UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-CV-22330-SEITZ/SIMONTON

PHYSICIANS HEALTHSOURCE, INC., an Ohio corporation, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

DOCTOR DIABETIC SUPPLY, LLC, a Florida limited liability company, GEORGE T. HEISEL, DDS HOLDINGS, INC., SANARE, LLC and JOHN DOES 1-10,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND INCORPORATED MEMORANDUM OF LAW

Defendants Sanare, LLC ("Sanare") and Doctor Diabetic Supply, LLC ("DDS"), pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, hereby move to dismiss the putative Second Amended Class Action Complaint [ECF # 41] filed by Plaintiff PHYSICIANS HEALTHSOURCE, INC. ("Physicians Healthsource") for lack of subject matter jurisdiction on grounds set forth in the following Memorandum of Law.

MEMORANDUM OF LAW

INTRODUCTION

This case is a class action alleging violations of the Telephone Consumer Protection Act and a common law claim for conversion. Plaintiff's Second Amended Complaint should be dismissed because it does not present an actual case or controversy as required by Article III of the U.S. Constitution. Defendants DDS and Sanare have each served an offer of judgment

pursuant to Federal Rule of Civil Procedure 68 (the "Offer of Judgment") that offers Plaintiff the maximum statutory damages and injunctive relief sought in its Second Amended Complaint, together with its costs. Having been offered full relief, Plaintiff no longer has standing to pursue this litigation, either in its individual capacity or on behalf of an uncertified, purported class of unnamed plaintiffs. In other words, because Defendants are giving Plaintiff everything it seeks in its claim against them, this action does not present a live case or controversy, as required for this Court to exercise subject matter jurisdiction. As a result, the Court should dismiss the Second Amended Complaint.

FACTUAL BACKGROUND

Plaintiff Physicians Healthsource has filed a nationwide class action complaint against Defendants alleging a claim for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and a claim for common law conversion. The claims arise out of two faxes that Plaintiff alleges Defendants transmitted on July 1, 2008 and on September 20, 2011. Second Amended Complaint ("Cpl."), Exhibit ("Ex.") A. Plaintiff alleges that it is entitled to the maximum statutory amount of $500.00 available under Section 227(b)(3)(B) of the TCPA for the 2008 Fax and the 2011 Fax. *Id*., p. 9. Plaintiff further prays that, should the Court determine that Defendants acted willfully and knowingly, Plaintiff's damages will be trebled to $1,500 for each Fax pursuant to Section 227(b)(3)(C) of the TCPA. (*Id.* at ¶ 30.)

In response to these allegations, prior to the filing of this Motion, Defendants each served Plaintiff with an Offer of Judgment, pursuant to which Defendants agreed to: (i) allow judgment to be entered against each of them for $6,000 for the 2008 Fax and 2011 Fax; (ii) pay Plaintiff's costs; (iii) the entry of a stipulated injunction against them prohibiting Defendants from engaging in the alleged statutory violations at issue; and (iv) provide Plaintiff any other relief requested in

the Second Amended Complaint which the Court determines is necessary to fully satisfy all Plaintiff's individual claims. *See* Composite Exhibit 1, attached hereto. Stated simply, the Offers of Judgment provide Plaintiff with the full relief requested in its Second Amended Complaint.

ARGUMENT

I. LEGAL STANDARD.

"Article III of the United States Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Swann v. Sec'y of Georgia*, 668 F.3d 1285, 1288 (11th Cir. 2012) (citation and quotations omitted). "The doctrine of mootness derives directly from the case-or-controversy limitation because 'an action that is moot cannot be characterized as an active case or controversy.'" *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001) (quoting *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1377 (11th Cir. 1997)). "An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Smymczyk*, -- U.S. --, 133 S. Ct. 1523, 1528 (2013) (internal quotations omitted). A case is moot "'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Al Najjar*, 273 F.3d at 1335-36 (quoting *Powell v. McCormack*, 394 U.S. 486, 496 (1969)). Because a moot case "'cannot present an Article III case or controversy," "the federal courts lack subject matter jurisdiction to entertain it.'" *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005) (*quoting Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1327 (11th Cir. 2004)). "It is a plaintiff's burden to show that a court has subject matter jurisdiction over his or her claims." *Telemax Entm't, Inc. v. Telemundo Network, Inc.*, Case No. 04-20150-CIV-GRAHAM, 2004 WL 3019373, at *2 (S.D. Fla. Dec. 16, 2004) (citations omitted).

An offer of judgment under Federal Rule of Civil Procedure 68 for the full relief requested by a plaintiff effectively moots that plaintiff's action. *See Zinni v. ER Solutions, Inc.*,

692 F.3d 1162, 1166 (11th Cir. 2012) (finding that "[o]ffers for the full relief requested have been found to moot a claim") (citations omitted)[1]; *Damasco v. Clearwire Corp.*, 772 F.3d 891, 895 (7th Cir. 2001) ("[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake") (citation and quotations omitted); *Young v. AmeriFinancial Solutions, LLC*, Case No. 12-60946-CIV, 2012 WL 3848574, at *1 (S.D. Fla. Sept. 5, 2012) (same) (citation and quotations omitted). Thus, if a plaintiff receives an offer of judgment for the full relief requested in the complaint, the complaint should be dismissed. *Mackenzie v. Kindred Hospitals E., LLC*, 276 F. Supp. 2d 1211, 1219 (M.D. Fla. 2003); *Young*, 2012 WL 3848574, at *1; *Krzykwa v. Phusion Projects, LLC*, Case No. 11-62230-CIV, 2012 WL 6965716, at *5 (S.D. Fla. Mar. 22, 2012). This is true whether or not the plaintiff accepts the offer of judgment. *Young*, 2012 WL 3848574, at *1; *see also Mackenzie*, 276 F. Supp. 2d at 1219 ("The defendant's offer of full relief therefore rendered this case moot, even though the plaintiff did not accept that offer.").

In *Genesis*, the U.S. Supreme Court considered whether in a Fair Labor Standards Act collective action, the plaintiff's claim "remained justiciable" once the plaintiff's individual claim became moot. *Id*. at 1529. The *Genesis* Court assumed, without deciding, that "an offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." *Id*. at 1528-29. The Court then held that when the "individual claim became moot," the class action became moot

[1] In *Zinni*, the Eleventh Circuit found that the plaintiff's claim was not moot because the defendants' settlement offer was not a Rule 68 offer of judgment and therefore "did not offer to have judgment entered against them as part of the settlement." 692 F.3d at 1166. The Eleventh Circuit thus found that the plaintiff had not been offered *full* relief – the plaintiff's prayer for a judgment was missing – and that the case was distinguishable from cases holding that a Rule 68 offer of judgment for the *full* relief requested moots a claim. *See id.* ("Because the settlement offers were not for the full relief requested, a live controversy remained over the issue of a judgment, and the cases were not moot.") (citation omitted).

because the plaintiff "lacked any personal interest in representing others in this action." *Id.* at 1529.

In the Eleventh Circuit, these same principles apply in the class action context. "In a class action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings suit and when the district court determines whether to certify the putative class." *Tucker v. Phyfer*, 819 F.2d 1030, 1033 (11th Cir. 1987). If that named plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot. *See id.* (holding that named plaintiff's putative class claim on behalf of incarcerated juveniles was moot where, when plaintiff sought class certification, he was no longer a juvenile). Therefore, when a defendant serves an offer of judgment for the full relief requested by the plaintiff, the plaintiff's claim is moot, and the putative class action complaint should be dismissed. *See Damasco*, 662 F.3d at 896 ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limit of federal jurisdiction express in Article III"); *Tucker*, 819 F.2d at 1035 (holding that complaint should be dismissed where plaintiff "did not move the court to certify his class as a class action until after his equitable claim had become moot"); *Krzykwa*, 2012 WL 6965716, at *5 ("Phusion's offer to settle Plaintiffs' claims in full, which Phusion made before Plaintiffs moved to certify the class, render Plaintiffs' claims moot.").

II. BECAUSE PLAINTIFF HAS BEEN OFFERED FULL AND COMPLETE RELIEF IN THIS CASE, ITS CLAIM IS MOOT, AND THERE IS NO SUBJECT MATTER JURISDICTION OVER ITS SECOND AMENDED COMPLAINT.

The Second Amended Complaint should be dismissed because Defendants' Offers of Judgment in this case render Plaintiff's claims moot. The terms of the Offers of Judgment make clear that they are intended to provide – and do provide – Plaintiff with the full relief requested in its Second Amended Complaint. Plaintiff's Second Amended Complaint requests an award of

statutory damages, costs, and an injunction. The Offers of Judgment offer Plaintiff the sum of $6,000.00, an award of costs, an injunction, and all other relief necessary to satisfy Plaintiff's individual claims. Because Defendants have offered Plaintiff complete relief for its TCPA and conversion claims, it does not have Article III standing, and its claims are moot. And, without a personal stake in the litigation, Plaintiff cannot represent the putative class alleged in the Second Amended Complaint. For these reasons, the Second Amended Complaint should be dismissed.

Four Judges of this District, Judges Middlebrooks, Cohn, Marra, and Moreno, have considered these issues and applied Eleventh Circuit precedent to hold that, after a plaintiff is offered the full relief sought, that plaintiff's complaint is moot and should be dismissed. In *Krzykwa*, Judge Middlebrooks considered whether plaintiffs' putative class claims were mooted after the defendant offered the two named plaintiffs the full relief requested in their complaint.[2] 2012 WL 6965716, at *3. Judge Middlebrooks found that the defendant's settlement offer mooted the claims and dismissed the complaint. Judge Middlebrooks cited the Seventh Circuit's decision in *Damasco*, finding that Article III does not permit a plaintiff offered full relief to "'spurn'" the offer and continue the litigation, and holding that even if the complaint describes the suit as a class action suit, if there is no class when the plaintiff's claims are mooted, "'then dismissal of the plaintiffs claim terminates the suit.'" *Id.* at *4 (quoting *Damasco*, 662 F.3d at 896). Judge Middlebrooks rejected the argument that he was allowing the defendant to "pick off" the named plaintiffs, holding that "[a]llowing a plaintiff who filed a class action complaint

[2] The settlement offer made by the defendant in *Krzykwa* was not a Rule 68 offer of judgment. *See* 2012 WL 6965716, at *2. The Eleventh Circuit clarified in August 2012 that the defendant must serve a Rule 68 offer judgment to provide the full relief requested. *Zinni*, 692 F.3d at 1166.

to proceed after he loses his personal stake in the matter would defy the limitations of Article III." *Id.* at *5.[3]

Judge Cohn also held that the defendant's Rule 68 offer of judgment mooted the plaintiff's claim. *Young*, 2012 WL 3848574, at *2. Judge Cohn, reviewing the relevant case law, found that "'Rule 68 offers can be used to show that the court lacks subject matter jurisdiction.'" *Id.* at *1 (*quoting Pollock v. Bay Area Credit Serv., LLC*, Case No. 08-61101-CIV, 2009 WL 2475167, at *1, *5 (S.D. Fla. Aug. 13, 2009)).

Similarly, in *Brown v. Kopolow*, Judge Marra held that the defendant's offer of complete relief to the plaintiff for his Fair Debt Collection Practices Act ("FDCPA") claims mooted those claims and removed subject matter jurisdiction. *See* Case No. 10-80593-CIV, 2011 WL 283253, at *2 (S.D. Fla. Jan. 25, 2011) ("By offering Plaintiff all that he could possibly recover on his federal claims, Defendant eliminated a case or controversy on those claims."). Judge Marra also rejected the plaintiff's argument that he had not received full relief. *See id.* ("Plaintiff's argument that the offer does not give Plaintiff complete relief to which he is entitled is incorrect. The federal statute does not provide for any more relief than what was offered."); *see also Young*, 2012 WL 3848574, at *1 ("Whether or not the plaintiff accepts the offer, 'generally, an offer of judgment providing the plaintiff with the maximum allowable relief will moot the plaintiff's [] claim.'") (*quoting Moten v. Broward Cty*, Case No. 10-62398-CIV, 2012 WL

[3] The plaintiffs, in arguing that the defendant should not be permitted to "pick off" their claims, had cited Judge Cohn's decision in *Capote v. United Collection Bureau, Inc.*, No. 09-61834-CIV, 2010 WL 966859, at *2 (S.D. Fla. Mar. 12, 2010). As Judge Middlebrooks noted, however, the *Capote* decision provided "very brief reasoning" and did not consider the Article III mandate relevant here, where Plaintiff has been offered the full relief requested in his Complaint and does not have a personal stake in the litigation. *See Krzykwa*, 2012 WL 6965716, at *5. Moreover, the settlement offer in *Capote* was not a Rule 68 offer of judgment. *See* 2010 WL 966859, at *2. In fact, when Judge Cohn had the opportunity to consider the same issue again, in the context of a Rule 68 offer of judgment, he granted the defendant's motion to dismiss for lack of subject matter jurisdiction. *See Young*, 2012 WL 3848574, at *2.

526790, at *2 (S.D. Fla. Feb. 16, 2012)); *accord*, *Keim v. ADF MidAtlantic*, Case No. 12-80577, 2013 WL 3717737, at *1, *2 (S.D. Fla. July 15, 2013) (holding that Rule 68 offer of judgment moots a class action);[4] *Barr v. Harvard Drug Group*, Case No. 13-cv-62019-KAM, 2014 WL 2612072, at *1, *3-*4 (S.D. Fla. June 11, 2014) (stating "[t]his Court follows the Seventh Circuit, which has held that an offer of full requested relief moots the case").

Many courts outside the District have ruled similarly and dismissed putative class actions after the sole plaintiff received an offer providing the full relief requested in its complaint. *See*, *e.g.*, *Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 611 (8th Cir. 2003) ("[A] federal court should normally dismiss an action as moot when the named plaintiff settles its individual claim, and the district court has not certified a class."); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 982-84 (3d Cir. 1992) (affirming dismissal of class certification motion as moot after putative class representatives had settled their claims); *Jones v CBE Group, Inc.*, 215 F.R.D. 558, 565 (D. Minn. 2003) (granting motion to dismiss and rejecting plaintiff's request for the court to "defer consideration of a challenge to its subject matter jurisdiction until it has ruled on a motion for class certification"); *Ambalu v. Rosenblatt*, 194 F.R.D. 451, 453 (E.D.N.Y. 2000) ("No class has been certified and no motion has been made for certification. Therefore nothing prevents the defendant from attempting to facilitate settlement by making a pre-certification Rule 68 offer of judgment.").

Under these decisions, once DDS and Sanare submitted their Offers of Judgment

[4] The Court should be aware that *Keim* and *Jeffrey M. Stein, DDS, MSD, P.A. v. Buccaneers Limited Partnership*, 2013 WL 7045328, at *1 (M.D. Fla. Oct. 24, 2013) are both on appeal at the Eleventh Circuit. Case No. 8:13–cv–2136, Doc. 28 (M.D.Fla. filed Nov. 25, 2013).

providing the full relief requested in the Complaint, Plaintiff's "federal case was over."[5] *See Damasco*, 662 F.3d at 896; *Krzykwa*, 2012 WL 6965716, at *3 ("[Defendant's] offer to settle Plaintiffs' claims in full, which [Defendant] made before Plaintiffs moved to certify the class, renders Plaintiffs' claims moot."); *Young*, 2012 WL 3848574, at *2 ("Because this judgment will provide Plaintiff with the maximum allowable relief on her claims, the action will be moot and the Court will no longer have subject matter jurisdiction over the suit."); *Brown*, 2011 WL 283253, at *2 (an offer providing full relief "eliminates a legal dispute upon which federal jurisdiction can be based") (quotations and citation omitted). Because Defendants have offered Plaintiff the full relief requested in its Second Amended Complaint, there is no live case or controversy before this Court, and the Second Amended Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion to Dismiss the Second Amended Class Action Complaint, and award such further relief as the Court deems just and proper.

[5] Policy considerations about whether a Rule 68 offer of judgment moots a putative class action are irrelevant to the analysis. *See Jones*, 215 F.R.D. at 564 ("while there may be valid policy arguments for not applying Rule 68 in the class context, there is little authority for such an exception") (citation and quotations omitted). As noted above, a few courts have suggested that offers of judgment could be used to "pick off" a putative class plaintiff. However, these criticisms have correctly been rejected as irrelevant, because whether an offer of judgment can be characterized as a "pick off" attempt does not alter "the limitations Article III places on the federal judiciary." *See id.*; *Krzykwa*, 2012 WL 6965716, at *5 (rejecting the argument that "pick off" offers of judgment waste judicial resources). The *Damasco* court, for example, refused the plaintiff's argument that the defendant should be prevented from picking off the plaintiff prior to class certification, finding that, "[t]o allow a case … to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III." *Damasco*, 662 F.3d at 896; *see Mackenzie*, 276 F. Supp. 2d at 1218 ("the plaintiff's disparagement of the offer of judgment as a 'coercive litigation tactic' … is unpersuasive").

WHEREFORE, Defendants Sanare, LLC and Doctor Diabetic Supply, LLC respectfully request the Court to enter an Order dismissing the Second Amended Complaint, and for such other and further relief as the Court deems just and appropriate.

CERTIFICATE OF COUNSEL PURSUANT TO LOCAL RULE 7.1

Counsel for Sanare and DDS have conferred with all parties or non-parties who may be affected by the relief sought in this Motion in a good faith effort to resolve the issues raised in the Motion, and Plaintiff has not agreed to the relief sought.

Counsel for Defendants Doctor Diabetic Supply, LLC and Sanare, LLC

Kenneth A. Horky, Esq.
horkyk@gtlaw.com;
Muehlfeldern@gtlaw.com;
FLService@gtlaw.com
John L. McManus, Esq.
mcmanusj@gtlaw.com; yeargina@gtlaw.com
GREENBERG TRAURIG, P.A.
401 E. Las Olas Boulevard, Suite 2000
Fort Lauderdale, FL 33301
Telephone: (954) 765-0500
Fax: (954) 765-1477

By*: s/John L. McManus*
John L. McManus
Florida Bar No. 0119423

--and--

Louis Smith, Esq.
smithlo@gtlaw.com
Admitted Pro Hac Vice
GREENBERG TRAURIG, LLP
200 Park Avenue, P.O. Box 677
Florham Park, NJ 07932
Telephone (973) 360-7900
Fax (973) 301-8410

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by ECF System or by U.S. Mail to the following listed persons, who are not authorized to receive electronically Notices of Electronic Filing.

/s/ John L. McManus
JOHN L. MCMANUS

SERVICE LIST

PHYSICIANS HEALTHSOURCE, INC., an Ohio corporation, individually and on behalf of all others similarly situated, Plaintiff, vs. DOCTOR DIABETIC SUPPLY, LLC, a Florida limited liability company, GEORGE T. HEISEL, DDS HOLDINGS, INC., SANARE, LLC and JOHN DOES 1-10, Defendants.

Counsel for Plaintiff

Ryan M. Kelly, Esq.
rkelly@andersonwanca.com
Brian J. Wanca, Esq.
bwanca@andersonwanca.com
ANDERSON + WANCA
3701 Algonquin Road, Suite 760
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
Fax: (847)368-1501

Counsel for Defendants Doctor Diabetic Supply, LLC and Sanare, LLC

Kenneth A. Horky, Esq.
horkyk@gtlaw.com
John L. McManus, Esq.
mcmanusj@gtlaw.com
GREENBERG TRAURIG, P.A.
401 E. Las Olas Boulevard, Suite 2000
Fort Lauderdale, FL 33301
Telephone: (954) 765-0500
Fax: (954) 765-1477

Louis Smith, Esq.
smithlo@gtlaw.com
Admitted Pro Hac Vice
GREENBERG TRAURIG, LLP
200 Park Avenue, P.O. Box 677
Florham Park, NJ 07932
Telephone (973) 360-7900
Fax (973) 301-8410

Counsel for Defendant George Heisel and DDS Holdings, Inc.
Lawrence D. Silverman, Esquire
lawrence.silverman@akerman.com
Sandra J. Millor, Esquire
Sandra.millor@akerman.com
AKERMAN SENTERFITT
One Southeast Third Avenue, 25th Floor
Miami, Florida 33131
Main: (305) 374-5600
Fax: (305) 374-5095

Co-Counsel for Plaintiff, Physicians Healthsource, Inc.
Leslie M. Mitchell Cohen Milstein Sellers & Toll PLLC
lkroeger@cohenmilstein.com
2925 PGA Boulevard, Suite 200
Palm Beach Gardens, FL 33410-2909
Telephone: 561-515-1400
Facsimile: 561-515-1401