No. 18-

IN THE

Supreme Court of the United States

ZOCDOC, INC.,

Petitioner,

v.

RADHA GEISMANN, M.D., P.C.,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

In *Campbell-Ewald Co. v. Gomez*, 577 U.S. ___, 136 S. Ct. 663, 672 (2016), this Court held that an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 was insufficient to "moot" a plaintiff's claim. But the Court reserved the question of "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* Chief Justice Roberts noted in dissent that "the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court." *Id.* at 683 (Roberts, C.J., dissenting). This appeal gives the Court the opportunity to answer the *Campbell-Ewald* hypothetical.

The questions presented are:

1. Did the Second Circuit err in finding that the deposit of $20,000.00 with the district court under Federal Rule of Civil Procedure 67, payment of that amount (plus interest) by check delivered to the plaintiff, and entry of the precise individual injunctive relief requested by the plaintiff left the plaintiff "emptyhanded"?

2. Did the Second Circuit err in finding that even if the plaintiff had received complete individual relief, the plaintiff retained standing to proceed as an adequate representative of the putative class?

PARTIES TO THE PROCEEDING

Petitioner ZocDoc, Inc. ("ZocDoc") is the defendant in the district court and appellee in the court of appeals. Respondent Radha Geismann, M.D., P.C. ("Geismann") is the plaintiff in the district court and appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner ZocDoc states that it is a privately held corporation. ZocDoc is a digital marketplace that connects patients with doctors of their choosing and enables them to instantly book medical appointments online. Patients use ZocDoc's search platform, free of charge, to independently discover a wide selection of healthcare providers that fit the criteria they input. ZocDoc does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This case concerns whether a defendant in a putative class action lawsuit can fully satisfy the claim of the individual named plaintiff, resulting in a judgment for the plaintiff and dismissal of the class allegations, without prejudice. This issue was reserved by the Court in *Campbell-Ewald Co. v. Gomez*, 577 U.S. ___, 136 S. Ct. 663, 672 (2016), which held that an unaccepted offer of judgment under Federal Rule of Civil Procedure 68 was insufficient to "moot" a plaintiff's claim but stated that "[w]e need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."

This hypothetical is manifest in this case, and it presents a substantial question with deep importance to putative class action litigation nationwide: How should a case proceed when the defendant has deposited the full value of a putative class representative's individual claim with the court and subsequently seeks judgment (including individual injunctive relief)? The Second Circuit held that even when a defendant had deposited funds with the district court and agreed to entry of individual injunctive relief, the plaintiff's individual claim was not satisfied or extinguished. (App., *infra*, p. 4a). The Second Circuit further found that the plaintiff was not afforded full relief because it was not given a "fair opportunity to show that class certification is warranted." (App., *infra*, p. 17a). But those findings are inconsistent with this Court's precedent and provide defendants no means of resolving a case in which the plaintiff "won't take 'yes' for

an answer." *Campbell-Ewald*, 136 S. Ct. at 683 (Roberts, C.J., dissenting). Accordingly, these issues warrant the Court's review.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 1a-18a) is reported at 909 F.3d 534. The opinion of the district court (App., *infra*, pp. 24a-38a) is reported at 268 F. Supp. 3d 599.

JURISDICTION

The Second Circuit judgment was entered on November 27, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

This case was brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (App., *infra*, pp. 42a-75a, the "TCPA"), with the plaintiff alleging that it received two unauthorized faxes and that those faxes had inadequate opt-out notices. But the issues presented in this Petition are not limited to the TCPA. Rather, they could apply in any context in which a putative class representative's individual damages could be definitively ascertained and provided by the defendant, leading a court to exercise its discretion and enter individual judgment (including individual injunctive relief) against that defendant before a class certification decision. These issues squarely implicate a fundamental constitutional question: Does Federal Rule of Civil Procedure 23 (App., *infra*, pp. 76a-87a) trump Article III of the U.S. Constitution (App.,

infra, pp. 39a-40a)? This question also implicates the Rules Enabling Act, 28 U.S.C. § 2072 (App., *infra*, p. 41a).

STATEMENT OF THE CASE

A. Legal Framework

Courts have long wrestled with the question of what should happen if the defendant offers or tenders complete relief to an individual plaintiff in a putative class or mass action before a class certification decision. In *Campbell-Ewald*, 136 S. Ct. at 672, this Court established that a mere ***offer*** of complete relief, without more, was inadequate to fully satisfy the plaintiff's claim. But the Court did not rule out the possibility that a defendant in a putative class action ***could*** fully satisfy or extinguish a named plaintiff's claim, leading to a judgment in the plaintiff's favor and dismissal (without prejudice) of the class allegations. In fact, the majority in *Campbell-Ewald* specifically reserved the question of what should happen "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment." *Id.* And the dissent indicated that depositing funds with the district court might satisfy the plaintiff's claim, reasoning that "the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court." *Id.* at 683 (Roberts, C.J., dissenting). But in this case, the Second Circuit rejected this approach, finding that a district judge lacks discretion to enter individual judgment for the plaintiff in such a scenario.

B. Factual and Procedural Background

In 2012, ZocDoc, an online medical care appointment booking service, allegedly sent two faxes to respondent Geismann, a medical office. Geismann, claiming that the faxes were sent without consent and that the faxes lacked adequate opt-out notices, filed a putative class action lawsuit under the TCPA on January 10, 2014, in Missouri state court. ZocDoc removed the case to the United States District Court for the Eastern District of Missouri on the basis of federal question jurisdiction. *See* 28 U.S.C. § 1331. ZocDoc then successfully moved to transfer the case to the United States District Court for the Southern District of New York on August 26, 2014, because, among other reasons, ZocDoc is headquartered in New York, New York.

Under the TCPA, Geismann's maximum damages are $1,500 per fax, for a total dollar amount of $3,000 for the two faxes at issue. *See* 47 U.S.C. § 227(b)(3). After ZocDoc's removal of the case to federal court, ZocDoc made an offer of judgment pursuant to Federal Rule of Civil Procedure 68 for $6,000 and an individual injunction prohibiting ZocDoc from engaging in the alleged statutory violations in the future. On April 8, 2014, Geismann rejected the offer. After the case was transferred to the U.S. Southern District of New York, the district court entered an order granting judgment in favor of Geismann and against ZocDoc for the full amount of the offer of judgment ($6,000), plus injunctive relief, and dismissing the class claims without prejudice. *See Geismann v. ZocDoc, Inc.*, 60 F. Supp. 3d 404, 407 (S.D.N.Y. 2014) ("*Geismann I*").

Although the district court's judgment provided Geismann with more money than it could hope to recover

by litigating the merits of its case, as well as the individual injunctive relief that Geismann had requested, Geismann appealed the district court's ruling to the Second Circuit. While that appeal was pending, the Supreme Court decided *Campbell-Ewald*. ZocDoc subsequently sought, and received, leave from the district court to deposit $6,100.00 with the Clerk of Court.

The Second Circuit overruled the district court's decision, finding that "[a]n unaccepted Rule 68 offer of judgment does not render an action moot." *Geismann v. ZocDoc, Inc.*, 850 F.3d 507, 513 (2d Cir. 2017) ("*Geismann II*"). But the court went on to say that "we need not, and do not, decide whether a different outcome would result if the facts here matched the *Campbell-Ewald* hypothetical." *Id.* at 515. The court expressly acknowledged that "the district court may, in its discretion, permit ZocDoc to deposit with the court 'any part of the relief sought.'" *Id.*

On remand, ZocDoc did not renew its offer of judgment, but rather sought to deposit an ***additional*** $13,900 with the district court clerk, an amount that would erase any doubt about whether the full monetary value of Geismann's claim had been satisfied. Although Geismann has argued that it is entitled to more than $3,000 in statutory damages, Geismann has repeatedly admitted that even under its damages theory, the maximum amount of damages it could possibly recover is $12,000.[1]

1. *See Geismann v. ZocDoc, Inc.*, Case No. 14-3708 (2nd Cir.), Docket Entry 40, at pp. 28-29 ("[U]nder Plaintiff's theory, ZocDoc would have to offer $12,000 to cover 'each such violation' of the TCPA implementing regulations, given the eight independent opt-out-notice violations in the **two faxes** attached to the FAC, just to satisfy Plaintiff's individual claims.") (emphasis added);

The district court granted ZocDoc's motion to deposit the funds with the Clerk of Court, as well as ZocDoc's pre-motion request for leave to file a summary judgment motion. *See Geismann v. ZocDoc, Inc.*, 268 F. Supp. 3d 599, 605 (S.D.N.Y. 2017) ("*Geismann III*") (App., *infra*, pp. 24a-38a). *Geismann III* acknowledged that ZocDoc intended to invoke the *Campbell-Ewald* hypothetical.

ZocDoc made that additional deposit on August 17, 2017, meaning that a total of $20,000 (plus interest) is now in escrow with the Clerk of Court for payment to Geismann. Based on the funds deposited with the district court, ZocDoc moved for summary judgment under Federal Rule of Civil Procedure 56, arguing that Geismann's individual damages claim had been more than satisfied by the amount deposited with the court for Geismann's benefit, that individual injunctive relief should be entered against ZocDoc, and that the class allegations should be dismissed without prejudice. On September 25, 2017, the district court granted ZocDoc's motion, entering a judgment for Geismann of $20,000 plus accrued interest, entering an injunction against ZocDoc's sending unsolicited faxes to Geismann in the future, and dismissing the class allegations, without prejudice. (App., *infra*, pp. 19a-20a).

Geismann v. ZocDoc, Inc., Case No. 16-0663 (2nd Cir.), Docket Entry 28, at p. 13 ("ZocDoc's deposit of $6,100 does not satisfy Plaintiff's entire individual demand of $12,000 on Plaintiff's theory that Plaintiff may recover statutory damages for multiple TCPA violations per fax."); *id.* at p. 32 ("Plaintiff has consistently maintained at the district court and before this Court in No. 14-3708 that it is entitled to recover statutory damages of up to $1,500 for each of eight independent TCPA violations in the **two faxes it received**. . . . That would total $12,000 for Plaintiff's individual statutory damages.") (emphasis added).

On October 5, 2017, the district court issued a check payable to Geismann for $20,052.12 and sent it to Geismann's counsel. Geismann returned the check to the district court on October 10, 2017.

Geismann again appealed the district court's order. On November 27, 2018, the Second Circuit issued its ruling. The court vacated the district court's judgment, holding that "[t]he deposit of funds in the district court registry, without more, leaves a plaintiff 'emptyhanded' because the deposit alone does not provide relief to him or her." *Geismann v. ZocDoc, Inc.,* 909 F.3d 534, 541 (2d Cir. 2018) ("*Geismann IV*") (App., *infra*, p. 13a). Thus, the court determined that ZocDoc's deposit of funds and agreement to individual injunctive relief, followed by the district court's sending a check for $20,052.12 to Geismann, were inadequate to satisfy Geismann's claim, meaning the district court should not have granted judgment to the plaintiff and dismissed the class claims without prejudice. (App., *infra*, p. 17a). Moreover, the court held that Geismann was not afforded full relief because it was not given a "fair opportunity to show that class certification is warranted." (App., *infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule 10(c), a petition for writ of *certiorari* can be granted where a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Here, the Court should grant the Petition on both grounds. By presenting the precise question left

unresolved in *Campbell-Ewald*, this case implicates deeply important questions about the interplay between Article III standing and Federal Rule of Civil Procedure 23 that should be resolved by this Court. Moreover, the Second Circuit's ruling conflicts with the precedent of this Court holding that a plaintiff should not be allowed to persist with litigation after the plaintiff has been made whole.

A. The Second Circuit's ruling addresses federal legal questions of deep nationwide importance that should be addressed by this Court.

The issue of how district courts may, in their discretion, respond to tenders of complete individual relief to named plaintiffs in putative class actions before a class certification decision is a critical question in countless cases nationwide. The Court did not have to address this issue at all in *Campbell-Ewald* because that case involved an unaccepted offer of judgment. But the Court made clear that tendering complete relief is ***different*** from making an unaccepted offer. *Campbell-Ewald*, 136 S. Ct. at 672.

1. Deposit under Rule 67, subsequent mailing of a check, and entry of individual injunctive relief are fundamentally different from an offer under Rule 68.

In reversing the district court, the Second Circuit reasoned that "[t]he deposit of funds in the district court registry, without more, leaves a plaintiff 'emptyhanded.'" (App., p. 13a). That is false. The deposit clearly was made to pay Geismann, and the district court sent a check to Geismann. Moreover, the district court entered individual injunctive relief for Geismann.

The actions taken by ZocDoc and the district court are ***precisely*** what Chief Justice Roberts highlighted as a potential solution in his *Campbell-Ewald* dissent, and the *Campbell-Ewald* hypothetical was explicitly invoked by the district court in *Geismann III*. (App., *infra*, p. 37a). In *Campbell-Ewald*, Chief Justice Roberts, joined by Justices Alito and Scalia, noted that the "easy answer" to the question of whether a defendant can really satisfy a settlement offer is to "have the firm ***deposit a certified check with the trial court***." *Campbell-Ewald*, 136 S.Ct. at 680 (Roberts, C.J., dissenting) (emphasis added). Moreover, Chief Justice Roberts found that "the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court." *Id.* at 683; *see also id.* at 684 (Alito, J. dissenting) ("[A] defendant might deposit the money with the district court (or another trusted intermediary) on the condition that the money be released to the plaintiff….").

The reasoning of Chief Justice Roberts and Justice Alito recognizes the critical difference between an ***offer*** under Rule 68 and a ***deposit*** under Rule 67. The Court in *Campbell-Ewald* expressed concerns about leaving the plaintiff "emptyhanded." *Id.* at 672. But unlike the plaintiff in *Campbell-Ewald*, Geismann was not left "emptyhanded" — the district court sent Geismann a check for more than the value of its claim, plus interest, Geismann elected to return the check, that money remains on deposit with the district court for Geismann's benefit (and continues to accrue interest), and the district court entered an injunction providing Geismann with its requested individual relief. To suggest, as the Second Circuit did, that this leaves Geismann "emptyhanded" like the plaintiff in *Campbell-Ewald* is absurd.

2. A plaintiff whose individual claim has been satisfied should not be allowed to continue as a putative class representative.

The Second Circuit's finding that Geismann has a concrete interest in this case even though its individual claim has been satisfied creates significant constitutional and policy concerns related to litigation of putative class actions. The Second Circuit's holding elevates the procedural mechanisms of Federal Rule of Civil Procedure 23 over the fundamental constitutional requirement of Article III standing. As renowned constitutional scholar Martin Redish has noted:

> It is important to keep in mind that a lawsuit does not "arise" under Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in the federal courts. The legal rights to be adjudicated, rather, are substantively created by some recognized legal authority — a legislative body, a court, or the Constitution.

Martin H. Redish, WHOLESALE JUSTICE: DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (Stanford Books 2009), at p. 3 ("Redish").[2]

2. This work has been cited favorably by the Seventh Circuit. *See Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014) (citing Redish on the abuse of the class action mechanism). Additionally, Redish is widely considered to be an authority on class action issues, with other publications of his having been cited by the First, Third, and Ninth Circuits. *See In re Lupron Mktg. & Sales Practices Litigation*, 677 F.3d 21, 35 (1st Cir. 2012); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

Rule 23, of course, was enacted by the Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2072. Because the Court (by design) is not elected by the American people, there is no democratic recourse if it enacts rules that alter or create substantive rights. For that reason, the Rules Enabling Act specifically states that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." *Id.* at (b); *see also Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'"); Fed. Rule Civ. Proc. 82 ("[R]ules shall not be construed to extend . . . the [subject-matter] jurisdiction of the United States district courts."). Relying on this principle, the Court in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), held that "[t]here is no federal general common law."

The Second Circuit's application of Rule 23 — allowing Geismann's case to proceed as a putative class action despite full individual satisfaction because Geismann did not have a "fair opportunity" to pursue class certification — would create standing to litigate where it otherwise would not exist, thereby modifying substantive law in contravention of the Rules Enabling Act, the Court's holding in *Amchem*, and Rule 82.

This is the fundamental problem with affording too much weight to Rule 23. "Under the guise of procedure, class actions often effect dramatic alterations in the DNA of the underlying substantive law. . . . Substantive law is altered, not through resort to traditionally recognized democratic procedures but rather by what

is effectively a procedural shell game." Redish, at p. 3; *see also Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005) ("It is axiomatic that Rule 23 cannot 'abridge, enlarge or modify any substantive right' of any party to the litigation."); *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) ("A class action is merely a procedural device; it does not create new substantive rights."); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 346 (7th Cir. 1997) ("The application of Rule 23 does not abridge, enlarge or modify any substantive right."); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (stating that the federal class-action procedure set forth in Rule 23 "is a rule of procedure and creates no substantive rights or remedies enforceable in federal court").

The question of whether a defendant can satisfy an individual putative class action plaintiff's claim has significant implications for putative class action litigation, particularly in the TCPA context. TCPA lawsuits, which are often filed as putative class actions that seek $500 to $1,500 per call or fax in statutory damages, now comprise a significant portion of the federal judiciary's civil case load. In 2016 and 2017, more than 4,000 TCPA cases were filed ***per year***. *See* WebRecon Stats for Dec 2017 & Year In Review (2018).[3] "American businesses have been besieged, [with] seemingly no industry . . . safe from TCPA litigation." U.S. Chamber Institute for Legal Reform, TCPA Litigation Sprawl, 1-5 (Aug. 2017).[4]

3. *Available at* https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review (last visited February 25, 2019).

4. *Available at* https://www.instituteforlegalreform.com/uploads/ sites/1/TCPA_Paper_Final.pdf (last visited February 25, 2019).

Before being nominated to the Court, Justice Kavanaugh identified the serious problem created by the significant statutory damages in the TCPA for actions that cause little-to-no harm. Justice Kavanaugh wrote of the TCPA: "Let that soak in for a minute: [Defendant] was potentially on the hook for $150 million for failing to include opt-out notices on faxes that the recipients had given [Defendant] permission to send." *Bais Yaakov of Spring Valley v. FCC,* 852 F.3d 1078, 1081 (D.C. Cir. 2017) (Kavanaugh, J.). Notably, failure to include an adequate opt-out notice is one of the allegations that Geismann has made in this case.

The Court should provide defendants with a tool to combat these sorts of outlandish results by establishing that it is within the discretion of the district court judge, before a class certification decision, to enter an individual judgment once the defendant has tendered and acquiesced to complete relief.

The *Campbell-Ewald* decision certainly left the door open for this approach — and the dissent expressly advocated for it. But many lower courts nonetheless have viewed tenders of complete individual relief with suspicion or outright hostility and have been unwilling to enter individual judgments or even allow defendants to deposit funds.[5]

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5. *See* Katrina Christakis, Jeff Pilgrim, James Morrissey, "'So You're Telling Me There's A Chance!': The Post-Campbell-Ewald Possibility Of Mooting A Class Action By 'Tender' Of Complete Relief," 71 Consumer Fin. L.Q. Rep. 237, 253 (2017) ("[T]he predominant attitude among courts that have addressed such tenders seems to be either suspicion or outright hostility.")

The Court should grant the Petition to provide guidance on whether Rule 23 trumps the constitutional requirement of individual Article III standing.

B. The Second Circuit's ruling is inconsistent with this Court's precedent.

The Second Circuit concluded that the district court did not have the discretion to enter individual judgment for Geismann over its objection. But there appears to be little doubt among the Justices that "a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 85 (2013) (Kagan, J., dissenting). The dissent by Justice Kagan in *Genesis* was joined by Justices Ginsburg, Breyer, and Sotomayor, and it was adopted by the majority in *Campbell-Ewald*. 136 S. Ct. at 669-70. The overriding principle — that a district court has the discretion to enter judgment when the defendant has "unconditionally surrendered" — also underlies Chief Justice Roberts' dissent in *Campbell-Ewald*. And this notion is consistent with earlier Supreme Court decisions finding that a plaintiff's claim can be fully satisfied by unilateral action when the claim is actually ***extinguished***. *See California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 313-14 (1893) (defendant paid full amount demanded into a bank account in plaintiff's name); *Little v. Bowers*, 134 U.S. 547, 556 (1890) (defendant made payment to satisfy tax claim); *San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138, 141 (1885) (same); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 100 (2013) (plaintiff's claim was extinguished by the defendant's unilateral covenant not

to sue); *Alvarez v. Smith*, 558 U.S. 87, 97 (2009) (plaintiff's claim was extinguished by the unilateral return of property seized by police).

Despite this clear authority, many district courts and circuit courts have been unwilling to exercise this discretion in putative class actions, often quoting the language of the *Campbell-Ewald* majority indicating that "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." 136 S. Ct. at 672. But to be afforded this opportunity, the plaintiff must have a "***live claim of her own***." *Id.* (emphasis added). Once a district court has entered judgment, the individual plaintiff's claim is no longer "live" and the court need not concern itself with providing this "fair opportunity." The Court should grant the Petition to clarify this issue.

As noted above, the aspect of *Campbell-Ewald* that made it different from the historical full satisfaction cases is not present here. In *Campbell-Ewald*, the Court expressed concern about the fact that the defendant's unaccepted offer would leave the plaintiff "emptyhanded." *Id.* But Geismann is emptyhanded (if at all) only by its own choosing — the funds that would provide Geismann with more than complete relief have been on deposit with the district court Clerk of Court since August 17, 2017, available to Geismann at any time. Moreover, at the district court's order, the Clerk sent Geismann a check for the amount of the judgment (plus interest), which Geismann returned. And the district court entered the individual injunctive relief requested by Geismann. Geismann is not emptyhanded; Geismann simply "won't take 'yes' for an answer." *Id.* at 683 (Roberts, C.J., dissenting).

The Court should grant the Petition to answer the *Campbell-Ewald* question (which in light of this case is no longer hypothetical) and hold that (1) the deposit of more than complete relief with the district court under Rule 67, payment of that amount (plus interest) by check delivered to the plaintiff, and entry of the precise individual injunctive relief requested by the plaintiff do not leave the plaintiff "emptyhanded" and (2) once a plaintiff has received complete individual relief, the plaintiff lacks standing to proceed as an adequate representative of a putative class.

CONCLUSION

The Petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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February 25, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 27, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017
Docket No. 17-2692

RADHA GEISMANN, M.D., P.C., individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ZOCDOC, INCORPORATED,

Defendant-Appellee,

JOHN DOES 1-10,

Defendants.

May 14, 2018, Argued;
November 27, 2018, Decided

Before: SACK AND RAGGI, *Circuit Judges*, and GARDEPHE, *District Judge*.*

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* Judge Paul G. Gardephe, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

Radha Geismann, M.D., P.C., appeals from a judgment of the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*) dismissing its putative class action suit against the defendant ZocDoc, Inc., alleging violations of the Telephone Consumer Protection Act. ZocDoc first attempted to render Geismann's action moot by submitting a settlement offer that would afford Geismann complete relief for its individual claims. Geismann rejected the offer. The district court subsequently entered judgment in Geismann's favor in the amount and under the terms of the unaccepted offer and dismissed the action for lack of subject matter jurisdiction on the ground that it had become moot. We vacated the district court's judgment and remanded the case to the district court for further proceedings. ZocDoc again attempted to moot Geismann's action by depositing $20,000, in full settlement of Geismann's individual claims, in the district court's registry. The district court concluded that ZocDoc's action successfully mooted Geismann's individual claim and putative class action, and accordingly entered judgment in Geismann's favor and dismissed the action. We conclude that the district court should not have entered judgment based on ZocDoc's deposit, nor should it have dismissed Geismann's action on that basis. Accordingly, the district court's judgment is.

VACATED and REMANDED for further proceedings.

Appendix A

SACK, *Circuit Judge*:

Radha Geismann, M.D., P.C. ("Geismann") filed a class action complaint against ZocDoc, Inc. ("ZocDoc") in the United States District Court for the Southern District of New York, alleging that it[1] received unsolicited telecopies (colloquially and hereinafter "faxes") from ZocDoc in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* After Geismann filed the complaint and moved for class certification, ZocDoc made a settlement offer to Geismann as to its individual claims pursuant to Federal Rule of Civil Procedure 68; Geismann rejected the offer. The district court (Louis L. Stanton, *Judge*) dismissed the action for lack of subject matter jurisdiction, *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 60 F. Supp. 3d 404 (S.D.N.Y 2014) ("*Geismann I*"), reasoning that the rejected offer rendered the entire action moot. The court therefore entered judgment in favor of Geismann. Geismann appealed. Relying in large part on the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), we vacated the judgment and remanded the matter to the district court for further proceedings. *See Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 850 F.3d 507 (2d Cir. 2017) ("*Geismann II*").

On remand, ZocDoc attempted to use another procedural rule to settle Geismann's individual claims: ZocDoc requested and obtained leave from the district

1. Because the plaintiff is "Radha Geismann, M.D., *P.C.*", we refer to the plaintiff as "it" rather than "she" or "her."

court to deposit funds in the court's registry pursuant to Federal Rule of Civil Procedure 67. The funds that ZocDoc deposited with the court represented what ZocDoc regarded as the maximum possible damages Geismann could receive for its individual TCPA claims. The district court agreed with ZocDoc that its deposit mooted Geismann's individual claim, and accordingly entered judgment in favor of Geismann and dismissed what remained of the action. *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 268 F. Supp. 3d 599 (S.D.N.Y. 2017) ("*Geismann III*"). We conclude that this was error and return the case to the district court again for further proceedings.

BACKGROUND

The Complaint

Geismann, a Missouri professional corporation, alleges that it received from ZocDoc, a Delaware corporation, two unsolicited faxes advertising a "patient matching service" for doctors. *See* Corrected First Amended Class Action Complaint ¶¶ 8-9, at Joint Appendix ("J.A.") 3 & Exhibits A and B to the Corrected First Amended Class Action Complaint, at J.A. 17-18. Both faxes stated, in a legend at the bottom of the fax, that if the recipient wished to "stop receiving faxes," he or she could call the domestic telephone number provided. *See* Exhibits A and B to the Corrected First Amended Class Action Complaint, at J.A. 17-18.

In 2014, Geismann filed this putative class action against ZocDoc in Missouri state court, alleging that these faxes were unsolicited advertisements in violation of the TCPA, 47 U.S.C. § 227. The TCPA prohibits, *inter alia*, the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless" the sender and recipient have an "established business relationship," the recipient volunteered its fax number directly to the sender or through voluntary participation in a directory or other public source, or the fax meets specified notice requirements. *Id.* § 227(b)(1)(C). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." *Id.* § 227(a)(5). Geismann sought between $500 and $1,500 in statutory damages for each alleged TCPA violation, an injunction prohibiting ZocDoc from sending similar faxes in the future, and costs.[2]

On the same day that it filed its complaint in state court, Geismann filed a separate motion for class certification pursuant to Missouri law. Geismann defined the proposed class as "[a]ll persons who on or after four years prior to the filing of this action, were sent telephone

2. The TCPA includes a private right of action for injunctive relief and damages in the amount of "actual monetary loss" or "$500 . . . for each such violation, whichever is greater," to be tripled at the court's discretion if the defendant "willfully or knowingly violated" the statute. 47 U.S.C. § 227(b)(3).

facsimile messages of material advertising [a] patient matching service for doctors by or on behalf of Defendant." *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, No. 14-cv-7009 (S.D.N.Y.), ECF No. 5, at 2.

On March 13, 2014, ZocDoc removed the action to the United States District Court for the Eastern District of Missouri. Two weeks later, ZocDoc made an offer of judgment to Geismann pursuant to Federal Rule of Civil Procedure 68[3] for: (i) $6,000, plus reasonable attorney's fees, in satisfaction of Geismann's individual claims, and (ii) an injunction prohibiting ZocDoc from engaging in the alleged statutory violations in the future. Geismann rejected ZocDoc's offer because it provided no relief to the other members of the class. ZocDoc subsequently moved to transfer the case to the United States District Court for the Southern District of New York. The district court granted ZocDoc's motion on August 26, 2014.

Geismann I Proceedings in the District Court

After the case was transferred to the Southern District of New York, ZocDoc moved to dismiss the complaint,

3. Rule 68 provides that "[a]t 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." Fed. R. Civ. P. 68(a). If the offer is accepted, "either party may then file the offer and notice of acceptance, plus proof of service," at which time the clerk must enter judgment. *Id.* A party's decision not to accept a Rule 68 offer of judgment comes with consequences: if the judgment that the offeree ultimately obtains is not more favorable than the unaccepted offer, the offeree is on the hook for the offeror's post-offer costs. *Id.* 68(d).

primarily on the ground that its offer of judgment provided full satisfaction of Geismann's claim, so the action was moot. On September 26, 2014, the district court granted ZocDoc's motion to dismiss for lack of subject-matter jurisdiction, reasoning that, as to Geismann's individual claims, ZocDoc's Rule 68 offer "more than satisfies any recovery Geismann could make," so "there remain[ed] no case or controversy." *Geismann I*, 60 F. Supp. 3d at 406-07. The court denied Geismann's motion for class certification, reasoning that Geismann could not adequately represent the class without a claim of its own. *Id.* at 407. The court accordingly entered judgment in the amount and under the terms of the rejected settlement offer, and dismissed the action as moot. *Id.*

Geismann timely appealed.

Geismann II

On January 20, 2016, after we held oral argument but before we issued a decision, the Supreme Court handed down its decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016). *Campbell-Ewald*'s procedural posture was similar to the *Geismann I* appeal then before us: The plaintiff filed a putative TCPA class action and the defendant made a Rule 68 offer of judgment to satisfy the plaintiff's individual claims, which the plaintiff rejected. *Id.* at 667-68. The Supreme Court decided that the defendant's unaccepted Rule 68 offer did not render the action moot because "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect" on the plaintiff's

individual claim. *Id.* at 670 (internal quotation marks omitted). With no settlement offer still operative, the Supreme Court reasoned, "the parties remained adverse" and "both retained the same stake in the litigation they had at the outset." *Id.* at 670-71. The Supreme Court further noted that "[w]hile a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* at 672 (internal citation omitted). However, the Supreme Court left open the possibility that "the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount," reserving that question "for a case in which it is not hypothetical." *Id.*

On February 1, 2016, while Geismann's appeal in *Geismann II* remained pending and after the Supreme Court issued its decision in *Campbell-Ewald*, ZocDoc filed a motion with the district court seeking to deposit a check in the amount of $6,100 payable to the clerk of the district court in satisfaction of judgment. The district court granted the request, reasoning that the Supreme Court's decision in *Campbell-Ewald* "favor[s] deposit of judgments with the Court" in these circumstances. Order for Deposit in Interest Bearing Account, filed February 3, 2016, at J.A. 19-20.

On March 9, 2017, we decided Geismann's appeal. *See Geismann II*, 850 F.3d 507. We vacated the district court's judgment and remanded the case for further proceedings. We concluded that "[i]n light of *Campbell-*

Ewald, the district court's conclusion in this case that Geismann's claim was 'mooted by the amount and content of the Rule 68 offer made by ZocDoc' [was] incorrect." *Id.* at 512 (quoting *Geismann I*, 60 F. Supp. 3d at 407). We explained that, notwithstanding ZocDoc's post-judgment deposit with the district court, the case did not "match[] the hypothetical posed by *Campbell-Ewald*," reasoning that because ZocDoc's rejected offer of settlement had "no continuing efficacy," the deposit was made "pursuant to and in furtherance of a judgment that should not have been entered in the first place." *Id.* at 512, 514 (internal quotation marks omitted). We declined to say whether judgment entered on the basis of a deposit would be permissible. *See id.* at 514-15 & n.16. We further determined that Geismann's class claim should not have been dismissed because its individual claim remained alive. *See id.* at 515. We directed that, on remand, "[a]lthough the district court may, in its discretion, permit ZocDoc to deposit with the court 'any part of the relief sought,'" under Federal Rule of Civil Procedure 67, "the basis for so granting the defendant leave to deposit must not be inconsistent with this opinion." *Id.*

Geismann III Proceedings in the District Court

On April 26, 2017, ZocDoc filed a letter motion with the district court seeking leave to deposit an additional $13,900 with the court under Federal Rule of Civil Procedure 67, explaining that "ZocDoc hereby makes an open-ended offer to Geismann with no expiration date of a total of $20,000.00 (twenty thousand dollars) and for all individual injunctive relief Geismann seeks in the

operative complaint."[4] J.A. 42. ZocDoc further urged that after depositing the funds, it would "seek to perfect the *Campbell-Ewald* hypothetical by filing a motion for summary judgment in which it will ask the Court to enter a judgment in favor of Geismann and against ZocDoc for the full amount of Geismann's individual claims and to dismiss the class allegations without prejudice." J.A. 43. Geismann rejected ZocDoc's offer, filed a letter opposing the motion to deposit, and urged the district court to proceed to consider class certification.

On July 28, 2017, the district court granted ZocDoc leave to deposit under Rule 67 and to file a motion for summary judgment. *See Geismann III*, 268 F. Supp. 3d at 601. The district court reasoned that "[t]here is a consequential difference between on the one hand a defendant's offer of an adequate amount in an offer of judgment whose utility depends on its being timely accepted under principles of contract and Fed. R. Civ. P. 68, and on the other hand a tender . . . which independently and fully satisfies a plaintiff's claim." *Id.* at 603-04. The district court then granted ZocDoc leave to deposit funds pursuant to Rule 67 because the deposit would enable ZocDoc to "make a cognizable, good-faith argument that this case should be terminated" on mootness grounds. *Id.* at 605.

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4. ZocDoc argued in the letter motion that although its "original deposit of $6,100.00 is enough to fully satisfy Geismann's individual monetary claims, ZocDoc has made the $20,000.00 offer to remove any possible argument that Geismann may be entitled to more." J.A. 42.

On August 25, 2017, ZocDoc filed a motion for summary judgment, arguing that its deposit and acquiescence to injunctive relief had made Geismann's claim moot and that the district court should therefore enter judgment in Geismann's favor. *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, No. 14-cv-7009, ECF No. 77, at 1-4 ("Geismann lacks standing because ZocDoc has tendered more than complete relief to Geismann and thus satisfied, or extinguished, Geismann's claim."). Geismann opposed ZocDoc's motion.

On September 25, 2017, the district court issued a two-page judgment granting ZocDoc's motion for summary judgment in favor of Geismann. The court ordered that, "[p]ursuant to this Court's Opinion and Order dated July 28, 2017," Geismann "shall recover from defendant ZocDoc, Inc. the sum of Twenty Thousand Dollars," and that ZocDoc is "enjoined, restrained, and forbidden from sending to plaintiff any faxes of any nature without express written prior approval from Plaintiff." Judgment at 1, J.A. 108. The district court further ordered that Geismann's motion for class certification and "all claims asserted on behalf of a purported class, are dismissed without prejudice for [Geismann's] lack of standing to represent or belong to the class." *Id.* at 2, J.A. 109. The district court directed the clerk to mail a check to the plaintiff in the amount due and to close the case. This timely appeal followed.[5]

5. After the notice of appeal was filed, on October 5, 2017, the clerk sent a check by overnight mail to Geismann, but Geismann rejected payment and returned the check to the clerk's office. The district court subsequently directed the clerk to invest the returned funds in an interest-bearing account.

Appendix A

DISCUSSION

On appeal, Geismann challenges the district court's orders insofar as they permitted ZocDoc to deposit funds pursuant to Rule 67, granted ZocDoc's motion for summary judgment, and dismissed Geismann's motion for class certification. As noted above, the district court based all three decisions on its conclusion that ZocDoc's Rule 67 deposit rendered Geismann's action moot. The focus of our analysis is on whether that conclusion was correct.

We begin with the Supreme Court's decision in *Campbell-Ewald*. The question before it was whether "an unaccepted offer to satisfy the named plaintiff's individual claim [is] sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated." 136 S. Ct. at 666. As the Seventh Circuit later observed, "nothing in this question [was] necessarily limited to a settlement offer presented pursuant to Federal Rule of Civil Procedure 68." *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541, 544 (7th Cir. 2017). Rather, as the Seventh Circuit noted, *id.*, the Supreme Court relied on a fundamental principle of contract law: An unaccepted offer is not binding on the offeree. Based on this principle, the Court concluded that the defendant's "settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy." *Campbell-Ewald*, 136 S. Ct. at 670. Like the Seventh Circuit, we see no material difference between a plaintiff rejecting a *tender* of payment (pursuant to Rule 67) and an *offer* of payment (pursuant to Rule 68). Indeed, other than their labels, once rejected, the two do not differ in

any meaningful way: In each case, "all that exists is an unaccepted contract offer, and as the Supreme Court recognized, an unaccepted offer is not binding on the offeree." *Fulton Dental*, 860 F.3d at 545.

Moreover, a key factor underlying the Supreme Court's holding in *Campbell-Ewald* was that the plaintiff "remained emptyhanded" once the defendant's Rule 68 settlement offer expired. 136 S. Ct. at 672. An unaccepted offer provides a plaintiff "no entitlement . . . to relief," so "the parties remained adverse; both retained the same stake in the litigation they had at the outset." *Id.* at 670-71. In other words, "a lawsuit—or an individual claim—becomes moot when a plaintiff *actually receives* all of the relief he or she could receive on the claim through further litigation." *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144 (9th Cir. 2016) (emphasis in original); *see also Gibson v. Brooks*, 175 F. App'x 491, 491 (2d Cir. 2006) (summary order) ("Because the only relief sought by plaintiff is a remand for a new trial, and because plaintiff has *already received* the benefit of a retrial . . . , we hold that plaintiff's appeal is moot and must be dismissed." (emphasis in original)).

The deposit of funds in the district court registry, without more, leaves a plaintiff "emptyhanded" because the deposit alone does not provide relief to him or her. "The Rule 67 procedure provides a place of safekeeping for disputed funds pending the resolution of a legal dispute, but it cannot be used as a means of altering the contractual relationships and legal duties of the parties." *LTV Corp. v. Gulf States Steel, Inc. of Ala.*, 969 F.2d 1050, 1063,

297 U.S. App. D.C. 50 (D.C. Cir. 1992); *see also Alstom Caribe, Inc. v. George P. Reintjes Co.*, 484 F.3d 106, 113 (1st Cir. 2007) ("The core purpose of Rule 67 is to relieve a party who holds a contested fund from responsibility for disbursement of that fund among those claiming some entitlement thereto."). Indeed, on its face, Rule 67 "is just a procedural mechanism that allows a party to use the court as an escrow agent." *Fulton Dental*, 860 F.3d at 544. It does not itself determine who is entitled to the money.

Rule 67 explicitly permits a party to deposit money "whether or not that party claims any of it" and directs that the funds be held in accordance with other statutory provisions, Fed. R. Civ. P. 67, including those that require the funds to be "deposited . . . in the name and to the credit of [the] court" and that permit their withdrawal only "by order of court," 28 U.S.C. §§ 2041, 2042. These provisions make clear that a party's deposit of funds with the court does not entitle another party to collect those funds.

In short, the Rule 67 procedure "is nothing like a bank account in the plaintiff's name—that is, an account in which the plaintiff has a right at any time to withdraw funds." *Fulton Dental*, 860 F.3d at 545; *cf. Campbell-Ewald*, 136 S. Ct. at 672 (leaving open hypothetical where defendant deposits full amount "*in an account payable to plaintiff*" (emphasis added)). By itself, then, ZocDoc's deposit of funds cannot be considered to have rendered Geismann's individual claims moot.

We also doubt that mootness is the correct legal concept to employ in analyzing the effect of ZocDoc's Rule 67 deposit. "A case becomes moot only when it is impossible

for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) (internal quotation marks omitted). By this standard, ZocDoc's Rule 67 deposit, by itself, could not have rendered Geismann's action moot. Geismann began this suit seeking damages and an injunction; after ZocDoc's deposit, Geismann had not yet "actually receive[d]" any funds, and although ZocDoc offered to submit to an injunction, it had not committed to stop sending the offending faxes.[6] *Chen*, 819 F.3d at 1144-46 (observing that expression of willingness to be enjoined does not mean plaintiff "received relief on his individual injunctive claim"). At that point in the litigation, the district court could still provide these remedies—and did so when it subsequently entered judgment in Geismann's favor on September 25, 2017. That judgment, which stipulated that a specified amount of damages should be paid and that an injunction should be entered, "is quintessentially a ruling on the merits of a case." *Fulton Dental*, 860 F.3d at 543. Accordingly, Geismann's individual claims could not have been "mooted" prior to that time by the Rule 67 deposit.

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6. We view ZocDoc's Rule 67 deposit as similar in certain respects to an accord pursuant to the doctrine of accord and satisfaction. We have explained that "[a]n agreement of one party to give, and another party to accept, in settlement of an existing or matured claim, a sum or performance other than that to which he believes himself entitled, is an accord," and "[t]he execution of the agreement is a satisfaction." *May Dep't Stores Co. v. Int'l Leasing Corp.*, 1 F.3d 138, 140 (2d Cir. 1993). An accord and satisfaction is an affirmative defense, but does not by itself render a case moot. *See* Fed. R. Civ. P. 8(c)(1) (recognizing accord and satisfaction as an affirmative defense).

While Rule 67 itself does not affect the vitality of a plaintiff's claims, those claims may of course become moot in other ways. Our decisions appear to recognize that where a defendant surrenders to "complete relief" in satisfaction of a plaintiff's claims, the district court may enter default judgment against the defendant—even without the plaintiff's agreement thereto—and "[t]hen, *after* judgment is entered, the plaintiff's individual claims will become moot for purposes of Article III." *Tanasi v. New Alliance Bank*, 786 F.3d 195, 200 (2d Cir. 2015) (emphasis in original); *see also Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013) (describing this process as "the typically proper disposition" under such circumstances); *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005) ("[A] [default] judgment would remove any live controversy from this case and render it moot.") This resolution recognizes, in part, a district court's discretion to "halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents [it] from accepting total victory." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 85, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013) (Kagan, J., dissenting); *see also McCauley*, 402 F.3d at 342 (recognizing plaintiff "is not entitled to keep litigating [its] claim simply because [the defendant] has not admitted liability"). But, a district court may not take that approach unless the defendant surrenders to the "*complete* relief" sought by the plaintiff, *Tanasi*, 786 F.3d at 200 (emphasis added), and "a judgment satisfying an individual claim does not give a plaintiff . . . exercising [its] right to sue on behalf of other[s] . . . 'all that [it] has . . . requested in the complaint (*i.e.*, relief for the class),'"

Genesis Healthcare, 569 U.S. at 85 (Kagan, J., dissenting) (quoting *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 341, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) (Rehnquist, J., concurring)); *see Chen*, 819 F.3d at 1147 (noting previous Supreme Court decisions' observation that a named plaintiff retains a "personal stake in obtaining class certification").

That is the case here. Even if the district court *first* entered judgment—enjoining ZocDoc from further faxes and directing the clerk of court to send Geismann a check for $20,000—and *thereafter* deemed Geismann's claims moot, that resolution would not have afforded Geismann *complete* relief. By rejecting the settlement offer and returning the clerk's check, Geismann effectively stated that its suit "is about more than the statutory damages to which it believes it is entitled; it is also about the additional reward that it hopes to earn by serving as the lead plaintiff for a class action. Nothing forces it to accept [ZocDoc's] valuation of the latter part of the case." *Fulton Dental*, 860 F.3d at 545. Indeed, as *Campbell-Ewald* states, "a would-be class representative with a live claim of [its] own *must* be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald*, 136 S. Ct. at 672 (emphasis added).

We therefore conclude that the district court must resolve the pending motion for class certification *before* entering judgment and declaring an action moot based solely on relief provided to a plaintiff on an individual

basis. If the motion is granted,[7] the class action may proceed. A conclusion otherwise would risk placing the defendant in control of a putative class action, effectively allowing the use of tactical procedural maneuvers to thwart class litigation at will. *See Roper*, 445 U.S. at 339 ("Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions[.]").

For these reasons, we conclude that ZocDoc's Rule 67 deposit did not provide Geismann with an entitlement to complete relief and therefore did not render its TCPA claim moot. The district court should not have entered judgment based on ZocDoc's deposit, nor should it have dismissed Geismann's action. The fact that Geismann's claim is not moot means both that its own claim is still viable and that the door remains open for possible class certification.

CONCLUSION

We have considered the parties' remaining arguments on appeal and find them to be without merit. For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further proceedings.

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7. Ultimately subject, of course, to a possible appeal to this Court.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 25, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14 Civ. 7009 (LLS)

RADHA GEISMANN, M.D., P.C.,

Plaintiff,

v.

ZOCDOC, INC.,

Defendant.

JUDGMENT

Pursuant to this Court's Opinion and Order dated July 28, 2017 (Doc. 73), defendant's motion for summary judgment (Doc. 76) in favor of plaintiff Radha Geismann, M.D., P.C., and against defendant ZocDoc, Inc. is granted and it is ORDERED, ADJUDGED and DECREED that:

1. Plaintiff Radha Geismann, M.D., P.C. shall recover from defendant ZocDoc, Inc. the sum of Twenty Thousand Dollars ($20,000);

2. Defendant ZocDoc, Inc. is enjoined, restrained and forbidden from sending to plaintiff any faxes of any nature without express written prior approval from plaintiff;

3. Plaintiff's allegations regarding possible additional unspecified, unidentified violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 by communications to plaintiff are dismissed without prejudice for failure to state a claim upon which relief can be granted;

4. Plaintiff's motion for class certification (Doc. 36), and all claims asserted on behalf of a purported class, are dismissed without prejudice for plaintiff's lack of standing to represent or belong to the class; and

5. The Clerk shall close this case and forthwith transmit by Federal Express overnight delivery, to plaintiff Radha Geismann, M.D., P.C., c/o Max G. Margulis, Esq., Margulis Law Group, 28 Old Belle Monte Rd., Chesterfield, MO 63017, the sum of $20,000 plus accrued interest being held on deposit for plaintiff's account pursuant to this Court's Order dated August 7, 2017 (Doc. 75).

Dated: New York, New York
September 25, 2017

/s/Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 7, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 14 Civ. 7009 (LLS) (KNF)

RADHA GEISMANN, M.D., P.C.,

Plaintiff,

v.

ZOCDOC, INC., *et al.*,

Defendants.

ORDER FOR DEPOSIT IN INTEREST BEARING ACCOUNT

WHEREAS, this matter came before the Court on defendant ZocDoc, Inc.'s request to deposit funds with the Clerk of the United District Court for the Southern District of New York, pursuant to Federal Rule of Civil Procedure 67, S.D.N.Y. Local Rule 67.1, and 28 U.S.C. § 2041;

WHEREAS, on September 26, 2014, the Court entered a judgment for $6,000.00 (six thousand dollars), plus reasonable attorneys' fees as determined by the Court, in favor of the plaintiff Radha Geismann, M.D.,

P.C. ("Geismann") and against ZocDoc, enjoined ZocDoc from sending any faxes to Geismann's number without proper opt-out notices under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and dismissed the class allegations;

WHEREAS, Geismann appealed the Court's Order to the Second Circuit, where the case remained pending until the Second Circuit vacated the judgment and issued its mandate on April 3, 2017;

WHEREAS, on February 3, 2016, while the matter was on appeal, the Court granted ZocDoc leave to deposit $6,100.00 (six thousand one hundred dollars) with the Clerk, to be placed in an interest-bearing account;

WHEREAS, on April 26, 2017, ZocDoc offered to Geismann a total of $20,000.00 (twenty thousand dollars) to resolve this matter, plus injunctive relief;

WHEREAS, ZocDoc has sought leave to deposit an additional $13,900.00 (thirteen thousand nine hundred dollars) with the Clerk, to be placed in an interest-bearing account;

WHEREAS, the proposed deposit and injunctive relief would invoke the hypothetical that has been discussed, but not ruled upon, in both *Geismann v. ZocDoc, Inc.*, 850 F.3d 507 (2d Cir. 2017) and *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663 (2016);

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WHEREAS, on July 28, 2017, the Court entered an Opinion and Order granting ZocDoc's request for leave to deposit an additional $13,900.00 (thirteen thousand nine hundred dollars) with the Clerk; and

WHEREAS, the Clerk has approved the form Order pursuant to Local Rule 67.1, IT IS ORDERED THAT:

1. Defendant ZocDoc, Inc. shall deposit $13,900.00 (thirteen thousand nine hundred dollars) with the Clerk, to be held with the $6,100.00 already deposited, payable to the plaintiff to secure a $20,000.00 judgement in favor of plaintiff.

2. The Clerk shall invest such funds in an interest-bearing account.

3. The Clerk shall deduct from the income on the investment a fee equal to ten percent (10%) of the income earned, but not exceeding the fee authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office.

4. ZocDoc shall serve a copy of this Order on the Clerk and the Financial Deputy of this Court pursuant to Local Rule 67.1.

Dated: New York, New York
August 7, 2017

/s/
LOUIS L. STANTON
U.S.D.J.

APPENDIX D — OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 28, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14 Civ. 7009 (LLS)

RADHA GEISMANN, M.D., P.C.,

Plaintiff,

- against –

ZOCDOC, INC.,

Defendant.

July 28, 2017, Decided
July 28, 2017, Filed

OPINION & ORDER

Defendant ZocDoc, Inc. requests leave to deposit $13,900.00 with the Clerk of Court and to move for summary judgment. For the following reasons, ZocDoc's request is granted.

Background

In 2014, plaintiff Radha Geismann, M.D., P.C., a Missouri professional corporation, filed a complaint

in Missouri state court, alleging that it received two unsolicited faxes from ZocDoc, in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, which, *inter alia*, prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement," unless "the unsolicited advertisement is from a sender with an established business relationship," the recipient volunteered its number to the sender, or the fax meets certain other notice requirements. *Id.* § 227(b)(1)(C).

Geismann seeks between $500.00 and $1,500.00 for each alleged TCPA violation, an injunction prohibiting ZocDoc from sending similar faxes in the future, and costs. It also filed a motion for class certification. On March 13, 2014, ZocDoc removed the action to the United States District Court for the District of Missouri. Two weeks later, ZocDoc made an offer of judgment pursuant to Fed. R. Civ. P. 68(a) for $6,000.00, plus reasonable attorney's fees, and an injunction prohibiting it from sending Geismann similar faxes in the future. On April 8, Geismann rejected the offer.

On April 18, 2014, ZocDoc moved to transfer the action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404(a), which the court granted. ZocDoc then moved to dismiss the complaint, arguing that its offer of judgment satisfied all of Geismann's claims, thereby mooting the action.

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On September 26, 2014, I granted ZocDoc's motion and entered judgment, holding that its offer of judgment "more than satisfies any recovery Geismann could make under the applicable statute" and as a result, "there remains no case or controversy before the Court." *Geismann v. ZocDoc, Inc.*, 60 F. Supp. 3d 404, 406-07 (S.D.N.Y. 2014), *vacated and remanded*, 850 F.3d 507 (2d Cir. 2017). Geismann appealed.

On January 20, 2016, during the pendency of Geismann's appeal to the Second Circuit, the Supreme Court decided *Campbell-Ewald Co. v. Gomez*, __ U.S. __, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), which resolved a circuit split over whether a defendant's unaccepted offer of judgment pursuant to Fed. R. Civ. P. 68 in full satisfaction of a plaintiff's claim moots that plaintiff's claim so as to deprive a federal court of the Article III "cases" and "controversies" jurisdictional requirement. In *Campbell-Ewald*, respondent Jose Gomez sued for damages pursuant to the TCPA for unsolicited text messages he received from petitioner Campbell. *Id.* at 667. Before the agreed-upon deadline for Gomez to file for class certification, Campbell made an offer of settlement pursuant to Fed. R. Civ. P. 68. *Id.* It offered to pay Gomez costs, excluding attorney's fees, and $1,503.00 for every unsolicited text message Gomez could show he had received. *Id.* at 668. Campbell also proposed an injunction barring it from sending further text messages in violation of the TCPA. *Id.* Gomez allowed Campbell's offer to expire after the fourteen days specified in Rule 68. *Id.* Campbell then moved for summary judgment pursuant to Fed. R. Civ. P. 12(b) (1). *Id.* It argued that its offer mooted Gomez's

claims and accordingly, there remained no Article III case or controversy to adjudicate. *Id.*

Holding that such an unaccepted offer does not moot an action, the majority adopted Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 133 S. Ct. 1523, 1532, 185 L. Ed. 2d 636 (2013) (Kagan, J., dissenting):

> "When a plaintiff rejects such an offer--however good the terms--her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer--like any unaccepted contract offer--is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.' *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 151 [7 S. Ct. 168, 30 L. Ed. 376] (1886). Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that '[a]n unaccepted offer is considered withdrawn.' Fed. Rule Civ. Proc. 68(b). So assuming the case was live before--because the plaintiff had a stake and the court could grant relief--the litigation carries on, unmooted." *Ibid.*

Campbell-Ewald, 136 S. Ct. at 670, quoting *Genesis Healthcare*, 133 S. Ct. at 1532 (Kagan, J., dissenting).

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The Supreme Court also raised a hypothetical which it declined to decide-- "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* at 672.

On February 1, 2016, ZocDoc requested leave to deposit $6,100.00 with the Clerk in satisfaction of its offer of settlement. I granted its request, noting "No principle or authority appears to prevent compliance with an unstayed judgment, even one under appeal." Dkt. No. 62. On February 5, 2016, ZocDoc deposited $6,100.00 with the Court's Clerk's Office, where it remains.

On March 9, 2017, the Second Circuit reversed and remanded my September 26, 2014 order and judgment, stating (850 F.3d at 512-13) (brackets and alterations in original):

> While this appeal was pending before us, the Supreme Court decided *Campbell-Ewald*. Its decision made clear that an unaccepted Rule 68 offer of judgment does not render an action moot. *Campbell-Ewald*, 136 S. Ct. at 670-71. Because that decision controls our review and is dispositive of the case at bar, we need not, and decline to, reach the issues raised by Geismann in its pre-*Campbell-Ewald* submissions.
>
> In *Campbell-Ewald*, the plaintiff sought individual and class-wide relief under the TCPA,

alleging that he and members of the putative class received unsolicited text messages sent by the defendant in violation of the statute. *Id.* at 667. The defendant, like ZocDoc, "proposed to settle [the plaintiff's] individual claim and filed an offer of judgment pursuant to Federal Rule of Civil Procedure 68," including an offer to pay "costs, excluding attorney's fees, and $1,503 per message," as well as "a stipulated injunction in which [the defendant] agreed to be barred from sending text messages in violation of the TCPA." *Id.* at 667-68. The plaintiff, like Geismann, declined the offer. *Id.* at 668. The Supreme Court concluded that an Article III "case" or "controversy" remained, Rule 68 offer notwithstanding, because "[a]n unaccepted settlement offer--like any unaccepted contract offer--is a legal nullity, with no operative effect." *Id.* at 670 (quoting *Genesis Healthcare Corp. v. Symczyk*,569 U.S. 66, 133 S. Ct. 1523, 1533, 185 L.Ed.2d 636 (2013) (Kagan, J., dissenting)). "[W]ith no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." *Id.* at 670-71.

In light of *Campbell-Ewald*, the district court's conclusion in this case that Geismann's claim was "mooted by the amount and content of the Rule 68 offer made by ZocDoc," *Geismann*, 60 F. Supp. 3d at 407, is incorrect. Rule 68 provides that, "[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." Fed. R. Civ. P. 68(a). "The plain purpose of Rule 68 is to encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 5, 105 S. Ct. 3012, 87 L.Ed.2d 1 (1985). Should the offeree decline the offer, however, it "is considered withdrawn." Fed. R. Civ. P. 68(b). *Campbell-Ewald* makes clear that such a "withdrawn" offer "ha[s] no continuing efficacy." 136 S. Ct. at 670. The district court's entry of judgment, therefore, imbued ZocDoc's offer with a power it did not possess.

The district court's conclusion in the case now before us is, of course, understandable, it having been reached before *Campbell-Ewald* was decided. And, as we have noted, "our prior case law has not always been entirely clear on this subject." *Tanasi*, 786 F.3d at 199. The district court also followed the "typically proper" procedure by "enter[ing] judgment against the defendant for the proffered amount and [ ] direct[ing] payment to the plaintiff consistent with the offer." *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013) (per curiam). But the basis upon which the district court entered judgment did not exist: An unaccepted Rule 68 offer of judgment does not render an action moot.

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The Second Circuit cautioned that Rule 23 being "harmonized" with Rule 68 might impair the hypothetical's application to class actions:

> We note, without deciding because the situation is not before us, that an attempt by the defendant to use the tactic described in the *Campbell-Ewald* hypothetical to "place [it] in the driver's seat," 136 S. Ct. at 672, might not work. The Supreme Court's criticism of similar tactics suggests that Rule 68 should be harmonized with Rule 23. See *id.* (describing a "kindred strategy" intended to "avoid a potential adverse decision" as a "gambit"); *cf. Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (stating that a court should not "short-circuit" a statutory collective action "by acceding to a defendant's proposal to make only the named plaintiff whole"). The Supreme Court has also acknowledged that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained obviously would frustrate the objectives of class actions," and "would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L.Ed.2d 427 (1980). However, we need not, and therefore do not, weigh in on whether further

> maneuvers by the defendant might render a motion to dismiss viable. We do no more than observe the obvious: an attempt to make use of the hypothetical posited in Campbell-Ewald is not guaranteed to bear fruit.

Id. at 515, n.8 (brackets in original).

On April 26, 2017, ZocDoc requested a pre-motion conference, in accordance with my individual practices, to "perfect the hypothetical contemplated by the Supreme Court in *Campbell-Ewald* and the Second Circuit in *Geismann*." ZocDoc stated:

> Specifically, to fully resolve Geismann's individual claims, ZocDoc hereby makes an open-ended offer to Geismann with no expiration date of a total of $20,000.00 (twenty thousand dollars) and for all individual injunctive relief Geismann seeks in the operative complaint, including but not limited to an injunction barring ZocDoc from ever sending any fax of any kind to Geismann in the future.

Dkt No. 69 at 2.

> After ZocDoc deposits the additional $13,900.00 (thirteen thousand nine hundred dollars), ZocDoc will seek to perfect the *Campbell-Ewald* hypothetical by filing a motion for summary judgment in which it will ask the Court to enter a judgment in favor of Geismann

> and against ZocDoc for the full amount of Geismann's individual claims and to dismiss the class allegations without prejudice.

Id. at 3.

On May 2, Geismann filed its opposition to ZocDoc's request. Dkt. No. 70 at 1.

Discussion

Campbell-Ewald is significant here not only for what it did, but also for what each justice stressed it did not decide. The majority reserved the question of "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." 136 S. Ct. at 672.

Since *Campbell-Ewald*, courts have been split on that issue. *Compare Gray v. Kern*, 143 F. Supp. 3d 363, 367 (D. Md. 2016) ("a measure which makes absolutely clear that the defendant will pay the complete relief the plaintiff can recover and that the plaintiff will be able to receive that relief will moot the issue in controversy"), *S. Orange Chiropractic Ctr. v. Cayan*, 15 Civ. 13069 (PBS), 2016 U.S. Dist. LEXIS 49067, 2016 WL 1441791, at *5 (D. Mass. Apr. 12, 2016) ("I conclude that this named plaintiff no longer has the requisite 'live claim' because Defendant has offered to deposit a check with the court . . . ."), *and Leyse v. Lifetime Entm't Servs.*, 13 Civ. 5794 (AKH), 171 F. Supp. 3d 153, 155 (S.D.N.Y. 2016), *aff'd*, 679 F. App'x

44 (2d Cir. 2017), ("once the defendant has furnished full relief, there is no basis for the plaintiff to object to the entry of judgment in its favor"), *with Bais Yaakov of Spring Valley v. Educ. Testing Serv.*, 251 F. Supp. 3d 724, 2017 U.S. Dist. LEXIS 70318, 2017 WL 1906890, at *14 (S.D.N.Y. 2017) ("the Court concludes that a representative plaintiff's claim is not mooted where a defendant tenders complete individual relief, even where no class has yet been certified"), *and Bell v. Survey Sampling Int'l, LLC*, 15 Civ. 1666 (MPS), 2017 U.S. Dist. LEXIS 36636, 2017 WL 1013294, at *5 (D. Conn. Mar. 15, 2017) ("I join the many other courts, including courts in this Circuit, in concluding that full tender does not moot a putative class action prior to a decision on class certification.").

I agree with those cases finding that a defendant's full tender renders the action moot. There is a consequential difference between on the one hand a defendant's offer of an adequate amount in an offer of judgment whose utility depends on its being timely accepted under principles of contract and Fed. R. Civ. P. 68, and on the other hand a tender ("A valid and sufficient offer of performance; specif., an unconditional offer of money or performance to satisfy a debt or obligation" Black's Law Dictionary 1696 (10th ed. 2014)) which independently and fully satisfies a plaintiff's claim, not because of plaintiff's agreement but because full payment extinguishes the claim. That is the principle which underlies the declaration imprinted on each Federal Reserve note: "This note is legal tender for all debts, public and private."

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In *Campbell-Ewald*, the majority reserved (for a case presenting it) the question whether a tender moots a plaintiff's claim (136 S. Ct. at 672); the remaining four justices insisted that tendering payment moots an action. Justice Thomas concurred only because ". . . a mere offer of the sum owed is insufficient to eliminate a court's jurisdiction to decide the case to which the offer related" (*id.* at 674), unlike "a fully tendered offer that extinguished the tax debt under California law." *Id.* at 677. Justice Roberts, joined by Justice Alito and Justice Scalia, dissented, basically because "the federal courts exist to resolve disputes, not to rule on a plaintiff's entitlement to relief already there for the taking." *Id.* at 678. "If the defendant is willing to give the plaintiff everything he asks for, there is no case or controversy to adjudicate, and the lawsuit is moot." *Id.* at 682. If there were any "question whether Campbell is willing and able to pay, there is an easy answer: have the firm deposit a certified check with the trial court." *Id.* at 681. Justice Alito noted in his own dissent "outright payment is the surest way for a defendant to make the requisite mootness showing." *Id.* at 684.

ZocDoc's proposal presents precisely those facts. It seeks permission to deposit a total of $20,000.00 with the Clerk of Court. The additional $13,900.00 it seeks to deposit brings the total to an amount far exceeding any Geismann could recover under the statute. *Campbell-Ewald*, 136 S. Ct. at 683 (Alito, J., dissenting) (". . . a defendant may extinguish a plaintiff's personal stake in pursuing a claim by offering complete relief on the claim, even if the plaintiff spurns the offer. Our Article III precedents make clear that, for mootness purposes, there

is nothing talismanic about the plaintiff's acceptance.") (citation omitted). There is no occasion to harmonize Rule 68 in the analysis: the matter is not one of contract, but of Constitutional law.

The Second Circuit, affirming the district court's entry of judgment, held in a summary order that *Campbell-Ewald* did not overturn prior case law permitting the court to enter judgment under the same circumstance (*Leyse*, 679 F. App'x at 47-48) (emphasis and alterations in original):

> Leyse contends that the district court erred in entering judgment on his individual claim upon Lifetime's depositing with the clerk of court the full amount of damages and costs recoverable by Leyse under the TCPA, even though Leyse had not accepted Lifetime's Fed. R. Civ. P. 68 offer of judgment in that amount. The argument is defeated by precedent. While an unaccepted Fed. R. Civ. P. 68 offer for complete relief does not *moot* a case-that is, it does not strip the district court of jurisdiction over the case-such an offer, if rejected, may nonetheless permit a court to enter a judgment in the plaintiff's favor. *See Tanasi v. New All. Bank*, 786 F.3d 195, 200-201 (2d Cir. 2015); *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013).
>
> Leyse argues that *Campbell-Ewald Co. v. Gomez,* U.S. , 136 S. Ct. 663, 193 L.Ed.2d 571 (2016), abrogated these precedents. The

> argument fails because *Campbell-Ewald Co.* held only that "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case," and therefore a district court "retain[s] jurisdiction" to adjudicate it. *Id.* at 672. In so holding, the Court expressly stated that its holding did not extend to cases in which a defendant "deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* Because that is the precise scenario at issue here, we conclude that *Campbell-Ewald Co.* does not undermine the controlling effect of *Tanasi* and similar precedents permitting the entry of judgment under these circumstances. We therefore affirm the district court's entry of judgment on Leyse's individual claim.

Thus on authority, and sound principles applied in the Second Circuit summary order after *Campbell-Ewald*, when ZocDoc has deposited with the Clerk of Court an additional $13,900.000 comprising an amount securing a judgment satisfying all of Geismann's monetary claims, and an unconditional consent to a proper form of injunction, it can make a cognizable, good-faith argument that this case should be terminated. The relevant law will no longer be that of contract, offer and acceptance, or Rule 68; it will be the Constitutional requirement of a case or controversy.

Appendix D

Conclusion

ZocDoc's motion (Dkt. No. 69) for leave to deposit $13,900.00 with the Clerk of Court, to be held with the $6,100.00 already deposited, payable to the plaintiff to secure a $20,000.00 judgment in favor of plaintiff, with a satisfactory form of consent to the entry of an injunction, and thereafter to follow the procedures for filing a motion for summary judgment, is granted.

So ordered.

Dated: New York, N.Y.
July 28, 2017

/s/ Louis L. Stanton
Louis L. Stanton
U.S.D.J.

APPENDIX E — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. Const. Art. III

ARTICLE III. THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. 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.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,

1. This clause has been affected by the Eleventh Amendment.

the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Appendix E

28 U.S.C. § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Appendix E

47 U.S.C.A. § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions.

As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[)].

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

Appendix E

(b) Restrictions on use of automated telephone equipment.

(1) Prohibitions.

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions.

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

> **(i)** calls that are not made for a commercial purpose; and
>
> **(ii)** such classes or categories of calls made for commercial purposes as the Commission determines--
>
> > **(I)** will not adversely affect the privacy rights that this section is intended to protect; and
> >
> > **(II)** do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the

Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk

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Fax Prevention Act of 2005 [enacted July 9, 2005]; and

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

(3) Private right of action.

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

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(c) Protection of subscriber privacy rights.

(1) Rulemaking proceeding required.

Within 120 days after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations.

Not later than 9 months after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted.

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the

Commission determines to require such a database, such regulations shall--

> **(A)** specify a method by which the Commission will select an entity to administer such database;
>
> **(B)** require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;
>
> **(C)** specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;
>
> **(D)** specify the methods by which such objections shall be collected and added to the database;
>
> **(E)** prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of

persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method.

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action.

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant

has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b).

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards.

(1) Prohibition.

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines.

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems.

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages

(i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information.

(1) In general.

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information.

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability

of any caller identification service to transmit caller identification information.

(3) Regulations.

(A) In general.

Not later than 6 months after the date of enactment of the Truth in Caller ID Act of 2009 [enacted Dec. 22, 2010], the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations.

(i) In general.

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders.

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) [Deleted]

(5) Penalties.

(A) Civil forfeiture.

(i) In general.

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) [47 USCS § 503(b)], to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this paragraph shall not exceed $ 10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $ 1,000,000 for any single act or failure to act.

(ii) Recovery.

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) [47 USCS § 504(a)].

(iii) Procedure.

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) [47 USCS § 503(b)(3)] or section 503(b)(4) [47 USCS § 503(b)(4)].

(iv) 2-year statute of limitations.

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine.

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $ 10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 [47 USCS § 501] for such a violation. This subparagraph does not supersede the provisions of section 501 [47 USCS § 501] relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States.

(A) In general.

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice.

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

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(C) Authority to intervene.

Upon receiving the notice required by subparagraph (B), the Commission shall have the right--

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction.

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process.

(i) Venue.

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.

(ii) Service of process.

In an action brought under subparagraph (A)--

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws.

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions.

For purposes of this subsection:

(A) Caller identification information.

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or

IP-enabled voice service.

(B) Caller identification service.

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service.

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation.

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law.

(1) State law not preempted.

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed

under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases.

If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States.

(1) Authority of States.

Whenever the attorney general of a State, or an official or agency designated by a State, has reason

to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $ 500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts.

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission.

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process.

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers.

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel

the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings.

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation.

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) **Definition.**

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk Fax Enforcement Report.

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

Appendix E

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best

notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment***. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues***. When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) ***Subclasses***. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General***. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders***. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class***.

(A) ***Information That Parties Must Provide to the Court***. The parties must provide the court with

information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) ***Grounds for a Decision to Give Notice.*** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements***. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded***. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections***.

(A) ***In General***. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) ***Court Approval Required for Payment in Connection with an Objection***. Unless approved

by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) ***Procedure for Approval After an Appeal***. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel***. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

> **(i)** the work counsel has done in identifying or investigating potential claims in the action;
>
> **(ii)** counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> **(iii)** counsel's knowledge of the applicable law; and
>
> **(iv)** the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).