16-1133

United States Court of Appeals for the Second Circuit

MARK LEYSE, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S PRINCIPAL BRIEF

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PRELIMINARY STATEMENT

This appeal is taken from: (1) that part of the Order of District Judge Alvin K. Hellerstein of the Southern District of New York, dated, and entered with the clerk on, September 22, 2015, that denied the motion by Plaintiff-Appellant, Mark Leyse ("Leyse"), for class certification (the "Class-Certification Order") (A-161 - A-169); (2) the Order of Judge Hellerstein, dated, and entered with the clerk on, March 17, 2016 (A-191 - A-194); and (3) the Judgment, dated April 11, 2016, and entered on April 12, 2016 (A-196).

STATEMENT OF JURISDICTION

The District Court had jurisdiction over Leyse's claims under 28 U.S.C. § 1331. Leyse filed a Notice of Appeal (A-197) on April 13, 2016, from the Judgment, which had disposed of all of Leyse's claims. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether a defendant that violates the law on a mass scale should be able to avoid class certification, under the guise of "ascertainability," by choosing not to obtain and keep records that existed and that would have shown who were the victims of the defendant's unlawful conduct.

2. Whether the Supreme Court's admonition that "a would-be class representative with a live claim of [his] own must be accorded a fair opportunity to

show that [class] certification is warranted," *Campbell-Ewald Company v. Gomez*, --- U.S. ---, 136 S. Ct. 663, 672 (2016), applies where a would-be class representative's individual claims become moot as the result of an entry of judgment that the would-be class representative opposed.

3. Whether, if the Second Question is answered in the affirmative, the "fair opportunity to show that class certification is warranted" ends, not upon the District Court's denial of a motion for class certification, but upon that denial's final disposition on appeal.

4. Whether, if the Third Question is answered in the negative, a judgment that moots a would-be class representative's individual claims should, where the plaintiff had opposed the issuance of the judgment, be vacated if such vacature must occur in order for the plaintiff to be able to appeal the District Court's denial of class certification.

5. Whether, if the Fourth Question is answered in the negative, a judgment may be issued that moots a plaintiff's individual claims even though the plaintiff had objected to the issuance of the judgment and even though the plaintiff had neither accepted, nor actually received, the payment that was the sole basis for the issuance of the judgment.

STANDARD OF REVIEW

As this Court recently noted, "[w]e review a district court's class[-]certification rulings for abuse of discretion, but we review *de novo* its conclusions of law informing that decision." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015).

STATEMENT OF THE CASE

A. Course of Proceedings

On August 16, 2013, Leyse commenced the District Court action by filing a complaint (A-17 - A-21).

On January 17, 2014, Lifetime filed its answer (A-22 - A-27).

On May 15, 2015, Leyse filed a motion for class certification (A-28 - A-53).

On June 12, 2015, Lifetime filed its opposition to Leyse's motion for class certification (A-54 - A-81).

On June 26, 2015, Leyse filed a reply in response to Lifetime's opposition to Leyse's motion for class certification (A-82 - A-160).

On September 22, 2015, the District Court issued the Class-Certification Order (and denied a motion for summary judgment by Lifetime) (A-161 - A-169).

On October 6, 2015, Leyse filed a motion for reconsideration of the Class-Certification Order (A-170 - A-171).

On October 19, 2015, the District Court issued an Order denying Leyse's

motion for reconsideration (A-172 - A-173).

On January 27, 2016, Lifetime filed a motion for: (1) judgment in favor of Leyse on his individual claims; and (2) dismissal of the Complaint (the "Motion for Judgment and Dismissal") (A-174 - A-187).

On February 12, 2016, Lifetime filed a supplemental declaration in further support of the Motion for Judgment and Dismissal (A-188 - A-190).

On March 17, 2016, the District Court issued an Order granting the Motion for Judgment and Dismissal (A-191 - A-194).

On March 17, 2016, the District Court recorded a Cashiers Office Registry Deposit in the amount of $1,903.00 from Lifetime (A-195).

On April 12, 2016, the District Court entered judgment in favor of Leyse (A-196).

On April 13, 2016, Leyse filed a Notice of Appeal (A-197).

B. Statement of Facts

Leyse alleges that, "on or about August 19, 2009, Lifetime, or a third party acting on behalf of Lifetime, placed, to Leyse's residential telephone line, a telephone call using an artificial or prerecorded voice that delivered a message that advertised the commercial availability or quality of Lifetime Television, a cable-television network that Lifetime owns and operates." Compl., ¶ 7 (A-18). The message stated as follows:

> Time Warner Cable customers? This is Tim Gunn. Do you know that Lifetime has moved to Channel 62? Tune in to Lifetime on Channel 62 tomorrow at 10 p.m. and see me and Heidi Klum in the exciting Season 6 premiere of "Project Runway." The "Project Runway" season premiere tomorrow at 10 p.m., following "The All-Star Challenge." Be there and make it work — only on Lifetime, now on Channel 62.

Class-Certification Order at 2 (A-162) (citation and quotation marks omitted); *accord*, Declaration of Mark Leyse in support of motion for class certification, ¶ 2 (A-52).

Leyse claims that Lifetime violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"); specifically Section 227(b)(1)(B), which makes it "unlawful . . . 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." 47 U.S.C. § 227(b)(1)(B). *See* Compl., ¶¶ 11-14 (A-19). As a result, Leyse, pursuant to 47 U.S.C. § 227(b)(3), sought, individually and on behalf of the other class members, statutory damages of between $500 and $1,500 per violation, and injunctive relief. *See* Compl., Prayer for Relief (A-21).

The prerecorded telephone call made to Leyse was one of approximately 450,000 such calls. When asked to "[i]dentify each area code and/or zip code, and the state, of the telephone numbers to which a PRMTC ['Project Runway Message Telephone Call'] was placed," Lifetime responded:

> Lifetime arranged with OnCall Interactive for telephone

> messages to be delivered to approximately 450,000 cable households in the New York City metropolitan area. . . . To the best of Lifetime's knowledge and information, approximately 45% of the calls went to answering machines, 40% were "live" pick-ups, and l5% were unanswered.

Lifetime's amended responses to Leyse's First Set of Interrogatories, No. 7 (A-64). Assuming, *arguendo*, that the unanswered calls did not give rise to a claim, the remainder, *i.e.*, 85 percent of the approximately 450,000 calls, gave rise to approximately 382,500 claims. In addition, the calls were placed only to New York City telephone numbers (Lifetime's above-quoted reference to the "New York City metropolitan area" likely was referring to the five boroughs of New York City). *See* Transcript of Deposition of Tracy Powell ("Powell Tr."), p.57, line 12 - p.58, line 3 (A-41 - A-42). Ms. Powell was Lifetime's "Vice President, Distribution Marketing." Lifetime's amended responses to Leyse's First Set of Interrogatories, No. 1 (A-60).

Lifetime's calls were made on August 19, 2009, and August 20, 2009. *See* Powell Tr., p.56, lines 2-9 (A-40).

The only variation in the prerecorded messages was that the messages on the campaign's first day referred to the advertised programming as airing "tomorrow," whereas the following day's calls referred to the programming as airing "tonight." *See* Powell Tr., p.47, line 24 - p.48, line 13 (A-38 - A-39).

Notwithstanding that Lifetime paid more than $55,000 to an entity known as OnCall Interactive for the calls to be made, *see* Lifetime's amended responses to

Leyse's First Set of Interrogatories, No. 23 (A-72), Lifetime never bothered to obtain, let alone keep, the list of phone numbers that were called (the "Phone-Number List"): "Lifetime does not possess, and to the best of its knowledge and information never did possess, a copy of the list of telephone numbers to which OnCall interactive (or an entity on behalf of OnCall Interactive) placed calls." Lifetime's amended responses to Leyse's First Set of Interrogatories, No. 7 (A-64).

When asked to "identify the source from which Leyse's Telephone Number was obtained for the purpose of placing a [call] to that number," Lifetime responded: "[t]o the best of Lifetime's knowledge and information, OnCall contracted with a third-party for telephone numbers. Lifetime does not possess, and to the best of its knowledge and information never did possess, a copy of the list of telephone numbers to which OnCall Interactive (or an entity on behalf of OnCall interactive) placed calls." Lifetime's amended responses to Leyse's First Set of Interrogatories, No. 9 (A-65). Lifetime incorporated this response when asked to identify the sources of the other telephone numbers that were called. *See id.*, No. 10 (A-66).

Given Lifetime's ostrich-like relationship with its calls, it can hardly be surprising that Lifetime did not have "prior express consent," 47 U.S.C. § 227(b)(1)(B), to make them. Indeed, Lifetime instead asserted an entirely frivolous basis on which supposed "prior express consent" existed. In response to being asked to "[i]dentify any source of permission regarding the placement of any [calls] to

Plaintiff's Telephone Number," Lifetime responded as follows: "Lifetime states that, to the best of its knowledge and information, cable customers consent to receive calls about their subscriptions." Lifetime's amended responses to Leyse's First Set of Interrogatories, No. 13 (A-67). Lifetime incorporated this response when asked the same question with respect to the other telephone numbers that were called. *See id.*, No. 14 (A-68).

Lifetime was not forthcoming about the basis of the supposed consent by "cable customers," as documented in a letter by Leyse's counsel to Lifetime's counsel, *see* Letter from Todd C. Bank to Sharon L. Schneier, *et al.*, dated Mar. 16, 2015 (A-85 - A-86). On October 27, 2014, Lifetime finally stated, in response to an interrogatory asking that Lifetime, "[w]ith respect to [Lifetime]'s [response to] Interrogatory Number 13 of Plaintiff's First Set of Interrogatories, identify the 'knowledge and information' to which such response refers," the following: "Time Warner Cable's Residential Services Subscriber Agreement is a 'source' of permission." Lifetime's responses to Leyse's Second Set of Interrogatories, No. 5 (A-99).

On January 7, 2015, Lifetime finally produced a copy of the "Time Warner Cable Residential Services Subscriber Agreement" (A-109 - A-125), paragraph 13(a) of which stated, in relevant part: "I consent to *TWC* calling the phone numbers I supply to it for any purpose, including the marketing of its current and future

Services. I agree that these phone calls may be made using any method, including an automatic dialing system or an artificial or recorded voice" (emphasis added) (A-121). However, Lifetime never presented any evidence that its calls were made on behalf of Time Warner Cable; and any notion that Section 13(a) of the Timer Warner Cable agreement rendered a Time Warner Cable customer to have given "prior express consent," 47 U.S.C. § 227(b)(1)(B), to receive prerecorded telephone calls from every third-party network that airs on Time Warner Cable is plainly nonsensical.

In sum, Lifetime paid a third party, *i.e.*, OnCall Interactive, to make, or arrange for the making of, Lifetime's prerecorded telephone calls, and OnCall Interactive turned to another third party to obtain the numbers to be called. Lifetime never even reviewed the Phone-Number List, much less kept it, and did not have prior express consent for its calls. If there were ever a case in which a defendant has been rewarded for its willful blindness, this case is it; and while the case law alone warrants reversal of the District Court's denial of class certification, the affirmance of that denial would necessarily encourage those who wish to violate the law on a mass scale to engage in the same type of conduct that resulted in Lifetime's victory before the District Court.

SUMMARY OF ARGUMENT

Point I

In denying Leyse's motion for class certification, the District Court relied solely, and cursorily, upon *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015), which had been decided six days before the District Court issued its order, and which, unfortunately, the parties were precluded from addressing by the District Judge's lack of allowing parties to submit notices of supplemental authority. In any event, the District Court erroneously treated *Brecher* as standing for the proposition that a defendant may defeat class certification by choosing not to maintain records that exist and that would enable the identification of class members.

In *Brecher*, the class was "truly indeterminable" because, following the District Court's procedurally improper expansion of the class, it was not possible for either the court or a class member to know who was a member of the class. *Brecher* had nothing to do with whether a class member would remember the facts that made him a member, or whether a class member could falsely claim to be a class member (although the fact that both possibilities could occur in the present case is the result of Lifetime's decision not to maintain records of class members). Rather, it was the "unique" complexity in *Brecher*, which concerned a default on Argentine bonds, that rendered the class unascertainable. Due to the trading of the bonds on the secondary market, where buyers and sellers do not know of each other's identities, an owner of

the bonds had no way of knowing which of his bonds, if any, remained in the class, and which of his bonds, if any, had been opted out of the class by any of the bonds' previous owners.

The only other decision of this Court that the District Court cited is *In re Public Offerings Secs. Litig.*, 471 F.3d 24 (2d Cir. 2006), but the District Court did not address the reason why this Court had found that the classes in that case were not ascertainable, which was because, unlike in the present case, a person's class membership depended upon his subjective intent or state of mind.

If this Court were to uphold the notion that a defendant should be rewarded for failing to keep records that would enable the identification of class members, the policies underlying class actions would be seriously undermined; and, moreover, those who wish to violate the law on a mass scale would simply need to do what Lifetime did, *i.e.*, engage in the mass violations without obtaining or keeping records of the victims. Clearly, this Court should not write what would amount to an instruction manual for those who wish to violate the law on a mass scale, but that would necessarily be the result if this Court affirmed the District Court's denial of class certification.

In a case just like this one, the court in *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014), certified a TCPA class based on the same provision at issue here, and rejected the notion that a defendant, through its record

keeping or lack thereof, should be able to control the size, or existence, of a class.

Point II

Even if Leyse's individual claims were mooted by the District Court's inviting of Lifetime to submit a payment to the court in Leyse's name in order for the court to issue a judgment on Leyse's individual claims (in response to Lifetime's motion for a judgment to be issued before making such payment), Leyse would still have the right to appeal the District Court's denial of class certification; a plaintiff with a live claim, which Leyse had before its presumed mooting, is entitled to a fair opportunity to show that class certification is warranted, as recognized in *Campbell-Ewald Company v. Gomez*, --- U.S. ---, 136 S. Ct. 663 (2016), and that opportunity is not to be taken away from a plaintiff whose judgment was forced upon him, as recognized in *Chen v. Allstate Ins. Co.*, No. 13-16816, --- F.3d. ---, 2016 WL 1425869 (9th Cir. Apr. 12, 2016). Moreover, as *Chen* also recognized, such fair opportunity includes the appeal of the denial of class certification.

Separate from the fair opportunity to appeal the denial of class certification, Leyse also has standing to bring the instant appeal in order to attempt to recover attorney's fees by spreading them among his fellow class members. That is because, whereas the seeking of attorney's fees does not ordinarily create an Article III case or controversy where the underlying claim is moot, the reason is that a court would, in order to award fees, have to issue a ruling on the merits of the mooted claim, *i.e.*,

an advisory opinion. In a class action, by contrast, any ruling that would result in the recovery of attorney's fees to a class representative whose individual claims have been mooted would be based on the claims of the unnamed class members, whose claims are live, not moot.

If this Court were to find that the issuance of the judgment on Leyse's individual claims precludes him from appealing the denial of class certification, the judgment should be vacated in order that Leyse be accorded a fair opportunity to show that certification is warranted. Otherwise, enabling Lifetime to force a judgment upon Leyse and thereby prevent Leyse from appealing the denial of class certification would, as *Chen* recognized, contravene Supreme Court precedents against allowing defendants to "pick off" putative class representatives in order to avoid class certification.

Finally, the District Court's issuance of judgment in favor of Leyse based upon Lifetime's deposit, with the court clerk, of a payment to Leyse was erroneous because, as well settled Supreme Court precedents hold, a payment that warrants the issue of a judgment must be accepted and actually received by the plaintiff, neither of which has occurred in the present case.

ARGUMENT

POINT I

THE CLASS IS ASCERTAINABLE

As a result of Lifetime's complete disregard for the Phone-Number List, the District Court found that Leyse did not "meet the ascertainability requirement of Fed. R. Civ. P. 23(b)." Class-Certification Order, p.8 (A-168). The sole case upon which the District Court relied is one that the parties were unable to address, as it had been decided after briefing was completed on Leyse's motion for class certification; indeed, only six days before the District Court made its ruling. *See id.*, citing *Brecher v. Republic of Argentina*, 802 F.3d 303 (2d Cir. 2015), *withdrawn and superseded*, 806 F.3d 22 (2d Cir. 2015) (with no changes that are material to the instant appeal).[1]

A. Discussion of *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015)

The appeal in *Brecher* was "the fourth time this Court ha[d] addressed . . . the manner in which the class [was] defined," *Brecher*, 806 F.3d at 23, an endeavor that had "proven to be [an] exasperating task[]." *Id.* Complicating matters was the fact that, after the District Court had "certified a class under a continuous[-][bond]holder requirement, *i.e.*, the class contained only those individuals who, like [the] [a]ppellee, possessed beneficial interests in a particular bond series issued by the Republic of

[1] Judge Hellerstein does not accept notices of supplemental authority. *See* District Court Dkt. Nos. 88, 89, 91, 93.

Argentina from the date of the complaint . . . through the date of final judgment," *id.*, the District Court granted summary judgment on liability in favor of the class but thereafter expanded the class definition:

> After this Court held in [two of the previous appeals] that the District Court's method of calculating damages was inflated and remanded with instructions to conduct an evidentiary hearing, the District Court entered an order . . . granting summary judgment to the [a]ppellee on liability but denying summary judgment on damages in order to hold a similar evidentiary hearing. *In place of the hearing*, however, the [a]ppellee . . . offered the District Court an alternative solution to its difficulties in assessing damages—simply *modifying the class definition* by *removing the continuous[-]holder requirement* and *expanding the class* to *all holders of beneficial interests in the relevant bond series without limitation as to time held*. Despite the fact that *a judgment on the merits had already been issued*, the District Court *granted* the motion.

Id. at 24 (emphases added).

This Court, which "recognize[s] an 'implied requirement of ascertainability' in Rule 23 of the Federal Rules of Civil Procedure," *id.*, found that "[t]he District Court . . . [had] neither articulated a standard for ascertainability of its new class nor made any specific finding under such a standard." *Id.* This Court proceeded to explain that "[a] class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case," *id.* at 24-25 (citation and quotation marks omitted), and further explained that, "[w]hile objective criteria may be necessary to

define an ascertainable class, it cannot be the case that any objective criterion will do," *id.* at 25, providing the following example:

> A class defined as "those wearing blue shirts," while objective, could hardly be called sufficiently definite and readily identifiable; it has *no limitation on time or context*, and the *ever-changing composition* of the membership would make determining the identity of those wearing blue shirts impossible. In short, the use of objective criteria *cannot alone determine ascertainability* when those criteria, taken together, do not establish the *definite boundaries* of a readily identifiable class.

Id. (emphases added; footnote omitted). In the omitted footnote, this Court noted that, "[o]f course, 'identifiable' does not mean 'identified'; *ascertainability does not require a complete list of class members at the certification stage*," *id.* at 25, n.2 (emphasis added), and added that "'[t]he class need not be so finely described . . . that every potential member can be specifically identified at the commencement of the action; it is sufficient that the *general parameters of membership are determinable at the outset*.'" *Id.*, quoting Joseph M. McLaughlin, *McLaughlin on Class Actions*, § 4:2 (11th ed. 2014) (emphasis added).

The reason that "removing the continuous[-]holder requirement and expanding the class to all holders of beneficial interests in the relevant bond series without limitation as to time held," *id.* at 24, ran afoul of the ascertainability requirement was that "*neither the purchaser* [of the bonds] *nor the court* can ascertain whether [the purchaser's] beneficial interest falls *inside or outside of the class*." *Id.* at 26 (footnote

omitted). This Court, using an on-point example, explained why this was so:

> A hypothetical illustrates this problem. Two bondholders—A and B—each hold beneficial interests in $50,000 of bonds. *A opts out of the class*, while *B remains in the class*. Following a grant of summary judgment on liability, both *A and B then sell their interests on the secondary market to a third party, C*. C now holds a beneficial interest in $100,000 of bonds, *half inside the class* and *half outside the class*. *If C then sells a beneficial interest in $25,000 of bonds to a fourth party, D, the absence of a temporal limitation* like the continuous[-]holder requirement *ensures that neither the purchaser nor the court can ascertain* whether D's beneficial interest falls *inside or outside of the class*.

Id. at 26 (emphases added). Accordingly, this Court found that "[t]he *lack of a defined class period*, taken *in light of the unique features* of the bonds *in this case*, thus makes the [expanded] class *insufficiently definite as a matter of law*," *id.* (emphases added); that is, "when it becomes necessary to determine who holds bonds that fall *inside (or outside) of the class*, it will be *nearly impossible to distinguish* between them once traded on the secondary market without a criterion as to time held." *Id.* (emphases added). As a result, this Court concluded that the District Court had "certifi[ed] . . . a class whose membership [was] *truly indeterminable*." *Id.* (emphasis added; citation and quotation marks omitted).

This Court also found that "[t]he expansion of the class after a judgment on liability further raises the specter of one-way intervention that motivated the 1966 amendments to Rule 23, . . . [which] were designed, in part, specifically . . . to assure

that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments, . . . [so that] potential class members [could not] wait[] on the sidelines to see how the lawsuit turns out and, if a judgment for the class is entered, interven[e] to take advantage of the judgment." *Id.* (citations omitted). Thus, "[a]lthough the class as originally defined by the District Court may have presented difficult questions of calculating damages, it did not suffer from a lack of ascertainability[,] [whereas] [t]he District Court erred in attempting to address those questions by introducing such a defect into the class definition, after liability had already been determined." *Id.*

B. The Failure by Defendant to Maintain Records That Would Enable the Identification of Class Members Did Not Render the Class "Truly Indeterminable"

Numerous factors distinguish the present case from *Brecher*. First, the District Court here, unlike the *Brecher* District Court, did not expand, or otherwise redefine, the class after issuing a judgment.

Second, the class that Leyse seeks to certify (the "Leyse Class") contains limitations on time and context.

Third, the Leyse Class is not made up of an ever-changing composition, but, instead, has definite boundaries.

Fourth, and perhaps of the most significance, is that, whereas the class members in *Brecher* could not even know who they were, the Leyse Class members

have not been prevented from knowing who *they* are. Rather, at least some class members will remember that they received one of Lifetime's telephone calls.

As an example of a class whose members were found not to be ascertainable, *Brecher* cited *Weiner v. Snapple Beverage Corp.*, No. 07-cv-8742, 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010), *see Brecher*, 806 F.3d at 23 (as did the District Court, *see* Class-Certification Order at 5 (A-165)); but the very different facts in *Snapple* show, again, why, by contrast, the Leyse Class *is* ascertainable.

In *Snapple*, the putative class comprised "[a]ll persons and entities who, within the State of New York, purchased . . . a Snapple beverage marketed . . . as 'All Natural,' but that contained [high-fructose corn syrup], from October 10, 2001 to January 1, 2009." *Snapple*, 2010 WL 3119452 at *2. The court noted that, "during the class period, several millions of bottles of Snapple were sold in the State of New York," *id.* at *12, and that, moreover, "the purported class is not limited to New York [residents], or even United States[] residents, [and thus] could potentially include millions of consumers from around the world." *Id.* In short, the court was confronted with "a geographically-dispersed class of consumers who purchased Snapple beverages in different locations, at different times, and for different prices." *Id.*

The plaintiffs in *Snapple* "suggest[ed] that after certification, the [c]ourt could require that [c]lass members produce a receipt, offer a product label, or even sign a declaration to confirm that the individual had purchased a Snapple beverage within

the class period," *id.* at *13 (quotation marks omitted); but the court found that "[t]his suggestion, to say the least, is unrealistic," *id.*, because "[the] [p]laintiffs offer no basis to find that putative class members will have retained a receipt, bottle label, or any other concrete documentation of their purchases of Snapple beverages bearing the 'All Natural' description." *Id.*

The Leyse Class compares very favorably to the class in *Snapple*. Here, there are approximately 382,500 claims, not several million; the class claims arose over a two-day period; and all of Lifetime's calls were made to New York City telephone numbers.

As an example of a case in which it was found that a class was ascertainable even though there were no records identifying the class members, *Brecher* cited *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561 (S.D.N.Y.2014). *See Brecher*, 806 F.3d at 26. In *Ebin*, the proposed class (and subclasses) comprised "persons in the United States who purchased [a particular product that was] packed before March 1, 2013." *Ebin*, 297 F.R.D. at 564. With respect to ascertaining the class members, the court was presented with "three ways to identify [them]: (1) provide a claim form and receipt; (2) submit the unique ID stamped on each tin [of the product]; and/or (3) provide a sworn affidavit identifying the particulars of the purchase." *Id.* at 567. Moreover: although "[the] plaintiffs acknowledge[d] that there are some burdens to easily identifying all the class members, they maintain[ed] that *retention of receipts is not*

an essential element for the management of a class action, or for establishing proof of injury or damages. Nor does the possibility that class members will have *discarded the* product render the class *unascertainable*." *Id.* (emphases added). The defendants responded by relying upon *Snapple*, *see id.*, in response to which the *Ebin* court acknowledged:

> Here as in *Snapple* [the named] plaintiffs do not point to any records that can objectively determine membership in the proposed class. Nor is it likely that consumers consistently maintain receipts of their purchase or the actual tins or bottles. Indeed, [the named] plaintiffs here have neither the [product] they purchased nor any receipts or documentation proving their purchases. The process described by [the] class[-]action administrator . . . to identify class members is very similar to the process found inadequate in *Snapple*.

Id. The court further acknowledged that, "[a]lthough *Snapple* is not binding on this Court, it raises concerns," *id.*, but explained that the denial of certification in *Ebin* was unwarranted, and that, if certification were denied, the public policy that class actions are designed to effect (which is addressed more fully in Point I(E), *infra*) would be undermined:

> [T]he Second Circuit has instructed that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Visa Check/Masterwoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001). Against this background, the Court finds that, in the end, *Snapple* goes further than this Court is prepared to go, and, indeed, *would render class actions against producers almost impossible to bring*. Yet the class[-

>]action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit. *Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action*.

Id. (emphases added).

Furthermore, whereas the court in *Snapple* had found that "putative class members are unlikely to remember accurately every Snapple purchase during the class period, much less whether it was an 'All Natural' or diet beverage, whether it was purchased as a single bottle or part of a six-pack or case, whether they used a coupon, or what price they paid," *Snapple*, 2010 WL 3119452 at *13, the products at issue in *Ebin*, by contrast, were uniform. *See Ebin*, 297 F.R.D. at 569. Likewise, in the present case, Lifetime's calls were uniform. *See* Class-Certification Order at 2-3 (A-162 - A-163).

The District Court, in denying Leyse's motion for reconsideration, found that "class members [could not] realistically be expected to recall a brief phone call received six years ago or be expected to retain any concrete documentation of their receipt of such a phone call." Order denying motion for reconsideration at 1 (A-172). On the contrary, it would not be unusual for a person to remember a telephone call from a popular celebrity host regarding his well-known television program. Of course, many or even most class members in various types of cases will not remember

the facts that gave them a claim, but that is no reason to deny, to those who do remember, that to which they are entitled.[2]

In *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29 (E.D.N.Y. 2015), the court, in addressing a class-certification motion regarding "'Freshmates,' which are advertised as 'flushable wipes,'" *id.* at 39, noted that "District judges in this District, and elsewhere, have expressed conflicting views on whether putative classes are ascertainable when consumers are unlikely to retain receipts or other records of purchase or whether additional records are required." *Id.* at 66 (additional citation and quotation marks omitted). The court proceeded to certify the class, in which "[o]nly one product [was] at issue, and it was labeled in a uniform manner." *Id.* Again, in the present case, there was also uniformity; *i.e.*, Lifetime's telephone phone calls all involved the same message. The *Belfiore* further found that "it is unlikely that consumers will retain receipts . . . , [but the] plaintiff[s] may rely on affidavits for those [of them who are] without receipt[s]." *Id.*

In *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397 (S.D.N.Y. 2015), the plaintiff sought to represent people who purchased, in either New York or California, a

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[2] The District Court also stated, in denying Leyse's motion for reconsideration, that "Plaintiff's request for still another opportunity to conduct discovery again is denied, as is its [sic] entire motion for reconsideration." Order denying motion for reconsideration at 1-2 (A-172 - A-173). However, Leyse had not requested permission to engage in additional discovery either when moving for class certification or when moving for reconsideration. Indeed, the Class-Certification Order did not even suggest that Leyse had made such a request.

particular product with a particular statement on its label. *See id.* at 404. The court "agree[d] with Judge Rakoff's reasoning in *Ebin* [that] [d]eclining to certify classes when consumers are likely to lack proof of purchase 'would render class actions against producers almost impossible to bring,'" *id.* at 407, quoting *Ebin*, 297 F.R.D. at 567, for "'the class[-]action device, at its very core, is designed for cases like this where a large number of consumers have [allegedly] been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit.'" *Id.*, quoting *Ebin*, 297 F.R.D. at 567 (bracketed "allegedly" in original).

Out-of-circuit cases have also found that the absence of records does not render a class administratively unfeasible. *See*, *e.g.*, *Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Calif. 2013), which certified a multi-state class of purchasers of cereal and snack products alleged to be falsely labeled as "All Natural" or "Nothing Artificial" and observed that "[i]f class actions could be defeated because membership was difficult to ascertain at the class[-]certification stage, there would be no such thing as a consumer class action," *id.* at 500; *see also Werdebaugh v. Blue Diamond Growers*, No. 12-cv-2724, 2014 WL 2191901 (N.D. Calif. May 23, 2014) (certifying a class of people who purchased, in California, almond-milk products whose labels contained one or both of two particular statements, *see id.* at *3, *21, and finding that the class members could "submit affidavits attesting to their belief that they have purchased a carton of [the product] in the past several years." *Id.* at *11).

C. Discussion of *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014)

In *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014), which concerned prerecorded telephone calls in violation of the same provision of the TCPA at issue in the present case, the same arguments that Lifetime makes here were forcefully rejected. There, the defendants, who had records relating to a small percentage of their calls but no records relating to the vast majority of them, *see id.* at 244-245, "argue[d] [that] the classes should be limited only to [those class members whose identities were included in] the records [that the] defendants themselves have produced. In other words, [the] defendants [were] *essentially arguing that the contours of the class should be defined by [the] defendants' own recordkeeping*." *Id.* at 250 (emphasis added).

The court responded to the defendants' proposal with the common-sense critique that "declining to certify a class . . . would create an incentive for a person to violate the TCPA on a mass scale and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct." *Id.* Accordingly, while the court anticipated that some of the class members would be able to "prov[e] [that] they received a call from one of the numbers on [a] Missouri Attorney General letter discussing the [defendants'] calls," *id.* at 249, the court also ruled that class members who could not do so "may in addition to . . . their telephone

records, bills, and/or recordings of the calls, . . . provide a sworn statement at an appropriate point during the litigation." *Id.* at 250. Likewise, a member of the Leyse Class should be able to submit a copy of a telephone bill showing that he had a New York City telephone number at the time that Lifetime's calls were made, and an affidavit stating he received one of the calls.

In sum, Lifetime's "ostrich" approach in carrying out its unlawful conduct need not, and must not, redound to Lifetime's benefit.

D. The Question of Whether a Person is a Member of the Leyse Class is Not Dependent Upon His Subjective Intent or State of Mind

This Court's decision in *In re Public Offerings Secs. Litig.*, 471 F.3d 24 (2d Cir. 2006), shows, as does *Brecher*, types of factors that weigh against ascertainability but that are inapplicable here. In *In re Public Offerings*, the Court addressed the question of class certification of a group of related actions that "involve[d] claims of fraud on the part of several of the nation's largest underwriters in connection with a series of initial public offerings." *In re Public Offerings*, 471 F.3d at 27. Although the Court concluded that "the predominance requirement is defeated because common questions of knowledge do not predominate over individual questions," *id.* at 43, the Court proceeded to observe that, "[y]et a further example of an aspect of this litigation bristling with individual questions is *ascertainment* of which putative class members have paid any undisclosed compensation to the allocating underwriter(s), a circumstance that, along with others,

would exclude them from the class [definition]." *Id.* at 44 (emphasis added; citation and quotation marks omitted).

Specifically, the Court noted that, even aside from "the somewhat paradoxical point as to how someone is to determine whether compensation that was 'undisclosed' was paid, . . . individual issues arise even as to those aspects of compensation that a [class member] might be able to determine were within the [named] [p]laintiffs' definition of 'Undisclosed Compensation.'" *Id.* Because "such compensation comprise[d] (a) paying inflated brokerage commissions; (b) entering into transactions in otherwise unrelated securities *for the primary purpose* of generating commissions; and/or (c) purchasing equity offerings underwritten by the Underwriter Defendants, including, but not limited to, secondary (or add-on) offerings *that would not be purchased but for the . . . unlawful scheme*," *id.* (emphases in original; citation and quotation marks omitted), the Court found that "[e]ach category of undisclosed compensation would require individualized determinations," *id.*, further explaining, with respect to ascertainability:

> Whether shares unrelated to [an initial public offering] were *purchased for the purpose of generating commissions* and whether shares purchased in the aftermarket would not have been bought but for the allegedly unlawful scheme would require inquiry into the *subjective intent* of the purchaser . . . [whereas] [o]bviously, *ascertaining* each purchaser's *intent* would require an individualized determination. *See Simer v. Rios,* 661 F.2d 655, 669 (7th Cir. 1981) (*class difficult to ascertain where "membership in the class depends on each individual's state of mind*");

> *Dunnigan v. Metropolitan Life Insurance Co.,* 214 F.R.D. 125, 135 (S.D.N.Y. 2003) ("[w]here membership in the class requires a *subjective determination*, the class is not identifiable.").

Id. at 44-45 (emphases added). The Court summarized: "[a]lthough *ascertainability* of the class is an issue *distinct* from the *predominance* requirement for a [Rule 23] (b)(3) class, the problems we have identified on th[e] topic [of ascertainability] further indicate the obstacles to proceeding . . . as class actions." *Id.* at 45 (emphases added).

In contrast to the situation in *In re Public Offerings*, neither the subjective intent or state of mind of the Leyse Class members is at issue.

E. A Class-Certification Requirement That a Defendant Maintain Records That Enable the Identification of Class Members Would Disregard and Undermine the Purposes and Benefits of Class Actions, and Would Enable Defendants to Plan Their Mass Lawbreaking Accordingly and Reward Them for Doing So

Rewarding Lifetime for deciding not to obtain and keep the Phone-Number List would have the necessary, obvious, and unavoidable effect of encouraging other mass violators of the law to do likewise, and would contravene "'[t]he policy at the very core of the class action mechanism[,] [which] is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting [his] rights.'" *Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70, 81 (2d Cir. 2015), quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)

(additional citation and quotation marks omitted). As this Court further noted, "'[a] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" *Id.*, quoting *Amchem*, 521 U.S. at 617 (additional citation and quotation marks omitted).

It is undeniable that, as the present case now stands, Lifetime has been rewarded for its willful blindness and that, absent reversal of the denial of class certification, other violators of the law will gladly learn from Lifetime's example and plan their wrongdoing accordingly. This was recognized in *Birchmeier*, *supra*, which rejected the obviously unjust notion that a defendant should be able to capitalize on the perverse incentive to fail to maintain records in order to control the class size (or, as in the present case, the very existence of a class):

> [The] defendants are essentially arguing that the contours of the class should be defined *by [the] defendants' own recordkeeping*. This would result in an artificial class definition that would leave out individuals who actually received the calls in question—*an unquestionably objective criterion—and who possess a record* [*such as a telephone bill*, *see id.* at 248] *that is at least circumstantial evidence of class membership, a picture they can complete with their own sworn statements*. Doing this—or declining to certify a class altogether, as [the] defendants propose—would create an *incentive* for a person *to violate the TCPA on a mass scale* and *keep no records* of its activity, knowing that it could *avoid legal responsibility for the full scope of its illegal conduct*.

Birchmeier, 302 F.R.D. at 250 (emphases added).

As in *Birchmeier*, the court in *Zyburo v. NCSPlus, Inc.*, 44 F. Supp. 3d 500

(S.D.N.Y. 2014), certified a TCPA class against a defendant, a debt-collection company, that had sought to use its lack of recordkeeping as a means of defeating certification: "by its own admission, the defendant keeps *poor or nonexistent records* of which class members have given consent to the underlying creditor. [The] [d]efendant is in effect asking the Court to *reward its imperfect record-keeping practices by precluding class certification*." *Id.* at 503 (emphases added). Clearly, the notion that a defendant should be better off (and the class members worse off) for failing to maintain records (whether sufficiently or altogether) would not advance justice, but would, instead, encourage its perversion. However, that is exactly what has transpired in the present case, and it should not be left to stand.

F. Plaintiff Preserves the Right to Argue Against a Heightened Ascertainability Requirement

Historically, the ascertainability inquiry related to whether class members are able to identify themselves as fitting within the class definition for purposes of an award or settlement distribution and the preclusion of the relitigation of a claim. *See* Joseph M. McLaughlin, *McLaughlin on Class Actions*, § 4:2 (11th ed. 2014) ("class members need to be able to determine with certainty from a class notice whether they are in the class. . . . If the class definition is amorphous, persons may not recognize that they are in the class, and thus may be deprived of the opportunity to object or opt out."); *see also* James Wm. Moore, *et al.*, *Moore's Federal Practice*, ¶ 23.21[1] (3d ed. 1999) (noting that a class must be "susceptible to precise definition"). Nothing in

Rule 23 of the Federal Rules of Civil Procedure, however, requires, or even authorizes, a heightened evidentiary burden in order to ensure that there is an "administratively feasible" method under which a court can determine who is part of the class. *See*, *e.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663-672 (7th Cir. 2015).

To the extent that the arguments raised in this subsection are foreclosed by binding precedent, Leyse raises them in order to preserve them in any future proceedings.

POINT II

DEFENDANT'S ATTEMPT TO "PICK OFF" PLAINTIFF DID NOT PRECLUDE PLAINTIFF FROM APPEALING THE DISTRICT COURT'S DENIAL OF HIS MOTION FOR CLASS CERTIFICATION

A. Even if Plaintiff's Individual Claims Were Mooted, Plaintiff Would Still Have the Right to Appeal the District Court's Denial of Class Certification

(i) Plaintiff is Entitled to a Fair Opportunity to Show That Class Certification is Warranted

In *Campbell-Ewald Company v. Gomez*, --- U.S. ---, 136 S. Ct. 663 (2016), the Court began its opinion with the following question: "[i]s an unaccepted offer to satisfy the named plaintiff's individual claim sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated?" *Id.* at 666. The Court answered this question in the negative, but did so

based upon general principles of contract law rather than upon the law as applied in class actions in particular, *see id.* at 669-672, and found that "the recipient's rejection of an offer leaves the matter as if no offer had ever been made." *Id.* at 670 (citations and quotation marks omitted). Accordingly, the Court summarized its opinion as follows: "when the settlement offer . . . [had] expired, [the plaintiff] remained emptyhanded; his TCPA complaint . . . stood wholly unsatisfied." *Id.* at 672. Given that the Court found that the scenario before it was equivalent to a scenario in which no offer had been made, there would ordinarily be no reason to address questions regarding class certification. However, the Court, immediately following the last quotation, stated the following:

> Because [the plaintiff]'s individual claim was not made moot by the expired settlement offer, that claim would retain vitality *during the time involved in determining whether the case could proceed on behalf of a class*. While a class lacks independent status until certified, *see Sosna v. Iowa*, 419 U.S. 393, 399 (1975), *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 (emphases added). This quotation raised the question of whether "a would-be class representative with a live claim of [his] own" would, upon his individual claims being mooted by a judgment in his favor but issued over his objection, still be entitled to "a fair opportunity to show that certification is warranted"; and, if so, whether that "fair opportunity" ends upon a District Court's denial of class

certification or whether it ends upon a final disposition on appeal of that denial.

Absent a plaintiff's consent to the mooting of his individual claims, the denial of a "fair opportunity" to pursue class certification would "transfer[] authority from the federal courts and . . . would place the defendant in the driver's seat." *Id.* Moreover, there is no basis for the notion that the "fair opportunity" to pursue class certification should exclude the pursuit of certification on appeal. These issues were recently addressed in *Chen v. Allstate Ins. Co.*, No. 13-16816, --- F.3d. ---, 2016 WL 1425869 (9th Cir. Apr. 12, 2016), in which the court rejected a post-*Campbell-Ewald* attempt to "pick off" a named plaintiff in order to avoid the possibility of class certification (for reasons that are addressed in Point II(C), *infra*).

In *Chen*, the court found that, "[e]ven if . . . the district court were to enter judgment providing complete relief on [the plaintiff]'s individual claims . . . before class certification, fully satisfying those individual claims, [the plaintiff] still would be entitled to seek certification," *id.* at *5, explaining:

> If the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the class[-]certification issue. Then, if the district court certifies the class, certification relates back to the filing of the complaint. Once the class has been certified, the case may continue *despite full satisfaction of the named plaintiff's individual claim* because an offer of judgment to the named plaintiff *fails to satisfy the demands of the class*.

Id. at *5, citing *Sosna v. Iowa*, 419 U.S. 393, 402-403 (1975) (emphases added;

citation and quotation marks omitted).

With respect to a plaintiff's appeal of a denial of class certification after his individual claims have been mooted, the court explained:

> [I]f the district court denies class certification, under *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and [*United States*] *Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the plaintiff may still pursue a limited appeal of the class[-]certification issue. *Only once the denial of class certification is final* does the defendant's offer—if still available—moot the merits of the [entire] case because [then] the plaintiff [will have] been offered *all that he can possibly recover through litigation*.

Id. (emphases added; additional brackets omitted).

(ii) Plaintiff Has Standing to Attempt to Recover Attorney's Fees by Appealing the Denial of Class Certification, as Such Recovery Would Not Depend Upon the Issuance of an Advisory Opinion

Although Lifetime's payment included Leyse's costs, *see* Judgment (A-196), Leyse has not recovered his attorney's fees; and his interest in recovering those fees among his fellow class members alone gives him standing to appeal the denial of class certification. As the Supreme Court explained in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. ---, 133 S .Ct. 1523 (2013):

> In *Roper,* the named plaintiffs' individual claims became moot after the District Court denied their motion for class certification under Rule 23 and subsequently entered judgment in their favor, based on the defendant[]'s offer of judgment for the maximum recoverable amount of damages, in addition to interest and court costs. The

> [*Roper*] Court held that even though the District Court had entered judgment in the named plaintiffs' favor, they could nevertheless appeal the denial of their motion to certify the class. The Court found that, under the particular circumstances of that case, the named plaintiffs possessed an *ongoing, personal economic stake* in the substantive controversy—*namely, to shift a portion of attorney's fees and expenses to successful class litigants*. Only then, in dicta, did the Court underscore the importance of a district court's class[-]certification decision and observe that allowing defendants to "pic[k] off" party plaintiffs before an affirmative ruling was achieved "would frustrate the objectives of class actions."

Genesis Healthcare, 133 S. Ct. at 1531-1532 (emphases added; footnote and citations omitted). In the omitted footnote, the Court stated: "[b]ecause *Roper* is distinguishable on the facts, we need not consider its continuing validity in light of our subsequent decision in *Lewis v. Continental Bank Corp.*, 494 U. S. 472 (1990). *See id.*, at 480 ('[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the *merits of the underlying claim*')." *Genesis Healthcare*, 133 S. Ct. at 1532, n.5 (emphasis added; brackets in original); *see also W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 109 (2d Cir. 2008) ("[o]n the face of the complaint, [the plaintiff's] only interest in this litigation as an attorney-in-fact is the recovery of its legal fees, which are a byproduct of the suit itself and cannot serve as a basis for Article III standing," citing *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-773 (2000), and *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986).

Lewis, *Diamond*, *Vermont Agency of Natural Res.*, and *W.R. Huff* are distinguishable from the present case because they did not concern class actions. Thus, in each of those cases, the only way that a court could have awarded attorney's fees was by ruling on the merits of a moot claim, *i.e.*, by issuing an advisory opinion. By contrast, Leyse has an interest in "shift[ing] to successful class litigants a portion of those fees . . . that have been incurred in this litigation," *Roper*, 445 U.S. at 334, an "individual interest [that] may be satisfied fully once effect is given to the decision of the Court of Appeals setting aside what it held to be an erroneous District Court ruling on class certification," *id.* at 336-337; *see also id.* at 338, n.9 (a putative class with small individual claims "would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.").

Unlike a plaintiff in an individual action, a putative class representative whose individual claims have been mooted does not require the issuance of an advisory opinion in order to recover attorney's fees. Rather, such recovery would be contingent upon the successful litigation of the claims of the other class members; and, of course, those claims are live, not moot. In short, the rationale of the *Diamond* progeny is inapplicable to a putative class representative who, like Leyse, seeks to recover fees based on the successful litigation of live claims.

B. The Judgment Should Be Vacated if Plaintiff Would Otherwise Be Prevented from Appealing the District Court's Denial of Class Certification

In *Chen*, the court, having ruled that the plaintiff's individual claims had not been mooted, found that "[t]he question remain[ed] whether [the court] should, as [the defendant] urge[d], instruct the district court to order . . . relief on [the plaintiff]'s individual claims, thereby mooting them, before [the plaintiff] has had an opportunity to move for class certification." *Id.* at *9. The court, which "assume[d], without deciding, [that] a court has authority in an appropriate case to enter judgment for complete relief on a plaintiff's individual claims over the plaintiff's objection," *id.*, found that *Campbell-Ewald* "clearly suggests it would be inappropriate to enter judgment under these circumstances," *id.*, reasoning that, "[a]s *Campbell-Ewald* explained, '[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.*, quoting *Campbell-Ewald*, 136 S. Ct. at 672 (emphasis in original).

The court concluded that, "[a]ccordingly, when a defendant consents to judgment affording complete relief on a named plaintiff's *individual* claims before certification, but fails to offer complete relief on the plaintiff's *class* claims, *a court should not enter judgment on the individual claims*, over the plaintiff's objection, before the plaintiff has had a fair opportunity to move for class certification." *Id.*

(emphases added). This conclusion, *Chen* explained,

> is consistent not only with *Campbell-Ewald* but also with previous Supreme Court decisions noting a named plaintiff's "'personal stake' in obtaining class certification," [*United States Parole Commission v.*] *Geraghty*, 445 U.S. [388] at 404 [(1980)], recognizing [that] "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires," *id.* at 399, and disapproving of the "picking off" of named plaintiffs to deny a would-be class representative a fair opportunity to seek class relief, *see Roper*, 445 U.S. at 339. As the Court said in *Roper*, 445 U.S. at 339, "[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."

Id. at *10. Here, Leyse has already moved for class certification, but his right to appeal its denial is, under *Roper*, on the same footing as was his right to seek it in the District Court.

In the event that this Court rejects Leyse's position, set forth in Point II(A), *supra*, that Leyse has retained the right to appeal the District Court's denial of class certification, the judgment should be vacated.

C. The District Court's Issuance of Judgment in Favor of Plaintiff on His Individual Claims was Erroneous

In *Campbell-Ewald*, the Supreme Court held as follows: "[w]e hold today, in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists." *Campbell-Ewald*, 136 S. Ct. at 666.

As an attempt to moot Leyse's individual claims without being precluded by *Campbell-Ewald*, Lifetime's counsel stated, in support of Lifetime's Motion for Judgment and Dismissal, that "I have been advised by my client that, upon entry of judgment in this case, Lifetime will immediately pay the sum of $1,503.00 to Leyse, plus costs as ordered by the Court, but that the company requires a completed Form W-9 (Request for Taxpayer Identification Number and Certification) in order to effectuate payment." Declaration of Sharon L. Schneier Decl., ¶ 6 (A-177).

Whereas Lifetime requested a judgment and promised to thereafter satisfy it, the District Court awarded the opposite relief: "[t]his court *will enter judgment* in plaintiff's favor *once defendant has deposited* with the Clerk of Court, to the credit of plaintiff, a bank or certified check in the amount of $1,503.00, and an additional amount of $400 to cover court costs as determined by the Clerk." Order Entering Judgment for Plaintiff at 4 (A-194).

In *Chen*, the court rejected a post-*Campbell-Ewald* attempt to "pick off" a named plaintiff in order to avoid liability to the class; an attempt that was similar to what the District Court ordered in response to Lifetime's Motion for Judgment and Dismissal. In *Chen*, "[the defendant] deposited $20,000 in full settlement of [the plaintiff]'s individual monetary claims in an escrow account pending entry of a final District Court order or judgment directing the escrow agent to pay the tendered funds to [the plaintiff]." *Chen*, 2016 WL 1425869 at *1.

As *Chen* noted, *Campbell-Ewald* "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 *3, quoting *Campbell-Ewald*, 136 S. Ct. at 672 (emphasis added), but instead "expressly reserved this question 'for a case in which it is not hypothetical.'" *Id.*, quoting *Campbell-Ewald*, 136 S. Ct. at 672. Noting that the defendant in *Chen* "seeks to take up that hypothetical here," *id.* at *4, by having made its deposit, the defendant relied, in arguing for individual mootness, upon the "trio of railroad cases," *id.* at *7, that *Campbell-Ewald* examined. *Id.*, citing *San Mateo County v. Southern Pacific Railroad Co.*, 116 U.S. 138 (1885), *Little v. Bowers*, 134 U.S. 547 (1890), and *California v. San Pablo & Tulare Railroad Co.*, 149 U.S. 308 (1893).

The court, in reasoning that is applicable to the present case, rejected the

defendant's reliance because the trilogy of cases stands for the principle that "a claim becomes moot once the plaintiff *actually receives* all of the relief to which [he] is entitled on the claim," *Chen*, 2016 WL 1425869 at *7 (emphasis in original), whereas the plaintiff in *Chen* "ha[d] not actually received all of [that] relief." *Id.* at *8.

Unlike in the present case, the defendant in *Chen* had "neither deposited the [payment] in the court nor unconditionally relinquished its interest in the [payment] to [the plaintiff]." *Id.* However, like the plaintiff in *Chen*, Leyse has not actually received, or accepted, Lifetime's payment; and, again, as *Chen* explained, it is the *actual receipt* of payment this is the *sine qua non* of a claim's mootness. To further explain this principle, the court turned to one of the railroad cases that *Campbell-Ewald* had addressed, *i.e.*, *San Pablo*, in which the Supreme Court found that a claim had been mooted notwithstanding that "the state did not accept the tender, [but because] the railroad deposited the funds in a bank *in accordance with a state law making such a deposit equivalent to actual payment*." *Id.* at *7 (emphasis added). Thus, "'[a]ny obligation of the defendant to pay to the State the sums sued for in this case . . . has been extinguished by the offer to pay all these sums, and the *deposit of the money in a bank, which by a statute of the State have the same effect as actual payment and receipt of the money*.'" *Id.*, quoting *San Pablo*, 149 U.S. at 313-314 (emphasis added).

The *Chen* court held: "[i]n sum, [the plaintiff]'s individual claims are not now

moot, because he *has not actually received* all of the relief to which he is entitled on those claims." *Id.* at *8 (emphasis added).

Finally, although the *Chen* court recognized that the Supreme Court, in *Genesis Healthcare*, "questioned the application of 'the "inherently transitory" relation-back rationale' to circumstances in which the transitory nature of the claim arises from 'the defendant's litigation strategy' rather than 'the fleeting nature of the challenged conduct giving rise to the claim,'" *id.* at *6, quoting *Genesis Healthcare*, 133 S.Ct. at 1531, the court rejected the defendant's reliance upon *Genesis Healthcare*, which concerned claims under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. ("FLSA"), explaining: "courts have universally concluded that the *Genesis* discussion does not apply to class actions. In fact, *Genesis* itself emphasizes that 'Rule 23 [class] actions are *fundamentally different* from collective actions under the FLSA.'" *Id.* at *6, quoting *Genesis Healthcare*, 133 S. Ct. at 1529) (emphasis added; additional citation and quotation marks omitted).

In sum, Leyse did not accept, or actually receive, Lifetime's payment, and the judgement was therefore issued erroneously.

CONCLUSION

That part of the Order of the District Court, dated, and entered with the clerk on, September 22, 2015, that denied class certification should be vacated; the Judgment should be vacated in the event that this Court finds that its issuance precludes Plaintiff-Appellant from appealing the District Court's denial of class certification; and Plaintiff-Appellant should be granted such other and further relief as authorized by law.

Dated: July 14, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,481 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

s/ *Todd C. Bank*
Todd C. Bank
Counsel to Plaintiff-Appellant
Dated: July 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2016, a true and accurate copy of the foregoing Appellant's Principal Brief, and the Joint Appendix, were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic-filing system and copies will be mailed to those parties, if any, by certified mail who are not served via the Court's electronic-filing system.

s/ *Todd C. Bank*
Todd C. Bank
Dated: July 14, 2016