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

SUPPLEMENTAL BRIEF OF APPELLEE

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On April 17, 2013, the Court ordered the parties to file supplemental briefs addressing the Supreme Court's recent decision in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). That case was brought by Laura Symczyk as a "collective action" under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), which allows employees to bring actions on behalf of themselves and other employees, but requires the other employees to opt in to become plaintiffs. Before other employees opted in, the defendants in that case made a Rule 68 offer to Ms. Symczyk, who conceded that the defendants had offered complete relief on her individual claim and did not challenge the Third Circuit's conclusion that the offer rendered her individual claim moot. Based on Ms. Symczyk's concessions and waiver, the Supreme Court "assume[d], without deciding, that [the] Rule 68 offer mooted [her] individual claim," and proceeded to address whether the case "remained justiciable based on the collective-action allegations in her complaint." 133 S. Ct. at 1529. The Court held that it did not. In dissent, four Justices explained that the majority decision addressed a situation that should never arise again because "an unaccepted offer of judgment cannot moot a case." *Id*. at 1533 (Kagan, J., dissenting, joined by JJ. Ginsburg, Breyer, and Sotomayor).

The question addressed in *Genesis*—whether a collective action "is justiciable when the lone plaintiff's individual claim becomes moot," *id*. at 1526—is not presented here because NCO's Rule 68 offer did not render Mr. Hrivnak's

individual claims moot. Unlike in *Genesis*, the defendants' Rule 68 offer in this case did not offer complete relief on Mr. Hrivnak's individual claims. Moreover, an unaccepted Rule 68 offer does not deprive a court of jurisdiction.

In addition, this case differs from *Genesis* in that it was filed as a Rule 23 class action, not a collective action. A class action complaint, unlike a collective action complaint, asserts claims on behalf of a juridically created entity—the class—that are not satisfied by relief to the named plaintiff. And Mr. Hrivnak has an interest in representing the class and an economic interest in the class action.

I. The Rule 68 Offer Did Not Offer Complete Relief on Mr. Hrivnak's Individual Claims.

The question whether an unaccepted Rule 68 offer of complete relief on a named plaintiff's individual claims moots those claims and deprives the court of jurisdiction over a putative class action only arises if the Rule 68 offer offers complete relief on the named plaintiff's individual claims—that is, if it offers relief "that satisfies a plaintiff's entire demand." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009). As explained in Mr. Hrivnak's brief (at 40-46) NCO's offer of judgment did not offer him complete relief on his individual claims. In particular, NCO did not establish that the offer provided all possible actual damages, punitive damages, and injunctive relief.[1]

[1] NCO claims that Mr. Hrivnak lacks standing to seek injunctive relief because it voluntarily dismissed its claims against him. However, when Mr. Hrivnak

The Supreme Court made clear in *Genesis* that its conclusion was premised on an admission that the offer of judgment provided complete relief to Ms. Symczyk. 133 S. Ct. at 1527-29, 1532. Because NCO's offer to Mr. Hrivnak was not complete, the issues addressed in *Genesis* are not presented here.

II. An Unaccepted Rule 68 Offer Does Not Render Claims Moot.

A. Even if NCO had offered complete legal relief on Mr. Hrivnak's individual claims, the Rule 68 offer would not have rendered those claims moot. "A case becomes moot only when 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) (citation omitted). The unaccepted Rule 68 offer did not deprive the district court of the ability to grant effectual relief to Mr. Hrivnak.

Merely tendering an offer cannot deprive a court of jurisdiction. Indeed, by providing that judgment would be entered for plaintiff if the offer were accepted, the offer (like Rule 68 itself) recognized that it did not moot the case; if it did, the court would lack jurisdiction to enter judgment on the offer if it were accepted.

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originally filed his claims against NCO, the lawsuit against him was ongoing; indeed, the claims were originally filed as counterclaims. "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 584 (6th Cir. 2012) (citation omitted). "Instead, the defendant bears 'the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id*. (citation omitted). Here, NCO dismissed under Ohio Rule of Civil Procedure 41(A)(2), which provides that the dismissal is without prejudice unless otherwise specified, and NCO has not met its burden of showing that the wrongful behavior could not reasonably be expected to recur.

Likewise, Mr. Hrivnak's decision not to accept the offer within the 14 days it was on the table, *see* Fed. R. Civ. P. 68(a), did not deprive the court of the ability to grant him relief. The Court could still grant him all the relief he requested. Indeed, his claims are still unsatisfied because judgment was never entered on them and he has not received any of his requested relief. His claims thus cannot reasonably be deemed moot.

As Justice Kagan explained in *Genesis*, "When a plaintiff rejects [an offer of judgment]—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." 133 S. Ct. at 1533 (Kagan, J., dissenting); *see also id*. ("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.'" (quoting *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 151 (1886))). This conclusion that an unaccepted offer has no operative effect is supported by Rule 68's text, which provides that "[a]n unaccepted offer is considered withdrawn" and is only admissible "in a proceeding to determine costs." Fed. R. Civ. P. 68(b).

In short, as Justice Kagan concluded, "assuming the case was live before [the Rule 68 offer]—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted." 133 S. Ct. at 1534 (Kagan, J.,

dissenting). Nothing in the *Genesis* majority opinion, which declined to consider whether a Rule 68 offer that satisfies a plaintiff's claim renders the claim moot, casts any doubt on Justice Kagan's analysis on this point.

B. We acknowledge that this Court stated in *O'Brien*, 575 F.3d at 575, that "a Rule 68 offer can be used to show that the court lacks subject-matter jurisdiction" and that "an offer of judgment that satisfies a plaintiff's entire demand moots the case."[2] But although it used the words "jurisdiction" and "moots," *O'Brien* did not actually hold that an offer of judgment that satisfies a plaintiff's entire demand renders the case moot in the Article III sense—that is, that it deprives the court of jurisdiction. When a court lacks jurisdiction, it cannot enter judgment on the merits, but must dismiss. *See*, *e.g.*, *Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 702 (6th Cir. 2009). *O'Brien*, however, specifically rejected the "view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand," as would be true if the offer mooted the case in the jurisdictional sense. The Court held instead that "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *O'Brien*, 575 F.3d at 575. By allowing the court to enter judgment for plaintiffs, *O'Brien* implicitly recognized, despite

[2] Because *O'Brien* is Sixth Circuit precedent, Mr. Hrivnak quoted this line in his initial brief. Hrivnak Br. 14. Mr. Hrivnak has maintained at all times, however, that neither his individual claims nor the class action are moot. *See*, *e.g.*, *id*. at 46.

using mootness language, that an offer of judgment that would satisfy a plaintiff's entire demand does not deprive the courts of jurisdiction.[3]

If, despite the Court's recognition that the courts retained jurisdiction to enter judgment, *O'Brien*'s holding were deemed jurisdictional, the Court should reconsider *O'Brien* in light of the Supreme Court's repeated explanation in the past year that a "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," *Decker*, 133 S. Ct. at 1335; *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012), as well as Justice Kagan's explanation why an unaccepted Rule 68 offer does not moot a claim.

III. A Rule 23 Class Action Differs from the FLSA Collective Action Considered in *Genesis*.

A. This case also differs from *Genesis* in that it is a class action, not a FLSA collective action. As *Genesis* stressed, "Rule 23 class actions are fundamentally

[3]Although it demonstrates that the decision is not truly jurisdictional, *O'Brien*'s conclusion that judgment should be entered on an unaccepted Rule 68 offer that would satisfy a plaintiff's claim if accepted is itself incorrect. Rule 68 provides that an unaccepted offer is considered withdrawn. Fed. R. Civ. P. 68(b). In any event, even if it were sensible for a district court to enter judgment for the plaintiff when the defendant offers the plaintiff all he is due in an individual action, such an approach would not be sensible or proper when a defendant makes an offer only on a named plaintiff's individual claims in a class action, because the offer would not be for all the plaintiff sought, and because allowing defendants to buy off named plaintiffs against their will would be "contrary to sound judicial administration." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Indeed, *O'Brien* noted that its decision did not implicate collective actions, which can raise the concern that "plaintiffs have been picked off by defendants." 575 F.3d at 575.

different from collective actions under the FLSA." 133 S. Ct. at 1529. Unlike collective actions, class actions bind all class members unless they opt out. Unlike collective action complaints, class action complaints toll the applicable statute of limitations for all class members. *Compare* 29 U.S.C. § 256, *with Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). And unlike employees in collective actions, "a putative class acquires independent legal status once it is certified under Rule 23." *Genesis*, 133 S. Ct. at 1530. Particularly given the "unique significance of certification decisions in class-action proceedings," *id*. at 1532, defendants should not be able to block district courts from reaching certification decisions by picking off named plaintiffs before courts can consider certification.

Because *Genesis* involved a collective action, and because the plaintiff in *Genesis* did not timely challenge that the Rule 68 offer rendered her individual claim moot, the Supreme Court did not consider in that case whether an offer of judgment that provides relief only on individual claims satisfies the plaintiff's entire demand when the plaintiff has brought the case as a putative class action under Rule 23, which provides plaintiffs with the right to represent a class if they can meet the Rule's requirements. It does not. As Justice Rehnquist explained in his concurrence in *Roper*: "Acceptance [of an offer to settle only the individual claims] need not be mandated . . . 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; *see*

also, e.g., *Alpern v.Utilicorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996). For this additional reason, the Rule 68 offer here did not moot Mr. Hrivnak's case.

B. The differences between FLSA collective actions and Rule 23 class actions also make the analysis in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), relevant here in a way that it was not in *Genesis*. In *Geraghty*, the Supreme Court considered the "[a]pplication of the personal-stake requirement" to "the right to represent a class." *Id*. at 402. It stated 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," because the "proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id*. at 404.

In FLSA collective actions, unlike in class actions, named plaintiffs are not entitled to represent other employees; they represent them only if those employees affirmatively opt in. *See, e.g.*, *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) ("In contrast to the Rule 23 plaintiff, a § 216(b) plaintiff has no claim that he is entitled to represent other plaintiffs."). Accordingly, in *Genesis*, there was no reason for the Court to consider the application of *Geraghty*'s analysis relating to the right to represent a class. Instead, *Genesis* held only that *Geraghty*'s holding that "a corrected ruling on appeal 'relates back'" to the erroneous denial of class certification did not apply because

there was "no certification decision to which respondent's claim could have related back." 133 S. Ct. at 1530 (quoting *Geraghty*, 445 U.S. at 404 & n.11).

Like the plaintiff in *Geraghty* and unlike the plaintiff in *Genesis*, Mr. Hrivnak has the right to represent a class if he can demonstrate that Rule 23's requirements are met. And although a footnote in *Geraghty* provided a narrower basis for the case's holding—namely, a "relation back" analysis applicable where a district court erroneously denied certification before the individual claim became moot, 445 U.S. at 404 n.11, which did not occur here—the analysis in *Geraghty*'s main text concerning the right to represent a class applies equally to situations in which certification has not yet been granted. Like the plaintiff in *Geraghty*, Mr. Hrivnak seeks to represent a class of people with live claims who will be part of a certified class if the court determines Rule 23's requirements are met. And like the plaintiff in *Geraghty*, Mr. Hrivnak can continue "vigorously to advocate his right to have a class certified." *Id*. at 404. In short, Mr. Hrivnak maintains the same personal stake in class certification as the plaintiff in *Geraghty*, which *Geraghty* found "sufficient to assure that Art. III values are not undermined." *Id*.; *cf. Carroll v. United Compucred Collections*, 399 F.3d 620 (6th Cir. 2005).

C. Finally, Mr. Hrivnak has a continuing economic interest in the class allegations. *See Roper*, 445 U.S. at 333 (dismissal of plaintiff's claim did not moot putative class action where plaintiff maintained "an economic interest in class

certification," specifically, a desire to shift a portion of fees and expenses to the class). First, as explained in Mr. Hrivnak's brief (at 27-28), the offer here did not clearly include fees for time spent on class claims. Moreover, the offer included only reasonable fees, to be determined by the district court if the parties could not agree. R.E. 18-2. 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 full fees for time already spent on the case, because the class allegations were not successful. But if the case proceeded through certification and were successful on behalf of a class, the court would likely award full fees for that time. Thus, the fees awarded for time already spent on the case may be greater if the case proceeds.

Second, this Court has recognized that "there may be circumstances [in class actions] where incentive awards are appropriate." *Hadix v. Johnson*, 322 F.3d 895, 898 (6th Cir. 2003). The potential for Mr. Hrivnak to receive an incentive award gives him an additional continuing personal stake in the class action. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012) (holding that possibility of incentive award provided standing to appeal denial of certification where individual claim was settled).

CONCLUSION

The decision of the district court should be affirmed on the ground that neither Mr. Hrivnak's individual nor his class claims are moot.

Respectfully submitted,

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May 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this date, May 1, 2013, 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
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