintiffs could appeal the denial of class certification. Determining that resolution of that issue "require[d] consideration only of the private interest of the named plaintiffs," the Court held that "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id*. at 332-33. The Court found that interest in the named plaintiffs' "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation." *Id*. at 334 n.6.

Here, Mr. Hrivnak maintains the same personal interest in this litigation as the *Roper* plaintiffs did in their case. The Rule 68 offer states that the judgment to be entered "shall include an additional amount for plaintiff's reasonable costs and

attorney's fees that apply to his claims against Defendants." R.E. 18-2, p. 2. The offer does not appear to have included attorney's fees for the time spent on the class claims, rather than on the individual claims. Because Mr. Hrivnak has incurred fees on the class claims, he has a continuing interest in class litigation to shift those costs and fees to the rest of the class.

b. Even if the offer did include all fees incurred in litigating the class claims, Mr. Hrivnak still has a sufficient personal stake in the case for it to continue. In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), decided the same day as *Roper*, the Supreme Court considered whether a federal prisoner who brought a class action challenging the U.S. Parole Commission's 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 there is a "flexible character [to] the Art. III mootness doctrine," *id*. at 400, and 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 class certification notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id*. Even if his individual claim on the merits has expired, 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.

In *Geraghty*, the Court recognized that Article III jurisdiction might depend on whether the named plaintiffs had *voluntarily* relinquished their claims, declining to express a view "as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification." *Id*. at 404 n.10. Similarly, *Roper* emphasized that, there, the termination of the individual plaintiffs' claims was involuntary, explaining that "the factual context in which this question arises is important. At no time did the named plaintiffs accept the tender in settlement of the case; instead, judgment was entered in their favor by the court without their consent and the case was dismissed over their continued objections." 445 U.S. at

332.

Here, Mr. Hrivnak did not accept the Rule 68 offer—indeed, he moved to strike it. Under circumstances such as these, where the named plaintiff does not accept the offer of judgment, but seeks to keep his interests aligned with those of the class so that he can move for class certification, the named plaintiff should be deemed part of an indivisible class with a continuing personal stake in the controversy. *See Weiss*, 385 F.3d at 347 ("[I]n certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided."). Under these circumstances, the case is not "moot under Article III . . . because, notwithstanding 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 constitute a personal stake in the result. *Lucero*, 2011 WL 1184168, at * 9 (quoting *Geraghty*, 445 U.S. at 403).

Indeed, because the named plaintiff is part of an indivisible class, an offer that would provide only relief on his individual claims does not offer complete relief. As Justice Rehnquist explained in his concurrence in *Roper*, "the

distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim . . . . Acceptance [of the offer] 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)[.]" 445 U.S. at 341 (emphasis in original); *see also Harris,* 2008 WL 508923, at *3 ("[W]hen a putative class action is filed, and the named plaintiff seeks relief for a class of which he is a member, a Rule 68 offer that provides relief only to the named plaintiff and not to the entire class does not provide all of the relief sought in the complaint."). Accordingly, "[j]udgment should be entered against a putative class representative on a defendant's offer of payment only where class certification has been properly denied and the offer satisfies the representative's entire demand for injuries and costs of the suit." *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996).

Citing *Pettrey v. Enterprise Title Agency, Inc.*, 584 F.3d 701 (6th Cir. 2009), and *Brunet*, 1 F.3d 390, NCO argues that a putative class action becomes moot when a named plaintiff receives all the individual relief to which he is entitled. Unlike here, however, the plaintiffs in those cases *voluntarily* settled their claims, choosing to separate themselves from the class. In *Pettrey*, for example, the plaintiffs settled their individual claims after class certification and a motion for

interlocutory appeal were denied. The Court held the case was moot, explaining that "it is doubtful that there is a live controversy here because the named plaintiffs' claims were voluntarily relinquished, whereas they were involuntarily terminated in both *Roper* and *Geraghty*." *Pettrey*, 584 F.3d at 705.[3]

In *Brunet*, male job applicants challenged the constitutionality of a consent decree governing a fire department's hiring. Before the class was certified, two of the men were hired into a recruitment class. The Court held that those men did not have standing to contest the hiring procedures at the time of the certification. 1 F.3d at 400-01. In so holding, the Court emphasized that "[i]n *Roper*, the plaintiffs never accepted the defendant's settlement offer as satisfaction of their substantive claims." *Id*. at 400. In contrast, the two firefighters "ultimately accepted the City's settlement offer" when they accepted the positions in the recruitment class. *Id*. The Court explained that the two men's hiring claims were not mooted by the City's settlement offer—which is what NCO claims moots the case here—or even by the court's order that they be allowed to join the next class

[3]*Pettrey* also distinguished *Roper* and *Geraghty* on the ground that, in those cases, the plaintiffs "could have shifted the litigation costs to their fellow class members if they had succeeded in obtaining class certification." *Pettrey*, 584 F.3d at 705. *But see Geraghty*, 445 U.S. at 417 (Powell, J., dissenting) (explaining that, in *Geraghty*, there was "not even a speculative interest in sharing costs, and respondent affirmatively denie[d] that he retain[ed] any stake or personal interest in the outcome of his appeal").

of recruits, but rather by their voluntary decision to join that class of recruits. *Id*.

More recently, in *Gawry v. Countrywide Home Loans, Inc*., the Court noted that "it may be appropriate for named plaintiffs who have resolved their claims to continue to represent a class . . . where those claims are 'involuntarily terminated.'" 2010 WL 3245542, at *4 (6th Cir. 2010) (*quoting Pettrey*, 584 F.3d at 705). Such a circumstance was not present in that case, however, because "the Gawrys voluntarily settled all of their claims against Countrywide." *Id*.

In short, "the manner in which defendants have attempted to moot the putative class action is relevant not only to policy issues, but to the question whether [the plaintiffs] have a sufficient 'stake' in this case to meet Article III's case-or-controversy requirement." *Harris*, 2008 WL 508923, at *3. Here, Mr. Hrivnak did not voluntarily settle his individual claims, thereby removing himself from the class. To the contrary, he has sought, at all times, to continue to represent and be part the class of people who were injured in the same way. Because Mr. Hrivnak is a putative class representative seeking relief not only for himself, but also for a class of which he is a member, a Rule 68 offer that provides only individual relief to him does not moot the case.

3. Where Defendants Make an Unaccepted Rule 68 Offer that Includes Relief Only to the Named Plaintiff, Class Certification Relates Back to the Filing of the Class Complaint.

This case is also not moot for another reason. As NCO acknowledges, "[t]here are circumstances in which the Plaintiff's individual claims will be mooted, but the action for class relief will not," NCO Br. 35, including when the "relation-back" doctrine applies. *Id*. at 37. Where the defendants make an unaccepted offer of judgment and the plaintiff does not unduly delay in filing a motion for class certification, a later-filed certification motion relates back to the filing of the class complaint.

In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Supreme Court held that a certified class action does not become moot just because the named plaintiff's individual claims become moot. The Court explained that although a case or controversy is necessary, "[t]he controversy may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id*. at 402. "Although the controversy is no longer alive as to [the class representative]," the Court explained, "it remains very much alive for the class of persons she has been certified to represent." *Id*. at 401. The Court then noted that

> [t]here may be cases in which the controversy involving the named

> plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 402 n.11. In light of this "relation back" approach, the timing of class certification "is not crucial" to the mootness inquiry. *Geraghty*, 445 U.S. at 398. Where the relation-back doctrine applies, the fact that "the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the court] of jurisdiction." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *see, e.g.*, *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (holding that district court had power to certify class even though no named plaintiff had a live controversy).

If Rule 68 offers that would provide complete individual relief to named plaintiffs rendered putative class actions moot whether or not the named plaintiffs wanted to settle, defendants would be able to pick off successive class representatives as soon as complaints were filed or cases were removed to federal court, keeping the district court from ever being able "to rule on a certification motion." *Sosna*, 419 U.S. at 402 n.11. In this case, for example, the Rule 68 offer was tendered only two days after the case was removed to federal court, long

before a decision on class certification could reasonably have been expected. Under these circumstances, a motion for class certification should relate back to the filing of a complaint. *See, e.g.*, *Weiss*, 385 F.3d at 348 ("[W]here a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint."); *Sandoz,* 553 F.3d at 920-21 ("[W]hen a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment.").

Put differently, as NCO recognizes (at 37), "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. . . . In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52 (internal quotation marks and citation omitted). "The essence of the [inherently transitory] exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class." *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010). If defendants can unilaterally moot

named plaintiffs' claims through Rule 68 offers, those plaintiffs will be uncertain about whether any of their claims will survive long enough for the court to be able to certify a class. Under such circumstances, the inherently transitory exception should apply.

NCO contends that the exception only applies when the underlying claims are by their nature of uncertain duration, such as when inmates are challenging the conditions of their detention. NCO Br. 46. If a Rule 68 offer moots the class representatives' claims, however, "as a practical matter, . . . a decision on class certification could, by tender to successive named plaintiffs, be made just as difficult to procure in a case" like this one as in the cases in which the Supreme Court has applied the inherently transitory exception. *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1050 (5th Cir. 1981). Where the defendants could "pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage. This result is precisely what the relation back doctrine . . . condemns, and [there is] no difference when it is caused by the defendant's purposive acts rather than by the naturally transitory nature of the controversy." *Id.*; *see also Weiss*, 385 F.3d at 347 (holding that inherently transitory exception applied because "[a]lthough Weiss's claims here are not 'inherently transitory' as a result of being

time sensitive, they are 'acutely susceptible to mootness,' . . . in light of defendants' tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action") (citation omitted).

NCO also contends that there was no "temporal uncertainty" because eight months passed between when Mr. Hrivnak's answer/counterclaim was filed in state court and when the Rule 68 offer was tendered, two days after it removed the case to federal court. NCO Br. 39. But Mr. Hrivnak could not have been "certain" during the time his case was pending in state court that NCO would dismiss its claims against him, move to realign the parties, succeed in having that motion granted, remove the case, defeat a motion to remand, and tender a Rule 68 offer. NCO Br. 38-39. Nor did the *federal court's* local rule that parties should file motions for class certification within 90 days, unless the Court orders otherwise, put Mr. Hrivnak "on notice," during the time he was in *state court*, that his interests in the class claim would disappear within a certain time. NCO Br. 39.

For similar reasons, NCO's contention that Mr. Hrivnak was dilatory in moving for class certification fails. NCO Br. 52. Mr. Hrivnak did not delay, "unduly" or otherwise, in not filing the motion for certification in the two days the case was pending in federal court before NCO made the Rule 68 offer. NCO thus focuses on the time the case was in state court, but the period during which this

case was in a different court system is irrelevant. In removing the case, NCO made clear that it wanted the case to proceed as a *federal* case, under federal rules. A motion for class certification under Federal Rule of Civil Procedure 23 could not have been brought in the Ohio courts. In any event, the case was proceeding timely in state court, with the parties engaging in discovery and Mr. Hrivnak responding to various motions by NCO. *See* R.E. 1-1, pp.1-4.

Further, NCO's emphasis on the four months that passed between when it removed the case from state court and when it filed its motion to dismiss for lack of jurisdiction, NCO Br. at 40, 51—and its corresponding insistence that, at that time, the "unmodified deadline" in the local rules had expired, *id*. at 40—is mysterious. To begin with, when NCO filed the motion to dismiss, R.E. 42, the district court had already ruled that the Rule 68 offer did not moot the case, R.E. 31, and Javitch had already moved for reconsideration. R.E. 33. The amount of time that passed between the date of removal and the date of a motion on an issue on which the court had already ruled is irrelevant. Moreover, at the time NCO filed the motion to dismiss, Mr. Hrivnak had already filed a motion to certify a class, which the district court had decided it "need not consider" and had termed "pending the establishment of a Case Management Plan for this action." R.E. 31. That Mr. Hrivnak "expressed no desire to modify the deadline" for filing a motion

he had already filed, NCO Br. 51, the consideration of which the court had postponed, neither shows delay nor says anything about whether the claims in this case are inherently transitory.

In short, where defendants can use Rule 68 offers to moot successive class representatives' claims prior to certification, the claims "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Geraghty*, 445 U.S. at 399. Under those circumstances, unless the class representative has unduly delayed in moving for class certification, a later-filed motion for class certification relates back to the filing of the class complaint, and the case is not moot.

II. The Offer of Judgment Did Not Offer Mr. Hrivnak Complete Relief on His Individual Claims.

If an offer does not resolve all potential claims—that is, if the offer does not provide the *maximum possible relief* available to the plaintiff—the plaintiff retains a personal stake in the outcome of the litigation and the case is not moot. *See, e.g.*, *Andrews v. Prof'l Bureau of Collections of Maryland, Inc.*, 270 F.R.D. 205, 208 (M.D. Pa. 2010). Here, the offer does not provide complete relief on Mr. Hrivnak's individual claims. Although Mr. Hrivnak sought more than $25,000 in

statutory, compensatory, and punitive damages, plus injunctive relief, R.E. 1-2, pp. 251-52, the offer in this case was for only $7,000 in damages, plus reasonable costs and attorney's fees. R.E. 18-2.[4]

The burden of proving that the offer is complete rests on the defendants. *See Cleveland Branch, NAACP*, 263 F.3d at 531 ("[T]he heavy burden of demonstrating mootness rests on the party claiming mootness."). In determining whether the party invoking the mootness doctrine has established that an offer is complete, "a useful analogy may be drawn to the standard by which a party opposing subject matter jurisdiction must demonstrate that a diversity plaintiff cannot recover in excess of the jurisdictional threshold." *Davis v. Abercrombie & Fitch Co.*, 2008 WL 4702840, at *6 (S.D.N.Y. Oct. 23, 2008). In diversity cases, "the amount claimed by the plaintiff in the complaint rules, as long as claimed in good faith." *Charvat v. GVN Mich., Inc.*, 561 F.3d 623, 628 (6th Cir. 2009). To "defeat diversity jurisdiction, '[i]t must appear to a legal certainty that the claim is

[4]Because the offer did not provide complete relief on Mr. Hrivnak's individual claims, as an alternative to affirming the district court, this court could dismiss this case as improvidently granted because it does not present the question of whether a Rule 68 offer that provides complete individual relief to a putative class representative moots the case. *See Nguyen v. City of Cleveland*, 312 F.3d 243 (6th Cir. 2002) (dismissing interlocutory appeal as improvidently granted where court of appeals might be put in position of rendering an advisory opinion on the certified question).

really for less than the jurisdictional amount.'" *Id.* (citation omitted).

Similarly, where, as in this case, the complaint requests relief in excess of the amount of the offer of judgment, the party advocating mootness must demonstrate to a legal certainty that the claim is really for no more than the amount offered. *See Gates v. Towery*, 430 F.3d 429, 431-32 (7th Cir. 2005) (explaining that a claim is not moot just because a theory will eventually be unsuccessful on the merits, and that it puts "the cart before the horse" to dismiss a case as moot because the plaintiff has not yet established compensable loss); *see also Derisme v. Hunt Leibert Jacobson, PC*, 2011 WL 320302, at *2 (D. Conn. Jan. 27, 2011) (noting that whether a plaintiff "will ultimately be able to prove [all damages sought] is irrelevant for purposes of determining whether [a] case still presents a case or controversy" after the defendant has made an offer of judgment). NCO has not met this burden here because the offer does not provide all possible actual damages, punitive damages, and injunctive relief.

A. Actual Damages

Both the FDCPA and OCSPA provide for actual damages, and the OCSPA allows the damages to be trebled. 15 U.S.C. § 1692k(a)(1); Ohio Rev. Code § 1345.09(A), (B). Where a court "cannot determine . . . whether there are such actual damages, and, if so, the amount of such damages," an offer of judgment that

does not account for actual damages "fails to meet or exceed the sum that could be awarded to the plaintiffs" and will not moot the case. *Sibersky v. Borah, Goldstein, Altschuler & Schwartz, P.C.*, 242 F. Supp. 2d 273, 277-78 (S.D.N.Y. 2002).

NCO contends that Mr. Hrivnak is not entitled to actual damages because he suffered no physical, mental, or employment-based damages. NCO Br. at 55. But that he did not suffer those types of harm does not mean that he did not incur economic damages or other detriment to his quality of life as a result of NCO's violations of the FDCPA. For example, he may ultimately be able to recover damages for the fees incurred in defending the original collection action against him or loss due to harm NCO might have done to his credit rating. *See Shepherd v. Law Offices of Cohen & Slamowitz, LLP*, 668 F. Supp. 2d 579, 580 (S.D.N.Y. 2009) (discussing in the context of a Rule 68 offer of judgment potential actual damages suffered in an FDCPA action, including "attorneys' fees [incurred] to obtain vacatur of the judgment" and "additional fees [incurred] to right [plaintiff's] credit rating"). NCO claims that "[t]here is no specific allegation of actual harm tied to the Defendants conduct in the complaint." NCO Br. at 56. But, at this point in the case, the burden is on NCO to show that there is no possibility that Mr. Hrivnak is entitled to such damages. Having failed to do so,

NCO cannot establish that its offer of judgment is complete. [5]

B. Punitive Damages

NCO also has not shown that the offer covers all potential punitive damages. Although the FDCPA does not authorize punitive damages, under Ohio law, "[p]unitive damages are recoverable from a defendant in a tort action where the actions of the defendant 'demonstrate malice or aggravated or egregious fraud.'" *Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d 968, 977 (N.D. Ohio 2008) (quoting Ohio Rev. Code § 2315.21(E)(1)). Mr. Hrivnak claims that NCO committed several torts, including the tort of civil conspiracy. NCO gives no reason why Hrivnak could not be awarded punitive damages under Ohio common law. And NCO's suggestion of why damages could not be awarded under the conspiracy theory—"because there are no actual

[5]The possibility of recovery for economic damages distinguishes this case from *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847 (W.D. Ky. 2007), an FDCPA case cited by NCO, in which the district court determined that an offer of $1,055 plus reasonable costs and attorney's fees provided complete relief. In *Tallon*, the plaintiff conceded that he suffered only $55 in economic damages, *id*. at 850, so the question whether the offer was complete came down to whether the plaintiff could recover for the emotional damages that he had allegedly suffered. On summary judgment, the court determined that the defendants had shown that the plaintiff was not entitled to recover emotional damages, relying on a rule that requires plaintiffs alleging emotional damages to produce actual evidence, which the plaintiff in that case had not done. *Id*. Here, in contrast, the case is at the motion-to-dismiss stage, discovery is not complete, economic damages are alleged, and no similar legal conclusion can be drawn.

damages," NCO Br. 66—is wrong for the reasons discussed above. Because there might be actual damages in this case, and because Hrivnak might be able show NCO acted with malice, punitive damages are potential relief that must be included within the offer of judgment for the offer to be complete. *See Beaudry v. Telecheck Servs., Inc.*, 2010 WL 2901781, at *4 (M.D. Tenn. Jul. 10, 2010) (where punitive damages are sought and "the court and the parties cannot say what, if any, the full measure of those damages might eventually be," "practically speaking, the defendants cannot unilaterally make an offer of judgment that moots the plaintiff's claims by giving her 'complete relief'").

C. Injunctive Relief

Finally, NCO has not shown that the offer includes all possible equitable relief. Under OCSPA, a plaintiff may seek "a declaratory judgment, an injunction, or other appropriate relief." Ohio Rev. Code § 1345.09(D). Mr. Hrivnak's pleading requested injunctive relief, as well as a declaratory judgment and other appropriate relief, R.E. 1-2, pp. 251-52, but the offer of judgment does not include any equitable relief. Because the offer does not provide for all potential relief—including injunctive relief—dismissal of the case on mootness grounds is inappropriate. *See, e.g.*, *Martin v. PPP, Inc.*, 719 F. Supp. 2d 967, 975-77 (N.D. Ill. 2010) (refusing to dismiss as moot claims against one defendant because offer

of judgment did not include injunctive relief as to that defendant and thus was not complete).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holding that the Rule 68 offer did not render Mr. Hrivnak's or the class claims moot.

Respectfully submitted,

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June 2, 2011

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief contains 10,662 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, June 2, 2011, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

APPELLEE'S DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiff-Appellee Christopher Hrivnak hereby sets forth his designation of relevant district court documents as required by Sixth Circuit Rule 30(b).

Record Entry Number	Description of Entry
1	Javitch's Notice of Removal
1-1	State Court Record – Part I
1-2	State Court Record – Part II
1-3	NCO Entities' Consent to Removal
17	Christopher Hrivnak's Motion to Remand
18	Christopher Hrivnak's Motion to Strike Offer of Judgment or, Alternatively, for Class Certification
18-2	Exhibit, Offer of Judgment
31	Memorandum and Order, Holding Rule 68 Offer Had No Effect
33	Javitch's Motion for Reconsideration, or in the Alternative, Motion for Certification to Appeal Interlocutory Order
42	Javitch's Motion to Dismiss for Lack of Subject Matter Jursidiction (Corrected)
43	Memorandum and Order, Staying Hrivnak's Obligation to Respond to Javitch's Motion to Dismiss
46	Memorandum and Order, Denying Motion for Reconsideration and Granting Motion for a Certificate to Appeal an Interlocutory Order
52	Memorandum and Order, Denying Javitch's Motion to Dismiss