No. 14-3423

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ARI WEITZNER, M.D., *et al.*,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

SANOFI PASTEUR INC., *et al.*,

Defendants-Appellants.

On Interlocutory Appeal from an Order of the U.S. District Court for the Middle District of Pennsylvania, Hon. A. Richard Caputo, U.S.D.J.

MOTION BY PUBLIC CITIZEN, INC., FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE

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

November 10, 2014

Attorneys for Public Citizen, Inc.

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 29(b), Public Citizen, Inc., moves for leave to file a brief as amicus curiae in support of plaintiffs-appellees and affirmance. A copy of the proposed brief is attached to this motion. Public Citizen has consulted with counsel for the parties, who did not consent to the filing of the brief.

This case presents the question whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 can moot a named plaintiff's claim and require dismissal of a class action that has not yet been certified. Defendants-Appellants argue that Rule 68 offers that offered the named plaintiffs in a putative class action the maximum the named plaintiffs could recover on their individual claims—but offered no relief to the rest of the class—rendered the named plaintiffs' claims moot and require dismissal of the case, even though the named plaintiffs did not accept the offers. The outcome of this case will determine the extent to which defendants in class actions that have not yet been certified can avoid the class action mechanism by "pick[ing] off" named plaintiffs through unaccepted Rule 68 offers. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). More generally, it will determine the

extent to which defendants can unilaterally deprive courts of subject-matter jurisdiction over claims by making unaccepted offers of judgment.

Public Citizen meets the criteria for participation as an amicus under Rule 29(b), because it has "a sufficient 'interest' in the case and . . . [its] brief is 'desirable' and discusses matters that are 'relevant to the disposition of the case.'" *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 129 (3d Cir. 2002) (quoting Fed. R. App. P. 29(b)). Public Citizen is a consumer-advocacy organization with over 300,000 members and supporters nationwide that appears on behalf of its membership before Congress, administrative agencies, and courts, and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, including as amicus curiae in cases in the United States Supreme Court and the federal courts of appeals. Public Citizen has a longstanding interest in protecting consumers' right to access to the civil justice system and has fought overly broad arguments that courts lack subject-matter jurisdiction over consumers' claims.

Public Citizen lawyers have represented parties in many cases that raise the issue whether an unaccepted offer of judgment can render

claims moot, including both class and individual actions. *See Genesis HealthCare v. Symczyk*, 133 S. Ct. 1523 (2013); *Keim v. ADF Midatlantic, LLC*, No. 13-13619 (11th Cir); *Floyd v. Sallie Mae, Inc.*, No. 13-13397 (11th Cir.); *Hooks v. Landmark Indus., Inc.*, No. 14-20496 (5th Cir.); *Mabary v. Home Town Bank, N.A.*, __ F.3d __, No. 13-20211 (5th Cir. Nov. 5, 2014); *Hrivnak v. NCO Portfolio Mgmt, Inc.*, 719 F.3d 564 (6th Cir. 2013); *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162 (11th Cir. 2012). Public Citizen has also participated as an amicus or moved to do so in cases raising the issue. *See Tanasi v. New Alliance Bank*, No. 14-1389 (2d Cir.); *Franco v. Allied Interstate LLC*, No. 14-1464 (2d. Cir.). As these cases illustrate, the issues presented by this case are being litigated in similar cases in numerous circuits, and their national significance gives them an importance beyond the particular interests of the parties.

Public Citizen believes that its familiarity with the mootness principles at issue may be of assistance to this Court in determining whether an unaccepted Rule 68 offer can moot individual claims and necessitate dismissal of class actions. Public Citizen's brief discusses facets of the issues presented by this case that are not addressed by plaintiffs-appellees. For example, it explains that offers of judgment

would be self-defeating if the mere tender of an offer mooted claims, and it addresses *Mabary v. Home Town Bank, N.A.*, __ F.3d __, No. 13-20211 (5th Cir. Nov. 5, 2014), which had not yet been decided when plaintiffs-appellees filed their brief.

Participation by Public Citizen as amicus curiae will not delay the briefing or argument in this case. Public Citizen is filing its brief within the time allowed by Federal Rule of Appellate Procedure 29(e).

Accordingly, Public Citizen respectfully requests that the Court grant its motion for leave to file a brief as amicus curiae in support of plaintiffs-appellees and affirmance and that the Court accept for filing the brief that is being submitted contemporaneously with this motion.

Respectfully submitted,

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

Attorneys for Public Citizen, Inc.

November 10, 2014

CERTIFICATE OF SERVICE

I certify that on November 10, 2014, the foregoing motion was served on all parties to this appeal, via CM/ECF, pursuant to Third Circuit Rule 25.1(b), because counsel for all parties are Filings Users who will be served electronically by the Notice of Docket Activity.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of this Court.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

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BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLEES AND AFFIRMANCE

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

November 10, 2014

Attorneys for Amicus Curiae
Public Citizen, Inc.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a consumer-advocacy organization with more than 300,000 members and supporters nationwide, appears before Congress, administrative agencies, and courts to work for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, including as amicus curiae in the United States Supreme Court and federal courts of appeals.

Public Citizen has a longstanding interest in protecting the right of access to the civil justice system. This interest is threatened by overbroad arguments that courts lack subject-matter jurisdiction over plaintiffs' claims. Public Citizen is filing this brief to address the argument that an unaccepted offer of judgment for a named plaintiff's maximum recoverable damages renders the plaintiff's individual claims moot and necessitates dismissal of a putative class action. This argument misunderstands fundamental mootness principles, and, if accepted,

[1] Public Citizen has moved for leave to file this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

would allow defendants to engage in procedural gamesmanship and thwart plaintiff classes from obtaining recoveries to which they are entitled.

BACKGROUND

The brief of defendants-appellants Sanofi Pasteur, *et al*. ("Sanofi"), attempts to discredit plaintiffs-appellees Ari Weitzner and Ari Weitzner, M.D., P.C. ("Weitzner"), as serial plaintiffs under the Telephone Consumer Protection Act (TCPA) and suggests that their prior state-court action is material to the issues before the Court. The facts actually relevant to this appeal, however, are straightforward. Weitzner filed a putative class action under the TCPA. Before he moved for class certification, Sanofi served offers of judgment under Federal Rule of Civil Procedure 68 that purportedly would provide complete relief on the individual claims. Weitzner did not accept, and Sanofi moved to dismiss the action as moot. The district court denied the motion, holding that the offer mooted Weitzner's individual claims but not his effort to maintain a class action.

The district court certified the action for interlocutory appeal under 28 U.S.C. § 1292(b), and this Court accepted the appeal. The

merits of Weitzner's claims, his conduct in other cases, and his state-court action have no bearing on the issues posed by the appeal, which are limited to whether the offer of judgment requires the district court to dismiss this action for lack of jurisdiction on grounds of mootness.

SUMMARY OF ARGUMENT

The district court correctly held that, even if it moots an individual claim, a Rule 68 offer that offers relief solely to a named plaintiff does not moot a class action. This Court need not reach that question, however, because it rests on a faulty premise: that an unaccepted Rule 68 offer can moot an individual claim or otherwise authorize the court to enter judgment against the plaintiff's wishes. Rule 68 is only a mechanism by which a defendant can *offer* to have judgment entered against it. If the offer is not accepted, it is withdrawn and is a nullity except for the purpose of determining whether the defendant receives costs at the conclusion of the case. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). An unaccepted offer neither moots a claim nor authorizes termination of a lawsuit over the plaintiff's objection.

Although this Court has previously stated that a Rule 68 offer of complete relief can moot the claim of an individual plaintiff, it should

reconsider that assumption. The theory that a Rule 68 offer moots a claim is directly contrary to limits on the mootness doctrine recently and 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." *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) (internal quotation marks and citations omitted from all three citations). The tendering of a Rule 68 offer does not deprive a court of the ability to grant effectual relief and therefore cannot moot a claim.

Justice Kagan, joined by three other justices, explained in her dissent in *Genesis HealthCare Corp. v. Symczyk*, that "[w]hen a plaintiff rejects [an offer of judgment]—however good the terms—her interest in the lawsuit remains just what it was before … [and] the litigation carries on, unmooted." 133 S. Ct. 1523, 1533-34 (2013) (Kagan, J., dissenting). The majority in *Symczyk* did not dispute Justice Kagan on this point. As the Ninth Circuit has recognized, Justice Kagan's reasoning is compelling and requires the conclusion that a Rule 68 offer cannot moot anything because it does not deprive a court of the ability to grant

effectual relief. *See Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013). This Court likewise should give serious consideration to Justice Kagan's suggestion that it "[r]ethink" the "mootness-by-unaccepted-offer theory." *Symczyk*, 133 S. Ct. at 1534.

Because a Rule 68 offer does not deprive the court of the ability to grant relief, the unaccepted offer in this case did not moot Weitzner's individual claim. And because the unaccepted offer did not moot Weitzner's individual claim or otherwise grant authority for the district court to enter judgment over Weitzner's objections, the question whether the offer affected the class action does not even arise, and this Court should affirm the holding that the case is not moot. Even if a Rule 68 offer could moot an individual claim, however, the Court should affirm the district court's holding because Weitzner has a personal stake in the class claims that satisfies Article III's case-or-controversy requirements.

ARGUMENT

I. An Unaccepted Rule 68 Offer Does Not Moot a Claim or Otherwise Authorize Entering Judgment on It.

The district court took as its starting-point that an offer of judgment for full relief moots a putative class representative's individual claim, and considered whether the offer also mooted the proposed class

action. The district court's premise is incorrect. An unaccepted Rule 68 offer neither moots a plaintiff's claim nor permits the district court to enter judgment on the claim over the plaintiff's objection.

A. An Unaccepted Offer of Judgment Does Not Moot an Individual Claim.

1. An Unaccepted Offer Does Not Deprive the Court of the Ability To Grant Relief.

a. The doctrine of mootness, together with the related standing and ripeness doctrines, ensures that federal courts adhere to Article III's command that federal jurisdiction be limited to "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1. These justiciability doctrines ensure that federal courts do not "'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin*, 133 S. Ct. at 1023 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (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 478 (internal quotation marks and citations omitted), mandating 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.*, 133 S. Ct. 721, 726 (2013) (citation omitted).

A court may not 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*, 132 S. Ct. at 2287 (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). Even a defendant's *agreement on the merits* with the plaintiff does not moot a case if the plaintiff's injury remains "concrete, persisting, and unredressed." *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013).

An offer of judgment that has not been accepted does not meet the criteria for mooting a case: Neither the offer itself, nor the plaintiff's decision not to accept it, redresses the plaintiff's grievance or makes it impossible for the court to do so. The court retains the ability to grant any relief the plaintiff requests. The plaintiff's claims thus are not moot.

b. Rule 68's procedural framework underscores that offers of judgment do not moot claims. As the Supreme Court has explained, Rule 68 is 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. 346, 350 (1981). The rule requires judgment for the plaintiff on the offered terms only if he accepts the offer in writing within 14 days of service. Fed. R. Civ. P. 68(a). But "[if] the offer is not accepted, it is deemed withdrawn 'and evidence thereof is not admissible except in a proceeding to determine costs.'" *Delta*, 450 U.S. at 350 (quoting former Fed. R. Civ. P. 68).[2]

Under the Rule, the plaintiff's rejection of an offer only "becomes significant in … a [post-judgment] proceeding to determine costs." *Id*. If a plaintiff ultimately wins a judgment that 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). Thus, the Rule establishes a cost-shifting mechanism to "encourage the settlement of litigation" by providing plaintiffs "an additional inducement to settle." *Delta*, 450 U.S. at 352.

[2] Since *Delta*, Rule 68 has been amended 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."

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 jurisdiction. Indeed, the Rule presupposes otherwise. It contemplates that a case will proceed to judgment whether an offer is accepted or rejected. If, and only if, an offer is accepted, the Rule authorizes entry of judgment on it. Fed. R. Civ. P. 68(a). When an offer is not accepted within the Rule's time-frame, the Rule anticipates that the case will be litigated to judgment—after which the unaccepted offer may become relevant, but only to the issue of costs. Fed. R. Civ. P. 68(d).

Thus, under Rule 68, an unaccepted offer of judgment is merely a rejected settlement offer—one that has been withdrawn and is not admissible except to determine costs once the case has ended. Such an offer does not affect the court's ability to grant relief and cannot logically be held to moot a case.

2. Justice Kagan's Dissent in *Genesis Healthcare v. Symczyk* Articulates Why an Unaccepted Offer of Judgment Does Not Moot an Individual Claim.

a. The Supreme Court's opinion in *Genesis Healthcare Corp. v. Symczyk* explained that the Court has never specifically addressed whether an unaccepted offer of judgment moots a plaintiff's individual

claim, 133 S. Ct. at 1528-29, and the majority declined to reach that question. *Id*. At issue in *Symczyk* was whether a plaintiff whose individual claim was moot could continue to pursue an opt-in collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). This Court had said that the individual claim was moot because of an unaccepted Rule 68 offer but held that the collective action remained alive. Before the Supreme Court, the plaintiff, supported by the Solicitor General of the United States, argued that a Rule 68 offer cannot moot a claim.[3] The *Symczyk* majority, however, held that that argument was not properly before it because it had not been presented in a cross-petition and because the plaintiff had conceded below that her claim was moot. *See Symczyk*, 133 S. Ct. at 1529. The majority therefore "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 the Rule 68 offer mooted the individual claim (and from the disposition of

[3] *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.

the case that resulted from the unexamined premise that the individual claim was moot). *See id*. at 1532-37 (Kagan, J., dissenting). Analyzing the issue that the majority did not address, Justice Kagan demonstrated that the view that an unaccepted Rule 68 offer moots a claim is "bogus." *Id*. at 1532. As she explained, even a Rule 68 offer that would provide complete relief on the plaintiff's individual claim does not deprive the plaintiff of a concrete interest in the case or the court of the ability to grant effectual relief:

> 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. … 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 1533-34.

The *Symczyk* majority did not disagree with Justice Kagan. *See id*. at 1534 (Kagan, J., dissenting) ("The majority does not attempt to argue … that the unaccepted settlement offer mooted [the plaintiff's] individual damages claim."). Sanofi's contention that the *Symczyk* majority disputed Justice Kagan's reasoning is wrong. The majority

could not have been more explicit in saying that it did not address whether an unaccepted Rule 68 offer of judgment renders a claim moot and that its decision did not resolve the issue. *Symczyk*, 133 S. Ct. at 1528–29. To ensure that the point was not lost, the Court cited its decision in *Baldwin v. Reese*, 541 U.S. 27, 34 (2004), which explains that, in such circumstances, the Court does not "express[] any view on the merits of the [waived] issue." *See Symczyk*, 133 S. Ct. at 1529.

Sanofi, however, points to a footnote in which the majority stated that "nothing in the nature of FLSA actions precludes satisfaction—and thus the mooting—of the individual's claim before the collective-action component of the suit has run its course." *Symczyk*, 133 S. Ct. at 1529, n.4. That very footnote began with another acknowledgment that the Court was not deciding whether a Rule 68 offer "is sufficient by itself to moot the action." *Id*. The footnote cited by Sanofi stands for the uncontroversial proposition that a claim that is *actually satisfied* by settlement or a properly entered judgment no longer presents a live controversy. *Id*. Likewise, in *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992), this Court noted that "[s]ettlement of a plaintiff's claim moots an action." *Id*. at 974. A consummated settlement, unlike a

rejected offer, actually does preclude a court from granting the plaintiff who has settled any further relief and thus deprives her of any ongoing financial interest in pursuing litigation.[4]

An unaccepted Rule 68 offer, by contrast, does not deprive the parties of a continuing financial stake because, as Justice Kagan explained, it leaves the parties in exactly the same situation they were in before the offer was made. *Symczyk*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting). Because an unaccepted offer is withdrawn by operation of Rule 68 and does not satisfy the plaintiff's claim, the *Sycmzyk* majority's observation that *satisfaction of a plaintiff's claim* can moot the controversy between the parties says nothing about whether *unaccepted Rule 68 offers* can do so, and is in no way inconsistent with Justice Kagan's demonstration that they cannot. Thus, as Justice Kagan stated (without objection from the majority), her analysis of the Rule 68 mootness issue "conflicts with nothing in the Court's opinion." *Id*. at 1534 (Kagan, J., dissenting).

[4] The Second Circuit's decision in *McCauley v. Trans Union, LLC*, 402 F.3d 340 (2005), which Sanofi incorrectly invokes as support for its position, makes the same point: An offer by itself cannot moot a plaintiff's claims, as the plaintiff maintains an interest in the outcome until judgment is entered in his favor. *Id*. at 342; *see also Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013); *Anjum v. J.C. Penney Co.*, 2014 WL 5090018, at *10 (E.D.N.Y. Oct. 9, 2014).

Although it is not binding authority, this Court therefore can, and should, consider her persuasive reasoning.

b. Since *Symczyk*, the Ninth Circuit, which had previously assumed that an offer of judgment could moot a claim, has adopted Justice Kagan's approach and held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Diaz*, 732 F.3d at 954-55. As the Ninth Circuit explained, "[t]his holding is consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness." *Id*. at 955. Once an offer of judgment lapses, it is "by its own terms and under Rule 68, a legal nullity." *Id*.

No court of appeals since *Symczyk* has considered and disagreed with Justice Kagan's analysis. The Sixth Circuit avoided the need to consider that analysis and reexamine its own view in the wake of *Symczyk* by finding that an offer did not provide complete relief. *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567–70 (2013). The Seventh Circuit, which had previously held that an offer of judgment may moot an individual's claim, likewise has avoided the issue while recognizing that its view may require reconsideration in light of Justice Kagan's

analysis. *See Scott v. Westlake Servs. LLC*, 740 F.3d 1124, 1126 n.1 (2014).

In *Payne v. Progressive Financial Services*, the Fifth Circuit acknowledged that the question whether an offer of judgment moots a claim is open after *Symczyk*. 748 F.3d 605, 608 n.1 (2014). The court in *Payne* did not have to resolve that question because it held that the offer before it was not complete. Subsequently, in *Mabary v. Home Town Bank*, __ F.3d __, No. 13-20211 (5th Cir. Nov. 5, 2014), the Fifth Circuit held that a complete offer of judgment to a class representative did not moot a class action. Although the court's brief discussion included the statement that a complete offer will "generally" moot a plaintiff's individual claim, the court also acknowledged that *Symczyk* left open the issue "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." *Id*., slip op. at 5, 6–7. Ultimately, because the court found the class claims not moot in any event, it again did not have to grapple with Justice Kagan's reasoning in.

The Second Circuit, in *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78 (2d Cir. 2013), found a case moot based on an offer of judgment, but the court did not consider Justice Kagan's analysis because the

parties in that case did not contest that a Rule 68 offer for complete relief can moot a claim.[5] The issue litigated there was whether the defendant's oral offer should be treated as if it were a proper Rule 68 offer. Thus, *Doyle* is best read to "hold that an offer of judgment that fails to meet the technical procedural requirements of Rule 68 is nevertheless an offer of judgment," *Cabala*, 736 F.3d at 230, not as a ruling on the mootness consequences of such offers. Indeed, the Second Circuit in *Cabala* acknowledged Justice Kagan's views (as well as the unsettled nature of the Second Circuit's precedent), *see id.* at 228 & n.2, but did not have to consider the issue because it found the offer before it to be incomplete.

3. This Court Can and Should Reconsider Its Previously Stated Views.

As Sanofi points out, this Court has previously stated that offers of judgment for full relief may moot individual claims, and then proceeded to hold that such offers do not moot class claims. *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). Although Justice Kagan's *Symczyk* dissent is of course not binding authority, this Court should

[5] *See* Plaintiff-Appellant's Principal Brief, *Doyle v. Midland Credit Mgmt., Inc.*, No. 12-4555, 2012 WL 6219030 (2d Cir. filed Dec. 10, 2012); Plaintiff-Appellant's Reply Brief, *Doyle v. Midland Credit Mgmt., Inc.*, No. 12-4555, 2013 WL 523741 (2d Cir. filed Jan. 22, 2013)

reconsider its previously stated view in light of the compelling force of her reasoning.

The Ninth Circuit was in a similar position in *Diaz*: It had previously stated that an offer of judgment for complete relief mooted a plaintiff's individual claim, but had then gone on to hold that the plaintiff's class action was not moot. *See Pitts v. Terrible Herbst, Inc.,* 653 F.3d 1081, 1091–92 (9th Cir. 2011). Because the court's *judgment* had been that the class action was not moot, the court in *Diaz* held that it was free to treat the issue of the effect of a Rule 68 offer on an individual claim as an "open question." *Diaz*, 732 F.3d at 952. Addressing that question in light of Justice Kagan's reasoning, the court held, notwithstanding its previous statements, that an unaccepted Rule 68 offer cannot, by itself, moot a plaintiff's individual claim. *Id*. at 954–55. This Court should take the same approach with respect to *Weiss*.

Indeed, Sanofi can hardly suggest that it is not open for this Court to reconsider *Weiss*'s statements about the mootness consequences of Rule 68 offers in light of the reasoning of the opinions in *Symczyk*, because that is exactly what Sanofi is urging the Court to do. *Symczyk* contains no controlling holding with respect to the mootness of a class

action (as opposed to the FLSA collective action that was at issue there). If, as Sanofi urges, this Court's holding in *Weiss* is nonetheless up for grabs in light of *Symczyk*, the Court's reconsideration of that precedent should surely extend to the premise that an unaccepted Rule 68 offer can moot an individual's claim.

Moreover, the other precedents of this Court cited by Sanofi do not resolve the issue definitively. In *Symczyk* itself, this Court stated that a Rule 68 offer mooted an individual's claims, but the Court's judgment was reversed and the opinion no longer has precedential effect. In *Lusardi*, 975 F.2d at 974, the Court held that individuals' claims may be mooted by actual settlements, but did not address the effect of mere offers that provide the plaintiff with no relief.[6] And in its recent nonprecedential decision in *Boyle v. International Brotherhood of Teamsters Local 863 Welfare Fund*, __ F. App. __, 2014 WL 4235045 (3d Cir. Aug. 28, 2014), the Court likewise held that a claim that is settled is no longer live, as well as that an offer of judgment for less than complete

[6] *Brown v. Philadelphia Housing Authority*, 350 F.3d 338, 343 (3d Cir. 2003), also relied on by Sanofi, is even farther afield: It held that a plaintiff's claim for injunctive relief was mooted when the plaintiff was no longer affected by the defendant's challenged conduct, but said nothing about the effect of offers.

relief does not moot a claim. The Court went on to say that an additional offer of complete relief would moot the plaintiff's claim, *see id.* at *2, but that statement, unnecessary to the judgment, is dicta.

4. If an Offer of Judgment Mooted a Claim, the Offer Would Be Self-Defeating.

The view that an unaccepted offer of judgment can render a case moot 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. *See Cunningham v. RR. Retirement Bd.*, 392 F.3d 567 (3d Cir. 2004). If a case becomes moot, the court loses "power to enter a judgment in plaintiff's favor" and is "compelled simply to dismiss, leaving the dispute unadjudicated." *ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.*, 485 F.3d 85, 94 (2d Cir. 2007).

As the Supreme Court has explained, "[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 (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."). Thus, if a Rule 68 offer that offered all recoverable relief mooted the plaintiff's claim, the court could not enter judgment on the offer, even if the plaintiff accepted it.

The notion that a Rule 68 offer moots a case has equally bizarre consequences where, as here, the offer is not accepted. In such a case, the plaintiff's claim has not been redressed, and the Rule 68 offer has lapsed and is a nullity. Yet, the theory that the mere offer of judgment under Rule 68 renders a case moot would, taken seriously, seemingly require the court to dismiss the case without providing any redress—because, for the reasons just discussed, a court cannot grant relief in a case in which it lacks jurisdiction. Such a dismissal, however, would contradict the basis for the theory that the case is moot—that is, that the plaintiff has

no live claim because he has received full redress—because it would effectively deny the plaintiff any means of redress.

Recognition of the incongruity of leaving a plaintiff with an unredressed claim while declaring that claim to be moot has led some courts to perform considerable legal and mental gymnastics to avoid that obviously incorrect result. Thus, the Sixth Circuit said in *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 575 (6th Cir. 2009), that an unaccepted offer moots the plaintiffs' claim, but that the court should nonetheless "enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." Sanofi argues for such an approach in this case. *See* Sanofi Br. 26 (contending that the "district court may enter judgment in favor of [Weitzner] … and dismiss the action"). Although the Sixth Circuit's approach is certainly better for the individual plaintiff than getting nothing, it is little better jurisprudentially, for it ignores the fact that if a case truly is moot, a court has no power to enter judgment. *See Steel Co.*, 523 U.S. at 94. The correct approach is not to declare that the court lacks jurisdiction while nonetheless entering judgment, but to recognize that Rule 68 offers have no effect on subject-matter jurisdiction.

B. An Offer of Judgment Does Not Justify Entering Judgment in a Plaintiff's Favor Over His Objections.

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*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *see also ABN Amro Verzekeringen BV*, 485 F.3d at 93 ("Where a defendant has consented to judgment for all the relief the plaintiff can win at trial (according to the trial court's determination), the defendant's refusal to admit fault does not justify a trial to settle questions which can have no effect on the judgment."). Thus, for example, in *McCauley*, although the court determined that the case was not moot, it stated that the plaintiff was "not entitled to keep litigating his claim simply because [the defendant] ha[d] not admitted liability," given that the defendant had *unconditionally agreed* to have

judgment entered against it, and it remanded to the district court to enter a default judgment. 402 F.3d at 342.

Nonetheless, an unaccepted Rule 68 offer cannot permit the court to enter judgment for an individual plaintiff and dismiss a class action, for two reasons. First, Rule 68 "provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent." *Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting). A Rule 68 offer is not an "unconditional surrender"; by the rule's terms, the offer 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 the plaintiff's favor. *See* Fed. R. Civ. P. 68(b). Thus, a Rule 68 offer does not constitute the defendant's consent to entry of judgment if the offer is not accepted, nor does it permit entry of judgment over the plaintiff's objection.

Moreover, an unaccepted offer is inadmissible except in a proceeding to determine costs, Fed. R. Civ. P. 68(b). Accordingly, an offer should not even be before a court while the merits of the case are pending. Thus, although a court may enter judgment when a defendant fully surrenders by consenting unconditionally to the entry of judgment,

any unaccepted Rule 68 offer should be irrelevant to that surrender-and-entry-of-judgment process.

Second, in a case brought on behalf of a class, it is inappropriate for a court to enter judgment solely for the class representative, over his objection, before considering class certification even if the defendant consents to judgment for the individual plaintiff. *See Symczyk*, 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"). Although a court may appropriately enter judgment in the plaintiff's favor when the defendant unconditionally consents to entry of judgment for the plaintiff's maximum recoverable damages in an *individual* case, *see*, *e.g.*, *McCauley*, 402 F.3d at 342; *ABN*, 485 F.3d at 93–94, it should not do so in a potentially certifiable class action, particularly in light of Rule 23's provision that the issue of class certification generally be addressed *before* the merits.

Once one puts aside the fallacy that the offer of judgment presents a jurisdictional basis for dismissal that must necessarily be resolved before consideration of other issues, 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. 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.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

The plaintiff in a class action is not being obstinate in refusing to accept an offer of judgment. To the contrary, he has excellent reasons for objecting to the court's resolution of his individual claims before class certification: Such a resolution fails to satisfy the 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 (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*.

Thus, in a class action, a court may not, "prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole." *Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting). The Rule 68 offer in this case neither rendered Weitzner's claim moot nor provided a reason to enter judgment in his favor over his objection, and the case should be allowed to proceed.

III. Weitzner Has a Personal Stake in the Class Claims Sufficient to Create a Justiciable Controversy.

Even if the Rule 68 offer could have mooted Mr. Weitzner's individual claim, this case is not moot, as the district court correctly recognized, because it was brought as a class action.

As this Court recognized in *Weiss*, the features of class actions give rise to multiple reasons for recognizing that a plaintiff's effort to represent a class creates a live case or controversy even if his individual claim becomes moot. The Supreme Court recognized in *U.S. Parole Commission v. Geraghty* that such a plaintiff maintains the "personal

stake" required by Article III in "the right to represent a class." 445 U.S. 388, 402 (1980). In *Geraghty*, the Supreme Court considered whether a prisoner who brought a class action challenging release guidelines could appeal the denial of class certification after he was released from prison. The Court concluded that he could, explaining that "timing is not crucial" to the mootness determination, *id*. at 398, and holding 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." *Id*. at 404.

The Supreme Court explained that "determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires,' … requires reference to the purposes of the case-or-controversy requirement." *Id*. at 402. "[T]he purpose of the 'personal stake' requirement," it determined, "is to assure that the case is in a form capable of judicial resolution," with "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id*. at 403. The Court concluded that these requirements could be met "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the

merits has expired." *Id*. Even if his individual claim is moot, a named plaintiff can retain "a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id*. at 404.

Here, Weitzner, like the plaintiff in *Geraghty*, seeks to represent a class of people with live claims who will be part of a certified class if a court ultimately determines that Rule 23's requirements are met. And like the plaintiff in *Geraghty*, Weitzner can continue "vigorously to advocate his right to have a class certified." 445 U.S. at 404. In short, Weitzner retains the same personal stake in representing a class as did the plaintiff in *Geraghty*. "[N]otwithstanding the rejected offer of judgment, the proposed class action continues to involve 'sharply presented issues in a concrete factual setting' and 'self interested parties vigorously advocating opposing positions,'" sufficient to satisfy Article III. *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1249 (10th Cir. 2011) (quoting *Geraghty*, 445 U.S. at 403).

The Supreme Court's decision in *Symczyk* does not alter the applicability of *Geraghty*'s personal-stake analysis to this case. Although *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 opted

into the action), it did so largely because of the significant differences between FLSA actions and class actions. As the Court stressed in *Symczyk*, "Rule 23 actions are fundamentally different from collective actions under the FLSA." 133 S. Ct. at 1532. "[A] putative class acquires an independent legal status once it is certified under Rule 23." *Id*. at 1530. As a result, members of the class are bound by the resolution of certified class actions unless they have opted out.

By contrast, a FLSA collective action is merely a procedural device by which persons with similar claims may receive notice of a suit's pendency 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." *Id*. at 1530.

Sanofi emphasizes that in this case, the Rule 68 offer preceded any motion for class certification. But because a class does not come into existence until it is certified, regardless of whether a motion has been filed, Sanofi's argument fails to distinguish *Geraghty* meaningfully. Moreover, the difference between the significance of certification in class and collective actions determines the nature of a named plaintiff's

interests before as well as after certification. Because "certification" of a collective action does not produce a binding class with its own legal status, the named plaintiff in a collective action, unlike a class action, "has no right to represent" anyone else and no "personal stake" in whether a prospective collective action will be certified. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003). The opposite is true in a class action.

In *Symczyk*, the Supreme Court described the differences between collective and class actions as being a "fundamental[]" difference between that case and *Geraghty*, explaining that the fact that a certified class acquires its own legal status was "essential" to its decision in *Geraghty*. 133 S. Ct. at 1529.[7] Because this case involves a class action—

[7] *Symczyk* also discussed a footnote in *Geraghty* in which the Supreme Court articulated a narrower alternative holding under a "relation back" analysis applicable where a district court erroneously denied certification before the individual claim became moot. *Symczyk* held that the footnote's analysis did not apply because there had been no certification decision before the individual's claim became moot. *Id*. at 1530 (citing *Geraghty*, 445 U.S. at 404 n.11). That distinction, however, does not apply to the broader reasoning of *Geraghty's* main text. Likewise, Sanofi's insistence that Weitzner's claims are not "inherently transitory" does not render *Geraghty* inapplicable because *Geraghty*'s reasoning was not based on the "inherently transitory" nature of the claims at issue.

like *Geraghty*—rather than a collective action—like *Symczyk*—that distinction between *Symczyk* and *Geraghty* does not apply here. Regardless of whether his individual claim is moot, Weitzner, like the plaintiff in *Geraghty*, maintains a personal interest in his right to represent the legal entity that will come into being once a class is certified.

For like reasons, since *Symczyk* was decided, numerous courts, including the Fifth, Sixth and Ninth Circuits, have found its holding inapplicable to class actions. *See*, *e.g.*, *Mabary*, __ F.3d __, slip op. at 5–7; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875–76 (9th Cir. 2014); *Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013), *vacated and remanded on other grounds*, *Schlaud v. Snyder*, 134 S. Ct. 2899 (2014).

Furthermore, a putative class representative whose individual claim has become moot may retain "an economic interest in class certification" sufficient to satisfy Article III. *Roper*, 445 U.S. at 333. In *Roper*, the Court found that interest in the potential for the individual plaintiffs to shift part of their attorney fees and expenses to the class, *see id.* at 334 n.6. Likewise, Weitzner has an interest in obtaining a fee recovery, which would be available on a common fund basis in the event

of a favorable resolution of this case on a class basis, but is not available in an individual action absent a fee-shifting provision (which the TCPA does not contain) and hence was not included in Sanofi's offer. In addition, a putative class representative such as Weitzner retains an 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 the possibility of incentive award provided standing to appeal denial of certification where an individual claim was settled).

In sum, regardless of the effect of the Rule 68 offer on Weitzner's individual claims, he maintains a personal stake in the class action allegations sufficient to satisfy Article III and allow this case to continue, as this Court held in *Weiss*.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order and remand for further proceedings.

Respectfully submitted,

/s/ Adina H. Rosenbaum

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

Attorneys for Amicus Curiae
Public Citizen, Inc.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, composed in Century Schoolbook BT using Microsoft Word 2010, consists of 6,917 words, excluding the portions not required to be counted under applicable rules, and that it complies with the requirements of FRAP 32(a)(7)(B) and 29(d).

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that this brief was served on November 10, 2014, on all parties by ECF.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF BAR MEMBERSHIP

I certify that Scott L. Nelson and Adina H. Rosenbaum, counsel for amicus curiae, are members of the Bar of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

LOCAL RULE 31.1(C) CERTIFICATIONS

I certify that the text of the electronic brief is identical to the text of the ten paper copies mailed to the Court pursuant to Local Rule 31.1(b)(3). I further certify that the electronic file of this brief was scanned with VIPRE anti-virus software and that no virus was detected.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum