No. 16-1336

In The
Supreme Court of the United States

TOP FLITE FINANCIAL INC.,

Petitioner,

v.

BRIDGING COMMUNITIES INC., AND
GAMBLE PLUMBING & HEATING, INC.,

Respondents.

**On Petition For Writ Of Certiorari To
The Sixth Circuit Court Of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents Bridging Communities, Inc. and Gamble Plumbing & Heating, Inc. had the burden of showing that a class should be certified under Federal Rule of Civil Procedure 23(b)(3). To meet this burden, Respondents had to show that questions whose answers would be resolved in common as to the entire class would predominate over questions that would need to be answered on an individualized, party-by-party, basis. After discovery was completed, Respondents did not introduce any evidence showing that the material issue of whether non-party InfoUSA had obtained consent from each proposed class member would be answered through common evidence. Did the failure of Respondents, as the moving party, to introduce any evidence on this issue justify denial of the motion for class certification?

The Sixth Circuit held that the District Court was speculating in denying class certification because there was no evidence showing that the issue of whether InfoUSA had obtained consent to send facsimiles would be answered on a common or individualized basis. Did this decision impermissibly shift the burden of proof on the motion for class certification from Respondents to Petitioner?

Petitioner offered evidence that there was a significant question regarding the standing of the potential class members that would need to be answered on an individualized basis. Respondents did not offer any

QUESTIONS PRESENTED FOR REVIEW
– Continued

evidence to rebut this showing. Did the Sixth Circuit err by nonetheless finding that common issues predominated over this individualized issue?

The decision on a motion for class certification is reviewed on an abuse of discretion standard. Did the Sixth Circuit appropriately defer to the decision by the District Court or did the Sixth Circuit instead substitute its own judgment for that of the District Court in what amounted to a de novo review of the decision on this motion?

CORPORATE DISCLOSURE STATEMENT

Petitioner Top Flite Financial Inc. does not have a parent or publicly held company that owns 10% or more of the corporation's stock.

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INTRODUCTION

Petitioner Top Flite Financial Inc. requests that this Court review the decision by the Sixth Circuit that a proposed class action be certified. Class actions are an exception from the normal practice of litigation being conducted solely between individual named parties. *Califano v. Yaminski*, 442 U.S. 682, 700-701 (1979). Federal Rules of Civil Procedure 23(a) and (b) ensure that this disfavored method of litigation is used only when its potential benefits outweigh its risks. Moreover, the party seeking class certification must demonstrate that its proposed class action complies with the stringent Rule 23(a) and (b) requirements before being allowed to proceed.

The Sixth Circuit decision challenges these restrictions upon class certification and impermissibly shifts the burden of proof on these issues from the party seeking class certification to the party opposing class certification. As a result, there is now a conflict between the Sixth Circuit and the Fifth Circuit regarding how to determine whether class certification is appropriate in federal Telephone Consumer Protection Act claims. Finally, this case presents an opportunity to review whether the Circuit Courts are, and should be, reviewing class action certification decisions on an abuse of discretion standard. Therefore, this Court should grant this Petition.

STATEMENT OF DECISIONS BELOW

The Sixth Circuit decision was reported at 843 F.3d 1119 (6th Cir. 2016) and is found at pages 1 to 16 of the Appendix. The District Court decision was not published, but is found at 2013 WL 2417939 (E.D. Mich. 2013) and is attached as pages 26 to 34 of the Appendix.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment by the Sixth Circuit that was entered on December 15, 2016. (App. 1-16). On December 29, 2016, Petitioner timely filed a motion for rehearing en banc. Fed. R. App. P. 35(c), 40(a)(1). The Sixth Circuit denied this timely filed petition on February 2, 2017. (App. 35).

This petition is being filed within 90 days of February 2, 2017 and is therefore timely. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. This Court has subject matter jurisdiction to review the Sixth Circuit decision under 28 U.S.C. § 1254(1). Respondents claim that Petitioner violated the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Therefore, the District Court had federal question subject matter jurisdiction. 28 U.S.C. § 1331; and *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 386-387 (2012).

STATUTORY PROVISION INVOLVED

This Petition is controlled by Federal Rule of Civil Procedure 23(b)(3), which provides that:

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

STATEMENT OF THE CASE

Respondents allege that Petitioner Top Flite Financial Inc. violated the TCPA by sending them unsolicited facsimile advertisements. Petitioner did not send these facsimiles and did not hire anyone to do so.

The company actually responsible for sending these facsimiles is a non-party named Business to Business ("B2B"). Respondents' counsel obtained the business records of B2B during prior litigation that did not involve Petitioner. Respondents' counsel has been mining these business records to learn the names of companies that B2B successfully solicited for its services. Respondents' counsel did not name B2B as a Defendant, and B2B assisted Respondents by providing an affidavit to support their motion for class certification.

Petitioner was not a customer of B2B. Instead, B2B tried to solicit another company, Taylor Door, to use B2B's services. Taylor Door was not interested, but the Taylor Door employee that B2B called, Fred Foley, Jr. decided to hire B2B with his own money. In his affidavit submitted to oppose the motion for class certification, Mr. Foley explained that his advertising campaign mentioned Petitioner because he was trying to generate leads that he could sell to Petitioner. Mr. Foley testified that Petitioner neither authorized him to conduct this advertising nor approved his decision to use Petitioner's name in his advertisements.

Because Mr. Foley paid for the advertisements, they listed his personal contact information, not that

of Petitioner. As a result, Petitioner did not learn that B2B had sent these advertisements for Mr. Foley until Petitioner was served with this lawsuit.

The parties conducted discovery before Respondents moved for class certification under Federal Rule of Civil Procedure ("Rule") 23(b)(3). In their class certification motions,[1] Respondents contended that common issues predominated over questions affecting individual proposed class members. Respondents supported their request with two affidavits. First, Caroline Abraham, a principal of B2B, submitted an affidavit in which she testified that B2B obtained facsimile lists from a company called InfoUSA and that B2B did not obtain consent from the businesses on these facsimile lists. Second, Respondents submitted an affidavit from an expert, who testified that he had reviewed the business records of B2B and determined that over 4,000 businesses had received the facsimiles that Mr. Foley paid B2B to send. In its response to the class certification motions, Petitioner submitted evidence showing that a small sampling of the proposed class members revealed that a significant number had been dissolved under Michigan law. In fact, over 25% of the dissolved entities were dissolved before the facsimiles were allegedly sent to them.

Federal District Court Judge Lawrence Zatkoff determined that Respondents had not met their

[1] Respondents filed separate motions, but they were essentially identical and considered together by both the District Court and the Sixth Circuit.

burden under Rule 23(b)(3). (App. 29-34). He reached this conclusion because Respondents relied solely upon the Abraham affidavit to try to show that the proposed class members had not consented to receive the facsimiles. (App. 31-33). While this affidavit attested to B2B's general business practices, Judge Zatkoff found that this affidavit did not address whether InfoUSA or anyone else had obtained consent from the facsimile recipients. (App. 32-33). Based upon this absence of evidence that the consent issue could be resolved on a common basis, Judge Zatkoff denied the motion for class certification. (App. 32-33).

Respondents sought interlocutory review of the class certification decision, but the Sixth Circuit declined to do so. As a result, the only claims that were pending were the TCPA claims by the two Respondents. The potential damages on these claims were far less than the cost of continuing to defend this case. Therefore, Petitioner served each Respondent with an offer of judgment for $1,500, an amount sufficient to cover each Respondent's potential damages. Although Respondents rejected the offers, the District Court decided to enter judgment in this amount because these judgments fully compensated Respondents. (App. 17-18). Petitioner has tendered payment to Respondents, who chose to return that payment.

After judgment was entered, Respondents filed a claim of appeal. The Sixth Circuit Court of Appeals heard oral argument on July 28, 2016. On December 15, 2016, the Sixth Circuit issued its published decision, which found that common issues predominated

over individual ones. (App. 1-16). Therefore, it held that Judge Zatkoff had abused his discretion by denying Respondents' motion for class certification and reversed his decision. (App. 14). On February 2, 2017, the Sixth Circuit denied Petitioner's timely filed motion for rehearing en banc. (App. 35). Petitioner now asks this Court to review the Sixth Circuit decision.

ARGUMENT

I. Respondents did not submit sufficient evidence to meet their burden of showing that common issues will predominate over individualized issues.

A plaintiff seeking class certification has the burden of showing that (1) the proposed class complies with Rule 23(a) and (2) at least one of the three distinct alternative grounds under Rule 23(b) is satisfied. *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

The crux of the dispute before this Court is whether Respondents demonstrated that their proposed class action would qualify under Rule 23(b)(3). This particular subrule allows class certification only when:

> 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.

Fed. R. Civ. P. 23(b)(3) (emphasis added). When considering the Rule 23(a) requirement of commonality, this Court found that "[w]hat matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (citing Negareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009) (alterations in original)).

Whether Petitioner is liable to the proposed class members under the TCPA depends primarily upon how the following three issues are resolved:

1. Whether non-party InfoUSA obtained consent from the proposed class members.

2. Whether each proposed class member has standing to pursue a TCPA claim.

3. Whether Petitioner is legally responsible for the allegedly unlawful conduct by Mr. Foley.

Respondents did not offer any evidence showing that there is a common resolution to the question of whether InfoUSA obtained consent. The second issue, the question of standing, is an inherently individualized inquiry that must be resolved on an individualized basis. The third issue, if Petitioner is legally responsible for the conduct of Mr. Foley, will be commonly

resolved. But, resolution of this final issue will predominate only if this District Court determines that Petitioner is not liable for Mr. Foley's conduct. Respondents, of course, dispute that this issue will be resolved against them and thereby dispose of this case. Therefore, on this record, Respondents did not show that common issues will predominate over individualized ones, and the District Court correctly denied class certification.

A. Respondents could not rely upon mere allegations and argument, but were required to submit evidence showing that common issues predominated over individualized inquiries.

For all Rule 23 motions, this Court has held that "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 564 U.S. at 352. The requirement at issue here – that common questions "predominate over any questions affecting only individual members" – is particularly stringent and "far more demanding" than the Rule 23(a) commonality requirement. *Amchem*, 521 U.S. at 623-624. Resolving whether the Rule 23 prerequisites have been met requires a rigorous inquiry into the record, often including a review of the merits of the claims. *Wal-Mart*, 564 U.S. at 350-352. The party seeking class certification must "actually

prove – not simply plead – that their proposed class satisfied each requirement of Rule 23." *Halliburton Co. v. Erica P. John Funds, Inc.*, 134 S. Ct. 2398, 2412 (2014). Therefore, this standard is similar to the one used to review Rule 56 motions because the potential proofs, not the allegations made in the pleadings, are considered by the reviewing court. *See, e.g.*, *Celotex Corp. v. Catrett*, 471 U.S. 317, 324 (1986) (finding that party with burden of proof must offer reviewing court more than pleadings).

With respect to Rule 23(b)(3), this Court has explained that:

> The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." . . . This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. . . . The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." . . . When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016) (citations omitted).

Accordingly, Respondents, as the party seeking class certification, could not rely upon their allegations, but instead had to offer evidence showing that common issues would predominate over individualized ones. *Halliburton*, 134 S. Ct. at 2412. The record shows that Respondents failed to do so and were therefore not entitled to class certification.

B. Respondents did not meet their burden of showing that common issues predominate because the Abraham affidavit did not address whether InfoUSA obtained consent.

One important issue in a TCPA case is whether the alleged recipients consented to receive the facsimiles or other communications. 47 U.S.C. § 227(b)(1)(C). Respondents have contended that an affidavit prepared by a representative of B2B, Caroline Abraham, resolved the issue of consent because she admitted that B2B generally did not obtain the consent of recipients, but instead relied upon lists purchased from InfoUSA. (App. 10-11). Based upon this affidavit, Respondents argued the issue of consent was a common one because the testimony of Ms. Abraham resolved it. (*Id.*). The Sixth Circuit agreed that this showing was sufficient. (App. 12).

If B2B were the defendant and had also compiled the list of facsimile recipients, then B2B's admission that it failed to obtain consent would show that the issue of consent could be resolved on a common basis.

But, B2B is not a party to this case. Therefore, the testimony by Ms. Abraham did not resolve the question of consent, but merely showed that other evidence would be needed to resolve the consent issue. One potential source of this evidence would be InfoUSA, which Ms. Abraham identified as the company that sold the facsimile lists to B2B. (App. 12). It is possible that InfoUSA can answer this question for every member of the lists that it allegedly sold to B2B. But, given how long ago B2B purchased these lists, it is likely that InfoUSA no longer has records that will answer this question. If InfoUSA does not have business records answering this question, then the issue of consent will have to be resolved on an individualized basis for every proposed class member.

Respondents had the burden of showing that common issues predominate over individualized ones. *Wal-Mart*, 564 U.S. at 352. If this were a Rule 56 motion, the absence of evidence in the record on a material issue would lead to summary judgment against the party with the burden of proof. *See, e.g.*, *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (requiring production of "specific facts showing that there is a *genuine issue of material fact.*") (emphasis in original). Respondents' failure to offer evidence on the InfoUSA consent issue means that they failed to meet their burden of proving that this issue (a) could be commonly resolved or (b) would predominate over individualized issues.

The Sixth Circuit, however, stated that the District Court and Petitioner were speculating because

they relied upon the absence of evidence showing that the InfoUSA consent issue would be commonly resolved. (App. 12-13). A party seeking summary judgment is not relying upon speculation when it points out the absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 325. Instead, a moving party properly supports a Rule 56 motion by "pointing out . . . an absence of evidence to support the non-moving party's case." *Id.* ***Therefore, if there is no evidence in the record to show how InfoUSA compiled its list, then Respondents did not meet their burden of proof that this issue will be resolved on a common, rather than individualized, basis.*** By instead finding that Petitioner was speculating because the record was bereft of evidence on this issue, the Sixth Circuit impermissibly shifted the burden of proof on this issue from Respondents to Petitioner. This Court should grant this Petition to ensure that the Sixth Circuit does not continue to apply this erroneous standard to review class certification decisions.

C. Petitioner offered evidence showing that there would need to be an individualized inquiry into whether each proposed class member has the legal right to pursue a claim under the TCPA.

Regardless of whether the InfoUSA issue can be commonly resolved, the record shows that another question must be decided on an individualized, plaintiff-by-plaintiff basis: whether the alleged facsimile recipients are legally capable of pursuing a TCPA claim.

This individualized standing issue will predominate during the resolution of this case even if the InfoUSA consent issue can be resolved by common proof.

A party may pursue a private cause of action under the TCPA only "if otherwise permitted by the laws or rules of court of a state." 47 U.S.C. § 227(b)(3). Under the applicable Michigan law, a dissolved corporation may continue to exist after its date of dissolution for a reasonable time to conclude winding up its affairs. *See, e.g.*, *Flint Cold Storage v. Dep't of Treasury*, 285 Mich. App. 483, 495-497; 776 N.W.2d 387 (2009); Mich. Comp. Laws § 450.1261(b) (authorizing active corporations to sue and be sued); Mich. Comp. Laws § 450.1833 (limiting business that may be conducted during corporate wind up), and Mich. Comp. Laws § 450.1834(e) (allowing corporation to sue and be sued while winding up). But, once the dissolved corporation has been wound up, it ceases to exist and loses the power to sue or participate in legal proceedings. *Flint Cold Storage*, 285 Mich. App. at 498 (citing *BASF Corp. v. Central Transport, Inc.*, 830 F. Supp. 1011, 1012-1013 (E.D. Mich. 1993)). Therefore, dissolved Michigan corporations cannot pursue a TCPA action because they cannot pursue any actions. 47 U.S.C. § 227(b)(3).

Respondents identified more than 4,000 companies that Respondents contend belong in the class. Petitioner performed a preliminary sampling of a small percentage of Respondents' proposed class. This sampling showed that more than 50 of these entities had been dissolved under Michigan law. In fact, almost one in four of the dissolved entities were dissolved before

they allegedly received the facsimiles. For each of the dissolved entities, the District Court would have to decide (1) if a reasonable time has passed since dissolution and (2) whether the dissolved entity has completed winding up its affairs. Moreover, there would need to be an individualized inquiry into whether each proposed class member was dissolved.

The District Court did not reach this issue because Judge Zatkoff determined that Respondents had not met their burden of showing that the issue of consent would be commonly resolved. (App. 30-33). The Sixth Circuit never addressed this issue. The standing question necessarily involves an individualized inquiry into the facts related to each dissolved corporation. This issue cannot be resolved on a common basis because whether an individual entity is currently authorized to pursue litigation must be an individualized inquiry.

Therefore, based upon this issue alone, individualized issues predominate over common ones.

D. The Sixth Circuit's decision conflicts with a decision by the Fifth Circuit applying Rule 23(b)(3) to determine if common issues predominated over individualized ones in determining consent under the TCPA.

In *Gene and Gene LLC v. BioPay LLC*, 541 F.3d 318, 329 (5th Cir. 2008), the Fifth Circuit held that class certification was not appropriate under Rule

23(b)(3) because the plaintiff had failed to offer a theory concerning lack of consent that would avoid a myriad of mini-trials. Therefore, it reversed the decision by the trial court to grant certification of the proposed class. *Id.*

In *Gene and Gene*, defendant offered evidence about its list compilation practices that created the need for mini-trials to determine if the recipients had consented. 541 F.3d at 329. In this case, Petitioner offered evidence showing that a similar myriad of mini-trials would be needed to resolve the issue of standing because a significant number of the proposed class members have been dissolved. *See supra* at 13-15. As a result, the District Court would need to determine, on a company-by-company basis, if potential class members have the legal standing to sue. For each dissolved entity, this will require evaluation of the factually intensive issues of (1) whether a reasonable time has passed for these entities to wind up their affairs and (2) whether each separate dissolved entity has completed winding up their affairs. *See Flint Cold Storage*, 285 Mich. App. at 498.

The record is also bare of evidence regarding the business practices of InfoUSA and how it compiled the lists allegedly purchased by B2B. Unless InfoUSA actually has evidence resolving this issue on a common basis for each class member, then the resolution of the consent issue will be another individualized issue, just as in *Gene and Gene*.

Therefore, by reaching a different result, the decision by the Sixth Circuit conflicts with the Fifth Circuit decision in *Gene and Gene*. As a result, this Court should grant this Petition to resolve this conflict.

E. Other cases involving B2B do not resolve the issues by this case.

In its Opinion, the Sixth Circuit relied heavily upon *other* cases involving B2B when it described the background of *this* case. (App. 3-4). This is not, however, a claim against B2B. Instead, B2B seems to be cooperating with Respondents' counsel by allowing them to continue to use B2B's business records and providing affidavits upon request, as B2B did in this case. In other words, although this claim arises primarily because B2B solicited Mr. Foley and then performed the acts that may have violated the TCPA, B2B is helping to prosecute, rather than defend, this case.

Petitioner is entitled, as a matter of due process, to have the TCPA claim against it resolved upon what Petitioner did and the issues that Petitioner raised to defend itself. None of the other cases that involve B2B's apparent wrongdoing addressed the critical issues in this case. Therefore, the Sixth Circuit abused its discretion by relying upon them.

For example, one case cited by the Sixth Circuit, *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 631-634 (6th Cir. 2015), considered Article III standing for persons who leased, but did not own, the facsimile machines in question. In *American Copper & Brass, Inc. v.*

Lake City Industrial Products, Inc., 757 F.3d 540, 544-546 (6th Cir. 2014), the Sixth Circuit considered the ownership versus leasing issue and whether Michigan Court Rule 3.501(A)(5) applied to TCPA claims filed in federal court. Neither case considered the issue of whether the plaintiffs had shown that the proposed class could be certified under Rule 23(b)(3).

There are also differences between this case and the B2B cases outside the Sixth Circuit. For example, in *Arnold Chapman v. Wagener Equities, Inc.*, 747 F.3d 489, 491-493 (7th Cir. 2014), the Seventh Circuit considered the ownership issue and other issues unrelated to Rule 23(b)(3) before ultimately concluding that it would not grant a petition for leave to appeal the class certification on an interlocutory basis under Rule 23(f). In *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 491-494, 498-502 (7th Cir. 2013), the Seventh Circuit explained how counsel for Respondents used material obtained from B2B to find other class action targets and clients as part of determining whether they should be class counsel.

None of these cases, then, addressed the essential question presented in this case, whether the proposed class of TCPA plaintiffs qualified under Rule 23(b)(3). The Sixth Circuit decision also conflicts the Fifth Circuit decision in *Gene and Gene*, which did apply Rule 23(b)(3) to deny a motion to certify a proposed TCPA class action. Accordingly, this Court should grant this Petition to resolve this case on its own merits.

II. The Sixth Circuit erred by finding that *Campbell-Ewald* required it to set aside the judgment.

The Sixth Circuit also held that this Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 U.S. 663 (2016) "require[d] us to reverse the district court's 12(b)(1) dismissal of the complaints as moot based on . . . Top Flite's [unaccepted] offers of individual judgment." (App. 14). But, *Campbell-Ewald* does not apply to the facts of this case.

In *Campbell-Ewald*, the defendant ("Campbell") created a text messaging recruiting campaign for the United States Navy. 133 S. Ct. at 667. The plaintiff ("Gomez") filed a TCPA claim after receiving the Navy's recruiting message, contending that he had not consented to receipt. *Id.* Before an agreed upon deadline for filing a motion for class certification, Campbell filed an offer of judgment for all of Gomez's potential damages under the TCPA. *Id.* at 667-668. Gomez did not accept the offer of judgment. *Id.* at 668. Campbell then moved to dismiss the case pursuant to Rule 12(b)(1) because the offer of judgment provided Gomez with the complete relief requested and therefore eliminated the Article III case or controversy raised by Gomez's complaint. *Id.*

The district court denied the motion, finding that Gomez had not been dilatory in seeking class certification and that the class claims would relate back to the filing of the complaint. 133 U.S. at 668. After discovery, the district court granted summary judgment

to Campbell on sovereign immunity grounds. *Id.* The Ninth Circuit reversed the grant of summary judgment, but agreed with the district court that the unaccepted offer of judgment for the full amount of an individual plaintiff's claim did not moot a class action. *Id.*

This Court granted certiorari in *Campbell-Ewald* to resolve a dispute among the Circuits regarding whether an unaccepted offer of judgment could moot a plaintiff's claim and deprive the federal courts of subject matter jurisdiction by eliminating the case or controversy. 133 U.S. at 669. This Court distinguished *Campbell-Ewald* from cases in which the defendant had actually made a payment that extinguished the requested judgment. *Id.* at 671. Moreover, this Court also recognized that Campbell was using the offer of judgment "to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept." 133 U.S. at 672.

In this case, Petitioner did not make the offer of judgment until after class certification was denied and the Sixth Circuit denied the request for interlocutory review of that decision. Full payment, in the form of a check, was presented to Respondents for a sum greater than all of their potential damages. Because Petitioner actually tendered payment of these sums to Respondents, there was no longer an Article III case or controversy before the District Court.

If this Court reverses the Sixth Circuit as to class certification, then there will not be an Article III case

or controversy between Petitioner and either of the Respondents, and the District Court judgment should be reinstated. Even if this Court does not reverse the class certification decision, this case still presents the unresolved question from *Campbell-Ewald*, which this Court might choose to review at this time.

III. This Court should use this case to provide guidance regarding what constitutes an abuse of discretion in the Circuit Court review of District Court decisions on class certification.

This Court has held that the law grants broad leeway to District Courts in making class certification decisions and that their decisions are to be reviewed by the Circuit Courts on an abuse of discretion standard. *See, e.g.*, *Califano*, 442 U.S. at 703. The hallmark of abuse of discretion review is granting deference to the decision made by the District Court. *See, e.g.*, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

Rather than grant deference to Judge Zatkoff and his decisionmaking, the Sixth Circuit essentially substituted its judgment for his judgment regarding the evidence presented by the parties. Moreover, the Sixth Circuit failed to consider the standing issue at all when assessing whether individualized or common issues would predominate. Finally, rather than require that Respondents meet their burden of proof, the Sixth Circuit placed the burden upon Petitioner, the party opposing class certification.

In summary, the Sixth Circuit applied its own standard of review that placed the burden of proof on the wrong party and did not consider evidence before it. However that standard is characterized, it is certainly not granting deference to the decision by the District Court. Therefore, this Court should grant this Petition to provide guidance regarding how the abuse of discretion standard should apply in reviewing class action certification decisions.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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