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 REPLY BRIEF

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INTRODUCTION

NAB's brief is notable mainly for what it does not contain. Although the Supreme Court has repeatedly explained that a case is not moot unless it is impossible for a court to grant effectual relief, NAB does not even attempt to explain how its Rule 68 offer deprived the court of the ability to grant such relief. Likewise, NAB does not explain what it thinks is wrong with Justice Kagan's well-reasoned explanation why an unaccepted Rule 68 offer cannot moot a claim, or with the opinions of the other circuits that have considered the effect of an unaccepted Rule 68 offer on a putative class action, all of which would agree that this case is not moot.

Moreover, NAB cites no authority for the proposition that a district court can enter judgment in a plaintiff's favor, over her objections, as a means of wiping out class claims. Nor does NAB cite any Sixth Circuit case holding that the involuntary mooting of a named plaintiff's claim requires dismissal of a class action or explain the significance of the factual differences it identifies between this case and *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005), in which this Court held—in its only decision on the issue—that a Rule 68 offer of complete relief did not moot a putative class action.

In sum, NAB's claim that its offer mooted this case reflects a pervasive failure to engage with the constitutional principles that determine when a case is

moot. Under those principles, the district court erred both in holding that the unaccepted Rule 68 offer mooted Ms. Mey's individual claim and in holding that the mootness of Ms. Mey's individual claim required dismissal of the class action.

ARGUMENT

I. The District Court Erred in Entering Judgment on Ms. Mey's Individual Claim.

NAB agrees that, "[b]efore turning to the question of whether an unaccepted Rule 68 offer of judgment can moot a putative class action, it is necessary to address whether an unaccepted Rule 68 offer can moot a plaintiff's individual claim[.]" NAB Br. 9. As Ms. Mey demonstrated in her opening brief (at 13-23), an unaccepted offer cannot render an individual claim moot. Nor does such an offer justify entering judgment in the named plaintiff's favor, over her objections, before the court has considered whether the case should proceed on behalf of a class.

A. The Unaccepted Offer of Judgment Did Not Moot Ms. Mey's Individual Claim.

The Supreme Court has reiterated three times in the last three years that a claim is not moot unless "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013); *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013); *Knox v. Service Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quotation marks and citations omitted from all three citations). This Court has stated likewise. *See, e.g.*,

Daily Servs., LLC v. Valentino, 756 F.3d 893, 898 (6th Cir. 2014). As Ms. Mey explained in her opening brief (at 13-19), neither NAB's tender of its Rule 68 offer, nor Ms. Mey's rejection of the offer, deprived the district court of the ability to grant effectual relief. Indeed, after Ms. Mey rejected the offer, the district court entered judgment in her favor and *granted her relief*, thereby demonstrating concretely that the rejected Rule 68 offer did not deprive the court of the power to grant relief and, accordingly, did not moot the case.

NAB does not even attempt to argue that the Rule 68 offer deprived the district court of the ability to grant effectual relief. Instead, NAB suggests that, once the Rule 68 offer was made, the case was moot because there was "no dispute over which to litigate." NAB Br. 10 (quoting *Valentine v. Check Plus Sys. L.P.*, 2010 WL 2572845, at *3 (N.D. Ohio June 23, 2010)). To the contrary, after Ms. Mey rejected the offer, the full case remained in dispute: Ms. Mey still had her claim, NAB still had its defenses, and "no ruling had been made on the validity of the claims or defenses." *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 704 (11th Cir. 2014). NAB had not provided Ms. Mey any relief, was under no obligation to provide her with any relief, and was not enjoined from violating the TCPA. In short, "the legal relationship between [NAB] and the named plaintiff[] was precisely the same as before the offer[] w[as] made." *Id.* All that had happened was that Ms. Mey had rejected a settlement offer.

As Justice Kagan, joined by three other Justices, explained in her dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533-34 (2013)—the only opinion in that case to reach the issue whether an unaccepted offer of judgment can moot a claim—"When a plaintiff rejects . . . an offer [of judgment]—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 . . . the litigation carries on, unmooted." NAB's sole response to Justice Kagan's analysis—and to the circuits that have recognized the correctness of her reasoning, *see Stein*, 772 F.3d at 703; *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954 (9th Cir. 2013)—is to note that this Court is not bound by dissents or by the decisions of sister circuits. However, that Justice Kagan's decision is not binding does not alter the persuasiveness or accuracy of its logic, and NAB does not explain how Justice Kagan's analysis is incorrect.

Instead of engaging with Justice Kagan's reasoning or trying to explain how a rejected settlement offer could have deprived the court of the ability to grant effectual relief, NAB argues that this Court's decision in *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009), establishes that an unaccepted Rule 68 offer moots an individual claim and that this Court is bound to that holding. *O'Brien* stated that "a Rule 68 offer can be used to show that the court lacks subject-matter jurisdiction," and that an "offer of judgment that satisfies a

plaintiff's entire demand moots the case." *Id.* at 574. However, as Ms. Mey explained in her opening brief (at 20-22), the Court could not have meant that the Rule 68 offer mooted the case in the Article III sense, because the Court proceeded to affirm entry of judgment in the plaintiff's favor. If the case had actually been moot, the Court would not have been able to affirm the judgment. Rather, in the absence of Article III jurisdiction over the action, the Court would have had to vacate the judgment and remand for dismissal of the case. *See, e.g.*, *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (explaining that if a case becomes moot, it must be "remanded with instructions to dismiss"); 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."). By affirming entry of judgment in favor of the plaintiffs—and by disagreeing with the "view that a plaintiff loses outright when he refuses an offer of judgment," *O'Brien*, 575 F.3d at 75—*O'Brien* made clear that, despite its use of mootness language, it was not holding that a Rule 68 offer of complete relief renders the case moot under Article III. [1]

[1] NAB also cites language in *Hrivnak v. NCO Portfolio Management, Inc.*, 719 F.3d 564, 568 (6th Cir. 2013), stating that "mootness occurs only when the offer is accepted or the defendant indeed offers to provide every form of individual relief the claimant seeks in the complaint." As the Court explained in *Hrivnak*, however, the defendant's argument in that case rested on two premises: "that the defendants have offered [the plaintiff] everything he could possibly win as an individual and that, once that is the case, the individual and uncertified class claims both must be

NAB insists that "the *O'Brien* court was fully aware of, and applied, Article III in reaching its decision based on mootness." NAB Br. 30. However, NAB does not address the quandary that the Court could not have both held the case moot under Article III and proceeded to rule on the merits of the case.

Instead of seeking to reconcile its reading of *O'Brien* with the fundamental jurisdictional rule that judgment cannot be entered on the merits of a moot case, NAB asserts that Ms. Mey's explanation that *O'Brien* could not have held that the case was moot under Article III—along with her explanation that the Rule 68 offer could not have mooted her claim because, if it had, the district court would not have been able to enter judgment in her favor—is a "straw man" because "regardless of what label might be placed on the judicial act . . . , there is no dispute that courts may enter judgment on individual claims." NAB Br. 29. In other words, when faced with questions about how the district court's opinion and its own reading of *O'Brien* can be reconciled with fundamental constitutional principles, NAB's primary response is to retreat from its position that the Rule 68 offer mooted Ms. Mey's individual claim and to argue instead that judgment could have properly been entered on Ms. Mey's claim even if it was not moot. NAB's inability to defend its reading of *O'Brien* and its position that the Rule 68 offer

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dismissed as moot." *Id*. at 567. The Court held that the defendants had not "cleared the first hurdle" of showing that the offer was complete and therefore did not reach the question whether a complete offer of relief moots individual and class claims. *Id*.

mooted Ms. Mey's claim underscores that NAB's position cannot, in fact, be reconciled with the Supreme Court's and this Court's mootness precedents. Under fundamental mootness principles, an unaccepted offer of judgment does not deprive the court of the ability to grant relief and cannot render a claim moot.

B. The Unaccepted Offer of Judgment Did Not Justify Entering Judgment on Ms. Mey's Individual Claim Over Her Objections.

NAB contends that it does not matter whether the Rule 68 offer mooted Ms. Mey's individual claim, because, whether or not the claim was moot, the district court had authority to enter judgment on it and, thereafter, to dismiss the class claims. NAB Br. 29. As Ms. Mey explained in her opening brief (at 24-27), however, once the notion that the unaccepted Rule 68 offer mooted Ms. Mey's individual claim is set aside, the district court had no basis for entering judgment in Ms. Mey's favor over her objections before considering class certification. *See Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (explaining that a court does not "have inherent authority to enter an unwanted judgment for [a plaintiff] on her individual claim, in service of wiping out her proposed [class] action"). To the contrary, the Federal Rules of Civil Procedure call for the issue of class certification to be decided "[a]t an early practicable time," Fed. R. Civ. P. 23(c)(1)(A), thereby indicating that the court should resolve class certification before entering judgment for the plaintiff on the underlying claim.

NAB responds that "courts long have recognized that a named plaintiff cannot represent a class if she lacks the individualized injury required to create a case or controversy," that "putative class actions routinely settle on an individual basis before class certification proceedings commence," and that "there is nothing novel about the proposition that putative class claims should be dismissed when the named plaintiff has no claim." NAB Br. 20-22. NAB's arguments are inapposite. The question here is not whether a plaintiff who lacks a claim or individualized injury can represent a class, nor is it whether a named plaintiff can agree to settle her individual claim before class certification. The question is whether, when a plaintiff has a live claim, is seeking to represent a class of people with similar live claims, and has *rejected* a settlement offer because it does not offer appropriate relief to the class, the court can enter judgment in the plaintiff's favor on the terms of the rejected settlement offer, over her objections, as a means of terminating the class action. NAB cites no authority for such action.

NAB insists that "there is no dispute that the Court may properly enter judgment pursuant to the Rule 68 offer." NAB 29. None of the cases NAB cites in support of that proposition, however, involved a class action. *See, e.g.*, *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013) (cited at NAB Br. 29) (stating, in an *individual* case, that an unaccepted offer of judgment that offers complete relief does not moot a claim, but that, if the defendant consents, the court can enter

judgment for the plaintiff on the terms of the offer). Moreover, in *O'Brien*, 575 F.3d at 575, this Court affirmed entry of judgment on the terms of an offer of complete relief only after specifically noting that the "plaintiffs did not purport to bring a collective action," thus suggesting that it would have treated the case differently had it been such an action.

Finally, NAB asserts that "[c]ourts routinely resolve putative class actions on the merits of the named plaintiff's individual claim before even considering whether to certify a class." NAB 21. But in all of the cases it cites in support of that statement, the court entered judgment *in favor of the defendant*. *See*, *e.g.*, *Wright v. Schock*, 742 F.2d 541, 542 (9th Cir. 1984) ("This case presents the issue whether a district court may, in its discretion, rule on a *defendant's motion for summary judgment* without first granting or denying a timely motion to certify a plaintiff class." (emphasis added)). In none of them did the court enter judgment in the *plaintiff*'s favor before considering class certification. There is a vast difference between a court's dismissing a claim held to be non-meritorious or non-justiciable without going through the class certification process and a court's entering judgment on a live claim in *favor* of the individual plaintiff, over her objections, without first considering whether the case should proceed on behalf of a class.

Here, where Ms. Mey had a live claim and was seeking to represent a class of other people with live claims, she was "entitl[ed] . . . to pursue [her] claim as a

class action" if it met the requirements of Rule 23. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). The court could not enter judgment in her favor, over her objections, as a means of cutting off the class claims, and this case should have been allowed to proceed to class certification.

II. The District Court Erred in Dismissing the Class Claims.

A. This Court Held in *Carroll* That a Rule 68 Offer of Complete Individual Relief Made Prior to Class Certification Did Not Moot the Class Action.

Even if the offer of judgment could be deemed to have mooted Ms. Mey's individual claim, the offer would not have required dismissal of the class claims. As NAB notes, this Court has already "addressed a Rule 68 offer [of complete relief] in the context of a Rule 23 class action lawsuit." NAB Br. 15 (citation omitted). In the case in which it did so—*Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005)—the Court held that the offer did not render the case moot, although it was made before the class was certified.

NAB contends that *Carroll* is "wholly distinguishable" because "in this case the Rule 68 Offer was made only to the named plaintiff early in the case," and was made after Ms. Mey's first motion for certification was denied but before another one "was filed, let alone briefed, argued," or made the subject of a magistrate judge's report and recommendation. NAB Br. 35-36.[2] But NAB does not explain

[2] NAB also notes that the offer in this case was made "before a class was certified." NAB Br. 36. Given that the offer in *Carroll* was also made before a

how any of those facts makes a difference to subject-matter jurisdiction. As Ms. Mey explained in her opening brief (at 32-34), none of the facts in *Carroll* on which NAB relies—that the "motion to certify was pending and had been fully briefed," that "the magistrate judge had recommended that a class be certified," that the "offer was made to both the named plaintiffs and the class members," and that "the offer had been accepted" by the named plaintiffs—would have provided the district court with jurisdiction if it otherwise had none. NAB Br. 36. Thus, those facts cannot be the reason that this Court held that the district court retained jurisdiction in *Carroll* and can provide no support for NAB's argument that the district court had jurisdiction in *Carroll*, but lacked it here.

NAB claims that "this Circuit repeatedly has held" that where a named plaintiff's claim becomes moot before certification, "through settlement or a Rule 68 offer of judgment," the case must be dismissed. NAB Br. 15. NAB does not cite a single case, however, let alone "repeated" cases, in which this Court held that a class action had to be dismissed because of a Rule 68 offer. Indeed, there are no such cases: *Carroll* is the only case in which this Court has considered the effect of a Rule 68 offer of complete relief on a class action, and that case held that the pre-certification Rule 68 offer did not require dismissal of the case.

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class was certified, *see* 399 F.3d at 622, that fact only highlights the similarities between this case and *Carroll*.

Instead of relying on Sixth Circuit cases involving Rule 68 offers to class representatives, NAB cites *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), and *Gawry v. Countrywide Home Loans, Inc.*, 395 F. App'x 152 (6th Cir. 2010). Those cases, however, involved *accepted settlements*, not unaccepted offers of judgment.[3]

In *Brunet*, male job applicants challenged the constitutionality of a consent decree governing a fire department's hiring. Before the class was certified, two of the men were hired into a training class. The Court determined that the two men's hiring claims were moot at the time of certification. 1 F.3d at 399. The Court pointed out that the men "ultimately accepted the City's settlement offer" when they accepted the positions in the training class. *Id*. at 400. It explained that the men's hiring claims were not mooted by the City's *offer* to settle, or even by the court's order that they be allowed to join the next training class, but rather by their entry into the training class. *Id*.

Similarly, in *Gawry v. Countrywide Home Loans, Inc.*, the named plaintiffs moved for class certification after settling their individual claims. The Court held

[3] NAB also cites *O'Brien* and *Hrivnak*. As discussed above, *O'Brien* involved the effect of a Rule 68 offer of judgment on individual claims, not class claims, and, in *Hrivnak*, the Court determined that the offer was not complete and therefore did not "reach the class-claims argument." 719 F.3d at 567. Thus, neither case considered the effect of a Rule 68 offer of complete relief on class claims.

that because they had "voluntarily settled all of their claims," the plaintiffs had no claim and could not represent the class. 395 F. App'x at 156.

Whether a named plaintiff's claim is settled or involuntarily extinguished can be an important factor in determining whether the plaintiff can continue to represent a class if the plaintiff's claim is resolved before a class is certified. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 405 n.10 (1980) (holding that a plaintiff whose individual claim became moot when he was released from prison could appeal the denial of class certification, but expressly declining to express a view on whether the same was true of "a named plaintiff who *settles* the individual claim" (emphasis added)). Indeed, this Court explicitly recognized in *Gawry* that "it may be appropriate for named plaintiffs who have resolved their claims to continue to represent a class . . . where those claims are 'involuntarily terminated.'" 395 F. App'x at 156 (citing *Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 705 (6th Cir. 2009)); *see also, e.g., Campion v. Old Republic Prot. Co.*, 775 F.3d 1144, 1147 (9th Cir. 2014) (holding that class claims were moot after named plaintiff voluntary settled his individual claims and distinguishing a case in which the Court held that an unaccepted Rule 68 offer did not moot a class action on the ground that, there, the "plaintiff's individual claims expired *involuntarily*"); *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) (distinguishing between voluntary settlement and involuntary extinguishment of

individual claims for mootness purposes); *Dugas v. Trans Union Corp.*, 99 F.3d 724, 727 (5th Cir. 1996) (same). Because *Brunet* and *Gawry* involved settlements, not unaccepted Rule 68 offers, they do not control here.

Moreover, the discussion of mootness in *Brunet* did not affect the outcome in that case. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 442 n.3 (6th Cir. 2012) (explaining that language that is "not necessary to the holding in [a] case . . . is properly considered non-binding dicta"). After concluding that the male firefighters' claims that they should have been hired were rendered moot when they were hired into the training class, the Court determined that those firefighters continued to have "standing to challenge the City's hiring practices" based on their loss of seniority rights to the female firefighters hired under the consent decree. *Brunet*, 1 F.3d at 401. The Court proceeded to consider the merits of the case, affirming the district court's order setting aside the consent decree, reversing the district court's order validating a particular hiring procedure, and adjusting the seniority of the female firefighters so that they were below those of the class the male firefighters represented. *Id*. at 413.

Furthermore, this Court specifically addressed *Brunet* in *Carroll*. It recognized that *Brunet* contained broad language stating that cases should be dismissed if the named plaintiff's claim becomes moot before certification (language that NAB cites here, *see* NAB Br. 15, 16), but it determined that, despite

that language, *Brunet* did *not* require it to hold that the pre-certification Rule 68 offer rendered the case moot. *See Carroll*, 399 F.3d at 625. Because this case is not meaningfully different from *Carroll*, the same conclusion should apply here.

This Court's decision in *Schlaud v. Snyder*, 717 F.3d 451 (6th Cir. 2013), *vacated and remanded on other grounds*, 134 S. Ct. 2899 (2014), further underscores that, contrary to NAB's claims, class actions do not need to be dismissed whenever the named plaintiff's claim becomes moot before class certification. In *Schlaud*, the named plaintiffs' claims were resolved through a mixture of settlement and acceptance of full relief before the class was certified. On appeal, the Court explained that, although the individual claims were moot, it retained jurisdiction over the case "to consider whether the district court properly denied certification of plaintiffs' proposed class and subclass." 717 F.3d at 456 n.3.

NAB contends that *Schlaud* is inapposite because it involved jurisdiction over the appeal of a denial of class certification "in a case where 'plaintiffs . . . moved for certification prior to defendants' attempt to settle.'" NAB Br. 37 n.6 (quoting *Schlaud*, 717 F.3d at 456 n.3). But jurisdiction must exist throughout "all stages of federal judicial proceedings." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Thus, in recognizing that it had jurisdiction over the appeal of the denial of the class certification motion, this Court implicitly recognized that the district court in *Schlaud* had had jurisdiction over the class certification motion

itself, even though the individual claims allegedly became moot before the district court considered that motion. Moreover, here, as in *Schlaud*, the plaintiff moved for class certification before the defendants attempted to settle, although the district court denied that motion without prejudice pending the issuance of a scheduling order.

In short, both in *Schlaud* and here, the actions taken by the defendant in its attempt to moot the individual claims occurred after the plaintiff moved for class certification, but before the district court certified a class. There is no reason why the class claims here should be considered moot, when the class claims in *Schlaud* were not.

B. NAB's Reliance on *Genesis Healthcare v. Symczyk* is Misplaced.

NAB contends that *Genesis HealthCare v. Symczyk*, which held that a Fair Labor Standards Act (FLSA) collective action could not continue when the named plaintiff's claim became moot before other plaintiffs opted in, "plainly applies in Rule 23 class actions." NAB Br. 31. This Court has already rejected that view, explaining that *Genesis* did "not involve class certification under Rule 23." *Schlaud*, 717 F.3d at 456 n.3. The Fifth, Ninth, and Eleventh Circuits have likewise rejected NAB's argument. *See Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824 (5th Cir. 2014) (opinion withdrawn Jan. 8, 2015) (rejecting the argument that

the relation-back doctrine did not survive *Genesis*);[4] *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014) (noting that the defendant "overstates the relevance of [*Genesis*], which involved a collective action brought pursuant to §16(b) of the Fair Labor Standards Act"); *Stein*, 772 F.3d at 709 (explaining that *Genesis* does not "change the clear law of the circuit" regarding class actions); *see also McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1019 (7th Cir. 2014) (holding, post-*Genesis*, that a pre-certification offer does not moot a plaintiff's class claims if the plaintiff has been diligent in seeking certification before receiving the offer).

As this Court explained in *Schlaud*, Rule 23 class actions are "'fundamentally different from collective actions under the FLSA' because 'a putative class acquires an independent legal status once it is certified under Rule 23[, whereas u]nder the FLSA . . . , 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action.'" 717 F.3d at 456 n.3 (quoting *Genesis*, 133 S. Ct. at 1530). NAB contends that because the primary difference between class and collective actions concerns the legal status of a certified class, the difference between class and collective actions does

[4] The Fifth Circuit withdrew the opinion in *Mabary* after the parties jointly moved to dismiss the appeal. Although Westlaw reports that the opinion was withdrawn on January 8, 2015, the Court did not notify counsel for the parties that the opinion had been withdrawn, and Westlaw did not update the case history until more recently; thus Ms. Mey did not note the withdrawal in her opening brief.

not matter when the named plaintiff's claim becomes moot before a class is certified. But the differences between class and collective actions affect whether mooting the named plaintiff's claim moots the entire case even when the named plaintiff's claim is rendered moot *before* a class is certified. *See, e.g.*, *Genesis*, 133 S. Ct. at 1530 (stating that "the fact that a putative class acquires an independent legal status once it is certified under Rule 23" was "essential" to its decision in *Geraghty*, 445 U.S. 388, a case in which no class had been certified at the time the named plaintiff's claim became moot). Unlike the named plaintiffs in a class action, who will represent a class if the requirements of Rule 23 are met, a FLSA plaintiff does not represent other class members unless those class members affirmatively opt in and therefore "has no claim that he is entitled to represent other plaintiffs" and no personal stake in class certification. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003); *see also Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) ("[T]here is a difference between when a Rule 23 class action and a FLSA collective action can become moot, because, unlike in a Rule 23 class action, in a FLSA collective action the plaintiff represents only him- or herself until similarly-situated employees opt in.").

C. Ms. Mey Retains a Personal Stake in Class Certification.

NAB contends that the argument that named plaintiffs can have a personal stake in class certification "repeatedly has been rejected by the Supreme Court." NAB Br. 22. In support, NAB relies on *Genesis* (along with a handful of cases that do not concern mootness). As explained above, *Genesis* involved a collective action, not a class action, and thus does not speak to whether named plaintiffs in a class action retain a personal stake in class certification when their cases become moot. *Geraghty*, on other the other hand, did involve a class action. There, the Supreme Court explained that a named plaintiff whose individual claim is moot can retain "a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." 445 U.S. at 404. Under the circumstances here, in which Ms. Mey rejected the offer of judgment to keep her interests aligned with the class, she retains a sufficient personal stake in class certification for the case to proceed.

NAB argues that *Geraghty* and its personal-stake analysis only apply if the court denied class certification before the individual's claim became moot, quoting a sentence in *Geraghty* stating that the case's "holding is limited to the appeal of the denial of the class certification motion." NAB Br. 33 (quoting *Geraghty*, 445 U.S. at 404). Read in context, however, it is clear that the Supreme Court, in that sentence, was not making distinctions based on *when* the named plaintiff's claim

expired (before or after the district court decided a class certification motion), but based on *what issues* the named plaintiff wanted to appeal. The next sentence reads: "A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." 445 U.S. at 404. Thus, in saying its holding was "limited to the appeal of the denial of the class certification motion," *id*., *Geraghty* was saying that although a named plaintiff whose claim on the merits becomes moot has a continuing personal stake in whether the class gets certified (and thus may appeal a denial of class certification), if certification is properly denied he does not have a continuing personal stake in the merits of the claim (and thus may not appeal the merits separately from an appeal of the denial of class certification).

NAB also cites *Genesis* and *Brunet* for the argument that *Geraghty* applies only if the plaintiff's claim becomes moot during the pendency of an appeal of a denial of class certification (NAB Br. 33), but those cases were not applying *Geraghty*'s personal-stake analysis. As Ms. Mey explained in her opening brief (at 37 n.3), *Geraghty* contains a footnote that sets forth an alternative basis for its holding—that reversal of a denial of class certification can relate back to the date of denial. 445 U.S. at 404 n.11. Both *Genesis* and *Brunet* relied on that footnote to state that *Geraghty*'s holding was limited to appeals of class certification denials. *See Genesis*, 133 S. Ct. at 1530; *Brunet*, 1 F.3d at 400. Because *Genesis* involved

collective action allegations and *Brunet* involved a voluntary settlement, however, the named plaintiffs in those cases did not have personal stakes in class certification and thus the personal-stake analysis in *Geraghty*'s main text was inapplicable. In contrast, here, where Ms. Mey brought a class action and never voluntarily settled, the personal-stake analysis in *Geraghty*'s main text applies.

Moreover, in *Schlaud*, 717 F.3d at 456 n.3, this Court cited *Geraghty* in explaining that it retained jurisdiction to consider the denial of class certification, although the individual claims became moot before the district court considered class certification. *Schlaud* thus further demonstrates that *Geraghty*'s analysis is not limited to cases in which individual claims are rendered moot after class certification is denied.

NAB also contends that *Geraghty* is inapplicable because the claim in that case was inherently transitory. NAB Br. 34. But *Geraghty* did not rely on the transitory nature of the plaintiff's claim. Instead, it held "that 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." 445 U.S. at 405. Here, Ms. Mey retains at least as strong a personal stake in the class allegations as the

plaintiff in *Geraghty*, and this case is not "moot under Article III." *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011).

Finally, NAB argues that courts cannot maintain jurisdiction over class actions when the named plaintiff's individual claim is moot, because doing so would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), which states that rules of procedure "shall not abridge, enlarge or modify any substantive right." *See* NAB Br. 11. But the maintenance of jurisdiction over class claims provides only a *procedure* by which the class claims can be asserted. *See, e.g.*, *Geraghty*, 445 U.S. at 402 (describing the "right to represent a class" as a "procedural claim"). It does not authorize additional *substantive* relief for the class representative. *See Shady Grove*, 559 U.S. at 407 (plurality opinion) ("If [a rule] governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946))). Because the district court's exercise of jurisdiction over the class action will not alter "the rules of decision by which th[e] court will adjudicate" Ms. Mey's substantive claim under the TCPA, *Miss. Publ'g Corp.*, 326 U.S. at 445, or otherwise modify any substantive right, the Rules Enabling Act is not implicated. The Supreme Court has repeatedly retained jurisdiction over class actions after the named plaintiff's individual claim has become moot, without expressing concern that its holding

violated the Rules Enabling Act. *See, e.g.*, *Geraghty*, 445 U.S. 388; *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980).

D. Defendants Should Not Be Able to Pick Off Named Plaintiffs As a Way of Evading Class Actions.

Because of the special characteristics of class actions, every court of appeals to have considered the effect of a Rule 68 offer on a putative class action would agree that, under the circumstances here, the district court has jurisdiction to proceed to class certification. *See Stein*, 772 F.3d at 700; *Mabary*, 771 F.3d at 824; *Gomez*, 768 F.3d at 875; *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011); *Lucero*, 639 F.3d at 1250; *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004). Indeed, the position NAB urges this Court to adopt would go beyond even the Seventh Circuit's decision in *Damasco*, 662 F.3d at 896, which is an outlier in that it requires "a putative class representative who wishes to avoid mootness or buy-off . . . [to] move to certify the class at the same time that the complaint is filed," as Ms. Mey did here, whereas "other circuits use a more flexible rule, under which the would-be representative need only file for class certification without undue delay." *McMahon*, 744 F.3d at 1018.

In addition to explaining, doctrinally, why an unaccepted Rule 68 offer does not require dismissal of class claims, these courts recognize the problems that would arise if defendants could unilaterally render class actions moot by offering payment just to the named plaintiff. As the Fifth Circuit explained in *Zeidman v. J.*

Ray McDermott & Co., Inc., "a series of individual suits, each brought by a new named plaintiff, could individually be 'picked off' before class certification; . . . . . [I]n those cases in which it is financially feasible to pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage." 651 F.2d 1030, 1050 (5th Cir. 1981) (noting that any difficulty in using this tactic "does not make it acceptable"); *see also Carroll*, 399 F.3d at 625 ("If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate." (citation omitted)).

Indeed, the Supreme Court itself has recognized that

> [Declaring a case moot] 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.

Despite the widespread recognition that allowing defendants to moot class actions by picking off named plaintiffs would undermine the purposes of the class action procedure, NAB insists that its position would "not impair any general

policies underlying Rule 23 class actions," noting that class members could still file their own individual suits. NAB Br. 23. At the same time, NAB asserts that its position would "promot[e] judicial economy and settlement of disputes." NAB Br. 26. But NAB cannot have it both ways. If each of the thousands (or, sometimes, millions) of potential class members in a TCPA case filed his or her own individual claim, the courts would be inundated with TCPA cases. On the other hand, if class members did not file their own cases, their statutory rights would go unvindicated, and the defendants would not be held accountable for breaking the law.

In short, although NAB is critical of class actions, they play an important role both in promoting judicial efficiency, *see Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting [many people] to be litigated in an economical fashion under Rule 23."), and in vindicating people's rights. *See Roper*, 445 U.S. at 339 ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). NAB and other defendants should not be able to evade the class-action mechanism and avoid class-wide liability by making an offer of judgment to the named plaintiff and forcing the terms of that offer on her,

over her objections. Such a result would be contrary both to "sound judicial administration," *id.*, and fundamental mootness principles.

CONCLUSION

This Court should reinstate the case, vacate the district court's entry of judgment in favor of plaintiff, reverse the district court's dismissal of the class claims, and remand to the district court for further proceedings.

Respectfully Submitted,

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RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (Microsoft Word 2010), the brief contains 6,261 words.

/s/ Adina H. Rosenbaum
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CERTIFICATE OF SERVICE

I hereby certify that on this date, April 23, 2015, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

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