No._____

IN THE

Supreme Court of the United States

CERDANT, INC. AND THE LAPTOP GUY, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

DHL EXPRESS (USA), INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 68 provides a mechanism to promote judicial efficiency by imposing costs upon a party that rejects an offer pursuant thereto and does not recover at trial an amount in excess of the offer. As applied by the Sixth Circuit in this case, Rule 68 can be used by class action defendants to prevent appellate review of denials of class certifications, which are always reviewable after trial, win or lose. Under this perverse application, Rule 68 is fatal to putative class actions that have initially been denied class certification because the class representative has no real choice but to accept a Rule 68 offer of judgment that exceeds the often nominal value of the individual claim. Requiring a putative class representative to reject a voluntary judgment from a Defendant for an amount greater than could be achieved at trial simply turms Rule 68 into a tool of judicial inefficiency. This misuse of Rule 68 and undermining of the class action vehicle cannot be countenanced.

The Ninth Circuit has recognized this potential for abuse and has permitted appeal of the denial of class certification after the acceptance of a Federal Rule of Civil Procedure 68 offer of judgment by the class representative unless the class claims are expressly released.

The Sixth Circuit dismissed Petitioners' appeal of the denial of class certification because they "voluntarily" terminated all of their claims by

accepting the Rule 68 offer of judgment (that made no mention of class claims) instead of proceeding to trial where they would have no chance to recover more than the amount offered and thus would bear the expenses of trial and Respondent's costs.

The question presented is:

Is a class representative in a putative class action faced with a Rule 68 offer of judgment in excess of its potential recovery that makes no reference to class claims required to reject said offer, proceed to trial, and bear all of the costs of continuing litigation in order to preserve its right to appellate review of a denial of class certification?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Sixth Circuit, whose judgment is sought to be reviewed, are:

- Cerdant, Inc. and The Laptop Guy, Inc., individually and on behalf of all others similarly situated, plaintiffs, appellants below, and petitioners here.

- DHL Express (USA), Inc., defendant, appellee below, and respondent here.

Petitioner Cerdant, Inc. does not have a parent corporation. No publicly held company owns 10% or more of Cerdant, Inc.'s stock.

Petitioner The Laptop Guy, Inc. does not have a parent corporation. No publicly held company owns 10% or more of The Laptop Guy, Inc.'s stock.

Respondent DHL Express (USA), Inc. is a wholly-owned subsidiary of DPWN Holdings (USA), Inc. DPWN Holdings (USA), Inc. is held, through a series of corporate entities, by Deutsch Post, AG, a German publicly-traded company. Deutsche Post, AG, does not have a financial interest in the outcome of this litigation.

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APPENDIX CONTENTS

TABLE OF CITED AUTHORITIES

OPINIONS BELOW

The Sixth Circuit's Order filed September 19, 2012, the subject of this petition, was not published in the official reports. (Appendix ["App."] 1-3.) The district court's judgment entered June 13, 2012 was not published in the official reports. (App. 4-5.)

JURISDICTION

The Sixth Circuit filed its opinion on September 19, 2012. (App.1-3.) This Court has jurisdiction under 28 U.S.C. §1254(1) to review on writ of certiorari the Sixth Circuit's September 19, 2012 decision.

RULE AT ISSUE

Respondent's offer of judgment was made pursuant to Federal Rule of Civil Procedure 68 which states as follows:

> (a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus

proof of service. The clerk must then enter judgment.

(b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

STATEMENT OF THE CASE

Petitioners brought this simple class action case with a well-defined, ascertainable class that satisfies the requirements of Rule 23.

Unfortunately, confusion over an irrelevant federal transportation board and its attendant statutes, regulations, and procedures, which are the subject of a sharp division in federal district courts regarding scope and applicability, combined with Respondent's admittedly poor recordkeeping, resulted in the denial of the certification of this class on August 25, 2010.

Petitioners, on behalf of themselves and the putative class, are seeking recovery of tens of millions of dollars from Respondent for millions of deceptive acts and practices. Respondent implemented a practice of charging "shipping fees" and "fuel surcharges" on "shipments" arranged that never occurred contrary to the express terms of the agreements between Respondent and its customers as set forth on its user interfaces.

After prevailing on the issue of class certification, Respondent seized upon the opportunity to preclude appellate review of the denial of class certification through manipulation and misuse of Rule 68. On June 8, 2012, Respondent made Petitioners an offer of judgment pursuant to Rule 68 (the "Offer"). The Offer was in an amount greater than the potential recovery of each Petitioner at trial, whose individual damages, like those of the ten-million-plus other members of the putative class, were only in the tens of dollars. Petitioners, therefore, had no option but to accept the Offer. Had they rejected the Offer, they would have borne their expenses of trial and exposed themselves to liability for all costs because under no conceivable circumstances could Petitioners have recovered more

at trial than the amount of the Offer.

It is important to keep in mind that Respondent, not Petitioners, controlled the terms of the Offer. Respondent could have included language releasing the class claims and the appeal of the denial of class certification in the Offer, but it did not. As such, the class claims, and Petitioners' interest therein, remain live and appealable.

The Offer made no mention of any of the class claims or the issue of class certification. Its full text is set forth below:

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, [Respondent] offers to allow a monetary judgment to be taken against it by [each Petitioner] in the lump sum amount of $8,750.00 [each] for all damages, attorney's fees, and costs accrued at the time of this offer.
>
> Failure to accept this offer within fourteen (14) days after its service will subject [each Petitioner] to an assessment of [Respondent]'s costs for the defense of this action from the date of this offer if the final judgment obtained by [Petitioner] is not more favorable than this offer. This offer does not constitute an admission of liability by [Respondent] and is made solely for the purposes set forth in Civil

Rule 68.

On June 12, 2012, each Petitioner, individually, accepted the Offer as written without any mention of the class and specifically noted that each was accepting the Offer only in its capacity as a "named Plaintiff." Judgment was entered on June 13, 2012 (the "Judgment"). Not only did the Judgment make no mention of the class claims or the issue of class certification, but it also was limited to each Petitioner in its individual capacity as a "named Plaintiff." (App. 4.)

After the Judgment, Petitioners appealed the denial of class certification to the Sixth Circuit Court of Appeals (the "Appeal"). Respondents filed a Motion to Dismiss the Appeal on August 8, 2012, which Petitioners opposed. On September 19, 2012, the Sixth Circuit dismissed the Appeal (the "Dismissal") on the basis that Petitioners' acceptance of the Offer was voluntary and thus not subject to the application of this Court's decisions in *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980) and *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980).

Given the implications of rejecting an offer of judgment when applied to the class action context where, as here, Petitioners' claims were in the tens of dollars and the Offer exceeded them exponentially, the acceptance of the Offer was far from voluntary.

This Court should grant review to decide whether Rule 68 can be used to preclude appellate review of denial of class certification.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the issue of whether Rule 68 can be used to preclude appellate review of denials of class certification impacts the proper functioning of the class action mechanism, is the subject of a circuit split that has not been resolved by this Court, and because the Sixth Circuit wrongly denied appellate review in this instance.

I. PERMITTING ACCEPTANCE OF RULE 68 OFFERS OF JUDGMENT THAT MAKE NO REFERENCE TO CLASS CLAIMS TO PRECLUDE APPELLATE REVIEW OF DENIALS OF CLASS CERTIFICATION UNDERMINES THE CLASS ACTION AS A VEHICLE FOR JUSTICE.

Prohibiting appeals of denials of class certifications by named putative class action plaintiffs who accept Rule 68 offers of judgment undermines the policy goals underlying class actions. Indeed, every defendant of putative class claims could preclude appellate review of the denial of class certification by simply, and relatively inexpensively in most cases, making a Rule 68 offer that fully satisfies the claims of the class representative.

Of course, when a class representative proceeds to trial, the denial of class certification is appealable whether the plaintiff wins or loses on the

merits. *Roper*; *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276-277 (10th Cir. 1977). Why, then, should a judgment resulting in even greater recovery for a putative class plaintiff than could have been attained at trial preclude the right to appeal the denial of class certification? A litigant who obtains a judgment while avoiding the inefficiencies of trial should not be put in a worse position vis-à-vis appellate review than one who prevails at trial. To permit class action defendants to avoid a trial and any possibility of appeal of a denial of class certification by merely making a Rule 68 offer endangers the class action vehicle and the rights of individual putative class representatives.

A Rule 68 offer that makes no reference to putative class claims does not equate to a release of the right to appeal the class certification ruling. Instead, consistent with this Court's precedent, a putative class plaintiff that accepts a Rule 68 offer that does not reference the class claims retains a stake in the action as a proposed class representative. Therefore, a viable "case or controversy" remains and the court of appeals retains jurisdiction under Article III of the Constitution.

II. CIRCUITS ARE SPLIT ON THE APPLICATION OF *ROPER* AND *GERAGHTY* AND WHETHER THE ACCEPTANCE OF A RULE 68 OFFER THAT DOES NOT MENTION CLASS CLAIMS PRECLUDES APPELLATE

REVIEW OF A DENIAL OF CLASS CERTIFICATION

While certain courts of appeals have upheld a putative class representative's right to appeal the denial of class certification after the acceptance of a Rule 68 offer of judgment that does not reference class claims, others have refused to permit such review.

In *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1022 (C.A.9,2012), the 9th Circuit explicitly held that:

> While the language of the offer of judgment does not include an express reservation of [the putative class representative's] right to pursue an appeal on behalf of the class, it is not so broad that it can be read to release her class claims. In cases where courts have found that a plaintiff has bargained away the right to appeal the class certification ruling, the language of the settlement agreement has made explicit reference to the class claims, thus clearly supporting that conclusion.

In addition to *Evon*, *supra*, the Ninth Circuit in *Narouz v. Charter Communications, LLC*, 591 F.3d 1261, 1264 (9th Cir. 2010) held "that when a class representative voluntarily settles his or her individual claims, but specifically retains a personal

stake as identified by *Geraghty* and *Roper*, he or she retains jurisdiction to appeal the denial of class certification." *Narouz* relied upon decisions from the Fourth and Eleventh Circuits in support of its holding. *See*, *Toms v. Allied Bond & Collection Agency, Inc.*, 179 F.3d 103, 106 (4th Cir. 1999) (holding that only a settlement agreement that specifically releases both individual and class-based interests extinguishes a party's interest in the litigation); *Love v. Turlington*, 733 F.2d 1562, 1565 (11th Cir. 1984) (permitting a proposed class representative who settles her individual claims to appeal the denial of class certification even without an explicit reservation of the right to appeal that issue). Focusing in part on the potential for compensation for serving as the class representative, the Ninth Circuit deemed a plaintiff's interests in recovery of attorneys' fees, costs, or other compensation in connection with prosecution of the class claims to be a sufficient stake. *Id.*

Harkening back to the central analysis in *Roper* and *Geraghty*, whether a dismissal or settlement is "voluntary" is not always a simple matter. Rather, one must consider the choices that precipitated the decision whether to accept or reject a Rule 68 Offer. Underscoring the rationale behind the holding, the Ninth Circuit stated in *Narouz*:

> Moreover, viewed realistically, the decision of Narouz to settle this case is voluntary only in the sense that it is a knowing choice between two

> alternatives. One was pursuing his individual claim to final judgment at the risk of possibly recovering nothing, combined with the expenditure of more resources than the case may have been worth. The other one, the one he chose, was settling the case in a manner that he had reason to believe would serve the interests of the class as well as his own.

Id. at 591 F.3d 1265.

The Fifth and Eleventh Circuits, in contrast, have held that a class representative must specifically carve out the right to appeal the denial of class certification in order to preserve the right to appeal after the acceptance of a Rule 68 offer. *See Dugas v. Trans Union Corp.*, 99 F.3d 724, 728–29 (5th Cir. 1996) (failure to reserve the right to appeal certification decisions divested circuit court of jurisdiction); *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989). The Ninth Circuit distinguished *Dugas* because the settlement agreement in *Dugas* expressly referenced the class certification denial. *Evon* at *3.

In the Dismissal entered in this case, the Sixth Circuit aggravated the circuit split. Instead of addressing the fact that class claims were mentioned neither in the Offer nor the Judgment, the Sixth Circuit ignored the issue. The Dismissal was based on the illusory notion that a class representative

faced with a Rule 68 offer accepts it voluntarily even though its other option is not an option at all.

This Court should grant review to resolve the circuit split on the question presented for review.

III. WHILE THIS COURT HAS NEVER DECIDED WHETHER A PUTATIVE CLASS REPRESENTATIVE WHO HAS ACCEPTED A RULE 68 OFFER CAN APPEAL A DENIAL OF CLASS CERTIFICATION, ITS PRIOR DECISIONS SUPPORT REVIEW IN THIS CASE.

In 1980, this Court decided two cases that support review of this petition and resolution of the question presented in favor of Petitioners. In *Roper* and *Geraghty*, this Court set forth the broad proposition that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Geraghty* at 445 U.S. 404, 100 S.Ct. 1212.

In *Roper*, consumers brought a class claim alleging that a credit card issuer had consistently charged usurious interest. Following the District Court's denial of class certification, the defendant offered judgment in favor of the two named plaintiffs for the "maximum amount that each could have recovered." *Id.* The Fifth Circuit Court of Appeals reversed the District Court's denial of class certification under Rule 23, rejecting the Bank's

argument that the offer of judgment rendered the issues moot.

This Court granted certiorari limited to the issue of "mootness" and identified four distinct "interests to be considered when questions touching on justiciability are presented in the class-action context." *Id.* at 445 U.S. 332, 100 S.Ct. 1170:

> [1] the interest of the named plaintiffs: their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims.... [2] the responsibility of named plaintiffs to represent the collective interests of the putative class.... [3] the rights of putative class members as potential intervenors, and.... [4] the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it.

Id. This Court next identified circumstances in which a seemingly "final" judgment would not foreclose an appeal, beginning with the axiom that "a decision that is 'final' for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run." *Id.* The Court expressly

recognized that "a confession of judgment by defendants on less than all the issues [does not] moot an entire case; other issues in the case may be appealable." *Id.*

In *Geraghty*, an inmate commenced a class action suit challenging certain parole guidelines as unconstitutional. He sought to represent a putative class of federal prisoners eligible for parole. In the District Court, class certification was denied. While Geraghty's appeal was pending, he was released from prison. The Parole Commission's motion to dismiss the appeal was denied upon a finding that the litigation was not mooted by the expiration of Geraghty's individual claims. This Court agreed:

> ....an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated....

Id. at 445 U.S. 404, 100 S.Ct. 1212-1213.

While *Geraghty* and *Roper*, as applied by the Ninth Circuit, preserve the right of a class representative to appeal the issue of class certification after acceptance of a Rule 68 offer, this Court has not directly addressed the issue. Indeed, in *Geraghty*, this Court expressly left open the similar issue of "whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification." 445 U.S. at 404 n. 10. The time has come to make clear the right of a class representative to appeal a denial of class certification after a judgment has been entered following a Rule 68 offer.

IV. RESPONDENT'S MANIPULATION OF RULE 68 WRONGFULLY DEPRIVED PETITIONERS OF THEIR RIGHT TO APPELLATE REVIEW OF THE DENIAL OF CLASS CERTIFICATION.

Despite the entry of the Judgment, Petitioners retained a stake in the action as proposed class representatives including, at a minimum, their potential compensation for serving in such roles, and, as such, the issue of class certification remains a live case or controversy under *Roper* and *Geraghty*. Petitioners' right to appellate review after acceptance of the Offer and entry of Judgment should be no different than the right to review following an identical (or less favorable) judgment obtained at trial.

Despite the Sixth Circuit's insistence, the acceptance of the Rule 68 offer was not voluntary in any meaningful way. As in *Narouz*, had each of the Petitioners pursued their individual claims to final judgment they ran "the risk of possibly recovering nothing, combined with the expenditure of more resources than the case may have been worth." *Id.* A putative class representative's "choice" when faced with a Rule 68 offer is not a choice at all. Instead, the acceptance of the offer, while undesirable, is the only acceptable choice given the risks inherent in a rejection.

Finally, neither the Offer nor the Judgment makes any reference to the class claims or the denial of class certification. As such, these claims were not released and the right to review of the denial of class certification was preserved.

Petitioners were the victims of a scheme orchestrated and enacted by Respondent to kill this class action. Rule 68 cannot be used as a weapon to prevent review of denials of class certification. This Court should grant review, resolve this issue in a manner that preserves appellate review of denials of class certification, and reverse the Dismissal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 12-3894

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERDANT, INC.; THE LAPTOP GUY, INC., individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

DHL EXPRESS (USA), INC.,

Defendant-Appellee.

ORDER

Filed September 19, 2012

Before: SILER, MOORE, and McKEAGUE, Circuit Judges.

The plaintiffs appeal the order denying their motion for class certification after the district court entered a judgment in their favor upon their acceptance of a Federal Rule of Civil Procedure 68 offer of judgment. Defendant DHL Express (USA),

Inc. ("DHL") moves to dismiss the appeal as moot. The plaintiffs oppose the motion to dismiss.

The district court denied class certification in August 2010, and we denied a petition for an interlocutory appeal. *In re Cerdant, Inc.*, No. 10-0314 (6th Cir. Jan. 3, 2011) (unpublished order). Prior to the trial on the plaintiffs' individual claims, DHL served upon them a Rule 68 offer of judgment. The offer was to pay to each plaintiff all damages, attorney fees, and costs accrued at that time, and the plaintiffs accepted the offer without reservation. As a general rule, an offer of judgment that fully compensates a plaintiff for his claim moots the action. *See O'Brien v. Ed Donnelly Enters. Inc.*, 575 F.3d 567, 574 (6th Cir. 2009).

In some instances, the denial of class certification is appealable by a named plaintiff in a putative class action after the plaintiff's individual claims have become moot. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). We have limited the application of Roper and Geraghty to instances where the claims of the named plaintiff were involuntarily terminated. *Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 705 (6th Cir. 2009). In addition, a plaintiff must retain a personal stake in the certification of the class to pursue an appeal of the denial of class certification after its individual claims have been fullysatisfied. *Id.*

The plaintiffs in the instant case voluntarily accepted DHL's offer of judgment. The ensuing judgment compensates them for all damages, attorney fees, and costs. As a result, they no longer retain any interest in shifting the costs of the litigation to the putative class members. The plaintiffs have not demonstrated a personal stake in the litigation, and there is no live case or controversy to support the court's jurisdiction.

DHL's motion to dismiss the appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CERDANT, INC., Plaintiffs, v. DHL EXPRESS (USA), INC., Defendant.	Case No. 2:08-cv-00186 Judge Marbley Magistrate Judge Able

JUDGMENT

IT APPEARING THAT the defendant DHL Express (USA) Inc., has served a Rule 68 Offer of Judgment upon named plaintiffs Cerdant, Inc. and The Laptop Guy, Inc. and named plaintiffs Cerdant, Inc. and The Laptop Guy have accepted such offer;

Wherefore; it is ORDERED, ADJUDGED AND DECREED that named plaintiffs Cerdant, Inc. and The Laptop Guy have and recover from said defendant DHL Express (USA) Inc. the lump sum amount of $8,750.00.

Judgment entered June 13, 2012.

James Bonini, Clerk
United States District Court
Southern District of Ohio
By: /s/ Paula Economus-Stout
Deputy Clerk