No. 14-2574

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIANA MEY,

Plaintiff-Appellant,

v.

NORTH AMERICAN BANCARD, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE AND RULE

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal concerns a defendant's repeated attempts to avoid class-wide liability for its violations of the law. As originally briefed, the appeal presented the question whether an offer of judgment made by defendant-appellee North American Bancard (NAB) to plaintiff-appellant Diana Mey rendered Ms. Mey's individual claim and the class action moot. The district court held that the unaccepted offer mooted the case, entered judgment on Ms. Mey's individual claim in accordance with the offer's terms, and dismissed the class claims.

While the appeal was pending, the Supreme Court held in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), that "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." *Gomez* thus made clear that the district court erred in holding that the Rule 68 offer mooted Ms. Mey's claims.

Gomez also made clear that a court should not enter judgment in a named plaintiff's favor without providing her a chance to show that a class should be certified. The Court instructed that "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id. Gomez* thus confirms that, even apart from its mootness determination, the district court erred in entering judgment on Ms. Mey's live claim without first considering class certification.

NAB responded to *Gomez*'s resolution of the issues in this appeal by

attempting to moot the case in a different way. On February 17, 2016, it delivered a cashier's check for $4,500 to Ms. Mey's counsel. It then filed a motion asking the Court to supplement the record with evidence of its delivery of the check and to allow supplemental briefing. On February 25, 2016, Ms. Mey returned the check to NAB. On March 23, 2016, this Court granted NAB's motion, allowed both parties to supplement the record, and ordered both parties to file supplemental briefs.

NAB now argues that its delivery of the check rendered Ms. Mey's claims moot. It did not, for five independent reasons. First, the check offered monetary relief only and did not even arguably moot Ms. Mey's claim for injunctive relief. Second, the district court entered judgment in Ms. Mey's favor, and a payment made in compliance with a judgment does not moot an appeal of that judgment. Third, Ms. Mey rejected the check, and under both the reasoning of *Gomez* and the common law of tender, a rejected check does not extinguish a debt or deprive a court of subject-matter jurisdiction. Indeed, even when a plaintiff accepts a payment, the question whether that payment ends the case is a merits question, not a question of jurisdiction. Fourth, the check did not include complete monetary relief; further litigation would be necessary to determine whether the check included complete statutory damages, and it did not include fees or costs. Finally, for the reasons explained in Ms. Mey's principal briefs, regardless of the check's effect on Ms. Mey's individual claim, it did not moot the class claims.

ARGUMENT

I. The District Court Lacked Authority To Enter Judgment for Ms. Mey Without First Considering Class Certification.

Because the issue is fundamental to understanding how the district court erred, we begin by addressing NAB's argument that, regardless of whether the case is moot, *Gomez* allows a district court to enter judgment when a plaintiff rejects a tender of full individual relief. NAB Br. 9. To the contrary, *Gomez* makes clear that, when a case is brought as a class action, a court *may not* enter judgment on the plaintiff's live claim without providing "a fair opportunity to show that certification is warranted." 136 S. Ct. at 672; *see also, e.g., Chen v. Allstate Ins. Co.*, __ F.3d __, 2016 WL 1425869, at *11 (9th Cir. Apr. 12, 2016) (refusing to "direct the district court to enter judgment on [the plaintiff's] individual claims before [he] has had a fair opportunity to move for class certification"); *Bais Yaakov of Spring Valley v. Varitronics, LLC*, 2016 WL 806703, at *1 (D. Minn. Mar. 1, 2016) (denying motion to deposit funds because "Plaintiff has not yet had a fair opportunity to show that class certification is warranted").

NAB's own reasoning compels this conclusion. NAB states that *Gomez* adopted Justice Kagan's statement in her dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013), that a "court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders," and NAB contends that such a scenario is present here. However,

Justice Kagan's next sentence explains that a court may *not* enter judgment for the plaintiff "when the supposed capitulation in fact fails to give the plaintiff all the law authorizes and she has sought," and that relief only on the individual's claim does not give a named plaintiff in a class action "'all that [she] has ... requested in the complaint (*i.e.*, relief for the class).'" *Id*. (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring)). As the Ninth Circuit explained in *Chen*, "[a] named plaintiff exhibits neither obstinacy nor madness by declining an offer … on individual claims in order to pursue relief on behalf of members of a class." 2016 WL 1425869, at *9.

Here, Ms. Mey never had a fair opportunity to show that a class should be certified. *Gomez* thus makes clear that the district court's entry of judgment was in error, must be vacated, and cannot serve as a basis for finding any aspect of the case moot. Moreover, *Gomez* dictates that, on remand, the district court may not enter judgment without providing Ms. Mey the requisite "fair opportunity" to show that class certification is warranted. 136 S. Ct. at 672.

II. The Check Did Not Moot Ms. Mey's Individual Claim.

A. The Check Did Nothing To Address Ms. Mey's Claim for Injunctive Relief.

Ms. Mey seeks not only monetary relief, but also the injunctive relief available under the TCPA. *See* 47 U.S.C. § 227(b)(3)(A); Complaint, RE 1, Page ID # 8. *Gomez* establishes that NAB's Rule 68 did not moot that claim. The tender

of a monetary payment does nothing additional to moot it.

NAB suggests that the fact that the district court already entered a "judgment including injunctive relief" is sufficient to moot Ms. Mey's injunctive claim. NAB Supp. Br. 8. However, that judgment was based on the mistaken belief that Ms. Mey's claim was moot, and it was reversible error for the court to enter the judgment without giving Ms. Mey "a fair opportunity to show that certification is warranted." *Gomez*, 136 S. Ct. at 672; *Chen*, 2016 WL 1425869, at *8-10. Accordingly, that judgment must be vacated and its existence provides no basis for concluding that the tender of a check that provides no injunctive relief moots Ms. Mey's claims.[1]

B. A Payment Made Pursuant to a Judgment Does Not Moot an Appeal of That Judgment.

Even if only money were at issue in this case, NAB's check would not have mooted Ms. Mey's individual claim. The district court entered judgment on Ms.

[1] The district court's judgment also does not provide complete injunctive relief because it does not make clear what it enjoins, if anything at all. The court entered judgment on the terms of NAB's Rule 68 offer, which offered to "stipulate to an injunction prohibiting [NAB] from making telemarketing calls in violation of the TCPA," and to "stipulate to implement and enforce internal compliance procedures to prevent further TCPA violations by NAB with regard to telemarketing calls." RE 11-1, Page ID ##121-122. Neither the offer nor order specifies any action NAB is prohibited from doing or any compliance procedures it must undertake. Indeed, because NAB never admitted that the telemarketing campaign alleged in the complaint violated the TCPA and the court never ruled on the merits, the offer and order leave unresolved whether NAB is enjoined from engaging in the very conduct challenged in the complaint.

Mey's individual claim in accordance with the terms of NAB's Rule 68 offer. NAB did not seek a stay of that judgment. Thus, NAB's delivery of the check to Ms. Mey was in (partial) compliance with the district court's order. Where the effects of compliance can be reversed, a party's compliance with a judgment does not render an appeal moot. *See, e.g.*, *Al-Dabagh v. Case W. Reserve Univ.*, 777 F.3d 355, 359 (6th Cir. 2015) ("[A]n appeal remains alive if the effects or benefits of compliance can be undone."); *Mancusi v. Stubbs*, 408 U.S. 204, 206 (1972) ("Petitioner's obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case."). "The general rule is now well settled: [when a party complies with a judgment,] the case is not moot unless the parties intended to settle, or unless it is not possible to take any effective action to undo the results of compliance." C. Wright, A. Miller, et al., 13B Fed. Prac. & Proc. Juris. § 3533.2.2 (3d ed.). Here, where NAB was required to pay money by a judgment that was entered in error, and where the Court would be able to undo the effects of compliance if there were any remaining, NAB's compliance with the judgment does not render the case moot.

C. A Rejected Check Does Not Moot a Claim.

Even if NAB's check were not pursuant to a judgment, it would not moot Ms. Mey's monetary claim because she rejected it and a rejected check does not moot a claim.

1. Under *Gomez*'s Analysis, a Rejected Check Does Not Moot a Claim.

In *Gomez*, the Supreme Court held that a rejected offer does not moot a claim. It explained that "'when a plaintiff rejects [a Rule 68] 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. ... So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.'" 136 S. Ct. at 670 (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting)).

The same analysis applies to a rejected check. When the check is not sent pursuant to a judgment, once the plaintiff returns the check, "her interest in the lawsuit remains just what is was before" and so "does the court's ability to grant her relief." *Id*. The plaintiff "remain[s] emptyhanded," she has no continuing "entitlement to the relief [the defendant] previously offered," and "the parties remain[] adverse." *Id*. at 670-72.

In other words, a rejected check is no different from any other rejected offer. *See, e.g., Martelack v. Toys R US*, 2016 WL 762656, at *2-3 (D.N.J. Feb. 25, 2016) (holding that "Defendant's tender of a check and offer of reinstatement" did not moot the plaintiff's claim for unpaid wages where the plaintiff "refused the offer of reinstatement and has not cashed the check"); *Fernandez v. Andy Iron Works, Inc.*, 2014 WL 3384701, at *1 n.1 (S.D. Fla. July 10, 2014) (explaining that

check for full statutory damages "should be construed as a settlement offer that was not accepted"). And *Gomez* makes clear that a rejected offer of damages does not render a claim moot. To the contrary, "the recipient's rejection of an offer leaves the matter as if no offer had ever been made," and the "litigation carries on, unmooted." 136 S. Ct. at 670 (internal quotation marks and citations omitted); s*ee also Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1164 n.5 (11th Cir. 2012) (noting that record contained no proof of tender of uncashed check for full statutory damages, but that "even if the check had been tendered, that fact would not change our ultimate conclusion" that the case was not moot).

2. History and Tradition Demonstrate That a Rejected Tender Does Not Moot a Claim.

The common law doctrine of tender further demonstrates that a rejected check does not moot a claim. The Supreme Court has repeatedly explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008). "[H]istory is particularly relevant to the constitutional standing inquiry" because "'Cases' and 'Controversies' is properly understood to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Vt. Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (internal quotation marks and citation omitted).

At common law, when a plaintiff rejected a tender, the claim remained live

and the court thus retained jurisdiction to decide it. At least as far back as Blackstone, "a tender by the debtor and refusal by the creditor w[ould] … discharge the costs, but not the debt itself." 3 W. Blackstone, Commentaries on the Laws of England 303 (1768). As the treatise relied on by Justice Thomas in his concurrence in *Gomez* for the history of tender explained, "[i]n no case in which there is a direct cause of action, will a tender and refusal discharge a debt or duty." A. Hunt, A Treatise on the Law of Tender, and Bringing Money Into Court § 362 (1903) (citing cases). "A tender and refusal in such case is no bar to an action." *Id*.; *see also* 2 W. Story, A Treatise on the Law of Contracts 623 (4th ed. 1856) ("A tender of money, in satisfaction of a debt ... is a defence to costs of suit and damages, and interest upon the debt accruing after tender; but it is no defence to the debt itself.").

As the Oregon Supreme Court has summarized: At common law, "[i]f the debtor actually produced, or 'tendered,' the coin of the realm and the creditor did not accept it, the debtor was relieved from liability for the consequences of nonpayment other than the debt, such as interest on the debt, but not from liability for the debt itself." *Malan v. Tipton*, 247 P.3d 1223, 1228 (Or. 2011). Because a rejected tender did not discharge the defendant's liability towards the plaintiff, claims based on the debt remained live, "amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Cases

asserting such claims are therefore among the cases that "Article III empowers federal courts to consider." *Sprint Commc'ns Co.*, 554 U.S. at 274.

The recognition that claims remain live after the claimant rejects tender of payment continues through the current day. *See, e.g.*, 28 Williston on Contracts § 72:45 (4th ed.) ("A cause of action on a money debt is not barred by a prior tender."); *Kennedy v. Boles Inv., Inc.*, 2011 WL 2262479, at *5 (S.D. Ala. June 7, 2011) ("Case authorities and treatises are legion for the proposition that a debtor whose tender is refused is *not* thereby relieved from liability for the principal amount of the debt."). Here, Ms. Mey's individual claim remains live, and the claim is not moot.

3. NAB Does Not Show That a Rejected Check Can Moot a Claim.

None of the authorities cited by NAB demonstrate that a rejected check can moot a claim. NAB relies largely on three 19th century railroad tax cases, *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893), *Little v. Bowers*, 134 U.S. 547 (1890), and *San Mateo County v. Southern Pacific R. Co.*, 116 U.S. 138 (1885). As *Gomez* explained, however, *San Pablo* "rested on California's substantive law, which required the State *to accept* a taxpayer's full payment of the amount in controversy." 136 S. Ct. at 671 (emphasis added). And in both *Little* and *San Mateo*, the railroads paid, and the government accepted, the disputed taxes.

The circuit court cases cited by NAB likewise do not hold that a rejected

tender can moot a claim. *Reid v. Prentice-Hall, Inc.*, 261 F.2d 700 (6th Cir. 1958), involved a settlement that the plaintiff backed out of and did not concern mootness. *Pakovich v. Verizon LTD Plan*, 653 F.3d 488 (7th Cir. 2011), gave no indication that the plaintiff rejected the ERISA benefits she received. And in *Chen*, which NAB cites for the statement that a case becomes moot when a plaintiff "actually receive[s]" the disputed amount, NAB. Br. 11, the Ninth Circuit distinguished "actual[] recei[pt]" of relief from relief being only "offered *or tendered*," stating that while the former can moot a case, the latter does not. 2016 WL 1425869, at *1 (emphasis added). *Chen* thus indicates that there is a difference between accepted payments and rejected tenders, such as the rejected check here.[2]

Even the two unpublished district court cases that NAB cites for the proposition that a rejected tender can moot a claim do not support NAB's position. *Vavak v. Abbott Laboratories, Inc.*, 2011 WL 10550065 (C.D. Cal. June 17, 2011), held that a rejected *offer* of a full refund mooted a claim for damages, *id*. at *3, and is thus not good law after *Gomez*. And in *Price v. Berman's Automotive, Inc.*, 2016 WL 1089417 (D. Md. Mar. 21, 2016), the court stated that because the plaintiff had returned the check, it could not "find that the payment mooted Plaintiffs'" claim.

[2] Moreover, although the defendant in *Chen* had not tendered a check, and thus the effect of a tender was not directly before the court, the court noted that "common law tender exists principally as a means of limiting damages or costs rather than mooting claims." *Id*. at *8 n.7.

Id. at *3. The court did then state that, if the defendant sent a second check and filed a renewed motion, it would dismiss the case as moot, but provided no explanation for its bizarre determination that a second check would moot a claim when the first one did not.

4. Even Acceptance of a Check Does Not Deprive the Courts of Jurisdiction.

Because Ms. Mey rejected NAB's check, this Court does not need to address the effects of an accepted check. Even acceptance of payment, however, does not render a case moot, but rather leads to a potential affirmative defense. *See Desjardins v. Desjardins*, 308 F.2d 111, 115 (6th Cir. 1962) ("[I]n federal courts, payment is an affirmative defense to be pleaded by the one resisting the claim."); Fed. R. Civ. P. 8(c)(1). As the Seventh Circuit recently explained, "even a defendant's proof that the plaintiff has *accepted* full compensation ... is an affirmative defense rather than a jurisdictional bar." *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015). If a plaintiff accepts payment and then presses his claim, the defendant may raise the payment as a defense, and the court may hold that the plaintiff is not entitled to any additional damages. But the court's determination that the plaintiff is not entitled to additional relief is a determination on the *merits* of the claim, not one of subject-matter jurisdiction. *See Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 570 (6th Cir. 2013) ("To rule on whether [the plaintiff] is entitled to a particular kind of relief is to decide the merits

of the case."); *see also Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013) (warning against "confus[ing] mootness with whether [the plaintiff] has established a right to recover" (citing *Powell v. McCormack*, 395 U.S. 486, 500 (1969))).

D. The Check Did Not Provide Complete Monetary Relief.

The check also did not moot Ms. Mey's individual claim because it did not provide complete monetary relief. NAB claims that the $4,500 check it sent Ms. Mey is "in connection with the three calls placed to Ms. Mey," NAB Supp. Br. at 4 & n.1. But the district court never made any factual determination of how many times NAB called Ms. Mey. *See id*. at 7 (asserting, without citing any factual support, that "Mey received three calls from NAB"). Indeed, until NAB's motion to supplement the record, Ms. Mey did not know that NAB claims to have called her three times. Thus, to determine whether $4,500 includes all of the damages Ms. Mey is owed would require further factual development. The necessity of further litigation to resolve this issue demonstrates that the case is not moot: "To rule on whether [the plaintiff] is entitled to a particular kind of relief is to decide the merits of the case." *Hrivnak*, 719 F.3d at 570; *see also Keim v. ADF Midatlantic, LLC*, 586 F. App'x 573, 574 (11th Cir. 2014) (where the record did not show how many messages the plaintiff received, explaining that even if the plaintiff had accepted an offer of $1,500 per TCPA violation, the named plaintiff's individual claim would not have been moot because "there was still work to be done to get the case to the

finish line").

Moreover, the total amount Ms. Mey should be awarded in damages, costs, and fees is far greater than $4,500. NAB asserts that the $4,500 was solely for damages and states that the "District Court maintains jurisdiction to enter an amount of attorneys' fees appropriate under the circumstances." NAB Supp. Br. at 8. But the question here is not whether Ms. Mey can later receive fees, but whether the check satisfied all of her demands in this case. Because the check was for less than the total she is seeking in damages, costs, and fees, it did not. A "tender is insufficient unless it makes the plaintiff whole and thus must include the filing fees and other costs." *Gates v. Towery*, 430 F.3d 429, 431 (7th Cir. 2005).

E. NAB's Reliance on *Gomez* Is Misplaced.

Citing the statement in *Gomez* that "[w]e need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount," 136 S. Ct. at 672, NAB claims that the *Gomez* majority acknowledged that a tender could moot a claim. NAB Br. 1, 5. Even putting aside that the Court's statement that it would not address the hypothetical cannot reasonably be said to suggest how the Court would decide the hypothetical, that statement in *Gomez* does not suggest that tender of payment could itself moot a case. Rather, it leaves open the possibility that a tender could

resolve a case if it is *followed by an entry of judgment*. That the Supreme Court discussed the possibility of a court entering judgment indicates that the Supreme Court believed that depositing money would *not* itself moot a claim because, if it did, the court would be deprived of jurisdiction and lack authority to enter judgment. *See Steel Co.*, 523 U.S. at 94.

III. Regardless of the Check's Effect on Ms. Mey's Individual Claim, the Class Claims Are Not Moot.

In her principal briefs, Ms. Mey explained that, even if the offer of judgment mooted her individual claim, the offer would not moot the class claims. *See* Mey Opening Br. 27-43; Mey Reply Br. 10-26. For the same reasons, even if the check mooted Ms. Mey's individual claim (which it did not), the court would retain jurisdiction over the class claims. *See Chen*, 2016 WL 1425869, at *5-*6; *Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013), *vacated and remanded on other grounds*, 134 S. Ct. 2899 (2014); *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005).

CONCLUSION

This Court should reinstate the case, vacate the entry of judgment, reverse the dismissal of the class claims, and remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, April 21, 2016, I am electronically filing this document through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum