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.

BRIEF FOR APPELLANT

Scott L. Nelson
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000
202-588-7795 (Fax)
snelson@citizen.org

Scott D. Owens
Scott D. Owens, P.A.
664 E. Hallandale Beach Blvd.
Hallandale, FL 33009
954-589-0588
954-337-0666 (Fax)
scott@scottdowens.com

Attorneys for Appellant

September 25, 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

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.

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

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument. This appeal involves an important and unresolved question in the wake of the decisions of the Supreme Court in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 133 S. Ct. 1523 (2013), and this Court in *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 (11th Cir. 2013): whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 can moot the individual claim of a proposed class representative and require dismissal of a class action for lack of subject-matter jurisdiction. Appellant submits that oral argument would assist the Court in resolving this issue.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases:

Constitutional Provisions, Statutes, and Regulations:

Other:

JURISDICTION

This action was filed by plaintiff-appellant Brian Keim in the United States District Court for the Southern District of Florida, asserting claims under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The district court had jurisdiction under 28 U.S.C. § 1331. On July 15, 2013, the district court entered an order dismissing the claims with prejudice for lack of subject matter jurisdiction. App. Tab 55.[1] An order dismissing all claims in an action with prejudice is a final, appealable order under 28 U.S.C. § 1291, *see Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86–87, 121 S. Ct. 513, 519–20 (2000); *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1356 (11th Cir. 2008), as is an order dismissing all claims for lack of subject-matter jurisdiction. *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1021 (11th Cir. 1994). On August 9, 2013, Mr. Keim filed a timely notice of appeal from the district court's final order in the form prescribed by Federal Rule of Appellate Procedure 4(a)(1). Doc. 56. This Court has jurisdiction under 28 U.S.C. § 1291.

---

[1] In this brief, "App." refers to the Appendix, and materials in the Appendix are cited by tab number and page or paragraph number within the item cited. "Doc." refers to docket entries listed in the district court docket found at App. Tab A.

STATEMENT OF ISSUES

(1) Whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 moots a plaintiff's individual claim by depriving a court of the ability to provide effectual relief.

(2) Whether a Rule 68 offer of judgment that, even if accepted, would leave the amount of the plaintiff's damages undetermined moots the plaintiff's individual claim.

(3) Whether an unaccepted Rule 68 offer of judgment to an individual plaintiff deprives the court of subject-matter jurisdiction over claims asserted on behalf of a class.

STATEMENT OF THE CASE

Course of the Proceedings and Disposition Below

Plaintiff-appellant Brian Keim filed the class action complaint in this action on May 27, 2012, alleging that defendants ADF Midatlantic, LLC, American Huts, Inc., ADF Pizza I, LLC, and ADF PA, LLC, had committed multiple violations of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), affecting both Mr. Keim and a large number of other people. App. Tab 1. The complaint requested certification of a hybrid class action under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), as it sought both

damages and injunctive relief on behalf of a class of people who had been subjected to the claimed violations. *Id*. at 13–16. The complaint sought statutory damages of up to $1500 per violation for members of the class, as well as an injunction against further violations, *see id*. at 18, as authorized by the TCPA's private right of action, 47 U.S.C. § 227(b)(3).

On July 27, 2012, the defendants filed a motion to dismiss the action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim on which relief could be granted. App. Tab 18. Three of the defendants simultaneously moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. App. Tab 21. While those motions were pending, on September 21, 2012, the defendants served an offer of judgment on Mr. Keim under Federal Rule of Civil Procedure 68. App. Tab 33-2. During the time permitted by Rule 68 for responding to the offer, Mr. Keim declined the offer and, on October 2, 2012, filed a motion for certification of a class. Doc. 33.

Following extensive briefing by the parties, the district court entered an order on July 15, 2013, granting the defendant's Rule 12(b)(1) motion and dismissing the action "with prejudice as moot." App. Tab 55, at 17. The court also denied the defendants' motion to dismiss for lack of

personal jurisdiction as moot, and it likewise denied Mr. Keim's motion for class certification. *Id*. Although it dismissed the action with prejudice for lack of subject-matter jurisdiction, the order further stated that the court would "retain[] continuing jurisdiction" to enter judgment on the Rule 68 offer. *Id*.

Statement of the Facts

The defendants are operators of Pizza Hut franchises, who, for marketing purposes, devised a program of sending promotional text messages to cell phones of consumers whose friends provided their cell phone numbers. App. Tab 1, at 3–4, 7–13. Mr. Keim's complaint alleges that the defendants used automated dialing equipment to send the messages, even though the recipients had not themselves consented to receive such messages. The messages provided no mechanism for recipients to opt out of receiving additional messages. *Id.* at 13, 16–18. The use of automated dialing equipment to send such messages to cell phones is a violation of the TCPA. 42 U.S.C. § 227(b)(1)(A)(iii).

Mr. Keim is among the thousands of consumers nationwide who received the unwanted Pizza Hut messages. App. Tab. 1, at 8, 12. Mr. Keim began receiving messages in about February 2011 and continued receiv-

ing them for many months. *Id*. at 12–13. His complaint in this action includes examples of some of the messages he received, but does not specify the total number of messages received. *Id*.

On July 16, 2012, the defendants made an informal offer to Mr. Keim to settle the case for a payment of $1,500 for each text message he had received, plus his attorneys' fees and taxable costs, and an agreement to comply with his request for injunctive relief. *See* App. Tab 55, at 2. The defendants' subsequent motion to dismiss for lack of subject-matter jurisdiction asserted that this offer mooted Mr. Keim's individual claims and required dismissal of the class action in its entirety for lack of subject-matter jurisdiction. App. Tab 18.

On September 21, 2013, after this Court's ruling in *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 (11th Cir. 2013), that a settlement offer does not moot a plaintiff's claim, the defendants served Mr. Keim with an offer of judgment "pursuant to Rule 68 of [the] Federal Rules of Civil Procedure." App. Tab 33-2, at 1. The offer stated that the defendants would allow judgment to be entered against them in Mr. Keim's favor in the amount of $1500 for each unsolicited message he "allegedly received," but did not specify a total number of messages or amount of payment. *Id*.

The defendants also offered to pay Mr. Keim's costs and attorneys' fees as a prevailing party in an amount to be determined by the court and to stipulate to the entry of an injunction prohibiting them from sending unsolicited text messages "in violation of the TCPA." *Id*. They further offered to provide "any other relief which is determined by the Court to be necessary to fully satisfy all of the individual claims of Keim in the action …." *Id*. at 2.[2] The offer concluded by stating that it was "made only for the purposes specified in Rule 68" and was tendered "solely to avoid the uncertainty and expense of further litigation." *Id.*

Mr. Keim promptly rejected the offer and, on October 2, 2012, filed a motion seeking to certify the class. Doc. 33. Thereafter, the defendants, in their briefing in support of the then-pending motion to dismiss for lack of subject-matter jurisdiction, relied upon the unaccepted Rule 68 offer rather than their earlier informal offer as the basis for their argument that Mr. Keim's individual claims were moot and that, as a result,

[2] The offer also purported to extend to up to ten other individuals who might be represented by Mr. Keim's counsel if they had already contacted counsel about claims against the defendants prior to the date of the offer, but this coverage did not include nonnamed class members who did not already have a relationship with Mr. Keim's attorney. *Id*. at 1–2.

the district court lacked subject-matter jurisdiction over the class action. *See* App. Tab 55, at 6.

By order dated July 15, 2013, the district court dismissed the action with prejudice as moot, accepting the defendant's theory that the Rule 68 offer mooted Mr. Keim's claims and deprived the court of subject-matter jurisdiction over his attempt to bring a class action. App. Tab 55. According to the court, the offer would have fully satisfied Mr. Keim's claims. Thus, even though it had not been accepted, the offer eliminated any cognizable controversy between the parties and placed the matter outside the "limits on federal jurisdiction expressed in Article III." *Id*. at 8. The court acknowledged that the offer did not specify how much relief Mr. Keim would receive and that further factfinding would be necessary to establish the number of text messages he had received and, therefore, the amount of statutory damages to which he was entitled. *See id*. at 4–5 n.5, 6, 14–15. The court, however, blamed this lack of precision on Mr. Keim and accepted that the offer was for full relief despite the fact that what constituted full relief was yet to be determined. *See id*.

In the court's view, this offer of "full relief" mooted Mr. Keim's claim "as soon as the offer was made." *Id*. at 16. The court therefore also

concluded that the offer mooted the class action as a whole because Mr. Keim had not moved to certify the class until after the offer was made. *Id*. The court acknowledged, however, that if Mr. Keim had moved for certification before the offer had been made, such a motion would have sufficed to prevent mootness of the class action—even if Mr. Keim had requested that the court defer consideration of the motion pending discovery on class issues. *See id*. at 12–13.

Based on these conclusions, the court granted the defendant's motion to dismiss for lack of subject-matter jurisdiction and "ordered and adjudged" that the claims in the case be "dismissed with prejudice as moot." *Id*. at 17. Although it had definitively held that it lacked jurisdiction and that the claims were dismissed, the court simultaneously stated that it "retain[ed] continuing jurisdiction" solely to enter a judgment comporting with the Rule 68 offer, including any "gathering of information necessary" for this purpose. *Id*.

Standard of Review

The correctness of a district court's dismissal of a complaint for lack of subject-matter jurisdiction (including dismissal on justiciability grounds such as mootness) is a question of law that this Court reviews *de*

novo, with any pertinent factual findings reviewed for clear error. *Zinni*, 692 F.3d at 1166; *see also Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006) (applying *de novo* review to a Rule 12(b)(1) dismissal based on ripeness and standing).

SUMMARY OF ARGUMENT

The district court erred in three ways, each one fatal to its decision. First, the court erred in concluding that an unaccepted Rule 68 offer of judgment moots a plaintiff's individual claim if it would have fully satisfied that claim had it been accepted. Rule 68 is merely 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 action. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146 (1981). In its recent decision in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 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, and Justice Kagan's dissent, joined by three other Justices, made clear why the Court had not issued such a ruling: 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 __, 133 S. Ct. at 1533 (Kagan, J., dissenting) (quoting *Chafin v. Chafin,* 568 U.S. __, __, 133 S. Ct. 1017, 1023 (2012)). A Rule 68 offer does not deprive a court of the ability to grant effectual relief and, therefore, cannot moot anything.

Second, even if a Rule 68 offer of complete relief could moot a plaintiff's individual claim, the offer in this case left open-ended and subject to further factual determination (and controversy) the amount of relief the plaintiff would receive if it were accepted. Because it left elements of the merits of Mr. Keim's claim—including the number of violations and resulting amount of damages—unresolved, the offer failed to offer complete relief or to resolve fully (even if accepted) the dispute between the parties. As a result, it could not moot the case or controversy between the parties. *See Zinni*, 692 F.3d at 1166–68; *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 570 (6th Cir. 2013); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 372–73 (4th Cir. 2012).

Third, even if the offer of judgment could be deemed to moot Mr. Keim's individual claims, it would neither moot those of the class nor bar

the court from exercising subject-matter jurisdiction over a class action brought by Mr. Keim, regardless of whether he moved for class certification before or after receiving the offer. *See, e.g., Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090-92 (9th Cir. 2011) (Bybee, J.). A class representative's interests in representing the putative class, together with the interests of the class as a juridical entity, allow the issue of class certification to remain alive even if the named plaintiff's individual claim has become moot. *See, e.g.*, *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 100 S. Ct. 1202 (1980); *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 100 S. Ct. 1166 (1980). The Supreme Court's recent decision in *Symczyk*, which declined to extend the principles of *Roper* and *Geraghty* to collective actions under the Fair Labor Standards Act (FLSA), does not govern the issue of mootness in a class action because, as *Symczyk* held, the differences between class actions and FLSA collective actions are so fundamental that decisions about one are "inapposite" to the other. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529.[3]

[3] Although each of these reasons independently provides a sufficient basis for overturning the district court's order, the Court need not reach the question whether a plaintiff whose individual claim is moot can seek to represent a class if it determines that the Rule 68 offer of judgment in this case did not moot Mr. Keim's individual claim.

ARGUMENT

I. An Unaccepted Rule 68 Offer of Judgment Does Not Moot a Plaintiff's Individual Claims.

The district court erred in holding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claims and deprives the court of subject-matter jurisdiction. 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. Indeed, 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 hence of the power to enter the very judgment contemplated by the offer.

A. 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*, 568 U.S. at __, 133 S. Ct. at 1023 (quoting *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477, 110 S. Ct. 1249, 1253 (1990)). In

particular, the mootness doctrine requires that parties "continue to have a 'personal stake in the outcome of the lawsuit" throughout its existence, *Lewis*, 494 U.S. at 477–78, 110 S. Ct. at 1254 (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.*, 568 U.S. __, __, 133 S. Ct. 721, 726 (2013) (citation omitted).

A court may not, however, 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*, 567 U.S. __, __, 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*, 568 U.S. at __, 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*, 570 U.S. __, __, 133 S. Ct. 2675, 2685 (2013).

A Rule 68 offer of judgment that has not been accepted 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. As the Supreme Court has explained, Rule 68 is merely 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, 101 S. Ct. at 1149. Specifically, 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, 101 S. Ct. at 1149 (emphasis added; quoting former Fed. R. Civ. P. 68).[4]

Under the Rule, the plaintiff's rejection of an offer only "becomes significant in … a [post-judgment] proceeding to determine costs." *Id.*

[4] Since *Delta*, 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."

Specifically, 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*, 450 U.S. at 351–52, 101 S. Ct. at 1149–50. Thus, what the Rule establishes is a cost-shifting mechanism designed to "encourage the settlement of litigation" by providing plaintiffs "an additional inducement to settle …." *Delta*, 450 U.S. at 352, 101 S. Ct. at 1150.

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. 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, only after which the unaccepted offer may become relevant, and then only to the issue of costs. R. 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*, 570 U.S. at__, 133 S. Ct. at 2685; *Chafin*, 568 U.S. at __, 133 S. Ct. at 1023; *Knox*, 567 U.S. at __, 132 S. Ct. at 2287. Decisions holding that an offer of judgment that would fully satisfy a plaintiff's claim moots that claim, *see* App. Tab 55, at 10–11 (citing *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011)), are untenable in light of the Supreme Court's decisions in *Windsor*, *Chafin*, and *Knox* emphasizing the limited scope of the mootness doctrine.

B. As the district court acknowledged (see App. Tab 55, at 10), the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk* pointed out that the question whether an unaccepted Rule 68 offer of judgment moots a plaintiff's individual claim is unresolved. 569 U.S. at __, 133 S. Ct. at 1528–29. The majority in *Symczyk* expressly declined to reach that issue. *Id*. At issue in *Symczyk* was whether a plaintiff whose individual claim was moot could continue to pursue an opt-in col-

lective action under the 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,[5] argued that a Rule 68 offer cannot moot a claim. The *Symczyk* majority, however, held that that argument was not properly before it because it had not been presented in a cross-petition and, in any event, the plaintiff had conceded below that her claim was moot. *See Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529. The majority therefore merely "assume[d], without deciding," that the individual claim was moot. *Id*.

Justice Kagan, joined by Justices Ginsberg, 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 the case that resulted from the unexamined premise that the individual claim was moot). *See id*. at __, 133 S. Ct. at 1532–37 (Kagan, J., dissenting). Turning to the issue that the majority did not address, Justice Ka-

[5] *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.

gan demonstrated that the view that an unaccepted Rule 68 offer moots a plaintiff's claim is, in her words, "bogus." *Id*. at __, 133 S. Ct. at 1532. As she explained, even a Rule 68 offer that would "provide complete relief on [the plaintiff's] individual; claim," *id* at __, 133 S. Ct. at 1532, 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,* 568 U.S. __, __, 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, 7 S. Ct. 168 (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 __, 133 S. Ct. at 1533–34.

Importantly, the *Symczyk* majority breathed 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 __, 133 S. Ct. at 1534.

Here, even in the face of Justice Kagan's unrebutted demonstration (backed by the Solicitor General of the United States) that it is a "fallacy" to suppose that Rule 68 offers can moot individual claims, *id*. at __, 133 S. Ct. at 1537, the district court chose to rely on decisions of other circuits (and other district courts) whose reasoning Justice Kagan had exposed as erroneous. Of course, the district court might have been required to ignore Justice Kagan's reasoning if a precedent of this Court demanded a finding that a Rule 68 offer mooted a plaintiff's claims. But this Court's decisions by no means support the result below. This Circuit has not decided whether a Rule 68 offer has mootness consequences. In *Zinni v. ER Solutions*, the Court held that an informal settlement offer that was made outside Rule 68 and did not include an offer to have judgment entered against the defendant could not moot a plaintiff's

claim because a "mere promise to pay" did not eliminate a "live controversy" over whether the plaintiff was entitled to a judgment on his claims. 692 F.3d at 1167–68. *Zinni* noted that some appellate courts had held that an offer of judgment that would provide a plaintiff with full relief could moot his claims, while others had disagreed, *see id.* at 1166–67 & n.8. The Court, however, had no need to resolve that issue, *see id.* at 1166 n.8, because under any view of the matter, an offer that did *not* provide full relief, but merely offered something less valuable to the plaintiff than the enforceable judgment sought, could not moot anything. *See id.* at 1166–68.

Although *Zinni* did not reach the issue, its reasoning is consistent with the view later expressed by Justice Kagan in *Symczyk*. *Zinni*, like Justice Kagan's *Symczyk* opinion, is grounded on the principle that "[a]n issue is moot 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)). An unaccepted Rule 68 offer of judgment no more deprives a court of the ability to grant meaningful relief than did the informal settlement offers at issue in *Zinni*. Like those settlement offers,

the unaccepted Rule 68 offer here, which is "considered withdrawn" by operation of Rule 68(b) and cannot be offered in evidence as an admission of liability of the defendant or for any other purpose (other than to establish an entitlement to costs in the circumstances described in Rule 68(d)), does not redress the plaintiff's injury or stand as an obstacle to the court's resolution of the question of the defendant's liability and entry of an effectual judgment satisfying the plaintiff's claims. It therefore cannot moot anything.

C. The district court's contrary view would have perverse consequences. 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 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*. 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 federal court must have subject matter jurisdiction to grant a party the relief it seeks." *Mic-*

cosukee Tribe of Indians v. Kraus-Anderson Constr. Co., 607 F.3d 1268, 1277 (11th Cir. 2010). Thus, "[a] district court must always dismiss a case upon determining that it lacks subject matter jurisdiction," and must do so "'without reaching the merits.'" *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001) (citation omitted); *accord*, *e.g.*, *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).

As the Supreme Court has put it, "[w]ithout 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." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012 (1998) (quoting *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868)); *see also* 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."). The Supreme Court's promulgation of a rule contemplating the entry of a judg-

ment on an accepted Rule 68 offer thus quite evidently reflects the view that the offer itself does not deprive the court of jurisdiction.

The notion that a Rule 68 offer moots a case has equally bizarre consequences in a case, like this one, where the offer is not accepted. In such a case, the plaintiff's claim has *not* been redressed. Indeed, Rule 68's own terms do not authorize the court to award redress on the basis of an unaccepted offer. As Justice Kagan's *Symczyk* opinion explains,

> Rule 68 precludes a court from imposing judgment for a plaintiff … based on an unaccepted settlement offer made pursuant to its terms. The text of the Rule contemplates that a court will enter judgment only when a plaintiff accepts an offer. … And the Rule prohibits a court from considering an unaccepted offer for any purpose other than allocating litigation costs—including for the purpose of entering judgment for either party.

569 U.S. at __, 133 S. Ct. at 1536 (Kagan, J., dissenting). Moreover, if the unaccepted offer truly divested the court of jurisdiction by mooting the case, the court would lack authority to render a judgment in the plaintiff's favor on the unaccepted offer even if the Rule permitted it to do so. Thus, the mootness theory, taken seriously, requires the court to dismiss the case on the ground that the plaintiff's claim has been redressed while simultaneously denying the plaintiff any means of redress.

A court cannot declare a claim for damages and injunctive relief moot while at the same time "send[ing] [the plaintiff] away empty-handed." *Id*. at 1534. Yet that is exactly the consequence of the 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," but the plaintiff who supposedly "won" gets nothing. *See Greisz v. Household Bank (Ill.)*, 176 F.3d 1012, 1015 (7th Cir. 1999). That theory makes no sense because, as Justice Kagan explained, 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*, 569 U.S. at __, 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*. Neither Rule 68 itself nor any other law or rule authorizes such a penalty. *See id.* at 12–13.

D. The incongruity of leaving a plaintiff with an unredressed claim while declaring that claim to be moot has led some courts to per-

form considerable legal and mental gymnastics to avoid that obviously incorrect result. Thus, the Sixth Circuit held in *O'Brien v. Ed Donnelly Enters., Inc.,* 575 F.3d 567 (6th Cir. 2009), that although the unaccepted offer moots the plaintiffs' claim, "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *Id*. at 575. That approach is certainly better for the individual plaintiff than getting nothing, but it is little better jurisprudentially, for it ignores that if a case is truly moot, a court has no *power* to enter judgment. *See Steel Co.*, 523 U.S. at 94, 118 S. Ct. at 1012.

Adopting a variant of *O'Brien*'s "better approach," the district court here granted the defendant's motion to dismiss for lack of subject-matter jurisdiction, stating unequivocally that the action was "dismissed with prejudice as moot."[6] App. Tab 55, at 16. The court, however, then purported to "retain[] continuing jurisdiction in this case to effectuate entry of a judgment consistent with the terms of Defendants' Rule 68 offer." *Id*. The court's order strikingly illustrates the absurd consequences of calling a case moot when the plaintiff has not yet obtained redress.

[6] The court evidently overlooked that a jurisdictional dismissal, by definition, cannot be "with prejudice." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008).

Obviously, "where the Court does not have jurisdiction, it cannot retain jurisdiction." *Gregory v. Mitchell*, 634 F.2d 199, 204 n.2 (5th Cir. 1981) (quoting *Fuller v. Daniel*, 438 F. Supp. 928, 930 (N.D. Ala. 1977)). Moreover, if a court genuinely lacks subject-matter jurisdiction because of the absence of a case or controversy, "effectuat[ing] entry of a judgment" is the last thing it should be doing. *See White* 776 F.2d at 977. When a court feels compelled to resort to the through-the-looking-glass device of "retaining" jurisdiction it has just said it lacks in order to do something that would be manifestly improper if it actually lacked jurisdiction, that is a strong indication that the court's jurisdictional theory is fundamentally flawed.

The defect in the theory that unaccepted Rule 68 offers can moot claims is its failure 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*, 570 U.S. at__, 133 S. Ct. at 2685. In such circumstances, an adverse party's failure to contest a claim, or even its concession that it is liable, may be a basis for a judicial resolution of the case in favor of the plaintiff, but it is not a basis for dismissing the case as outside the court's jurisdiction. If the law were otherwise, a defendant

could, by conceding liability, paradoxically either *avoid* an adverse judgment or force a court to enter a judgment in a case in which it lacked jurisdiction. Neither alternative makes sense.

E. As Justice Kagan explained in *Symczyk*, 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 where a plaintiff perversely refuses to take yes for an answer: "a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Symczyk*, 569 U.S. at__, 133 S. Ct. at 1536 (Kagan, J., dissenting); *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)). But an unaccepted Rule 68 offer like the one in this case cannot permit the court to enter judgment for the individual plaintiff (and dismiss a class action), for two reasons. *First*, a Rule 68 offer of judgment is not an "unconditional surrender"; it becomes a nullity if not accepted within 14 days, and thereafter it cannot be treated as a concession of liability or as the basis for entry of judgment in favor of the plaintiff. A Rule 68 offer does not consti-

tute consent by the defendant to entry of judgment if the offer is not unaccepted, nor does is permit entry of judgment over the plaintiff's objection: "The Rule provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent." *Symczyk*, 569 U.S. at__, 133 S. Ct. at 1536 (Kagan, J., dissenting).

Second, in an action brought on behalf of a class, neither Rule 68 nor any other source of law permits a district court to determine the merits of the plaintiff's individual claim (even if it is uncontested) before considering the claim that the case should be given class treatment. On the contrary, the Federal Rules of Civil Procedure call for the issue of class certification to be given priority and decided "[a]t an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). Once the fallacy that the offer of judgment presents a *jurisdictional* basis for dismissal that must necessarily be resolved before consideration of other issues is put aside, there is no basis for allowing a defendant to compel entry of a judgment in favor of an individual plaintiff in order to terminate prosecution of claims on behalf of the class. Indeed, allowing the defendant to do so would distort the proper functioning of the judicial process:

> To deny the right to [proceed with a class action] simply because the defendant has sought to "buy off" the individual private

> claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Roper, 445 U.S. at 339, 100 S. Ct. at 1174.

The plaintiff in a class action has an excellent reason for objecting to the court's resolution of his individual claims prior to consideration of the propriety of class certification: Such a resolution fails to satisfy the entirely legitimate objective for which he has brought the action—obtaining relief for the class. As then-Justice Rehnquist pointed out in his concurring opinion in *Roper*, there is no rule of law "that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims." *Id.* at 341, 100 S. Ct. at 1175 (Rehnquist, J., concurring). Rather, "[a]cceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable." *Id.*; *see also Symczyk*, 569 U.S. at__, 133 S. Ct. at 1536 (Kagan, J., dissenting).

In sum, the theory that unaccepted Rule 68 offers of judgment moot claims for which, if accepted, they would have provided complete relief has no basis in any accurate understanding of the meaning of mootness. Rather, dismissing claims based on such offers serves only to terminate actual cases or controversies in ways that are unauthorized by any rule of law and that allow circumvention of sound principles of judicial administration of actions presenting claims for both individual and classwide relief. As Justice Kagan advised in *Symczyk*, courts that have adopted the view that Rule 68 offers can moot claims should "[r]ethink" that position, while those that—like this Court—have not yet taken a position on the issue should heed her caution: "Don't try this at home." *Symczyk*, 569 U.S. at__, 133 S. Ct. at 1534 (Kagan, J., dissenting).

II. Even If an Unaccepted Rule 68 Offer of Judgment for Full Relief Could Moot a Plaintiff's Individual Claim, an Offer That Leaves the Relief Offered to Be Determined Would Not Do So.

The purported Rule 68 offer did not specify how much money the defendants were offering to satisfy Mr. Keim's claims. As to damages, it said only that the defendants would allow judgment to be entered against them for the maximum statutory damages "for each and every unsolicited commercial text message … allegedly received by Plaintiff Brian Keim

…." App. Tab 33-2, at 1. As the district court acknowledged, the number of text messages received by Mr. Keim is not alleged in his complaint and has not otherwise been determined. App. Tab 55, at 6, 14–15. Thus, the offer was contingent on determination of an unresolved issue: the amount of the statutory damages to which Mr. Keim was entitled, which depended on how many messages he had received and, potentially, on whether they were determined to be "unsolicited" within the meaning of the TCPA. The district court recognized that determining the amount to be paid under the offer would require a further judicial determination potentially requiring the "gathering of information." *Id.* at 17.

In addition, the defendants' offer of injunctive relief ambiguously stated that they would agree to an injunction against sending text messages "in violation of the TCPA," App. Tab 33-2, at 1, but they did not admit that the text message campaign alleged in the complaint violated the TCPA. Thus, their agreed injunction would have left unresolved whether they were permitted to engage in the very conduct challenged in the complaint. That uncertainty was exacerbated by the offer's further inclusion of "any other relief which is *determined by the Court* to be necessary to fully satisfy all of the individual claims of Keim in the action

…." App. Tab 33-2, at 2. (emphasis added). As the court acknowledged, the offer expressly contemplated the possible need for "providing additional relief determined by the Court to be necessary to fully satisfy all of Plaintiff's individual claims." App. Tab 55, at 14. Nonetheless, despite its understanding that the offer on its face left work for the court to do to determine Mr. Keim's damages and other relief, the court held that the offer eliminated any case or controversy and dismissed the action.

Even if a Rule 68 offer that, on its face, specified all the relief sought by a plaintiff would suffice to moot the plaintiff's claims, an offer that requires the court to determine the nature and amount of the relief to which the plaintiff is entitled could not render his claims moot. Even those courts that (wrongly) accept the proposition that a Rule 68 offer of judgment that provides complete relief to the plaintiff can moot his claims require that the offer ensure that the plaintiff receive "every form of individual relief the claimant seeks in the complaint." *Hrivnak v. NCO Portfolio Mgmt.*, 719 F.3d at 568. This court, while reserving opinion on whether a Rule 68 offer of judgment that would provide complete relief can ever moot a claim, has likewise held that an offer that *fails* to pro-

vide for everything that a court could order on a claim does *not* give rise to mootness. *Zinni*, 692 F.3d at 1166–68.

As Judge Sutton of the Sixth Circuit explained in *Hrivnak*, an offer that provides only that relief to which the plaintiff is *legitimately* entitled—and that leaves it up to the court to make the determination of what that may be—does not suffice to moot a claim. *Hrivnak*, 719 F.3d at 568–70. Such an offer only emphasizes that a live case or controversy remains, for "[t]o rule on whether [the plaintiff] is entitled to a particular kind of relief is to *decide the merits of the case*." *Id*. at 570 (emphasis added).[7] By expressly leaving merits issues—at a minimum, the amount and nature of relief necessary, and possibly even liability issues as to whether particular conduct violated the TCPA—for determination by the court, the offer here on its face made clear that the parties retained con-

[7] In *Hrivnak*, the offer at least specified precisely what the defendant was offering; the merits determination that it left for the court was whether that offer fully satisfied the individual plaintiff's claims, which in turn required the court to determine whether the plaintiff had valid claims for more. Thus, the offer "require[d] the district court to address their other merits arguments in order to determine whether a Rule 68 offer of judgment as to some claims moots all claims." *Id*. Here, the offer is one step further from mooting the claims, because it requires merits rulings not just to determine the adequacy of the defendants' offer, but even to determine what the plaintiff would receive under the offer.

crete interests in a judicial resolution of the case and that it *was* possible for the court to provide effectual relief as between the parties.

For like reasons, the Fourth Circuit has twice rejected the proposition that a case can be mooted by an offer that leaves the amount of damages subject either to the submission of further information by the plaintiff or to determination by the court. *See Simmons v. United Mortgage & Loan Inv., LLC*, 634 F.3d 754 (4th Cir. 2011); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365. In *Simmons*, which this Court cited approvingly in *Zinni*, *see* 692 F.3d at 1167, the defendant offered to "compensate[] fully" each plaintiff "upon receipt of an affidavit" justifying his or her claim for overtime. *See* 634 F.3d at 760–61. The court found the offer "ineffective at mooting the Plaintiffs' … claims" because "the parties still had work to do in order to figure out what amounts the plaintiffs were allegedly owed"—work that "raised many unanswered questions" and created the possibility of further disputes between the parties. *Id*. at 766. The same is true of the offer in this case.

The Fourth Circuit's subsequent decision in *Warren* is even more pertinent. There, the offer stated that the plaintiff would receive $1001 in statutory damages plus actual damages of $250 "or an amount deter-

mined by the Court upon Plaintiff's submission of affidavits or other evidence of actual damage." 676 F.3d at 369. The court held that the provision calling for the court to determine an unresolved issue of damages created an "inherent flaw" in the defendant's claim of mootness, because the offer was "predicated on what the district court as fact finder might or might not do" and created the possibility of litigation over the plaintiffs' damages calculation. *Id*. at 372-73. The same is true of the offer in this case, which, as the district court itself realized, contemplated a further judicial role in determining the relief to be awarded. App. Tab 55, at 14, 17.

Warren also points to another difficulty created by treating such an offer as mooting a case and depriving a court of subject matter jurisdiction: It deprives the plaintiff of the "right to have a jury determine disputes of fact" over damages. *Warren*, 676 F.3d at 373. The court's order in this case has the same effect. By dismissing Mr. Keim's action for lack of subject-matter jurisdiction with the amount of damages unresolved, and treating that question as a matter to be determined in some strange form of post-dismissal collateral proceedings, the court substitutes its own ad hoc "information gathering" process for the procedural entitle-

ments, including the entitlement to jury factfinding, of a litigant who seeks to have a contested issue resolved in an action proceeding under the Federal Rules of Civil Procedure.[8]

The district court's only justification for treating the open-ended offer here as one for full relief was that Mr. Keim himself had not alleged the number of text messages he received in violation of the TCPA or the exact amount of statutory damages he sought. *See* App. Tab 55, at 14–16. But as the Fourth Circuit stated in *Simmons*, such complaints about the plaintiff's failure to specify the amount he claims "matter[] not to a mootness inquiry." 634 F.3d at 766; *see also Warren*, 676 F.3d at 373 n.4. An offer that requires additional factfinding to determine relief is not transformed into an offer of full relief simply because the defendant blames the plaintiff for the lack of information that prevents it from making such an offer. The very fact that no undisputed amount of dam-

[8] Federal courts regularly recognize the availability of jury trials in TCPA actions, and the issue of whether the defendant sent particular communications to the plaintiff is treated as a jury issue. *See*, *e.g.*, *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825, 832 (D. Md. 2011); *Mais v. Gulf Coast Collection Bur., Inc.*, __ F. Supp. 2d __, __, 2013 WL 1899616, at *15 (S.D. Fla. May 8, 2013).

ages has been established itself indicates that the case cannot be moot, regardless of who is believed responsible. *See Simmons*, 634 F.3d at 766.

In any event, Mr. Keim was not required to plead the amount of damages sought, *see Equity Capital Co. v. Sponder*, 414 F.2d 317, 319 n.1 (5th Cir. 1969) ("the prayer of the complaint is irrelevant under F. R. Civ. P. 54(c) as to relief"), or the number of text messages received, nor was he required to state any position on those subjects in advance of any exchange of discovery between the parties that would provide the information.[9] To the extent that the defendants believed they were entitled to that information, they could have sought discovery, moved for a more definite statement under Federal Rule of Civil Procedure 12(e), or even, if they believed that the failure to allege the number of text messages rendered the complaint insufficient under Rule 8(a), moved to dismiss under Rule 12(b)(6). Aside from whatever entitlements to additional in-

[9] The district court seems to have assumed that Mr. Keim was in control of the information that would establish the number of messages received, but there is no evidentiary basis for that assumption, and the court does not appear to have considered the possibility that Mr. Keim might need discovery of the defendants' records, or those of the two text messaging marketing companies engaged by the defendants for the advertising program at issue, *see* App. Tab 1, at 5, 7–12, in order to make a complete and accurate determination of the number of calls.

formation those provisions of the rules may create, the defendants have no free-floating right to have the plaintiff come forward with a definite damages figure at the outset of the case just so that they can make a Rule 68 offer in an effort to moot his claim before the court can address class certification. And certainly there is no basis for punishing a plaintiff for failing to come forward with such information by treating a Rule 68 offer as mooting his claim when, on its face, it does not.

As argued above, this Court should lay to rest any notion that an unaccepted Rule 68 offer can moot a claim even if it offers full relief. But even if a Rule 68 offer could ever moot a plaintiff's individual claim, an offer that would require further factfinding to determine damages—as the district court conceded that this offer did—could not possibly do so. Such an offer no more moots a case than does a stipulation of liability that leaves open the question of damages. A stipulation of liability may obviate the need for a trial on liability issues (whether the plaintiff likes it or not), but no one would seriously suggest that it moots the case and requires its dismissal for lack of subject-matter jurisdiction. It simply limits the issue that requires resolution to the proper relief. *See*, *e.g.*, *Waldorf v. Shuta*, 142 F.3d 601 (3d Cir. 1998). Indeed, a Rule 68 offer

that leaves unresolved the question of relief does even less to moot a case than a liability stipulation, because, unlike a stipulation, which generally binds the party who files it (*see id.* at 616–20), an unaccepted Rule 68 offer does not bind the defendant, but is withdrawn by operation of law. Fed. R. Civ. P. 68(b). Such an offer by no means prevents a court from granting effectual relief.

III. Even If Mr. Keim's Individual Claim Were Moot, the Action Would Not Be Subject to Dismissal Because the Class Claims Are Not Moot.

The district court erred not only in holding that Mr. Keim's individual claims were mooted by the Rule 68 offer of judgment, but also in presupposing that mootness of Mr. Keim's individual claims would require dismissal of this action, in which Mr. Keim asserted not only individual claims, but also claims on behalf of a class of others similarly situated. As the Supreme Court has held, however, the mootness of a plaintiff's individual claims does not necessarily imply that the plaintiff's effort to represent a class asserting similar claims must be rejected on mootness grounds. *Roper,* 445 U.S. at 333–35, 100 S. Ct. at 1171–72; *Geraghty,* 445 U.S. 403–04, 100 S. Ct. 1212–13. The authority of those opinions remains unaltered by the Supreme Court's recent decision in

Symczyk, which declined to extend them to what the Court called the "fundamentally different" context of a collective action under the FLSA. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529.

The features of class actions give rise to a number of reasons for recognizing that a named plaintiff's effort to represent a class creates a live case or controversy even if the plaintiff's purely individual claim is moot. First, as the Court recognized in *Geraghty*, such a plaintiff maintains the "personal stake" required by Article III in "the right to represent a class."445 U.S. at 402, 100 S. Ct. at 1212. Thus, the Court stated, "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied," because the "proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id*. at 404; 100 S. Ct. at 1212–13. In such cases, moreover, not only do the merits of the class's claims remain at issue, but also "[t]he question whether class certification is appropriate remains as a concrete, sharply presented issue," and the putative class representative can "continue[] vigorously to advocate his right to

have a class certified" regardless of the status of his personal claim. *Id*. at 403–04, 100 S. Ct. at 1212.

Second, as the Court recognized in *Roper*, a putative class representative retains "an economic interest in class certification." 445 U.S. at 333, 100 S. Ct. at 1171. In *Roper*, for example, the court noted that the individual plaintiffs had an interest in the potential ability to shift attorney fees and expenses they had incurred to the class, *see id*. at 334 n.6, 100 S. Ct. at 1172 n.6. Likewise, here, Mr. Keim has an interest in the recovery of attorney fees and costs attributable to his counsel's efforts on behalf of the class, which were not covered by the Rule 68 offer, which consented only to fees to which Mr. Keim would be entitled as an individual prevailing party. *See* App. Tab 33-2, at 1. In addition, a putative class representative such as Mr. Keim retains an individual interest in a possible incentive award for his efforts on behalf of the class. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012) (holding that possibility of incentive award provided standing to appeal denial of certification where individual claim was settled); *cf*. *Nelson v. Mead Johnson & Johnson Co.*, 484 F. Appx. 429 (11th Cir. 2012) (affirming approval of class settlement that provided incentive award).

Third, the ultimate certification of a class creates a juridical entity with "a legal status separate from the interest of [the named plaintiff]." *Sosna v Iowa*, 419 U.S. 393, 399, 95 S. Ct. 553, 557 (1975). Under appropriate circumstances, a certification decision may relate back to earlier events in the case where the named plaintiff indisputably had a live claim, and thus enable the court to consider class certification even after the named plaintiff's claim is mooted. *Geraghty*, 445 U.S. at 404 n.11; 100 S. Ct. at 1213 n.11. Appellate decisions following *Sosna*'s and *Geraghty*'s reasoning have held that in circumstances like those in this case, the possible certification of a class should be deemed to relate back to the filing of the class action complaint, permitting class claims to continue even if the individual plaintiff's claim has become moot, in order to "avoid[] the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved." *Pitts v. Terrible Herbst,* 653 F.3d at 1090.

For these reasons, the plurality of federal appellate courts to consider the issue have held that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—

does not moot a class action." *Pitts*, 653 F.3d at 1091–92; *see also Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004). Thus, even if the Rule 68 offer is (wrongly) viewed as mooting the named plaintiff's individual claim, the class action may not be dismissed as moot:

> If the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the class certification issue. Then, if the district court certifies the class, certification relates back to the filing of the complaint. Once the class has been certified, the case may continue despite full satisfaction of the named plaintiff's individual claim because an offer of judgment to the named plaintiff fails to satisfy the demands of the class.

Pitts, 653 F. 3d at 1092; *accord Lucero*, 639 F.3d at 1249; *Weiss*, 385 F.3d at 348.

These decisions, which recognize not only the "flexible" construction the Supreme Court has given the mootness doctrine, *Geraghty,* 445 U.S. at 400, 100 S. Ct. at 1211, but also the significant interests served by the class action device and the undesirability of allowing those interests to be frustrated by letting defendants prevent certification by attempting to "'buy off' the individual private claims of the named plaintiffs," *Roper*, 445 U.S. at 339, 100 S. Ct. at 1174, remain persuasive after *Symczyk*. *Symczyk* held that an FLSA collective action is moot once the

individual plaintiff's claim is moot (if no other plaintiff with a live claim has yet opted into the action), but it did so in large part because of the significant differences between FLSA actions and class actions, which make decisions about mootness of one "inapposite" to the other. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529.

As the Court explained in *Symczyk*, class actions differ "fundamentally" from FLSA collective actions in large part because of the "unique significance of certification decisions in class-action proceedings." *Id*. at __, __, 133 S. Ct. at 1529, 1532. "[A] putative class acquires an independent legal status once it is certified under Rule 23." *Id*. at __. 133 S. Ct. at 1530. As a result, members of the class are bound by the resolution of certified class actions unless they have opted out. *See Smith v. Bayer Corp.*, 564 U.S. __, __, 131 S. Ct. 2368, 2380 (2011).

By contrast, a collective action under the FLSA is merely a procedural device by which persons with claims similar to the FLSA plaintiff's may receive notice of the pendency of the action and opt in *as additional individual parties*. "Under the FLSA, … 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1530. Criti-

cally, as this Court has held, anticipating the distinction drawn by the Supreme Court in *Symczyk*, an FLSA plaintiff "has no right to represent" anyone else. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003). Thus, in an FLSA action, the named plaintiff has no "personal stake" in the collective action, *id*. at 1247, nor does an FLSA action result in the creation of a class with its own legal status and, hence, live interests of its own that can create a case or controversy irrespective of the mootness of the claims of any one individual. In short, because of the "fundamental, irreconcilable difference" between an FLSA action and a Rule 23 class action, *id*. at 1249, *Symczyk* does not control the outcome of a case involving a class action.

Accordingly, in the short time since *Symczyk* was decided, several courts, including the Sixth Circuit, have held its holding and reasoning inapplicable to class actions. *See Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013); *Sandusky Wellness Ctr. LLC v. Medtox Scientific, Inc.*, 2013 WL 3771397 (D. Minn. July 18, 2013); *Ramirez v. Trans Union, LLC*, 2013 WL 3752591 (N.D. Cal. July 17, 2013); *Craftwood II, Inc. v. Tomy Int'l, Inc.*, 2013 WL 3756485 (C.D. Cal. July 15, 2013); *Chen v. Allstate Ins. Co.*, 2013 WL 2558012 (N.D. Cal. June 10, 2013); *Canada v.*

Meracord, LLC, 2013 WL 2450631 (W.D. Wash. June 6, 2012). As these courts have concluded, even if an offer of judgment could be said to moot the individual claims of a class action plaintiff, it would not require dismissal of the class action.

The district court, however, concluded that this action must be dismissed in its entirely because Mr. Keim had not filed his motion for class certification until after he received the offer of judgment (although he did move for certification less than 14 days after receiving the offer, during the time in which he could have accepted it). *See* App. Tab 55, at 16. There is no reason, however, to accord talismanic significance to the filing of a certification motion. After all, filing the motion for certification does not itself bring the class into existence. *See Smith v. Bayer*, 564 U.S. at __, 131 S. Ct. at 2380. It does, of course, signify the plaintiff's intent to seek class action status, but so does the filing of a complaint that, like Mr. Keim's, is brought on behalf of a class and contains a request for class treatment.

Thus, if—as the district court's decision assumes—certification of a class may relate back to a motion filed before a Rule 68 offer of judgment and thus prevent the offer from mooting the class action, there is no rea-

son why it may not relate back to the filing of the complaint itself, at least in the absence of "undue delay" in the filing of a certification motion, which is not alleged here. *Weiss*, 385 F.3d at 348; *accord Pitts*, 653 F.3d at 1092; *Lucero*, 639 F.3d at 1249. Moreover, because the plaintiff's own interests in certification of the class survive the Rule 68 offer and are sufficient to maintain an ongoing case or controversy over the appropriateness of class treatment and the merits of the class claim, *see Geraghty*, 445 U.S. at 402, 100 S. Ct. at 1212; *Roper*, 445 U.S. at 333, 100 S. Ct. at 1171, a certification motion may still be filed after the Rule 68 offer of judgment even if, as the district court wrongly held, the Rule 68 offer mooted the plaintiff's individual claims "as soon as the offer was made." App. Tab 55, at 16.[10]

Adoption of the contrary view of the district court would not serve genuine Article III interests, but merely encourage the premature filing

[10] As explained above, the district court's view that the action was already moot even though the certification motion was made within 14 days of the Rule 68 offer because the offer immediately mooted the action even before the time for accepting it expired—indeed, at the very moment the time began to run—paradoxically implies that even if the offer had been accepted, the district court would have been without jurisdiction to enter judgment on it. Of course, that is all the more reason to reject the court's basic premise that the Rule 68 offer mooted anything.

of class certification motions at the time complaints are filed. Indeed, this has become the practice in the Seventh Circuit, which pioneered the approach adapted by the district court here in *Damasco v. Clearwire Corp.*, 662 F.3d at 895. *See Falls v. Silver Cross Hosp. & Med. Ctrs.*, 2013 WL 2338154, at *1–2 (N.D. Ill. May 24, 2013) (stating that the "practice of an up-front certification motion, even though it cannot be ruled upon until discovery in a number of areas has been completed," is effective to prevent a Rule 68 offer to the individual plaintiff from mooting a class action). The filing of such a placeholder motion that serves no genuine purpose other than to reinforce what the complaint already says—that the plaintiff seeks to bring an action on behalf of a class—is not necessary to ensure the concrete adversity that the mootness doctrine is designed to protect. Here, Mr. Keim made clear both by filing a class action complaint and by moving promptly for class certification that he sought to represent a class. His effort to do so is not mooted by a Rule 68 offer of judgment on his personal claims, regardless of the timing of his motion for class certification.

CONCLUSION

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

Respectfully submitted,

s/Scott L. Nelson

Scott D. Owens
Scott D. Owens, P.A.
664 E. Hallandale Beach Blvd.
Hallandale, FL 33009
954-589-0588
954-337-0666 (Fax)
scott@scottdowens.com

Scott L. Nelson
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-7724
202-588-7795 (Fax)
snelson@citizen.org

Attorneys for Appellant

September 25, 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant 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 11,070 words.

/s/Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2013, this Brief for Appellant was served through the court's ECF system on counsel for defendants-appellees, as follows:

Karin Dougan Vogel
kvogel@sheppardmullin.com
David S. Almeida
DAlmeida@sheppardmullin.com
David M. Poell
DPoell@sheppardmullin.com
Sedgwick, LLP
1 N Wacker Dr.
Suite 4200
Chicago, IL 60606

/s/Scott L. Nelson
Scott L. Nelson