

In The  
**United States Court of Appeals**  
For The Fourth Circuit

**MA'LISSA SIMMONS, on behalf of themselves and all others similarly situated; MONTERRUS MARSHALL, on behalf of themselves and all others similarly situated; YOLANDA CARRAWAY, on behalf of themselves and all others similarly situated; DELANA PRUITT, on behalf of themselves and all others similarly situated,**

*Plaintiffs – Appellants,*

v.

**UNITED MORTGAGE AND LOAN INVESTMENT, LLC; ARTHUR E. KECHIJIAN; LARRY E. AUSTIN; AUSTIN INVESTMENTS, L.P.; KECHIJIAN INVESTMENTS, L.P.; UMLIC CONSOLIDATED, INC.; UMLIC-SEVEN CORPORATION; UMLIC HOLDINGS, LLC; UNITED MORTGAGE HOLDINGS, LLC; UNITED MORTGAGE LOAN AND INVESTMENT, LLC,**

*Defendants – Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
AT CHARLOTTE**

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**BRIEF OF APPELLANTS**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 09-2147 Caption: Ma'lissa Simmons, et al. v. United Mortgage and Loan Investment, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Yolanda Carraway who is Appellant, makes the following disclosure:  
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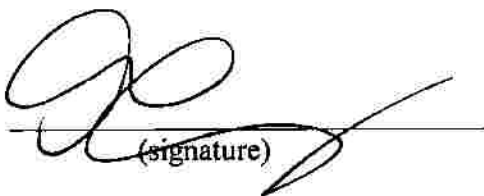
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If yes, identify all such owners:
- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  YES  NO  
If yes, identify entity and nature of interest:
- 5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
- 6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

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10/14/2009  
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No. 09-2147 Caption: Ma'lissa Simmons, et al. v. United Mortgage and Loan Investment, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Monterrus Marshall who is Appellant, makes the following disclosure:  
(name of party/amicus) (appellant/appellee/amicus)

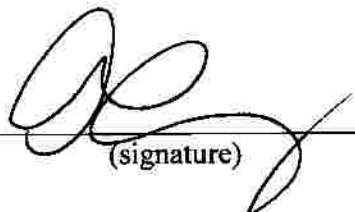
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No. 09-2147 Caption: Ma'lissa Simmons, et al. v. United Mortgage and Loan Investment, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Delana Pruitt who is Appellant, makes the following disclosure:  
(name of party/amicus) (appellant/appellee/amicus)

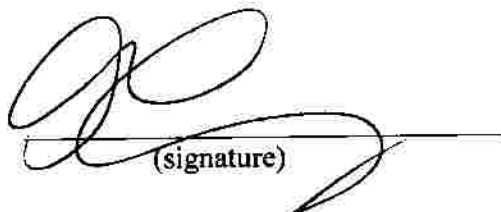
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No. 09-2147 Caption: Ma'lissa Simmons, et al. v. United Mortgage and Loan Investment, et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ma'lissa Simmons who is Appellant, makes the following disclosure:  
(name of party/amicus) (appellant/appellee/amicus)

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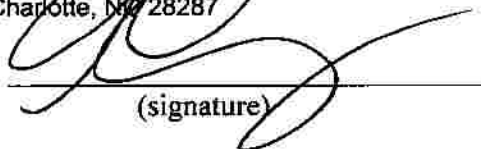
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## **Statement of Jurisdiction**

This is an appeal from a final order of the United States District Court for the Western District of North Carolina on September 14, 2009, granting defendants' motion to dismiss plaintiffs' claims, denying plaintiffs' motion to conditionally certify the collective action, denying plaintiffs' amended motion to conditionally certify the collective action, and denying plaintiffs' motion for reconsideration of the court's May 30, 2008 order granting in part and denying in part defendants' motion to dismiss plaintiffs' claims. Plaintiffs timely filed a notice of appeal on October 5, 2009. The jurisdiction of this Court is premised on 28 U.S.C. sections 1291 and 1332.

## **Statement of the Issues**

1. When the plaintiffs filed their motion for conditional certification of a collective action under the Fair Labor Standards Act ("FLSA") promptly and without undue delay, did the District Court err in finding the case moot based on defendants' settlement offer?

2. Did the District Court err in dismissing plaintiffs' claims under the North Carolina Wage and Hour Act ("NCWHA") when some plaintiffs had worked for defendants while North Carolina's minimum wage was higher than the federal minimum wage, and if so, did it therefore err in finding the case moot

based on defendants' settlement offer before plaintiffs had a reasonable opportunity to move for class certification of their NCWHA claims under Rule 23?

3. Did the District Court err in finding the case moot based on defendants' settlement offer when the offer was not for a definite sum, was ambiguous as to its terms, was not left open for at least ten days, and was not clarified before plaintiffs filed their motion for conditional certification of their collective action?

### **Statement of the Case**

Plaintiffs, former employees of defendants in Charlotte, North Carolina, allege that defendants did not pay them overtime and did not pay them for all the hours they worked, in violation of the federal and state wage and hour laws. On October 17, 2007, plaintiffs Ma'Lissa Simmons, Monterrus Marshall, Yolanda Carraway, and Delana Pruitt, on behalf of themselves and all others similarly situated, filed suit in Mecklenburg County Superior Court against defendants United Mortgage and Loan Investment, LLC ("United Mortgage"), and its owner-officers Arthur E. Kechijian and Larry E. Austin. Plaintiffs brought claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the North Carolina Wage and Hour Act ("NCWHA"), N.C. Gen. Stat. § 95-25.1 *et seq.*, and alleged that the action should be certified as a collective action under the FLSA and a Rule 23 class action under the NCWHA. Defendants removed the case to

the United States District Court for the Western District of North Carolina on November 21, 2007.

On November 26, 2007, defendants moved to dismiss plaintiffs' claims under the NCWHA and their record-keeping claims under the FLSA pursuant to Rule 12(b)(6). On March 26, 2008, plaintiffs filed their Amended Complaint, adding corporate defendants Austin Investments, L.P., Kechjian Investments, L.P., UMLIC Consolidated, Inc., UMLIC Holdings, LLC, UMLIC-Seven Corp., United Mortgage Holdings, LLC, and United Mortgage Loan and Investment, LLC. On April 15, 2008, pursuant to Rule 12(b)(6), defendants moved to dismiss plaintiffs' claims in the Amended Complaint under the NCWHA and their record-keeping claims under the FLSA .

Between January 28 and May 6, 2008, nine former employees of defendants filed notices of consent to join the action as opt-in plaintiffs under the FLSA. On May 16, 2008, defendants' counsel sent a letter to plaintiffs' counsel, stating that he had been authorized by defendants to "offer each opt-in plaintiff full relief in this case." The letter stated that "the offer remains open for five days after receipt until May 23, 2008."

On May 21, 2008, plaintiffs moved for conditional certification of the FLSA collective action and for court-facilitated notice to potential collective action members. On May 29, 2008, defendants moved to dismiss all of plaintiffs' claims

in the Amended Complaint, contending that the court lacked subject matter jurisdiction because defendants had offered to satisfy plaintiffs' claims in their entirety. On June 2, 2008, plaintiffs filed an amended motion for conditional certification of the FLSA collective action and for court-facilitated notice to potential collective action members.

On May 30, 2008, the court issued an order granting in part and denying in part defendants' November 26, 2007 motion to dismiss. Specifically, the court granted the motion with regard to plaintiffs' NCWHA claims and denied the motion with regard to plaintiffs' FLSA claims. On June 2, 2008, the court amended its order to specify that its ruling was made on defendants' April 15, 2008 motion to dismiss instead of the November 26, 2007 motion to dismiss. On June 9, 2008, plaintiffs moved the court to reconsider the portion of its May 30, 2008 order dismissing plaintiffs' NCWHA claims and, in the alternative, requested leave to file a second amended complaint pursuant to Rule 15(a).

On September 14, 2009, the court issued an order granting defendants' motion to dismiss for lack of jurisdiction, denying plaintiffs' motion for conditional certification of the FLSA collective action, denying plaintiffs' amended motion for conditional certification of the FLSA collective action, and denying plaintiffs' motion for reconsideration of the court's May 30, 2008 order. Plaintiffs timely filed a notice of appeal on October 5, 2009. The parties attempted

to settle the case through the Fourth Circuit mediation program for several months, but were unsuccessful.

## **Statement of the Facts**

### **I. Plaintiffs' Wage and Hour Claims**

Defendants buy and service distressed mortgage, business, and consumer loans. (JA 67) Defendant United Mortgage operated an office in Charlotte, North Carolina. (JA 67)

As alleged in plaintiffs' Amended Complaint, the named plaintiffs, opt-in plaintiffs, and potential class/collective action members worked for United Mortgage as Junior Asset Managers in its Charlotte office during the period from 2004 through 2007. Plaintiff Simmons was employed as a Junior Asset Manager from August 2004 to December 2004 and from June 2005 to March 1, 2006. (JA 61) Plaintiff Marshall was employed as a Junior Asset Manager from November 2005 to May 2006. (JA 61) Plaintiff Carraway was employed as a Junior Asset Manager from January 2006 to June 2006. (JA 61) Plaintiff Pruitt was employed as a Junior Asset Manager from June 2006 to February 2007. (JA 61)

The primary duty of the Junior Asset Manager is to collect payments on delinquent loans. (JA 67) The Junior Asset Manager makes recommendations about the disposition of accounts, but has no significant decision-making authority. (JA 68) Instead, the Collection Manager, to whom the Junior Asset Manager

reports, reviews the Junior Asset Manager's summaries and recommendations, and makes all significant decisions about how to proceed with the account. (JA 68)

Junior Asset Managers do not have any supervisory or managerial authority over any employees, do not have the authority to hire or fire any employee or to make suggestions and recommendations as to hiring or firing any employee, and do not perform any managerial duties. (JA 67)

During the relevant time period, defendants routinely required the Junior Asset Managers to work more than 40 hours per week. (JA 68) Defendants paid the Junior Asset Managers as salaried "exempt" employees, however, and refused to pay them for hours worked in excess of 40 hours per week. (JA 68) In August 2004, defendants began requiring the Junior Asset Managers to fill out a time card documenting the hours that they worked. (JA 68) The time cards confirmed that Junior Asset Managers were routinely working more than 40 hours per week. (JA 68) Nonetheless, defendants continued to pay them a fixed salary, regardless of the number of hours worked. (JA 68)

In 2006, an investigator from the United States Department of Labor visited defendants' office and interviewed several employees about possible violations of the FLSA by defendants. (JA 68) In 2006, defendants instructed the Junior Asset Managers to stop filling out time cards. (JA 68) From that point forward, defendants required the Junior Asset Managers to work "off the clock." (JA 68)

On October 17, 2007, the named plaintiffs – Simmons, Marshall, Carraway, and Pruitt – filed suit in Mecklenburg County Superior Court against defendants United Mortgage and its owner-officers Kechjian and Austin. (JA 18-29) Plaintiffs brought claims under the FLSA and NCWHA, and further alleged that the action should be certified as a collective action under the FLSA and a Rule 23 class action under the NCWHA.

Specifically, plaintiffs alleged that Junior Asset Managers are not exempt employees under the FLSA and NCWHA, and thus defendants violated those laws by failing to pay plaintiffs and other Junior Asset Managers overtime pay for hours worked in excess of 40 hours per week, and by failing to compensate them for all the hours they worked, particularly those hours worked “off the clock.” (JA 26-28) Plaintiffs also alleged that defendants unlawfully failed to maintain proper time records of employees under the FLSA and NCWHA, and failed to properly notify employees of pay policy changes under the NCWHA. (JA 26-28)

Bringing their claims on behalf of themselves and others similarly situated, plaintiffs sought to pursue their claims as a collective action under the FLSA, and a Rule 23 class action under the NCWHA. Plaintiffs brought their FLSA claims as an opt-in collective action pursuant to the FLSA, 29 U.S.C. § 216(b), on behalf of all persons who were, are, or will be employed by United Mortgage in the position of Junior Asset Manager (the “FLSA Collective Plaintiffs”) on or after the date that

is three years before the filing of their complaint (the “FLSA Period”). (JA 20) Plaintiffs alleged that they and the other FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and have been subject to United Mortgage’s common practices of refusing to pay wages and overtime pay for hours of work they performed in excess of 40 hours per week. (JA 20)

Similarly, plaintiffs brought their NCWHA claims as a class action under North Carolina Rule of Civil Procedure 23, on behalf of all persons who were, are, or will be employed by United Mortgage in the position of Junior Asset Manager (the “NCWHA Class”) on or after the date that is three years before the filing of their complaint (the “NCWHA Class Period”). (JA 20-21) Plaintiffs alleged that the NCWHA Class was easily ascertainable, that the class is numerous, comprising at least 50 persons, that common questions of fact and law regarding defendants’ pay practices predominate over individual issues, that the named plaintiffs’ claims are typical of those of the class, that the named plaintiffs could adequately represent the class, that a class action is a superior vehicle for resolving these claims, and that use of a class action is supported by public policy. (JA 21-23)

Defendants removed the case to the United States District Court for the Western District of North Carolina on November 21, 2007. (JA 10-14) Subsequently, on March 26, 2008, plaintiffs filed their amended complaint, which

added affiliated corporate defendants Austin Investments, L.P., Kechjian Investments, L.P., UMLIC Consolidated, Inc., UMLIC Holdings, LLC, UMLIC-Seven Corp., United Mortgage Holdings, LLC, and United Mortgage Loan and Investment, LLC. (JA 60-74) Plaintiffs alleged that these corporate defendants were related to United Mortgage, that they were plaintiffs' employers under the FLSA and NCWHA, and that, along with United Mortgage, were joint employers under the FLSA and common law. (JA 62-63)

Between January 28 and May 6, 2008, the following nine former employees of defendants – all of whom worked as Junior Asset Managers – filed notices of consent and joined the action as opt-in plaintiffs under the FLSA: Vance Melissa Williams, Marlena Brooks, Lisa Samuels, Donald Barnes, Anthony Papas, William Kelly, Kathy Raymer, Andre Moser, and John H. Mays, Jr. (JA 46-59, 78-83, 94-96) After plaintiffs' filed their motion for conditional certification of the FLSA collective action, an additional six former Junior Asset Managers filed notices of consent and joined the action as opt-in plaintiffs: Cedrice Brown, Cindy Garner, Barbara Long, Angela Bailey, Robert Dunlap, and Debbie Hartley. (JA 204-221)

## **II. The Parties' Settlement Negotiations**

On or about December 19, 2007, the date of counsel's Rule 26(f) conference, counsel for defendants asked plaintiffs' counsel to submit a settlement demand. In response, plaintiffs' counsel agreed to work on preparing a demand.

(JA 198) In order to prepare the settlement demand, on January 8, 2008, plaintiffs' counsel asked defendants' counsel to produce documents reflecting hours worked and wage information for each of the four named plaintiffs. (JA 199)

On January 18, 2008, defendants produced time sheets for three of the named plaintiffs for the period of April 4, 2004, through May 19, 2006. (JA 199) Defendants provided no wage information for any employee, no time information after May 2006 for any employee, and no wage or time information for plaintiff Pruitt or any of the opt-in plaintiffs. (JA 199) Although some of the named plaintiffs and opt-ins kept their own records of the hours they worked, others did not. (JA 199)

On April 7, 2008, plaintiffs' counsel sent a letter to defendants, through counsel, requesting a list of names and contact information for former Junior Asset Managers who worked for defendants during the three years before the Complaint was filed. (JA 203) Defendants did not respond to the letter. (JA 199)

As opt-in plaintiffs joined the suit, plaintiffs' counsel gathered from them information and declarations in support of plaintiffs' motion for conditional certification of the FLSA collective action. (JA 199) The last declaration plaintiffs' counsel received before plaintiffs filed their motion for conditional certification was faxed from Kathy Raymer to counsel's office on or about May 12, 2008. (JA 199)

On May 16, 2008, defendants' counsel sent a letter to plaintiffs' counsel, stating that he had been authorized by defendants to "offer each opt-in plaintiff full relief in this case." (JA 201-02) The letter specified:

Each opt-in plaintiff will be compensated fully upon receipt of an affidavit stating the dates on which overtime was worked, the total hours they worked each week of their employment up to the date of their termination, the total amount of back pay they claim is owed to them, and a statement explaining how the calculation of overtime amounts claimed was done. My clients will also pay taxable costs and reasonable attorneys' fees supported by time records properly describing the work done and the hours reasonably worked which can be either agreed upon by the parties or submitted to the Court for resolution.

This offer requires that the parties enter a settlement agreement specifying that all claims will be waived and released, this action will be dismissed with prejudice, the settlement will be kept confidential and there will be no admission of liability or disclosure of the settlement terms. I will provide you with the information my client has that is necessary to prepare the affidavits.

(JA 201) In conclusion, the letter stated that "the offer remains open for five days after receipt until May 23, 2008." (JA 201)

On May 23, 2008, plaintiffs' counsel sent a letter to defendants' counsel asking defendants to clarify whether the offer included liquidated damages and whether "each opt-in plaintiff" was intended to refer only to the opt-in plaintiffs, or also to the named plaintiffs and potential collective/class action members. (JA 200) Defendants responded to plaintiffs' letter on May 29, 2008, the same day defendants filed their Motion to Dismiss for Lack of Jurisdiction, and sent the

letter to plaintiffs' counsel by regular mail, so that plaintiffs' counsel received it after receiving defendants' electronically filed motion. (JA 200) Defendants' response stated, "the offer was presented to include liquidated damages and is made to the named Plaintiffs and all opt-in Plaintiffs. My client cannot offer to settle with those who are not parties to the case." (JA 200)

### **III. The Court's Rulings**

#### **A. Dismissal of NCWHA Claims**

After plaintiffs filed their Amended Complaint, defendants moved to dismiss plaintiffs' claims under the NCWHA and record-keeping claims under the FLSA for failure to state claims upon which relief could be granted pursuant to Rule 12(b)(6). (JA 75-77) By its order on May 30, 2008, as amended on June 2, 2008, the court granted the motion as to plaintiffs' NCWHA claims and denied the motion as to plaintiffs' FLSA claims. (JA 131-36, 140)

Analyzing plaintiffs' NCWHA claims, the Court observed that N.C. Gen. Stat. § 95-25.14(a)(1) provides that certain provisions of the NCWHA, specifically those that pertain to overtime and record keeping, do not apply if the employee works for "an enterprise engaged in commerce or the production of goods for commerce as defined in the FLSA." (JA 133-34) Plaintiffs alleged in their complaint that United Mortgage is an employer that engages in commerce under the FLSA. (JA 134) Ordinarily then, plaintiffs could not pursue overtime and

record-keeping claims under the NCWHA if the FLSA applied to defendants. (JA 134)

The court recognized, though, that the NCWHA contains an exception to N.C. Gen. Stat. § 95-25.14(a)(1) for any period of time when the applicable North Carolina minimum wage is higher than the federal minimum wage. (JA 134-35 (quoting N.C. Gen. Stat. § 95-25.14(a)(1)(b))) It also recognized that the North Carolina minimum wage was at the time of the court's order higher than the federal minimum wage, that it had been so since January 1, 2007, and that one of the named plaintiffs, Delana Pruitt, was employed through February 2007. (JA 135) The court stated, however, that Pruitt's employment in the relevant time period did not affect the viability of the NCWHA claims "because Ms. Pruitt does not allege that she worked any overtime hours during this month." (JA 135) The court therefore granted the motion to dismiss as to plaintiff's NCWHA claims.

On June 9, 2008, plaintiffs moved the court to reconsider the portion of its May 30, 2008 order dismissing plaintiffs' NCWHA claims and, in the alternative, requested leave to file a second amended complaint pursuant to Rule 15(a). (JA 160-62) Plaintiff's proposed second amended complaint contained a more specific allegation regarding plaintiff Pruitt's employment, and named three additional plaintiffs who worked for defendants in 2007 and 2008. (JA 163-78) As to plaintiff Pruitt, the proposed complaint stated: "During this time, and specifically

during January and February 2007, Defendants routinely required plaintiff Pruitt to work in excess of 40 hours per week. Defendants failed to compensate plaintiff Pruitt for the hours she worked in excess of 40 hours per week.” (JA 172) As to each of the additional named plaintiffs, the proposed complaint specified the time periods during 2007 and 2008 in which they worked for defendants, and stated for each that during those periods the plaintiffs were routinely required to work in excess of 40 hours per week and were not compensated for those excess hours. (JA 173)

As part of its September 14, 2009 order, the court denied plaintiffs’ motion for reconsideration or leave to amend. (JA 222-26) Without further explanation, the court stated: “Regarding the Plaintiffs request for this Court to reconsider its earlier order dismissing the NCSWA claims, the Court declines to take such action.” (JA 226)

### **B. Dismissal for Lack of Jurisdiction**

On May 21, 2008, plaintiffs moved for conditional certification of the FLSA collective action and for court-facilitated notice to potential collective action members. (JA 97-99) On May 29, 2008, defendants moved to dismiss all of plaintiffs’ claims in the Amended Complaint pursuant to Rule 12(b)(1), contending that the court lacked subject matter jurisdiction because defendants had offered to satisfy plaintiffs’ claims in their entirety. (JA 123-25) On June 2, 2008, plaintiffs

filed an amended motion for conditional certification of the FLSA collective action and for court-facilitated notice to potential collective action members. (JA 137-39)

On September 14, 2009, the court issued an order granting defendants' motion to dismiss for lack of jurisdiction. (JA 222-26) The court stated, "In the context of FLSA cases, 'when a defendant offers a plaintiff the maximum the plaintiff could possibly recover at trial, no justiciable controversy remains, as the offer moots the action.'" (JA 224-25) (quoting *Louisdor v. Am. Telecomm.*, 540 F. Supp. 2d 368, 372 (E.D. N.Y. 2008)) The court acknowledged that the prevailing view in several circuits is that the offer of judgment rule is not applicable to legitimate Rule 23 class actions. (JA 225) The court reasoned that because a FLSA collective action is an opt-in process, as opposed to the opt-out process in a Rule 23 class action, the concerns militating against the use of offers of judgment in class actions are not present in FLSA collective actions. (JA 225) Finding that defendants' May 16, 2008 letter constituted a valid offer of judgment for full relief to the named and opt-in plaintiffs, the court concluded that the offer mooted the action, depriving the court of subject matter jurisdiction. (JA 225-26)

The court also denied plaintiffs' motion for conditional certification of the FLSA collective action and their amended motion for conditional certification of the FLSA collective action. The court concluded that because defendants had made their offer of judgment before plaintiffs moved for certification, the case had

already been mooted, and the court did not have jurisdiction to grant the motions.

(JA 226)

### **Summary of Argument**

The four named plaintiffs in this case brought suit to vindicate their rights and the rights of their fellow Junior Asset Managers to receive the full amount of compensation and overtime pay to which they are entitled under federal and North Carolina law. To do so, plaintiffs diligently pursued their FLSA claims as a collective action under the FLSA and their NCWHA claims as a Rule 23 class action. These procedural vehicles are designed to make it judicially and economically feasible for many plaintiffs to litigate common claims that otherwise could not practicably be brought as small individual cases. As the Supreme Court and several circuits have recognized, the objective of collective and class actions would be thwarted if defendants are allowed to “pick off” class representatives by making an offer of judgment to named plaintiffs and mooting the case before plaintiffs can seek certification of the class or collective action. The District Court erred in permitting defendants to use just this tactic, and in finding the case moot based on defendants’ purported offer of judgment.

Following the other circuits that have addressed this issue, the Court should instead conclude that because plaintiffs promptly and without undue delay moved for conditional certification of their claims under the FLSA, defendants’ settlement

offer – even if deemed a proper offer of judgment for full relief – cannot moot this action because plaintiffs’ motion “relates back” to the date plaintiffs’ filed their complaint.

This principle applies with equal force to plaintiffs’ class action claims under the NCWHA. Plaintiffs were unable to seek certification of the NCWHA class because the District Court erroneously dismissed their NCWHA claims. Even though the court acknowledged that plaintiffs would have stated valid NCWHA claims if they had worked for defendants in 2007 or 2008, the court ignored the allegations of plaintiff Pruitt’s work during this period, and then inexplicably did not allow plaintiffs to amend their complaint with more detailed allegations regarding Pruitt and additional named plaintiffs who worked in the relevant time period. This Court should conclude that plaintiffs have alleged viable claims under the NCWHA, and that they should be allowed a reasonable period to seek certification of the NCWHA Class before the claims can be mooted by defendants’ settlement offer.

Finally, defendants’ settlement offer did not constitute a proper offer of judgment for full relief because the offer was not for a definite sum, was ambiguous as to its terms, was not left open for at least ten days, and was not clarified before plaintiffs filed their motion for conditional certification of the

collective action. Therefore, the District Court erred in concluding that the settlement offer mooted the case.

## **Argument**

### **Standard of Review.**

This Court reviews a district court's decision to dismiss plaintiffs' claims due to lack of subject matter jurisdiction *de novo*, "taking all of plaintiffs' allegations 'in the light most favorable to [them].'" *Wilson v. Johnson*, 535 F.3d 262, 264 (4th Cir. 2008) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)). Similarly, this Court reviews *de novo* a district court's dismissal for failure to state a claim under Rule 12(b)(6), accepting as true all well-pleaded allegations and viewing the complaint in the light most favorable to the plaintiffs. *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007).

Although this circuit has not yet spoken on the issue, the Court should join other circuits that review *de novo* the legal interpretations of Rule 68 offers of judgment, and review for clear error the factual findings concerning the circumstances under which Rule 68 offers were made. *See, e.g., Andretti v. Borla Performance Indus.*, 426 F.3d 824, 835 (6th Cir. 2005) (collecting cases reflecting this majority view). *Cf. Le v. Univ. of Penn.*, 321 F.3d 403, 406 (3d Cir. 2003)

(“We have plenary review over both legal questions regarding the interpretation of Rule 68 and the construction of the offer of judgment.”).

**I. The District Court erred in finding this case moot based on defendants’ settlement offer because plaintiffs filed their motion for conditional certification of a collective action under the FLSA promptly and without undue delay.**

**A. When applying mootness principles in class actions, courts properly prevent named plaintiffs from being picked off by settlement offers before class claims can be certified.**

The question of whether a pre-certification settlement offer, even one that purports to offer full relief, can moot collective action claims under the FLSA or class action claims under Rule 23 is one of first impression for the Fourth Circuit. Other courts have considered the interplay between traditional mootness principles, class actions, and FLSA collective actions. The unanimous consensus among appellate courts that have addressed the issue is that class action or collective action plaintiffs must be given a reasonable opportunity to move for certification before their case can be mooted by a defendant’s unilateral settlement offer. Otherwise, defendants would be able to “pick off” named plaintiffs and prevent a class action or collective action from ever being certified. Because these principles are more developed in the class action context, the Court’s analysis should begin there.

Article III of the United States Constitution limits the jurisdiction of the federal courts to “cases and controversies.” U.S. Const. art. III § 2; *Flast v. Cohen*,

392 U.S. 83, 94 (1968). When the issues presented in a case are no longer “live” or the parties lack a legally cognizable interest in the outcome, the case becomes moot and the court no longer has subject matter jurisdiction. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 457 (4th Cir. 2005). A definite monetary offer of complete relief will generally moot the plaintiff’s claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation. *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1987) (holding that because “defendants had offered Horowitz the full amount of damages (\$3,281.25) to which she claimed individually to be entitled, there was no longer any case or controversy.”); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (holding that after district court denied class action certification, defendant’s Rule 68 offer of judgment for \$1135.00 plus costs, satisfying plaintiff’s entire demand, mooted plaintiff’s individual claim).

The question of mootness in class action cases is more complicated, especially with regard to Rule 68 offers of judgment. “Special mootness rules apply in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own.” *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992); see *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 401 (1980) (noting that the mootness doctrine has a flexible character). The certification of a class action is the critical step in the litigation, and the treatment

of offers of judgment for mootness purposes varies depending on the stage of certification. Offers of judgment to named plaintiffs may arise at four different points in a class action suit: (1) a Rule 68 offer is made after a Rule 23 motion for class certification is granted; (2) an offer is made after a motion for certification is denied; (3) an offer is made while a motion for certification is pending; or (4) an offer is made before the filing of a motion for class certification.

In the first situation, it is well-established that that “once a class has been certified, mooting a class representative’s claim does not moot the entire action because the class ‘acquires a legal status separate from the interest asserted by the named plaintiff.’” *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)); *Bowens v. Atlantic Maint. Corp.*, 546 F. Supp. 2d 55, 76 (E.D. N.Y. 2008). “[C]lass certification will preserve an otherwise moot claim.” *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994); see *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (“the termination of a class representative’s claim does not moot the claims of the unnamed members of the class”).

In the second situation, the Supreme Court has held that when class certification has been denied, the action is not mooted by the expiration of the named plaintiff’s individual claim because there is a continuing interest in the appeal of the denial of class certification. *Geraghty*, 445 U.S. at 404 (holding that

although the named plaintiff's interest in the case expired upon his release from prison, he could continue to appeal denial of class certification because a "proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure Art. III values are not undermined."); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 340 (1980) (holding that "entry of judgment in favor of named plaintiffs over their objections did not moot" the action as the named plaintiff's individual interest "is sufficient to permit their appeal of the adverse certification ruling").

In *Roper*, the Supreme Court expressed concern about a defendant's ability to "pick off" named plaintiffs by mooting their private individual claims. 445 U.S. at 339. Credit card holders brought a class action challenging finance charges levied on their accounts and those of similarly situated card holders. *Id.* at 328-29. After the district court denied their motion for class certification, the bank tendered to each named plaintiff the maximum amount he would have received individually. *Id.* at 329. The named plaintiffs refused the offer, but the district court, over their objections, entered judgment in their favor and dismissed the action as moot. *Id.* at 330. Rejecting the defendant's argument that the entire case had been mooted by the individual offers, the Supreme Court stated:

Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it

would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

*Id.* at 339. Then-Associate Justice Rehnquist, concurring in the judgment, continued this line of reasoning:

The distinguishing feature here is that the defendant has made an unaccepted offer of tender in settlement of the individual putative representative's claim. The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance [of defendant's offer] need not be mandated under our precedent since the defendant has not offered all that has been requested in the complaint (i.e. relief for the class) . . . .

*Id.* at 341 (Rehnquist, J., concurring). The Court's concern about picking off named plaintiffs is squarely implicated in this case.

In the third situation, when an offer of judgment is made while a class certification motion is pending, the Fifth, Sixth, and Seventh Circuits have held that "a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages" if the "motion for class certification has been pursued with reasonable diligence." *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978); *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir. 1981) (holding that when "the plaintiffs have filed a timely motion for class certification and have diligently pursued it, the defendants should not be allowed to prevent consideration of that motion by tendering to the

named plaintiffs their personal claims before the district court reasonably can be expected to rule on the issue”); *Brunet v. City of Columbus*, 1 F.3d 390, 400 (6th Cir. 1993) (suggesting that it would be inappropriate to moot a case based on an offer of judgment while a class certification motion is pending, though plaintiffs in this case lost standing by accepting the offer before filing the motion).

Establishing this standard, the Fifth and Seventh Circuits used the “relation back” doctrine.

The Supreme Court has recognized the propriety of using the “relation back” doctrine to address mootness for transitory claims. In *Sosna*, the Court noted:

There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to “relate back” to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

419 U.S. at 402 n.11; *see also Geraghty*, 445 U.S. at 399 (holding that class certification may relate back to the filing of the complaint where 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.”).

Applying the doctrine to offers of judgment, the Seventh Circuit explained that “just as necessity required the development of the relation back doctrine in

cases where the underlying factual situation naturally changes so rapidly that the courts cannot keep up, so necessity compels a similar result here.” *Susman*, 587 F.2d at 870. “If the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification.” *Id.* Therefore, if an offer of judgment “made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.” *Id.* The Fifth Circuit shared the concern that “in those cases in which it is financially feasible to pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage.” *Zeidman*, 651 F.2d at 1051. “This result is precisely what the relation back doctrine . . . condemns, and we see no difference when it is caused by the defendant’s purposive acts rather than by the naturally transitory nature of the controversy.” *Id.* For the same reasons, the relation back doctrine should apply to this case.

In the fourth situation, when the offer of judgment is made before plaintiffs file the motion for certification, the Third Circuit has adopted the rule that “absent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting the possible class relief asserted in the complaint, the appropriate course is to relate the

certification motion back to the filing of the class complaint.” *Weiss*, 385 F.3d at 348; *see also McDowall v. Cogan*, 216 F.R.D. 46, 51 n.5 (E.D. N.Y. 2003) (holding that “if a defendant wishes to make an offer of judgment prior to class certification . . . , it must do so to the putative class and not to the named plaintiff alone,” but the rule “only applies in situations where, as here, the offer of judgment is made before the plaintiff has had a reasonable opportunity within which to move for class certification.”); *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108, 112 (S.D. N.Y. 2001) (“With the class certification motion merely awaiting the relevant discovery – and related scheduling Orders – the Defendant’s Offer of Judgment for the individual Plaintiff does not moot this matter, and the Defendant’s motion to dismiss for mootness must be denied.”).

In *Weiss*, a case under the Fair Debt Collections Practices Act (“FDCPA”), the defendant made an offer of judgment for \$1,000 plus attorneys’ fees and costs two months after the amended complaint was filed, before the plaintiff moved for class certification, and before the defendant had even filed an answer. *Id.* at 340. The plaintiff did not accept the offer and the defendant filed a motion to dismiss, contending that the District Court no longer had subject matter jurisdiction over the plaintiff’s claims. *Id.* The District Court agreed and dismissed the class action complaint. *Id.* On appeal, the plaintiff argued that because the offer of judgment did not offer relief to the putative class, the case was not mooted by the offer. *Id.*

After reviewing the Supreme Court’s cases on mootness, the Third Circuit focused on the purposes of class actions and the effects of offers of judgment. Class action suits reduce costs of litigation by allocating those costs among all members of the class who benefit from the recovery. *Id.* at 344-45 (quoting *Roper*, 445 U.S. at 338 n.9). Class actions also “permit the plaintiffs to pool claims which would be uneconomical to litigate individually.” *Id.* at 345 (quoting *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985)). “This ‘cost-spreading can also enhance the means for private attorney general enforcement and the resulting deterrence of wrongdoing.’” *Id.* (quoting *In re Gen’l Motors Corp., Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)). “Allowing defendants to ‘pick off’ putative lead plaintiffs contravenes one of the primary purposes of class actions – the aggregation of numerous similar (especially small) claims in a single action.” *Id.*

The court also observed that allowing plaintiffs to be “picked off” at an early stage in a putative class action may waste judicial resources by causing new suits to be brought by similar plaintiffs. *Id.* (citing *Roper*, 445 U.S. at 339). It further noted that “Rule 68 offers to individual named plaintiffs undercut close court supervision of class action settlements, create conflicts of interests for named plaintiffs, and encourage premature class certification motions.” *Id.* at 344 n.12. In response, defendants would “race to pay off” named plaintiffs before they could

file a motion for certification, which is not a sound judicial practice. *Id.* at 348 n.18. Finally, as the FDCPA’s statutory scheme fundamentally relied on enforcement by private attorney generals acting in a representative capacity, undercutting the possibility of class actions for FDCPA claims would frustrate the intent of the statute. *Id.* at 345.

The court then extended the reasoning of *Susman* and *Zeidman* in applying the relation back doctrine to cases where the offer of judgment precedes the motion for certification. *Id.* at 347-48. Although those cases concerned offers made after the filing of the motion, “reference to the bright line event of the filing of the class certification motion may not always be well-founded. Representative actions vary according to the substantive claims and the courses of action.” *Id.* at 347. As “the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations, . . . the class action process should be able to ‘play out’ according to the directives of Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.” *Id.* at 347-48. Therefore, the relation back doctrine applies absent “undue delay” in filing a motion for class certification, which prevents a Rule 68 offer to the named plaintiffs from mooting the entire action. *Id.* at 348. Accordingly, the court remanded the case to allow the plaintiff to file the appropriate motion. *Id.*

Together, the reasoning in *Roper*, *Susman*, *Zeidman*, and *Weiss* convincingly demonstrates that defendants cannot be allowed to use offers of judgment to pick off class action lead plaintiffs before they have had a reasonable amount of time to file a motion for class certification. This principle squarely applies to plaintiffs' class action claims under the NCWHA and, as discussed below, plaintiffs' collective action claims under the FLSA.

**B. Applying the same principles to the FLSA, courts properly protect named plaintiffs in FLSA collective actions from being picked off by settlement offers before actions can be conditionally certified.**

While a collective action under the FLSA operates differently than a class action under Rule 23, the reasons for applying the relation back doctrine to class actions are equally applicable to FLSA collective actions. Section 216(b) of the FLSA provides: “An action to recover the liability [under the FLSA] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). “No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” *Id.* “Thus, the FLSA allows an employee to bring a claim on behalf of other similarly-situated employees, but the other employees do not become plaintiffs in the action unless and until they

consent in writing.” *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 (5th Cir. 2008).

Collective actions typically proceed in two stages. First, the named plaintiffs move for conditional certification of the collective action. *Id.* at 916 n.2. The court then decides, usually based on the pleadings and affidavits of the parties, whether to provide notice to fellow employees who may be similarly situated to the named plaintiffs, thereby conditionally certifying a collective action. *Id.*<sup>1</sup> Because the court has minimal evidence at this point, it makes its determination using a lenient standard. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1243 n.2 (11th Cir. 2003) (per curiam). If the court conditionally certifies the action, potential class members are given notice and the opportunity to “opt-in.” *Id.*

The second determination is typically precipitated by a motion for “decertification” by the defendant, usually filed after discovery is largely complete and the matter is ready for trial. *Id.* At this stage, the court has much more

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<sup>1</sup> “The term ‘similarly situated,’ although not defined in the statute, has been interpreted as requiring only a ‘modest factual showing sufficient to demonstrate that the named plaintiff and potential plaintiffs together were victims of a common policy or plan that violated the law.’” *Bowens v. Atlantic Maint. Corp.*, 546 F. Supp. 2d 55, 82 (E.D. N.Y. 2008) (quoting *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D. N.Y. 1997)). This burden is significantly less than that required to sustain a class certification motion under Rule 23 because the FLSA’s opt-in provision merely provides an opportunity for potential plaintiffs to join and conditional certification is only a preliminary determination as to which potential plaintiffs may in fact be similarly situated. *Id.*

information, and makes a factual determination on whether the plaintiffs who have opted-in are indeed similarly situated to the named plaintiffs. *Id.* If so, the collective action may proceed to trial, and if not, the court must dismiss the opt-in employees, leaving only the named plaintiffs' original claims. *Sandoz*, 553 F.3d at 916 n.2.

The opt-in aspect of the procedure is what most distinguishes collective actions from class actions. “In a Rule 23 proceeding a class is described; if the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by judgment, whether favorable or unfavorable, unless he has ‘opted out’ of the suit.” *Id.* at 916 (quoting *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 (5th Cir. 1975)). Under the FLSA, however, class members are only those who “opt in.” *Id.* Therefore, “unlike in a Rule 23 class action, in a FLSA collective action the plaintiff represents only him- or herself until similarly-situated employees opt in.” *Id.* at 919.

The Fifth Circuit in *Sandoz* is the only appellate court to have confronted the issue of whether the relation back doctrine applies to FLSA collective actions to address premature offers of judgment. Because of the difference between the opt-in and opt-out procedures, the court concluded that it is improper to unthinkingly apply the precise rules from the Rule 23 context to the FLSA context. *Id.* at 919.

Instead, the court carefully considered the issue in light of the purposes of the collective action procedure.

“‘Congress’ purpose in authorizing § 216(b) class actions was to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer.’” *Id.* (quoting *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003)). The collective action gives employees the advantage of lower individual costs to vindicate rights by their pooling of resources and benefits the judicial system by allowing for efficient resolution in one proceeding of common issues of law and fact arising from the same allegedly unlawful practice. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

Like the courts in *Roper*, *Susman*, *Zeidman*, and *Weiss*, the Fifth Circuit concluded that allowing a defendant to moot a collective action by tendering an offer of judgment at an early stage “would violate the policies behind the FLSA because a plaintiff never would be able to certify a collective action.” *Sandoz*, 553 F.3d at 919. Applying mootness principles as the District Court did in this case “would provide an incentive for employers to use Rule 68 as a sword, ‘picking off’ representative plaintiffs and avoiding ever having to face a collective action.” *Id.*

The court then reviewed the use of the relation back doctrine as a way to reconcile the use of offers of judgment with the need to preserve viable collective

actions. *Id.* at 919-20. Although the doctrine “arose in the Rule 23 class action context, the differences between class actions and FLSA § 216(b) collective actions do not compel a different result regarding whether a certification motion can ‘relate back’ to the filing of the complaint.” *Id.* at 920. “The status of a case as being an ‘opt in’ or ‘opt out’ class action has no bearing on whether a defendant can unilaterally moot a plaintiff’s case through a Rule 68 offer of judgment.” *Id.* In either case, the procedure “would be rendered a nullity if defendants could simply moot the claims as soon as the representative plaintiff files suit. Thus, the policies behind applying the ‘relation back’ principle for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions.” *Id.*

The Fifth Circuit is undoubtedly correct in its analysis. As in an opt-out class action, allowing defendants to pick off named plaintiffs contravenes the principal purpose of FLSA collective actions: allowing for the aggregation of numerous similar claims in a single action. Destroying a potential collective action by individual offers of judgment leads to the same adverse consequences: wasting judicial resources by causing new suits to be brought by similar plaintiffs, undercutting close court supervision of class action settlements, creating conflicts of interests for named plaintiffs, encouraging premature class certification motions, and ultimately causing defendants to “race to pay off” named plaintiffs before they

can file a motion for conditional certification. *See Weiss v. Regal Collections*, 385 F.3d 337, 344 n.12, 345, 348 n.12 (3d Cir. 2004).

“The proper course, therefore, is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment.” *Sandoz*, 553 F.3d at 920; *see also Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1013-14 (D. Minn. 2007) (holding that the plaintiffs’ claims were not moot where the defendant filed its motion to dismiss before the plaintiffs filed their motion for conditional class certification, because “[a]llowing such a defensive strategy would frustrate the FLSA’s collective action provision allowing for the aggregation of small claims, and would endorse an unacceptably narrow understanding of Article III’s case-or-controversy requirement”); *Bowens*, 546 F. Supp. 2d at 61 (denying defendant’s motion to dismiss, filed three days before plaintiff’s motion for FLSA conditional class certification, where “any delay on plaintiffs’ part was not a result of their inattention to this case”).

Accordingly, this Court should conclude that when a plaintiff’s motion for conditional certification of a FLSA collection action is filed without undue delay, as it was here, the motion relates back to the date of the initial complaint, and a defendant’s purported offer of judgment does not moot the entire action.

**C. Plaintiffs’ motion for conditional certification of the FLSA collective action was filed promptly and without undue delay, and therefore “relates back” to the date of the complaint.**

In this case, plaintiffs diligently pursued their collective action claims and filed their motion for conditional certification without undue delay. Plaintiffs filed suit in Mecklenburg County Superior Court on October 17, 2007. After the case was removed to the United States District Court for the Western District of North Carolina, and defendants filed their initial motion to dismiss, plaintiffs filed their Amended Complaint on March 26, 2008, which added corporate defendants that allegedly were joint employers of plaintiffs along with defendant United Mortgage. Defendants never answered the Amended Complaint, instead filing a motion to dismiss on April 16, 2008.

Between January 28 and May 6, 2008, nine former Junior Asset Managers filed notices of consent and joined the action as opt-in plaintiffs. As opt-in plaintiffs joined the suit, plaintiffs’ counsel proceeded to gather from them information and declarations in support of plaintiffs’ motion for conditional certification of the FLSA collective action. Before filing the motion, the last declaration plaintiffs’ counsel received was from Kathy Raymer on or about May 12, 2008. On May 21, 2008 – less than two months after filing their Amended Complaint, and before the entry of any scheduling order – plaintiffs moved for

conditional certification of the FLSA collective action and for court-facilitated notice to potential collective action members.

Plaintiffs' counsel needed to gather information and declarations from the new opt-in plaintiffs before filing the motion for conditional certification because those claims help demonstrate that additional employees would be "similarly situated" to the named plaintiffs, warranting court-facilitated notice to potential collective action members and conditional certification. *See Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916 n.2 (5th Cir. 2008) (noting that parties' affidavits are considered on a motion for FLSA conditional certification); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1243 n.2 (11th Cir. 2003) (per curiam) (same); *see also Bowens v. Atlantic Maint. Corp.*, 546 F. Supp. 2d 55, 79 (E.D. N.Y. 2008) (noting as a factor in denying defendant's motion to dismiss case as moot that six other employees had filed notices of consent, which "was clear evidence at the outset of this case that other individuals were interested in joining").

Here, plaintiffs filed a motion for conditional certification less than two months after filing their Amended Complaint, before defendants filed their answer or motion to dismiss for lack of jurisdiction. Plaintiffs' counsel used the intervening time to gather information from nine additional opt-in plaintiffs. Under these circumstances, the Court should conclude that plaintiffs timely filed

their motion for conditional certification “without undue delay.” *See Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004); *see also Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1013-14 (D. Minn. 2007) (holding that the plaintiffs’ claims were not moot where the defendant filed its motion to dismiss only three days before the plaintiffs filed their motion for conditional class certification); *Bowens*, 546 F. Supp. 2d at 61 (holding same where plaintiff’s motion was filed without undue delay). The circumstances here are very similar to those in *Weiss*, where the defendant made an offer of judgment only two months after the amended complaint was filed, before the plaintiff moved for class certification, and before the defendant had filed an answer. *Weiss*, 385 F.3d at 340. As in that case, the Court should reverse the district court and remand the case for consideration of plaintiffs’ motion for conditional certification. *See id.* at 348.

**II. The District Court erred in dismissing plaintiffs’ NCWHA claims because some plaintiffs had worked for defendants while North Carolina’s minimum wage was higher than the federal minimum wage.**

The District Court plainly erred in dismissing plaintiffs’ claims under the NCWHA. Although the court acknowledged that plaintiffs would have stated valid NCWHA claims if they had worked for defendants in 2007 or 2008, the court ignored the allegations of plaintiff Pruitt’s work during this period, and then inexplicably did not allow plaintiffs to amend their complaint with more detailed

allegations regarding Pruitt and additional named plaintiffs who worked in the relevant time period.

In their Second Claim for Relief, plaintiffs brought a class action under the NCWHA. Plaintiffs' primary NCWHA claims allege that "Defendants, through their policies and practices . . . have willfully violated the NCWHA . . . [b]y failing to pay the NCWHA Plaintiffs and other members of the NCWHA Class their earned wages for all hours worked, in violation of N.C. Gen. Stat. § 95-25.6; [and] [b]y failing to pay the NCWHA Plaintiffs and other members of the NCWHA Class overtime pay, in violation of N.C. Gen. Stat. § 95-25.4." (JA 71) According to the complaint, plaintiffs and the class members were non-exempt employees that defendants paid as salaried "exempt employees," defendants required them to work "off the clock," and defendants failed to pay their earned wages and their overtime pay for work in excess of 40 hours per week.

The District Court concluded that plaintiffs' NCWHA claims were barred by N.C. Gen. Stat. § 95-25.14(a)(1), which is an exemption for certain NCWHA claims for employers that are covered by the FLSA. The provision states:

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.5 (Youth Employment), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions do not apply to:

(1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act. . . .

N.C. Gen. Stat. § 95-25.14(a)(1). The exemption, though, contains an exception that provides that if North Carolina's minimum wage is higher than its federal counterpart, then the exemptions of this section do not apply:

b. Notwithstanding the above, any employee other than a learner, apprentice, student, or handicapped worker as defined in the Fair Labor Standards Act who is not otherwise exempt under the other provisions of this section, and for whom the applicable minimum wage under the Fair Labor Standards Act is less than the minimum wage provided in G.S. 95-25.3, is not exempt from the provisions of G.S. 95-25.3 or G.S. 95-25.4 . . . .

N.C. Gen. Stat. § 95-25.14(a)(1)b (emphasis added). From January 1, 2007, through July 23, 2008, North Carolina's minimum wage of \$6.15 per hour, N.C. Gen. Stat. § 95-25.3, was more than its federal counterpart. *See* 29 U.S.C. § 206(a)(1) (stating that the federal minimum wage was raised to \$5.85 on July 24, 2007, and to \$6.55 on July 24, 2008).

The District Court recognized the exception in N.C. Gen. Stat. § 95-25.14(a)(1)b, that the North Carolina minimum wage was higher than its federal counterpart in 2007 and 2008, and that one of the named plaintiffs, Delana Pruitt, was employed during this period as she was employed until February 2007. The court concluded, however, that Pruitt's employment in the relevant time period did not affect the viability of the NCWHA claims "because Ms. Pruitt does not allege that she worked any overtime hours during this month." The court's reading of the Amended Complaint is plainly mistaken.

Plaintiffs' Amended Complaint stated:

- “Defendants employed plaintiff Delana Pruitt as a Junior Asset Manager from June 2006 to February 2007.”
- “During this time Defendants routinely required plaintiff Pruitt to work in excess of 40 hours per week.”
- “Defendants failed to compensate plaintiff Pruitt for the hours she worked in excess of 40 hours per week.”
- “Plaintiff Pruitt has sustained substantial losses from Defendants' failure to pay her earned wages and overtime.”

(JA 69) (emphasis and bullet points added). As the allegations state that Pruitt was routinely required to work overtime hours during her entire employment, that she worked through February 2007, and that she did in fact work overtime hours without receiving overtime pay, the clear inference is that Pruitt worked overtime hours in January and February 2007. *See Andrew v. Clark*, 561 F.3d 261, 264 (4th Cir. 2009) (“We review a dismissal for failure to state a claim de novo, drawing all reasonable inferences in favor of the plaintiff and accepting the allegations that are stated in the complaint as true.” (quoting *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 367 (4th Cir. 1998)) (emphasis added)). To hold that plaintiff's factual allegations are not specific enough, as the District Court did, is to return to the technical rules of pleading that prevailed before the Federal Rules of Civil Procedure. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (acknowledging that “Rule 8 marks a notable and generous departure from the hyper-technical,

code-pleading regime of a prior era”). Because plaintiffs’ Amended Complaint sufficiently alleges that plaintiff Pruitt worked overtime during 2007, this Court should conclude that plaintiffs have alleged valid claims under the NCWHA. *See* N.C. Gen. Stat. § 95-25.14(a)(1)b.

And since the District Court dismissed plaintiffs’ NCWHA claims because their allegations were not specific enough, the court also erred in denying plaintiffs’ motion for leave to file a second amended complaint, which plaintiffs filed in the alternative to their motion for reconsideration of the May 30, 2008 Order. As provided in Rule 15(a), “leave [to amend] shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a)(2). “This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities.” *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). This Court has interpreted Rule 15(a) to provide that “leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile.” *Id.* at 426-27 (citations omitted). Plaintiff’s proposed second amended complaint contained a more specific allegation regarding plaintiff Pruitt’s employment, and named three additional plaintiffs who worked overtime hours for defendants in 2007 and 2008. As there was no prejudice to defendants at this early stage of the proceedings, no bad faith by plaintiffs, and the proposed second

amended complaint would have cured the supposed defect in plaintiffs' allegations, plaintiffs should have been granted leave to amend their complaint. *See id.*

Finally, upon remand, plaintiffs should be allowed to proceed with the NCWHA claims regardless of defendants' settlement offer. For the reasons discussed in Section I.A, *supra*, and Section III, *infra*, defendants' offer of judgment cannot moot plaintiffs' class action claims under the NCWHA until plaintiffs have been given a reasonable opportunity to move for certification of their class action. *See Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004).

**III. The District Court erred in finding the case moot based on defendants' settlement offer when the offer was not for a definite sum, was ambiguous as to its terms, was not left open for at least ten days, and was not clarified before plaintiffs filed their motion for collective action conditional certification.**

The District Court erred in concluding that defendants' May 16, 2008 settlement offer constituted a valid offer of judgment for full relief that could moot plaintiffs' action. As previously discussed, even if defendants had tendered a proper offer of judgment, their offer would not have mooted this action because plaintiffs timely filed their motion for conditional certification of the FLSA collective action and did not have a reasonable opportunity to move for certification of their NCWHA class action. The deficiencies and ambiguities in

defendants' purported offer of judgment further demonstrate why the Court cannot allow such an offer to moot plaintiffs' claims in their entirety.

Rule 68 of the Federal Rules of Civil Procedure allows defendants to make an offer of judgment by "serv[ing] on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. P. 68. "If the offeree rejects the offer, and later obtains a judgment at trial which is less favorable than the terms of the rejected offer, the rule provides that the offeree must pay any costs accrued after the offer was made." *Clark v. Sims*, 28 F.3d 420, 423 (4th Cir. 1994).

In order to constitute an "offer of judgment" under Rule 68, an offer must meet certain formal requirements. *See generally* Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d, § 3002 (1997) (hereafter "Wright & Miller"). Logistically, the offer must be "served" as a pleading (although not filed with the court), the defendant must offer to have a judgment entered against it, and the opposing party shall be given ten days to accept the offer. *Id.*; *see also Clark*, 28 F.3d at 424 (requiring that an offer of judgment must also be in writing). In addition, a Rule 68 "offer must specify a definite sum or other relief for which judgment may be entered, which plaintiff can either accept or reject." Wright & Miller, § 3002 (emphasis added); *see Clark*, 28 F.3d at 423 ("Fed. R. Civ. P. 68

allows a defendant to serve upon the adverse party a formal offer of judgment for a specific amount or to a specific effect.” (emphasis added)).

“[A] plaintiff who receives a Rule 68 offer is in a difficult position, because a Rule 68 offer has a binding effect when refused as well as when accepted; this results from the Rule’s cost-shifting mechanism, which becomes operative upon failure to accept.” *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 402 (8th Cir. 1988) (internal quotation marks omitted) (quoting *Shorter v. Valley Bank & Trust*, 678 F. Supp. 714, 719-20 (N.D. Ill. 1988)). “Thus, especially when considering a Rule 68 offer, the offeree needs to have a clear understanding of the terms of the offer in order to make an informed decision whether to accept it.” *Id.* at 402-03.

Therefore, a defendant “cannot invoke Rule 68 with an ambiguous offer.” *Arkla Energy Res. v. Roye Realty & Dev., Inc.*, 9 F.3d 855, 867 (10th Cir. 1993).

For example, in *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451 (5th Cir. 2003), the defendant’s offer stated, in relevant part: “this Offer of Judgment envisions the attorneys for the parties agreeing upon reasonable compensation for Plaintiff’s claimed ‘actual damages,’ and that said amount is added to this Offer of Judgment.” *Id.* at 454. The Fifth Circuit held that the defendant’s offer was too ambiguous under Rule 68 because “the offer purported to settle all claims, yet failed to quantify damages . . . .” *Id.* at 455. “Moreover, such a vague offer of judgment did not provide [plaintiff] with a clear baseline to

evaluate the risks of continued litigation. To hold otherwise would be to strip Rule 68 of its purpose.” *Id.*

In this case, defendants’ May 16, 2008 settlement offer was ambiguous and contemplated that the parties would later agree to an amount of damages. The offer did not specify a definite monetary amount, or even range of amounts, for the plaintiffs to consider. Instead, the offer was contingent on plaintiffs submitting an affidavit that would have to be based on information that defendants had failed to provide. The offer stated that defendants would provide the pertinent information, though plaintiffs had been asking for this same information since January 2008, to no avail. While defendants may now claim that they would have accepted any amounts claimed by plaintiffs in their affidavits, the offer, as written, requires the affidavits to be based on defendants’ records (which plaintiffs had never seen), so defendants could have challenged whether plaintiffs claimed amounts were in fact properly supported by records. In effect, the “offer” was simply an invitation for plaintiffs to make a specific demand, with the possibility that the parties would be able to agree on the amount of damages based on a review of the records. It is no different than the offer of judgment in *Basha* for an amount to be determined later. *See Basha*, 336 F.3d at 454.

Moreover, the May 16 offer, limited by its terms to “the opt-in plaintiffs,” failed to specify (1) if it applied to the named plaintiffs and potential plaintiffs as

well as the opt-in plaintiffs; (2) whether defendants would pay liquidated damages in addition to actual damages; and (3) whether defendants would pay for two years or three years of back overtime pay. *See* 29 U.S.C. § 260 (stating that liquidated damages need not be paid if the employer acted in “good faith”); 29 U.S.C. § 255(a) (stating that the FLSA’s statute of limitations is extended from two years to three years in the case of “willful” violations). Defendants never clarified the last question, and though they later contended that the offer applied to the named plaintiffs and included liquidated damages, they did so only after having filed their motion to dismiss for lack of jurisdiction. Finally, the offer required plaintiffs to respond within five days of its receipt, instead of allowing ten days as specified in Rule 68.

Given the offer’s ambiguity, lack of a specific monetary sum, and five-day deadline, it plainly did not constitute a valid Rule 68 offer of judgment. *See Clark*, 28 F.3d at 424; *Basha*, 336 F.3d at 454-55; *Arkla Energy*, 9 F.3d at 867. Contrary to the purpose of Rule 68 – to encourage definite offers to settle claims – defendants tendered an obviously deficient offer, too ambiguous and uncertain for plaintiffs to fully evaluate, for the sole purpose of seeking a dismissal of plaintiffs’ claims on grounds of mootness.

Failing to meet Rule 68’s requirements, defendants’ offer is too indefinite and ambiguous to moot plaintiffs’ collective and class action claims. As the

District Court found that plaintiffs' FLSA claims were mooted on the basis of defendants' settlement offer – a consequence far greater than the mere cost-shifting mechanism of Rule 68 – defendants' settlement offer must be at least as definite and unambiguous as would be required for a Rule 68 offer of judgment. *See Radecki*, 858 F.2d at 402-03 (“the offeree needs to have a clear understanding of the terms of the offer in order to make an informed decision whether to accept it”). Accordingly, “if an offer is determined to be ambiguous, courts have refused to permit costs to be shifted and have denied motions to dismiss based on lack of subject matter jurisdiction and mootness.” *See, e.g., Moore v. Hecker*, 250 F.R.D. 682, 684 (S.D. Fla. 2008) (collecting cases and holding same). To hold otherwise would place plaintiffs in the impossible position of having to make a vital litigation decision without having a clear understanding of the defendants' offer and enough time to fully consider it. Therefore, the District Court's conclusion that plaintiffs' claims are moot based on defendants' settlement offer must be reversed.

### **Conclusion**

For the foregoing reasons, this Court should reverse the District Court's dismissal of plaintiffs' claims, and remand the case with directions to the District Court to (1) consider plaintiffs' motion to conditionally certify the FLSA collective action; (2) if necessary, allow plaintiffs to amend their complaint to add more

specific allegations regarding their NCWHA claims; and (3) allow plaintiffs reasonable time to seek class action certification of their NCWHA claims.

Respectfully submitted this 25th day of March, 2010.

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Dated: March 25, 2010

/s/ Ann E. Groninger  
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I hereby certify that on this 25th day of March, 2010, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 25th day of March, 2010, I caused the required number of bound copies of the foregoing Brief of Appellants and Joint Appendix to be hand-filed with the Clerk of this Court and one copy of the same to be served, via UPS Ground Transportation, to all case participants, at the above listed addresses.

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