No. 13-13619

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIAN KEIM, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

ADF MIDATLANTIC, LLC; AMERICAN HUTS, INC.; ADF PIZZA I, LLC; ADF PA, LLC,

Defendants-Appellees.

On Appeal from a Final Order of the
United States District Court for the Southern District of Florida
No. 9:12-cv-80577-KAM, Hon. Kenneth A. Marra, U.S.D.J.

APPELLANT'S REPLY BRIEF

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November 21, 2013

No. 13-13619, *Keim v. ADF Midatlantic, LLC, et al.*

APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Pursuant to Eleventh Circuit Rule 26-1, appellant provides the following list of persons who may have an interest in the outcome of this appeal:

ADF Midatlantic, LLC

ADF PA, LLC

ADF Pizza I, LLC

Almeida, David S.

American Huts, Inc.

Davant, Charles Stuart

Harty, Don

Keim, Brian

King, David V.

King & Charles, LLC

Melendez, Moises

Marra, Kenneth A. (U.S.D.J.)

Nelson, Scott L.

Owens, Scott D. (Scott D. Owens, P.A.)

Poell, David M.

Public Citizen Foundation, Inc. (Public Citizen Litigation Group)

Public Citizen, Inc.

Rosenbaum, Adina H.

Sedgwick, LLP

Sheppard Mullin Richter & Hampton LLP

Vogel, Karin Dougan

2. Appellant is not a corporation, and so no corporate disclosure is required by FRAP or the Rules of this Court.

s/Scott L. Nelson
Scott L. Nelson

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SUMMARY OF ARGUMENT

The most straightforward way to resolve this case is to hold, as the Ninth Circuit recently did in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), that an unaccepted Rule 68 offer of judgment, regardless of the relief offered, does not moot a plaintiff's claims. Appellees ADF Midatlantic *et al.* (ADF) repeatedly assert that their offer mooted Mr. Keim's claim because it "provided" him complete relief and made it impossible for the court to provide effectual relief. But as Justice Kagan explained in her dissent in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, __, 133 S. Ct. 1523, 1532 (2013)—and as this case illustrates—an unaccepted offer is a legal nullity that, in itself, "provides" the plaintiff nothing at all, and hence leaves a court's ability to provide effectual relief unaffected.

Even if an offer of judgment that would provide full relief if accepted could moot a plaintiff's claim, an offer that requires the court to determine the extent of the plaintiff's damages could not do so, because it would leave unresolved a controversy over the *merits* of the plaintiff's claim. ADF insists that it intended to satisfy Mr. Keim's claims fully, but cannot deny that its offer would require the court to determine how

many messages Mr. Keim could prove ADF sent in violation of the Telephone Consumer Protection Act. Although ADF (wrongly) says Mr. Keim is to blame for the incompleteness of its offer, blame is irrelevant: An offer that requires further judicial factfinding cannot moot a controversy.

For the foregoing reasons, this Court should hold that Mr. Keim's individual claims are not moot, and hence that his effort to pursue a class action is also not moot. Even if Mr. Keim's individual claims were moot, however, ADF's effort to extend the holding of *Symczyk*—that a Fair Labor Standards Act (FLSA) collective action is nonjusticiable when the sole individual plaintiff's claim is moot—to class actions is unwarranted because class actions and FLSA collective actions are fundamentally different. ADF's advocacy of the minority rule set forth in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), under which a Rule 68 offer moots a class action unless a class certification motion is filed before the offer is served, is analytically incoherent and contrary to sound principles of judicial management. Should it reach the issue—which it need not because the Rule 68 offer did not moot Mr. Keim's individual claims—this Court should follow those courts that have held that when a

plaintiff files a class action complaint, a Rule 68 offer does not prevent him from seeking class certification if he does so in a reasonable time.

ARGUMENT

I. An Unaccepted Rule 68 Offer Does Not Moot A Plaintiff's Claim.

A. ADF's argument that its unaccepted Rule 68 offer of judgment mooted Mr. Keim's individual claims largely ignores or sidesteps the central issue: whether an unaccepted offer, which by its own terms is *void* and has no legal effect other than the potential to shift costs at the end of the action, deprives a court of any power to grant effectual relief between the parties. ADF never directly confronts the point that "[w]hen a plaintiff rejects [a Rule 68] offer—however good its terms—her interest in the lawsuit remains just what it was before," and "so too does the court's ability to grant her relief." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1533 (Kagan, J., dissenting). As the Ninth Circuit recently held, Justice Kagan's compelling reasoning in *Szymcyk* points to only one possible conclusion: "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Diaz*, 732 F.3d at 954–55.

ADF relegates *Diaz* to a footnote addressing another issue, but the decision is particularly instructive here. Like this Court, the Ninth Circuit had, before *Symczyk*, never held that an unaccepted Rule 68 offer of judgment could moot a claim, although it had assumed that to be the case. *See id.* at 952 (citing *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090–92 (9th Cir. 2011)). Following Justice Kagan's demonstration to the contrary in her *Symczyk* opinion, the Ninth Circuit squarely addressed the question and was "persuaded that Justice Kagan has articulated the correct approach." *Id*. at 954. The court therefore followed Justice Kagan's advice to courts that had not yet adopted the view that Rule 68 offers moot cases: "*Don't try this at home*." *Id.* (quoting *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (emphasis added by *Diaz*)). This Court should do the same.

B. ADF's arguments to the contrary are unavailing. ADF takes Mr. Keim to task for discussing the language, structure, and function of Rule 68 because, it asserts, "[m]ootness is [d]etermined by Article III [c]onsiderations, [n]ot by the Federal Rules of Civil Procedure," and because "[n]othing in the text of Rule 68 precludes a full offer of judgment from mooting a claim under the case or controversy requirements of Ar-

ticle III." ADF Br. 15, 20. Obviously, the Federal Rules of Civil Procedure do not define when a case is moot, nor does the text of Rule 68 mention mootness. But understanding the functioning of Rule 68 is critical to understanding why an unaccepted Rule 68 offer of judgment does not moot a claim—that is, why it does not eliminate the plaintiff's interest in obtaining a judgment or the court's power to issue one.

ADF nowhere contests the critical aspects of Rule 68 that bear on the question of mootness: namely, that the rule authorizes entry of judgment only when an offer of judgment is accepted by the plaintiff, Fed. R. Civ. P. 68(a); that an offer that is not accepted within 14 days is "withdrawn" by operation of law, Fed. R. Civ. P. 68(b); that "evidence of an unaccepted offer is not admissible except in a proceeding to determine costs," *id*; and that the sole significance of an *unaccepted* offer under the rule is that the plaintiff must pay the offeror's post-offer costs if the judgment obtained "is not more favorable than the unaccepted offer." Fed. R. Civ. P. 68(d).

ADF asks "why a complete offer of judgment provides no redress or what concrete interests the parties would retain in such situations." ADF Br. 16. The answer is obvious: The terms of the rule itself demonstrate

that an unaccepted offer of judgment does not "provide" *any* relief, let alone complete relief. It therefore does not moot anything.

Indeed, *an offer itself* does not provide relief even if it is accepted. The offer, together with the plaintiff's acceptance, authorizes the *court* to resolve the controversy between the parties by entering a judgment providing relief to the plaintiff. Only then is the controversy terminated. An unaccepted offer does even less: The offer itself gives the plaintiff nothing, and because it is withdrawn when not accepted within 14 days, it cannot serve as the basis for an order granting the plaintiff relief. As Justice Kagan explained, in the wake of an unaccepted offer of judgment, the plaintiff's "individual stake in the lawsuit thus remain[s] what it ha[s] always been, and ditto the court's capacity to grant relief." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting).

In short, the terms of Rule 68, as construed by the Supreme Court in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146 (1981), show that, following the expiration of ADF's offer, Mr. Keim still "possessed an unsatisfied claim, which the court could redress by awarding [him] damages." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting).

C. ADF attacks a straw man in arguing that Justice Kagan's dissent in *Symczyk* is "not binding authority." ADF Br. 26 (citation omitted). Of course it is not. But as ADF acknowledges, lower courts may consider dissenting opinions for their persuasive force unless they are contrary to a majority opinion. *Id*. ADF offers no *analysis* refuting Justice Kagan's reasoning.

Instead, ADF tries to assert that the *Symczyk* majority stated its disagreement with Justice Kagan's reasoning on the question whether a Rule 68 offer moots a claim. The majority, however, could not have been more explicit in saying that it did not address the question whether an unaccepted Rule 68 offer of judgment renders a claim moot and that its decision did not resolve the issue. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1528–29. Because the issue had been waived, the Court merely "assume[d], *without deciding*," that the individual claim was moot. *Id*. at __, 133 S. Ct. at 1529 (emphasis added). To ensure that the point was not lost, the Court cited its decision in *Baldwin v. Reese*, 541 U.S. 27, 34, 124 S. Ct. 1347, 1352 (2004), which explains that, in such circumstances, the Court does not "express[] *any view* on the merits of the [waived] issue." *See Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529; *see also Wolff v. Royal*

Am. Mgmt., Inc., __ F. Appx. __, __, 2013 WL 5433773, at *4 (11th Cir. Oct. 1, 2013) (noting that *Symczyk* "explicitly said" that it did not decide whether an unaccepted Rule 68 offer moots a claim).

ADF points to a footnote in *Symczyk* in which the majority stated 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." *Symczyk*, 569 U.S. at __, n.4, 133 U.S. at 1529, n.4. That very footnote, however, began with another acknowledgment that the Court was *not* speaking to the question whether a Rule 68 offer "is sufficient by itself to moot the action." *Id*. The statement cited by ADF stands 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, in *Yunker v. Allianceone Receivables Management, Inc.*, 701 F.3d 369 (11th Cir. 2012), this Court held that where a plaintiff *accepted* a Rule 68 offer of judgment in satisfaction of all her claims, and a judgment was entered accordingly, there was no longer a live controversy that permitted the appellate resolution of legal issues that the district court had decided before

the case was concluded by the agreed-to judgment, because neither party had a "continuing financial stake" in the case. *Id*. at 374.[1]

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*, 569 U.S. at __, 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 Justice Kagan's demonstration that they cannot. Thus, as Justice Kagan

[1] 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*, 569 U.S. at __; 133 S. Ct. at 1535. 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 __, 133 S. Ct. 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).

stated (without objection from the majority)—and as the Ninth Circuit recently concluded in *Diaz*—her analysis of the Rule 68 mootness issue "conflicts with nothing in the Court's opinion." *Id*. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting). This Court therefore can, and should, consider her persuasive reasoning notwithstanding that her opinion, like all other dissents, is not binding authority.

D. Beyond incorrectly asserting that Justice Kagan's reasoning is inconsistent with the majority's decision, ADF makes little effort to counter her analysis or to demonstrate that its own position can be squared with the Supreme Court's mootness precedents. ADF recites a string of generalities about the nature of mootness, *see* ADF Br. 11–13, and it observes that decisions relied on by Mr. Keim in his opening brief, and by Justice Kagan in her dissent, involved factually different circumstances. *See* ADF Br. 18–20. But ADF cannot, and ultimately does not, genuinely dispute that the teaching of the Supreme Court's mootness jurisprudence is that "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. __, __, 133 S. Ct. 1017, 1023 (2012). An unaccepted and hence withdrawn Rule 68 offer hardly makes it impossible for

a court to grant relief. Rather, the offer presupposes that the court will grant relief, if the offer is accepted, by entering judgment on it, and, if it is not accepted, by resolving the parties' claims as if the offer had never been made.

Nonetheless, ADF gamely asserts that "it would truly be impossible for the District Court to grant any 'effectual relief' to Keim given that Defendants' Rule 68 offer of judgment provided the maximum relief available under the TCPA." ADF Br. 20. ADF's argument makes no sense because the unaccepted offer "provided" Mr. Keim with nothing at all: Mr. Keim still has an unsatisfied claim for relief that the district court could adjudicate and for which it could, if he prevailed, provide a remedy. For the same reason, ADF's invocation of the notion that "[y]ou cannot persist in suing after you've won," *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999), is unavailing, because Mr. Keim has not "won" anything: He has only a lapsed offer, which is to say, nothing at all.

E. ADF's contention that this Court's decision in *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 (11th Cir. 2013), supports its position is also wide of the mark. ADF goes so far as to argue that this Court in

Zinni "acknowledged" that "an offer of complete relief deprives a plaintiff of his Constitutionally-mandated 'personal stake' in the action." ADF Br. 14. To support this misreading of *Zinni*, ADF quotes this Court's statement that "[o]ffers for the full relief requested have been found to moot a claim." *Id*. (quoting *Zinni*, 692 F.3d at 1166). But the language ADF cites merely reflected this Court's acknowledgment that *other* courts had held (pre-*Symczyk*) that a claim could be mooted by Rule 68 offers that, if accepted, would provide complete relief. *See Zinni,* 692 F.3d at 1166-67. Far from acknowledging that those decisions were correct, let alone "unremarkable," as ADF claims (ADF Br. 14), *Zinni* pointed out that there was substantial disagreement among the courts on the point, and it expressly stated that "[w]e need not decide whether an offer for full relief, even if rejected, would be enough to moot a plaintiff's claims." *Id*. at 1167 n.8.

Zinni's actual holding was that, even if an offer for full relief could moot a claim, the offers in that case did not, because they did not offer all the relief that the plaintiffs would obtain if they litigated their cases to a favorable judgment. That decision does not imply that an offer of judgment *would* moot a claim. On the contrary, the contention that an offer

of judgment moots a claim is at odds with the basic understanding of mootness reflected in *Zinni*—that a case is moot only "when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Id.* at 1166 (quoting *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009)). That is exactly the criterion that an unaccepted Rule 68 offer does *not* satisfy.

Having never held that an unaccepted Rule 68 offer of judgment is sufficient to moot a claim—and having previously announced and applied principles of mootness that foreclose such a holding—this Court, like the Ninth Circuit in *Diaz*, is free to hold, for the reasons set forth in Mr. Keim's opening brief and in Justice Kagan's persuasive opinion in *Symczyk*, that a Rule 68 offer of judgment does not moot a plaintiff's claim.

F. If this Court were to accept ADF's and the district court's position that Mr. Keim's "federal case was over as soon as the [Rule 68] offer was made," ADF Br. 15, the consequences would be bizarre. ADF does not deny that its reasoning means that a Rule 68 offer of judgment for complete relief moots a case instantly—even before the 14 days during which the plaintiff has the opportunity to accept it have expired.

ADF's position is that the plaintiff's case is moot and that the court lacks subject matter jurisdiction *even if the plaintiff accepts the offer*. How, then, can the judgment contemplated by Rule 68 and offered by the defendant ever be entered? A court without subject matter jurisdiction may not enter a judgment or otherwise grant a party relief. *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1281 & n.6 (11th Cir. 2012); *Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1277 (11th Cir. 2010).

ADF claims to have an answer to this point: Ancillary jurisdiction, it asserts, permits the Court to "engage in the ministerial act of entering judgment on the claim that was originally filed." ADF Br. 33. Ancillary jurisdiction, however, cannot fill the role ADF assigns it. As the cases cited by ADF hold, ancillary jurisdiction permits a court to enforce judgments and orders it has already entered—that is, to "effectuate its decrees," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379–80, 114 S. Ct. 1673, 1676 (1994)—as well as to decide "collateral matters." *Jenkins v. Weinshienk,* 670 F.2d 915, 918 (10th Cir. 1982). But those powers do not create jurisdiction to *enter judgment* when the court otherwise lacks subject matter jurisdiction, whether because of the absence

of a case or controversy or for some other reason. *See Anago*, 677 F.3d at 1281.

The ancillary enforcement jurisdiction ADF invokes is limited to "the exercise of a federal court's inherent power to enforce its judgments" and cannot be used as the basis for entering a judgment imposing liability on a person who is "not *already* liable" for a judgment entered by the court. *Peacock v. Thomas*, 516 U.S. 349, 356, 357, 116 S. Ct. 862, 868 (1996) (emphasis added); *see also Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, PA*, 551 F.3d 812, 817 (8th Cir. 2009) (ancillary jurisdiction permits enforcement only of an "extant decree"). Thus, as the First Circuit correctly held in a decision cited by ADF, ancillary jurisdiction provides a source of authority for a court to *enforce* a judgment entered under Rule 68 (in a case in which the court had jurisdiction), *Fafel v. Dipaola*, 399 F3d 403, 411–15 (1st Cir. 2005), but it cannot serve as the source of authority to *enter judgment in the first place*.[2]

[2] ADF cites an unpublished district court opinion asserting "ancillary jurisdiction" to enter judgment on an unaccepted Rule 68 offer that the court believed mooted the plaintiff's claim. *Scott v. Westlake Services, LLC,* 2013 WL 2468253 (N.D. Ill. June 6, 2013). *Scott* rests on fundamen-

In fact, in a case where a Rule 68 offer of judgment is *accepted*, a court need not resort to ancillary jurisdiction to enter judgment because Rule 68 offers of judgment are mechanisms for *resolving* cases, not mooting them. An offer that is accepted does not make it impossible for the Court to grant effectual relief—on the contrary, it *authorizes* the award of such relief as an exercise of the Court's power to resolve a case properly within its jurisdiction. The case is not moot (or, more accurately, not *over*) until judgment is entered. *See Cabala v. Crowley*, __ F.3d __, __, 2013 WL 6066412 at *2 (2d Cir. Nov. 19, 2013); *cf. Zinni*, 682 F.3d at 1167–68 (noting the importance of obtaining a judgment in order to provide complete relief to a plaintiff). An offer that is *not* accepted neither moots the case nor provides a basis for its termination by entry of judgment: Rule 68 does not permit entry of judgment on an unaccepted offer, and an unaccepted offer does nothing to resolve the issues between the parties or prevent the court from granting effectual relief. An unaccepted Rule 68 offer therefore cannot serve as the basis for an order dismissing the action for lack of subject matter jurisdiction, and still less for entry of

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tal misunderstandings both of mootness and ancillary jurisdiction, for the reasons stated above.

judgment in the dismissed case through a purported exercise of ancillary jurisdiction.

G. Asking this Court to import policy considerations into its mootness analysis, ADF argues that attaching mootness consequences to unaccepted Rule 68 offers would advance Rule 68's objective of encouraging settlement. Rule 68, however, encourages settlement in a very specific way, by shifting costs only in the particular circumstance when a plaintiff who rejects an offer obtains a judgment that is not more favorable than the offer. *Delta Air Lines, Inc. v. August*, 450 U.S. at 352–56, 101 S. Ct. at 1150–52. Even if it were appropriate to manipulate jurisdictional doctrines to achieve the kinds of policy objectives that ADF advocates, the Supreme Court made clear in *Delta* that expanding the consequences of rejecting an offer beyond those set forth expressly in Rule 68 is *contrary* to the rulemakers' intent. *See id*.

Moreover, as explained in Mr. Keim's opening brief (at 27–28) and by Justice Kagan in *Symczyk*, 569 U.S. at__, 133 S. Ct. at 1536 (Kagan, J., dissenting), courts have other means to ensure that cases do not proceed to trial when there is no genuine issue as to the extent of a defend-

ant's liability. There is no reason to distort mootness doctrine to achieve legitimate case-management objectives.

To the extent policy considerations are relevant, they strongly disfavor adopting a view of mootness that would diminish the effectiveness of the class action device by enabling defendants to pick off class plaintiffs with offers of judgment. ADF insists that it is unfair to characterize its offer as a pick-off attempt because it sought only to avoid unnecessary litigation. Defendants understandably view all class actions as unnecessary, but that does not mean they should be provided a tool to pretermit such actions before courts have the opportunity to determine whether they present legitimate claims appropriate for class treatment.[3] As the Supreme Court recognized in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S. Ct. 1166 (1980), allowing defendants such power to

[3] ADF also contends this particular class action is meritless because the messages at issue came from class members' friends, not from it. Although the point is not relevant to mootness, Mr. Keim's complaint makes no such allegation. Instead, he alleges that cellular telephone numbers were surreptitiously obtained from class members' "friends," and messages were sent to the class members from a third party autodialing system contracted by ADF. App. Tab. 1, at 7–13. Those allegations state a claim for violations of the Telephone Consumer Protection Act. *See Hickey v. Voxernet LLC,* 887 F. Supp. 2d 1125, 1129 (W.D. Wash. 2012); *Pimental v. Google, Inc.*, 2012 WL 691784 (N.D. Cal. March 2, 2012).

avoid class actions "would be contrary to sound judicial administration." 445 U.S. at 339, 100 S. Ct. at 1174. Then-Justice Rehnquist—no fervent promoter of class actions—agreed that defendants should not have the "practical power" to opt out of class actions through offers of judgment. *Id*. at 341, 100 S. Ct. at 1175 (Rehnquist, J., concurring).

II. ADF Did Not Offer Full Relief.

A. ADF does not deny that even those courts that have held or assumed that a Rule 68 offer can moot a claim have insisted that the offer be for complete relief and that it leave no merits issues to be resolved by the court. ADF continues to assert that it offered complete relief, but, more than a year after it made its Rule 68 offer, ADF still cannot say how much it offered. On its face, ADF's offer leaves unresolved factual issues as to the number of calls for which it is liable, and also requires the court to "determine[]" whether "any other relief" is "necessary to fully satisfy" Mr. Keim's claims. App. Tab 33-2, at 2. Far from mooting the case, an offer that requires a court to determine such classic *merits* issues demonstrates that a live case or controversy remains. *See Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 570 (6th Cir. 2013).

ADF contends that the Sixth Circuit's decision in *Hrivnak*, as well as the Fourth Circuit's decisions in *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365 (4th Cir. 2012), and *Simmons v. United Mortgage & Loan Inv., LLC*, 634 F.3d 754 (4th Cir. 2011), involved factual circumstances different from those in this case. ADF Br. 41 & n.10. The factual differences, however, do nothing to negate the applicability to this case of the principle applied in each of those cases: An offer that requires the court to make further determinations of fact and law in order to ascertain the amount to which the plaintiff is entitled does not moot a case. By requiring the court to determine how many messages ADF sent Mr. Keim and what relief was necessary to satisfy his claims, ADF's offer, even if accepted, would not have completely resolved the case. Moreover, as the Fourth Circuit pointed out in *Warren*, 676 F.3d at 373, treating such an offer as mooting the plaintiff's case effectively deprives him of his right to a jury trial on the issue of damages, a point ADF does not address.

B. ADF nonetheless contends that its offer would have provided Mr. Keim "everything" he asked for (ADF Br. 38) and observes that the offer said it was "intended to fully satisfy [Mr. Keim's] individual claims." App. Tab. 33-2, at 2. But merely expressing that intent did not

make the offer adequate to accomplish it. Thus, although ADF insists that the offer left no merits issues to be adjudicated, ADF Br. 40, the district court correctly understood that the offer required it to determine how many calls were made to Mr. Keim's phone. *See* App. Tab 55, at 14, 17. In this respect, the offer differed from those in *Martin v. PPP, Inc.*, 719 F. Supp. 2d 967 (E.D. Ill. 2010), and *Johnson v. Midwest ATM, Inc.*, 881 F. Supp. 2d 1071 (D. Minn. 2012), because there was no uncertainty about the exact amounts sought by the plaintiffs and offered by the defendants in those cases. By contrast, ADF's offer was not to pay for whatever calls Mr. Keim might claim were made, but the number he could *prove*. An offer to pay only the plaintiff's "verifiable" entitlements does not moot a case. *See Hughes Concrete & Masonry Co. v. Southeast Personnel Leasing, Inc.*, 2013 WL 5798638 (M.D. Fla. Oct. 28, 2013). Whether or not ADF was "interested" in adjudicating the merits of Mr. Keim's claims (ADF Br. 40), it made an offer that *necessitated* such an adjudication, and such an offer cannot moot a case.

Similarly, as ADF itself acknowledges, the district court recognized that ADF's offer on its face called for the district court to determine whether "additional" relief was necessary to satisfy Mr. Keim's claims.

ADF Br. 38 (quoting App. Tab. 55, at 14). Determining what relief is necessary is the essence of merits adjudication, *see Hrivnak*, 719 F.3d at 570; *see also Kensington Phys. Therapy, Inc. v. Jackson Therapy Partners, LLC*, __ F. Supp. 2d __, __, 2013 WL 5476979 (D. Md. Oct. 2, 2013) (holding that an offer including "any such other relief which is determined by a court of competent jurisdiction to be necessary to fully satisfy all of the [plaintiff's] individual claims" was not an offer of full relief under the Fourth Circuit's decision in *Simmons*).

ADF's position, taken to its logical conclusion, would suggest that a defendant could moot a plaintiff's claims just by offering to pay him whatever he proves he is entitled to receive. A defendant's offer to pay what it is liable to pay begs the question of the amount of the defendant's liability and leaves that question for judicial resolution. The need to resolve questions concerning the extent of a defendant's liability is the hallmark of a case or controversy, not a moot case. *Hrivnak*, 719 F.3d at 570. As this Court recognized in *Zinni*, an offer that would require the plaintiff to "continue litigating the claims sought to be settled" moots nothing. 692 F.3d at 1167 (citation omitted); *see also Cabala*, __ F.3d at

__, 2013 WL 6066412 at *2 (case is not moot when parties continue to dispute "extent of the relief").

C. ADF falls back on the idea that it was Mr. Keim's fault that it did not know how much to offer him to provide complete relief, and that its offer should be deemed sufficient to moot his claims to prevent "gamesmanship" by plaintiffs. ADF Br. 39. ADF's argument rests on the factual assumption that information about the number of messages ADF sent to Mr. Keim was in the exclusive possession of Mr. Keim or his cell phone carrier or was more readily accessible to Mr. Keim than to ADF. As Mr. Keim's opening brief pointed out, this assumption is unsupported by the record, Keim Br. 37 n.9, and ADF does not provide any support. The dispositive issue is how many messages ADF caused to be *sent*, *see Hickey*, 887 F. Supp. 2d at 1129, a determination likely to require third-party discovery.

Moreover, the idea that plaintiffs must facilitate efforts by defendants to moot their claims by pleading more specifically than required by the Federal Rules of Civil Procedure is baseless. Defendants who wish to know the possible damages in a case so that they can tender a Rule 68 offer of complete relief have ample resources at their disposal: They can

search their own records for relevant information, request a more definite statement under Rule 12(e), propound interrogatories or requests for admission, and seek discovery from third parties. Here, ADF took none of those steps. It was so eager to moot the case that it attempted to offer "complete relief" at a time when neither the parties nor the court even knew what complete relief encompassed. That the resulting offer would not obviate the need for further judicial proceedings even if accepted is not Mr. Keim's fault; and in any event, such an offer cannot moot a claim, regardless of the reasons for its incompleteness.

D. Finally, ADF impugns the motives of trial counsel and Mr. Keim by suggesting that they had no legitimate reason for rejecting its offer, and that doing so reflected a "zealous desire to manufacture additional fees," subordination of the client's interests to trial counsel's, and/or "a perversion of the class action device in general and the purpose of the TCPA in particular," ADF Br. 42, although ADF hastens to add that it does not mean "to besmirch Keim or his counsel." *Id*. ADF's assertions, besides being baseless, are irrelevant to the issue of mootness. The Rule 68 offer either mooted Mr. Keim's claims at the moment it was made (as ADF asserts) or it did not (as Mr. Keim has demonstrated). The

motives of Mr. Keim or his counsel in rejecting the offer have no possible bearing on the offer's legal effect.

Moreover, there is no mystery about why a plaintiff suing on behalf of a class may, for eminently legitimate reasons, reject an offer aimed at forestalling the class action by providing relief only to the named plaintiff. Such a plaintiff seeks to represent not only his own interests, but those of a class, by remedying what he perceives as a broad pattern of unlawful conduct. An adequate response to such conduct may require both monetary relief to compensate class members and create incentives for lawful conduct, and injunctive relief to protect the class against future violations. An offer of relief only to one class member, or a handful of members, does not accomplish those objectives and thus neither fulfills the aims of the "class action device in general" nor fully vindicates the "purpose of the TCPA in particular." ADF Br. 42.

III. A Rule 68 Offer to a Named Plaintiff Does Not Moot Class Claims.

A. Based on its assumption that the individual plaintiff's claim was moot, *Symczyk* held that the mootness of a named plaintiff's FLSA claim moots an FLSA collective action to which no other plaintiff has opted in. As Mr. Keim's opening brief explained, a large number of

courts, including the Sixth Circuit, have already ruled that that holding does not apply to class actions, because of the significant differences between class actions and FLSA collective actions identified by the Court in *Symczyk*. *See* Keim Br. 45. ADF does not dispute the extent of that authority or cite any contrary rulings holding *Symczyk* applicable to class actions. Indeed, ADF acknowledges that the *Symczyk* majority expressly held precedents concerning the mootness issue in the class action context inapplicable to FLSA collective actions. ADF Br. 50 n.11. Its attempt to explain the Supreme Court's comments away—namely, that the Court distinguished class action cases because the plaintiff had attempted to rely on them, *id*.—only emphasizes the point.

ADF contends that *Symczyk*'s reasoning is applicable in the class action context because when a class has not yet been certified, just as when a collective action has not been certified, the plaintiff does not *yet* have any "personal interest in representing others." ADF Br. 51. But *Symczyk*'s holding that an FLSA named plaintiff lacks an interest in pursuing collective as opposed to individual claims was not based on the *timing* of the certification decision, but on the much more basic point that an FLSA certification "does not produce a class with an independent le-

gal status." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1530. Thus, an FLSA plaintiff *never* has a "right to represent" anyone else or any "personal stake" in a collective action. *See Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249, 1247 (11th Cir. 2003). By contrast, the filing of a class action reflects a case or controversy over the claims of the nascent class as well as the putative class representative's interest in representing it.

B. ADF asserts more generally that *Roper* and *United States Parole Commission v. Geraghty,* 445 U.S. 388, 100 S. Ct. 1202 (1980), are inapplicable here because they involved situations where a court had already addressed class certification—albeit *denying* it—while "[n]o case" has held that class allegations in a *complaint* not yet considered by a court can preserve a live case or controversy when the named plaintiff's individual claim is moot. ADF Br. 45. However, although the Supreme Court has not addressed that scenario, the courts of appeals have, and the Third, Ninth, and Tenth Circuits have held that a named plaintiff may seek certification of a class even if his individual claims are mooted before he has filed a certification motion. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Lucero v. Bur. of Collection Recovery,*

Inc., 639 F.3d 1239 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

ADF offers no logical defense of its position that a *failed* motion for certification is necessary to allow a plaintiff whose individual claims are moot to continue to seek class certification. ADF asserts that "the Supreme Court has never found that a putative class has *any* independent legal status before it is certified under Rule 23," ADF Br. 46, and that *Roper* and *Geraghty* thus require "a class certification ruling *before* a class is found to have an independent legal status." *Id*. at 50 n.11. But those assertions make no sense because the class action rulings in *Roper* and *Geraghty* had *denied* certification, yet the individual plaintiffs (whose own claims were moot) were permitted to continue to pursue, on appeal, certification for the as-yet nonexistent class, which by definition did not have any "independent legal status."

C. ADF's invocation of *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001), is similarly unavailing. To begin with, *Murray* did not involve a claim that named plaintiffs' claims were mooted by an offer of settlement, but involved more fundamental challenges to whether the plaintiffs had suffered injury at all. *See id*. at 810–11. Moreover, the Court did

not decide whether, under *Roper*, the plaintiffs had asserted a cognizable interest in representing the class, nor, indeed, did it resolve any issues as to the class members' status. Rather, the Court remanded to the district court for further consideration, including of whether any exceptions to the mootness doctrine might apply. *See id*. at 811.

ADF's reliance on *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134 (10th Cir. 2009), is also misplaced. In *Clark*, the named plaintiff's individual claim had been fully adjudicated, with final judgment entered and paid more than a year before the plaintiff moved to certify a class. *See id.* at 1136–37. The Tenth Circuit understandably held that the case was moot. Later, in *Lucero*, the court distinguished *Clark* and held that where a plaintiff sought class certification within a *reasonable* time, the mootness of the plaintiff's individual claim would not bar certification. *See Lucero*, 639 F.3d at 1248–49, 1250.

D. Abandoning its own assertion that a *ruling* on class certification (even if adverse) is necessary to allow a plaintiff whose individual claim is moot to pursue class claims, ADF ultimately advocates adoption of the Seventh Circuit's rule in *Damasco v. Clearwire Corp.*, 662 F.3d 891, under which a plaintiff who has received a Rule 68 offer that would

provide complete relief on his individual claims may pursue a class action if, but only if, he moved for class certification before receiving the offer. ADF Br. 51–53. ADF never explains why, from the standpoint of Article III, the *filing* of a motion for certification should be determinative. Filing the motion does not bring the class into existence any more than does filing a complaint with class allegations. *See Smith v. Bayer Corp.*, 564 U.S. __, 131 S. Ct. 2368 (2011). And filing a class complaint, just as much as filing a motion for certification, signifies that class claims are in issue in the case. Thus, from a doctrinal standpoint, the rule of *Pitts*, *Lucero*, and *Weiss*, which requires that the plaintiff seek certification in a reasonable time, is far more logical than *Damasco*.

Moreover, the benefits of the *Damasco* approach that ADF touts are illusory. That approach adds little or nothing in the way of predictability and certainty, and has the adverse effect of encouraging placeholder class certification motions by plaintiffs who seek to avoid having class representatives picked off. *See Falls v. Silver Cross Hosp. & Med. Ctrs.*, 2013 WL 2338154, at *1–2 (N.D. Ill. May 24, 2013). District courts in this Circuit have recently discouraged the filing of premature class certification motions to avoid mootness. *See Haight v. Bluestem Brands, Inc.*, No.

6:13-cv-1400, Order Denying Class Certification (M.D. Fla. Sept. 26, 2013); *Taylor v. Acquinity Interactive, LLC*, No. 0:13-cv-61088, Order Denying Class Certification (S.D. Fla. May 17, 2013). The rule of *Pitts, Lucero*, and *Weiss* avoids distorting the litigation process through premature motions practice while remaining more consistent with Article III principles than *Damasco*'s arbitrary line.

ADF suggests that Mr. Keim unreasonably delayed moving for class certification even under the standard of *Pitts*, *Lucero*, and *Weiss*. ADF Br. 32. But Mr. Keim filed his motion only four months after filing this action, when no scheduling order was yet in place. And although ADF now faults Mr. Keim for not seeking discovery on class certification, ADF successfully objected to any discovery, and even to a discovery conference under Federal Rule of Civil Procedure 26(f), while its motion to dismiss was pending. *See* Docs. 28, 38. Only if the litigation process were converted into an unseemly race between the filing of a certification motion and the service of a Rule 68 offer of judgment could Mr. Keim be said to have sought certification too late.

E. ADF concludes with the astonishing assertion that Mr. Keim would not be an adequate representative of a class because he did not ac-

cept ADF's Rule 68 offer. ADF Br. 54. The point has nothing to do with mootness. It is also nonsensical. It is the plaintiff who sells out a class for individual gain that is an inadequate representative, *see Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 959-60 (9th Cir. 2009), not the plaintiff whose commitment to the class leads him to reject a defendant's effort to decapitate it. ADF's position would create a Catch-22: A plaintiff could not represent a class unless he settled his individual claim and *disabled* himself from representing the class. That cannot be the law.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court and remand for further proceedings.

Respectfully submitted,

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November 21, 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Century Schoolbook BT. As calculated by my word processing software (Word 2010), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 6,994 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 21, 2013, this Appellant's Reply Brief was served through the court's ECF system on counsel for defendants-appellees, as follows:

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