

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**

REPLY BRIEF OF APPELLANTS

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Summary of Argument

From the beginning, the named plaintiffs in this case have sought to recover rightly-earned wages and overtime pay not just for themselves, but also for the other Junior Asset Managers who worked for defendants. Congress, recognizing the need for FLSA plaintiffs to be able to combine their individual claims for lost wages into a single action, created the collective action process for that very purpose. Under this process, named plaintiffs must promptly file their FLSA claims, be joined by opt-in plaintiffs, and then seek conditional certification of the collective action so that other potential opt-ins can be notified of the action. That is the only effective means to remedy defendants' multiple violations of the FLSA.

Following the established process, the named plaintiffs here filed their complaint with collective action allegations, amended their complaint to include proper defendants, and filed consent notices as opt-in plaintiffs joined the case. Because the district court might have rejected their motion for conditional certification of the collective action without the presence of opt-in plaintiffs, the named plaintiffs waited for several opt-in plaintiffs to join the case before filing their motion. While defendants characterize plaintiffs as inappropriately dilatory, plaintiffs were in fact diligently and prudently pursuing their collective action claims.

Rather than contest plaintiffs' collective action claims or motion for certification on the merits, defendants have sought to abort the statutory process. Relying on inapposite cases, mischaracterizing plaintiffs' motives and actions, and ignoring the realities of collective action litigation, defendants ask the Court to validate their strategy of preempting certification of a FLSA action. The Court must reject defendants' tactics and allow FLSA plaintiffs a reasonable opportunity to file a viable motion for collective action certification.

With respect to plaintiffs' NCWHA claims, the Federal Rules of Civil Procedure require only that plaintiffs make allegations that give rise to the reasonable inference that defendants have acted unlawfully, and do not require the exact language on which defendants insist. Here, the complaint alleges that plaintiff 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 allegations are sufficient to set forth claims that fall under the NCWHA's exception to FLSA preemption. Because the pleading stage is not a forum for hyper-technical parsing of language, the district court erred in dismissing plaintiffs' NCWHA claims.

Finally, in seeking to abort plaintiffs' claims, defendants tendered an ambiguous and indefinite offer, and then failed to clarify some of the offer's patent ambiguities before filing a motion to dismiss. While defendants now characterize

their ambiguous offer as a “blank check,” plaintiffs could not reasonably have assumed that defendants’ offer was so generous at the time. The Court cannot give effect to a plainly inadequate offer based on defendants’ self-serving, post-hoc interpretation.

I. Defendants Rely on Inapposite Authority, Mischaracterize Plaintiffs’ Diligent Litigation of Their Case, and Misapprehend the Purpose of FLSA Collective Actions.

A. Defendants Rely on Appellate Cases that Do Not Involve Unilateral Settlement Offers to Moot Claims and District Court Cases that Support Plaintiffs’ Position.

Courts addressing mootness claims in class or collective action cases have afforded plaintiffs reasonable opportunities to move for certification before their cases can be mooted by a defendant’s unilateral settlement offer. (Pls.’ Opening Br. at 19-34.) The courts have recognized that defendants must not be permitted to “pick off” named plaintiffs in order to prevent a class action or collective action from ever being certified. Defendants mistakenly contend that if the class has not been certified, mooting a class representative’s claim will necessarily moot the class action. (Defs’ Br. at 11-16.) Defendants ignore controlling authority to the contrary.¹

¹ As discussed in Section III, *infra*, defendants’ settlement offer was too ambiguous and indefinite to moot the named plaintiffs’ individual claims, let alone the entire class and collective action.

In several cases, the Supreme Court has found actions not to be moot, despite the loss of a “personal stake” in the merits of the litigation by the proposed class representative. *E.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (applying the “relation back” doctrine to hold that the court retained jurisdiction even though the named plaintiffs’ claims had become moot before the class action was certified); *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 (1980); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 340 (1980); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-95 (1977); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *see also Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975).

Federal appellate courts have likewise used the “relation back” doctrine for transitory claims. *E.g.*, *Wade v. Kirkland*, 118 F.3d 667, 669-70 (9th Cir. 1997) (holding that, although the named plaintiff’s individual claim was moot, jurisdiction remained to appeal lack of decision on motion for class certification, and remanding case for consideration of *Geraghty* principles); *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (holding that class action was not mooted even though student plaintiffs left the school that had been the cause of their individual injuries).

And, as discussed in plaintiff’s opening brief, circuit courts have also applied the “relation back” doctrine to reject the mootness of class actions where

defendants tender relief to satisfy the named plaintiffs' claims. *E.g.*, *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978) (holding 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"); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir. 1981) ("defendants should not be allowed to prevent consideration of [the certification] motion by tendering to the named plaintiffs their personal claims before the district court reasonably can be expected to rule on the issue"); *Reed v. Heckler*, 756 F.2d 779, 786-87 (10th Cir. 1985) (following *Zeidman* to hold that the defendant's resolution of the named plaintiffs' claims cannot preclude consideration of the class certification issue).

Under the latter line of cases, the "relation back" doctrine should be applied to prevent defendants' settlement offer from mootng plaintiffs' FLSA and NCWHA claims. *See Weiss v. Regal Collections*, 385 F.3d 337, 347-48 (3d Cir. 2004) (applying *Susman* and *Zeidman* where offer of judgment preceded the motion for certification); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir. 2008) (holding same in FLSA context); *see also Reed*, 756 F.2d at 787 n.10 (applying *Zeidman* even though the certification motion was not pending at the time defendants settled the named plaintiffs' individual claims).

Rather than confront these cases, defendants rely on cases where (1) named plaintiffs had claims that were mooted by circumstances not sufficiently transitory to fall under *Sosna* and *Geraghty*;² (2) named plaintiffs never had standing to bring their claims in the first place;³ or (3) named plaintiffs voluntarily settled their claims⁴. None of these circumstances are present here.

Defendants also rely on several district court cases to support their position that defendants can moot FLSA collective action claims with an offer of judgment tendered before the plaintiff files a motion for conditional certification. (Defs.' Br. at 16-17.) In each of these cases, however, there was a single named plaintiff who had not been able to find even one opt-in plaintiff to join the suit. *Darboe v.*

Goodwill Indus. of Greater N.Y. & N. N.J., 485 F. Supp. 2d 221, 224 (E.D.N.Y.

² *Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975); *Nestler v. Bd. of Law Examiners*, 611 F.2d 1380, 1382 (4th Cir. 1980); *Banks v. Multi-Family Mgmt., Inc.*, 554 F.2d 127, 128 (4th Cir. 1977); *Holt v. Moore*, 541 F.2d 460, 462 n.2 (4th Cir. 1976); *Rocky v. King*, 900 F.2d 864, 870-71 (5th Cir. 1990); *Cicchetti v. Lucey*, 514 F.2d 362, 366-67 (1st Cir. 1975); *see also Kremens v. Bartley*, 431 U.S. 119, 132-33 (1977) (finding *Sosna* inapplicable because change in law had mooted claims of named and potential plaintiffs); *Bd. of School Comm'rs v. Jacobs*, 420 U.S. 128, 130 (1975) (declining to apply *Sosna* because no effort was made to identify the class or to certify the class action).

³ *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403-04 (1977); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962); *Wilson v. Sec'y of Health & Human Servs.*, 671 F.2d 673, 679 (1st Cir. 1982).

⁴ *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1300 (4th Cir. 1978) (deciding procedure when plaintiffs voluntarily settle and move to dismiss); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 979-80 (3d Cir. 1992).

2007); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 270 (S.D.N.Y. 2006); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 128 (D. Conn. 2005); *Mackenzie v. Kindred Hosps. E. L.L.C.*, 276 F. Supp. 2d 1211, 1220 (M.D. Fla. 2003).

The district courts in these cases did recognize the problem of defendants “picking off” FLSA plaintiffs before a collective action could be certified. *See Ward*, 455 F. Supp. 2d at 269 (“Ward argues that BONY should not be permitted to ‘pick off’ a representative action plaintiff with a Rule 68 offer of judgment. ... Ward’s policy arguments about the collective action mechanism of the FLSA do give this Court some pause.”); *Darboe*, 485 F. Supp. 2d at 223. Because there was no indication that the named plaintiffs in these cases would be able to obtain opt-in plaintiffs and present a viable collective action, the mootng of their cases with an offer of judgment did not conflict with the policy underlying the collective action procedure. *See Darboe*, 485 F. Supp. 2d at 224 (“application of Rule 68 to moot a single plaintiff’s claim creates no conflict with the policy underlying the collective action procedure”); *Vogel*, 371 F. Supp. 2d at 128 (“without the inclusion of other active plaintiffs who have ‘opted-in’ to the suit, the section 216(b) plaintiff simply presents only her claim on the merits”); *Mackenzie*, 276 F. Supp. 2d at 1220-21 (also rejecting motion for conditional certification on its merits).

In *Cameron-Grant v. Maxim Healthcare Servs.*, 347 F.3d 1240 (11th Cir. 2003) (per curiam), another case on which defendants rely, three of the four named

plaintiffs voluntarily settled their FLSA claims before the district court ruled on their motion for conditional certification, the district court denied the pending motion for conditional certification because the plaintiffs failed to present evidence that any employees desired to opt-in to the lawsuit, and the remaining named plaintiff then voluntarily settled his FLSA claim and sought to appeal the district court's certification decision. *Id.* at 1242-44. As the only remaining named plaintiff had voluntarily settled his claim, and no opt-in plaintiffs had ever joined the suit, the Eleventh Circuit concluded the case was moot. *Id.* at 1249. Because there was no indication that any opt-in would ever join the plaintiff's suit, and the lone plaintiff voluntarily settled his own claims, the court's determination of mootness did not create any conflict with the policy underlying the collective action procedure.

In this case, by contrast, four named plaintiffs and nine opt-in plaintiffs were present when defendants filed their motion to dismiss. None of these plaintiffs voluntarily settled their claims with defendants. As discussed below, the number of opt-in plaintiffs shows that there was a viable collective action and that the district court denied plaintiffs the reasonable opportunity to move for conditional certification of the collective action. Affirming the district court's dismissal of plaintiffs' claims would fatally undermine the collective action procedure.

B. Plaintiffs Diligently Litigated Their Claims and Waited for Opt-in Plaintiffs to Join the Case in Order to Present a Meritorious Motion for Conditional Certification of the Collective Action.

Defendants argue that *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004), and *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir. 2008), are distinguishable because defendants made their settlement offer and filed their motion to dismiss seven months after plaintiffs filed their complaint. (Defs.’ Br. at 20-25.) During that time, however, plaintiffs appropriately filed notices of consent as opt-in plaintiffs joined the case, and once a critical mass of plaintiffs had been reached, plaintiffs filed their motion for conditional certification of the collective action on May 21, 2008. (JA 46-59, 78-83, 94-116). Because plaintiffs timely filed their motion for conditional certification “without undue delay,” the motion relates back to the date plaintiffs filed the initial complaint. *See Sandoz*, 553 F.3d at 920; *Weiss*, 385 F.3d at 348.

In deciding when to file a motion for conditional certification, one important factor is the presence of opt-in plaintiffs. Affidavits from opt-in plaintiffs help to demonstrate that other potential employees are “similarly situated” to the named plaintiffs. *See Sandoz*, 553 F.3d at 916 n.2. Moreover, some courts considering a motion for conditional certification require a showing that other employees desire to opt-in to the lawsuit. *See, e.g., Dybach v. State of Fla. Dep’t of Corr.*, 942 F.2d 1562, 1567-68 (11th Cir. 1991); *Davis v. Charoen Pokphand (USA), Inc.*, 303 F.

Supp. 2d 1272, 1277 (M.D. Ala. 2004) (noting that the interest of other employees can be shown by consents to join from opt-in plaintiffs and affidavits of other employees); *Parker v. Rowland Express, Inc.*, 492 F. Supp. 2d 1159, 1165 n.4 (D. Minn. 2007) (holding that two named plaintiffs alone is insufficient to show others would join suit, but indicating that the presence of eight plaintiffs would be sufficient without more). *But see Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) (holding that the standard for conditional certification is fairly lenient and requires “nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan.”).

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 by defendants to federal court in November 2007, defendants filed their initial motion to dismiss, which required briefing by the parties. Beginning in December 2007, with the Rule 26(f) conference, the parties began settlement discussions. On January 8, 2008, plaintiffs’ counsel asked defendants’ counsel to produce documents reflecting wage and hour information for the named plaintiffs. On January 18, 2008, defendants produced incomplete information for three of the named plaintiffs. On April 7, 2008, plaintiffs requested additional information, but

received no response from defendants. In the meantime, the court had not yet even ruled on the parties' proposed discovery order.

After further investigation of the ownership structure of defendant United Mortgage & Loan Investment, LLC ("United Mortgage"), plaintiffs filed their Amended Complaint on March 26, 2008, adding corporate defendants that allegedly were joint employers of plaintiffs along with United Mortgage. Defendants never answered the Amended Complaint, instead filing a motion to dismiss on April 16, 2008. This required further briefing by the parties, which was not completed until May 5, 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. Through May 12, 2008, plaintiffs' counsel gathered from them information and declarations in support of plaintiffs' motion for conditional certification. On May 21, 2008, plaintiffs moved for conditional certification of the FLSA collective action and for court-facilitated notice to potential collective action members.

Plaintiffs' course of litigation was diligent and prudent, and in no way dilatory or unjustified. Plaintiffs opposed defendants' motions to dismiss, sought out and included additional defendants in their Amended Complaint, and engaged in preliminary settlement negotiations. At the same time, plaintiffs gathered information and declarations from the new opt-in plaintiffs to help demonstrate

that additional employees would be “similarly situated” to the named plaintiffs and to show that other employees would opt-in if they were notified. *See Dybach*, 942 F.2d at 1567-68. Just as Congress intended, plaintiffs prepared a meritorious motion for conditional certification so that a collective action could proceed with the inclusion of all other underpaid employees. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

Concerned about the interest plaintiffs’ lawsuit had generated and the likelihood of certification, defendants sought to preemptively foreclose certification of the collective action by settling the claims of the plaintiffs already in the case. Although defendants here waited a few months longer to offer a settlement than did the defendants in *Weiss* or *Sandoz*, their actions are indistinguishable.

Defendants trumpet their generosity in offering settlement to the then-present opt-in plaintiffs, but consistently overlook the fundamental purpose of a collective action: “to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer.” *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003). That purpose is accomplished by conditional certification and court-approved notice to all potential plaintiffs. *See Hoffmann-La Roche*, 493 U.S. at 170-71. By trying to moot plaintiffs’ collective action before their motion for

conditional certification can be considered, defendants undermine a process that is designed to reach all potential employees who were harmed by defendants' unlawful activities.

If the courts permit defendants' tactic in this case, other defendants in FLSA cases will always be able prevent certification of a collective action as soon as it appears that a motion for conditional certification would succeed. Such a result would cripple enforcement of the FLSA, would be contrary to the Congressional intent in creating the collective action procedure, and would substantially diminish the ability of underpaid employees to recover the wages that they are rightfully owed.

II. Defendants Wrongly Demand Particular Words in Plaintiffs' Complaint for the NCWHA Claims When the Clear Inference of the Allegations is that Plaintiff Pruitt Worked Overtime Hours in 2007.

Plaintiffs' NCWHA claims were dismissed by the district court for failure to state a valid claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (JA 131-36) When reviewing a complaint under Rule 12(b)(6), all of the factual allegations in the complaint are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *See Andrew v. Clark*, 561 F.3d 261, 264 (4th Cir. 2009); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.")

(emphasis added)). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations.’” *Iqbal*, 129 S. Ct. at 1950 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

In their brief, defendants recast their challenge to plaintiffs’ NCWHA claims as one based on lack of standing. (Defs.’ Br. at 26-28.) Although standing was clearly not the basis of defendants’ motion to dismiss or the district court’s order, an argument based on standing does not alter the analysis. When considering standing “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

With regard to plaintiff Pruitt, the allegations in plaintiffs’ Amended Complaint stated 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. (JA 69) It is both an obvious and reasonable inference that Pruitt worked overtime hours in January and February 2007 for which she was not properly compensated. *See Iqbal*, 129 S. Ct. at 1950. While defendants argue that plaintiffs should have made more detailed factual allegations, nothing more is required for pleadings under Rule 8. *See id.*

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.

III. Defendants' Ambiguous and Indefinite Offer Cannot Moot Plaintiffs' Claims, Regardless of Defendants' Post-Hoc Interpretation of the Offer.

The district court found that defendants' May 16, 2008 settlement offer constituted an offer of judgment and dismissed plaintiffs' claims on this basis. (JA 225-26) Abandoning the district court's reasoning, defendants now argue that even though their settlement offer was not an offer of judgment, it was a "blank check" that mooted plaintiffs' case. (Defs.' Br. at 30-31.) Defendants' post-hoc interpretation of their ambiguous and indefinite offer is not controlling. When presented to plaintiffs before defendants filed their motion to dismiss, the offer was plainly insufficient to moot any case, let alone one where plaintiffs had timely filed their motion for conditional certification of the collective action.

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

- The term "opt-in plaintiffs" may or may not have encompassed the named plaintiffs.

- The term “opt-in plaintiffs” may or may not have encompassed potential opt-in plaintiffs who would be notified when the collective action was conditionally certified.
- The term “full relief” may or may not have included liquidated damages in addition to actual damages. *See* 29 U.S.C. § 260 (stating that liquidated damages need not be paid if the employer acted in “good faith”).
- The term “full relief” may encompass damages based on a statute of limitations of either two years or three years. *See* 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).
- The exact monetary value of plaintiffs’ actual damages remains unknown and cannot be determined without discovery.

Compounding the ambiguity of the offer, defendants gave the multiple plaintiffs only five days to respond. *Cf.* Fed. R. Civ. P. 68 (requiring ten days to respond to offer of judgment).

Because of these patent ambiguities in the offer, it was not nearly specific enough to moot plaintiffs’ claims. *See Radecki v. Amoco Oil Co.*, 858 F.2d 397, 402-03 (8th Cir. 1988) (“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”); *Moore v. Hecker*, 250 F.R.D. 682, 684 (S.D. Fla. 2008) (“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”).

In fact, in all the cases defendants point to where a settlement offer was sufficient to moot a plaintiff’s claim, the offer was for a definite amount of

damages. *See, e.g., Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1987) (offer of \$3,281.25); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (offer of \$1135 plus costs); *Darboe v. Goodwill Indus. of Greater N.Y. & N. N.J.*, 485 F. Supp. 2d 221, 222 (E.D.N.Y. 2007) (offer of \$12,500 plus fees and costs); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 265 (S.D.N.Y. 2006) (offer of \$1000 plus fees and costs). Defendants cannot point to any case where an offer as ambiguous and indefinite as theirs served to moot a plaintiff's claim. Moreover, nothing prevented defendants from making a definite offer based on an estimate of plaintiffs' damages, as was done in these other cases.

Faced with such an uncertain offer, plaintiffs reasonably asked defendants to clarify the offer's substantial ambiguities. Instead of answering plaintiffs' reasonable inquiries, defendants filed their motion to dismiss. On the same day, defendants responded to plaintiffs' letter seeking clarification of the offer, but sent the letter to plaintiffs' counsel by regular mail, so that plaintiffs' counsel received it after receiving defendants' electronically filed motion. (JA 200)

While defendants accuse plaintiffs of "intransigence" in the settlement discussions, (Defs.' Br. at 31-32), the record demonstrates that defendants were not attempting to negotiate a settlement in good faith. Had they been trying to do so, they would have addressed plaintiffs' legitimate questions about their offer before filing a motion to dismiss. Instead, defendants rushed to file their motion to

dismiss because their purpose was to try to moot plaintiffs' case before the court could certify the collective action.

Finally, defendants' refrain that they offered all possible relief must be rejected because their settlement offer did not extend to potential plaintiffs who would soon be contacted when the collective action was conditionally certified. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring) ("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)..."). This misconception of the collective action procedure animates all of defendants' arguments. As discussed above, plaintiffs are seeking to address all the employees underpaid by defendants through the collective and class action procedures. Plaintiffs litigated and continue to pursue this action to vindicate the rights of the numerous employees harmed by defendants. That legitimate goal, authorized and encouraged by the FLSA and NCWHA, cannot be short-circuited by defendants' tactics.

Conclusion

For the foregoing reasons, and for the reasons in Plaintiffs' Opening Brief, 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 13th day of May, 2010.

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Dated: May 13, 2010

/s/ Ann E. Groninger
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I hereby certify that on this 13th day of May, 2010, I caused this Reply 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 13th day of May, 2010, I caused the required number of bound copies of the foregoing Reply Brief of Appellants to be hand-filed with the Clerk of this Court.

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