ORAL ARGUMENT REQUESTED

Nos. 14-1425, 14-1454

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROSE JACOBSON,

Plaintiff-Appellant/Cross-Appellee,

v.

CREDIT CONTROL SERVICES, INC.

Defendant-Appellee/Cross-Appellant.

On Appeal from a Final Order and Judgment of the
United States District Court for the District of Colorado,
No. 1:13-cv-3307-WYD-MJW, Hon. Wiley Y. Daniel, U.S.D.J.

OPENING BRIEF FOR APPELLANT/CROSS-APPELLEE

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There are no prior or related appeals.

JURISDICTION

Plaintiff-appellant and cross-appellee Rose Jacobson filed her complaint in this action on December 9, 2013, against defendant-appellee and cross-appellant Credit Control Services, Inc. (CCS), in the United States District Court for the District of Colorado. Aplt. App. 5a.[1] The complaint alleged violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*., and sought damages under the FDCPA's private right of action, 15 U.S.C. § 1692k. The district court had subject matter jurisdiction over the action under 28 U.S.C. § 1331.

On September 17, 2014, the district court entered a final order dismissing the complaint for lack of subject-matter jurisdiction on the ground that it had been rendered moot by CCS's proffer to Ms. Jacobson of an offer of judgment under Federal Rule of Civil Procedure 68 some eight months earlier, on January 7, 2014. Att. A-1. The following day, the clerk of the district court entered a final judgment in favor of CCS. Att. A-6. On October 9, 2014, the clerk entered an order taxing costs against Ms. Jacobson. Aplt. App. 69a. Ms. Jacobson filed a timely notice of appeal

[1] Citations in this brief to Appellant/Cross-Appellee's Appendix take the form "Aplt. App. [page number]." Citations to the record materials included as attachments to this brief as required by this Court's rules take the form "Att. [page number]."

from the dismissal order, judgment, and cost order on October 15, 2014. Aplt. App. 70a. This Court has jurisdiction under 28 U.S.C. § 1291, as the dismissal and judgment are final as to all claims and all parties.

STATEMENT OF ISSUES

1. Whether an unaccepted offer of judgment under Rule 68 moots a plaintiff's claims if a district court concludes that it would have offered her complete relief if she had accepted it. (This issue was raised by CCS's motion to dismiss, Aplt. App. 25a, and the opposition and reply concerning the motion, Aplt. App. 51a, 57a, and was ruled on in the court's order dismissing the action, Aplt. App. 62a.)

2. Whether a plaintiff's subsequent waiver of damages claims retroactively makes an offer of judgment that was incomplete when made, and has lapsed, an offer of complete relief. (This issue was raised by CCS's motion to dismiss, Aplt. App. 25a, and the opposition and reply concerning the motion, Aplt. App. 51a, 57a, and was ruled on in the court's order dismissing the action, Aplt. App. 62a.)

3. Whether the district court erred in dismissing the plaintiff's claims as moot and entering judgment against her when she had been afforded no relief whatsoever. (This issue was raised by CCS's motion to

dismiss, Aplt. App. 25a, and the opposition and reply concerning the motion, Aplt. App. 51a, 57a, and was ruled on in the court's order dismissing the action, Aplt. App. 62a.)

4. Whether the district court's judgment taxing costs against the plaintiff was proper. (This issue was both raised and ruled on by the district court clerk's sua sponte issuance of a final judgment providing for taxation of costs under Federal Rule of Civil Procedure 54(d)(1), Aplt. App. 23.)

STATEMENT OF THE CASE AND FACTS

The underlying facts of this case, as alleged in the complaint, are straightforward. Rose Jacobson is a resident of Wheat Ridge, Colorado. CCS is a debt collection agency that does business in, among other states, Colorado. Aplt. App. 5a–6a. In October 2013, Ms. Jacobson spoke by telephone with CCS regarding its attempt to collect a consumer debt in the amount of $389.61 that it said she owed to Comcast. Aplt. App. 7a–8a. Ms. Jacobson informed CCS that she disputed the debt. Aplt. App. 8a–9a. After Ms. Jacobson informed CCS that she disputed the debt, CCS reported the debt to one or more of the major credit reporting agencies—

Experian, Equifax, and Transunion—without reporting that the debt was disputed. Aplt. App. 9a–10a.

In December 2013, Ms. Jacobson filed this action, alleging that CCC's communications to the credit reporting agencies in connection with its attempt to collect the claimed debt violated the FDCPA's prohibitions against the use of false, deceptive, or misleading communications and unfair and oppressive means in connection with the collection of consumer debts. *See* 15 U.S.C. §§ 1692e, 1692f. In particular, she alleged that CCS had violated specific prohibitions against falsely representing the "character, amount, or legal status" of a debt, *id*. § 1692e(2)(A), as well against '[c]ommunicating … to an person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." *Id*. § 1692e(8). Aplt. App. 13a.

Ms. Jacobson's complaint invoked the FDCPA's private right of action, found at 15 U.S.C. § 1692k, which provides that a plaintiff who is the victim of any violation of the FDCPA committed by a debt collector may recover actual damages resulting from the violation, statutory damages of up to $1000, and reasonable attorney's fees and costs. *Id*.

§§ 1692k(a)(1), (a)(2)(A), & (a)(3). Ms. Jacobson's complaint did not specify the amount of damages she sought or limit her claim to statutory as opposed to actual damages. Aplt. App. 14a–15a.

On January 7, 2014, CCS made an offer of judgment to Ms. Jacobson under Federal Rule of Civil Procedure 68. Aplt. App. 34a–35a. CCS offered Ms. Jacobson $1,001 in damages (one dollar more than the maximum statutory damages provided for by § 1692k(a)(2)(A)), as well as costs and attorney's fees in an amount to be agreed by counsel for the parties or determined by the district court. Ms. Jacobson did not accept the offer within the 14 days provided for under Rule 68(a), and as a result it was, by operation of the rule, "considered withdrawn" and "not admissible except in a [post-judgment] proceeding to determine costs." Fed. R. Civ. P. 68(b). Presumably because the offer was limited to statutory damages but Ms. Jacobson's complaint was not, CCS did not immediately contend that the offer mooted Ms. Jacobson's claims.

On May 13, 2014—nearly four months after the offer had expired, and following Ms. Jacobson's deposition by defendants' counsel—Ms. Jacobson instructed her counsel to waive her claim for actual damages. Ms. Jacobson's counsel accordingly filed with the court a notice stating

that Ms. Jacobson was "waiving her claim for actual damages in this case pursuant to the FDCPA, 15 U.S.C. § 1692k(a)(1)." Aplt. App. 25a. Six days later, CCS filed a motion to dismiss the action for lack of subject-matter jurisdiction. Aplt. App. 25a. The motion argued that because Ms. Jacobson now sought only statutory damages, CCS's earlier offer—which had expired four months before—had rendered the case moot by offering her all she was entitled to recover. Ms. Jacobson opposed the motion. Aplt. App. 51a.

On September 17, 2014, the district court entered an order granting the motion to dismiss. Att. A-1. The district court recognized that this Court has not yet squarely addressed whether an offer of judgment for full relief to an individual plaintiff moots a case. *See id*. at A-4 (citing *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1243 (10th Cir. 2011)). The court stated that a "majority of circuits" have held that "an Offer of Judgment for the full relief to which a plaintiff is entitled may moot a case," *id*., but at the same time recognized that the most recent court of appeals to address the issue had held to the contrary. *Id*. (citing *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 953–55 (9th Cir. 2013)). Adopting what it considered the majority

rule, the court held that "because Plaintiff waived her claim for actual damages (ECF No. 14), I find that Defendant's unequivocal Offer of Judgment of $1001.00 plus reasonable attorney's fees and costs offered plaintiff an amount that exceeds what she can recover pursuant to 15 U.S.C. § 1692k(a). Thus, Plaintiff's action is moot and must be dismissed for lack of subject matter jurisdiction." *Id*. at A-5.

The court acknowledged that, as this Court has put it, a case becomes moot when "the parties lack a legally cognizable interest in the outcome." *Id*. (quoting *Citizens for the Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000)). The court did not, however, explain how an offer that has lapsed and pursuant to which a plaintiff has received *no* relief deprives her of a legally cognizable interest in the outcome. Nor did it explain how an offer that did not provide all the relief that the plaintiff sought at the time it was made, and that was no longer open when she limited her claim, could be said to have offered her complete relief even under the reasoning of those courts that had held that offers of judgment for full relief have mootness consequences. Nonetheless, the Court held that it must dismiss the action without

prejudice for lack of subject matter jurisdiction because CCS's offer deprived it of "authority to adjudicate the matter." *Id*. at A-2.

The following day, the clerk of the district court entered final judgment in the action in favor of CCS. Att. A-6. In addition to reciting that the action was dismissed without prejudice, the judgment provided for an award of costs in favor of CCS pursuant to Federal Rule of Civil Procedure 54(d)(1). *Id.* Pursuant to that provision in the judgment, the clerk subsequently taxed costs against Ms. Jacobson in the amount of $854.08. Aplt. App. 69a.

SUMMARY OF ARGUMENT

1. The district court fundamentally erred in concluding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claim, and requires the court to dismiss the claim without providing any relief, if the offer would have fully satisfied the plaintiff's claim had it been accepted. Rule 68, however, is only a mechanism by which a defendant can *offer* to have judgment entered against it. If the offer is not accepted, it is a nullity except for purposes of determining whether the defendant is entitled to costs at the conclusion of the case. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). An unaccepted offer neither moots a

claim nor otherwise authorizes termination of a lawsuit over the plaintiff's objection.

In its recent decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Supreme Court expressly declined to rule that a Rule 68 offer of judgment for full relief moots a plaintiff's claim (because it found the issue waived in that case). Justice Kagan's dissent, joined by three other Justices, makes clear why the Court would have recognized that a Rule 68 offer does not moot a plaintiff's claims if the Court had reached the issue: The theory that a Rule 68 offer of judgment moots a claim is directly contrary to limits on the mootness doctrine repeatedly stated by the Supreme Court, under which a claim is not moot unless "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id*. at 1533 (Kagan, J., dissenting) (quoting *Chafin v. Chafin,* 133 S. Ct. 1017, 1023 (2012)). Moreover, Justice Kagan pointed out, Rule 68 provides absolutely no authorization for a court to terminate the case of a plaintiff who does not accept an offer. *Id*. at 1536. As the Eleventh and Ninth Circuits have recently recognized, Justice Kagan's reasoning is compelling and requires the conclusion that a Rule 68 offer cannot moot anything because it does not deprive a court of the ability to

grant effectual relief. *See Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 702–04 (11th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 954–55.

This case vividly illustrates the paradoxical consequences of the theory that a Rule 68 offer of judgment moots a case. If, as the district court held, an unaccepted Rule 68 offer moots a case and requires its dismissal, the effect of the offer is to deny the plaintiff any redress for her claims. But the theory that the offer moots the case is that it *provides the plaintiff complete relief* and thus eliminates any case or controversy for the court to resolve. If the plaintiff has received nothing, however, the controversy between the parties remains live.

2. Even those courts that concluded, before *Symczyk*, that an offer of judgment for complete relief may moot a plaintiff's claims have stressed that such an offer must provide everything the plaintiff seeks, not just everything to which the defendant believes she may be entitled. *See*, *e.g.*, *Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 449–50 (2014). Here, CCS never offered everything Ms. Jacobson sought at the time of its offer: When it made the offer, it offered only statutory damages even though Ms. Jacobson's claim was not at that time limited to statutory

damages. It was not until months after the offer had expired that Ms. Jacobson limited her claim to statutory damages, and at that point CCS was no longer willing to pay her demand. Thus, even under the erroneous view that a Rule 68 offer can moot a claim, at no point in the process was there any absence of controversy between the parties. That Ms. Jacobson ultimately reduced her claims did not retroactively render an expired offer capable of depriving the court of jurisdiction (even assuming that a Rule 68 offer could ever have that effect).

3. As the Eleventh Circuit recently recognized in *Stein*, even if an unaccepted offer of judgment could provide a basis for terminating a plaintiff's action, an order that dismisses claims on the basis of an offer while denying the plaintiff all relief must still be reversed. *Stein*, 772 F.3d at 703. If a defendant wishes to terminate litigation on the ground that there is no further controversy between the parties as to the plaintiff's entitlement to relief, it must actually accept entry of judgment in her favor in the amount of its offer. The defendant cannot have its cake and eat it too, by claiming the plaintiff has no further stake in the action while at the same time continuing to dispute her entitlement to relief.

4. Even if the dismissal in this case were proper, the district court clerk's judgment providing for taxation of costs under Rule 54(d)(1) was unauthorized. Costs in an action dismissed for lack of jurisdiction are governed not by Rule 54(d)(1), but by 28 U.S.C. § 1919, which requires that the court itself exercise its discretion to award costs by order. *See Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1339 (10th Cir. 1998). Here, because the district court never exercised its discretion or entered an order under § 1919, the clerk's inclusion of costs in the judgment under Rule 54(d)(1) was improper.

ARGUMENT

I. An unaccepted Rule 68 offer of judgment does not moot a plaintiff's claims.

The district court erred in holding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claims, deprives the court of subject-matter jurisdiction, and requires dismissal of claims that have received no redress whatsoever. A Rule 68 offer of judgment does no such thing: It does not deprive the plaintiff of a concrete interest in obtaining a judgment or render the court incapable of providing relief between the parties. If it did so, Rule 68 would become self-defeating, as the defendant's mere offer of judgment under its terms would deprive the

court of jurisdiction and, therefore, of the power to enter the very judgment contemplated by the offer. The consequence would be that courts would have to dismiss entirely unsatisfied claims as moot—as the district court did here. But if a plaintiff has received no satisfaction for her claims, they are not moot, because the court still has the ability to grant effectual relief by exercising jurisdiction over the claims and resolving them on the merits.[2]

A. An unaccepted Rule 68 offer is a legal nullity that does not affect a court's ability to grant effectual relief between the parties.

The doctrine of mootness, together with the related standing and ripeness doctrines, ensures that the federal courts adhere to the fundamental command of Article III that federal jurisdiction be limited to "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1. The three justiciability doctrines provide that "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin*, 133 S. Ct. at 1023 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). In particular, the mootness doctrine requires

[2] The issues over whether the district court properly dismissed for lack of subject-matter jurisdiction are subject to de novo review. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

that parties "continue to have a personal stake in the outcome of the lawsuit" throughout its existence, *Lewis*, 494 U.S. at 477–78 (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 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 v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (emphasis added; citations and internal quotation marks omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*. (citation omitted); *accord Chafin*, 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 unaccepted Rule 68 offer of judgment does not meet the criteria for rendering a case moot because it does not, in itself, provide redress

for the plaintiff's grievance or make it impossible for a court to grant effectual relief. As the Supreme Court has explained, Rule 68 is a procedural device that "prescribes certain consequences for formal settlement offers made by 'a party defending against a claim.'" *Delta Air Lines v. August*, 450 U.S. at 350. The rule permits judgment to be entered in the plaintiff's favor on the offered terms if, but only if, the plaintiff accepts the offer in writing within 14 days of being served with it. *See id.*; Fed. R. Civ. P. 68(a). On the other hand, "[i]f the offer is not accepted, it is deemed withdrawn 'and *evidence thereof is not admissible* except in a proceeding to determine costs.'" *Delta Air Lines*, 450 U.S. at 350 (emphasis added; quoting former Fed. R. Civ. P. 68).[3]

Under the Rule, the plaintiff's rejection of an offer only "becomes significant in … a [post-judgment] proceeding to determine costs." *Id*. If a plaintiff wins a judgment, but that judgment is not more favorable than the unaccepted Rule 68 offer, the plaintiff is liable for the defendant's "costs incurred after the offer was made." Fed. R. Civ. P. 68(d); *Delta Air*

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

Lines, 450 U.S. at 351–52. Thus, the Rule establishes a cost-shifting mechanism designed to "encourage the settlement of litigation" by providing plaintiffs "an additional inducement to settle." *Id.* at 352.

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

Thus, an unaccepted offer—even one that, if accepted, would have resulted in a judgment that fully satisfied a plaintiff's claim—neither redresses the plaintiff's injury nor makes it impossible for the court to provide redress. Because the parties retain concrete interests that will be affected by a judicial resolution of the case, the offer does not moot the

case. *See Windsor*, 133 S. Ct. at 2685; *Chafin*, 133 S. Ct. at 1023; *Knox*, 132 S. Ct. at 2287. The view that an offer of judgment that would fully satisfy a plaintiff's claim moots the claim is untenable in light of the reasoning of the Supreme Court's decisions in *Windsor*, *Chafin*, and *Knox* emphasizing the limited scope of the mootness doctrine.

B. Justice Kagan's persuasive analysis in her dissenting opinion in *Genesis Healthcare Corp. v. Symczyk* demonstrates that Rule 68 offers have no mootness consequences.

The Supreme Court has never specifically addressed the question whether an unaccepted Rule 68 offer of judgment moots a plaintiff's individual claim. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. at 1528–29. The majority in *Symczyk* expressly declined to reach that question. *Id*. Justice Kagan's dissenting opinion on behalf of herself and three other Justices, however, demonstrated convincingly that, had the Court reached the issue, its precedents would have required it to conclude that an unaccepted Rule 68 offer does not moot a plaintiff's claim. *See id*. at 1532–37.

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 of judgment. Before the Supreme Court, the plaintiff, supported by the Solicitor General of the United States, argued that a Rule 68 offer cannot moot a claim.[4] The *Symczyk* majority, however, held that that Rule 68 argument was not properly before it because it had not been presented in a cross-petition and because the plaintiff had conceded below that her claim was moot. *See Symczyk*, 133 S. Ct. at 1529. The majority therefore merely "assume[d], without deciding," that the individual claim was moot. *Id*. To ensure that the point was not lost, the Court cited its decision in *Baldwin v. Reese*, 541 U.S. 27, 34 (2004), which explains that, in such circumstances, the Court does not "express[] *any view* on the merits of the [waived] issue." *See Symczyk*, 133 S. Ct. at 1529.

Justice Kagan, joined by Justices Ginsburg, 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

[4] *See* Br. for the United States as Amicus Curiae Supporting Affirmance 10–15, *Genesis Healthcare Corp. v. Symczyk*, No. 11-1059 (U.S. filed Oct. 17, 2012), *available at* http://www.justice.gov/osg/briefs/2012/3mer/1ami/2011-1059.mer.ami.pdf.

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," *id.*, does not deprive the plaintiff of a concrete interest in the outcome of a case or the court of the ability to grant effectual relief:

> We made clear earlier this Term that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin,* 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 (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 said not a word of disagreement, either express or implied, with Justice Kagan's analysis. As Justice Kagan herself emphasized, "what I have said conflicts with nothing in the Court's opinion. The majority does not attempt to argue … that the unaccepted settlement offer mooted [the plaintiff's] individual damages claim." *Id*. at 1534.

The majority did observe in a footnote that "nothing in the nature of FLSA actions precludes satisfaction—and thus the mooting—of the individual's claim before the collective-action component of the suit has run its course." *Id*. at 1529, n.4. That footnote, however, stated first that the Court was *not* speaking to the question whether a Rule 68 offer "is sufficient by itself to moot the action." *Id*. The majority's footnote stands only for the uncontroversial proposition that a claim that is *actually satisfied* by settlement or a properly entered judgment no longer presents a live controversy. For example, where a plaintiff *accepts* a Rule 68 offer of judgment in satisfaction of all her claims, and a judgment is entered accordingly, there is no longer a live controversy that permits the appellate resolution of legal issues that the district court decided

before the case was concluded by the agreed-to judgment, because neither party has a "continuing financial stake" in the case. *Yunker v. Allianceone Receivables Mgmt., Inc.*, 701 F.3d 369, 374 (11th Cir. 2012).[5]

An unaccepted Rule 68 offer, by contrast, does not deprive the parties of a continuing financial stake because, as Justice Kagan explained, it leaves the parties in exactly the same situation they were in before the offer was made—or, put another way, exactly the position they would be in had no offer ever been made. *Symczyk*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting). Because an unaccepted offer is withdrawn by operation of Rule 68 and does not satisfy the plaintiff's claim, the *Sycmzyk* majority's observation that *satisfaction* of a plaintiff's claim can moot the controversy between the parties says nothing about whether unaccepted Rule 68 offers can do so, and is in no way inconsistent with

[5] Notably, Justice Kagan agreed with the majority on this point, acknowledging that if a plaintiff accepts a settlement, "of course, all is over; like any plaintiff, she can assent to a settlement ending her suit." *Symczyk*, 133 S. Ct. at 1535 (Kagan, J., dissenting). The majority's footnote disagreed with Justice Kagan on a different point: her statement that the situation where an individual plaintiff's claim was satisfied before a collective action was resolved "should never arise." *Id.* at 1536 (Kagan, J., dissenting). The majority was correct that individuals seeking to assert class or collective claims sometimes settle or otherwise resolve their individual claims while class or collective issues remain unresolved. *See*, *e.g.*, *Muro v. Target Corp.*, 580 F.3d 485 (7th Cir. 2009).

Justice Kagan's demonstration that they cannot. This Court therefore can, and should, consider her persuasive reasoning even though her opinion, like all other dissents, is not binding authority.

This Court's description of mootness in *Citizens for the Responsible Government State PAC v. Davidson*, 236 F.3d 1174, cited by the district court below, reinforces Justice Kagan's analysis. As this Court put it in *Davidson*, a case becomes moot when "the parties lack a legally cognizable interest in the outcome." *Id.* at 1182. A lapsed offer does nothing to deprive the parties of a legally cognizable interest in the outcome of the case: The defendant, whose offer is no longer open, retains an interest in opposing any recovery by the plaintiff, while the plaintiff, who has received no redress, retains her interest in obtaining a judgment awarding relief.

Moreover, this Court has not resolved the specific question whether an unaccepted Rule 68 offer that would provide complete relief to an individual plaintiff moots her claims. In *Lucero v. Bureau of Collection Recovery*, 639 F.3d 1239, this Court considered whether a Rule 68 offer to a named plaintiff in a putative (but uncertified) class action that would have provided complete relief on the plaintiff's individual claims mooted

the plaintiff's attempt to represent a class. The Court noted that some other courts had held that an offer of judgment could moot a plaintiff's individual claims, but that it had not done so. *See id*. at 1243. The Court went on to hold that, in any event, such an offer does not moot a proposed class action if the plaintiff proceeds to seek class certification in a timely manner. *Id*. at 1250. The Court therefore had no need to, and did not, definitively resolve whether the offer mooted the plaintiff's individual claims. Thus, as district courts in this Circuit have concluded, this Court has not "conclusively address[ed] the matter," but has "carefully avoid[ed] deciding the question." *Delgado v. Castellino Corp.*, __ F. Supp. 2d __, __, 2014 WL 4339232 at * 3 (D. Colo. Sept. 2, 2014); *see also Perez v. Pinon Mgmt., Inc.*, 2014 WL 5596261 at *7 (D. Colo. Nov. 4, 2014) (explaining absence of controlling authority on the point). The Court is therefore free to accept Justice Kagan's compelling reasoning.

C. The weight of recent authority rejects the district court's approach.

Courts faced with claims that cases are moot in light of unaccepted Rule 68 offers have, since *Symczyk*, recognized the force of Justice Kagan's reasoning and adopted it as a rule of decision. Most recently, the Eleventh Circuit in *Stein v. Buccaneers Limited Partnership*, 772 F.3d

698, held unequivocally that an unaccepted Rule 68 offer of judgment does not meet the criteria for rendering a case moot: It does not, in itself, provide redress for the plaintiff's grievance or make it impossible for a court to grant effectual relief. *See* 772 F.3d at 702. Emphasizing that, under the terms of the Rule, an unaccepted offer is withdrawn and has no effect outside a post-judgment proceeding to allocate costs, the court stated that "[g]iving controlling effect to an unaccepted Rule 68 offer—dismissing a case based on an unaccepted offer as was done here—is flatly inconsistent with the rule." *Id*. The court expressed its complete agreement with Justice Kagan's view that an unaccepted offer neither redresses the plaintiff's injury nor makes it impossible for the court to provide redress. *Id*. at 702–03. After the offer expires, "the plaintiff[] still ha[s] [her] claims, and [the defendant] still ha[s] its defenses." *Stein*, 772 F.3d at 702. Because the parties retain concrete interests that will be affected by judicial resolution of the case, the offer does not moot the case. *Stein*, 772 F.3d at 702, 704.

The Ninth Circuit, likewise, has adopted Justice Kagan's analysis and held that an unaccepted Rule 68 offer does not moot an individual's claim. *See Diaz v. First Am. Home Buyers Protection Corp*. 732 F.3d at

954–55; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014) (reaffirming *Diaz*). Like this Court, the Ninth Circuit had, before *Symczyk*, never squarely held that an unaccepted Rule 68 offer of judgment could moot a claim. It had, however, issued opinions that *assumed* that a Rule 68 offer for complete relief would moot a plaintiff's individual claim, while holding that such an offer did not moot class claims. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090–92 (9th Cir. 2011). Following *Symczyk*, the court recognized that its assumption in *Pitts* was not binding precedent on the issue (just as this Court's decision in *Lucero* contains no holding that individual claims are mooted by Rule 68 offers), and that the assumption that unaccepted Rule 68 offers can moot individual claims was no longer viable in the face of Justice Kagan's convincing reasoning. *See Diaz*, 732 F.3d at 952, 954–55.

Based on "the language, structure and purposes of Rule 68" and "fundamental principles governing mootness," *Diaz* held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Id*. at 954–55. Such an offer, once it lapsed, "was, by its own terms and under Rule 68, a legal nullity," and thus it did not render it "impossible for a court to grant 'any

effectual relief whatever to the prevailing party.'" *Id*. at 955 (quoting *Knox*, 132 S. Ct. at 2287 (citation omitted)). Rather, the plaintiff's "individual stake in the lawsuit … remained what it had always been, and ditto the court's capacity to grant her relief. After the offer lapsed, just as before, [she] possessed an unsatisfied claim, which the court could redress by awarding her damages. As long as that remained true, [her] claim was not moot …." *Id*. (quoting *Symczyk*, 133 S. Ct. at 1534 (Kagan, J., dissenting)).

Since *Symczyk*, no federal appellate court has expressed disagreement with Justice Kagan's analysis. The Second, Fifth, and Seventh Circuits have all recognized that the question whether a Rule 68 offer of complete relief can moot a plaintiff's claim remains unresolved in light of *Symczyk*, although the circumstances of the cases before them did not require resolution of the issue. *See Cabala v. Crowley*, 736 F.3d 226, 228 n.2 (2d Cir. 2013); *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 608 n.1 (5th Cir. 2014); *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824 (5th Cir. 2014); *Scott v. Westlake Servs. LLC*, 740 F.3d 1124, 1126 n.1 (7th Cir. 2014); *Smith v. Greystone Alliance, LLC*, 772

F.3d at 450.[6] The Seventh Circuit, which before *Symczyk* had held that Rule 68 offers of complete relief moot individual claims, has twice acknowledged that Justice Kagan's reasoning provides "reasons to question our approach to the problem." *Scott*, 704 F.3d at 1126 n.1; *see also Smith*, 772 F.3d at 450.

Meanwhile, a number of thoughtful district court opinions, including two in this Circuit, have recognized the force of Justice Kagan's reasoning. *See, e.g., Perez v. Pinon Mgmt., Inc.*, 2014 WL 5596261 at *7; *Delgado v. Castellino Corp.*, 2014 WL 4339232 at *4; *Boucher v. Rioux*, 2014 WL 4417914 (D.N.H. Sept. 8, 2014); *Bais Yaakov of Spring Valley v. ACT, Inc.*, 987 F. Supp. 2d 124, 128 (D. Mass. 2013) ("With no controlling precedent in the First Circuit, this Court has looked to the reasoning expressed by other courts on this issue, and is persuaded by that expressed [by] the Ninth Circuit in *Diaz* and by

[6] The Sixth Circuit avoided the need to decide the issue in the wake of *Symczyk* by finding that the offer before it did not provide complete relief. *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567–70 (2013). The Second Circuit, in *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78 (2d Cir. 2013), found a case moot based on an offer of judgment, but did not consider Justice Kagan's analysis because the parties did not contest that a Rule 68 offer of complete relief can moot a claim.

Justice Kagan's dissent in *Genesis Healthcare*."), *interlocutory appeal pending*, No. 14-1789 (1st Cir.).

The weight of reasoned precedent since *Symczyk* thus strongly reinforces Justice Kagan's views and supports the conclusion that the district court in this case must be reversed because an unaccepted Rule 68 offer, following which the plaintiff's claims remain unredressed, does not moot a case or deprive a court of subject-matter jurisdiction.

D. The argument that Rule 68 offers render claims moot has paradoxical implications.

The position accepted by the district court in this case has perverse consequences and would, taken seriously, seriously undermine Rule 68 by precluding entry of judgment even on an offer that was *accepted*. No proposition is more fundamental than that a court cannot enter an enforceable judgment in a case over which it has no subject-matter jurisdiction: "[A] judgment is void if the court that enters it lacks jurisdiction over either the subject matter of the action or the parties to the action." *United States v. 51 Pieces of Real Prop.*, 17 F.3d 1306, 1309 (10th Cir. 1994). "Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Cunningham v. HHP Petrol. Great Britain PLC*, 427 F.3d 1238, 1245

(10th Cir. 2005) (quoting *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409–10 (11th Cir. 1999)). A court that lacks jurisdiction may not enter a judgment even with the consent of the parties. *See White v. Comm'r of Internal Revenue*, 776 F.2d 976, 977 (11th Cir. 1985); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without 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.") (quoting *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868)); 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.").

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 of complete relief 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*. *See Steel Co.*, 523 U.S. at 94; *Cunningham*, 427 F.3d at 1245. The Supreme Court's

promulgation of a rule contemplating the entry of a judgment on an accepted Rule 68 offer, however, quite evidently reflects the view that the offer itself does *not* deprive the court of jurisdiction, and counsels against adoption of a view of mootness that would, taken seriously, effectively negate the rule.

The notion that a Rule 68 offer moots a case has equally bizarre consequences where, as here, 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. Thus, the theory that the mere offer of judgment under Rule 68 renders a case moot seemingly requires 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, contradicts the basis for the theory that the case is moot—that is, that the plaintiff has no live claim because she has received full redress—because it effectively denies the plaintiff any means of redress.

A court cannot declare a claim for damages moot while at the same time "send[ing] [the plaintiff] away empty-handed." *Symczyk*, 133 S. Ct. at 1534 (Kagan, J., dissenting). But that is exactly what the district court

did here based on its erroneous 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," *Greisz v. Household Bank (Ill.)*, 176 F.3d 1012, 1015 (7th Cir. 1999), but the plaintiff who supposedly "won" gets nothing. That theory makes no sense. Rather, 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).

Dismissing the claim of a plaintiff who does not accept a Rule 68 offer thus does not reflect genuine mootness concerns, but simply "imposes dismissal as a litigation penalty for persisting with a claim notwithstanding the offer." Br. for United States 12, *Symczyk*, *supra* note 4. Neither Rule 68 itself nor any other law or rule authorizes a penalty for declining an offer other than the potential imposition of costs at the end of the action. *See id.* at 12–13.[7]

[7] 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 if the defendant in fact consents to the entry of a judgment for all the relief sought in a complaint: "[A] court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally

In short, the theory that an unaccepted Rule 68 offer can moot a case fails to recognize that a case is not moot as long as a plaintiff has an injury that a court can redress through a judgment against the adverse party. *Windsor*, 133 S. Ct. at 2685. If the law were otherwise, a defendant could, by conceding liability, paradoxically either *avoid* an adverse judgment or prompt a court to enter a judgment in a case in which it has just held it lacks jurisdiction to do so. Neither alternative makes sense.

II. CCS did not offer complete relief on Ms. Jacobson's claims as they stood at the time of the offer.

Even courts that have accepted the possibility that an unaccepted Rule 68 offer may moot a claim have insisted that the offer be complete—that is, that it offer everything sought by the plaintiff, not merely the maximum that the defendant believes she is entitled to recover. *See, e.g.,*

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surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *accord*, *Diaz*, 732 F.3d at 955; *see*, *e.g.*, *Husain v. Springer*, 691 F. Supp. 2d 339, 341–42 (E.D.N.Y. 2009) (citing *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.,* 485 F.3d 85, 93 (2d Cir. 2007)). Judgment in the plaintiff's favor is appropriate in such a situation not because the court lacks jurisdiction, but because the court *has* jurisdiction and there is no contest before it over whether judgment should be entered fully resolving plaintiff's claims. In other words, the defendant's consent to the entry of a judgment authorizes the Court to exercise its jurisdiction by entering the consented-to judgment. A Rule 68 offer that has expired, and under which the defendant's consent to entry of judgment has been withdrawn, carries with it no such consequences.

Smith v. Greystone Alliance, 772 F.3d at 449; *Scott v. Westlake Servs.*, 740 F.3d at 1127; *Hrivnak v. NCO Portfolio Mgmt.*, 719 F.3d at 567. "An offer limited to the relief the *defendant* believes is appropriate does not suffice." *Id*. As the Seventh Circuit recently stated, even under the view that a complete offer may moot a claim, "[a] controversy exists when the plaintiff wants more, or different relief than the defendant is willing to provide. … [If] A demands $200,000, and B offers $110,000, there is a justiciable controversy even if B insists that A's legal entitlement is less than the offer. To know whether A's entitlement exceeds $110,000, the court would have to decide the merits." *Smith*, 772 F.3d at 449–50.

In this case, Ms. Jacobson's complaint, the only statement of her claims at the time the Rule 68 offer was open, was not by its terms limited to statutory damages: It requested damages under 15 U.S.C. § 1692k in an amount to be determined at trial. CCS's Rule 68 offer encompassed only the maximum statutory damages of $1000 (plus an additional dollar). CCS thus offered "only what it [thought] might be due." *Scott*, 740 F.3d at 1126. Such an offer "does not render the plaintiff's case moot" under any view of mootness. *Id*.

Not until months after the offer had expired did Ms. Jacobson waive any claim for actual damages and expressly limit her demand to statutory damages (plus fees and costs). By then, the Rule 68 offer was no longer pending, and CCS did not renew it. At no point in the case did CCS offer to consent to an entry of judgment that satisfied all Ms. Jacobson's demands at the time. The case therefore always satisfied the fundamental jurisdictional requirement that the parties maintain a stake in the outcome "through all stages of federal judicial proceedings." *Lewis v. Cont'l Bank*, 494 U.S. at 477.

For this reason, even if a complete Rule 68 offer could ever moot a claim, the district court erred in holding that Ms. Jacobson's case was moot just because CCS had offered, months before, an amount that would, *if offered again*, have satisfied her claims after the course of litigation had subsequently "whittle[d] down the amount in controversy." *Smith*, 772 F.3d at 450. As the Seventh Circuit put it in *Smith*, the determination that a plaintiff is entitled only to a "small recovery" that is lower than an offer made (and withdrawn) many months earlier "does not retroactively terminate federal jurisdiction." *Id*.

III. Even if the expired Rule 68 offer provided a proper basis for terminating this action, it was improper for the district court to deny Ms. Jacobson any recovery.

As explained above, there is a fundamental contradiction between asserting that there is no case or controversy because a defendant has offered to provide a plaintiff with full redress and sending the plaintiff away empty-handed with no recovery whatsoever. As Justice Kagan explained in *Symczyk*, and the Eleventh and Ninth Circuits subsequently held in *Stein* and *Diaz*, the proper response to that contradiction is recognition that the plaintiff's claims are not moot and that the expired Rule 68 offer provides no basis for terminating her action. Moreover, even among those courts that, before *Symczyk*, expressed the view that an unaccepted Rule 68 offer could provide a basis for dismissal of a plaintiff's claims, the majority rule was that "a plaintiff's claims could not just be dismissed as was done here; the proper approach, the courts said, was to enter judgment for the plaintiff in the amount of the unaccepted offer." *Stein*, 772 F.3d at 703 (citing *O'Brien v. Ed Donnelly Enters., Inc.,* 575 F.3d 567, 575 (6th Cir. 2009); *McCauley v. Trans Union, L.L.C.,* 402 F.3d 340 (2d Cir. 2005)). Thus, as the Eleventh Circuit stated in *Stein*, even if there were some merit to the view that an

unaccepted Rule 68 offer of complete relief justifies ending a plaintiff's action, a court of appeals "would be unable to affirm the dismissal of the plaintiffs' claims without the entry of judgment for the amount of the Rule 68 offers." *Id*. Absent such a judgment, there is no possible basis for concluding that the plaintiff does not maintain live claims for redress.

Here, the district court dismissed Ms. Jacobson's case on the theory that she had no live claims for relief, but it denied her the recovery she would be entitled to if she prevailed on her claims and left her with no relief whatsoever. If CCS insists that its offer of complete relief provides a basis for ending Ms. Jacobson's case, it must be compelled to put its money where its mouth is through the entry of a judgment that actually provides her the relief that CCS says has terminated the controversy between the parties. Merely dismissing the case, as the district court did here, is error even under the incorrect view that an unaccepted (and lapsed) Rule 68 offer can be given legal effect.

IV. The clerk of the district court erred in entering a judgment against Ms. Jacobson that awarded costs.

The day after the district court's order dismissing the action for lack of subject matter jurisdiction, the clerk of the court, without direction from the court, entered a judgment reciting that the action was

dismissed without prejudice and providing for taxation of costs against Ms. Jacobson under Federal Rule of Civil Procedure 54(d)(1). The court's order had made no determination concerning the award of costs.

The judgment, including the award of costs, must be vacated if, as demonstrated above, the district court's order dismissing the action for lack of subject-matter jurisdiction was erroneous. Even if the dismissal could be sustained, however, the clerk's inclusion in the judgment of dismissal of a provision authorizing costs under Rule 54(d)(1) was improper.[8] Costs in an action dismissed for lack of subject-matter jurisdiction are not governed by Rule 54(d)(1), under which there is a presumption that the prevailing party's costs are to be included in a merits judgment unless the court provides otherwise by order (or the award is precluded by statute or rule). Rather, the availability of costs in an action dismissed for lack of subject matter jurisdiction is determined by 28 U.S.C. § 1919, which provides that "[w]henever any action or suit is dismissed in any district court … for want of jurisdiction, such court

[8] The propriety of the inclusion of costs in the judgment in this case is subject to de novo review on appeal because it is a purely legal question. *See, e.g., United States v. Diaz*, 989 F.3d 391, 392 (10th Cir. 1993) ("We review interpretations of law *de novo*.").

may order the payment of just costs." *See Callicrate v. Farmland Indus., Inc.*, 139 F.3d at 1339. The statute requires that the *court* exercise its "judicial discretion" to determine both whether to award costs and whether the costs awarded are just and reasonable. *Id*.

Here, the district judge did not exercise discretion under § 1919 and issued no order requiring payment of costs. The clerk's pro forma inclusion of costs under Rule 54(d)(1) was unauthorized and must be reversed even if the dismissal of the action were proper.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing the action for lack of subject-matter jurisdiction, vacate the judgment and cost award entered by the clerk of the court, and remand for further proceedings.

Respectfully submitted,

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January 9, 2015

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-appellant/cross-appellee Rose Jacobson respectfully requests that the Court hear oral argument in this appeal. Oral argument would be helpful to the Court because this case presents important issues concerning the relationship between Rule 68 offers of judgment and mootness that this Court has not previously resolved, that frequently arise, and that have taken on nationwide importance in the wake of the Supreme Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). In resolving these issues, the Court would likely benefit from the full exploration that oral argument would allow.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS OF FED. R. APP. P. 32(A) AND WITH THIS COURT'S ELECTRONIC FILING REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Century Schoolbook BT.

3. This brief complies with the requirements for redaction of private information; it is identical to the paper copy of the brief; and the electronic file containing it has been scanned for viruses with an updated version of a commercial virus scanning program (Windows Defender) and is free from viruses.

/s/ Scott L. Nelson

January 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2015, the foregoing Brief for Plaintiff-Appellant/Cross-Appellee has been served through this Court's electronic filing system upon counsel for the defendant-appellee.

/s/ Scott L. Nelson

ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03307-WYD-MJW

ROSE JACOBSON,

Plaintiff,

v.

CREDIT CONTROL SERVICES, INC., a Delaware corporation,

Defendant.

ORDER

I. INTRODUCTION AND BACKGROUND

This matter is before the Court on the Defendant Credit Control Services, Inc.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) (ECF No. 15).

On December 9, 2013, Plaintiff Rose Jacobson filed a complaint alleging that Defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"). Plaintiff claims that the Defendant violated the FDCPA by, among other things, making false representations in connection with its attempts to collect Plaintiff's debt. (Compl. ¶¶ 1-62). In her prayer for relief, Plaintiff seeks "[d]amages pursuant to 15 U.S.C. § 1692k(a)" and "[r]easonable attorneys fees and costs pursuant to 15 U.S.C. § 1692k(a)(3)." (Compl. at 11).

On January 7, 2014, Defendant tendered Plaintiff an Offer of Judgment pursuant to Fed. R. Civ. P. 68. (ECF No. 15-1). Rule 68 states in relevant part, "[a]t least 14 days before the date set for trial, 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." Fed. R. Civ. P. 68(a). If a plaintiff rejects a Rule 68 offer, he or she must pay costs incurred after the offer was made if the amount awarded at trial is less than the offer. Fed. R. Civ. P. 68(d). Defendant's Offer of Judgment stated that pursuant to Fed. R. Civ. P. 68,

> Defendant hereby offers to allow judgment to be taken against it in favor of Plaintiff Rose Jacobson, ... as follows:
>
> 1) Judgment shall be entered in the total amount of One Thousand One Dollars ($1,001.00), as against Defendant;
>
> 2) In addition, Plaintiff's costs and reasonable attorneys' fees are to be added to the judgment as against Defendant; said fees and costs shall be as are agreed to between counsel for the parties, or if they are unable to agree, as determined by the Court upon motion; ...

(ECF No. 15-1 at 1). Plaintiff did not accept Defendant's Offer of Judgment within fourteen days. On May 19, 2014, the Defendant filed the pending motion to dismiss.

II. DISCUSSION

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Instead, it is a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of a complaint. *See Casteneda v. I.N.S.*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The party asserting jurisdiction has the burden of establishing subject matter

jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). Should the court lack jurisdiction, it "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Id.* The dismissal is without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006).

In general, a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction takes on two forms: a "facial attack" on the complaint's allegations in which the court must accept the allegations as true, and a "factual attack," in which the court has wide discretion to review matters outside the pleadings to resolve jurisdictional facts. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995) (internal citations omitted). Here, Defendant proffers this motion as a "factual attack" with respect to subject matter jurisdiction. When making a Rule 12(b)(1) "factual attack," a party may rely on affidavits or other evidence properly before the court. *See New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *Holt*, 46 F.3d at 1003. A court has broad discretion to consider affidavits or other documents to resolve disputed jurisdictional facts under Rule 12(b)(1). *Id.* In those instances, a court's reference to evidence outside the pleadings does not necessarily convert the motion to a Rule 56 motion for summary judgment. *Id*.

Section 1692k(a) of the FDCPA states, in relevant part, that debt collectors who violate the FDCPA are liable to plaintiffs in an amount equal to the sum of: "(1) any actual damage sustained by such person as a result of such failure; (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not

exceeding $1,000." 15 U.S.C. § 1692k(a). Here, Plaintiff's Complaint seeks damages, reasonable attorney's fees and costs. However, in the pending motion to dismiss, Defendant argues that because Plaintiff filed a notice clarifying that she is waiving her claim for actual damages, Defendant's Offer of Judgment of $1001.00 plus attorney's fees and costs constituted the total relief available to Plaintiff should the case proceed to trial. (ECF No. 14). Defendant goes on to maintain that "Plaintiff's failure to accept Defendant's Offer of Judgment, which offered her in excess of what she can possibly recover at trial renders her case moot and entitles her to no award." (ECF No. 15 at 7).

A majority of circuits have accepted Defendant's argument that an Offer of Judgment for the full relief to which a plaintiff is entitled may moot a case. *See Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1243 (10th Cir. 2011) (stating that "[w]hile [the Tenth Circuit] has yet to address the question squarely, other circuits have concluded that if a defendant makes an offer of judgment in complete satisfaction of a plaintiff's claims ... the plaintiff's claims are rendered moot because he lacks a remaining interest in the outcome of the case"); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574 (6th Cir. 2009); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991); *contra Diaz v. First Am. Homes Buyers Prot. Corp.*, 732 F.3d 948, 953-55 (9th Cir. 2013).

Given the authority cited above and the Tenth Circuit's apparent approval of that line of cases, I agree with Defendant's argument that when an Offer of Judgment

unequivocally offers a plaintiff all the relief she sought to obtain, the offer renders the plaintiff's action moot. *See Warren*, 676 F.3d at 371; *see Lucero*, 639 F.3d at 1243. Here, because Plaintiff waived her claim for actual damages (ECF No. 14), I find that Defendant's unequivocal Offer of Judgment of $1001.00 plus reasonable attorney's fees and costs offered Plaintiff an amount that exceeds what she can recover pursuant to 15 U.S.C. § 1692k(a). Thus, Plaintiff's action is moot and must be dismissed for lack of subject matter jurisdiction. *See Citizens for the Responsible Government State PAC v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (holding that "[a] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" and "[t]he parties must continue to have a personal stake in the outcome throughout the case").

III. CONCLUSION

Based on the foregoing, it is

ORDERED that Defendant Credit Control Services, Inc.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) (ECF No. 15) is **GRANTED.** Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**.

Dated: September 17, 2014

BY THE COURT:

s/ Wiley Y. Daniel
WILEY Y. DANIEL,
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03307-WYD-MJW

ROSE JACOBSON,

Plaintiff,

v.

CREDIT CONTROL SERVICES, INC., a Delaware corporation,

Defendant.

FINAL JUDGMENT

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Order, filed on September 17, 2014, by the Honorable Wiley Y. Daniel, Senior United States District Judge, and incorporated herein by reference as if fully set forth, it is hereby

ORDERED that judgment is hereby entered in favor of Defendant, Credit Control Services, Inc., and against Plaintiff, Rose Jacobson, on Defendant Credit Control Services, Inc.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) [ECF Doc. No. 15]. It is further

ORDERED that plaintiff's complaint and action are dismissed without prejudice. It is further

ORDERED that Defendant shall have it costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen (14) days of entry of judgment, and pursuant to the procedures set forth in Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED at Denver, Colorado this 18th day of September, 2014.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

/s/ Robert R. Keech
Robert R. Keech,
Deputy Clerk