Case No. 13-16816

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD CHEN, et al.,
Plaintiffs-Appellees,

v.

ALLSTATE INSURANCE COMPANY,
Defendant-Appellant.

Appeal from United States District Court for the Northern District of California
(Case No. 4:13-cv-00685-PJH)

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT ALLSTATE INSURANCE CO.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae the Chamber of Commerce of the United States of America and the Consumer Data Industry Association respectfully submit this supplemental brief addressing the Supreme Court's recent decision in *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016). A full statement of the interest of *amici* is set forth in the principal brief filed by the same *amici* in this case. *See* ECF No. 13 (Dec. 23, 2013). For the same reasons expressed in that brief, *Amici* have a direct interest in the proper interpretation and application of *Campbell-Ewald*.

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Campbell-Ewald*, the Supreme Court held that an *unaccepted offer* of complete relief was insufficient to moot an individual plaintiff's claim, a question that was originally presented in this case. The Court, however, expressly left open the possibility that the *tender of complete relief*—by depositing the funds in escrow or by other means—is sufficient to moot the individual plaintiff's claim, and thus the class action as a whole. After the Supreme Court issued its decision, Allstate Insurance Co. ("Allstate") tendered the full amount of Plaintiff Florencio Pacleb's

individual monetary claim by depositing the funds in an escrow account, to be disbursed upon further order and judgment by the district court. That act moots Plaintiff's individual claims under Article III of the U.S. Constitution and, as explained in Allstate and *Amici*'s prior briefing to this Court, the mooting of the individual Plaintiff's claim necessarily moots any putative class claims as well. The Court should accordingly remand to the district court for disbursement of the tendered funds, the entry of judgment in favor of Plaintiff, and the dismissal of this action.

ARGUMENT

1. In *Campbell-Ewald*, the Supreme Court held that an unaccepted offer to satisfy a plaintiff's individual claim is insufficient to deprive the plaintiff of the requisite "personal stake" in the lawsuit and thus rejected the argument that the defendant's *offer* mooted the action. 136 S. Ct. at 669, 672. In so holding, however, the Court expressly reserved the question whether the answer would be different if the defendant had provided "actual payment" for the amounts at issue, explaining that Campbell-Ewald had not provided "actual payment" when it sent its settlement offer. *Id.* at 671-72. The Court stated: "We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* at 672.

Every member of the Court recognized that payment could be different—and five members indicated that payment likely *would* moot the claim. Justice Breyer, who joined the majority opinion, suggested at oral argument that, once the defendant actually pays the money or "deposits the money in the court," the judge should say, "The case is over. Goodbye." Transcript of Oral Argument at 48-49, *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016) (No. 14-857), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-857_mlho.pdf; *see id.* at 47-51 (discussing amicus brief filed by the AFL-CIO).

Justice Thomas, who concurred in the judgment, reasoned that the Court should look to the "common-law history of tenders" to resolve the question whether an unaccepted *offer* moots a claim. *Campbell-Ewald*, 136 S. Ct. at 674 (Thomas, J., concurring in the judgment). Under the common law, "[t]he tender had to offer and *actually deliver* complete relief," *i.e.*, by "brin[ging] the money into Court." *Id.* at 674-75 (emphasis added) (citation omitted). Accordingly, he recognized that a "fully tendered offer" was different. *Id.* at 677 (discussing *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893)).

The Chief Justice, joined by Justices Scalia and Alito, dissented. In their view, Campbell-Ewald's offer of complete relief *did* moot this action because there was no reason to believe that Campbell-Ewald would not make "good on [its] promise" to the plaintiff. *Id.* at 680 (Roberts, C.J., dissenting). Nevertheless, the

Chief Justice added that, "to the extent there is a question whether Campbell is willing and able to pay, there is an easy answer: have the firm deposit a certified check with the trial court." *Id.* Thus, the Chief Justice observed at the close of his dissent: "The good news is that this case is limited to its facts. … For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court." *Id.* at 683.

Justice Alito, who joined the Chief Justice's dissent, also filed a separate dissent. In his view, the "linchpin for finding mootness in this case" was that there was "no real dispute that Campbell would 'make good on [its] promise' to pay Gomez the money it offered him if the case were dismissed." *Id.* at 683 (Alito, J., dissenting) (alteration in original) (quoting Chief Justice's dissent). He added:

> While I disagree with [the majority's] result on these facts, I am heartened that the Court appears to endorse the proposition that a plaintiff's claim *is* moot once he has 'received full redress' from the defendant for the injuries he has asserted. Today's decision thus does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds.

Id. at 685 (citations omitted).

2. Following the Court's decision in *Campbell-Ewald*, Allstate tendered to Plaintiff here the amount of $20,000.00 in full settlement of his individual claims. The tendered funds were deposited in an escrow account, pending entry of a final judgment by the district court for Plaintiff directing the escrow agent to pay

Plaintiff and requiring Allstate to stop sending non-emergency telephone calls and short message service messages to Plaintiff in the future. *See* Allstate Suppl. Br. (ECF No.81) at 7. That tender fully satisfies Plaintiff's claims. This case thus now has all the hallmarks of a moot case—one in which "only the plaintiff's obstinacy or madness prevents him from accepting total victory." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting).

3. Plaintiff offers four reasons why, notwithstanding Allstate's tender of complete relief, this case may proceed. None is persuasive.

First, Plaintiff claims that the tender does not provide him full relief because "Allstate has consistently refused to admit liability." Pl. Suppl. Br. (ECF No. 83) at 4-5. But as the Chief Justice explained in his *Campbell-Ewald* dissent, the Supreme Court's precedents "plainly establish that an admission of liability is not required for a case to be moot under Article III." 136 S. Ct. at 682 n.3 (Roberts, C.J., dissenting). For example, in *Already LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013), the Supreme Court found that the action was moot after the defendant had, in effect, given the defendant all the relief he could secure through the action (and voluntarily ceased the complained of conduct)—even though the defendant never formally admitted that it had acted unlawfully. In addition, any admission of liability would be rendered unnecessary for purposes of claim preclusion as to these parties given that Allstate has already agreed to entry of judgment for

Plaintiff. Accordingly, Plaintiff lacks any concrete, real world interest, in the legal question of liability.

Second, Plaintiff argues that he has an interest "in receiving the full scope of injunctive relief sought in the Complaint rather than the watered-down injunctive relief offered by Allstate." Pl. Suppl. Br. 5. But the relief that Allstate has offered is more than sufficient to redress any harm to Plaintiff. Moreover, under the "voluntary cessation" doctrine, a claim for injunctive relief is moot where the alleged violation is fully redressed and it is not reasonable to expect it will recur. *See, e.g.*, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Here, Plaintiff's claim for injunctive relief is moot because Allstate has fully redressed the alleged violation that Plaintiff alleged and there is no showing or credible argument that any violation could reasonably be expected to recur. *See Already*, 133 S. Ct. at 724.

Third, Plaintiff takes issue with the $10,000 figure for attorneys' fees. Pl. Suppl. Br. 7 n.2. As an initial matter, a plaintiff is not entitled to any attorney's fees because the TCPA does not authorize them. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). In any event, "the question of attorney's fees is ancillary to the underlying action and survives [the mooting of a claim] independently under the Court's equitable jurisdiction." *United States v. Ford*, 650 F.2d 1141, 1143-44 (9th Cir. 1981); *see also Lewis v. Continental Bank Corp.*, 494

U.S. 472, 480 (1990) (an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"). Accordingly, Plaintiff's attempt to dispute Allstate's offer of attorney's fees certainly cannot save this case from mootness.

Fourth, Plaintiff points to the Court's statement in *Campbell-Ewald* that "a would-be class representative with a *live claim of her own* must be accorded a fair opportunity to show that certification is warranted." Pl. Suppl. Br. 8 (emphasis added) (quoting *Campbell-Ewald*, 136 S. Ct. at 672). But that only begs the question discussed above. And, as explained, Plaintiff here no longer has a "*live* claim." Accordingly, he no longer has any justiciable interest in this case.[1]

Justice Breyer summed it up at oral argument in *Campbell-Ewald*: "The judge at th[is] point should say, the defendant has all he wants. The case is over. Goodbye. And, of course, if that person now has all he wants, he can't certify this is a class because he isn't harmed." *Campbell-Ewald* Tr. 59; *see id.* at 47-51.[2]

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[1] For this reason, the district court's decision in *Brady v. Basic Research, L.L.C.*, No. 2:13-cv-07169 (SJF)(ARL), 2016 WL 462916 (E.D.N.Y. Feb. 3, 2016), is erroneous. But in any event, that case involved issues under Federal Rule of Civil Procedure 67 that are not involved here. In addition, the defendant sought to tender funds in accordance with a Rule 68 offer that had already expired. Here, by contrast, the defendant has tendered a separate settlement offer—with complete relief.

[2] The Court's decision in *Campbell-Ewald* suggests that entry of judgment would be the appropriate manner of resolving a case after a defendant's tender of complete relief. *See* 136 S. Ct. at 672. Even if the tender of full relief does not

CONCLUSION

For the foregoing reasons and those stated in *Amici*'s prior brief in this case, the judgment of the district court should be reversed and the case remanded for entry of judgment in accordance with Allstate's tender of complete relief.

Dated: February 19, 2016

Respectfully submitted,

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require dismissal for mootness, a court may dispose of the case by entering judgment for plaintiff based on the terms of the relief provided. *See, e.g.*, *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009); *see also U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (mootness does not render a court powerless to take non-merits steps to dispose of the case "consonant to justice"). Either way, the case is over.

CERTIFICATION OF COMPLIANCE WITH FRAP 32(A)(7)(B)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i) and Federal Rule of Appellate Procedure 29(d), I certify that Brief for Amici Curiae complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 1,905 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), which is less than half the maximum length allowed for the party briefs in its January 22, 2016 Order requesting supplemental briefing.

Dated: February 19, 2016

s/ Gregory G. Garre
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CERTIFICATE OF SERVICE

I, Gregory G. Garre, hereby certify that I electronically filed the foregoing Supplemental Brief of Amici Curiae the Chamber of Commerce of the United States of America and the Consumer Data Industry Association in Support of Defendant-Appellant Allstate Insurance Company with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 19, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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