No. 12-___

IN THE

Supreme Court of the United States

CONVERGENT OUTSOURCING, INC.,
formerly known as ER Solutions, Inc.,
Petitioner,

v.

ANTHONY W. ZINNI,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an individual action raising claims under the Fair Debt Collection Practices Act, the defendant offered to settle those claims for all the relief that the plaintiff had sought, that is, $1 more than the statutory maximum amount of damages plus costs and attorney fees. When the plaintiff failed to respond to the offer the District Court dismissed the claims for lack of subject matter jurisdiction under Article III, § 2 of the Constitution, holding that the offer had left the plaintiff with no "personal stake" in the case and thus mooted his claims. The Eleventh Circuit reversed, holding—in agreement with one Circuit but in conflict with another—that such an offer does not moot a claim unless the defendant also offers to consent to the entry of a judgment.

The question presented is:

Does an offer to provide a plaintiff with all of the relief he has requested, including more than the legal amount of damages plus costs and reasonable attorney's fees, fail to moot the underlying claim because the defendant has not also offered to agree to the entry of a judgment against it?

RULES 14.1 AND 29.6 STATEMENT

Petitioner herein, and a defendant and appellee below, is Convergent Outsourcing, Inc. Petitioner was called ER Solutions, Inc. at the time the case was litigated in the District Court and briefed and argued in the Court of Appeals, but it changed its name in November of 2011. (The company will be referred to herein as "Petitioner".) Petitioner is a privately held company incorporated in the State of Washington. Its parent company is Convergent Resources, Inc., a privately held company incorporated in the State of Georgia. No publicly held company owns 10% or more of the stock of either Petitioner or its parent.

Petitioner and Respondent Anthony W. Zinni were the only parties to their case in the District Court. The Court of Appeals consolidated Respondent's appeal with two other appeals arising from other cases decided in the same District Court, and decided the three cases together in the single opinion reproduced at App. 9a-20a. The plaintiffs-appellants in the other two appeals were Blanche M. Dellapietro and Naomi M. Desty, and the defendants-appellees, respectively, were ARS National Services, Inc. and Collection Information Bureau, Inc.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 9a-20a) is reported at 692 F.3d 1162. The opinion of the District Court (App. 1a-6a) was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 2012. No petition for rehearing was filed. On November 9, 2012, Justice Thomas extended the time for filing a petition for a writ of

certiorari to and including December 17, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III, § 2.

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C.A. § 1692a *et seq.*, provides, in part:

> **Amount of damages**
>
> Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damage sustained by such person as a result of such failure; [or]

> (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000.…

15 U.S.C. § 1692k(a).

STATEMENT

Respondent filed the underlying individual action in the United States District Court for the Southern District of Florida on July 2, 2010. He alleged that Petitioner made a series of telephone calls to his residence between May of 2009 and February of 2010 in an effort to collect a debt, leaving a series of voice mails. Respondent claimed that these calls violated provisions of the federal FDCPA and the Florida Consumer Collection Practices Act, Fla. Stat. §559.55 *et seq.*, by failing to make certain required disclosures and by amounting to conduct intended to annoy, abuse or harass Respondent. ECF Doc. # 1.[1] In each of the five counts in Respondent's complaint he asked that the District Court "enter judgment in favor of Plaintiff and against Defendant for: a. Damages; b. Attorney's fees, litigation expenses and costs of suit; and c. Such other or further relief as the Court deems proper." ECF Doc. # 1, p. 18-21.

In disclosures subsequently served under Fed. R. Civ. P. 26(a)(1), Respondent confirmed that he was not seeking actual damages or claiming any injury. Instead, he listed what he was seeking by filing his lawsuit as follows:

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[1] Citations to documents contained in the District Court record but not included in the Appendix to this Petition will take the form "ECF Doc. # ___," referring to the document number assigned on the District Court's docket for *Zinni v. ER Solutions, Inc.*, Case No. 10-80780-CIV-RYSKAMP/VITUNAC (S.D. Fla.).

> 1. Regarding the Fair Debt Collection Practices Act, statutory damages of up to $1,000 pursuant to 15 U.S.C. § 1692k(a)(2).
>
> 2. Regarding the Florida Consumer Collection Practices Act, statutory damages of up to $1,000.00, per adjudication, pursuant to Fla. Stat. §559.55 *et seq*.
>
> 3. Declaratory and injunctive relief.
>
> 4. Costs, litigation expenses, and attorneys fees.

ECF Doc. # 13-1, p. 3.[2]

On January 10, 2011, counsel for Petitioner sent an e-mail to counsel for Respondent that contained offers to resolve both Respondent's FDCPA and state-law claims. In the e-mail counsel offered to resolve the FDCPA claims for "$1,001, plus reasonable attorney's fees and costs as determined to be recoverable by the Court," and to resolve the state-law claims on similar terms.[3] Counsel further indicated that the offers were separate, and that neither one depended on acceptance of the other. ECF Doc. # 13-2 (Exhibit B). Petitioner's counsel reiterated the offer 10 days later.

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[2] Respondent's references to declaratory and injunctive relief attached only to his state law claims. In Counts IV and V of his complaint, which charged violations of Florida's FCCPA, Respondent had requested statutory damages, fees and costs, and declaratory and injunctive relief. ECF Doc. # 1, p. 20-21. Neither declaratory nor injunctive relief are available in private actions brought under the FDCPA. *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004); *Crawford v. Equifax Payment Serv's, Inc.*, 201 F.3d 877, 882 (7th Cir. 2000).

[3] Florida's FCCPA similarly limits statutory damages to $1,000. Fla Stat. § 559.77(2).

Receiving no response to either of its offers, Petitioner moved to dismiss the case for lack of subject matter jurisdiction, arguing that its offer of all of the relief Respondent had asked for in connection with his FDCPA claims—indeed, $1 more in damages than he could receive under the law, plus fees and costs—had rendered Respondent's FDCPA claims moot and deprived the District Court of subject matter jurisdiction. In response Respondent did not dispute the notion that Petitioner had offered him all of the relief he had asked for in his FDCPA claims in the way of damages, costs and fees; instead, he claimed that the offer did not moot those claims because he had also requested the entry of a judgment against Petitioner in his complaint (though he had not in his Rule 26 disclosures), and because Petitioner's offer had not included agreeing to the entry of such a judgment against it, either under Fed. R. Civ. P. 68 or otherwise.[4]

The District Court agreed with Petitioner, holding that Petitioner's offer had deprived it of jurisdiction over the FDCPA claims. App. 1a-6a. Noting that Article III limits the jurisdiction of federal courts to "cases and controversies," the court ruled that no case or controversy exists once a plaintiff has lost any "legally cognizable interest" in his claim, which occurred in this case when Petitioner offered "more than Plaintiff is entitled to recover under the

[4] Rule 68(a) provides, in part, that prior to 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."

FDCPA, thereby mooting the FDCPA claim." App. 3a-4a. The court also rejected Respondent's argument that Petitioner's proposed resolution was deficient in lacking an offer of judgment because the FDCPA, in specifying the relief available to a wronged plaintiff, "does not provide that an individual is entitled to recover 'a judgment' as part of his or her damages." App. 5a. And the District Court called "nonsensical" Respondent's contention that a judgment was necessary to insure that he could enforce Petitioner's promise to pay. In the District Court's view, that concern was created entirely by Respondent's failure to respond to Petitioner's offer; had Respondent accepted the offer, the court observed, it would have "become[] a binding agreement that can be enforced through a motion to enforce settlement." App. 5a.

Having held that the FDCPA claims were moot, and thus that it had no subject matter jurisdiction over them, the District Court declined to exercise supplemental jurisdiction over the Florida law claims under 28 U.S.C. § 1367(a), and dismissed the case. App. 5a-6a.[5]

The Eleventh Circuit reversed. It acknowledged that "[o]ffers of the full relief requested have been found to moot a claim" even if not accepted, App. 16a

[5] After the District Court dismissed the case, Petitioner's counsel tendered a check for $1,001 to Respondent's counsel. That check was not cashed, and in fact was returned to Petitioner's counsel. Petitioner's counsel informed the Eleventh Circuit of the tender of the check in accordance with that court's requirement that counsel advise the court of developments that could have an impact on the outcome of the case. See *Perez v. Sanford-Orlando Kennel Club, Inc.*, 518 F.3d 1302, 1304 (11th Cir. 2008). The Eleventh Circuit court noted this fact but indicated that it did not change its conclusion. App. 12a n. 5.

(citation omitted), although it expressly declined to rule on that issue, App. 17a n. 8. Instead it held that Petitioner had not offered Respondent "full relief" because it "did not offer judgment as part of the settlement." App. 17a. The court noted that Respondent had asked for a judgment in his complaint and disagreed with the District Court's view that a judgment would not be necessary in order to allow Respondent to enforce Petitioner's promise to pay what it had offered:

> A judgment is important to [Respondent] because the district court can enforce it. Instead, with no offer of judgment accompanying [Petitioner's] settlement offers, [Respondent was] left with a mere promise to pay. If [Petitioner] did not pay, [Respondent] faced the prospect of filing a breach of contract suit in state court with its attendant filing fees—resulting in two lawsuits instead of one.

App. 19a. The court relied on supporting authority from the Fourth Circuit, App. 17a-18a (citing *Simmons v. United Mtge. & Loan Investment LLC*, 634 F.3d 754, 766 (4th Cir. 2011)), while distinguishing cases decided by the Seventh Circuit that had held that offers of full relief moot claims on the grounds that the offers in those cases had included judgments, App. 17a (citing *Greisz v. Household Bank (Ill.) N.A.*, 176 F.3d 1012, 1014 (7th Cir. 1999) and *Rand v. Monsanto Co.*, 926 F.2d 596, 597 (7th Cir. 1991)). But the court did not address other Seventh Circuit cases Petitioner had cited that held that offers of "full relief" moot claims even in the absence of an offer of judgment.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the Eleventh Circuit, in agreement with the Fourth Circuit but in conflict with the Seventh Circuit, erroneously held that a plaintiff who has been offered everything he could have obtained in his case still has a hypothetical stake in obtaining a judgment as well—a judgment that would serve no purpose once he had received his relief and that would be entirely unnecessary to insure that he did. The ruling below thus eschewed a pragmatic view of the mootness doctrine that is constitutionally incorporated in Article III's "case or controversy" requirement, imposing instead an additional requirement that defendants who have already offered all the relief a plaintiff could possibly obtain also to agree to the entry of a judgment against them. In addition to deepening an existing conflict among the Circuits, this ruling will allow plaintiffs to continue to pursue cases in which they no longer have a real stake while providing an unnecessary disincentive to defendants in settling cases because of the potential adverse consequences of the entry of a judgment against them—consequences that are often avoided when cases are settled without the entry of a judgment.

I. IN CONFLICT WITH THE SEVENTH CIRCUIT, THE ELEVENTH CIRCUIT REQUIRES THAT A DEFENDANT WHO HAS ALREADY OFFERED ALL THE RELIEF A PLAINTIFF COULD OBTAIN ALSO OFFER A JUDGMENT IN ORDER TO RENDER A CLAIM MOOT.

In holding that an offer that included all of the relief Respondent could have obtained on his FDCPA

claims—damages exceeding the statutory limit, costs and attorney fees—was not enough to erase the plaintiff's stake in his claims because it also lacked a judgment, the Eleventh Circuit deepened an existing conflict between the Fourth and Seventh Circuits. While the Fourth Circuit agrees with the Eleventh that a judgment is a necessary part of such an offer, the Seventh has held that it is not, and that a plaintiff who has been offered everything he filed his lawsuit to get no longer has a "personal stake" in his case. This conflict merits resolution by the Court.

Article III, § 2 of the Constitution limits the "judicial power" (*i.e.,* the jurisdiction) of the federal courts to the resolution of "cases or controversies." It does so in order to "limit[] the business of the federal courts to 'questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process,'" and by doing so to define the role of the judicial branch within the three-branch federal structure. U.S. Const., art. III, § 2; *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-96 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

The doctrine of mootness represents one way in which federal courts enforce the "case or controversy" requirement. Whether a case or controversy continues to exist, or whether instead a case is or has become moot, depends on whether the issues presented remain "live" or whether "the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Because the issue of mootness rests on Article III's case or controversy requirement, the federal courts are without power to decide cases that have become moot. *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

Where a plaintiff no longer has a "legally cognizable interest in the outcome" of his claim, he is said to have lost his "personal stake" in it. This in turn relates to the part of the case or controversy requirement that "limit[s] judicial power to disputes capable of judicial resolution." See *Geraghty*, 445 U.S. at 396; see also *Flast*, 392 U.S. at 95 (case and controversy requirement in part limits "the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."). By assuring that a party retains an interest in the resolution of his claims, the "personal stake" requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). Moreover, the parties must maintain that "personal stake" in the proceedings beyond the time of the filing of the suit; the case or controversy requirement persists "through all stages of federal proceedings." *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477 (1990); see also *Geraghty*, 445 U.S. at 397.

In the instant case the District Court correctly held that Petitioner's offer to provide Respondent with all of the relief he had requested—damages exceeding the legal limit, costs and attorney fees—mooted his FDCPA claims by dissolving his personal stake in their outcome. App. 3a-5a. The Court of Appeals disagreed; while it expressly declined to decide whether an offer of "full relief" would moot a claim, App. 17a n. 8, it held that Petitioner had not offered "full relief" because it did not also offer to consent to the entry of an adverse judgment, App. 17a-19a. Petitioner asks the Court to review and reverse

that holding. Once Respondent had been offered everything he could possibly have obtained by filing his FDCPA claims, he lost any real interest in the outcome of the dispute those claims presented regarding the lawfulness of Respondent's telephone calls to his home. In relying instead on Respondent's purported interest in obtaining a judgment separate and apart from the relief it might embody, though, the Eleventh Circuit lost the appropriate focus on Respondent's "personal stake" and seized instead on a hypothetical interest in assuring payment that had never been refused, one that could easily be addressed without a judgment.

A. The Eleventh And Fourth Circuits Require An Offer Of "Full Relief" To Include An Offer Of Judgment, But The Seventh Circuit Does Not.

Although unaccepted (and, in fact, ignored), Petitioner's offer of more than the full amount of damages plus costs and fees extinguished Respondent's interest in his FDCPA claims by making available to him everything he could have obtained had he successfully litigated them. It has been said that "this and other courts routinely have held that a tender of full relief remedies a plaintiff's injuries and eliminates his stake in the outcome." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 346-47 (1980) (Powell, J., dissenting) (citing, *inter alia*, *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 313-14 (1893) (writ of error dismissed; "Any obligation of the defendant to pay to the state the sums sued for in this case, together with interest, penalties, and costs, has been extinguished by the offer to pay all these sums, and the deposit of the money in a bank… and the state has obtained everything that it

could recover in this case by a judgment of this court in its favor.")).[6] Indeed, in *Roper*, which involved plaintiffs who had advanced both individual and class action claims, the majority was willing to "assume" that, in the absence of any issue related to a plaintiff's ability to press representative claims, the entry of a judgment "fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment." 445 U.S. at 333.

The lower federal courts have applied this rule to offers of settlement, particularly where, as in this case, issues related to class certification or collective action are not (or are no longer) present. And they do

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[6] Whether an unaccepted offer of "full relief" moots a claim is an issue "fairly included" within the question presented by this Petition and the Eleventh Circuit's ruling, that is, whether such an offer must include a judgment. See Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). It is also an issue the Court may take up in *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189 (3d Cir. 2011), cert. granted, 133 S.Ct. 26 (2012), oral argument held December 3, 2012. As the Eleventh Circuit acknowledged, the issue *was* briefed on appeal in this case, although that court did not resolve it. App. 17a n. 8. Although this Court also need not address the issue in order to resolve the question presented in this Petition, it may do so. Petitioner recognizes that the Court does not generally "decide questions not raised or involved in the lower court." See *Youakim v. Miller*, 425 U.S. 231, 234 (1976). But the Court can address legal issues that *were* raised below and are presented by or fairly included within a petition even if they were not addressed by the lower court. See, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). Whether an unaccepted offer of "full relief" moots a claim presents such an issue, especially in the absence of any dispute as to the terms of the offer made to Respondent or the fact that he did not accept it.

so even where such an offer has been rejected. See, *e.g.*, *Greisz*, 176 F.3d at 1015 (rejected offer of $200 more than maximum amount of damages, made after class certification denied, "eliminate[d] a legal dispute upon which federal jurisdiction can be based.… You cannot persist in suing after you've won."); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (offer of maximum amount of damages claimed in interrogatory responses, made and rejected after class certification denied, mooted claims); *Abrams v. Interco, Inc.*, 719 F.2d 23, 32 (2d Cir. 1983) (offer of three times amount of individual plaintiffs' purchases, plus costs and attorney fees, made and rejected after denial of class certification, mooted individual claims). Indeed, in *Abrams* Judge Friendly thought that the case of an offer of more than full relief presented "the hypothetical described in *Roper* in which an individual plaintiff's claims were mooted by a judgment that fully satisfied them." 719 F.2d at 32.

The conflict presented by this Petition, then, arises not on the issue of whether an offer that includes (or, as in this case, exceeds) all that a plaintiff could be awarded based on his claims erases his "personal stake" in the dispute presented by those claims.[7] Peti-

[7] The Eleventh Circuit's suggestion below that there is a conflict among the Circuits on this issue is wrong. The court correctly cited the Seventh Circuit's decision in *Rand* for the proposition that "a rejected offer of judgment for a plaintiff's entire demand would be enough to moot a case." App. 17a, n. 8, citing *Rand*, 926 F.2d at 575. The court also cited two cases that it said disagreed with the Seventh Circuit, but neither case actually does so. In *O'Brien v. Ed Donnelly Ent., Inc.*, 575 F.3d 567, 574-76 (6th Cir. 2009), the court "agree[d] with the Seventh Circuit's view that an offer of judgment that satisfies a plaintiff's entire demand moots the case" and actually affirmed

tioner instead asks the Court to resolve a difference among Circuits about the form such an offer must take, and specifically whether such an offer, even if otherwise complete as to what the plaintiff is seeking, must also include the defendant's consent to the entry of an adverse judgment, either through the mechanism of Rule 68 or otherwise. In holding that an offer of judgment was required the Eleventh Circuit did not find Petitioner's offer wanting in any respect related to the relief, that is, the damages, costs and fees, that Respondent had affirmed that he was seeking on his FDCPA claims. Instead the court attached an independent significance to the entry of judgment itself based on what was plainly a hypothetical and unwarranted concern over the enforcement of Petitioner's obligation to pay had Respondent accepted its offer—an offer to which Respondent never responded in the first place. In this the Eleventh Circuit was in agreement with the Fourth Circuit, but in conflict with the Seventh.

In holding that Petitioner's offer of costs, fees and a dollar more than allowable statutory damages did not moot Respondent's claim because it did not also include agreement to the entry of an adverse judgment, the Eleventh Circuit relied expressly on the Fourth Circuit's decision in *Simmons*. App. 17a-19a. In *Simmons* the plaintiffs filed a collective

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the dismissal of the relevant two counts as moot, while suggesting that it would have been preferable had the district court simply entered judgment against the offering defendant in accordance with its offer. And in *McCauley v. Trans Union LLC*, 402 F.3d 340, 341-42 (2d Cir. 2005), the court also did not disagree with the notion that an offer of everything a plaintiff could have recovered mooted the case; instead it held that a lingering disagreement about confidentiality preserved the existence of a controversy between the parties.

action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, seeking payment of unpaid overtime wages. The defendant's counsel sent plaintiffs' counsel a letter proposing, "without admitting legal liability or fault,… to offer each opt-in plaintiff full relief in this case," including unpaid wages, costs and attorney fees. 634 F.3d at 760 (internal quotation marks omitted). In a subsequent letter, counsel clarified that their offer included liquidated damages and applied to both named plaintiffs and those that had opted in. *Id.* at 761. When the time limit in the offer expired without it being accepted, the defendant moved to dismiss the case, arguing that its offer to "satisfy Plaintiffs' claims in their entirety" left no remaining case or controversy and thus deprived the district court of subject matter jurisdiction. *Id.* The district court granted the motion, holding that the defendant's offer, which the court referred to as an "offer of judgment," had been "for full relief, including attorney's fees and taxable costs," rendering the case moot. 634 F.3d at 762.

On appeal, the Fourth Circuit initially ruled that the district court had erred in describing the defendant's offer as an "offer of judgment" because it had only offered to enter into an agreement to settle the case but had not addressed the entry of a judgment at all, much less in the terms prescribed by Rule 68. 634 F.3d at 764. The court went on to consider whether the offer mooted the case anyway, and held that it did not because no judgment had been offered in addition to damages, costs and fees. The court initially observed that the offer's failure formally to comply with Rule 68 was not determinative, recognizing that "the doctrine of mootness is constitutional in nature, and therefore, not constrained by formalities." *Id.* But the court nonetheless held that

the defendant had not offered "full relief" because it "did not offer for judgment to be entered against the Defendants." The court explained that:

> Had the Plaintiffs been allowed to litigate their FLSA claims and had they fully prevailed on such claims, the district court would have entered a judgment against the Defendants for full relief with respect to those claims. From the view of the Plaintiffs, a judgment in their favor is far preferable to a contractual promise by the Defendants in a settlement agreement to pay the same amount. This is because district courts have inherent power to compel defendants to satisfy judgments entered against them,… but 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.

634 F.3d at 764-65 (citations omitted). The Fourth Circuit distinguished its earlier decision in *Zimmerman* and the Second Circuit's decision in *Abrams* because in both of those cases the offers that had mooted those plaintiffs' claims had been made in the form of offers of judgment. 634 F.3d at 765-66.

In its ruling in this case, the Eleventh Circuit relied expressly on the Fourth Circuit's ruling in *Simmons*. App. 17a-19a. It also distinguished two cases from the Seventh Circuit, *Greisz* and *Rand*, on the same grounds relied on by the Fourth Circuit in distinguishing its decision in *Zimmerman* and the Second Circuit's in *Abrams*—that is, because those cases involved offers of judgment. See App. 17a ("Those cases are distinguishable, however, because the defendants there offered the full relief requested—the full amount of damages *plus* a judgment."

(emphasis in original; citing *Greisz*, 176 F.3d at 1014, and *Rand*, 926 F.2d at 597)). In distinguishing *Rand* and *Greisz* the Eleventh Circuit plainly suggested that the Seventh Circuit would have agreed with, or at least had not disagreed with, its (and the Fourth Circuit's) rule that an offer of "full relief" must include a judgment in order to moot a claim.

But the Seventh Circuit does disagree, and the Eleventh Circuit's incomplete discussion of Seventh Circuit authority masks a direct conflict. As an initial matter, the fact that the offers in *Rand* and *Greisz* were made in the form of offers of judgment did not figure at all in the Seventh Circuit's holdings that offers that included full damages, costs and/or fees extinguished the plaintiffs' stakes in their claims. See *Rand*, 926 F.2d at 597-98 (case mooted by refused offer of "*the full amount by which answers to interrogatories assert that Rand was injured, plus the costs of the suit*.... Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate,... and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake.") (emphasis added; citations omitted); *Greisz*, 176 F.3d at 1015 (rejected offer of $200 more than maximum amount of damages plaintiff could obtain "eliminate[d] a legal dispute upon which federal jurisdiction can be based."). Nothing in either opinion suggested that the offer of a judgment was significant to the Seventh Circuit's analysis; indeed, neither opinion even mentioned the fact that a judgment was part of those offers except to note in passing that the offers were made under Rule 68.

More to the point of this Petition, in cases the Eleventh Circuit did *not* discuss (although Petitioner

cited them in its brief on appeal) the Seventh Circuit has plainly held that "full relief" need not include a judgment. In *Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994), the court held that a plaintiff's claim that his car was improperly towed was mooted by the defendant's offer, refused by plaintiff, simply "to refund to [plaintiff] the towing and storage fees he was forced to pay." 29 F.3d at 1147. The opinion did not anywhere suggest that the offer of a "refund" was made in the form of, or otherwise included, an offer of judgment. And in *Damasco v. Clearwire Corp.*, 662 F.3d 891, 894-95 (7th Cir. 2011), the court again held that an offer to pay the full amount of requested damages and costs, to which offer the plaintiff never responded, mooted the plaintiff's claim. That offer was made in a letter to the plaintiff's counsel that made no mention of a judgment or of Rule 68. 662 F.3d at 893. As the Seventh Circuit made clear, no offer of judgment was involved; the plaintiff had actually argued in the district court that the defendant "should not be allowed to circumvent Rule 68 by casting its offer in the form of a settlement." 662 F.3d at 894. Moreover, the absence of an offer of judgment plainly would not have mattered to the result; the Seventh Circuit expressly rejected plaintiff's request to revisit *Holstein* and to hold, in accord with cases from several other Circuits, that a named plaintiff in a class action may seek class certification after his own claim was mooted, noting that "[a]lthough these decisions address offers that, unlike [the defendant's], were made under Rule 68, their same analysis seems to apply to any offer of complete relief." 662 F.3d at 896.

Holstein and *Damasco* make plain what *Rand* and *Greisz* at least strongly implied. In the Seventh Circuit it is not necessary to offer a judgment along

with all of the damages, costs or fees requested by a plaintiff in order to extinguish his personal stake in his claims. The offer Petitioner made to Respondent in this case would have ended the case in the Seventh Circuit but did not do so in the Eleventh, and would not have in the Fourth either.[8] The Court should grant review in this case to resolve this conflict.

B. The Eleventh Circuit's Concern About Enforcement Was Both Hypothetical And Unfounded.

In finding Petitioner's offer to resolve Respondent's FDCPA claims to constitute less than "full relief," the Eleventh Circuit never suggested that it did not cover any damages, costs or attorney fees Respondent could possibly have been awarded had he prevailed on his FDCPA claims. Nor did the court question the notion that, had Respondent accepted that offer, a proper settlement agreement would have been concluded

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[8] It would also likely have ended the case in the Second Circuit. Although the rejected offer in *Abrams* was made in the form of an offer of judgment, that fact was not critical to the court's conclusion that it mooted the plaintiffs' case; as was true in the Seventh Circuit's opinions in *Rand* and *Greisz*, what mattered to the Second Circuit was the relationship between the terms of the offer and the plaintiffs' claims. See *Abrams*, 719 F.2d at 31 ("[T]here is no justification for taking the time of the court and the defendant in the pursuit of miniscule individual claims which defendant has more than satisfied."). See also *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011) (rejected Rule 68 offer would moot case absent representative claims; "*An offer of complete relief* will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation."), citing *Rand*, 926 F.2d at 598 (citation and internal quotation marks omitted; emphasis added)), cert. granted, 133 S.Ct. 26 (2012), oral argument held December 3, 2012).

that would have reflected its terms. Instead the court found the offer lacking solely because, in addition to offering Respondent everything he could have recovered on his FDCPA claims, Petitioner did not also offer to consent to the entry of a judgment against it.

To support its conclusion that a judgment had some value to Respondent over and above the damages, costs and fees it would have reflected, the court cited only a concern for enforcement of Petitioner's promise to pay what it had offered. That concern was both imagined and unnecessary. The Eleventh Circuit's "enforcement" rationale does not support its disagreement with the Seventh Circuit regarding whether a judgment must be part of an offer of "full relief."

The Eleventh Circuit's concern that Petitioner might not pay what it had offered after the District Court dismissed the case based on that offer was, in the first place, a hypothetical conjured by Respondent's own failure to respond to, much less accept, that offer. As the District Court correctly pointed out, "[i]t is [Respondent's] failure to accept the offer that creates these issues in the first place." App. 5a. Having ignored Petitioner's offer, Respondent never had an agreement he could enforce, and was thus in no position to advance concerns over the enforcement of an agreement he declined to make.

Nor did it matter that Respondent had requested a judgment in the prayer for relief in his complaint, as many (if not most) plaintiffs routinely do. Although the Eleventh Circuit found this fact significant, see App. 19a, the District Court correctly pointed out that the FDCPA, while it provides for awards of damages and attorney fees, "does not provide that an

individual is entitled to recover 'a judgment'" as a form of relief under that statute, App. 5a. Nor did Respondent list "a judgment" as an item of relief he was seeking in his Rule 26 disclosures. See *supra* p. 4. Plainly Respondent did not attach any independent significance to a judgment beyond the damages, fees and costs it might reflect until Petitioner moved to dismiss his case.

In any event, the Eleventh Circuit's concerns over enforcement were groundless; Petitioner's offer, had it been accepted by Respondent, could have been enforced with far less fuss than the Eleventh Circuit believed (assuming, of course, that Petitioner did not simply pay what it had offered before dismissal). While the District Court noted that Petitioner's offer, had it been accepted, could have been enforced by means of "a motion to enforce settlement," App. 5a, the Eleventh Circuit thought instead that Respondent would have been required to file a breach of contract suit against Petitioner in state court if Respondent had not honored its commitment, "resulting in two lawsuits instead of one," App. 19a. The District Court was plainly correct, as to this case and likely as to any other such case brought in federal court.

The procedure contemplated by the District Court, in which a plaintiff who has not been paid need only move for enforcement of the settlement agreement in the court where the case had been pending, would have been readily available in this case had Respondent accepted Petitioner's offer. That objective could have been accomplished in one of two ways. As the Court explained in *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), a federal court that dismisses a case pursuant to a settlement agreement

may easily acquire jurisdiction to enforce that agreement by making its terms a part of the dismissal order "either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." 511 U.S. at 381. The District Court would have had the discretion to include either type of provision in a dismissal order in this case had the case been dismissed on Respondent's motion under Fed. R. Civ. P. 41(a)(2) or, with the agreement of the parties, to include either type of provision in an order occasioned by a dismissal stipulation filed under Fed. R. Civ. P. 41(a)(1)(ii). *Kokkonen,* 511 U.S. at 381-82.

Accordingly the concern expressed by the Eleventh Circuit regarding enforcement of Petitioner's proposed promise to pay—the only basis advanced for holding that Petitioner's offer was not enough to moot Respondent's FDCPA claims—was entirely contrived. The outcome suggested by the Eleventh Circuit, in which Respondent would have had to file a state-court breach of contract suit to enforce a settlement agreement (App. 19a), could easily, even routinely, have been avoided. And in this case it certainly *would* have been avoided. There is no reason to doubt that the District Court would have employed one or both of the procedures endorsed in *Kokkonen* in this case. That was plainly contemplated by the court's observation that Petitioner's promise to pay what it had been offered, had that offer been accepted, could have been "enforced through a motion to enforce settlement." App. 5a. At the time Petitioner made its offer to Respondent the District Court was doubtless aware of the alternatives that had been laid out by this Court in *Kokkonen* and that had been further explained by the Eleventh Circuit itself in *Am. Disa-*

bility Ass'n, Inc. v. Chmielarz, 289 F.3d 1315, 1320-21 (11th Cir. 2002).

Stripped of its underlying rationale, the rule followed in the Fourth and Eleventh Circuits, that an offer of "full relief" must include a judgment in order to moot a case so that the underlying settlement agreement can be enforced without the need for a separate lawsuit, should fall. Absent any genuine concern over enforcement, that rule lets plaintiffs who have been offered everything they could possibly get to continue to pursue claims when there is nothing more to litigate. As a result, plaintiffs in the Fourth and Eleventh Circuits will be able to press on (and run up attorney fees and costs) in cases in which they no longer have any interest in the dispute that underlies those cases. Such needlessly prolonged litigation does not fit the model of a dispute "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast*, 392 U.S. at 95.

The rule followed in the Seventh Circuit more accurately reflects the concerns at issue in limiting federal subject matter jurisdiction to genuine "cases and controversies," and the Court should grant this Petition to resolve this plain difference. As the Seventh Circuit has explained, "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate." *Rand*, 926 F.2d at 598. In the instant case that dispute, and Respondent's "personal stake" in a determination of whether Petitioner's calls to his residence violated the FDCPA, evaporated when he was offered all of the damages, costs and attorney fees he could have won had he obtained the determination he sought. And because no judgment was necessary in order to

assure Respondent would receive what he was offered, the absence of one did not revive a dispute that mootness had placed beyond the power of federal courts to resolve.

II. WHETHER A DEFENDANT WHO HAS OFFERED EVERYTHING A PLAINTIFF COULD GET MUST ALSO OFFER JUDGMENT PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW.

Whether a defendant that offers a plaintiff "full relief" must also include an offer to consent to an adverse judgment presents an important issue of federal law. While Rule 68 provides defendants with the option of offering judgment in an effort to end litigation and cut off its costs and fees, a defendant who is already willing to offer a plaintiff all that he could possibly recover on his claims should not be required to offer more. The Eleventh Circuit's requirement that a judgment also be offered to such a plaintiff asks defendants to accept adverse consequences that have nothing to do with the underlying dispute or the interests of the plaintiff in pursuing his claims.

The fact that settlements are routinely concluded without the entry of a judgment, or even an admission of liability, is a testament to the value to defendants of avoiding the entry of adverse judgments in settling cases. The reasons they may wish to do so are many. As an initial matter, the scope of a judgment offered as part of a settlement may require negotiation in order to establish the extent to which it would give rise to claim preclusion. See, *e.g.*, *Scosche Industries, Inc. v. Visor Gear, Inc.*, 121 F.3d 675, 678 (Fed. Cir. 1997) (scope of Rule 68 judgment determined by parties and interpreted as a matter

of contract law). Beyond such basic concerns, an adverse judgment may have other practical consequences that a defendant may legitimately wish to avoid. Adverse judgments often must be disclosed to insurers or lenders, potentially raising the cost of acquiring the services of either. Of special concern to debt collectors like Petitioner are requirements that judgments be disclosed in licensure proceedings, either directly, as a requirement of obtaining a license to do business in the relevant jurisdiction, or indirectly, as a requirement of obtaining a required surety bond.

Whether a defendant who has already thrown in the towel and offered a plaintiff everything he could get from his claims should also be required to bear the consequences that can arise with the entry of an adverse judgment presents an important issue of federal law. The further pursuit of this case now that Respondent has passed up an offer of all the damages, costs and fees he could have obtained by winning will require the federal courts to spend time and resources adjudicating a dispute over the legality of telephone calls in which Respondent has demonstrated that he has no interest. That is a result Article III was designed to avoid. Under the Eleventh Circuit's holding in this case, though, Petitioner's only alternatives are to incur additional costs litigating that lifeless dispute or to shoulder the costs of a judgment for which Respondent has no actual use. A defendant who is willing to satisfy all of a plaintiff's demand should be able to stop the bleeding without having to accept the additional costs or risks associated with a judgment. The Court should grant review in this case to resolve the conflict between the Circuits regarding whether defendants may do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2012

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-80780-CIV-RYSKAMP/VITUNAC

ANTHONY W. ZINNI,
Plaintiffs,

vs.

ER SOLUTIONS, INC.,
Defendant.

ORDER GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION

THIS CAUSE comes before the Court pursuant to Defendant's motion to dismiss for lack of subject matter jurisdiction, filed February 23, 2011 [DE 13]. Plaintiff responded on March 14, 2011 [DE 14]. Defendant replied on March 24, 2011 [DE 15]. This motion is ripe for adjudication.

Plaintiff alleges violations of the Fair Debt Collection Practices Act, 15 U.S.C. §1692a, *et seq*. ("FDCPA") and the Florida Consumer Collection Practices Act, Fl. Stat. §559.55, *et seq*., ("FCCPA"). Plaintiff claims that Defendant left messages on Plaintiff's telephone that did not disclose Defendant's identity. Defendant also allegedly caused Plaintiff's telephone to ring repeatedly or continuously with the intent to annoy, abuse or harass. Plaintiff seeks statutory damages, attorney's fees and costs under

the FDCPA and FCCPA, plus injunctive relief under the FCCPA. Plaintiff is not seeking actual damages.

On January 10, 2011, Defendant made a written settlement offer to Plaintiff offering $1,001 to resolve Plaintiff's claims under the FDCPA, plus reasonable attorney's fees and costs to be determined by the court; and a separate offer in the amount of $1,001, plus reasonable attorney's fees and costs as to be determined by the court, to resolve Plaintiff's FCCPA claims. On January 20, 2010, Defendant's counsel emailed Plaintiff's counsel to reiterate the offer. Plaintiff has not responded.

Defendant maintains that since it has offered everything that Plaintiff is entitled to under the FDCPA claim, there is no longer a federal claim in dispute. Accordingly, Defendant requests dismissal for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1).

Attacks on subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) are either "facial" or "factual." *See Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). "Facial attacks" require the court "merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Id*. (citing *Menchaca v. Chrysler Credit Corp*., 613 F.2d 507, 511 (5th Cir.)). "Factual attacks" challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id*. (citing *Menchaca*, 612 F.2d at 511). When the attack is factual, as it is here, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial

court from evaluating for itself the merits of jurisdictional claims." *Id*. (quoting *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981)).

Article III of the United States Constitution limits the jurisdiction of the federal courts to "cases and controversies." U.S. Const. art. III § 2; *Flast v. Cohen*, 392 U.S. 83, 94, 88 S.Ct. 1942, 1949 (1968); *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001). When the case lacks a legally cognizable interest, a justiciable case or controversy no longer exists, and thus, the case should be dismissed for lack of subject matter jurisdiction. *Id*. If there is no live controversy, the court must dismiss Plaintiff's claim as moot. *See National Advert. Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005) ("By its very nature, a moot suit cannot present an Article III case and controversy and the federal courts lack subject matter jurisdiction to entertain it.") (internal quotation omitted); *Al Najjar*, 273 F.3d at 1336 ("If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then case is moot and must be dismissed."); *Labora v. MCI Telecommunications Corporation*, No. 98-1073-CIV, 1998 WL 1572719, at *2 (S.D. Fla. July 20, 1998)("a case will be subject to dismissal on the grounds of mootness when a defendant satisfies the plaintiff's demand for relief"). "Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate…and a plaintiff who refuses to acknowledge this loses outright under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake." *See Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 258 F.Supp.2d 157, 159-160 (E.D.N.Y. 2003) (citing *Rand v. Monsanto Co*., 926 F.2d 596, 598 (7th Cir. 1991)). Defendant offered more than

Plaintiff is entitled to recover under the FDCPA, thereby mooting the FDCPA claim.

In *Davon Outten v. United Collection Bureau, Inc.*, No. 09-21817-CIV-GOLD (S.D. Fla. April 5, 2010), which involved the same Plaintiff's attorney, the Court dismissed the same FDCPA claim based upon mootness. Judge Gold stated that "[b]ecause Defendant offered to settle Plaintiff's FDCPA claims in their entirety, Plaintiff lacks a personal stake in the suit thereby rendering the FDCPA claims moot." Although the defendant in *Outten* did not make a Rule 68 Offer of Judgment, the court nevertheless found that the offer mooted plaintiff's FDCPA claim for statutory damages. *Id*. In *Brown v. Kopolow*, Case No. 10-80593-CIV-MARRA (S.D. Fla. Jan. 25, 2011), which involved the same Plaintiff's attorney, Judge Marra dismissed plaintiff's FDCPA claim on grounds of mootness based upon a written settlement offer. Plaintiff argued that Rule 68 case law does not apply to informal settlement offers, but Judge Marra rejected that argument:

> The doctrine of mootness has its source in Article III of the United States Constitution, which provides that federal judicial power extends only to 'cases' or 'controversies.' This requirement limits federal courts to deciding 'questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'

Brown, at *7 (citing *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)).

Defendant argues that the FDCPA claim is not moot because Plaintiff seeks a judgment, not merely damages and fees. Section 1692k(1) of the DCPA

states that an individual may recover "any actual damage sustained by such person as a result" of the debt collector's failure to comply with the FDCPA. Section 1692k(2)(A) provides that a person may recover "such additional damages as the court may allow, but not exceeding $1,000." Section 1692k, however, does not provide that an individual is entitled to recover "a judgment" as part of his or her damages.

Plaintiff also maintains that Defendant's offer is unsatisfactory as there is no binding enforcement of the settlement: there is no stipulated payment date, no sanctions for non-payment or any interest on the amount if not paid. This argument is nonsensical. It is Plaintiff's failure to accept the offer that creates these issues in the first place. If Plaintiff accepts the offer, it becomes a binding agreement that can be enforced through a motion to enforce settlement. The FDCPA claim is dismissed with prejudice for lack of subject matter jurisdiction.

Plaintiff also alleges claims under the FCCPA. A district court has "supplemental jurisdiction" over state law claims that are part of the same case or controversy as claims over which the district court has "original jurisdiction." 28 U.S.C. §1367(a). A district court, however, "may decline to exercise supplemental jurisdiction over a claim" if the claim "raises a novel or complex issue of State law," or where all claims over which the district court has jurisdiction have been dismissed. 28 U.S.C. §1367(c). Since Plaintiff's only federal law claim has been dismissed for lack of subject matter jurisdiction, the Court declines to exercise supplemental jurisdiction over the FCCPA claim. It is hereby

ORDERED AND ADJUDGED that Defendant's motion to dismiss for lack of subject matter jurisdiction, filed February 23, 2011 [DE 13], is GRANTED. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 18th day of April, 2011.

S/Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12413

District Court Docket No. 9:10-cv-80780-KLR

ANTHONY W. ZINNI,
Plaintiff – Appellant,

versus

ER SOLUTIONS, INC.,
Defendant – Appellee.

No. 11-12931

District Court Docket No. 9:11-cv-80192-KLR

BLANCHE M. DELLAPIETRO
Plaintiff – Appellant,

versus

ARS NATIONAL SERVICES, INC.,
Defendant – Appellee.

No. 11-12937

District Court Docket No. 9:10-cv-80114-KLR

NAOMI M. DESTY,
Plaintiff – Appellant,

versus

COLLECTION INFORMATION BUREAU, INC.,
Defendant – Appellee.

Appeals from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 27, 2012
For the Court: John Ley, Clerk of Court
By: Jeff R. Patch

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12413

District Court Docket No. 9:10-cv-80780-KLR

ANTHONY W. ZINNI,
Plaintiff – Appellant,

versus

ER SOLUTIONS, INC.,
Defendant – Appellee.

No. 11-12931

District Court Docket No. 9:11-cv-80192-KLR

BLANCHE M. DELLAPIETRO
Plaintiff – Appellant,

versus

ARS NATIONAL SERVICES, INC.,
Defendant – Appellee.

No. 11-12937

District Court Docket No. 9:10-cv-80114-KLR

NAOMI M. DESTY,
Plaintiff – Appellant,

versus

COLLECTION INFORMATION BUREAU, INC.,
Defendant – Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(August 27, 2012)

Before CARNES, BARKETT and BLACK, Circuit Judges.

BLACK, Circuit Judge:

This consolidated appeal[1] presents the issue of whether a settlement offer for the full amount of statutory damages requested under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, *et seq.,* moots a claim brought pursuant to the FDCPA. Appellants Anthony W. Zinni, Blanche Dellapietro, and Naomi Desty appeal the district court's dismissal of their complaints for lack of subject matter jurisdiction. In each case, an Appellee[2]

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[1] Upon Appellants' motion, we consolidated the three cases.

[2] Appellees are ER Solutions, Inc., ARS National Services, Inc., and Collection Information Bureau, Inc.

sent an e-mail offering to settle an Appellant's FDCPA case for $1,001 – an amount exceeding by $1 the maximum statutory damages available for an individual plaintiff under the FDCPA.[3]

Appellees also offered attorneys' fees and costs in each case, but did not specify the amount of fees and costs to be paid. Appellants did not accept the settlement offers. The district court subsequently granted Appellees' motions to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), holding that the offers left Appellants with "no remaining stake" in the litigation. The district court then dismissed Appellants' complaints with prejudice. We conclude the settlement offers did not divest the district court of subject matter jurisdiction.

I. BACKGROUND

A. ZINNI

Zinni filed a complaint on July 2, 2010, alleging that ER Solutions, Inc. violated the FDCPA by causing his 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 disclosures required by §§ 1692d(6) and 1692e(11). Zinni alleged ER Solutions had left him more than 50 voice mail messages in the course of attempting to collect a debt. Zinni requested damages, attorneys' fees, and costs under the FDCPA, as well as judgment in his favor and against ER Solutions.

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[3] "A debt collector can be held liable for an individual plaintiff's actual damages, statutory damages up to $1,000, costs, and reasonable attorney's fees." *Edwards v. Niagara Credit Solutions, Inc.,* 584 F.3d 1350, 1352 (11th Cir. 2009) (citing 15 U.S.C. § 1692k(a)(1)-(3)).

On January 10, 2011, ER Solutions e-mailed a settlement offer to Zinni's counsel. In the e-mail, ER Solutions offered $1,001 to resolve Zinni's claims under the FDCPA, plus reasonable attorneys' fees and costs to be determined by the court.[4] Zinni did not respond. On January 20, 2011, ER Solutions e-mailed Zinni's counsel a second time to reiterate the offer, but Zinni once again did not respond.[5]

On February 23, 2011, ER Solutions filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). ER Solutions asserted that because it had offered Zinni everything he was entitled to under the FDCPA, his FDCPA claim was moot and should be dismissed with prejudice.

The district court granted ER Solutions' motion and dismissed the case with prejudice, explaining that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate." The district court acknowledged that Zinni had never accepted ER Solutions' offer, but rejected as "nonsensical" Zinni's argument that, had he accepted ER Solutions' offer, he would have been left with

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[4] Zinni also alleged ER Solutions violated the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. §§ 559.55-559.785. ER Solutions offered to settle Zinni's FCCPA claim for $1,001, plus reasonable attorneys' fees and costs. The district court declined to exercise supplemental jurisdiction over this issue.

[5] In its brief, ER Solutions asserts "[w]hile not a part of the record, ER Solutions notifies the Court that it tendered the $1,001 settlement check to Zinni on May 4, 2011, but Zinni has not cashed the check." This purported tender of the settlement check is not in the record, and even if the check had been tendered, that fact would not change our ultimate conclusion.

nothing but an unenforceable promise. The district court concluded 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."

B. Dellapietro

Dellapietro filed a complaint on February 18, 2011, alleging that ARS National Services, Inc. (ARS) left messages on her voice mail identifying itself only as "ARS," and stating that it was "very important" that ARS speak to her "right away." The message did not disclose the purpose of the call other than to state it was "not a telemarketing or sales call." The complaint alleged that ARS failed to meaningfully disclose its identity, purpose for calling, or disclose its status as a debt collector as required by 15 U.S.C. §§ 1692d(6) and 1692e(11). Dellapietro requested damages, attorneys' fees, and costs under the FDCPA, as well as judgment in her favor and against ARS.

On February 23, 2011, ARS e-mailed Dellapietro's counsel an offer to settle the FDCPA claims for $1,001 and "reasonable attorneys' fees and costs." The e-mail stated, "[i]f we are unable to agree on attorneys' fees and costs, we will agree to submit that issue to the court for resolution." Dellapietro did not respond to the offer. On April 20, 2011, ARA filed a motion to dismiss the case for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The district court granted the motion in an order virtually identical to the one in *Zinni,* finding that ARS had "offered more than Plaintiff is entitled to recover under the FDCPA, thereby mooting the FDCPA claim."

C. Desty

Desty filed a complaint on January 27, 2011, alleging that Collection Information Bureau, Inc. (CIB) repeatedly left automated voice mail messages on her cellular phone. The caller identified himself as "Ted Lee" and stated that he had an "important message" for her and that he "must speak with [her] as soon as possible regarding [her] account number." Desty alleged CIB failed to meaningfully disclose its identity, purpose for calling, or identify itself as a debt collector as required by 15 U.S.C. §§ 1692d(6) and 1692e(11). She also alleged CIB caused her "telephone to ring repeatedly or continuously with the intent to annoy, abuse or harass in violation of 15 U.S.C. § 1692d(5)," and used 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.[6] The com-

[6] Desty also alleged violations of the FCCPA, as well as the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The district court declined to exercise its supplemental jurisdiction over Desty's FCCPA claim, and dismissed Desty's TCPA claim for lack of jurisdiction. Although Desty does not challenge the dismissal of her TCPA claim on appeal, we note the Supreme Court has recently overruled this Court's prior precedent on which the district court relied, holding "that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA." *Mims v. Arrow Fin. Servs., LLC,* ___ U.S. ___, 132 S. Ct. 740, 745 (2012), *overruling Mims v. Arrow Fin. Servs., LLC,* 421 F. Appx. 920, 921 (11th Cir. 2010). Thus, we *sua sponte* reverse the district court's dismissal of Desty's TCPA claim. *See Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1275 (11th Cir. 2012) ("We have an independent obligation to determine whether jurisdiction exists in each case before us, so we may consider questions of jurisdiction *sua sponte* even when, as here, the parties have not raised jurisdictional challenges.").

plaint requested statutory damages, attorneys' fees, and costs, as well as judgment in her favor and against CIB.

On March 7, 2011, CIB offered via e-mail to settle Desty's case for $1,001, "plus reasonable attorney's fees and court costs." The e-mail stated that if the parties were "unable to reach an agreement as to the amount of Plaintiff's attorney's fees and costs, CIB would "submit the issues of fees and costs to the Court to decide."

When Desty did not respond to the offer, CIB moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The district court granted CIB's motion in an order virtually identical to the orders in *Zinni* and *Dellapietro.*

II. DISCUSSION

The issue before us is whether Appellees' settlement offers for the full amount of statutory damages requested under the FDCPA rendered Appellants' claims moot, requiring their dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[7] "When evaluating a district court's conclusions on a Rule 12(b)(1) motion, we review the district court's legal conclusions *de novo* and its factual findings for clear error." *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel,* 657 F.3d 1159, 1169 (11th Cir. 2011) (quotations and alteration omitted).

Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies. *Flast v. Cohen*, 392 U.S. 83, 94, 88 S. Ct.

[7] This is an issue of first impression in our Circuit.

1942, 1949 (1968). "[T]here are three strands of justiciability doctrine—standing, ripeness, and mootness—that go to the heart of the Article III case or controversy requirement." *Christian Coal. of Fla., Inc. v. United States,* 662 F.3d 1182, 1189 (11th Cir. 2011) (quotations omitted). With regard to mootness, the Supreme Court has explained "a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12, 113 S. Ct. 447, 449 (1992) (quotations omitted). "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210, 1216 (11th Cir. 2009) (quotations omitted).

Appellants contend that the settlement offers were not for the full relief requested because Appellees did not offer to have judgment entered against them as part of the settlement. Thus, Appellants argue, the settlement offers were insufficient to moot their claims. Appellees respond that their offers were for the full amount of statutory damages plus attorneys' fees and costs, and argue that the lack of an offer of judgment does not preclude a mootness finding.

Offers for the full relief requested have been found to moot a claim. *See Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) ("By [submitting an offer of judgment to plaintiff for] $1,200 plus reasonable costs and attorney's fees, the bank . . . was offering her more than her claim was worth to her in a pecuniary sense. Such an offer, by giving the plaintiff the equivalent of a default judgment . . .

eliminates a legal dispute upon which federal jurisdiction can be based."); *Rand v. Monsanto Co.,* 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake.") (citations omitted). Those cases are distinguishable, however, because the defendants there offered the full relief requested—the full amount of damages *plus* a judgment. *See Greisz*, 176 F.3d at 1014; *Rand,* 926 F.2d at 597. Here, there is no dispute that Appellants did not offer judgment as part of the settlement. This distinction is important to our mootness analysis.[8]

The Fourth Circuit has held that the failure to offer the full relief requested prevented the mooting of a Fair Labor Standards Act (FLSA) claim. *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 766 (4th Cir. 2011). There, the district court dismissed a case as moot when the defendants made a settlement offer "for full relief, including attorney's fees and

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[8] The issue of whether the offer was accepted or rejected, while argued by the parties is not relevant to our analysis because Appellees never offered full relief. We need not decide whether an offer for full relief, even if rejected, would be enough to moot a plaintiff's claims. *See Rand*, 926 F.2d at 598 (stating the view that a rejected offer of judgment for plaintiff's entire demand would be enough to moot a case). *But see O'Brien v. Ed Donnelly Enters., Inc.,* 575 F.3d 567, 575 (6th Cir. 2009) (expressing disagreement "with the Seventh Circuit's view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand"); *McCauley v. Trans Union L.L.C.,* 402 F.3d 340, 340 (2d Cir. 2005) (holding that a plaintiff's rejection of an offer of judgment for the full amount desired does not, in and of itself, moot the case).

taxable costs." *Id.* at 762. The Fourth Circuit reversed because the settlement offer, while purporting to offer "full relief," did not include an offer of judgment against the defendants. *Id.* at 764. The court explained that from a plaintiff's view, a judgment in his or her favor "is far preferable to a contractual promise" to pay the same amount "because district courts have inherent power to compel defendants to satisfy judgments against them . . . but 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." *Id*. at 765. The court cited language from *Federal Practice and Procedure* to further illustrate the importance of a judgment:

> Settlements often do not involve the entry of a judgment against the defendant, as compared to a judgment of dismissal, so that from the plaintiff's perspective the willingness of the defendant to allow judgment to be entered has substantial importance since judgments are enforceable under the power of the court. Indeed, should 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. Even if the court retains jurisdiction, plaintiff is left to litigate a breach of contract action or, perhaps, to continue litigating the claims sought to be settled.

Id. (quoting 12 Wright, Miller, & Marcus, *Federal Practice and Procedure* § 3002, p. 90 (2d ed. 1997)). The Fourth Circuit reversed the district court's finding of mootness, holding "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." *Id.* at 766.

The district court erred in finding Appellees' settlement offers rendered moot Appellants' FDCPA claims because the settlement offers did not offer full relief. *See id.* Each of the Appellants requested that the district court enter judgment in his or her favor and against an Appellee as part of the prayer for relief in the complaint. Appellees' settlement offers, however, did not offer to have judgment entered against them. Because the settlement offers were not for the full relief requested, a live controversy remained over the issue of a judgment, and the cases were not moot. *See Friends of Everglades,* 570 F.3d at 1216.

A judgment is important to Appellants because the district court can enforce it. Instead, with no offer of judgment accompanying Appellees' settlement offers, Appellants were left with a mere promise to pay. If Appellees did not pay, Appellants faced the prospect of filing a breach of contract suit in state court with its attendant filing fees-resulting in two lawsuits instead of just one.

III. CONCLUSION

We hold the failure of Appellees to offer judgment prevented the mooting of Appellants' FDCPA claims.[9] The district court erred in concluding Appellees' offers of settlement were for full relief such that Appellants' cases were mooted. We reverse the dis-

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[9] Federal Rule of Civil Procedure 68 provides a procedure for a party wishing to submit an offer of judgment. Notably, the purpose of Rule 68 comports with Appellees' goal of settlement. *See Marek v. Chesny*, 473 U.S. 1, 5, 105 S. Ct. 3012, 3014 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation.")

trict court's dismissal of Appellants' claims for lack of subject matter jurisdiction, and remand for further proceedings consistent with this opinion.[10]

REVERSED AND REMANDED.

[10] Because we conclude Appellees' offers did not moot Appellants' claims, we do not address Appellants' alternate argument that the claims were not moot because the offers did not provide for a sum certain of attorneys' fees and costs. We note that if a judgment is entered by the district court, it will retain jurisdiction to resolve any attorneys' fees and costs disputes. *See, e.g., Sahyers v. Prugh, Holliday & Karatinos, P.L.,* 560 F.3d 1241, 1243 (11th Cir. 2009).