No. 14-13769

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TAMIKO P. WALKER,

Plaintiff-Appellant,

v.

FINANCIAL RECOVERY SERVICES, INC.,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of Florida
No. 1:13-cv-60230-RNS, Hon. Robert N. Scola, Jr., U.S.D.J.

BRIEF FOR APPELLANT

Donald A. Yarbrough
P.O. Box 11842
Fort Lauderdale, FL 33339
954-537-2000
954-566-2235 (Fax)
don@donyarbrough.com

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

O. Randolph Bragg
Horwitz, Horwitz & Associates, Ltd.
25 E. Washington St., Ste. 900
Chicago, IL 60602
312-372-8822
312-372-1673 (Fax)
rand@horwitzlaw.com

Attorneys for Appellant

December 31, 2014

No. 14-13769, *Walker v. Financial Recovery Services, Inc.*

APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, Tamiko P. Walker, certifies, pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-2, that the following is a list of those individuals and entities known or believed to have an interest in the outcome of this case:

1. Judge Robert N. Scola, Jr., United States District Judge, *Trial Judge*
2. Financial Recovery Services, Inc., *Defendant-Appellee*
3. Brian Charles Bowers, *President/Major Stockholder of Defendant-Appellee; Formerly Named as a Defendant but No Longer a Party*
4. Tamiko P. Walker, *Plaintiff-Appellant*
5. Donald A. Yarbrough, *Attorney for Appellant*
6. Scott L. Nelson, *Attorney for Appellant*
7. Public Citizen Foundation, Inc. (Public Citizen Litigation Group), *Non-Profit Organization/Public Interest Legal Organization Employing Mr. Nelson*

8. Public Citizen, Inc, *Non-Profit Organization Affiliated with Public Citizen Foundation, Inc.*

9. O. Randolph Bragg, *Attorney for Appellant*

10. Horwitz, Horwitz & Associates, LTD, *Mr. Bragg's Law Firm*

11. Matthew Kostolnik, *Attorney for Appellee*

12. Moss & Barnett, P.A., *Mr. Kostolnik's Law Firm*

13. Alissa M. Ellison, *Attorney for Appellee*

14. Gray Robinson, P.A., *Ms. Ellison's Law Firm*

Because plaintiff-appellant Walker is not a corporation, no corporate disclosure statement is required.

Respectfully submitted,

s/ Scott L. Nelson
Scott L. Nelson

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. This appeal involves questions that were resolved by this Court in its recent decision in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014): namely, whether an offer of judgment to the named plaintiff in an not-yet-certified class action moots the plaintiff's individual claim and requires dismissal of the proposed class action. *Stein* answered both questions in the negative and compels reversal of the district court's order in this case. Because of the identity of issues between this case and *Stein*, as well as *Keim v. ADF Midatlantic, LLC*, No. 13-13619, which was argued together with *Stein*, this Court entered an order on October 3, 2014, staying briefing in this case pending its decisions in *Stein* and *Keim*. With those cases now decided, and with the precedential opinion in *Stein* rejecting the grounds for the district court's decision below in this case, there is no remaining need for oral argument.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

Cases:

Constitutional Provisions, Statutes, and Regulations:

JURISDICTION

Plaintiff-appellant Tamiko Walker filed this action against defendant-appellee Financial Recovery Services, Inc. (FRS), in the United States District Court for the Southern District of Florida on January 30, 2013. App. Tab 1.[1] The complaint asserted claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. The district court had jurisdiction under 28 U.S.C. §§ 1331.

On June 18, 2014, the district court entered an order granting FRS's motion to dismiss the action "with prejudice" for lack of subject-matter jurisdiction, based on an offer of judgment under Federal Rule of Civil Procedure 68 that Ms. Walker had rejected. App. Tab. 46. On the same day, the court entered a final judgment based on the rejected offer of judgment, awarding Ms. Walker $31,501, declaratory and injunctive relief, and costs. App. Tab 45. The order and judgment are final, appealable orders under 28 U.S.C. § 1291.

On July 16, 2014, Ms. Walker filed a timely motion under Federal Rule of Civil Procedure 59(e). App. Tab 47. The district court denied the

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

motion on July 23, 2014. App. Tab 50. On August 21, 2014, Ms. Walker filed a timely notice of appeal in the form prescribed by Federal Rule of Appellate Procedure 4(a)(1). Doc. 51. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

(1) Whether an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 moots a plaintiff's individual claims and thus requires dismissal of an action for lack of subject-matter jurisdiction and/or entry of judgment for the plaintiff in the amount of the offer.

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

STATEMENT OF THE CASE

Facts, Course of the Proceedings, and Disposition Below

This case is a proposed class action alleging violations of the Telephone Consumer Protection Act (TCPA), which prohibits use of automated dialing equipment and artificial or pre-recorded voices to place telephone calls to cellular telephones. 47 U.S.C. § 227(b)(1)(A)(iii). The district court dismissed the action for lack of subject-matter jurisdiction

on the ground that it became moot when the individual named plaintiff received and rejected an offer of judgment under Federal Rule of Civil Procedure 68 that would have provided her complete relief on her individual claims while providing no relief to the class. This Court's recent decision in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), holds that a rejected offer of judgment moots neither a named plaintiff's individual claims nor a proposed class action. *Stein* requires reversal of the district court's judgment.

Plaintiff-appellant Tamiko Walker filed her initial complaint in this action on January 30, 2013, against defendant-appellee FRS as well as one individual defendant and a John Doe defendant. App. Tab 1. Ms. Walker's initial complaint alleged only individual claims. The complaint alleged that on June 29, 2010, FRS, a company engaged in debt-collection services, *id*. at ¶ 7, had made a call to Ms. Walker's cell phone and left a pre-recorded message attempting to collect a debt from someone named Sharon Hansford. *Id*. at ¶ 9. Thereafter, FRS left other messages on Ms. Walker's cellular phone using automated dialing systems and/or artificial or pre-recorded voices. *Id*. at ¶ 10. The complaint alleged that these calls violated the TCPA's prohibition on automated or pre-recorded calls to

cell phones, *id*. at ¶ 13, and sought statutory damages of $500.00 per call, as well as a declaration that the calls violated the TCPA and a prohibition on additional calls. *Id*. at 5.

On June 7, 2013, Ms. Walker filed a motion for leave to amend the complaint to assert claims on behalf of a class, as preliminary discovery had revealed a factual basis for such claims. Doc. 15. On November 26, 2013, the district court, finding that "there is good cause to amend the complaint and that justice requires amending the complaint," entered a paperless order granting Ms. Walker's motion for leave to amend. Doc. 28. Ms. Walker filed her amended complaint that same day. App. Tab 29.

The amended complaint reiterated the allegations concerning the unlawful calls made to Ms. Walker's cell phone. *Id*. at ¶¶ 5–6.[2] It further alleged that FRS made similar unlawful calls to the cell phones of other Florida residents, *id*. at ¶ 6, and it sought certification of a class of Florida residents who had received such illegal calls from FRS. *Id*. at ¶ 12. The amended complaint alleged, based on FRS's uniform practice of using such pre-recorded messages, that the class was so numerous that

[2] The amended complaint asserted claims only against FRS. The individual defendant had been dismissed on May 6, 2013. Doc. 13.

joinder of all members would be impractical, that the class's claims against FRS presented common legal and factual issues, that common issues predominated over individual ones, that Ms. Walker's claims were typical, that Ms. Walker and her counsel would adequately represent the class, and that a class action would be superior to individual litigation for resolving the class claims. *Id*. at ¶¶ 13–17. The amended complaint sought statutory damages under the TCPA for each member of the class, *see* 47 U.S.C. § 227(b)(3)(B), as well as declaratory and injunctive relief for the class as a whole. App. Tab 29, at 5.

On December 30, 2013, Ms. Walker filed an unopposed motion to amend a scheduling order the district court had entered when the action asserted only individual claims. Doc. 31. The motion explained that the addition of the class claims required alterations and additions to the schedule, and it proposed that any motion for class certification be filed by August, 7, 2014. Doc. 31. The district court entered the consented-to scheduling order on January 6, 2014. Doc. 34.

Meanwhile, discovery had revealed that FRS had made 21 calls to Ms. Walker's cellular phone. *See* App. Tab 32-1, at 1–2. On December 5, 2014, FRS served an offer of judgment under Federal Rule of Civil Pro-

cedure 68 on counsel for Ms. Walker. App. Tab 32-2, Exh. B. In the offer, FRS offered to allow judgment to be entered against it in favor of Ms. Walker in the amount of $31,501, plus costs. *Id*. FRS also offered to allow issuance of an injunction prohibiting it from calling Ms. Walker's cell phone using an automated dialer or pre-recorded or artificial voice, as well as a declaratory judgment stating that its calls to Ms. Walker had violated the TCPA. *Id*. at 1–2. The amount offered by FRS was $1.00 more than the maximum statutory damages Ms. Walker could recover if she proved that each of the 21 calls was a willful TCPA violation. *See* 47 U.S.C. § 227(b)(3) (allowing award of $1,500 in damages for a willful violation). FRS did not offer to provide any relief to the class.

Ms. Walker did not accept the offer within the 14-day period provided for by Rule 68(a). On December 31, 2013, FRS filed a motion to dismiss Ms. Walker's action for lack of subject-matter jurisdiction. FRS argued that the offer of judgment had rendered the action moot as of the moment it was made because it would have provided Ms. Walker with complete relief on her claims if she had accepted it. App. Tab 32. Ms. Walker opposed the motion, arguing that an unaccepted offer of judgment does not moot a plaintiff's individual claims, regardless of how

complete it may be, and that even if an offer of judgment did render the named plaintiff's individual claim moot, if would not moot the claims of the class or the named plaintiff's effort to represent the class. Doc. 40.

On June 18, 2014, the district court simultaneously entered judgment for Ms. Walker on the terms set forth in the unaccepted Rule 68 offer and granted FRS's motion to dismiss the action "with prejudice" for lack of subject-matter jurisdiction. App. Tabs 45, 46. The court held, first, that the offer of judgment mooted Ms. Walker's individual claims by offering her complete relief. According to the court, Ms. Walker's action became moot "as soon as the offer was made." App. Tab 46, at 5.

Having held the individual claims moot, the district court went on to conclude that the class claims Ms. Walker sought to present likewise failed to present a justiciable case or controversy. The court acknowledged that if Ms. Walker had moved for class certification before the offer was made, her "'personal stake' in maintaining a class action [would] outlive[] her mooted individual claim." *Id*. at 2. The court also recognized that "[t]here is a circuit split on whether an offer of judgment to completely satisfy a plaintiff's individual claim, made before a motion for class certification, moots the plaintiff's case," and that this Circuit had

not addressed the issue. *Id*. The court rejected the view of the majority of the circuits that an offer of judgment to a named plaintiff does not moot class claims and instead adopted the Seventh Circuit's decision in *Damasco v. Clearwire Corp*., 662 F.3d 891 (7th Cir. 2011), under which class claims survive only if a plaintiff has moved for class certification before the offer is made, regardless of how premature such a motion may be. *See* App. Tab 46, at 3. The court explained this choice by asserting that a *motion* for class certification creates a "justiciable controversy as to class certification," but a *complaint* asserting class claims does not. *Id*. Thus, the court encouraged plaintiffs wishing to avoid a "buy-off" of their class claims to "move to certify the class at the same time that they file their complaint." *Id*. at 5 (quoting *Damasco*, 662 F.3d at 896). Absent such a motion, the court held that a defendant may avoid class claims by offering judgment to the individual plaintiff. *Id*. at 4.

Ms. Walker filed a timely motion under Rule 59(e) requesting that the district court withdraw its judgment and hold the matter pending this Court's decisions in *Keim v. ADF Midatlantic, LLC*, No. 13-13619, and *Stein v. Buccaneers Limited Partnership*, No. 13-15417, in which ap-

peals of the same issues were then pending. The court denied the motion, and Ms. Walker filed this timely appeal.

On October 3, 2014, this Court ordered that briefing be stayed pending this Court's consideration of *Stein* and *Keim*, and that Ms. Walker file her brief within 30 days of the Court's opinions in those cases. This Court decided *Stein* and *Keim* on December 1, 2014. *See Stein*, 772 F.3d 698; *Keim v. ADF Midatlantic, LLC*,__ F. Appx. __, 2014 WL 6734829 (11th Cir. Dec. 1, 2014)

Standard of Review

The correctness of a district court's dismissal of a complaint for lack of subject-matter jurisdiction (including dismissal on justiciability grounds such as mootness) is a question of law that this Court reviews *de novo* in the absence of a disputed issue of fact. *See Stein*, 772 F.3d at 701.

SUMMARY OF ARGUMENT

This Court's decision in *Stein* controls the outcome of this case. *Stein* demonstrates that the district court made two fundamental errors, each of which requires reversal. First, the court erred in holding that the offer of judgment mooted Ms. Walker's individual claims. Second, the court erred in holding that the supposed mootness of her individual

claims barred Ms. Walker from seeking class relief merely because the offer of judgment preceded the filing of a class certification motion. Each of these errors independently requires reversal of the district court's dismissal order and judgment.

1. *Stein* holds that an unaccepted Rule 68 offer of judgment that would have provided complete relief if accepted does not moot a plaintiff's claim because it does not itself either provide any relief or authorize the district court to provide relief. *See* 772 F.3d at 702–04. *Stein* explains that 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 a nullity except for purposes of determining whether the defendant is entitled to costs at the conclusion of the case. *See Stein*, 772 F.3d at 702–04; *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146 (1981). Such an unaccepted offer neither moots a claim nor otherwise authorizes the district court to terminate a lawsuit. *See Stein*, 772 F.3d at 702–04.

Stein explains that the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. __, 133 S. Ct. 1523 (2013), expressly declined to rule that a Rule 68 offer of judgment for full relief moots a plaintiff's claim. As *Stein* elaborates, Justice Kagan's *Symczyk*

dissent, joined by three other Justices, makes clear why the Supreme Court would not have issued such a ruling had it reached the issue: The theory that a Rule 68 offer of judgment moots a claim is directly contrary to limits on the mootness doctrine repeatedly stated by the Supreme Court, under which a claim is not moot unless "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id*. at __, 133 S. Ct. at 1533 (Kagan, J., dissenting) (quoting *Chafin v. Chafin,* 568 U.S. __, __, 133 S. Ct. 1017, 1023 (2012)); *see also Stein*, 772 F.3d at 702–03. Moreover, Rule 68 provides absolutely no authorization for a court to terminate the case of a plaintiff who does not accept an offer. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1536 (Kagan, J., dissenting); *accord Stein*, 772 F.3d at 702. The district court thus erred both in holding that the offer in this case deprived it of jurisdiction over Ms. Walker's individual claims and in entering judgment in the amount of the offer.

2. *Stein* holds in the alternative that even if an offer of judgment could somehow be deemed to moot a class representative's individual claims, "the class claims remain live, and the named plaintiff[] retain[s] the ability to pursue them." *Id*. at 704. *Stein* reasons that "the necessary personal stake in a live class action sometimes is present even when the

named plaintiff's own individual claim has become moot." *Id.* at 705. Therefore, as long as a proposed class representative has not unduly delayed seeking to certify a class, an offer of judgment that would satisfy her individual claims does not preclude her from pursuing a class action. *See id.* at 705–09. Under *Stein*, the offer in this case did not deprive the district court of subject-matter jurisdiction over Ms. Walker's proposed class action, regardless of whether she moved for class certification before or after receiving the offer. *See id.* at 707.

Stein specifically rejects the rule adopted by the district court in this case, under which an offer of judgment moots class claims if it is made before a class certification motion, but not if a certification motion is on file. *See id.* at 708. *Stein* also explains that the Supreme Court's decision in *Symczyk*, which held that a plaintiff who has no live individual claim may not pursue a collective action under the Fair Labor Standards Act (FLSA), does not govern the issue of mootness in a class action because, "as the Supreme Court repeatedly emphasized in *Symczyk* itself, FLSA actions and class actions are different," and "Rule 23 gives a class representative a markedly different stature from an FLSA plaintiff." *Stein*, 772 F.3d at 709.

Stein is thus dispositive of this case in two ways: It demonstrates that the offer did not moot Ms. Walker's individual claims, and that even if it had done so, it would not have provided a basis for dismissing her class claims. As a precedential ruling of this Court, *Stein* is "binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1342 (11th Cir. 2008). *Stein* thus requires this Court to reverse the district court's order of dismissal, vacate the judgment, and remand for further proceedings.

ARGUMENT

I. An unaccepted Rule 68 offer of judgment does not moot a plaintiff's claims or provide grounds for terminating her action.

The district court erred in holding that an unaccepted Rule 68 offer of judgment moots a plaintiff's claims and deprives the court of subject-matter jurisdiction. As this Court held in *Stein*, a Rule 68 offer of judgment does no such thing: It does not deprive the plaintiff of a concrete interest in obtaining a judgment or render the court incapable of providing relief between the parties. *See* 772 F.3d at 702. Indeed, if it did so, Rule 68 would become self-defeating, as the defendant's mere offer of

judgment under its terms would deprive the court of jurisdiction and, therefore, of the power to enter the very judgment contemplated by the rule. The consequence would be that courts would have to dismiss entirely unsatisfied claims as moot. The alternative chosen by the district court here—entering judgment on the terms of the expired Rule 68 offer while simultaneously dismissing for lack of subject-matter jurisdiction—is equally unacceptable: It is completely unauthorized by the terms of Rule 68 and makes no sense jurisprudentially because a court cannot enter judgment if it lacks jurisdiction.

A. *Stein* holds that a Rule 68 offer does not moot a plaintiff's claims.

The doctrine of mootness, together with the related standing and ripeness doctrines, ensures that the federal courts adhere to the fundamental command of Article III that federal jurisdiction be limited to "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1. "A case is moot 'when it no longer presents a live controversy with respect to which the court can give meaningful relief.'" *Stein*, 772 F.3d at 702 (quoting *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1246 (11th Cir. 2003)). As the Supreme Court has put it, "[a] case becomes moot only when it is *impossible* for a court to grant any effectual relief

whatever to the prevailing party." *Knox v. Serv. Employees Int'l Union*, 567 U.S. __, __, 132 S. Ct. 2277, 2287 (2012) (emphasis added; citations and internal quotation marks omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (citation omitted); *accord Chafin*, 568 U.S. at __, 133 S. Ct. at 1023. Thus, even a defendant's *agreement on the merits* with a plaintiff's claim does not moot a case or controversy if the plaintiff's injury remains "concrete, persisting, and unredressed." *United States v. Windsor*, 570 U.S. __, __, 133 S. Ct. 2675, 2685 (2013).

This Court's recent decision in *Stein* holds unequivocally that an unaccepted Rule 68 offer of judgment does not meet the criteria for rendering a case moot: It does not, in itself, provide redress for the plaintiff's grievance or make it impossible for a court to grant effectual relief. *See* 772 F.3d at 702. Rule 68 is merely a procedural device that "prescribes certain consequences for formal settlement offers made by 'a party defending against a claim.'" *Delta Air Lines v. August*, 450 U.S. at 350, 101 S. Ct. at 1149. Specifically, the rule permits judgment to be entered in the plaintiff's favor on the offered terms if, but only if, the plaintiff accepts the offer in writing within 14 days of being served with it. *See id.*;

Fed. R. Civ. P. 68(a). An unaccepted offer, however, is "considered withdrawn" and can no longer be accepted by the plaintiff or entered as a judgment by a court. *Stein*, 772 F.3d at 702 (quoting Fed. R. Civ. P. 68(b)). Indeed, the terms of such an offer are "not admissible" except in a proceeding to determine costs under Rule 68(d), which provides that "a party who rejects an offer, litigates, and does not get a better result must pay the other side's costs." *Id*.

Thus, an unaccepted offer—even one that, if accepted, would have resulted in a judgment that fully satisfied a plaintiff's claim—neither redresses the plaintiff's injury nor makes it impossible for the court to provide redress. After the offer expires, "the plaintiff[] still ha[s] [her] claims, and [the defendant] still ha[s] its defenses." *Stein*, 772 F.3d at 702. Because the parties retain concrete interests that will be affected by judicial resolution of the case, the offer does not moot the case. *Stein*, 772 F.3d at 702, 704.

Stein followed the persuasive reasoning of the dissenting opinion of Justice Kagan, joined by three other Justices, in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. at __, 133 S. Ct. at 1532 (Kagan, J., dissenting). At issue in *Symczyk* was whether a plaintiff whose individual claim

was conceded to be moot could pursue an opt-in collective action under the FLSA, 29 U.S.C. § 216(b). The *Symczyk* majority expressly declined to rule on whether a Rule 68 offer moots an individual claim because the parties had agreed below that the individual plaintiff's claim was moot. *See Stein*, 772 F.3d at 702 (citing *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529). Justice Kagan's dissent took on the issue that the majority did not address and demonstrated that the view that an unaccepted Rule 68 offer moots a plaintiff's claim is "bogus." 568 U.S. at __, 133 S. Ct. at 1532.

In a passage incorporated in *Stein*, Justice Kagan explained:

> That thrice asserted view [that the defendant's offer mooted the plaintiff's individual claims] is wrong, wrong, and wrong again. We made clear earlier this Term that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin,* 568 U.S. __, __, 133 S. Ct. 1017, 1023 (2012) (internal quotation marks omitted). "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Ibid.* (internal quotation marks omitted). By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill,* 119 U.S. 149, 151, 7 S. Ct. 168 (1886). Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unac-

> cepted offer is considered withdrawn." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.

Id. at __, 133 S. Ct. at 1533–34 (quoted in *Stein*, 772 F.3d at 702–03).

The *Symczyk* majority did not contest Justice Kagan's analysis. As Justice Kagan emphasized, "what I have said conflicts with nothing in the Court's opinion. The majority does not attempt to argue … that the unaccepted settlement offer mooted [the plaintiff's] individual damages claim." *Id*. at __, 133 S. Ct. at 1534. Because Justice Kagan's analysis does not conflict with the majority's holding, *Stein*'s adoption of her views was entirely appropriate.

Indeed, since *Symczyk*, no federal appellate court has expressed disagreement with Justice Kagan's analysis. Like this Court, the Ninth Circuit has adopted Justice Kagan's reasoning and held that an offer of judgment cannot moot a plaintiff's individual claims. *See Diaz v. First Am. Home Buyers Prot. Corp.* 732 F.3d at 954–55; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014). The Second, Fifth, and Seventh Circuits have all recognized that the question whether a Rule 68 offer of complete relief can moot a plaintiff's claim remains unresolved in light of *Symczyk*, though the circumstances of the cases before them did

not require resolution of the issue. *See Cabala v. Crowley*, 736 F.3d 226, 228 n.2 (2d Cir. 2013); *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 608 n.1 (5th Cir. 2014); *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824 (5th Cir. 2014); *Scott v. Westlake Servs. LLC*, 740 F.3d 1124, 1126 n.1 (7th Cir. 2014); *Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 450 (2014).[3] The Seventh Circuit, which before *Symczyk* had held that Rule 68 offers of complete relief moot individual claims, has twice acknowledged that Justice Kagan's reasoning provides "reasons to question our approach to the problem." *Scott*, 704 F.3d at 1126 n.1; *see also Smith*, 772 F.3d at 450.

In short, Justice Kagan's sound analysis, adopted in *Stein*, requires reversal of the district court's holding that Ms. Walker's claims are moot.

[3] The Sixth Circuit also avoided the need to consider Justice Kagan's analysis 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 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 of complete relief can moot a claim.

B. The district court lacked authority to enter judgment on the unaccepted Rule 68 offer.

In this case, as in *Stein*, the district court dismissed the action for lack of subject-matter jurisdiction based on its incorrect view that the offer of judgment mooted Ms. Walker's claims the moment it was made. Unlike in *Stein*, and in contradiction of its own holding that the offer itself deprived it of subject-matter jurisdiction, the court also entered judgment on the offer. *Stein* demonstrates that the district court's entry of judgment on the offer was as improper as the dismissal, and that the proper course of action for the district court was to allow the action to proceed to possible consideration of the question of class certification.

Stein observed that the district court in the case before it had not entered judgment for the plaintiff, and that even courts that have held that offers of judgment for complete relief moot claims have generally "enter[ed] judgment for the plaintiff in the amount of the unaccepted offer." 772 F.3d at 703. But *Stein* by no means implies that entry of judgment is proper under such circumstances. Quite the contrary: *Stein* states explicitly that the Court "agree[s] with the *Symczyk* dissent," *id*., and Justice Kagan's dissent explicitly states that neither outright dismissal nor dismissal combined with entry of judgment in the amount of a

lapsed offer is proper when a plaintiff rejects a Rule 68 offer of judgment. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1536 (Kagan, J., dissenting). Moreover, if the proper course in such cases were to enter judgment in the plaintiff's favor on the unaccepted offer, *Stein* would have remanded for entry of such a judgment. Instead, it reversed outright the district court's dismissal of the case because "a plaintiff's individual claim is not mooted by an unaccepted Rule 68 offer of judgment." 772 F.3d at 709.

Stein also explained exactly why it would be improper for a district court to enter judgment on a rejected Rule 68 offer: It "is flatly inconsistent with the rule" to "giv[e] controlling effect to an unaccepted Rule 68 offer." *Id*. at 702. "When the deadline for accepting these offers passed, they were 'considered withdrawn' and were 'not admissible.' *See* Fed. R. Civ. P. 68(b). *The plaintiffs could no longer accept the offers or require the court to enter judgment*." *Id*. (emphasis added). As Justice Kagan put it in her *Symczyk* opinion:

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

569 U.S. at __, 133 S. Ct. at 1536 (Kagan, J., dissenting).

The district court's entry of judgment only serves to illustrate the paradoxical consequences of the theory, rejected in *Stein*, that a Rule 68 offer of judgment moots a case. If a Rule 68 offer indeed mooted a case and deprived the court of subject-matter jurisdiction over it, the court would have no authority to enter judgment on the offer *even if it was accepted*, because a court cannot grant a party relief in a case over which it has no jurisdiction.[4] If, as the district court thought, the action was moot the moment the offer was made, the court would have had to dismiss the case without providing any redress. But such a dismissal would contradict the basis of the theory that the case is moot—that is, that the plaintiff has no live claim because she has received full redress. A court cannot declare a claim for damages and injunctive relief moot while at the same time "send[ing] [the plaintiff] away empty-handed." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1534 (Kagan, J., dissenting).

---

[4] *See Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268, 1277 (11th Cir. 2010); *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409–10 (11th Cir. 1999); *White v. Comm'r of Internal Revenue*, 776 F.2d 976, 977 (11th Cir. 1985); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012 (1998); Fed. R. Civ. P. 12(h)(3).

The district court here sought to avoid that consequence by providing redress, but in so doing it contradicted its own holding that the case was moot. It also contradicted the terms of Rule 68, which not only do not affirmatively provide for entry of judgment on an unaccepted Rule 68 offer, but do not even *permit* the entry of such a judgment, as they expressly provide that the offer is a nullity once the time for accepting it has expired. *See Stein*, 772 F.3d at 702. A proper application of Rule 68 and of mootness doctrine avoids these contradictions by recognizing that an unaccepted Rule 68 offer provides no basis for terminating an action in any manner, whether by dismissal or by judgment.

II. Even if Ms. Walker's individual claims were moot, the district court's dismissal order would remain improper because the class claims are not moot.

Stein's alternative holding—that even if a Rule 68 offer did moot a putative class representative's individual claim, such an offer "does not moot a class action in circumstances like those presented here, even if the proffer comes before the plaintiff has moved to certify a class," 722 F.3d at 709—also requires reversal of the district court's dismissal of Ms. Walker's proposed class action. *Stein* specifically rejects the rule adopted by the district court in this case, under which a Rule 68 offer of complete

individual relief forecloses a plaintiff from pursuing a class action if the offer is made before the plaintiff moves for class certification. *Stein* holds instead that as long as a plaintiff does not unduly delay seeking class certification, she may continue to pursue class claims in the face of a Rule 68 offer of complete individual relief, regardless of whether she has moved for certification at the time the offer is made. *See* 722 F.3d at 707.

Stein's holding is grounded in Supreme Court authority recognizing that "the necessary personal stake in a live class-action controversy sometimes is present even when the named plaintiff's own individual claim has become moot." *Id*. at 705. In particular, where an individual named plaintiff's claim is mooted "before the district court can reasonably be expected to rule on a certification motion," *id*. (quoting *Sosna v. Iowa,* 419 U.S. 393, 402 n.11, 95 S. Ct. 553, 559 n.11 (1975)), a subsequent order certifying a class may "relate back" to the filing of the complaint in order to avoid the problem of claims that are "capable of repetition, yet evading review." *Id*. at 705–06. Because class certification creates a juridical entity with a "legal status separate from the interest of [the named plaintiff]," *id*. at 705 (quoting *Sosna*, 419 U.S. at 399, 95 S. Ct. at 557), such relation back operates to satisfy the requirement that

there be plaintiffs with live claims throughout the course of the action. *Stein*, moreover, holds explicitly that relation back is proper not only when the claims at issue are inherently transitory but also, as in this case, when the issue of mootness arises from the "purposive acts" of a defendant that has, and has attempted to exercise, "the ability by tender to each named plaintiff effectively to prevent any plaintiff in the class from procuring a decision on class certification." *Id*. at 706 (quoting *Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1050 (5th Cir. 1981)).

Stein also rejects the view, adopted by the district court here, that certification relates back only to the date when a plaintiff files a motion for class certification, and that a Rule 68 offer can thus moot a class action if tendered before a certification motion is on file. As *Stein* explains:

> The relation-back doctrine allows a named plaintiff whose individual claims are moot to represent class members not because the named plaintiff has moved to certify a class but because the named plaintiff will adequately present the class claims and unless the named plaintiff is allowed to do so the class claims will be capable of repetition, yet evading review. And when, as here, the relation-back doctrine applies, certification relates back not to the filing of the motion to certify but "to the filing of the complaint."

Id. at 707 (citations omitted). Moreover, *Stein* points out, a rule based on the time of filing of a certification motion "makes no sense" because the

motion itself does not bring the class into being; it only "indicates that the named plaintiff intends to represent a class if allowed to do so, but the complaint itself announces that same intent; the motion is not needed for that purpose." *Id*. Requiring plaintiffs to file premature class certification motions in order to avoid mootness dismissals based on offers of judgment would not only be illogical, but would also "produce unacceptable results"—namely, "unnecessary and premature certification motions in some cases and unnecessary gamesmanship in others." *Id*.

Stein therefore holds that a Rule 68 offer of individual relief does not bar a plaintiff from seeking to represent a class as long as she "acts diligently to pursue the class claims." *Id*. And *Stein* emphasizes that "to act diligently, a named plaintiff need not file a class-certification motion with the complaint or prematurely; it is enough that the named plaintiff diligently takes any necessary discovery, complies with any applicable local rules and scheduling orders, and acts without undue delay." *Id*.

Ms. Walker readily satisfies *Stein*'s standard of diligence. She promptly sought and was granted leave to amend her complaint to assert class claims when discovery provided a basis for doing so. Docs. 15, 28. Approximately a month after the complaint was amended, she filed an

unopposed motion proposing that any class certification motion be filed within approximately seven months, by August 7, 2014. Doc. 31. The district court promptly granted that motion as well, Doc. 34, an action reflecting the court's acceptance of the schedule as appropriate for a class action conducted with reasonable diligence. Ms. Walker was in full compliance with all applicable scheduling orders and "did not miss any deadlines" in her effort to represent a class. *Stein*, 772 F.3d at 707. *Stein* therefore requires that her class claims be allowed to proceed.

As *Stein* explains, its holding in this respect is fully compatible with the Supreme Court's holding in *Symczyk* that a plaintiff who has no live claims may not pursue an opt-in collective action under the FLSA. *Symczyk*, which distinguished the Supreme Court's earlier decisions allowing plaintiffs with moot claims to seek class certification, "repeatedly emphasized" that "FLSA actions and class actions are different." *Id*. at 709. Indeed, *Symczyk* stated that those differences are so significant that decisions about the mootness of one are "inapposite" to the other. *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1529.

Class actions differ "fundamentally" from FLSA collective actions in large part because of the "unique significance of certification decisions

in class-action proceedings." *Id*. at __, __, 133 S. Ct. at 1529, 1532. "[A] putative class acquires an independent legal status once it is certified under Rule 23." *Id*. at __; 133 S. Ct. at 1530. That independent status, the Supreme Court has previously recognized, gives the "proposed representative … a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 100 S. Ct. 1202, 1212–13 (1980). Thus, even if a proposed class representative's own claims are moot, "[t]he question whether class certification is appropriate remains as a concrete, sharply presented issue," and the putative class representative can "continue[] vigorously to advocate his right to have a class certified" regardless of the status of his personal claim. *Id*. at 403–04, 100 S. Ct. at 1212. Once the class has been certified, its independent status can, as this Court explained in *Stein*, relate back to the filing of the complaint.[5]

[5] In addition, a putative class representative retains "an economic interest in class certification." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333, 100 S. Ct. 1166, 1171 (1980). In *Roper*, for example, the Court noted that the individual plaintiffs had an interest in the potential ability to shift attorney fees and expenses to the class. *See id*. at 334 n.6, 100 S. Ct. at 1172 n.6. Likewise, here, Ms. Walker has an interest in the recovery of attorney fees attributable to her counsel's efforts on behalf of the class, which were not covered by the Rule 68 offer. Statutory attorneys' fees are not available under the TCPA, but a class re-

By contrast, an FLSA collective action is merely a procedural device by which persons with claims similar to the FLSA plaintiff's may receive notice of the pendency of the action and opt in as additional individual parties. "Under the FLSA, … 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action." *Symczyk*, 569 U.S. at __, 133 S. Ct. at 1530. 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. *Cameron-Grant*, 347 F.3d at 1249. Thus, the named plaintiff has no "personal stake" in an FLSA collective action, *id*. at 1247, nor does an FLSA action result in the creation of a class with live interests of its own that can preserve a case or

---

covery would allow for sharing of attorneys' fees by the class under the common-fund doctrine, *see*, *e.g.*, *Americana Art China Co. v. Foxfire Printing & Packaging Co.*, 743 F.3d 243, 247 (7th Cir. 2014), while the offer here left Ms. Walker to bear the entirety of counsel's fees out of her own award. In addition, a putative class representative such as Ms. Walker retains an individual interest in a possible incentive award for her efforts on behalf of the class. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012) (holding that possibility of incentive award provided standing to appeal denial of certification where individual claim was settled); *cf. Nelson v. Mead Johnson & Johnson Co.*, 484 F. Appx. 429 (11th Cir. 2012) (affirming approval of class settlement that provided incentive award).

controversy irrespective of the mootness of the claims of any one individual. In short, because of the "fundamental, irreconcilable difference" between an FLSA action and a Rule 23 class action, *id*. at 1249, *Symczyk* does not control the outcome of a case involving a class action.

For like reasons, every other court of appeals to address the issue in the wake of *Symczyk* has ruled consistently with *Stein*'s holding that *Symczyk*'s analysis does not apply to class actions, and that a Rule 68 offer of complete individual relief to a proposed class representative does not bar her from seeking to represent a class. *See*, *e.g.*, *Mabary v. Home Town Bank*, 771 F.3d at 824; *Gomez v. Campbell-Ewald Co*., 768 F.3d at 875–76*; 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). The circuit consensus noted in *Stein* that an offer of judgment of individual relief does not disable a plaintiff from representing a class, see 772 F.3d at 709, remains intact.

Because the district court's dismissal of Ms. Walker's class claims rested on grounds expressly rejected in *Stein*, that order must be reversed, and Ms. Walker must be afforded the opportunity to pursue certification of those claims on remand.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court, vacate its judgment and order of dismissal, and remand for further proceedings on the merits.

Respectfully submitted,

s/ Scott L. Nelson

Donald A. Yarbrough
P.O. Box 11842
Fort Lauderdale, FL 33339
954- 537-2000
954- 566-2235 (Fax)
don@donyarbrough.com

O. Randolph Bragg
Horwitz, Horwitz & Associates, Ltd.
25 E. Washington St., Ste. 900
Chicago, IL 60602
312-372-8822
312-372-1673 (Fax)
rand@horwitzlaw.com

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

Attorneys for Appellant

December 31, 2014

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Century Schoolbook BT. As calculated by my word processing software (Word 2010), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 6,982 words.

s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that, on December 31, 2014, the foregoing Brief for Appellant was served through the court's ECF system on counsel for defendants-appellees.

s/ Scott L. Nelson
Scott L. Nelson