Nos. 11-12413, 11-12931 and 11-12937 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANTHONY W. ZINNI,
Plaintiff-Appellant,

v.

ER SOLUTIONS, INC.,

Defendant-Appellee.

BLANCHE M. DELLAPIETRO,
Plaintiff-Appellant,

v.

ARS NATIONAL SERVICES, INC.,

Defendant-Appellee.

NAOMI M. DESTY,
Plaintiff-Appellant,

v.

COLLECTION INFORMATION BUREAU, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

JOINT BRIEF FOR APPELLANTS ANTHONY W. ZINNI, BLANCHE M. DELLAPIETRO, AND NAOMI M. DESTY

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No. 11-12413, *Zinni v. ER Solutions, Inc.*
No. 11-12931, *Dellapietro v. ARS National Services, Inc.*
No. 11-12937, *Desty v. Collection Information Bureau, Inc.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26-1, appellant provides the following list of persons who may have an interest in the outcome of this appeal:

A. Interested Persons

ACE US Holdings, Inc.

ACE Limited (NYSE: ACE)

ARS National Services, Inc.

Beck, Gregory A.

Collection Information Bureau, Inc.

Convergent Resources, Inc.

Dellapietro, Blanche M.

Desty, Naomi P.

ER Solutions, Inc.

Fernandez, Barbara

Golden & Scaz PLLC

Golden, Dale T.

Hartnett, David P.

Hinshaw & Culbertson, LLP

McHale, Charles James Jr.

Pearcy, Maureen G.

Public Citizen Foundation

Public Citizen, Inc.

Ryskamp, Hon. Kenneth L.

St. Paul Fire and Marine Insurance Company

The Travelers Companies, Inc. (NYSE: TRV)

Vitunac, Hon. Ann E.

Westchester Fire Insurance Co.

Yarbrough, Donald A.

Zinni, Anthony W.

/s/Gregory A. Beck
Gregory A. Beck

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because these appeals involve an important question of federal subject-matter jurisdiction. In these cases, defendants emailed counsel for plaintiffs an offer to settle plaintiffs' claims under the Fair Debt Collections Practices Act (FDCPA). The district court held that defendants' proposals to settle, although never accepted by plaintiffs, rendered the cases moot. As explained below, such offers have become a common tactic by debt collectors seeking to deprive plaintiffs of an enforceable judgment under the FDCPA, and, if left unchecked, threaten to undermine the effectiveness of the Act's remedial regime. The issue has led to conflicting decisions among the federal courts, including district courts in this circuit. The Court would benefit from oral argument on these issues.

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STATEMENT OF JURISDICTION

Each of the three consolidated cases was brought in the district court under the Fair Debt Collections Practices Act, 15 U.S.C. § 1692. The district court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). The court entered an order dismissing *Zinni v. ER Solutions* for lack of subject-matter jurisdiction on April 20, 2011. Zinni Doc 16. The court issued separate orders dismissing *Dellapietro v. ARS National Services* and *Desty v. Collection Information Bureau* for lack of subject-matter jurisdiction on June 8, 2011. Dellapietro Doc 17; Desty Doc 18. Notices of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) were timely filed in *Zinni* on May 20, 2011 (Zinni Doc 17); and in *Dellapietro* and *Desty* on June 24, 2011 (Dellapietro Doc 18; Desty Doc 19). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Does a rejected offer to settle a plaintiff's claims under the Fair Debt Collections Practices Act deprive a district court of jurisdiction over the plaintiffs' claims, where the offer includes the maximum statutory damages of $1,001 but does not include consent to entry of an enforceable judgment or resolve plaintiffs' claims for attorneys' fees?

STATEMENT OF THE CASE

This is a consolidated appeal of three cases brought under the Fair Debt Collection Practices Act (FDCPA), which the district court dismissed as moot

based on defendants' settlement offers. In each case, the defendant sent an email to plaintiff's counsel offering to settle the FDCPA claims for $1,001—an amount exceeding by $1 the maximum statutory damages available for an individual plaintiff under the FDCPA. The defendant in each case also offered attorneys' fees and costs, but did not specify the amount of fees and costs to which plaintiffs would be entitled. None of the defendants' offers constituted an offer of judgment under Federal Rule of Civil Procedure 68 or provided any mechanism for plaintiffs to enforce the agreement.

When plaintiffs did not accept the offers, the district court granted defendants' motions to dismiss for lack of subject-matter jurisdiction, holding that the offers, even if not accepted, left plaintiffs with "no remaining stake" in the litigation. Zinni Doc. 16 at 3 (quoting *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 258 F.Supp.2d 157, 159-160 (E.D.N.Y. 2003)). The court dismissed plaintiffs' claims with prejudice, leaving them with neither a settlement agreement nor an enforceable judgment, and thus without any means to obtain relief on their FDCPA claims.

A. Statutory Background

In the FDCPA, Congress responded to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices" by enacting a comprehensive, detailed remedial scheme that imposes civil liability on debt

collectors who violate the Act. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1173 (11th Cir. 1985); 15 U.S.C. § 1692(a). Congress relied on extensive evidence showing that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). Congress also found that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts," and sought "to insure that those debt collectors who refrain from using abusive collection practices are not competitively disadvantaged." *Id.* § 1692(c), (e) .

The FDCPA prohibits debt collectors from engaging in a range of misleading and abusive conduct. As relevant to these cases, § 1692d of the FDCPA forbids a debt collector from "engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." The statute provides a non-exclusive list of conduct that violates this section, including "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." *Id.* § 1692d(5). The statute also requires debt collectors to, among other things, disclose "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," *id.* § 1692e(11), and to make a "meaningful disclosure of the caller's

identity" and when communicating by telephone, *id.* § 1692d(6); *see Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1353 (11th Cir. 2009). The FDCPA provides a civil cause of action against any debt collector who fails to comply with these requirements. Subject to affirmative defenses, a debt collector who violates the Act's provisions is liable for actual damages and statutory damages of up to $1,000. 15 U.S.C. § 1692k(a); *see Edwards*, 584 F.3d at 1352.

A key component of the FDCPA's enforcement scheme is its requirement of the payment of reasonable attorneys' fees and costs to successful plaintiffs. 15 U.S.C. § 1692k(a)(3); *see Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). "The reason for mandatory fees is that congress chose a 'private attorney general' approach to assume enforcement of the FDCPA." *Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir.1995). Because actual damages under the FDCPA are frequently small or nonexistent and the Act caps statutory damages at $1,000, Congress recognized that enforcement of these claims would often not justify the cost of hiring a lawyer at prevailing market rates and that statutory fee shifting was therefore necessary to ensure private enforcement of the Act. *See Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991) (noting that the FDCPA "mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general").

B. Proceedings and Dispositions Below

The three consolidated appeals each involve claims for statutory damages, attorneys' fees, and costs under the FDCPA.

1. In *Zinni v. ER Services*, plaintiff Anthony W. Zinni alleged that the defendant debt collector had left him more than fifty voicemail messages in the course of attempting to collect a debt. Zinni Doc 1 ¶¶ 10-11. The complaint claimed that the company violated the FDCPA by causing plaintiff's phone to "ring repeatedly or continuously with the intent to annoy, abuse or harass" in violation of 15 U.S.C. §1692d(5), and by failing to make the disclosures required by §§ 1692d(6) and 1692e(11). Zinni Doc. 1 ¶ 10. Plaintiff requested damages, attorneys' fees, and costs under the FDCPA. *Id.* at 21.

About six months Zinni filed his complaint, counsel for defendant sent an email to Zinni's counsel stating that the defendant had "authorized me to offer Plaintiff the amount of $1,001, plus reasonable attorney's fees and costs as determined to be recoverable by the Court, to resolve all claims asserted by Plaintiff against Defendant for violations of the Fair Debt Collections Practices Act alleged in the Complaint." Zinni Doc. 13-2 at Page 2 of 2. When plaintiff did not respond to the offer, the company moved to dismiss for lack of subject-matter jurisdiction, arguing that, because Zinni had not claimed actual damages,

defendant's offer of the maximum statutory damages available under the Act rendered plaintiff's claims moot. Zinni Doc. 13-1.

Zinni opposed the motion on the grounds that he had not accepted defendant's offer, that the offer would not have left him without complete relief on his claims, and that the defendant had included in its proposal neither an offer of judgment nor any other mechanism to enforce compliance with the offer's terms. Zinni Doc. 14. In Zinni's memorandum opposing the motion, Zinni's counsel explained that defendants in other FDCPA cases had failed to pay his other clients under similar agreements, and that in several cases he had been forced to file separate lawsuits to enforce the terms of the settlements. *Id.* at 4. Zinni requested that the district court deny the motion to dismiss or, in the alternative, that the court enter judgment for the plaintiff on the terms offered by defendant. *Id.* at 6.

The district court granted defendant's motion and dismissed the case with prejudice, holding that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate." Zinni Doc. 16 at 3. Although the court acknowledged that Zinni had never accepted defendant's offer, it relied on a case involving a formal offer of judgment under Federal Rule of Civil Procedure 68 to hold that a plaintiff "who refuses to acknowledge" that a defendant's offer has resolved his claims "loses outright under Fed. R .Civ. P.

12(b)(1), because he has no remaining stake." Zinni Doc. 16 at 3 (quoting *Greif*, 258 F. Supp. 2d at 160).

The court rejected as "nonsensical" Zinni's argument that, had he accepted defendant's offer, he would have been left with nothing but an unenforceable promise. *Id.* at 4. The court wrote that it was "Plaintiff's failure to accept the offer that creates these issues in the first place" because, "[i]f Plaintiff accepts the offer, it becomes a binding agreement that can be enforced through a motion to enforce settlement." *Id.*[1]

2. In *Dellapietro v. ARS National Services*, plaintiff Blanche M. Dellapietro alleged that defendant ARS National Services left messages on her voicemail identifying itself only as "ARS," and stating that it was "very important" that it speak to her "right away." Dellapietro Doc. 1 ¶ 10. The message did not disclose the purpose of the call other than to state that it was "not a telemarketing or sales call." *Id.* The complaint alleged that defendant failed to meaningfully disclose its name, purpose for calling, or identity as a debt collector as required by 15 U.S.C. § 1692d(6) and 1692e(11). Dellapietro Doc. 1 ¶¶ 14-17.

[1] In addition to the FDCPA claims, Zinni asserted claims under the Florida Consumer Collection Practices Act (FCCPA). Defendant made a separate offer to settle those claims. Zinni Doc. 13-22. After dismissing Zinni's FDCPA claims for lack of subject-matter jurisdiction, the district court dismissed the FCCPA claims under 28 U.S.C. § 1367(c)(3) (providing that the district court "may decline to exercise supplemental jurisdiction over a claim under subsection ... the district court has dismissed all claims over which it has original jurisdiction"). Zinni Doc. 16 at 5.

As in *Zinni*, the defendant emailed plaintiff's counsel an offer to settle the FDCPA claims for $1,001 and "reasonable attorneys' fees and costs." Dellapietro Doc. 14 at 1. The email stated that, "[i]f we are unable to agree on attorneys' fees and costs, we will agree to submit that issue to the court for resolution." *Id.* When plaintiff's counsel did not respond to the offer, the company moved to dismiss the case for lack of subject-matter jurisdiction, and Dellapietro opposed the motion on the same grounds as in *Zinni*. Dellapietro Docs. 14, 15. The district court again granted the motion, holding in an order virtually identical to its prior order in *Zinni* that defendant had "offered more than Plaintiff is entitled to recover under the FDCPA, thereby mooting the FDCPA claim." Dellapietro Doc. 17 at 3.

3. In the final case, *Desty v. Collection Information Bureau, Inc.*, plaintiff Naomi M. Desty alleged that defendant repeatedly left automated voicemail messages on her cellular phone. The caller identified himself as "Ted Lee" and stated that he had an "important message" for her and said that he "must speak with [her] as soon as possible regarding [her] account number." Desty Doc. 1 ¶¶ 10-11. The complaint requested damages and attorneys' fees for defendant's failure to meaningfully disclose its name, purpose for calling, or identity as a debt collector as required by 15 U.S.C. § 1692d(6) and 1692e(11), and for using an automated dialer to repeatedly call her cellular phone in a manner "the natural

consequence of which is to harass, oppress, or abuse" in violation of 15 U.S.C §1692d. Desty Doc. 1 ¶¶ 18-25.

Once again, the defendant offered via email to settle the case for "$1,001, plus reasonable attorneys' fees and court costs." Desty Doc. 15-2. The email stated that if the parties were "unable to reach an agreement as to the amount of Plaintiff's attorney's fees and costs," the defendant "offers to submit the issue s of fees and costs to the Court to decide." *Id.*

When plaintiff did not respond to the offer, defendant moved to dismiss for lack of subject-matter jurisdiction. Desty Doc. 15. The district court granted defendant's motion in an order virtually identical to the orders in *Zinni* and *Dellapietro*. Desty Doc. 18.[2]

C. Standard of Review

A district court's dismissal of a case on grounds of mootness is a question of law, which this Court reviews de novo. *Via Mat Int'l S. Am. Ltd. v. United States*, 446 F.3d 1258, 1262 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

The question of mootness, at its core, turns on whether a plaintiff retains a personal stake in the outcome of the case. Defendants' settlement offers in these

[2] Like Zinni, Desty also asserted claims under the FCCPA, which the district court dismissed under 28 U.S.C. § 1367(c)(3). *See supra*, note 1. Desty also asserted claims under the Telephone Consumer Protection Act (TCCPA), which the district court separately dismissed on other grounds.

cases in no way eliminated plaintiffs' stake because an *offer* to settle a case confers no rights or benefits unless the offer is accepted, and plaintiffs here never accepted the offers. The district court relied for its contrary holding on decisions involving offers of judgment under Federal Rule of Civil Procedure 68. Defendants, however, never made a Rule 68 offer, and, in any event, nothing in Rule 68 suggests that an unaccepted offer renders a case moot. Even if Rule 68 did apply, the court should have entered judgment for the plaintiffs rather than dismissing the case because, by dismissing when plaintiffs had not accepted the settlement offers, the court deprived plaintiffs of any means to obtain relief.

Even if an unaccepted offer were capable of mooting a plaintiff's claims in some cases, defendants' settlement offers would not moot plaintiffs' claims here because the offers did not provide plaintiffs with everything they were entitled to under the statute—in particular, attorneys' fees and an enforceable judgment.

First, the offers did not consent to entry of a judgment, and thus rendered the offer of damages effectively unenforceable. The district court's belief that it could have entertained a motion to enforce the agreement ignores the fact that federal courts generally lack jurisdiction to enforce private settlement agreements that are not made part of a judgment. A suit for breach of contract in state court would also have been infeasible, because the agreement was not specific enough to be

enforceable, and because, without the benefit of the FDCPA's provision for attorneys' fees, pursuing a $1,001 would make little practical sense.

The proposed settlements also failed to resolve the question of attorneys' fees and costs. Rather, the agreements delegated to the district court the task of determining reasonable fees and costs, and thus anticipated further litigation. The district court's conclusion that the case was nevertheless moot cannot be reconciled with *Deposit Guarantee National Bank v. Roper*, 445 U.S. 326 (1980). There, the Supreme Court held that plaintiffs retained an "economic interest" in a class action even after judgment had been entered in their favor because class certification would shift some of their fees and costs to class plaintiffs. Plaintiffs have an even stronger economic interest here in recovering fees and costs from defendants.

Finally, the district court erred in dismissing plaintiffs' claims with prejudice. If the court were correct that it lacked jurisdiction over the case, then it had no jurisdiction to enter a decision on the merits.

ARGUMENT

In each of the three consolidated cases on appeal, the defendant sent plaintiffs' counsel an email offering to settle plaintiffs' FDCPA claims for $1,001—an amount exceeding by $1 the maximum statutory damages available for an individual plaintiff under the FDCPA—plus an unspecified amount for attorneys' fees, to be determined by the court. Such offers, followed closely by

motions to dismiss for lack of subject-matter jurisdiction, have become an increasingly common tactic among debt collectors for avoiding liability under the FDCPA. *See* Desty Doc. 15-3 (compiling decisions).

Regardless of whether a plaintiff accepts or rejects a defendant's offer of settlement, plaintiffs under the district court's view of the law are left without a viable option for effectively vindicating their FDCPA claims. Plaintiffs who choose to accept the offer must agree to give up their federal claims and any possibility of obtaining an enforceable judgment. In exchange, they receive a private agreement in which at least one key term—the amount of attorneys' fees—remains unspecified. If the parties then cannot agree on fees or other details of the settlement, or if defendant refuses to pay, plaintiffs are left, at best, with the option of filing a new action for breach of contract under state law, in which the FDCPA's provision for attorneys' fees would be unavailable. Such plaintiffs are left in a worse position than if the FDCPA action had never been filed—with nothing but a claim against the defendant, and without the benefits of the FDCPA's carefully crafted enforcement regime for vindicating that claim.

Plaintiffs who choose to reject a defendant's offer are even worse off under the district court's holding. Such a plaintiff, according to the district court, "loses outright under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake." Desty Doc. 16 at 3. The plaintiff would be left with neither a private settlement

agreement nor the possibility of obtaining an enforceable judgment under the FDCPA, and would thus lack any means for obtaining relief. That is the position in which plaintiffs find themselves here.

This court should reverse the district court's holding that defendants' offer is sufficient to moot plaintiffs' FDCPA claims. Mootness is an aspect of justiciability that is derived from Article III's limit of federal jurisdiction to "cases" and "controversies." *United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1569 (11th Cir. 1994) (internal quotation omitted). At its core, the question of mootness turns on whether the plaintiff retains a sufficient "personal stake" in the outcome of the case to ensure proper functioning of the adversary process. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402, 100 S. Ct. at 1212 (1980). The district court here was wrong to conclude that defendants' emailed offers left plaintiffs with "no remaining stake." On the contrary, defendants' offers, even if accepted by plaintiffs, would have left them with nothing but an unenforceable promise to pay $1,001. That dubious benefit falls far short of satisfying all plaintiffs' interests in the outcome of the litigation.

I. Defendants' Settlement Offers Do Not Moot Plaintiffs' Claims Because Plaintiffs Never Agreed to the Offers.

Defendants' *offers* to settle plaintiffs' claims, standing alone, do not resolve any of the issues at stake in these cases. "[A] mere offer not assented to constitutes no contract" and thus conveys no rights or benefits to the party receiving the offer.

Bullock v. Harwick, 158 Fla. 834, 838 (1947). The district court's dismissal of plaintiffs' claims in the absence of a settlement agreement thus left plaintiffs without any relief, and with no means of obtaining relief, on their claims.

In holding that defendants' unaccepted offers mooted plaintiffs' claims, the district court analogized these cases to cases where defendants made formal offers of judgment under Federal Rule of Civil Procedure 68. Zinni Doc. 16 at 3. Those cases, however, are not applicable here. The "critical feature" of a Rule 68 offer is that it "allows judgment to be taken against the defendant." *Marek v. Chesny*, 473 U.S. 1, 6 (1985); *see also* 12 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3002 (3d ed.) (noting that a Rule 68 offer is one not merely to settle the suit but to permit judgment to be entered on specified terms). Defendants never consented to entry of such a judgment.

Even in the Rule 68 context, this Court has never endorsed the proposition that an unaccepted offer can moot a plaintiff's claims. There are good reasons for this Court not to endorse such a result. As these cases demonstrate, allowing an unaccepted offer to render a case moot gives parties enormous power to manipulate a district court's jurisdiction. Merely by sending a short email, defendants here were able to deprive plaintiffs of their FDCPA claims, their access to a federal forum, the right to a judgment, and any practical way for them to enforce their claims. Nothing in Rule 68 requires that result. On the

contrary, the rule provides that "[a]n unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b). An offer that has been withdrawn cannot possibly resolve all the issues in a case.

Finally, even assuming defendants' informal offer of settlement could be treated as having completely resolved the case, the district court should not have dismissed plaintiffs' claims. As other courts have recognized, dismissing a case when the settlement offer has not been accepted leaves plaintiffs with neither an enforceable settlement agreement nor a judgment on which to obtain relief, and a plaintiff's claims cannot be moot if the plaintiff "does not receive any relief." *Mackenzie v. Kindred Hospitals E., L.L.C.*, 276 F. Supp. 2d 1211, 1219 (M.D. Fla. 2003). To avoid the paradox of finding a case moot based on relief that the plaintiff has no possibility of obtaining, these courts follow Rule 68 further and enter judgment for the plaintiff on the terms of the defendant's settlement offer. *See, e.g.*, *Ambalu v. Rosenblatt*, 194 F.R.D. 451, 453 (E.D.N.Y. 2000); *Muldrow v. Credit Bureau Collection Services, Inc.*, 09-61792, 2010 WL 2650906 (S.D. Fla. June 30, 2010). Indeed, that was the approach followed by the case on which the district court relied for the proposition that plaintiffs' claims should be dismissed as moot. *Greif*, 258 F. Supp. at 161. If this Court holds that plaintiffs' settlement offers resolved plaintiffs' claims, it should therefore reverse the decision below and instruct the district court to enter judgment for plaintiffs.

II. Defendants' Settlement Offers Do Not Fully Satisfy Plaintiffs' Interests in the Case.

Even if an unaccepted offer were capable of mooting a plaintiff's claims, defendants' settlement offers here would not lead to that result because the offers do not provide plaintiffs with the full relief to which they would be entitled as prevailing plaintiffs under the FDCPA. In particular, the offers would not provide plaintiffs with an enforceable judgment or determine the amount of attorneys' fees and costs to which they are entitled.

A. The Offers Do Not Provide for an Enforceable Judgment.

Defendants' offers do not provide plaintiffs with an important form of relief that they would be entitled to if they prevailed on their claims—a judgment. Judgments have "substantial importance" to plaintiffs because, unlike private settlement agreements, they "are enforceable under the power of the court." 12 *Federal Practice and Procedure* § 3002, at 90. Thus, a settlement offer that does not provide for incorporating its terms into an enforceable order cannot moot a plaintiff's claims. *See Simmons v. United Mortg. & Loan Inv.*, LLC, 634 F.3d 754, 764-66 (4th Cir. 2011) (holding that "the failure of the Defendants to make their attempted offer for full relief in the form of an offer of judgment prevented the mooting of the Plaintiffs' FLSA claims").

Although recognizing that the settlement provided no means for enforcement, the district court attributed this problem to "Plaintiff's failure to

accept the offer." Zinni Doc. 16 at 4. The court wrote that, if the offer had been accepted, it would have become "a binding agreement that can be enforced through a motion to enforce settlement." *Id.* But the district court's belief that it could have adjudicated a dispute over the settlement cannot be reconciled with its holding that defendants' offer deprived the court of jurisdiction. Unless a settlement agreement is incorporated into a court's judgment, enforcement of the agreement "is more than just a continuation or renewal of the dismissed suit." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994). Rather, it is a separate claim for enforcement of a contract under state law, "and hence requires its own basis for jurisdiction. *Id.*; *see also In re T2 Med., Inc.*, 130 F.3d 990, 994 (11th Cir. 1997). Without jurisdiction over the case, the court would have no jurisdiction to enforce the settlement's terms. Thus, even if plaintiffs had accepted defendants' proposed settlement agreement, they would have been unable to enforce the terms of the agreement in the district court. *See Simmons*, 634 F.3d at 764-66 ("[D]istrict courts . . . lack the power to enforce the terms of a settlement agreement absent jurisdiction over a breach of contract action for failure to comply with the settlement agreement"); *see also Federal Practice and Procedure* § 3002, at 90 ("[S]hould a settlement not embodied in a judgment come unraveled, the court may be without jurisdiction to proceed in the case, which often becomes a breach of contract action for failure to comply with the settlement agreement.").

Nor would plaintiffs here likely be able to enforce the settlement by pursuing a new claim for breach of contract in state court. Defendants' offers would not be enforceable contracts under state law even if they had been accepted by plaintiffs, because the offers left an essential term—the amount of attorneys' fees—unresolved. *See David v. Richman*, 568 So. 2d 922, 924 (Fla. 1990). Given the FDCPA's $1,000 limit on statutory damages and plaintiffs' lack of claims for actual damages, plaintiffs' claims for attorneys' fees and costs would almost certainly make up the majority of any monetary relief they obtain under the FDCPA. Without agreement between the parties on the largest source of liability in the case, there is no contract for a state court to enforce. *See* Restatement (Second) of Contracts § 33 (1981) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

Finally, even if plaintiffs could enforce the agreements in state court, the settlements proposed by defendants provide no practical means to do so because they do not provide for recovery of attorneys' fees and costs in such an action. As Congress recognized in adopting the FDCPA's fee-shifting provision, a $1,000 claim for statutory damages under the FDCPA does not justify the cost of hiring a lawyer at prevailing market rates. Plaintiffs would have no more incentive to hire a lawyer to pursue the same $1,000 under a breach-of-contract theory. If recovery

under the FDCPA required plaintiffs to pursue collections actions against debt collectors at their own expense, Congress's carefully crafted remedial scheme would be rendered useless.

B. The Offers Do Not Resolve Plaintiffs' Claims for Attorneys' Fees and Costs.

Defendants' settlement offers also fail to resolve all the issues in the case because they fail to specify a key term of the settlement—the amount of fees and costs to which plaintiffs are entitled under § 1692k(a)(3) of the FDCPA. Like other federal fee-shifting statutes, the FDCPA provides the claim for fees and costs to the *plaintiff*, not the plaintiff's attorney. *See* 15 U.S.C. § 1692k ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable *to such person*" for "the costs of the action, together with a reasonable attorney's fee as determined by the court"); *see Astrue v. Ratliff*, 130 S. Ct. 2521, 2525 (2010). Here, statutory fees are an essential component of plaintiffs' claims. Indeed, as already explained, the fees are almost certainly the *largest* component of those claims.

Defendants' proposed settlement agreements do not resolve plaintiffs' claims for fees and costs. The offers only restate the FDCPA provision that entitles prevailing plaintiffs to "reasonable" fees and costs under the statute; they do not provide the *amount* of fees and costs to which plaintiffs are entitled. Indeed, all three settlement offers delegate to the district court a continuing role in

determining the final amount of fees. In *Dellapietro* and *Desty*, defendants' offers provide that fees and costs will be submitted to the district court for decision if the parties are unable to reach agreement on those terms. Dellapietro Doc. 14-1; Desty Doc. 15-1. And in *Zinni*, defendants' offer assigned the issue for decision by the district court in the first instance, offering payment of fees and costs "as determined to be recoverable by the Court." Zinni Doc 13-2 at 2 of 2. The district court was thus wrong to conclude that defendants had "offer[ed] to satisfy [plaintiffs'] entire demand," leaving "no dispute over which to litigate." Zinni Doc. 16 at 3. An offer to submit a disputed issue to the court for judicial resolution is not an offer to satisfy plaintiffs' claims; it is an offer to *litigate* those claims. *Compare Danow v. Law Office of David E. Borack, P.A.*, 367 F. App'x 22, 23 (11th Cir. 2010) (offer of judgment in FDCPA case that specified attorneys' fees of $1,700 and costs of $300 in addition to damages).

2. The district court's dismissal of plaintiffs' claims for lack of a continuing interest in the litigation where the issues of attorneys' fees and costs remained unresolved cannot be reconciled with the Supreme Court's decision in *Deposit Guarantee National Bank v. Roper*, 445 U.S. 326 (1980). *Roper* considered the effect of a settlement offer on named plaintiffs in a putative class action against a bank. After two named plaintiffs appealed the district court's denial of class certification, the bank offered them $889.42 and $423.54, respectively, to settle

their claims. *Id.* at 329. When plaintiffs would not accept the offers, the bank deposited the settlement funds with the district court. *Id*. Over the named plaintiffs' objections, the district court then entered judgment in plaintiffs' favor on the ground that the tendered amount exceeded the maximum damages that plaintiffs could have recovered in the action. *Id.* at 330.

The Supreme Court rejected the bank's argument that the district court's entry of judgment rendered plaintiffs' appeals moot. The Court held that "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id.* at 332-33. The Court concluded that plaintiffs retained a sufficient "personal stake" in the case because a successful appeal of the district court's denial of class certification would "shift to successful class litigants a portion of those fees and expenses that have been incurred in [the] litigation." *Id.* at 334 n.6.

If an interest in shifting fees and costs among potential plaintiffs is a sufficient interest for maintenance of federal jurisdiction, an interest in shifting fees from the *defendants* is surely sufficient as well. Indeed, plaintiffs here have an interest in continuing the litigation that is in many ways much stronger than in *Roper*. The defendant in *Roper* did much more than make an informal offer to pay damages. The bank's offer included consent to a judgment in the named plaintiffs'

favor, and the bank deposited the full settlement amount, including costs, with the district court. Moreover, based on the bank's tender, the district court entered judgment for the plaintiffs in the amount of defendants' offer. Plaintiffs thus had both an enforceable judgment and the means to readily take possession of the settlement funds. Defendants here, in contrast, only sent email stating the defendants' willingness to settle, without stating the full amount for which defendants admitted liability. Defendants did not offer a judgment, and rather than entering a judgment in plaintiffs' favor, the district court dismissed the claims as moot. Plaintiffs are thus left without any means to obtain the relief that the district court held sufficient to moot their claims.

III. The District Court Erred by Dismissing Plaintiffs' Claims With Prejudice.

In each of the consolidated cases, the district court ordered that "[t]he FDCPA claim is dismissed with prejudice for lack of subject matter jurisdiction." Desty, Doc. 18 at 4-5. If the district court were correct that it lacked jurisdiction over the cases, then it also necessarily lacked jurisdiction to order dismissal with prejudice. *See Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1133 (11th Cir. 1994) (holding that a district court without jurisdiction lacked the power to dismiss the case with prejudice). For this additional reason, the district court's decisions in these cases should be reversed.

CONCLUSION

The district court's decision in each of the consolidated cases should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 5,029 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2011, I caused a copy of the foregoing to be delivered to a third-party commercial carrier for delivery within two business days to the Office of the Clerk and to the following counsel:

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