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14-1194

No. ____

In the
Supreme Court of the United States

THE HARVARD DRUG GROUP, LLC,
Petitioner,

v.
SCOTT BARR, DDS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23 and receives an offer of complete relief before any class is certified.

Identical questions are the subject of a petition for a writ of certiorari in *Campbell-Ewald Company v. Gomez*, Case No. 14-857, currently pending before this Court.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

There is no parent corporation and no publicly held corporation that owns 10% or more of the stock of Petitioner The Harvard Drug Group, LLC.

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Petitioner The Harvard Drug Group, LLC, (“Harvard Drug”¹) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit issued in favor of Scott Barr, DDS, (“Barr”²) in this case.

Harvard Drug requests that this Court hold this petition in light of the petition in *Campbell-Ewald*, Case No. 14-857 then dispose of it as appropriate. These two petitions together establish that the 9th and 11th Circuits have issued decisions in conflict with other Circuits on the same important matter. In this case, the judgment of the 11th Circuit should be reversed with instructions to dismiss for lack of subject matter jurisdiction.

OPINIONS BELOW

The opinion of the 11th Circuit Court of Appeals is unpublished. *Barr v. The Harvard Drug Group, LLC*, 591 Fed. Appx. 928, 2015 U.S. App. LEXIS 1405 (11th Cir. 2015) (App. 1a). It relies exclusively on the recent reported opinion of *Stein v. Buccaneers Ltd P’ship*, 772 F.3d 698 (11th Cir. 2014). *Stein* is the basis of at least two other recent unreported 11th Circuit decisions on the same issue: *Keim v. ADF Midatlantic, LLC*, 586 Fed. Appx. 573, 574 (11th Cir. 2014); and *Barr v. Int’l Dental Supply Co.*, 586 Fed. Appx. 580, 581 (11th Cir. 2014).

¹ The 11th Circuit referred to petitioner as “The Harvard Drug Company, LLC (HDC)”, but its correct name is The Harvard Drug Group, LLC.

² Barr’s pleadings variously referred to respondent as “Mr.”, “him” and “it”, but Harvard Drug understands that Barr is a corporate entity.

The opinion of the district court granting Harvard Drug's motion to dismiss for lack of subject matter jurisdiction is unreported. *Barr v. The Harvard Drug Group, LLC*, No. 13-CV-62019-KAM, 2014 U.S. Dist. LEXIS 79422 (S.D. Fla. June 11, 2014) (App. 4a).

JURISDICTION

The 11th Circuit Court of Appeals entered judgment on January 29, 2015. (App. 1a.) This petition is timely because it is filed within 90 days from the entry of judgment. S. Ct. Rule 13. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. § 1254(1).

AUTHORITY INVOLVED

1. Article III, Section 2 of the U.S. Constitution:

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

2. Federal Rule of Civil Procedure 68(a):

Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance,

plus proof of service. The clerk must then enter judgment.

3. Telephone Consumer Protection Act, 47 U.S.C. § 227 (App. 15a)

INTRODUCTION

Before Barr moved for class certification, Harvard Drug offered all the relief that Barr could possibly recover at trial, including the maximum statutory damages per alleged violation, an injunction, reasonable attorney fees, and costs. Barr rejected the offer, preferring to litigate in an attempt to obtain the exact same relief just offered to it. Harvard Drug's offer of judgment eliminated Barr's personal stake in this action. Barr lacked standing, the claim was moot, and the district court lacked subject matter jurisdiction, so it dismissed the action under Federal Rule of Civil Procedure 12(b)(1).

The 11th Circuit reversed in a 1.5-page unreported opinion based exclusively on its recent reported opinion in *Stein v. Buccaneers*, which held that an unaccepted offer of judgment under Rule 68 did not render the named plaintiff's complaint moot. *Stein*, 772 F.3d at 704. This decision is wrong, contradicts other circuit decisions, and reflects the minority view in a split among the circuits. This Court should grant the petition and review this issue.

This petition relies upon and incorporates by reference the arguments and authority presented in the pending petition in *Campbell-Ewald Company v. Gomez*, Case. No. 14-857.

STATEMENT OF THE CASE

I. Statement of Facts

Harvard Drug is a wholesale distributor of prescription and over-the-counter drugs. (Tab 25 ¶ 10.³) It does business as Expert Med, among other names. Barr is a dental practice in Florida. (Tab 1 ¶¶ 8, 30.) It is undisputed that Harvard Drug has shipped drugs to Barr that Barr paid for; Barr therefore is in Harvard Drug's customer database. *See, e.g.*, Dist. Ct. Dkt. No. 19 at 2.⁴

Barr allegedly received a single, one-page fax from Harvard Drug listing Harvard Drug's products and discounted prices. (Tab 1 ¶ 26.) That fax stated: "If you'd like to be removed from our fax blast list, call toll free 800.875.0123 ext. 2000, or fax 734.743.7000." *Id.* at Ex. A. Barr asserted that this opt-out notice was insufficient. It claimed that the fax also should have stated that Harvard Drug's failure to comply with an opt-out request within the shortest reasonable time is unlawful and also should have stated that the opt-out request must identify the requester's fax number. *Id.* ¶ 26. It is undisputed that Barr never opted out of receiving Harvard Drug faxes. (Dist. Ct. Dkt. No. 19 at 2.) Barr received the fax via computer, not a traditional fax machine that prints every fax. (Tab 1 Ex. A.)

³ "Tab" refers to the tab number in the appendix to the 11th Circuit briefs.

⁴ "Dist. Ct. Dkt. No." refers to the docket entry number in the Southern District of Florida district court.

II. Procedural History

Based on this single fax, Barr filed a one-count class action complaint alleging violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "Act"), which gave rise to federal question jurisdiction. Barr sought statutory damages of \$500 for each violation or \$1,500 for each willful or knowing violation, plus an injunction against further violations and attorney fees and costs. (Tab 1 ¶¶ B–E.) The only attachment to the complaint was this single fax. *Id.* at Ex. A. Barr did not move for class certification simultaneously with filing the complaint. (Tab A.) Harvard Drug answered the complaint and denied the factual allegations. (Tab 8.)

Shortly thereafter, Harvard Drug served a settlement offer of judgment on Barr's counsel offering \$1,500 to Barr for each violation alleged in the complaint, plus an injunction, attorney fees and costs, and a judgment to this effect. (App. 12a.) This is the maximum amount that Barr could possibly recover, and more, since attorney fees are not recoverable under the Act. No class certification motion had been filed before the offer of judgment was served by email. Barr ultimately rejected the offer of judgment, even though Harvard Drug offered all the relief requested by Barr in the complaint and more. (Tab 19-3.)

Realizing the legal significance of the offer of judgment, Barr responded to it by moving for class certification later that same day, using a form brief. (Tab 13.) Barr sought class certification, appointment of Barr as class representative, and appointment of its attorney as class counsel. *Id.*

Barr variously defined the putative class as “statewide” and “nationwide.” (Tab 13 at 5, 14; Tab 1 ¶¶ 9, 30.) Barr requested discovery before the district court’s consideration of the certification motion. (Tab 13 at 5.)

With its response to the certification motion, Harvard Drug moved to dismiss based on the offer of judgment, which mooted Barr’s claim in this action. (Dist. Ct. Dkt. No. 19.) In response, Barr did not dispute the dispositive effect of an offer of judgment for full relief, served before a class certification motion. (Tab 22.) Barr’s only argument was that email service of the offer of judgment was not effective.⁵ *Id.* at 2-4.

III. Rulings

The district court granted Harvard Drug’s motion, dismissed the action with prejudice, and retained jurisdiction to award costs and attorney fees. (App. 4a.) While noting the Article III requirements of a “case or controversy”, the district court analyzed only the issue briefed by Barr: whether email service of the offer of judgment was effective. Barr entirely failed to address the issue’s merits: whether an unaccepted Rule 68 offer of judgment renders a named plaintiff’s case moot.

The 11th Circuit reversed in a 1.5-page opinion based exclusively on *Stein*. (App. 1a.) It held that

⁵ In the 11th Circuit, Harvard Drug argued that Barr waived the legal arguments presented in its appeal brief because it failed to present them to the district court. The 11th Circuit disagreed, stating that it has an independent obligation to investigate subject matter jurisdiction. (App. 3a n. 1.) This issue is not the subject of this petition.

the “facts in the instant case are the same in all relevant respects” as in *Stein*. *Id.* at 3a. It followed *Stein* and held that an “unaccepted offer of judgment under Rule 68 did not render the named plaintiff’s complaint moot.” *Id.* It reversed and remanded the case on January 29, 2015, and the litigation is set to proceed in the district court. *Id.*

Barr has filed at least five other complaints in federal district court in Florida seeking to exploit the Act:

- *Scott Barr, DDS v. Int’l Dental Supply Co.*, 0:13-cv-61981-RNS (“*IDS*”)
- *Scott Barr, DDS v. Futuredontics, Inc.*, Case No. 0:13-cv-61982-JIC
- *Scott Barr, DDS v. Isolite Systems*, Case No. 0:13-cv-61986-WJZ
- *Scott Barr, DDS v. Garrison Dental Solutions, Inc.*, Case No. 0:13-cv-61992-WJZ
- *Scott Barr, DDS v. Exsto Enterprises, LLC*, Case No. 0:13-cv-61994-JIC

As in the instant case, the dismissal in *IDS* was reversed by the 11th Circuit based exclusively on *Stein*. *Futuredontics* was stayed pending the 11th Circuit decisions and was ultimately settled. The remaining cases were settled or dismissed. Barr’s counsel in this case also represented the plaintiff in *Keim*. This is not surprising because, as described in the *Campbell-Ewald* petition, the Act has “become an extortionist weapon in the hands of class action attorneys seeking to extract lucrative attorneys’ fees for class-wide settlements.” *Id.* at 2.

REASONS FOR GRANTING THE WRIT OR HOLDING THE PETITION

The instant petition presents the same legal issue as the petition for a writ of certiorari in *Campbell-Ewald Company v. Gomez*, which is incorporated here by reference and relied upon to support this petition. Together with the Campbell-Ewald petition, this petition establishes that the decisions of the 9th and 11th Circuits conflict with the decisions in other circuits. The circuits are split on this issue, and review by this Court is needed.

As addressed more fully in the *Campbell-Ewald* petition, a case becomes moot, and thus beyond the judicial power of Article III, when a plaintiff receives an offer of complete relief, whether under Rule 68 or otherwise. This is equally true for a named plaintiff asserting class claims under Federal Rule of Civil Procedure 23.

In this case, as in *Campbell-Ewald*, the 11th Circuit wrongly held that the district court retains subject matter jurisdiction even after a named plaintiff in a class action receives an offer of complete relief. This merely prolongs litigation after a plaintiff has recovered all or more than he could recover at trial. In both cases, the circuit courts improperly reversed dismissals and remanded for further proceedings.

Those decisions should be reversed because they contravene basic Article III principles, directly conflict with well-reasoned decisions in other circuits, and result in protracted, complicated litigation after a plaintiff has been offered full relief.

CONCLUSION

The petition for a writ of certiorari should be granted, in light of the arguments presented in the *Campbell-Ewald* petition. At a minimum, this Court should hold this case pending the disposition of *Campbell-Ewald*.

Respectfully submitted,

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