No. 11-1059

In The Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION AND ELDERCARE RESOURCES CORP.,

Petitioners,

v.

LAURA SYMCZYK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF ACA INTERNATIONAL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, ACA International ("ACA"), is a nonprofit corporation founded in 1939 and based in Minneapolis, Minnesota. ACA is an association of credit, collection, and debt-purchasing professionals who provide a wide variety of accounts-receivable management services. ACA's interests in this matter are both public and private.

ACA represents approximately 5,500 third-party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. Also included among its membership are approximately 3,000 third-party debt collection companies, 650 credit grantors, 225 asset buyers, 200 vendor affiliates, and 850 in-house, compliance, defense, or collection attorneys.

ACA members range in size from small businesses with several employees to large, publicly held corporations. Together, ACA members employ close to 150,000 workers. These members include the very smallest of businesses that operate within a limited geographic range of a single state as well as the very

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief pursuant to Rule 37.3.

largest of multinational corporations that operate in every state and non-U.S. jurisdictions. Approximately 2,000 of the company members of ACA maintain fewer than ten employees and more than 2,500 of the members employ fewer than twenty persons. Many of the companies are wholly or partially owned or operated by minorities or women. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service. ACA continually educates its members and others on the law governing debt collection practices, including the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection Act ("TCPA") in addition to numerous other federal and state laws.

In the process of attempting to recover outstanding accounts and balances, ACA members act as an extension of every community's businesses. They represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services delivered to consumers. Each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to business and then reinvested in local communities. Without an effective collection process, the economic viability of these businesses and, by extension, the local and national economies in general are threatened; at the very least, citizens would be forced to pay inflated prices to compensate for uncollected debts.

ACA members are acutely aware of the economic costs of litigation in statutory fee shifting cases, and often champion the purposes served by Rule 68 in that context. As such, ACA's members have a perspective on the operation of mootness principles in the confines of federal statutory actions, some of which involve fee shifting, that ACA believes is both relevant and will help the Court in deciding this matter.

Amicus curiae ACA urges the Court to reverse the Third Circuit's decision and find that the offer of complete relief made to respondent mooted both her claim and her action.

SUMMARY OF THE ARGUMENT

The Third Circuit has unmoored mootness doctrine from Article III, allowing prudential considerations to eclipse the constitutional requirement of a live controversy at all stages of the proceeding. The "pick-off" problems identified by the Third Circuit are in reality constrained by the economic cost of making successive offers of judgment; it's decision promotes filing of disingenuous class allegations in every lawsuit, and promotes waste. Giving effect to an individual offer of judgment before certification is sought does not undercut the viability of class actions, or waste judicial resources. Before class certification is sought, there is no "class" interest at stake.

A party suing over the deprivation of a dollar has a justiciable controversy as long as the Court has

within its power to grant judgment for that dollar. Once the dollar is awarded, recovered or voluntarily repaid, the controversy evaporates. Used judiciously, offers of judgment that afford complete relief in such actions help bring closure to litigation, saving scarce judicial resources and curtail runaway litigation costs.

Accordingly, *amicus* ACA respectfully urges the Court to reverse the judgment of the Third Circuit in this case.

ARGUMENT

I. A justiciable controversy no longer exists after an offer of judgment affording complete relief has been tendered.[2]

This Court has approached the case or controversy requirement of Article III by exploring the fit between the nature of the interests at stake, the remedies sought, and the relief available. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*

[2] ACA confines its discussion of mootness to the class action context, despite some notable differences between collective actions and class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 2:16 (8th ed. 2011) (hereinafter "MCLAUGHLIN ON CLASS ACTIONS") (highlighting distinctions). *But see Espenscheid v. DirectSat USA, LLC*, ___ F.3d ___, 2012 WL 3156326, *4 (7th Cir. 2012) ("Courts treat them [collective actions] as the equivalent of class actions – . . . except that in a collective action unnamed plaintiffs need to opt in to be bound, rather than, as in a class action, opt out not to be bound.").

(TOC), Inc. 528 U.S. 167, 191-92 (2000); *Camreta v. Greene*, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011); U.S. CONST. art. III § 2. In the context of each case, measuring the relief sought against the judicial power to grant meaningful relief, ensures that only live controversies consume the Court's attention. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1938).

It is clear that before a class action is certified, non-named members of a putative class are not parties to the action. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2379, 180 L.Ed.2d 341 (2011). It is also clear that before a class action is certified, and before a motion for class certification is filed, the named plaintiff's claims can expire and render the entire action moot. *Board of School Commissioners v. Jacobs,* 420 U.S. 128, 130 (1975). To the extent the named plaintiff in a putative class action has an interest in spreading the costs of the action onto unnamed class members, that pecuniary interest is sufficient to keep the action alive for purposes of appealing an adverse ruling on class certification after mooting the named plaintiff's individual claims. *Camreta v. Greene*, 131 S.Ct. 2020, 2039, 179 L.Ed.2d 1118 (Kennedy, J., dissenting). "[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs." *Deposit Guaranty Nat. Bank,*

Jackson, Miss. v. Roper, 445 U.S. 326, 332 (1980). However, "[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 (emphasis added).

What remains unanswered, and the issue which has divided the Courts, is whether a putative class representative with no live personal interest at stake (after having received an offer of judgment affording complete individual relief, including her costs), nonetheless satisfies the controversy requirement of Article III solely by virtue of the future prospect of an unexercised procedural interest in representing others where no motion for class certification was ever filed. *See* 13C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.9.1 (3d ed. 2008) (hereinafter "FEDERAL PRACTICE AND PROCEDURE"); 7AA FEDERAL PRACTICE AND PROCEDURE § 1785.1; 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 2:11 (5th ed. 2011) (hereinafter "NEWBERG ON CLASS ACTIONS").

In that prior to moving for certification of a class, there are no class certification costs invested, no other party has a concrete interest in the resolution of the action, and the prospect of obtaining representative status is entirely conjectural, ACA would urge the Court to find that a justiciable controversy no longer exists after an offer of judgment affording complete relief has been tendered. *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011).

A. Economic costs of litigation animate and limit offers of judgment.

Rule 68 and Rule 23 should be harmonized by giving effect to each according to their own terms, even if the result in a given case means Rule 23 will never be employed. The tension that arises between Rule 68 and Rule 23 in putative class actions is one of timing and economics: if the motion for class certification is filed before the offer of judgment, the issue of class certification has been joined and is in controversy, and a subsequent offer of judgment will not render the action moot. *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005). If the offer of judgment precedes a motion for class certification, the two rules can and should be read to allow a Defendant to short circuit the proceedings by making an offer to the putative class representative on an individual basis. If there are truly hundreds or thousands of others with like claims, surely one or more other willing representatives will heed the call to arms and file another action, and the economic weight of making successive offers will prevent abuse.

Consider, for example, a simple TCPA action, which Plaintiff claims a single violation of 47 U.S.C. § 227(b)(1)(B), for which the individual seeks recovery of $500 in federal court,[3] pursuant to 47 U.S.C.

[3] *See Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 753 (2012).

§ 227(b)(3)(B).[4] The TCPA plaintiff has a justiciable controversy as long as the Court has within its power to grant recovery for $500. If the Defendant makes an offer of judgment for $500 at the outset of the action, it should readily appear that the controversy has evaporated because there is nothing remaining in dispute, erstwhile the Plaintiff is entitled to her judgment in the amount of $500. 13B FEDERAL PRACTICE AND PROCEDURE § 3533.2. If the TCPA Plaintiff also prayed for a cheeseburger and milkshake, it should not matter because the Court does not have the power to grant the additional relief requested. The case and the controversy are over.

Similarly, consider an FDCPA action, which provides for statutory fee shifting under 15 U.S.C. § 1692k(a)(3), and is among suits within the "largest categories of privately initiated federal court civil actions." *See* Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, at n. 11 (2009), citing Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 337 n. 20 (2007). Suppose further that litigating the case to final judgment will cost the Plaintiff $15,000 and cost the Defendant $20,000. Emery G. Lee III & Thomas E.

[4] The statute also provides for trebling in the case the court finds the violation willful or knowing. 47 U.S.C. § 227(b)(3). It likewise provides for injunctive relief. 47 U.S.C. § 227(b)(3)(A).

Willging, *Defining The Problem Of Cost In Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010). Most would agree that given the stakes in the case being what they are, spending 20 times the amount at risk to defend the case is not ordinarily justifiable. Further, the longer it takes to resolve the case, whether because of a vigorous prosecution or defense, the greater the potential fee award becomes. John R. Chiles, Alan D. Leeth, R. Frank Springfield, Zachary D. Miller, *Same Song, Different Year – Attorneys' Fees Still A Driving Force Behind Consumer Finance Litigation*, 62 CONSUMER FIN. L.Q. REP. 256, 257 (Fall-Winter 2008). After years of paying a few thousand to resolve handfuls of these suits, a defendant might want to defend a "nuisance suit" and draw a line in the sand; send a message that it isn't a pushover and would be willing to spend this kind of money to prove its innocence or engaged in no wrongdoing. Marie Gryphon, *Assessing The Effects Of A "Loser Pays" Rule On The American Legal System: An Economic Analysis And Proposal For Reform,* 8 RUTGERS J. L. & PUB. POL'Y 567, 577-78 (Spring 2011) (hereinafter "Gryphon, *Economic Analysis*"). At the same time, Plaintiff might seek to maximize attorneys fees before entertaining any settlement discussions, in order to reach the break-even threshold or maximize profits. Gryphon, *Economic Analysis,* 580. Defendant, on the other hand, is incentivized to make an offer of judgment "early in the litigation to provide maximum leverage." Harold S. Lewis, Jr., Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, at n. 25.

Rule 68 contains a self-limiting economic principle that should be allowed to operate according to its terms, and Rule 68 should not be trumped or negated by Rule 23. For example, the FDCPA limits defendants' potential liability to participating class members to "the lesser of $500,000 or 1 per centum of the [defendant's] net worth." 15 U.S.C. § 1692k(a)(2)(B). If the first of several FDCPA Plaintiffs is paid $1,000, his costs and reasonable fees and his claim is rendered moot, successive suits involving the same claim filed against the same defendant would deter the Defendant from making similar offers seriatim, because it would cost the defendants more to continue to "pick off" putative representatives than it would to lose on class and on the merits. Consider for instance, the *Jerman* class. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 271 F.R.D. 572 (N.D. Ohio 2010) (on remand from *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010)) (certifying a class where the maximum potential recovery was shown to be $3.10 for 4,211 class members).[5] If 4,211 people lined up to sue, and

[5] In subsequent proceedings, the district court found that no 'additional damages' were warranted. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, No. 1:06-cv-01397, 2011 WL 1434679, *11 (N.D.Ohio Apr. 14, 2011). Undaunted, the Plaintiff's attorneys sought an award of attorney's fees of $343,411.79. N.D. Ohio Case No. 1:06-cv-01397, doc. no. 62-1, PageID 473, https://ecf.ohnd.uscourts.gov/doc1/14115543811 (last visited 8/27/12). An appeal was filed, and the parties settled with the appeal pending. Under the terms of the settlement, 3,893 Class Members received their pro rata share of 1% of the

(Continued on following page)

the defendant sought to buy them off one by one, the Defendant would have to pay a minimum of $4,211,000 to resolve all the cases (4,211 x $1,000), instead of $13,052.25 (1% of net worth). After paying 10 people $1,000 each, plus costs and fees, the folly of this approach would lead the *defendant* to seek consolidation and class certification of all claims. Even in other higher-stakes contexts "picking off" putative representatives one after another would obviously be cost-prohibitive and otherwise impractical.

Defendants will elect to forgo the opportunity to make an offer of judgment in many cases, because class actions provide an incentive for the defendant to have all claims resolved together. 1 MCLAUGHLIN ON CLASS ACTIONS § 3:3. Creating a rule that flatly prohibits Defendants from evaluating the economic risk associated with one or many lawsuits, and delaying implementation of that choice until after class certification has been sought, promotes waste. The argument that giving effect to an offer of judgment in this context would permit Defendants to manipulate, opt out of class actions or game the system, applies in like fashion to Plaintiffs. Plaintiffs will be rewarded for gaming the system and opting out of the operation

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Defendants' net worth of $13,052.25, which equaled $3.35 per person. N.D. Ohio Case No. 1:06-cv-01397, doc. no. 91, https://ecf.ohnd.uscourts.gov/doc1/14116110684 (last visited 8/27/12). The attorneys received the lion's share of the $160,000.00 settlement fund, although Plaintiff did bear the costs of class administration.

of Rule 68 offers of judgment by filing disingenuous class allegations in every lawsuit, incentivizing Plaintiffs to maximize their time and costs seeking class certification, even on marginal claims. When only an individual claim remains possible because class certification has been sought and lost, for the offer to provide complete relief, Defendants will be required to offer to pay for all costs and reasonable attorneys fees to moot the remaining claims. Requiring the Defendant to pay for a failed class certification effort only rewards "attorneys as the only real parties in interest and virtually the only private individuals who stand to benefit financially from . . . prosecution of the action." Martin H. Redish, *Class Actions And The Democratic Difficulty: Rethinking The Intersection Of Private Litigation And Public Goals,* 2003 U. CHI. LEGAL F. 71, conclusion (2003).

Requiring the action be artificially kept alive to permit class discovery, class certification motion practice, and appeals, after mooting the individual's claim needlessly increases the cost and length of litigation.

If the Defendant elects to make an offer of judgment early in the litigation for the maximum statutory damages, costs, and reasonable fees, it accomplishes four things. First, it forces Plaintiff to make an assessment of the relative strength of the merits. *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985). Second, it puts the post-offer costs at risk. FED. R. CIV. P. 68(d).

Third, it puts post-offer fees in jeopardy[6] if the court finds the time spent post offer was not reasonable or amounts to waste. *Lee v. Thomas & Thomas*, 109 F.3d 302, 306-07 (6th Cir. 1997). Fourth, and most important, it renders the action moot because there is nothing remaining in controversy. *Marschall v. Recovery Solution Specialists, Inc.*, 399 Fed.Appx. 186, 187-88, 2010 WL 3937992, *1 (9th Cir. 2010); *Thomas v. Law Firm of Simpson & Cybak*, 244 Fed.Appx. 741, 744, 2007 WL 2126270, *2 (7th Cir. 2007).

B. The individual interests at stake in putative class actions can be satisfied before class certification.

Should the hypothetical TCPA Plaintiff above, after settling her individual claim, later experience an epiphany by imagining a representative claim that she might have pursued, any desire to promote the interests of others would nevertheless be too remote, hypothetical, or conjectural and come too late into the proceedings, to keep the controversy alive. *Alvarez v. Smith*, 558 U.S. 87, 130 S.Ct. 576, 580-81 (2009) ("a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'"); *Muro v. Target Corp*., 580 F.3d

[6] Because 15 U.S.C. § 1692k(a)(3) does not contain language indicating fees are part of the costs, post-offer fees are not automatically cut-off. *Marek v. Chesny* 473 U.S. 1, 43-45 (Brennan, J., dissenting).

485, 491 (7th Cir. 2009) ("An abstract interest in a matter never has been considered a sufficient basis for the maintenance of – or the continuation of – litigation in the federal courts.").

In the context of putative class actions, there is considerable uncertainty whether the action is rendered moot before a class action is certified, in part, because prior to 2003, it was thought that the filing of a putative class action complaint alone somehow injected the interests of unnamed class members into the action. *See McDowall v. Cogan*, 216 F.R.D. 46, 50 (E.D.N.Y. 2003) (construing pre-amendment Rule 23(e) in support of the proposition that the "adverse party" for the purposes of settlement to be the putative class itself, not merely the named plaintiff). FED. R. CIV. P. 23(e) was amended in 2003 to make clear that judicial approval of any settlement of a putative class action only applies to a "certified class." *See* Fed. R. Civ. P. 23(e), Advisory Committee Notes to 2003 Amendment. 1 NEWBERG ON CLASS ACTIONS § 1:1; 2 MCLAUGHLIN ON CLASS ACTIONS § 6:1. The Amendment was intended to make clear that before certification, there is no "class" to protect. *Committee on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee* (May 20, 2002), *reprinted in* 215 F.R.D. 158, 203, 209-10, 220, 242-43 (2003). "[S]ettlements or voluntary dismissals that occur before class certifications are outside the scope of [Rule 23]." *Buller v. Owner Operator Indep. Driver Risk Retention Group, Inc.*, 461 F.Supp.2d 757, 764 (S.D. Ill.

2006) (quoting 7B FEDERAL PRACTICE AND PROCEDURE § 1797).

If at the outset of the hypothetical TCPA action, the Plaintiff had filed suit seeking not only her $500, but also sought to represent the interests of similarly situated recipients of like calls made by the Defendant, until the Court has certified a class, and before a motion for class certification has been filed, an offer of judgment affording her a judgment in the amount of $500 moots the action. *Damasco v. Clearwire Corp.,* 662 F.3d 891, 896. In such a case, not only are the interests of the TCPA Plaintiff moot, but the entire action is also moot, because there is no other Article III interest at stake prior to certification of a class. *Board of School Commissioners v. Jacobs,* 420 U.S. 128, 130. "Federal Rule 23 determines what is and is not a class action in federal court. . . . [A] 'properly conducted class action,' with binding effect on nonparties, can come about in federal courts in just one way – through the procedure set out in Rule 23." *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2380. Whether or not class certification is attainable, the Plaintiff stands to recover nothing more than the $500 already obtained. If this means the Defendant will face a series of repetitive lawsuits where each new Plaintiff tries her luck at obtaining certification before being given a judgment of $500, then relitigation and successive suits are mere byproducts of the systemic design already in place that cannot be avoided by the creation of de facto class actions by the fiction of nascent or indivisible classes. *Id*. at 2380-81.

C. The Third Circuit's expansion of the inherently transitory exception to mootness to all class and representative actions is misguided.

Many Courts have held the pendency of a motion for class certification made at the time of the offer of judgment to the individual plaintiff avoids mooting the action. Romualdo P. Eclavea, Annotation, *Mootness of class representative's claim pending litigation as precluding maintenance of class action under Rule 23 of Federal Rules of Civil Procedure, as amended in 1966*, 33 A.L.R. FED. 484 (1977 & SUPP.); 1 NEWBERG ON CLASS ACTIONS § 2:9; 1 MCLAUGHLIN ON CLASS ACTIONS § 4:28 (8th ed.).

Notably, the Third Circuit first rejected this approach, and applied the inherently transitory exception to mootness in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). In *Weiss*, the Third Circuit observed that FDCPA class actions are susceptible to being mooted by offers of judgment, and that the putative class representative is acutely susceptible to being picked off by an offer of judgment. *Weiss v. Regal Collections*, 385 F.3d 337, 345. The Third Circuit extended the application of this exception to FLSA representative actions in *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011). ACA offers the following analysis of the Third Circuit decision in *Weiss* to show that *Symczyk v. Genesis HealthCare Corp.* was wrongly decided. *See* generally Daniel A. Zariski, et al., *Mootness In The Class Action Context: Court-Created Exceptions To*

The "Case Or Controversy" Requirement Of Article III, 26 REV. LITIG. 77, 109-10 (Winter 2007).

In *Weiss v. Regal Collections*, the Third Circuit evaluated a putative FDCPA class action, finding that a pre-certification offer of judgment completely satisfied the individual's FDCPA claims. *Weiss v. Regal Collections*, 385 F.3d 337, 340-42, 344. The Court went on to hold, however, the action was not moot, because in the Court's view, "picking off" a named plaintiff in the context of putative FDCPA class litigation undercut the "viability of the class action procedure. . . ." *Weiss v. Regal Collections*, 385 F.3d 337, 344-45. Recognizing that this Court had never addressed the issue directly, the Court drew on the inherently transitory exception to mootness and the relation back doctrine to find the filing of a class action complaint makes the Plaintiff a part of an indivisible class before class certification has been sought. *Weiss v. Regal Collections*, 385 F.3d at 342-47. Further, recognizing that the relation back doctrine had only been employed when a motion for class certification was pending, the Court nonetheless found the rationale for looking to the pendency of a motion for class certification not "well-founded," and the "class action process should be able to 'play out' according to the directives of Rule 23. . . ." *Weiss,* 385 F.3d at 347-48. In that the Plaintiff had not filed a motion for class certification at the time the case was dismissed, and likewise finding no "undue delay," the Court went further to direct the district court to allow time for discovery and to allow the Plaintiff to file a

motion for class certification. *Id*. at 348. This logic has been followed by other circuits, and rejected most recently by the Seventh Circuit in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (rejecting *Weiss*); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1242 (10th Cir. 2011) (following *Weiss*); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (same).

The Third Circuit's decision in *Weiss* cannot be reconciled with this Court's expositions on the inherently transitory exception to mootness; the decision promotes Rule 23 at the expense of Rule 68, needlessly increasing the cost and length of litigation, and the reasons advanced do not support a distinct "class action exception" to mootness doctrine.

In *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991), this Court, addressing a Section 1983 claim based on failing to provide "prompt" judicial determinations of probable cause, observed that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. . . . In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the class claim for judicial resolution." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52. The qualifying description of the application of the inherently transitory exception doctrine to "some claims" appears to have been lost on the Third Circuit, because it has treated "all claims" filed as class or representative actions as

fitting the bill. In order for a claim to be "inherently transitory," the claim must satisfy two requirements: "(1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint." *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (construing *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975)). *See also, e.g., Sze v. I.N.S.*, 153 F.3d 1005, 1010 (9th Cir. 1998); *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (an inherently transitory claim focuses on the "claims of the class as a whole" and is one where "there is a constantly changing putative class"); *Cruz v. Farquharson*, 252 F.3d 530, 534-35 (1st Cir. 2001); *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 983 (3d Cir. 1992); *Rocky v. King*, 900 F.2d 864, 870-71 (5th Cir. 1990).

A putative class action seeking recovery of statutory damages under the FDCPA does not fit this paradigm because each individual possesses a claim that expires when the statute of limitations runs, and the putative FDCPA class is defined retrospectively, not prospectively.[7]

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[7] Nor is an offer of judgment akin to voluntary cessation, which likewise provides an exception to mootness. 13C FEDERAL PRACTICE AND PROCEDURE § 3533.5. Under the voluntary cessation doctrine, a dispute over the legality of the challenged practices continues to present a live controversy despite voluntary

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D. There is no "nascent" or "indivisible" interest at stake before a motion for class certification has been filed.

Every individual action has the potential to become a class action, and every putative class action has the potential to become an individual action, because complaints can be amended throughout an action. FED. R. CIV. P. 15. Putative class actions are treated as individual actions before certification in almost every other context and for most other purposes. 7B FEDERAL PRACTICE AND PROCEDURE §§ 1795, 1798.[8] There is no basis for finding that before ever seeking certification, the Plaintiff is part of an "indivisible class" or has a distinct "nascent interest" in class

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cessation of a challenged practice, unless it is shown there is no realistic expectation the practice will recur. *Los Angeles County v. Davis*, 440 U.S. 625, 631-32 (1979). While it may be true of actions seeking prospective relief to compel a defendant to comply with legal requirements, when no declaratory or injunctive relief is in issue, and only claims seeking monetary damages, future compliance with legal requirements, and the voluntary cessation doctrine are irrelevant. *Goldenberg v. Indel, Inc.*, No. 09-5202, 2012 WL 2466567, *4 (D.N.J. June 27, 2012). *See also Alvarez v. Smith*, 588 U.S. 87, 130 S.Ct. 576, 581 (mootness exception for "capable of repetition yet evading review" inapplicable to actions for damages).

[8] In *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551 (1974), this Court held the statute of limitations was tolled as to absent members of the claimed class until a decision was had on class certification, using language suggesting absent members were 'parties.' In *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2380, n. 10, the Court rejected the notion that *American Pipe* meant absent members of a claimed class that was not certified were 'parties' for purposes of preclusion.

relief. *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 196; *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249. The *Lucero* Court found that "a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the case moot under Article III." *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249. Yet, this "nascent interest" concept finds no support in this Court's Article III precedent, nor in Rule 23. If every named plaintiff in a putative class action were treated as part of an non-participating, uninvolved and absent class, whose legal and economic interests were at stake from the inception of the action, without ever filing for class certification, then every individual action is also analytically indistinguishable from a certified class.

The lens through which the existence of a "controversy" is assessed, is that of the parties to the action. Absent intervention, class certification or substitution, the only parties to the action are the Plaintiff and the Defendant. The Plaintiff's interest in representing a class before certification is sought, is remote, hypothetical and conjectural, much as it is before the filing of the action. "Where on the face of the record it appears that the only concrete interest in the controversy has terminated, reasonable caution is needed to be sure that mooted litigation is not pressed forward, and unnecessary judicial pronouncements on even constitutional issues obtained,

solely in order to obtain reimbursement of sunk costs." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

Prior to filing the motion for class certification, the prospect of having the interests of others adjudicated in the proceedings is entirely remote, hypothetical, and conjectural. Bystanders who do not participate in the action have no flesh in the game, have nothing to gain or lose, and are not bound by the outcome. Until the point in time in the proceedings when the interests of others are joined to the proceedings, or there has been a procedural ruling on class certification warranting appellate review, putative class complaints do not warrant any distinguishable treatment, and no Rule 23 exception should be read into Rule 68. It is only when the personal stake in securing appellate review of the procedural ruling "exist[s] with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired," that "the right to have a class certified" is a sufficient personal stake to keep the action alive. *U.S. Parole Commission v. Geraghty,* 445 U.S. 388, 403-04 (1980).

Thus, if there was never any motion filed to intervene, to substitute, to certify a class, prior to mooting of the individual's claims, the case and controversy is over.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's brief, the decision of the Third Circuit should be reversed.

Respectfully submitted,

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