14-1389

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PATRICK TANASI, on behalf of himself and others similarly situated,
Plaintiff-Appellee,

v.

NEW ALLIANCE BANK, FIRST NIAGARA FINANCIAL GROUP, INC.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of New York

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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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.

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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 the courts to work for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker 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 consumers' and workers' right to access the court system, and has fought overly broad 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 damages renders the plaintiff's individual claims moot and necessitates dismissal of a putative class action. Public Citizen believes this argument—which is also before the Court in *Franco v. Allied Interstate LLC*, No. 14-1464 (2d Cir.)—misunderstands fundamental mootness principles, and, if accepted, would allow defendants to engage in procedural gamesmanship and thwart plaintiff classes from obtaining recoveries to which they are entitled.

[1] All parties have consented to the filing of 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.

BACKGROUND

This case was brought by Patrick Tanasi on behalf of himself and other similarly situated people, alleging claims against defendants New Alliance Bank and its successor-in-interest First Niagara Financial Group, Inc. (collectively, "New Alliance"), based on New Alliance's reordering of debit transactions to maximize overdraft fees. Before Tanasi could move for class certification, New Alliance made him an offer of judgment under Federal Rule of Civil Procedure 68 that offered him more than he could recover on his individual claim, but did not offer any relief to the rest of the class. Tanasi did not accept the offer.

New Alliance moved to dismiss, arguing that the unaccepted offer rendered the case moot. The district court disagreed. The court stated that New Alliance's offer would have mooted Tanasi's claim in an individual action, but held that a pre-certification offer of judgment to the named plaintiff does not moot a putative class action. The district court certified for interlocutory appeal the following question: "If, in keeping with Defendants' pre-certification Rule 68 offer of judgment, which afforded the named Plaintiff complete relief on his individual claims in this putative class action, this Court were to enter judgment in the named Plaintiff's favor, would the entire Rule 23 putative class action be rendered moot?" SPA-19-20.

SUMMARY OF ARGUMENT

The district court correctly held that, even if a Rule 68 offer that offers relief solely to a named plaintiff could moot an individual claim, it does not moot a class action. Likewise, if the district court were to enter judgment in Tanasi's favor, that judgment would not moot the putative class action. This Court does not need to reach these issues, however, because they rest 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. In fact, 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 considered withdrawn and is a nullity except for the purpose of determining whether the defendant is entitled to costs at the conclusion of the case. *See* Fed. R. Civ. P. 68(b); *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). An unaccepted offer can neither moot a claim nor otherwise force termination of a lawsuit over the plaintiff's objection.

The theory that a Rule 68 offer moots a claim runs contrary to the limit on the mootness doctrine repeatedly stated by the Supreme Court: 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. As Justice Kagan, joined by three other justices, explained in her dissent in *Genesis HealthCare Corp. v. Symczyk*, "[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 claims because it does not deprive a court of the ability to grant effectual relief. *See Diaz v. First Am. Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013).

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 Tanasi's individual claim. And because the unaccepted offer did not moot Tanasi's individual claim or otherwise grant authority for the district court to enter judgment over Tanasi's objections, the question whether the offer affected the class action does not even arise. Even if a Rule 68 offer could moot an individual claim, however, the Court should affirm the district court's holding because Tanasi has a personal stake in the class claims sufficient to satisfy Article III.

ARGUMENT

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

The question certified by the district court presupposes that, in response to an unaccepted Rule 68 offer of full relief to an individual plaintiff, the district court could enter judgment on that plaintiff's claim. That premise is incorrect. An unaccepted Rule 68 offer neither moots a plaintiff's claim nor otherwise authorizes entry of judgment over the plaintiff's objection.[2]

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 the 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. The three 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 (citation omitted). In particular, the mootness doctrine requires that parties "continue to have a personal stake" in the lawsuit throughout its existence, *id.* (internal quotation marks and citations omitted), by requiring

[2] In considering an interlocutory appeal, the Court is not confined to the question certified by the district court, but rather "may address any issue fairly included within the certified order because it is the *order* that is appealable." *In re U.S. Lines, Inc.*, 197 F.3d 631, 635-36 (2d Cir. 1999) (citation omitted).

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, however, lightly conclude that a case is moot. "A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 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). Thus, even a defendant's agreement on the merits with a plaintiff's claim 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 unaccepted offer of judgment does not meet the criteria for mooting a case: Neither the offer itself, nor the plaintiff's decision not to accept it, provides redress for the plaintiff's grievance or makes it impossible for a court to grant effectual relief. The court retains the ability to grant all the relief the plaintiff requested, and the plaintiff's claims are not moot.

b. Rule 68 and the procedures it establishes underscore that an offer of judgment cannot moot a case. 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*, 450 U.S. at 350. Specifically, the rule permits judgment to be entered in the plaintiff's favor on the offered terms if the plaintiff accepts the offer in writing within 14 days of being served with it. Fed. R. Civ. P. 68(a). On the other hand, "[if] the offer is not accepted, it is deemed withdrawn." *Delta*, 450 U.S. at 350. In that case, the plaintiff's rejection of an offer only "becomes significant in . . . a [post-judgment] proceeding to determine costs." *Id*. Specifically, if a plaintiff wins a judgment, but that judgment is not more favorable than the unaccepted Rule 68 offer, the plaintiff is liable for the defendant's "costs incurred after the offer was made." Fed. R. Civ. P. 68(d). Thus, the Rule establishes a cost-shifting mechanism designed to "encourage the settlement of litigation" by providing plaintiffs "an additional inducement to settle." *Delta*, 450 U.S. at 352.

Notably, nothing in Rule 68 *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, for it contemplates a case proceeding to judgment, whether an offer is accepted or rejected. In the case of acceptance (and only in that case), the Rule authorizes entry of judgment on the offer. Fed. R. Civ. P. 68(a). In cases where an offer is not accepted within the Rule's time-frame, the Rule provides that the offer "is considered withdrawn,"

Fed. R. Civ. P. 68(b), and it anticipates that the case will then be litigated to judgment.

Thus, under the terms of 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 therefore does not moot a case.

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

In *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court pointed out that it 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). The lower courts had held that the individual claim was moot because of an unaccepted Rule 68 offer. 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

[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.

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 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 plaintiff's 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:

> We made clear earlier this Term that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. __, __, 133 S. Ct. 1017, 1023 (2012) (internal quotation marks omitted). "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Ibid*. (internal quotation marks omitted). By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first year law student

> learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 151 (1886). Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.

Id. at 1533-34. Importantly, the *Symczyk* majority did not disagree with Justice Kagan's analysis. *See id*. at 1534 (Kagan, J., dissenting) ("[W]hat I have said conflicts with nothing in the Court's opinion. The majority does not attempt to argue . . . that the unaccepted settlement offer mooted [the plaintiff's] individual damages claim.").

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; *see also Gomez v. Campbell-Ewald Co.*, __ F.3d __, 2014 WL 4654478, *2 (9th Cir. Sept. 18, 2014). As that court explained, "[t]his holding is consistent with the language, structure and purposes of Rule 68 and with fundamental principles governing mootness." *Diaz*, 732 F.3d at 955. Once an offer of judgment lapses, it is "by its own terms and under Rule 68, a legal nullity." *Id*.

3. This Court Has Recognized That an Unaccepted Offer Does Not Moot a Claim.

Like Justice Kagan, this Court has "rejected the argument that an unaccepted offer of settlement for the full amount of damages owed 'moots' a case such that the case should be dismissed for lack of jurisdiction if the plaintiff desires to continue the action." *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013) (citing *McCauley v. Trans Union, LLC*, 402 F.3d 340 (2d Cir. 2005)). In *McCauley*, the defendant made an offer of judgment to the plaintiff for everything he could potentially recover in litigation, and the district court dismissed the case, entering judgment in the defendant's favor. This Court vacated the dismissal, explaining that, when judgment was entered in the defendant's favor, the defendant "was relieved of the obligation to pay" damages to the plaintiff, and that, in "the absence of an obligation to pay" the claimed damages, the controversy between the parties was "still alive." *Id*. at 342. The Court therefore held that it "cannot conclude that the rejected settlement offer, by itself, moots the case." *Id*. Because the defendant did not contest entry of a default judgment against it for the full amount of the plaintiff's claim, and because the plaintiff conceded that a default judgment would be satisfactory, the Court concluded that, rather than dismissing the case as moot and entering judgment in favor of the defendant, the district court should have entered a default judgment in favor of the plaintiff, and it remanded with instructions for the district court to do so. *Id*.

Despite *McCauley*, the district court stated that "if Tanasi were not seeking to represent a class, the Bank's complete offer of judgment would moot his claim and strip this Court of subject-matter jurisdiction over it." SPA-5. In support of this statement, the court cited *Doyle v. Midland Credit Management, Inc.*, 722 F.3d 78 (2d Cir. 2013). In *Doyle*, however, the parties did not challenge the notion that an unaccepted offer of judgment can moot a claim.[4]

In *Doyle*, the defendant, Midland, moved to dismiss for lack of jurisdiction after the plaintiff, Doyle, did not accept a Rule 68 offer of full statutory damages. At a hearing on the motion, Doyle's counsel explained that he also sought actual damages, and Midland orally offered to pay Doyle an additional amount in such damages. Doyle's counsel agreed that the new offer offered all the relief Doyle sought, but did not accept it, and the district court held that the case was moot. *Id.* at 80.

In his briefs before the panel, Doyle did not cite *McCauley* or argue that an unaccepted offer of judgment does not affect subject-matter jurisdiction. Instead, he asserted that the original offer was substantively defective and that, if the offer

[4] The district court also cited *ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.*, 485 F.3d 85, 92-93 (2d Cir. 2007), as having "affirm[ed] [a] Rule 12(b)(1) dismissal based on a tender of the maximum amount owed." SPA-5. However, although the Court in that case affirmed the district court's entry of judgment, it specifically explained that the district court had been "mistaken in believing that the case had become moot and that the court lacked jurisdiction." 485 F.3d at 94.

had deprived the court of jurisdiction, "subject-matter jurisdiction would have been reinstated upon the expiration" of the offer. Pl.-Appellant's Principal Br., *Doyle v. Midland Credit Mgmt., Inc.*, No. 12-4555, 2012 WL 6219030, *8 (2d Cir. filed Dec. 10, 2012). With regard to the offer made at the motion hearing, he contended that "a Rule 68 offer may not be made orally," and that, in any event, Midland would have had to move to compel its acceptance. Pl.-Appellant's Reply Br., *Doyle v. Midland Credit Mgmt., Inc.*, No. 12-4555, 2013 WL 523741, *2 (2d Cir. filed Jan. 22, 2013).

In its opinion, the Court focused on the oral offer, holding that whether it complied with the specific requirements of Rule 68 was irrelevant because "an offer need not comply with Federal Rule of Civil Procedure 68 in order to render a case moot under Article III." 722 F.3d at 81. The Court concluded (without citing either *McCauley* or Justice Kagan's dissent in *Symczyk*) that "Doyle's refusal to settle the case in return for Midland's offer . . . , notwithstanding Doyle's acknowledgment that he could win no more, was sufficient ground to dismiss this case for lack of subject matter jurisdiction." *Id*.

Thus, none of the parties in *Doyle* argued that an unaccepted Rule 68 offer could not render claims moot. Accordingly, although the decision unsurprisingly accepted the uncontested premise that a Rule 68 offer could moot a case, it focused instead on the question whether the offer needed to conform with Rule 68's

requirements to moot a case. Under these circumstances, and in light of *McCauley* and the Supreme Court's decisions in *Windsor*, *Chafin*, and *Knox* emphasizing the mootness doctrine's limited scope, *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 that an unaccepted offer of judgment can render a claim moot.

Nonetheless, the coexistence of *Doyle* and *McCauley* has led to confusion among courts and commentators about the effect of a Rule 68 offer in this Circuit. *See Cabala*, 736 F.3d at 230 n.4 (suggesting that *Doyle* and *McCauley* might be inconsistent); *Recent Case, Diaz v. First Am. Home Buyers Prot. Corp, 732 F.3d 948*, 127 Harv. L. Rev 1260, 1263 (2014) ("[O]ther courts interpreting these opinions have come to opposite views about the Second Circuit's position."). A case from the early 1980s, *Abrams v. Interco Inc.*, 719 F.2d 23 (2d Cir. 1983), contributes to the confusion. In *Abrams*, after the district court refused to certify a class, the defendant offered to allow entry of judgment for the maximum amount the named plaintiffs could recover, and the district court entered an order purporting to dismiss the case for lack of subject-matter jurisdiction but then ordered the parties to "settle a judgment" and ultimately entered judgment against the defendant. *See id.* at 25-26; *see also Abrams v. Interco Inc.*, 1984 WL 660 (S.D.N.Y. July 25, 1984) (confirming judgment was entered *against* defendant).

This Court then affirmed both the denial of class certification on the merits, *see* 719 F.3d at 28-31—a ruling that presupposed that the issue was not moot—and the dismissal of the individual claims after class certification was denied, *see id*. at 32-34.

Regardless of whether these cases are reconcilable, to the extent the Court's precedents are read to hold that an unaccepted Rule 68 offer can moot a claim, this Court should follow Justice Kagan's suggestion to "[r]ethink [the] mootness-by-unaccepted-offer theory." *Symczyk*, 133 S. Ct. at 1534 (Kagan, J., dissenting). To ensure consistency between this Court and the Supreme Court's mootness principles, the Court should clarify that an offer of judgment does not affect subject-matter jurisdiction and should hold that a Rule 68 offer cannot moot a case.

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 *accepted* offer, 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: "Federal courts are powerless to adjudicate a suit unless they have subject matter jurisdiction over the action." *European Community v. RJR Nabisco, Inc.*, __ F.3d __, 2014 WL 4085863, *10 (2d Cir. Aug. 20, 2014). 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*, 485 F.3d at 94.

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 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. 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, as just discussed, a court cannot grant relief when 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 moot has led some courts to perform considerable legal and mental gymnastics to avoid that obviously incorrect result. Thus, the Sixth Circuit held in *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009), that although the unaccepted offer moots the plaintiffs' claim, "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer." New Alliance seems to argue for such an approach in this case. *See* New Alliance Br. 9 (contending that, if the case is dismissed as moot, Tanasi "will benefit from judgment entered in his favor"). This Court at one time appears to have followed this approach, *see Abrams*, 719 F.2d at 26 (affirming district court order that granted defendant's motion to dismiss for lack of case or controversy but then ordered parties to settle a judgment), but has since recognized that if a case has "truly become moot" the court must "leav[e] the dispute unadjudicated." *ABN Amro Verzekeringen BV*, 485 F.3d at 94. Although

the Sixth Circuit's approach is certainly a better result for the individual plaintiff, who gets something rather than nothing, it makes no sense jurisprudentially: 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 at the same time 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 fact that an unaccepted offer of judgment cannot moot a claim 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. 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 the court remanded the case to the district court to enter a default judgment for the plaintiff. 402 F.3d at 342.

Nonetheless, the unaccepted Rule 68 offer here cannot permit the court to enter judgment for the individual plaintiff (and dismiss the class action) for two reasons. First, although this Court has stated in dicta that "the typically proper disposition" when a defendant makes an offer of judgment for all damages owed "is for the district court to enter judgment against the defendant for the proffered amount and to direct payment to the plaintiff consistent with the offer," *Cabala*, 736 F.3d at 228, 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. Indeed, although the Court remanded for entry of a default judgment in *McCauley*, it did so only after the parties agreed that such an outcome would be satisfactory. 402 F.3d at 342.

Moreover, an unaccepted offer is inadmissible except in a proceeding to determine costs. Fed. R. Civ. P. 68(b). Accordingly, the 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 (for example, by moving for entry of judgment against it), a Rule 68 offer should be irrelevant in that process.

Second, in a case brought on behalf of a class, a court cannot appropriately enter judgment solely for the class representative, over his objection, before considering class certification. *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 this Court has allowed entry of 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, it has never done so in the context of a certifiable class action: *McCauley* was not a class action, and in *Abrams*, the Court affirmed the denial of class certification before addressing the effect of full tender on the individual claims. In the class-action context, once one puts aside the fallacy that the offer of judgment presents a jurisdictional ground for dismissal, there is no basis for allowing a defendant to compel entry of a judgment in favor of an individual plaintiff as a means of terminating prosecution of claims on behalf of a class. Indeed, allowing the defendant to do so would distort the proper functioning of the judicial process:

> To deny the right to [proceed with a class action] simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

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

The plaintiff in a class action has an excellent reason for objecting to the court's resolution of his individual claims prior to 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 many 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 offer in this case

neither mooted Tanasi's claim nor provided a reason to enter judgment in his favor over his objection, and the case should be allowed to proceed.

III. Tanasi Has a Personal Stake in the Class Claims Sufficient To Create a Justiciable Controversy.

Not only did the Rule 68 offer not moot Tanasi's individual claim, but the features of class actions give rise to several 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.

First, as the Supreme Court recognized in *U.S. Parole Commission v. Geraghty*, 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," the Court 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, Tanasi, 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*, Tanasi can continue "vigorously to advocate his right to have a class certified." *Id*. at 404. In short, Tanasi 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 yet opted in), it did so in large part because of the significant differences between FLSA actions and class actions. As the Court stressed, "Rule 23 actions are fundamentally different from collective actions under the FLSA." 133 S. Ct. at 1529. "[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 claims similar to the plaintiff's may receive notice of the pendency of the action and opt in as additional individual parties. "Under the FLSA, . . . 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action." *Id*.

New Alliance contends that because the primary differences between class and collective actions relate to the meaning of certification, they are irrelevant here, where the Rule 68 offer preceded any motion for class certification. New Alliance Br. 8. But the difference in the significance of certification in class and collective actions also affects the interests of the named plaintiff prior to

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 the collective action. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003).

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 1530.[5] Because this case involves a class action—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, Tanasi, 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.

Since *Symczyk* was decided, both the Sixth and Ninth Circuits, as well as numerous district courts, have held its holding inapplicable to class actions. *See*

[5] *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). New Alliance's summary of *Geraghty* mentions only the footnote's holding, rather than the analysis in *Geraghty*'s main text. *See* New Alliance Br. 24.

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); *Gomez*, __ F.3d __, 2014 WL 4654478, at *3.[6] No circuit has held otherwise.

Furthermore, a putative class representative whose individual claim has become moot may retain "an economic interest in class certification" sufficient to constitute a personal stake in the case. *Roper*, 445 U.S. at 333. In *Roper*, the Court found that interest in the potential for the individual plaintiffs to shift to the class attorney fees and expenses they had incurred. *See id*. at 334 n.6. Likewise, here, Tanasi has an interest in the recovery of attorney fees attributable to his counsel's efforts on the class's behalf. New Alliance's offer included only reasonable fees, to be determined by the court if the parties cannot agree. A court awarding fees in a case brought as a class action, but in which judgment was entered only on individual claims, might not award full fees for time spent on the class allegations, because those allegations were unsuccessful. But if the case proceeded through certification and were successful on behalf of a class, the court would likely award full fees for that time. Thus, the fees awarded for time already spent on the case

[6] *Gomez* further held that *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), which New Alliance contends "may no longer be good law," New Alliance Br. 18, is, indeed, still good law in the Ninth Circuit. *See Gomez*, 2014 WL 4654478, at *3. *Pitts* held that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action." 653 F.3d at 1091-92.

may be greater if the case proceeds. In addition, a putative class representative such as Tanasi 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 possibility of incentive award provided standing to appeal denial of certification where individual claim was settled).

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

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holding that the case is not moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,834 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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