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.

RESPONSE AND REPLY BRIEF FOR APPELLANT/CROSS-APPELLEE

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SUMMARY OF ARGUMENT

The position of the appellee/cross-appellant, Credit Control Services, Inc. (CCS), is fundamentally at odds with itself. CCS denies that appellant/cross-appellee Rose Jacobson is entitled to the relief she seeks in this action, and its cross-appeal seeks a merits judgment in its favor. At the same time, however, CCS asserts that the action is moot because there is no dispute between the parties that could be resolved by the court.

CCS cannot have it both ways. If it continues to deny Ms. Jacobson's entitlement to relief and resists the entry of a judgment by the district court that would provide her the redress she seeks, its argument that the action is moot cannot conceivably be correct. If CCS does not dispute Ms. Jacobson's entitlement to the relief she seeks, the district court should have entered judgment in her favor. But in neither event was it proper to turn her away with no recovery, and still less would it be proper to grant CCS a merits judgment—that is, a dismissal with prejudice—simply because Ms. Jacobson at one point in the case turned down an offer of judgment that, had it still been open when she reduced her claims, would have provided complete relief.

CCS's contrary arguments are unconvincing. CCS offers no analysis to overcome the fundamental point stressed by Justice Kagan in her influential dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2012) (Kagan, J., dissenting): A case is not moot unless it is impossible for a court to grant effectual relief, and an unaccepted offer of judgment under Rule 68, which provides the plaintiff with nothing and is a legal nullity, does not make effectual relief impossible. CCS relies on appellate decisions predating *Symczyk*, yet none of those opinions comes to grips with the fundamental flaw Justice Kagan identified in their mootness analysis, and no post-*Symczyk* federal appellate opinion that has addressed her opinion has rejected its logic.

Moreover, CCS's offer did not satisfy the fundamental requirement imposed by those courts that have said an offer may moot a case: It did not offer complete satisfaction of the claims she was asserting. Only months after the offer expired did Ms. Jacobson reduce her claims, and at that point CCS refused to offer satisfaction. As the Seventh Circuit has clearly explained, the reduction of a plaintiff's demands does not retroactively make an offer that is no longer available sufficient to moot a case.

Smith v. Greystone Alliance, LLC, 772 F.3d 448 (7th Cir. 2014). CCS has no answer; indeed, it does not address the point.

Even if CCS's offer provided a proper basis for resolving Ms. Jacobson's case, it could not justify dismissing the case without entering judgment for her in the amount of the offer. CCS's theory that a plaintiff who rejects an offer of complete relief loses outright because "[y]ou cannot persist in suing after you've won," makes no sense. CCS Br. 37 (quoting *Greisz v. Household Bank (Ill.)*, 176 F.3d 1012, 1015 (7th Cir. 1999)). A plaintiff who is sent away empty-handed has not "won" anything. If a plaintiff's case must be ended because she has "won," the defendant must accept the consequence of her victory: a judgment in her favor..

The judgment below was also improper in providing that CCS would have its costs when the court itself did not, as CCS had requested, order that CCS was receive costs. Under 28 U.S.C. § 1919, which governs costs in cases where a court dismisses for lack of jurisdiction, costs are awarded through a court order. Section 1919 thus "provides otherwise" than Rule 54(d), which provides for costs when the court's order is silent. CCS's contrary position is unsupported by precedent, and its assertion that the issue is not properly before this Court is wrong: The cost enti-

tlement was included in a final, appealable judgment, and Ms. Jacobson had no prior opportunity to raise the purely legal issue of the judgment's propriety because the clerk included costs sua sponte.

Finally, CCS's cross-appeal is completely without merit. CCS contends that the district court's dismissal should have been with prejudice. But a dismissal with prejudice is a merits adjudication. If the district court were correct in holding that it lacked subject matter jurisdiction, it would have no authority to adjudicate the merits. Thus, this Court has repeatedly held that a dismissal for lack of subject matter jurisdiction (including on Article III justiciability grounds) is without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213 (10th Cir. 2006).

ARGUMENT

I. An unaccepted offer of judgment cannot moot a plaintiff's claims.

A. A lapsed offer does not make it impossible for the court to grant relief.

CCS concedes that a case is moot only when it becomes "impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012)); *see* Appee. Br. 18.

But CCS's lapsed offer of judgment by no means made it impossible for the district court to grant effectual relief to Ms. Jacobson if she were to prevail. At no point in the proceedings did CCS provide Ms. Jacobson any redress, and even while moving to dismiss her claims it continued to dispute that it had any liability to her and to resist the entry of a judgment in her favor. "In short, the plaintiff[] still had [her] claims, and [CCS] still had its defenses. [CCS] had not paid the plaintiff[], [and] was not obligated to pay the plaintiff[]." *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 702 (11th Cir. 2014).

Under such circumstances, the district court could readily grant Ms. Jacobson effectual relief: It could enter a judgment in her favor for the statutory damages and other relief she sought. Because Ms. Jacobson "possessed an unsatisfied claim, which the court could redress by awarding her damages, … [her] claim was not moot, and the District Court could not send her away empty-handed." *Symczyk*, 133 S. Ct. at 1534 (2012) (Kagan, J., dissenting). CCS offers no reasoned analysis to refute Justice Kagan's logic, or that of the Eleventh and Ninth Circuit decisions that have since adopted her analysis. *See Stein*, 772 F.3d at 703; *Diaz v. First Am. Home Buyers Prot. Corp.,* 732 F.3d 948, 954–55 (9th Cir. 2013).

Wholly absent from CCS's brief is any explanation of how an unredressed and disputed claim for relief could possibly be moot, or how an unaccepted offer could make effectual relief impossible.

Instead of arguing that it was impossible for the district court to grant effectual relief, CCS says only that once Ms. Jacobson reduced her claim to statutory damages, it was impossible for the court *to award more than CCS had earlier offered*. Appee. Br. 20. CCS's observation is irrelevant. The court could still, indisputably, have awarded relief that was effectual and would have resolved the ongoing dispute between the parties. That the relief would not have been greater than CCS's withdrawn offer could not possibly mean that the court lacked jurisdiction to award it.

Indeed, Rule 68 expressly contemplates that a court may ultimately issue a judgment that is less than an earlier, rejected offer. *See* Fed. R. Civ. P. 68(d). If a case were moot whenever the amount the plaintiff was entitled to recover ended up being less than a previous unaccepted offer, then Rule 68(d) would never operate, because the court would lack the power to enter the judgment for the plaintiff that is the predicate of Rule 68(d)'s cost-shifting provision. *See Delta Air Lines, Inc. v. August*, 450

U.S. 346, 352 (1981) (holding that Rule 68(d) applies only when a plaintiff obtains a judgment in her favor that is less favorable than an offer of judgment she earlier declined to accept).

Unable to refute Justice Kagan's analysis itself, CCS wrongly asserts that the majority in *Symczyk* rejected it. *See* Appee. Br. 22 (citing *Symczyk*, 133 S. Ct. at 1529 n.4). But the majority clearly said—in the very footnote CCS cites—that "we do not resolve the question whether a Rule 68 offer that fully satisfies the plaintiff's claims is sufficient to moot the action." *Symczyk*, 133 S. Ct. at 1529 n.4; *see also id*. at 1528–29 ("[W]e do not reach this question."). CCS maintains that the majority "acknowledged the court of appeals' decisions which have held that a case may be rendered moot by 'an unaccepted offer of complete relief alone.'" Appee. Br. 22 (quoting *Symczyk*, 133 S. Ct. at 1529 n.4). What the majority "acknowledged," however, was the *existence* of such decisions, as well as of decisions holding to the contrary. *See Symczyk* 133 S. Ct. at 1528 & n.3, 1529 n.4. The majority did not acknowledge the *correctness* of any view on the question, which it insisted it was not deciding. *See id*.

CCS hangs its hat on the majority's footnoted observation that "nothing in the nature of FLSA actions precludes satisfaction—and thus the mooting—of the individual's claim." *Symczyk*, 133 S. Ct. at 1529 n.4. That statement recognizes that complete *satisfaction* of a claim terminates the controversy between the parties because it makes the award of further relief impossible.[1] It says nothing about whether an offer that has been rejected, and pursuant to which the plaintiff has received no satisfaction, can moot a claim. Here, it is undisputed both that Ms. Jacobson's claim has not been satisfied and that CCS is resisting its satisfaction. CCS can therefore take no comfort in the *Symczyk* majority's observation about the consequences of satisfaction of a claim.

B. CCS's invocation of appellate precedents is unpersuasive.

CCS is likewise off the mark in contending that this Court's decision in *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011), supports its position on mootness. Once more relying on what an opinion "acknowledged" rather than what it held, CCS states that *Lucero* "acknowledged the authority stating that a Rule 68 offer for the

[1] *See, e.g.*, *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009) (holding that where a plaintiff's claims had been "'fully satisfied' by a monetary judgment" they were moot).

plaintiff's maximum recover[y] may render the action moot." Appee. Br. 27. Again, however, the Court in *Lucero* "acknowledged" only the existence of decisions of "other circuits." 639 F.3d at 1243. The Court was careful to note that "we have yet to address the question," *id*., and the Court did not decide the issue in *Lucero* because it held that a class action would not be mooted even if an offer of judgment mooted the named plaintiff's individual claims. *See id*. at 1250.

Beyond its misplaced reliance on the *Symczyk* majority and *Lucero*, CCS relies principally on the weight of what it calls the view of "the majority of circuits" that a complete offer of judgment may moot a claim. Appee. Br. 14. CCS's nose count is particularly unpersuasive. *See United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995) (deciding cases is not an exercise of "count[ing] noses" of other circuits). First, CCS does not contest that no court of appeals has, since *Symczyk*, addressed and rejected Justice Kagan's reasoning. And the pre-*Symczyk* decisions CCS cites offer no analysis of *how* an offer that is no longer operative, and pursuant to which the plaintiff has received nothing, could make it impossible for a court to grant effectual relief—the necessary condition for any finding of

mootness. Those decisions thus offer no counterweight to the reasoning of Justice Kagan and the recent decisions in *Stein* and *Diaz*.

Second, many if not most of the cases CCS cites as constituting the "majority" view do not support the outcome below. Rather than permitting a court to send a plaintiff away empty-handed, those cases require that any termination of a case based on an offer of judgment be accompanied by entry of judgment in favor of the plaintiff in the amount of the offer. *See*, *e.g.*, *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, 342 (2d Cir. 2005). As the Eleventh Circuit pointed out in *Stein*, to the extent there was a pre-*Symczyk* "majority" rule on the question whether it is permissible to dismiss a plaintiff's claims *with no relief* based on an unaccepted offer of judgment, the majority rejected that proposition. 772 F.3d at 703.

One court of appeals—the Seventh Circuit—did, before *Symczyk*, actually affirm dismissal of a plaintiff's claim on the theory that a plaintiff who rejects an offer of judgment "loses outright." *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011); *see also Greisz*, 176 F.3d at

1015.[2] Since *Symczyk*, however, the Seventh Circuit has stated explicitly that in light of Justice Kagan's opinion "there are reasons to question our approach to the problem," *Scott v. Westlake Servs. LLC*, 740 F.3d 1124, 1126 n.1 (7th Cir. 2014); *see also Smith v. Greystone Alliance, LLC*, 772 F.3d at 450 (noting that *Scott* "flagged [the] issue" of whether the court should reconsider *Damasco*). That court has also recognized that labeling a case "moot" because of an offer of judgment is at least a misnomer because "[a] suit is moot when relief is impossible, … and there's no doubt that a court could provide [a plaintiff who rejected an offer] with relief in the form of money damages." *Id*. at 449. To be sure, the Seventh Circuit has not yet revisited its precedents—because the circumstances of neither *Scott* nor *Smith* required it to do so—but its own doubts as to their analytic soundness undermine whatever persuasive effect they might otherwise have.

[2] Leaving aside decisions that expressly disagree with it, the Seventh Circuit's "loses outright" language has been quoted in parentheticals in only two opinions of other circuits. In those cases, however, it did not serve as the basis for holdings that a plaintiff's claim may be dismissed without providing her any relief, as the decisions in question held the actions not moot for other reasons. *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 n.5 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004).

C. CCS has not unconditionally surrendered, and dismissal would be improper even if it had.

CCS points out that Justice Kagan in *Symczyk* and the Eleventh Circuit in *Stein* recognized that a court may properly terminate a case where, instead of making an offer subject to Rule 68's conditions, which render the offer a nullity if not accepted, the defendant consents outright to entry of judgment for complete relief and thus "unconditionally surrenders." Appee. Br. 24 (quoting *Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting)). Of course, in a case (like this one) that presents only individual claims, a court may *enter judgment for the plaintiff* if the defendant consents or defaults; if that judgment provides all the relief the plaintiff seeks, the plaintiff cannot object. *See ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.,* 485 F.3d 85, 93–94 (2d Cir. 2007); *McCauley*, 402 F.3d at 341–42. "[I]f the defendant has thus thrown in the towel there is nothing left for the district court to do except enter judgment." *Chathas v. Local 134 IBEW,* 233 F.3d 508, 512 (7th Cir. 2000).

That principle does not help CCS here, for two reasons. First, CCS has not "thrown in the towel" or "unconditionally surrendered." When Ms. Jacobson limited her claims to statutory damages, her counsel made

clear to CCS that she would accept entry of judgment on the terms CCS had proposed if CCS would again offer to consent to such a judgment. *See* Aplt. App. 44a–49a. Instead, both in the district court, and now before this Court, CCS has continued to resist Ms. Jacobson's claims and deny her entitlement to any relief. That is a strange way of "surrendering," to say the least. Second, if CCS had consented unconditionally to the entry of judgment by the district court, the consequence would not be dismissal of Ms. Jacobson's claims (the result it attempts to defend here), but the entry of judgment in her favor in accordance with the defendant's consent. *See ABN*, 485 F.3d at 93–94; *McCauley*, 402 F.3d at 340–41; *Chathas*, 233 F.3d at 512.

The power of a court to enter judgment in such circumstances is not, as CCS appears to contend, based on the principle that the defendant's consent, default, or surrender by itself moots the case. Rather, "if the case had truly become moot and the court had lacked subject matter jurisdiction, the court would have been without power to enter a judgment." *ABN*, 485 F.3d at 94. The court's authority to enter judgment on consent arises from the fact that the defendant's consent, or its failure to contest liability, is a proper basis for *resolving* a live case or controversy

over which the court has jurisdiction. The plaintiff's claims in such circumstances do not cease to present a case or controversy until a judgment granting complete relief has actually been entered. *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013). "Only after such a disposition is the controversy resolved such that the court lacks further jurisdiction." *Id*.

If the law were otherwise, and the defendant's consent to entry of judgment—or its mere *offer* to consent—itself mooted a case, a court could never enter a consented-to judgment because it would always lack subject matter jurisdiction over the case at that point. And Rule 68, which expressly contemplates entry of judgment on an offer that is accepted, would be self-defeating. CCS suggests that this bizarre consequence of its position would not follow, because "a court may always maintain jurisdiction to wrap up a case that has been rendered moot …, such as [by] awarding costs and entering judgment." Appee. Br. 35–36. For this proposition, CCS cites an Eighth Circuit opinion, *Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935 (8th Cir. 2012), which holds no such thing: What *Hartis* holds is that a court that inadvertently dismisses a case for lack of subject matter jurisdiction when it intended to issue a merits judgment has jurisdiction to correct its clerical error. *See id*. at

949–50. Likewise, a court that otherwise lacks jurisdiction may possess authority to consider ancillary or collateral matters, such as costs. *See Jenkins v. Weinshienk,* 670 F.2d 915, 918 (10th Cir. 1982). Issuance of a judgment, however, is not simply an exercise in "wrapping up" collateral matters; it is the quintessential exercise of jurisdiction, and without jurisdiction a court has "no power to … enter judgment in the case." *Cunningham v. BHP Petrol. Great Britain PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005).

CCS's acknowledgment that a court has jurisdiction to enter a judgment when a party unconditionally surrenders is thus fatal to its argument that the court in this case lost jurisdiction based on CCS's *offer*, withdrawn when it was not accepted, to surrender. If the former does not moot a case and preclude the grant of relief to the plaintiff, it follows that the latter cannot either.

II. CCS did not offer complete relief.

Even those courts of appeals that have said, incorrectly and before *Symczyk*, that an offer of judgment may moot a claim have uniformly recognized that the offer must provide everything the plaintiff seeks, not merely everything the defendant (or the court) thinks the plaintiff is en-

titled to seek. *See*, *e.g.*, *Smith,* 772 F.3d 448; *Scott*, 740 F.3d 1124; *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605 (5th Cir. 2014); *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564 (2013); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365 (4th Cir. 2012); *Simmons v. United Mort. & Loan Inv., LLC*, 634 F.3d 754 (4th Cir. 2011). By its own acknowledgment, CCS did not do so.

CCS concedes that at the time it made its offer, Ms. Jacobson's claim was not limited to the statutory damages that CCS offered, and that it was only when Ms. Jacobson limited her claim to statutory damages, months after the Rule 68 offer had expired, that the offer would have been sufficient to satisfy her claims—*if* it had still been open, which it was not. Appee. Br. 5–6. Thus, at no point in time was there a pending offer from CCS that would, if accepted, have provided Ms. Jacobson with complete relief on her pending claims. The most CCS can say is that once Ms. Jacobson limited her claim to statutory damages, "it was … impossible for the district court to award Jacobson more relief than was *previously* offered." *Id*. at 6 (emphasis added). But it was fully possible for the district court to award Ms. Jacobson more relief than CCS was *then* offering because CSS was then offering nothing.

Strikingly, the court of appeals whose pre-*Symczyk* decisions form the principal basis for CCS's view that a plaintiff who turns down an offer of complete relief should lose outright—the Seventh Circuit—has held explicitly that an offer like the one CCS made in this case is *not* sufficient. In *Smith v. Greystone Alliance*, the Seventh Circuit explicitly held that when a plaintiff's claims are "whittle[d] down" in the course of litigation, federal jurisdiction is not "retroactively terminate[d]" merely because the defendant earlier made (and withdrew) an offer that did not satisfy all the plaintiff's demands at the time it was made. 772 F.3d at 450. Even though its position that Ms. Jacobson should lose outright depends virtually entirely on Seventh Circuit case law, CCS makes no effort to distinguish the Seventh Circuit's holding in *Smith*, which it does not even cite. Indeed, CCS simply ignores Ms. Jacobson's argument that it did not offer complete relief. It offers neither precedent nor reasoning to support its novel claim that a case can be moot when at no moment in the course of the proceedings was there an open offer from the defendant to consent to a judgment for all the plaintiff was seeking at that time.

CCS touches on the point only glancingly, implicitly suggesting that its failure to offer all that Ms. Jacobson claimed should be disregarded

because Ms. Jacobson and her attorney should not have sought actual damages in the first place. Appee. Br. 8. But whether the claims for actual damages were meritorious or "should have [been] reevaluated" (*id.*) is irrelevant to the issue of mootness: As the Sixth Circuit has explained, that a defendant disputes the plaintiff's claims and that the claims may ultimately be found to lack merit does not mean that those claims are moot. *Hrivnak*, 719 F.3d at 567. If a defendant wants to end a case by making an offer of complete relief, it must fully satisfy *all* of the claims the plaintiff is advancing. CCS's offer did not do so.

III. Ms. Jacobson cannot be sent away empty-handed.

Ironically, in arguing that the district court's decision should be affirmed, CCS relies to a considerable degree on decisions indicating that, in similar circumstances, the proper disposition is entry of judgment in the plaintiff's favor on the terms of the defendant's Rule 68 offer, not dismissal with no relief. *See*, *e.g.*, *Cabala*, 736 F.3d at 228; *Hartis*, 694 F.3d at 949; *O'Brien,* 575 F.3d at 575; *McCauley,* 402 F.3d at 342. Although the district court's dismissal without entering judgment for Ms. Jacobson in the amount of the offer would constitute error under all

those decisions, CCS contends that Ms. Jacobson instead must be denied any relief.

For that proposition, CCS relies entirely on the reasoning of the Seventh Circuit, which boils down to the notion that "[y]ou cannot persist in suing after you've won," and "a plaintiff who refuses to acknowledge this loses outright … because he has no remaining stake." CCS Br. 37 (quoting *Greisz*, 176 F.3d at 1015, and *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)). That reasoning makes no sense: A plaintiff who has received nothing has not "won" anything. And because she has won nothing, and the defendant continues to resist her claim, she has a "remaining stake." CCS's contention that Ms. Jacobson must *lose* because she has already *won* contradicts itself.

If CCS were correct that the Court should disregard the fact that, under the terms of Rule 68, CSS's offer is no longer pending, *see* CCS Br. 22–23, and should instead treat the offer as an unconditional surrender that has the ongoing effect of obviating the need to decide Ms. Jacobson's claim, the proper response would be to enter judgment in Ms. Jacobson's favor under the approach taken by the courts in such cases as *O'Brien*, *Cabala*, and *McCauley*. As the Eleventh Circuit put it in *Stein*, even if a

court were unwilling to accept the logic of Justice Kagan's *Symczyk* dissent, it should "be unable to affirm the dismissal of the plaintiffs' claims without the entry of judgment for the amount of the Rule 68 offers." 772 F.3d at 703. Either CCS's offer is a nullity, in which case it does not eliminate the ongoing controversy between the parties, or it has some continuing effect, in which case it may serve as the basis for entry of judgment in Ms. Jacobson's favor. In either event, "the District Court could not send her away empty-handed." *Symczyk*, 133 S. Ct. at 1534 (Kagan, J., dissenting).

IV. The judgment's directive that CCS have its costs is improper.

In the final judgment under appeal, the clerk of the district court provided that "CCS shall have its costs" pursuant to Rule 54(d), even though the court itself had not directed that costs be taxed. Aplt. App. 67a. Rule 54(d) provides that unless another statute or rule "provides otherwise," judgments should allow costs to a prevailing party except when the court's order expressly denies them. By contrast, the federal statute addressing costs in cases dismissed for lack of jurisdiction, 28 U.S.C. § 1919, provides for costs when the court awards them by "order," and this Court has held that such an order requires an exercise of judicial

discretion both as to whether costs should be allowed and as to the amount of costs that is just. *Callicrate v. Farmland Indus., Inc.*, 139 F.3d 1336, 1339 (10th Cir. 1998). Absent such an order, the clerk had no authority to include an entitlement to costs in the judgment.

CCS asserts, without citing any authority, that an award of costs is proper under Rule 54(d) because § 1919 does not "provide otherwise." But CCS's argument refutes itself: As CCS itself points out, Rule 54(d) provides for a "presumptive" award of costs if the court's order is silent. Appee. Br. 54. Section 1919, by contrast, provides for taxation of costs only if the court exercises its discretion to order that they be allowed. *Callicrate*, 139 F.3d at 1339. The rule and the statute create opposite default rules, and the statute would have no effect whatsoever if the Rule provided for costs in the absence of an order allowing them. As explained in an opinion cited with approval by this Court in *Callicrate*, "unlike costs awarded under Rule 54, costs awarded under 28 U.S.C. § 1919 are not subject to a presumption that they shall be awarded to a prevailing party," and thus an award of costs in a case dismissed for lack of jurisdiction is not "controlled by Rule 54," but instead "is governed by 28 U.S.C.

§ 1919." *Edward W. Gillen Co. v. Hartford Underwriters Ins. Co.*, 166 F.R.D. 25, 27–28 (E.D. Wisc. 1996) (cited in *Callicrate*, 139 F.3d at 1339).

The Supreme Court's recent opinion in *Marx v. General Revenue Corp.*, 133 S. Ct. 1166 (2013), underscores the point. There, the Court held that a statute awarding fees *and* costs to prevailing defendants in certain limited circumstances did not "provide otherwise" from Rule 54(d) and preclude award of costs to a prevailing defendant under the Rule. The Court based its holding in large part on the fact that the statute in question was enacted against and reflected the background rules that *costs* are generally available to prevailing parties, but *fees and costs* are available only where there is bad faith. *See id.* at 1174–78.

Section 1919, by contrast, was enacted against and created an exception to a very different background rule: that costs were not available to a party who prevailed in obtaining dismissal of a case for lack of jurisdiction. *See Signorile v. Quaker Oats Co.*, 499 F.2d 142, 144 (7th Cir. 1974); *see also Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884) (noting the "general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs"). Section 1919 creates an excep-

tion to that principle in cases in which the court affirmatively concludes that an award of costs is just, which is inconsistent with Rule 54(d)'s presumptive authorization of costs unless the court's order *denies* them. *See Gillen*, 166 F.R.D. at 77–78. Moreover, unlike the statute at issue in *Marx*, § 1919 would be rendered wholly superfluous if Rule 54(d) applied to cases dismissed for lack of jurisdiction. Thus, as another circuit has put it, "§ 1919 stands in stark contrast to costs under Rule 54(d)." *Otay Land Co. v. United Enters. Ltd.*, 672 F.3d 1152, 1157 (9th Cir. 2012).

Unable to reconcile the inclusion of costs in the judgment absent an order of the court with § 1919, CCS contends that the issue is not properly before this Court because, after filing her notice of appeal, Ms. Jacobson filed a motion in the district court seeking review of the actual costs taxed by the clerk after the judgment was entered, and because she did not raise the objection to the clerk's authority to award costs before appealing the judgment. CCS thus argues that her appeal is both premature and raises an issue not preserved below.

CCS's argument is misguided. The clerk sua sponte included the entitlement to costs in the final judgment, and a final judgment is indisputably an appealable order under 28 U.S.C. § 1291. Ms. Jacobson had no

opportunity before entry of judgment to challenge the propriety of the judgment's inclusion of costs, and CCS cites no authority for the proposition that a party challenging an appealable final judgment that includes an erroneous term must engage in additional exhaustion of procedures in the district court before taking an appeal. Moreover, under such circumstances, where the propriety of the challenged aspect of the judgment presents a purely legal issue, where the clerk implicitly determined that he possessed the authority to include costs in the judgment, and where there is no dispute that the principal issues posed by the district court's final order and judgment (that is, whether the case was properly dismissed) are properly before this Court, it is appropriate for this Court to consider Ms. Jacobson's challenge to the judgment's inclusion of costs now. *Cf. United Steelworkers of Am. v. Ore. Steel Mills, Inc.*, 322 F.3d 1222, 1228 (10th Cir. 2003) (exercising discretion to review "purely legal" issue not raised below); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1538–39 (10th Cir. 1996) (same).[3]

[3] Of course, it will be unnecessary to consider this issue if the Court reverses the dismissal, because absent the dismissal CCS will not be a prevailing party, and the basis for both the judgment and its direction that CCS have its costs will vanish.

Nor does Ms. Jacobson's filing of a motion seeking review of the costs actually taxed, after she filed her notice of appeal, divest this Court of jurisdiction. In the absence of one of the pending post-trial motions described in Federal Rule of Appellate Procedure 4(a)(4)(A), a notice of appeal from a final judgment transfers jurisdiction to the court of appeals as to the matters subject to the appeal. *Garcia v. Burlington N.R.R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987). Subsequent filings in the district court cannot divest this Court of jurisdiction or render the notice of appeal premature. *See Walker v. City of Orem*, 451 F.3d 1139, 1146 (10th Cir. 2006). Thus, the notice of appeal in this case properly brings before this Court the issue whether it was proper to include an entitlement of costs in the judgment. Although the district court may retain jurisdiction as to "collateral" matters, *Garcia*, 818 F.2d at 721, including determination of the *amount* of costs, its consideration of such matters does not affect this Court's jurisdiction over the propriety of the judgment itself.

Finally, CCS's assertion that the judgment's inclusion of costs was "harmless error" is untenable. CCS's contention that the district court "would have reached the same conclusion" (CCS Br. 42) even if Ms. Jacobson is correct in contending that 28 U.S.C. § 1919 requires an affirm-

ative order awarding costs makes no sense. CCS requested costs in its motion to dismiss, Aplt. App. 32a, and the district court's order did not grant that request, but directed only that the action be dismissed without prejudice. Aplt. App. 66a. Thus, it is not a matter of speculation whether the district court would have ordered costs if requested to do so: It did not. The clerk's inclusion of costs in the judgment was not harmless error because it granted relief that was available only if ordered by the district court, which had declined to issue such an order.

V. CCS's assertion in its cross-appeal that the district court should have dismissed Ms. Jacobson's claims with prejudice is meritless.

While insisting that the district court correctly dismissed Ms. Jacobson's claims for lack of subject-matter jurisdiction, CCS simultaneously asserts in its cross-appeal that the court should have dismissed her claims with prejudice rather than without prejudice. Repeated decisions of this Court foreclose CCS's argument.

This Court has long recognized that "[a] dismissal with prejudice is an adjudication on the merits." *Creek Indians Nat'l Council v. Sinclair Prairie Oil Co.*, 142 F.2d 842, 845 (10th Cir. 1944). The Supreme Court has likewise held that the term "with prejudice" is "shorthand for 'an ad-

judication on the merits,'" which in turn is "the opposite of a 'dismissal without prejudice.'" *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001).

Because subject-matter jurisdiction refers to "the courts' statutory or constitutional *power* to adjudicate the case," *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89 (1998), it is axiomatic that a court that lacks subject-matter jurisdiction cannot engage in merits adjudication. "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." *Id*. at 94 (quoting *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868)). As this Court has put it, "a court's threshold determination of its jurisdiction is a prerequisite to any judicial action." *In re Lang*, 414 F.3d 1191, 1195 (10th Cir. 2005). "[S]ubject-matter jurisdiction necessarily precedes a ruling on the merits." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

If a court that lacks subject-matter jurisdiction cannot adjudicate the merits, and a dismissal with prejudice is a merits adjudication, it follows that a court that lacks subject-matter jurisdiction cannot dismiss a

case with prejudice. Accordingly, this Court has long recognized that a dismissal for lack of subject-matter jurisdiction is necessarily without prejudice: "It is fundamental, of course, that a dismissal for lack of jurisdiction is not an adjudication of the merits and therefore dismissal of the … claim *must be without prejudice*." *Martinez v. Richardson*, 472 F.2d 1121, 1126 (10th Cir. 1973) (emphasis added); *accord*, *e.g.*, *Abernathy v. Wandes*, 713 F.3d 538, 558 (10th Cir. 2013); *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1249 (10th Cir. 2004).

In its most thorough discussion of the issue, this Court explained in *Brereton v. Bountiful City Corp.* that "dismissals for lack of jurisdiction should be without prejudice because the court, having determined that it lacks jurisdiction over the action, is *incapable* of reaching a disposition on the merits of the underlying claims." 434 F.3d at 1218. *Brereton* held as well that this principle applies fully to jurisdictional dismissals based on Article III justiciability doctrines such as standing and mootness. *See id.* at 1216 ("Since standing is a jurisdictional mandate, a dismissal with prejudice for lack of standing is inappropriate, and should be corrected to a dismissal without prejudice.").

The requirement that a jurisdictional dismissal be without prejudice not only follows directly from the nature of subject-matter jurisdiction, but also is expressly incorporated in Federal Rule of Civil Procedure 41(b). That Rule provides that any involuntary dismissal "operates as an adjudication on the merits"—that is, it is with prejudice—unless it states otherwise, "*except one for lack of jurisdiction*, improper venue, or failure to join a party." (Emphasis added.) The Rule thus provides that a dismissal for lack of jurisdiction is not an adjudication on the merits and thus is without prejudice. *See Costello v. United States*, 365 U.S. 265, 285–86 (1961). As this Court put it in *Brereton*, the rule that jurisdictional dismissals are without prejudice "is preserved now in Fed. R. Civ. P. 41(b)." 434 F.3d at 1216.

Against this weight of authority and reason, CCS cites a district court decision, *Bradford v. HSBC Mortg. Corp.*, 280 F.R.D. 257 (E.D. Va. 2012). The cited footnote from *Bradford* discusses policy reasons for that court's view that adjudicating claims following an expired offer of judgment that would have provided full relief would be a waste of time, but says nothing about whether a dismissal for lack of subject-matter jurisdiction based on such an offer should be with or without prejudice. Nei-

ther the term "with prejudice" nor "without prejudice" appears in the opinion. The court ordered only that the case be dismissed for lack of jurisdiction, *see id.* at 264—a disposition that under Rule 41(b) would plainly be without prejudice.

CCS also contends that *Symczyk* stands for the proposition that a dismissal for lack of subject-matter jurisdiction may be with prejudice, because the underlying district court dismissal in the case stated that it was with prejudice. CCS Br. 44. But the Supreme Court in *Symczyk* never mentioned that the district court's dismissal had been with prejudice; instead, "assum[ing], without deciding," that the plaintiff's individual claim in the case was moot, and holding that she had no personal interest in pursuing an opt-in collective action on behalf of other claimants under the Fair Labor Standards Act, the court held only that her suit was "appropriately dismissed for lack of subject-matter jurisdiction." 133 S. Ct. at 1532. Whether such a dismissal should be with or without prejudice was not disputed by the parties or touched on in the Court's opinion.

The Supreme Court has repeatedly emphasized that its opinions are not precedents with respect to issues—even issues going to jurisdiction—that are "neither noted nor discussed" by the Court. *Ariz. Chris-*

tian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011). Thus, *Symczyk* cannot be invoked as precedent for the extraordinary proposition that a court has jurisdiction to enter a merits dismissal in a case over which it lacks subject-matter jurisdiction. *See id*. at 1448–49. Rather, given the Supreme Court's repeated insistence that a federal court may not adjudicate the merits in any case over which it lacks Article III jurisdiction, *see Ruhrgas*, 526 U.S. at 583–84; *Steel Co.*, 523 U.S. at 94, the Court's holding that the case was appropriately dismissed for lack of subject-matter jurisdiction implies that the dismissal should have been without prejudice. *See Armour & Co. v. Ft. Morgan S.S. Co.*, 270 U.S. 253, 258 (1926) ("If there was no jurisdiction, the decree should have recited that ground of dismissal, so as to be without prejudice."); *Gen. Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 288 (1922) ("[T]he dismissal, being for want of jurisdiction, should have been without prejudice.").

CCS also asserts that "the district court did not dismiss Jacobson's case because it was more appropriate to be filed in another court" but because she "no longer had a personal stake in the outcome," and therefore dismissal with prejudice "would be appropriate due to the fact that the

case had been rendered moot." CCS Br. 55. This argument can only be described as a series of non sequiturs. A court must dismiss without prejudice when it lacks subject-matter jurisdiction not because such a dismissal reflects a judgment that it would have been more "appropriate" to file the case in another court, but because a court that lacks subject-matter jurisdiction has no power to adjudicate the merits. *Brereton*, 434 F.3d at 1218. A federal court has no more power to adjudicate a case that is moot in the Article III sense than it has to decide a case that should have been filed in a state court because there is no statutory basis for federal jurisdiction. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement."); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477–78 (1990). Thus, if Ms. Jacobson's case were truly moot, the district court would have lacked authority to adjudicate it, and any dismissal would have to be without prejudice. *See*, *e.g.*, *Wyo. v. U.S. Dept. of Agric.*, 414 F.3d 1207, 1211–14 (10th Cir. 2005). None of the cases CCS cites in connection with its contention that a dismissal with prejudice is "appropriate" when a case is moot, *see* CCS Br. 55, supports

that assertion, because none of them even discussed dismissal with prejudice.

Ultimately, CCS's request for a merits disposition underscores that its claim that Ms. Jacobson should lose this case because she did not accept a Rule 68 offer of judgment is not truly a mootness argument at all. Rather, CCS is asking the federal courts to *exercise* jurisdiction in this case and enter a merits judgment against Ms. Jacobson as a penalty for declining an offer that CCS believes she was required to accept. But as the Solicitor General pointed out in the amicus brief of the United States in *Symczyk*, neither Rule 68 nor any other source of authority permits a court to "impose[] dismissal as a litigation penalty for persisting with a claim notwithstanding [a Rule 68] offer."[4]

Of course, CCS could have avoided waste of judicial resources and needless litigation expense by renewing its Rule 68 offer, or by consenting unconditionally to entry of judgment in Ms. Jacobson's favor, once she reduced her demand to the amount it had previously offered. In that

[4] Br. for the United States as Amicus Curiae Supporting Affirmance 12, *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.

event a merits disposition—judgment in Ms. Jacobson's favor in the amount of her claim—would have been proper not because the case was moot, but because entry of a judgment to which the defendant consents is a permissible way of *resolving* a case or controversy that remains alive until the judgment is entered. *See ABN*, 485 F.3d at 94–96. What CCS cannot do, however, is obtain a dismissal on mootness grounds while contesting Ms. Jacobson's entitlement to relief, or obtain a merits adjudication in its *favor* in such circumstances based on its contention that there is no controversy over whether she is entitled to relief.

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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March 16, 2015

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 7,333 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

March 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 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