No. _____

In The Supreme Court of the United States

GENESIS HEALTHCARE CORPORATION
and ELDERCARE RESOURCES CORP.,

Petitioners,

v.

LAURA SYMCZYK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Genesis HealthCare Corporation is owned by FC-GEN Acquisition, Inc., which is owned by FC-GEN Acquisition Holding, LLC, which is owned by Health Care REIT, Inc. Of those entities, only Health Care REIT, Inc. is publicly traded.

Petitioner ElderCare Resources Corp. is owned by GHC Ancillary Corp., which is owned by Genesis HealthCare LLC, which is owned by GEN Operations II, LLC, which is owned by GEN Operations I, LLC, which is owned by FC-GEN Operations Investment, LLC. None of those entities is publicly traded.

The lone respondent is Laura Symczyk.

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PETITION FOR A WRIT OF CERTIORARI

Genesis HealthCare Corporation and ElderCare Resources Corp. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 656 F.3d 189. The opinion of the district court resolving the issues relevant to the petition (Pet. App. 30-44) is unreported. A related order of the district court entering a final judgment (Pet. App. 45-46) also is unreported.

JURISDICTION

The court of appeals entered judgment on August 31, 2011 and denied a timely petition for rehearing on October 20, 2011. Pet. App. 47-48. On December 13, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to February 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * * ."

29 U.S.C. 216(b) provides, in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. 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.

STATEMENT OF THE CASE

Petitioners offered to pay the lone respondent in this proceeding an amount conceded to provide all that she seeks in her complaint; yet the court of appeals refused to affirm the district court's decision to dismiss the matter as moot. Instead, the court of appeals revived this lawsuit-with-no-plaintiff and remanded it for proceedings to assess the possibility that respondent's attorneys can identify additional parties who might wish to join in litigation against petitioners.

1. For several months during 2007, respondent worked as a registered nurse at a facility in Philadelphia that was owned by a subsidiary of petitioner Genesis HealthCare Corporation. In December of 2009, after respondent had ceased working at that facility, she filed suit, alleging that petitioners had violated the Fair Labor Standards Act of 1938 (the "FLSA"), 29 U.S.C. 201 et seq., because her employer charged her for automatic meal break deductions without regard to whether she in fact took an uninterrupted break.

Relying on FLSA Section 216(b), respondent brought the action on behalf of herself and other similarly situated individuals. See Pet. App. 3-4, 31-32. To date, however, no other individual has opted to

join in the litigation. Thus, at all times since the filing of the complaint, respondent has been the sole plaintiff. See Section 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."); Pet. App. 3, 6 (opinion of court of appeals noting the absence of other plaintiffs), 42 (opinion of district court noting the same). See generally Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169-74 (1989) (explaining that the traditional rules for class litigation do not apply in litigation under Section 216(b), in which plaintiffs join only by affirmative acts of consent); see *id*. at 175-78 (Scalia, J., dissenting) (emphasizing distinction between class actions and actions under Section 216(b)).

2. On February 18, 2010, petitioners answered the complaint and served an offer of judgment under Fed. R. Civ. P. 68 for $7,500 in alleged unpaid wages, as well as "attorneys' fees, costs and expenses as determined by the Court." Although the offer fully satisfied her claims, respondent made no response. Because the offer to pay her claims in full deprived respondent of any ongoing personal stake in the litigation, petitioners on March 23, 2010 filed a motion to dismiss the case under Fed. R. Civ. P. 12(b)(1). See Pet. App. 4-5.

3. On May 19, 2010, the district court issued a detailed opinion tentatively granting the motion. Pet. App. 30-44. The court started from respondent's concession that the offer fully satisfied her claims. Pet.

App. 34. The court also noted the settled rule that an offer of full satisfaction under Rule 68 ordinarily moots a plaintiff's claim and thus ordinarily leads to dismissal. Pet. App. 35-36 (citing L.A. County v. Davis, 440 U.S. 625, 631 (1979); Weiss v. Regal Collections, 385 F.3d 337, 340 (CA3 2004)). The district court acknowledged that some courts had declined to dismiss collective actions under the FLSA even when a defendant had offered to make a plaintiff whole, but pointed out that in all but one of those cases the plaintiff already had moved for conditional certification or other individuals already had joined the action. Pet. App. 38-42.

The court embraced the distinction between a Rule 23 class action and a collective action under FLSA Section 216(b). In the former, class members are bound by the judgment unless they opt out; in the latter, the "plaintiff is deemed to represent himself only" unless others "take the affirmative step of opting in to the action." Pet. App. 39 (internal quotation marks omitted) (quoting Darboe v. Goodwill Industries, 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007)). In this case, because there were no plaintiffs with unsatisfied claims at the time of the motion to dismiss, and not even a pending motion for certification, the court concluded that dismissal of the FLSA claim was appropriate. Pet. App. 42-44.

4. After subsequent proceedings (not at issue here or in the court of appeals) in which the district court concluded that it was inappropriate to exercise

supplemental jurisdiction over state-law claims, the district court dismissed the case. Pet. App. 45-46.

5. The court of appeals reversed. Pet. App. 1-29. The court acknowledged that respondent retains no legally cognizable interest in the case, and that the lack of a justiciable controversy with the lone plaintiff ordinarily justifies immediate dismissal. Pet. App. 14 ("An 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."). The court concluded, however, that it would "frustrate the objectives of class actions" to allow a defendant's tender of judgment to "pic[k] off" multiple plaintiffs. Pet. App. 15 (quoting Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)).

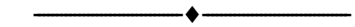
The court relied heavily on cases involving class actions. In that context, the court noted, several courts of appeals have held that a case does not become moot when the claims of a class representative become moot, on the theory that the certification of a class "relates back" to the filing of the complaint. Under the reasoning of those cases, for purposes of mootness analysis, all members of the class become parties as of the date of the complaint. Pet. App. 15-20 (citing Weiss v. Regal Collections, 385 F.3d 337 (CA3 2004)).

The court acknowledged the important differences between class actions under Fed. R. Civ. P. 23 and collective actions under Section 216(b): the plaintiff in a class action represents all members of the

class, and they are bound by a judgment even if they have not participated; a collective action under Section 216(b) binds (and benefits) only those individuals that affirmatively opt into the case. Pet. App. 21-22. The court also noted the history of Section 216(b), which Congress amended in 1947 to prohibit representative actions. Pet. App. 22 n.11.

Ultimately, however, the court of appeals dismissed the significance of the differences between class actions and Section 216(b) and extended the class action precedents to the FLSA context. It worried that a mootness inquiry "predicated inflexibly on whether any employee has opted in to an action" would make it too easy for employers to dispose of litigation (by paying full satisfaction to all plaintiffs). Pet. App. 23-24. The court also relied heavily on its sense of the "considerations that caution against allowing [settlement offers] to impede the advancement of a representative action." Pet. App. 25-27. Concluding that a contrary decision would "facilitat[e] an outcome antithetical to the purposes behind § 216(b)" (Pet. App. 26), the court ordered that the action proceed. Pet. App. 28.

6. Petitioner filed a timely petition for rehearing, which the court of appeals denied without opinion on October 20, 2011. Pet. App. 47-48.



REASONS FOR GRANTING THE PETITION

From the first years of this Court's existence (Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n. (1792)), the Court has taken special care to enforce Article III's limitation of the judicial power to actual Cases and Controversies. E.g., Arizona Christian School Tuition Org. v. Winn, 131 S. Ct. 1436, 1441-42 (2011). Subordinating that limitation to pragmatic concerns about judicial access and statutory policy, the court of appeals has lost sight of Article III, permitting litigation to continue against petitioners despite the absence of any adverse party: petitioners have offered the lone plaintiff in this case everything she sought in her complaint. The only beneficiaries of further litigation are respondent's counsel and future parties, as yet unidentified, who might join the litigation if it continues. Because the confusion into which the courts of appeals have fallen overlooks constitutional limitations on the judicial power, only this Court can resolve the issue.

I. The Judicial Power Does Not Extend to a Dispute in Which the Defendants Offer Full Relief to the Lone Plaintiff.

The compelling need for guidance to the lower courts is underscored by the simplicity with which the existing precedents of this Court resolve the case. The first step is to consider the dispute between petitioners and respondent Symczyk. She sought

monetary relief for alleged violations of the FLSA.[1] Petitioners responded by offering all the relief that she sought. Respondent conceded that petitioners' offer was adequate. Pet. App. 4, 32. Thus, respondent has no continuing stake in the litigation, nothing more to gain from its continuing pursuit. It is hornbook law that an offer to accord all relief that a plaintiff demands moots a case unless the plaintiff retains some additional stake in continuing litigation. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 332-33 (1980).[2] Unless something additional is at stake, the dispute no longer involves a "Case" that a federal court can adjudicate.

The styling of the complaint as seeking relief on behalf of others "similarly situated" does not provide the necessary stake. It bears repeating that this is not a class action (in which a class representative represents the interest of absent class members), but rather a collective action under Section 216(b) of the FLSA. The distinction is not technical, but

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[1] Because the complaint in this case sought relief under Sections 206 and 207 of the FLSA, and sought no relief under Section 215(a)(3) (see First Amended Complaint ¶¶ 1, 42, and 62, Pet'r's C.A. App. 83, 89, 93), this case arises under the first sentence of Section 216(b), which does not authorize equitable relief. 29 U.S.C. 216(b); see Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 921 n.6 (CA5 2008).

[2] See Rand v. Monsanto Co., 926 F.2d 596, 598 (CA7 1991); Weiss v. Regal Collections, 385 F.3d 337, 340 (CA3 2004); 13B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3533.2, at 800-806 (3d ed. 2008 (Supp. 2011)).

substantive. See *Hoffman-La Roche Inc.*, 493 U.S. at 175-78 (Scalia, J., dissenting) (emphasizing the differences between class actions and FLSA actions under Section 216(b)). As this Court explained in *Hoffman-La Roche Inc.*, Congress more than half a century ago "abolished" the "representative action" previously available under the FLSA, driven by concerns about "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome." 493 U.S. at 173.

To be sure, Section 216(b) includes a provision by which other similarly situated individuals eventually could have joined the litigation. But respondent does not "represent" those individuals, and until one of them chooses to join the litigation she is the only party seeking relief. In the words of Chief Justice Marshall, any possible dispute between petitioners and those individuals "becomes a case" for purposes of Article III only when "a party * * * asserts his rights in the form prescribed by law," Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819 (1824) (quoted in *Hoffman-La Roche Inc.*, 493 U.S. at 175-76 (Scalia, J., dissenting)); cf. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000) (explaining that there can be no Article III standing on the part of an assignee until some claim has been assigned).

Because none of those other individuals has yet joined this litigation, there is no possibility that a judgment here (favorable or unfavorable) would bind them. See Section 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."). Thus, the absent parties indisputably lack the "personal stake in the outcome" necessary for exercise of the judicial power, Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992).[3] In sum, because there is not yet, for purposes of Article III, a "Case" (or a "Controvers[y]") between petitioners and any of those as yet unidentified individuals, the only relevant dispute is the one with respondent that has been mooted by petitioners' offer.

Neither *Roper* nor its companion (United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)) supports a contrary decision. First, *Roper* itself rests on the plaintiff's continuing financial interest in class certification – the plaintiff's ability to shift fees to other members of the class. *Roper*, 445 U.S. at 334 n.6, 336 (discussing "desire [of plaintiffs] to shift part of the costs of litigation"); see *Roper*, 445 U.S. at 343 n.2 (Stevens, J., concurring) (agreeing with that point); *Roper*, 445 U.S. at 345-47 (Powell, J., dissenting) (characterizing this as the holding of the *Roper* Court). Because the offer in this case extended to all

[3] See Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 103 n.5 (1998) (asking "whether a plaintiff personally would benefit in a tangible way from the court's intervention" (citation, emphasis, and internal quotation marks omitted)); Flast v. Cohen, 392 U.S. 83, 100-01 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

costs and fees incurred by respondent, she has no continuing individual stake of her own and thus no claim under the reasoning of *Roper*.

Second, to the extent *Roper* discussed (without relying on) "the responsibility of named plaintiffs to represent the collective interests of the putative class," 445 U.S. at 331, it discussed a form of litigation that is not relevant in this action under Section 216(b). Again, respondent has no responsibility to any as-yet unidentified individuals who might allege similar treatment. Even if she did, *Geraghty*'s holding that a putative class representative can appeal the denial of a class certification when the representative's claim becomes moot (445 U.S. at 404) has no relevance to a case in which no motion for certification (or even its FLSA analogue) has been filed (much less denied).

The argument that the termination of the plaintiff's personal stake takes the case outside Article III is a strong one. See *Geraghty*, 445 U.S. at 409-24 (Powell, J., dissenting). But the facts of *Roper* and *Geraghty* at least presented a conceptual foundation for allowing the litigation to continue – the interests of the class on whose behalf the named representative brought the litigation. See *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring) (concluding that the decision in *Roper* could be justified because "the defendant ha[d] not offered all that ha[d] been requested in the complaint (i.e., relief for the class)"). Because the class representative can bind other members of the class, it makes some sense to recognize the

representative as obligated to absent members, and thus to recognize a continuing controversy even when the individual claims of the named representatives dissipate. Cf. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (emphasizing that "a class representative must * * * possess the same interest and suffer the same injury as the class members" (citations and internal quotation marks omitted)). That foundation has no relevance in this case under the FLSA, from which Congress explicitly and intentionally has removed any possibility of a representative action, specifically to limit the pursuit of litigation "by plaintiffs lacking a personal interest in the outcome," *Hoffman-La Roche Inc.*, 493 U.S. at 173. Again, because no judgment in this case could either benefit, or burden, any of the potential plaintiffs, they have no Article III dispute with petitioners. See Sprint Communications Co., L.P. v. APCC Services, 554 U.S. 269, 298-99 (2008) (Roberts, C.J., dissenting) (Article III requires dismissal when "[r]espondents have nothing to gain from their lawsuit").

The absence of any concrete controversy is underscored by the justifications the court of appeals offered to sustain its decision. The court of appeals did not think it necessary even to speculate about what controversy might exist between petitioners and any potentially adverse party. Rather, it relied entirely on its sense of "incentive[s]" and "strategi[es]" to avoid a decision that "inflexibly" would require the existence of an active controversy. Pet. App. 22-23. That purposive analysis divorces the relatively

unexceptionable holding in *Roper* from the factual underpinnings of a controversy that was identifiable in fact, a dispute that would affect the interests of identifiable parties. Compare Spencer v. Kemna, 523 U.S. 1, 11 (1998) (criticizing a "parsimonious view of the function of Article III standing" that accepts the "remote possibility of collateral consequences as adequate to [avoid mootness]"). By allowing the idiosyncratic policy intuitions of individual judges to stand in the place of a personal stake in the litigation, the court has strayed beyond constitutional limits.

II. The Question Presented Warrants This Court's Attention.

A. The Lower Courts Are in Disarray.

The failure of the lower courts to draw coherent guidance from the deeply fractured decisions in *Roper* and *Geraghty* has led to widespread, widely recognized, and steadily deepening confusion about the most basic questions of justiciability in this context.[4] Because the relevant issues have shifted so much since the Court's decisions in *Roper* and *Geraghty* at the dawn of the class-action era, the lower courts have taken to resolving these questions through the parsing of their own precedents. As the discussion

[4] See Symczyk v. Genesis HealthCare Corp., No. 09-CV-5782 (E.D. Pa.) (transcript of Dec. 20, 2011 hearing on remand from court of appeals decision), at 25, 44, 45 (expressing frustration about the "confusing area" of the law and repeatedly noting the "conflict" in the circuits).

above illustrates, they have lost sight of the core principles that animate (and confine) this Court's decisions in *Roper* and *Geraghty*. Thus, lacking guidance from this Court in the FLSA context, some courts have extended *Roper* and *Geraghty* without recognizing the importance of the differences between Rule 23 and Section 216(b). Others, failing to notice the factual context that supported the narrow majorities in *Roper* and *Geraghty*, have discounted the importance of an ongoing controversy. Those courts have extended *Roper* and *Geraghty* to justify continuing adjudication even when the original controversy has dissipated before the plaintiff has sought to certify a case for collective adjudication. The disparate analysis of those two problems has produced disarray that only this Court can redress.

1. First, the courts of appeals have taken diametrically opposed approaches to the extension of *Roper* and *Geraghty* to FLSA cases. On the one hand, the Ninth and Eleventh Circuits have emphasized the difference between class actions under Rule 23 and collective actions under Section 216(b). The key decision here is the Eleventh Circuit's ruling in *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240 (2003). After a careful and thorough discussion of *Roper*, *Geraghty*, and the history of Section 216(b) (347 F.3d at 1245-49), that court concluded that because "§ 216(b) is a fundamentally different creature than the Rule 23 class action, * * * the § 216(b) plaintiff * * * has no right to represent [similarly situated individuals]," 347 F.3d at 1249. The court

reasoned that until other individuals join the Section 216(b) case, "no person will be bound by or may benefit from judgment." 347 F.3d at 1249 (citation and quotation marks omitted). Accordingly, the court held, an action under Section 216(b) became moot when the last remaining named plaintiff settled his claims. 347 F.3d at 1249. Six years later, the Ninth Circuit followed *Cameron-Grant* to a similar conclusion. See Smith v. T-Mobile USA, Inc., 570 F.3d 1119, 1122-23 (2009) (holding that an FLSA plaintiff that settles individual claim has no justiciable interest in appealing adverse decision on certification of collective action).

On the other side are the Third and Fifth Circuits, which have uncritically extended the decisions in *Roper* and *Geraghty* from the class action context to FLSA actions under Section 216(b). As summarized above, the Third Circuit in this case consciously followed the Fifth Circuit's decision in *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (2008). Like *Cameron-Grant* and this case, *Sandoz* involved a collective action under Section 216(b). The defendant responded to the complaint with an offer under Rule 68 to provide the plaintiff all the relief sought in the complaint. The district court declined to dismiss the case, but instead allowed the plaintiff to file a motion to certify the case for collective action. On appeal, the Fifth Circuit affirmed. The court acknowledged the "fundamental, irreconcilable difference between the class action described by Rule 23 and that provided

for by FLSA [§ 216(b)]." 553 F.3d at 916. Specifically, the court explained:

> 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. Under [§ 216(b)] of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent.

553 F.3d at 916 (quoting LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (CA5 1975) (per curiam)) (brackets by *Sandoz* panel). The court cited *Cameron-Grant* and noted that "[t]he Eleventh Circuit is the only other circuit that has addressed the same type of scenario." 553 F.3d at 917. The *Sandoz* panel acknowledged that the only difference between the facts of *Cameron-Grant* and the facts of *Sandoz* was a technicality the panel regarded as irrelevant – the type of settlement (voluntary in *Cameron-Grant* and instigated by Rule 68 in *Sandoz*). 553 F.3d at 917 n.3. The court even went so far as to "find persuasive the Eleventh Circuit's ruling in *Cameron-Grant* that there is a difference between when a Rule 23 class action and a FLSA collective action can become moot, because, * * * in a FLSA collective action the plaintiff represents only him- or herself until

similarly-situated employees opt in." 553 F.3d at 919 (citing *Cameron-Grant*, 347 F.3d at 1249).

Still, without identifying any error in the reasoning of *Cameron-Grant*, or specifying any factual distinction that might render that reasoning inapplicable, the *Sandoz* panel concluded that the settlement of the named plaintiff's claim was not enough to moot the case. Motivated by concerns of judicial policy, the court noted the "incentive for employers to use Rule 68 as a sword, 'picking off' representative plaintiffs and avoiding ever having to face a collection action." 553 F.3d at 919. To solve that problem, the court adopted a rule under which a plaintiff that files a motion for certification in a reasonable time can avoid mootness by having the effectiveness of the certification relate back to the date of the complaint. 553 F.3d at 920-21. Because the plaintiff's thirteen-month delay arguably was unreasonable, the panel remanded the case to the district court for further consideration of the reasonableness of the delay. 553 F.3d at 921.

The decisions in this case and in *Sandoz* are contrary to the results in *Smith* and in *Cameron-Grant*. Here and in *Sandoz*, the claim of the only person to enter litigation against the defendant became moot. In each case, the plaintiff's only relation to similarly situated individuals was the possibility that those individuals at some later point in the future might have chosen to join the action. But in *Cameron-Grant* and *Smith*, the possibility of later joinder was held insufficient to justify the continued

exercise of jurisdiction by an Article III court. Application of the rule of those cases would have led to immediate and unconditional dismissal in *Sandoz* and in the decision below.

2. The decision below also brings into play a second problem on which the courts of appeals are in even deeper conflict: whether the potential for a not-yet-filed motion to certify a collective proceeding is enough to bring a case within the rule of *Roper*. At bottom, the question is whether a certification motion can revive a controversy when it is filed after the named party has lost any continuing interest in the dispute. As discussed above, the court of appeals in this case held that the doctrine of "relation back," articulated in Weiss v. Regal Collections, 385 F.3d 337 (CA3 2004), justified continuing jurisdiction over a case despite dissipation of the interest of the named plaintiff, because any subsequent certification would "relate back" to the complaint. The premise of this "relation back" doctrine lies not in the text of Rule 23 or Section 216(b) (much less the principles of Article III). Rather, it rests on the felt need to prevent defendants from "picking off" class plaintiffs, which is thought to justify treatment of the as-yet unidentified plaintiffs, for mootness and Article III purposes, as adverse parties from the moment that the complaint is filed. *Weiss*, 385 F.3d at 344-45. At least three courts of appeals have accepted the Third Circuit's line of reasoning on that point. Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 920-21 (CA5 2008) (following *Weiss*); Lucero v. Bureau of Collection

Recovery, Inc., 639 F.3d 1239, 1247-50 (CA10 2011) (discussing *Weiss* and *Sandoz*); Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091-92 (CA9 2011) (following *Weiss*, *Sandoz*, and *Lucero*).

At the same time, the Seventh Circuit, joining the Fourth and Eighth Circuits, has directly rejected the relation back doctrine, despite the acknowledged conflict. See Damasco v. Clearwire Corporation, 662 F.3d 891 (2011). The Seventh Circuit in *Damasco* explained its customary understanding that a settlement with a named plaintiff moots a collective proceeding if it "comes before class certification is sought." 662 F.3d at 895 (quoting Greisz v. Household Bank (Ill.), N.A., 176 F.3d 1012, 1015 (CA7 1999)). The *Damasco* panel noted that "[f]our circuits disagree with this approach, but we have not been moved to reverse course." *Id*. at 895 (citing the contrary decisions of the Third, Fifth, Ninth, and Tenth Circuits discussed above).

Damasco keeps the Seventh Circuit in line with the established rejection of the relation back doctrine by the Fourth and Eighth Circuits. Indeed, those courts go even farther, holding that even a pending certification motion is insufficient to keep a case alive when the controversy with the named plaintiff dissipates. Thus, in the Eighth Circuit, "voluntary settlements reached by the named plaintiffs [in a class action render] the entire case * * * moot," even if a motion for class certification is under consideration at the time. Anderson v. CNH U.S. Pension Plan, 515 F.3d 823, 826-27 (2008). Similarly, the Fourth Circuit,

acknowledging the disarray among the courts of appeals, recently held that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III." Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88, 100 (2011); see *id*. at 100 (noting that "[o]ther circuit courts addressing this issue have reached different conclusions").

Had this case been filed in the Fourth, Seventh, or Eighth Circuits, it plainly would have been dismissed as moot. At the time petitioners' offer mooted respondent's interest in the case, respondent had not yet sought certification of a collective proceeding. Accordingly, any of those courts would have affirmed the decision of the district court. The willingness of the court of appeals to rely on the possibility of a future motion as a basis for continued adjudication is directly contrary to the reasoning of those courts.

The diverging perspectives are entrenched, and percolation over the last year has served only to deepen the existing split, with the Ninth and Tenth Circuits adding themselves to the "relation back" camp, the Fourth Circuit rejecting that rule, and the Seventh Circuit reiterating its unwillingness to shift to that rule. The increasingly clear disparity of result is particularly troublesome for national employers, exposed to the ability of counsel to initiate suit in

those circuits that take a flexible and pragmatic approach to mootness.

B. This Case Is an Ideal Vehicle for Resolving the Conflict.

Several features of this case make it an ideal vehicle for addressing the set of overlapping issues discussed above. None of the relevant facts is disputed, and the petition thus presents the legal questions cleanly. For example, because petitioners' offer was admittedly adequate, the case avoids a factual issue that clouds the analysis in some of the cases. Cf. Simmons v. United Mortgage and Loan Investment, 634 F.3d 754 (CA4 2011) (case not moot because Rule 68 offer inadequate).

More fundamentally, because the case has the most extreme facts favoring mootness of any of the cases yet to reach the courts of appeals, it affords this Court an opportunity to address both of the extant conflicts directly. On plenary review, respondent would prevail only if the Court held in her favor on both of the divisive questions: whether *Roper* and *Geraghty* extend to FLSA cases; and whether *Roper* and *Geraghty* apply when the plaintiff's claim is mooted before the filing of a motion to certify a collective proceeding. Review of a case under Rule 23 (like *Damasco*) would not afford an opportunity to address the FLSA/Rule 23 controversy. Review of a case in which a certification motion was already filed (like *Rhodes*) would afford an incomplete opportunity to

address the "relation back" doctrine. This is the first petition to reach the Court since *Damasco* summarized (and deepened) the conflict in the court of appeals. It appears to be the only case currently pending on appeal that would put the entire range of issues before the Court.

C. The Willingness of Lower Courts to Elevate Ungrounded Policy Concerns over Article III Principles Warrants This Court's Immediate Attention.

Even aside from the disparate decisions of the courts of appeals, the decision of the court below to revive this lawsuit-with-no-plaintiff warrants review by this Court because of the perverse incentives it creates for the litigation process. Two points are salient. First, the decision below rests on a fundamentally wrongheaded distaste for settlement. Petitioners responded to a suit under a federal regulatory statute with a prompt and unconditional offer to pay respondent every penny she requested, no questions asked. Still, despite that offer, petitioners, years later, bear the cost and expense of discovery, motion practice, and related litigation in the district court, all for the purpose of determining whether the lawyers representing respondent can identify another plaintiff willing to join the litigation against petitioners. It is one thing for a defendant to incur those costs when there is a controversy with an existing plaintiff, but to impose those costs in a case with no adverse plaintiff stands on its head this Court's traditional

solicitude for rules that facilitate settlement. E.g., Marek v. Chesny, 473 U.S. 1, 10 (1985); St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898). Again, this is not a plaintiff driven by exiguity of resources to accept a lowball settlement: this is a plaintiff offered every penny that she sought. See *Roper*, 445 U.S. at 349 n.6 (Powell, J., dissenting) ("We may assume that respondents had some interest in the class-action procedure as a means of interesting their lawyers in the case or obtaining a satisfactory settlement * * * , but once respondents obtained both access to court and full individual relief that interest disappeared.").

Second, for similar reasons, the decision below buttresses the unfortunate tendency of the lower courts to foster "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome," *Hoffman-LaRoche Inc.*, 493 U.S. at 173. As the case comes to this Court, there is no claimant who will gain – or lose – from this Court's disposition of this matter. See *Geraghty*, 445 U.S. at 414 (Powell, J., dissenting) (ridiculing idea that Article III could accommodate "a lawsuit that has no plaintiff"); Sprint Communications Co., L.P. v. APCC Services, 554 U.S. 269, 298-99 (2008) (Roberts, C.J., dissenting) (Article III requires dismissal when "[r]espondents have nothing to gain from their lawsuit"). The only individuals with anything to gain (or lose) are the attorneys who represented respondent before her interest in the case became moot. See *Roper*, 445 U.S. at 353 (Powell, J., dissenting) ("Apart from the

persistence of the lawyers, this has been a noncase since the petitioner tendered full satisfaction of the respondents' individual claims.").

It is reprehensible when this occurs in the class context. Cf., e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (detailing "perverse incentives" of class representatives to take actions that harm interests of class members). But it is inexplicable when it occurs in FLSA litigation, where Congress more than a half-century ago stepped in to ban representative litigation. Compare *Hoffman-La Roche Inc.*, 493 U.S. at 173 (discussing Congress's intention to "fre[e] employers of the burden of representative actions"), with Pet. App. 22-27 (conclusion of the court below that the importance of fostering representative actions under the FLSA justifies a "flexible" attitude to traditional mootness doctrine). As the Court recently had occasion to emphasize, it "would be inimical to the Constitution's democratic character" for "the federal courts to decide questions of law arising outside of cases and controversies," *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011). Only this Court can redirect the attention of the courts of appeals to the limitations Article III imposes on exercise of the judicial power. See Spencer v. Kemna, 523 U.S. 1, 11 (1998) (emphasizing the importance of the "constitutional requirement [a]s a means of defining the role assigned to the judiciary in a tripartite allocation of power" (citation and internal quotation marks omitted)).

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD J. MANN

February 2012

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-3178

LAURA SYMCZYK, an individual, on behalf of herself and others similarly situated,
Appellant

v.

GENESIS HEALTHCARE CORPORATION; ELDERCARE RESOURCES CORPORATION d/b/a GENESIS ELDERCARE

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 09-cv-05782
(Honorable Michael M. Baylson)

Argued March 7, 2011

Before: SCIRICA, AMBRO and VANASKIE,
Circuit Judges.

(Filed: August 31, 2011)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

Laura Symczyk sought relief under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 207 and 216(b), on behalf of herself and all others similarly situated. The District Court for the Eastern District of Pennsylvania dismissed Symczyk's complaint for lack of subject matter jurisdiction after defendants Genesis HealthCare Corporation and ElderCare Resources Corporation extended an offer of judgment under Fed. R. Civ. P. 68 in full satisfaction of her

alleged damages, fees, and costs. At issue in this case is whether a collective action brought under § 216(b) of the FLSA becomes moot when, prior to moving for "conditional certification" and prior to any other plaintiff opting in to the suit, the putative representative receives a Rule 68 offer. We will reverse and remand.

I.

From April 2007 through December 2007, Symczyk was employed by defendants as a Registered Nurse at Pennypack Center in Philadelphia, Pennsylvania. On December 4, 2009, Symczyk initiated a collective action under 29 U.S.C. § 216(b) on behalf of herself and all similarly situated individuals, alleging defendants violated the FLSA when they implemented a policy subjecting the pay of certain employees to an automatic meal break deduction whether or not they performed compensable work during their breaks.[1]

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[1] Symczyk's amended complaint identified those "similarly situated" as

> All persons employed within the three years preceding the filing of this action by Defendants . . . , whose pay was subject to an automatic 30 minute meal period deduction even when they performed compensable work during the unpaid "meal break". . . .
>
> These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers,

(Continued on following page)

On February 18, 2010, defendants filed an answer to Symczyk's complaint and served her with an offer of judgment under Fed. R. Civ. P. 68 in the amount of "$7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and expenses as determined by the Court."[2] Symczyk did not dispute the adequacy of defendants' offer but nevertheless declined to respond.

The District Court – unaware of the offer of judgment – held a Fed. R. Civ. P. 16 scheduling conference on March 8, 2010. Two days later, the court entered a scheduling order providing for "an initial ninety (90) day discovery period, at the close of which [Symczyk]

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nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

[2] In part, Fed. R. Civ. P. 68 provides:

(a) At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

will move for conditional certification under § 216(b) of the FLSA." Following the court's ruling on certification, the parties were to have "an additional six (6) month discovery period, to commence at the close of any Court-ordered opt-in window."

On March 23, 2010, defendants filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), contending that, because Symczyk had effectively rejected their Rule 68 offer of judgment, *see* Fed. R. Civ. P. 68(a) (providing a plaintiff with 14 days to accept an offer), she "no longer ha[d] a personal stake or legally cognizable interest in the outcome of this action, a prerequisite to this Court's subject matter jurisdiction under Article III of the United States Constitution." Symczyk objected, citing defendants' strategic attempt to "pick off" the named plaintiff before the court could consider her "certification" motion.[3]

On May 19, 2010, the District Court "tentatively concluded" that defendants' Rule 68 offer mooted the collective action and that the action should be

[3] On March 29, 2010, defendants removed Symczyk's related state-court action to the United States District Court for the Eastern District of Pennsylvania. Thereafter, on April 13, 2010, the parties jointly filed a proposed stipulated order providing Symczyk would voluntarily dismiss her related state-law action and amend her complaint in this action to include those state-law claims asserted in the related action. The District Court entered the parties' stipulated order on April 15, 2010, and Symczyk filed an amended class/collective action complaint on April 23, 2010.

dismissed for lack of subject matter jurisdiction. *Symczyk v. Genesis HealthCare Corp.,* No. Civ. A 09-5782, 2010 U.S. Dist. LEXIS 49599, at *17 (E.D. Pa. May 19, 2010). In its memorandum, the court explained:

> Symczyk does not contend that other individuals have joined her collective action. Thus, this case, like each of the district court cases cited by Defendants, which concluded that a Rule 68 offer of judgment mooted the underlying FLSA collective action, involves a single named plaintiff. In addition, Symczyk does not contest Defendants' assertion that the 68 offer of judgment fully satisfied her claims. . . .

Id. at *16-17. The court instructed Symczyk to file a brief in support of continued federal jurisdiction on her state-law claims and her motion for class certification under Fed. R. Civ. P. 23 by June 10, 2010. *Id.* at *17. Symczyk did so but conceded she did not believe the court possessed an independent basis for jurisdiction over her state-law claims in the event her FLSA claim was dismissed. The District Court declined to exercise supplemental jurisdiction over Symczyk's state-law claims in accordance with 28 U.S.C. § 1367(c) and dismissed those claims without prejudice. The court also dismissed Symczyk's FLSA

claim with prejudice in accordance with its earlier memorandum. Symczyk timely appealed.[4]

II.

A.

Enacted in 1938, the FLSA, 29 U.S.C. § 201 *et seq.,* was designed "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 707 n.18 (1945). Under the "collective action" mechanism set forth in 29 U.S.C. § 216(b), an employee alleging an FLSA violation may bring an action on "behalf of himself . . . and other employees similarly situated," subject to the

[4] Prior to dismissing the action, the District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 216(b). We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291. Our review of the court's order granting defendants' motion to dismiss for lack of subject matter jurisdiction is plenary. *Gould Elecs., Inc. v. United States,* 220 F.3d 169, 176 (3d Cir. 2000). Because defendants' motion to dismiss was based on facts outside the pleadings (i.e., their Rule 68 offer of judgment), the trial court was entitled to weigh and evaluate the evidence bearing on the jurisdictional dispute. *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977). This factual evaluation "may occur at any stage of the proceedings." *Id.* "When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1409 (3d Cir. 1991).

requirement that "[n]o 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."

Prior to 1947, the FLSA permitted an aggrieved employee to "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *Martino v. Mich. Window Cleaning Co.,* 327 U.S. 173, 175 n.1 (1946) (quoting Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938)). But in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome," Congress amended the Act to eliminate "representative action by plaintiffs not themselves possessing claims." *Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165, 173 (1989); *see also* Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947). Further altering the collective action procedure in § 216(b), Congress inserted a requirement that similarly situated employees must affirmatively "opt in" to an ongoing FLSA suit by filing express, written consents in order to become party plaintiffs. *See id.*

In deciding whether a suit brought under § 216(b) may move forward as a collective action, courts typically employ a two-tiered analysis. During the initial phase, the court makes a preliminary determination whether the employees enumerated in the complaint can be provisionally categorized as similarly situated to the named plaintiff. If the plaintiff

carries her burden at this threshold stage, the court will "conditionally certify" the collective action for the purposes of notice and pretrial discovery. In the absence of statutory guidance or appellate precedent on the proper definition of "similarly situated," a divergence of authority has emerged on the level of proof required at this stage. Some trial courts within our circuit have allowed a plaintiff to satisfy her burden simply by making a "substantial allegation" in her pleadings that she and the prospective party plaintiffs suffered from a single decision, plan or policy, but the majority of our circuit's trial courts have required the plaintiff to make a "modest factual showing" that the proposed recipients of opt-in notices are similarly situated. *See Wright v. Lehigh Valley Hosp.,* No. Civ. A 10-431, 2010 U.S. Dist. LEXIS 86915, at *7-10 (E.D. Pa. Aug. 24, 2010) (canvassing cases).

Under the "modest factual showing" standard, a plaintiff must produce some evidence, "beyond pure speculation," of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees. *See Smith v. Sovereign Bancorp, Inc.,* No. 03-2420, 2003 U.S. Dist. LEXIS 21010, at *10 (E.D. Pa. Nov. 13, 2003). We believe the "modest factual showing" standard – which works in harmony with the opt-in requirement to cabin the potentially massive size of collective actions – best comports with congressional intent and with the Supreme Court's directive that a court "ascertain[ ] the contours of [a collective] action

at the outset." *See Hoffmann-La Roche,* 493 U.S. at 172.[5]

After discovery, and with the benefit of "a much thicker record than it had at the notice stage," a court following this approach then makes a conclusive determination as to whether each plaintiff who has

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[5] Although this two-step approach is nowhere mandated, it appears to have garnered wide acceptance. And, while courts retain broad discretion in determining whether to "conditionally certify" a collective action, it is useful to prescribe a uniform evidentiary standard. *Cf. In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 316-20 (3d Cir. 2008) (outlining the guiding principles for a district court's discretionary evaluation of a class certification motion in the Rule 23 context).

This case illustrates how an uncertain standard may work to the detriment of § 216(b) plaintiffs. Here, the court – unaware of defendants' Rule 68 offer – issued a case management order allotting Symczyk "an initial ninety (90) day discovery period" to compile evidence before she would be expected to move for "conditional certification." Symczyk represents she considered the standard for "conditional certification" a "moving target in our circuit" and requested discovery in order to buttress the allegations in her pleadings with sufficient evidence to make a "meaningful motion" at this initial stage. Because defendants' Rule 68 offer preceded the commencement of this preliminary discovery period, however, Symczyk had no opportunity to gather such evidence before the court granted defendants' motion to dismiss. Had Symczyk been operating under the assumption that the court would employ the "substantial allegation" standard, she may have been prepared to move for "conditional certification" without conducting minimal discovery. And, had the court in fact facilitated notice to potential opt-ins based solely on the allegations in Symczyk's complaint, defendants' Rule 68 offer may not have antedated the arrival of a consent form from a party plaintiff, an occurrence that would have fundamentally transformed the court's mootness analysis.

opted in to the collective action is in fact similarly situated to the named plaintiff. *Morgan v. Family Dollar Stores, Inc.,* 551 F.3d 1233, 1261 (11th Cir. 2008). "This second stage is less lenient, and the plaintiff bears a heavier burden." *Id.* Should the plaintiff satisfy her burden at this stage, the case may proceed to trial as a collective action.[6]

Absent from the text of the FLSA is the concept of "class certification." As the Eighth Circuit has noted, however, "[m]any courts and commentators . . . have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases brought pursuant to

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[6] Because only the notice stage is implicated in this appeal, we need not directly address the level of proof required to satisfy the similarly situated requirement at the post-discovery stage. Although this standard must necessarily be more rigorous than the standard applicable at the notice stage, the fact-specific, flexible nature of this approach affords district judges latitude in exercising their discretion. *See* 45C Am. Jur. 2d *Job Discrimination* § 2184 (2011) (listing fourteen factors courts may consider at the post-discovery stage). As we have explained:

> A representative (but not exhaustive or mandatory) list of relevant factors [at this stage] includes whether the plaintiffs are employed in the same corporate department, division and location; advanced similar claims of . . . discrimination; sought substantially the same form of relief; and had similar salaries and circumstances of employment. Plaintiffs may also be found dissimilar on the basis of case management issues, including individualized defenses.

Ruehl v. Viacom, Inc., 500 F.3d 375, 389 n.17 (3d Cir. 2007) (citations omitted).

§ 16(b) of the FLSA." *Kelley v. Alamo,* 964 F.2d 747, 748 n.1 (8th Cir. 1992). As a result, courts commonly refer to a plaintiff's satisfaction of her burden at the notice stage as resulting in "conditional certification," *see, e.g., Ruehl v. Viacom, Inc.,* 500 F.3d 375, 389 n.17 (3d Cir. 2007), or "provisional certification," *see, e.g., Nash v. CVS Caremark Corp.,* 683 F. Supp. 2d 195, 199 (D.R.I. 2010). Similarly, the court's second-step analysis is traditionally triggered by a defendant's motion to "decertify the class" on the ground that its proposed members are not similarly situated. *See, e.g., Lusardi v. Xerox Corp.,* 975 F.2d 964, 967 (3d Cir. 1992). And, in the same fashion, a named plaintiff becomes a "class representative," *see, e.g., id.* at 966, his attorney becomes "class counsel," *see, e.g., Harkins v. Riverboat Servs., Inc.,* 385 F.3d 1099, 1101 (7th Cir. 2004), and similarly situated employees become "potential class members," *see, e.g., In re Family Dollar FLSA Litig.,* 637 F.3d 508, 518 (4th Cir. 2011).

Despite this judicial gloss on § 216(b), "the 'certification' we refer to here is only the district court's exercise of [its] discretionary power, upheld in *Hoffmann-La Roche,* to facilitate the sending of notice to potential class members," and "is neither necessary nor sufficient for the existence of a representative action under FLSA." *Myers v. Hertz Corp.,* 624 F.3d 537, 555 n.10 (2d Cir. 2010); *see also Morgan,* 551 F.3d at 1261 n.40 ("District courts following the two-step . . . approach should treat the initial decision to certify and the decision to notify potential collective

action members as synonymous.").[7] Defendants here rely heavily on the superficiality of the similarities between the "certification" processes inherent in Rule 23 class actions and § 216(b) collective actions in arguing Symczyk could not purport to "represent" the interests of similarly situated employees before anyone had opted in to the action. And, as noted, expedient adoption of Rule 23 terminology with no mooring in the statutory text of § 216(b) may have injected a measure of confusion into the wider body of FLSA jurisprudence. Although "conditional certification" may not vest a § 216(b) "class" with the independent legal status that certification provides a Rule 23 class, *see Trotter v. Klincar,* 748 F.2d 1177, 1183 (7th Cir. 1984), this realization does not control our mootness analysis in the manner suggested by defendants. Provision of notice does not transform an FLSA suit into a "representative action," but, as we will explain, its central place within the litigation scheme approved of by the Supreme Court in *Hoffmann-La*

[7] In *Hoffmann-La Roche,* the Supreme Court recognized the efficacy of § 216(b) hinges on "employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." 493 U.S. at 170. To ensure this task "is accomplished in an efficient and proper way," the Court interpreted § 216(b) as endowing district courts with "the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the Federal Rules of Civil Procedure." *Id.* at 170-71.

Roche necessarily shapes our approach to squaring Rule 68 and § 216(b).

B.

Article III of the United States Constitution limits the jurisdiction of the federal courts to "actual 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.,* 554 U.S. 269, 298 (2008) (Roberts, C.J., dissenting). "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." *Weiss v. Regal Collections,* 385 F.3d 337, 340 (3d Cir. 2004). "An 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." *Id.* Thus, whether or not the plaintiff accepts the offer, no justiciable controversy remains when a defendant tenders an offer of judgment under Rule 68 encompassing all the relief a plaintiff could potentially recover at trial. *See Rand v. Monsanto Co.,* 926 F.2d 596, 598 (7th Cir. 1991). We have recognized, however, that conventional mootness principles do not fit neatly within the representative action paradigm. *Cf. Lusardi,* 975 F.2d at 974 ("[S]pecial mootness rules apply in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own.").

Rule 68 was designed "to encourage settlement and avoid litigation." *Marek v. Chesny,* 473 U.S. 1, 5

(1985). In the representative action arena, however, Rule 68 can be manipulated to frustrate rather than to serve these salutary ends. Exploring this deviation from Rule 68's purposes, the Supreme Court has noted:

> 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.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); *see also Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1050 (5th Cir. Unit A July 1981) ("By tendering to the named plaintiffs the full amount of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiffs' claims before a decision on certification is reached.").

We addressed the tension between Rules 23 and 68 in *Weiss.* There, the named plaintiff filed a federal class action complaint alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and, prior to moving for class certification, received a Rule 68 offer of judgment in full satisfaction of the individual relief sought. The plaintiff rejected the offer, and the court granted the defendants' 12(b)(1) motion to dismiss the complaint on mootness grounds. On

appeal, we explored the applicability of the "relation back" doctrine to a scenario in which the defendants' "tactic of 'picking off' lead plaintiffs with a Rule 68 offer . . . may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion." 385 F.3d at 347. Finding application of the doctrine necessary to vindicate the policy aims inherent in Rule 23, we held that, "[a]bsent 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 possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint." *Id.* at 348. As there had been no undue delay, we reversed and directed the district court to allow the plaintiff to file a class certification motion that would "relate back" to the filing of the complaint. *Id.*[8]

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[8] In *Weiss,* we noted that our opinion might be viewed as creating tension with *Lusardi,* which involved alleged violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Section 7(b) of the ADEA incorporates § 216(b) by reference. *See* 29 U.S.C. § 626(b). However, in distinguishing *Lusardi,* we did not rely on the differences between the procedures applicable to Rule 23 and § 216(b) actions. *See Weiss,* 385 F.3d at 348-49. Instead, we explained that *Lusardi,* unlike *Weiss,* involved a voluntary settlement entered into by the named plaintiffs rather than "an offer of judgment made in response to the filing of a complaint." *Id.* at 349. We wrote:

> In this appeal, the 'picking off' scenarios described by the Supreme Court in *Roper* are directly implicated.

(Continued on following page)

In essence, the relation back doctrine allows a district court to retain jurisdiction over a matter that would appear susceptible to dismissal on mootness grounds by virtue of the expiration of a named plaintiff's individual claims. In *Sosna v. Iowa,* 419 U.S. 393, 401 (1975), the Supreme Court found federal court jurisdiction to adjudicate a live controversy between members of a certified Rule 23 class and a named defendant was not extinguished by the named plaintiff's claim becoming moot before the district court reached the merits of the case. Addressing the possibility that resolution of the controversy as to the named plaintiffs may occur "before the district court can reasonably be expected to rule on a certification motion," the Court explained such certification "can be said to 'relate back' to the filing of the complaint" when the issue might otherwise evade review. *Id.* at 402 n.11; *see also U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 399 (1980) (preserving an Article III court's authority to review class certification issues when a named plaintiff's claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification

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> In *Lusardi* they were not. . . . In *Lusardi,* no unilateral action by the Defendant rendered the plaintiffs' claims 'inherently transitory.' Defendants here used the Rule 68 offer to thwart the putative class action before the certification question could be decided.

Id. These considerations are not unique to the Rule 23 context, and *Weiss* did not turn on the disparity between opt-in and opt-out actions.

before the proposed representative's individual interest expires").

This equitable principle has evolved to account for calculated attempts by some defendants to short-circuit the class action process and to prevent a putative representative from reaching the certification stage. Certification vests a named plaintiff with a procedural right to act on behalf of the collective interests of the class that exists independent of his substantive claims. *See Sosna,* 419 U.S. at 399 (explaining that, once a class has been certified, the mooting of a class representative's individual claims does not invariably result in the mooting of the entire action because "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]"). Although traditional mootness rules would ordinarily apply absent an affirmative ruling on class certification, "in certain circumstances, to give effect to the purposes of Rule 23, it is necessary to conceive of the named plaintiff as a part of an indivisible class and not merely a single adverse party even before the class certification question has been decided." *Weiss,* 385 F.3d at 347. The rationale underpinning the relation back doctrine serves to shield from dismissal on mootness grounds those claims vulnerable to being "picked off" by defendants attempting to forestall class formation. As the Seventh Circuit has explained:

> Normally, . . . a class action must be certified as such in order for it to escape dismissal

> once the claims of the named plaintiff become moot. But the courts have recognized that an absolute requirement would prevent some otherwise justiciable claims from ever being subject to judicial review. . . . [J]ust 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. If the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification. If a tender 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.

Susman v. Lincoln Am. Corp., 587 F.2d 866, 870 (7th Cir. 1978) (citations omitted).

When a defendant's Rule 68 offer threatens to preempt the certification process, reconciling the conflicting imperatives of Rules 23 and 68 requires allocating sufficient time for the process to "play out." *Weiss,* 385 F.3d at 348. By invoking the relation back doctrine, a court preserves its authority to rule on a named plaintiff's attempt to represent a class by treating a Rule 23 motion as though it had been filed contemporaneously with the filing of the class complaint. Consequently, "the 'relation back' principle ensures that plaintiffs can reach the certification stage."

Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 919 (5th Cir. 2008).

III.

A.

The issue we must resolve on this appeal, then, is whether an FLSA collective action becomes moot when (1) the putative representative receives a Rule 68 offer in full satisfaction of her individual claim prior to moving for "conditional certification," and (2) no other potential plaintiff has opted in to the suit.[9] Animating our decision in *Weiss* was the ability of defendants to use Rule 68 "to thwart the putative class action before the certification question could be decided." 385 F.3d at 349. Symczyk cites similar arguments in the § 216(b) context and discerns no material distinction between the two procedures insofar

[9] Relying on a careful analysis of various district court efforts to grapple with the interplay of Rule 68 and § 216(b) provided in *Briggs v. Arthur T. Mott Real Estate LLC,* No. 06-0468, 2006 U.S. Dist. LEXIS 82891 (E.D.N.Y. Nov. 14, 2006), the District Court concluded Symczyk's case was distinguishable from those in which courts declined to dismiss complaints following Rule 68 offers because, in those, "other individuals had already opted in to join the collective action, it was unclear whether the Rule 68 offer fully satisfied the plaintiff's claims, or the plaintiff had already filed a motion for conditional certification under § 216(b)." *Symczyk,* 2010 U.S. Dist. LEXIS 49599, at *13 (footnotes omitted). Here, Symczyk did not dispute the adequacy of the offer as it pertained to the value of her individual claim. However, as we will explain, we believe treating the other two conditions as dispositive would be imprudent.

as this consideration is concerned. By contrast, defendants contend *Weiss* does not apply in the FLSA context because a putative § 216(b) named plaintiff allegedly lacks the "representative" status that accords a Rule 23 named plaintiff a personal stake in the matter sufficient to confer continued Article III jurisdiction once his individual claim has been mooted. We believe the considerations warranting application of the relation back doctrine to Rule 23 class actions also apply to § 216(b) collective actions.

In support of their effort to confine *Weiss* to the class action setting, defendants rely principally on the dissimilar roles played by Rule 23 and § 216(b) named plaintiffs. As noted, the statutory form of aggregation provided for in the FLSA requires each party plaintiff affirmatively to opt in to a collective action by filing a consent form "in the court in which such action is brought." 29 U.S.C. § 216(b). Whereas a member of a certified class in a Rule 23(b)(3) proceeding will be bound by judgment unless he has intentionally opted out of the suit, resolution of a § 216(b) collective action will not bind any similarly situated employee absent his express, written consent. *See id.*; *LaChapelle v. Owens-Illinois, Inc.,* 513 F.2d 286, 288 (5th Cir. 1975).[10] Defendants argue a § 216(b) named plaintiff whose individual claim has been mooted by a

[10] Of course, class actions certified under Rule 23(b)(1) or (b)(2) are "mandatory" class actions in that class members are not permitted to opt out. *Wal-Mart Stores, Inc. v. Dukes,* ___ U.S. ___, 131 S. Ct. 2541, 2558 (2011).

Rule 68 offer before anyone has opted in to the action cannot purport to possess a personal stake in representing the interests of others.[11]

Although defendants' logic has some surface appeal, reliance on the watershed event of an opt-in to trigger application of the special mootness rules that prevail in the representative action context incentivizes the undesirable strategic use of Rule 68

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[11] As noted, the Portal-to-Portal Act notionally abolished "representative actions." *See* Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947). This amendment, however, did not strip an employee – such as Symczyk – of her right to act on behalf of similarly situated co-workers. Rather, the 1947 amendment eliminated the so-called "agency suit," divesting nonparty representatives of standing to initiate actions under § 216(b). *See id.* "By identifying 'employees' as the only proper parties in a § 216(b) action, the Portal to Portal Act aimed to ban representative actions that previously had been brought by unions on behalf of employees." *Cameron-Grant v. Maxim Healthcare Servs.,* 347 F.3d 1240, 1248 (11th Cir. 2003); *see also Arrington v. Nat'l Broad. Co.,* 531 F. Supp. 498, 502 (D.D.C. 1982) (explaining Congress amended the FLSA "to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party's action in filing suit"). The FLSA does not prevent an employee, serving as lead plaintiff, from fulfilling a representative role. When defendants made their Rule 68 offer of judgment, Symczyk represented only her own interests, and defendants' potential liability consisted entirely of the individual damages sought by Symczyk as named plaintiff. That Symczyk had yet to assume a representative role vis-à-vis the allegedly similarly situated employees listed in her complaint stemmed not from some purported statutory prohibition but instead from defendants' successful attempt to pick her off before the court had occasion to consider the suitability of allowing the claims to be litigated collectively with Symczyk as lead plaintiff.

that prompted our holding in *Weiss.*[12] As the Supreme Court explained in *Hoffmann-La Roche,* actualization of § 216(b)'s purposes often necessitates a district court's engagement at the notice phase of the proceeding. 493 U.S. at 170-71; *see also Morgan,* 551 F.3d at 1259 ("[T]he importance of certification, at the initial stage, is that it authorizes either the parties, or the court itself, to facilitate notice of the action to similarly situated employees."). When a defendant's Rule 68 offer arrives before the court has had an opportunity to determine whether a named plaintiff has satisfied his burden at this threshold stage, and the court has therefore refrained from overseeing the provision of notice to potential party plaintiffs, it is not surprising to find the offer has also preceded the arrival of any consent forms from prospective opt-ins. If our mootness inquiry in the § 216(b) context were predicated inflexibly on whether any employee has opted in to an action at the moment a named plaintiff

[12] In both *Susman* and *Zeidman,* the relation back rationale was deployed to salvage a court's jurisdiction over class complaints when the named plaintiffs' claims had ostensibly been mooted while their motions for class certification were pending. However, because "the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations," we explained in *Weiss* that "reference to the bright line event of the filing of the class certification motion may not always be well-founded." 385 F.3d at 347. Consequently, we extended the doctrine to instances in which the plaintiff moved for class certification subsequent to receipt of a Rule 68 offer so long as he did so without "undue delay." *Id.* at 348.

receives a Rule 68 offer, employers would have little difficulty preventing FLSA plaintiffs from attaining the "representative" status necessary to render an action justiciable notwithstanding the mooting of their individual claims.

In *Sandoz,* the only court of appeals' decision to address the applicability of the relation back doctrine in the FLSA context, the Fifth Circuit concluded Congress did not intend, through the enactment of § 216(b), to create an "anomaly" by allowing employers "to use Rule 68 as a sword, 'picking off' representative plaintiffs and avoiding ever having to face a collective action." 553 F.3d at 919. The court elaborated:

> [T]he 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. 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. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action 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. at 920 (citations omitted). There, the defendant tendered its offer of judgment approximately one month after Sandoz had commenced her FLSA action, and Sandoz waited thirteen months after filing her complaint to move for "conditional certification." *Id.* at 921. Borrowing language from *Weiss* and holding that "relation back is warranted only when the plaintiff files for certification without undue delay,'" *id.* (quoting *Weiss,* 385 F.3d at 348), the Fifth Circuit remanded for the district court to consider whether Sandoz had "timely sought certification of her collective action," *id.*

B.

Although the opt-in mechanism transforms the manner in which a named plaintiff acquires a personal stake in representing the interests of others, it does not present a compelling justification for limiting the relation back doctrine to the Rule 23 setting. The considerations that caution against allowing a defendant's use of Rule 68 to impede the advancement of a representative action are equally weighty in either context. Rule 23 permits plaintiffs "to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985). Similarly, § 216(b) affords plaintiffs "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffmann-La*

Roche, 493 U.S. at 170. Rule 23 promotes "efficiency and economy of litigation." *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 349 (1983). Similarly, "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." *Prickett v. DeKalb Cnty.,* 349 F.3d 1294, 1297 (11th Cir. 2003).

When Rule 68 morphs into a tool for the strategic curtailment of representative actions, it facilitates an outcome antithetical to the purposes behind § 216(b). Symczyk's claim – like that of the plaintiff in *Weiss* – was "acutely susceptible to mootness" while the action was in its early stages and the court had yet to determine whether to facilitate notice to prospective plaintiffs. *See Weiss,* 385 F.3d at 347 (internal quotation marks omitted). When the certification process has yet to unfold, application of the relation back doctrine prevents defendants from using Rule 68 to "undercut the viability" of either type of representative action. *See id.* at 344.

C.

Additionally, the relation back doctrine helps safeguard against the erosion of FLSA claims by operation of the Act's statute of limitations. To qualify for relief under the FLSA, a party plaintiff must "commence" his cause of action before the statute of limitations applying to his individual claim has

lapsed. *Sperling v. Hoffmann-La Roche, Inc.,* 24 F.3d 463, 469 (3d Cir. 1994).[13] For a named plaintiff, the action commences on the date the complaint is filed. 29 U.S.C. § 256(a). For an opt-in plaintiff, however, the action commences only upon filing of a written consent. *Id.* § 256(b). This represents a departure from Rule 23, in which the filing of a complaint tolls the statute of limitations "as to all asserted members of the class" even if the putative class member is not cognizant of the suit's existence. *See Crown, Cork & Seal Co.,* 462 U.S. at 350 (internal quotation marks omitted). Protracted disputes over the propriety of dismissal in light of Rule 68 offers may deprive potential opt-ins whose claims are in jeopardy of expiring of the opportunity to toll the limitations period – and preserve their entitlements to recovery – by filing consents within the prescribed window.[14]

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[13] Plaintiffs seeking recovery under the FLSA must commence an action within two years of the alleged violation (or within three years if the violation is "willful"). 29 U.S.C. § 255(a).

[14] Defendants contend a party plaintiff's cause of action vests at the moment he files his consent form and that no conception of the relation back doctrine would permit this statutorily mandated act of opting in to relate back to the filing of the collective action complaint. While perhaps true, this assertion is beside the point. For the sake of argument, consider a hypothetical co-worker of Symczyk's who was subjected to a willful FLSA violation and whose tenure with the company also ended in December 2007. Because Symczyk's complaint was dismissed before this (or any) employee had opted in to the action, this potential plaintiff forfeited any claim to relief in December 2010. The relation back doctrine cannot, at this juncture, redeem this

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D.

In sum, we believe the relation back doctrine helps ensure the use of Rule 68 does not prevent a collective action from playing out according to the directives of § 216(b) and the procedures authorized by the Supreme Court in *Hoffmann-La Roche* and further refined by courts applying this statute. Depriving the parties and the court of a reasonable opportunity to deliberate on the merits of collective action "conditional certification" frustrates the objectives served by § 216(b). *Cf. Sandoz,* 553 F.3d at 921 (explaining "there must be some time for a[n FLSA] plaintiff to move to certify a collective action before a defendant can moot the claim through an offer of judgment"). Absent undue delay, when an FLSA plaintiff moves for "certification" of a collective action, the appropriate course – particularly when a defendant makes a Rule 68 offer to the plaintiff that would have the possible effect of mooting the claim for collective relief asserted under § 216(b) – is for the district court to relate the motion back to the filing of the initial complaint.

Upon remand, should Symczyk move for "conditional certification," the court shall consider whether such motion was made without undue delay, and, if it

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would-be plaintiff's cause of action. However, had Symczyk been permitted to move – in timely fashion – for "conditional certification" in light of defendants' March 2010 motion to dismiss, this plaintiff may have received notice of the ongoing collective action prior to her claim growing stale.

so finds, shall relate the motion back to December 4, 2009 – the date on which Symczyk filed her initial complaint. If (1) Symczyk may yet timely seek "conditional certification" of her collective action, (2) the court permits the case to move forward as a collective action (by virtue of Symczyk's satisfaction of the "modest factual showing" standard), and (3) at least one other similarly situated employee opts in, then defendants' Rule 68 offer of judgment would no longer fully satisfy the claims of everyone in the collective action, and the proffered rationale behind dismissing the complaint on jurisdictional grounds would no longer be applicable. If, however, the court finds Symczyk's motion to certify would be untimely, or otherwise denies the motion on its merits, then defendants' Rule 68 offer to Symczyk – in full satisfaction of her individual claim – would moot the action.

IV.

For the foregoing reasons, we will reverse the judgment of the District Court and remand for proceedings consistent with this opinion.

LAURA SYMCZYK,
Plaintiff,
v.
GENESIS HEALTHCARE CORPORATION and ELDERCARE RESOURCES CORPORATION,
Defendants.

CIVIL ACTION NO. 09-5782.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2010 U.S. Dist. LEXIS 49599

May 19, 2010, Decided
May 19, 2010, Filed

COUNSEL: For LAURA SYMMCZYK, an individual, on behalf of herself and others similarly situated, Plaintiff: GARY F. LYNCH, LEAD ATTORNEY, CARLSON LYNCH LTD, NEW CASTLE, PA; GERALD D. WELLS, III, LEAD ATTORNEY, FARUQI & FARUQI LLP, HUNTINGDON VLY, PA; TREVAN P. BORUM, LEAD ATTORNEY, PHILADELPHIA, PA.

For GENESIS HEALTHCARE CORPORATION, ELDERCARE RESOURCES CORPORATION, doing business as GENESIS ELDERCARE, Defendants: JAMES N. BOUDREAU, LEAD ATTORNEY, CHRISTINA TELLADO-WINSTON, GREENBERG TRAURIG LLP, PHILADELPHIA, PA; MICHELE HALGAS MALLOY, LITTLER MENDELSON PC, PHILADELPHIA, PA.

JUDGES: Michael M. Baylson, U.S.D.J.

OPINION BY: Michael M. Baylson

OPINION

MEMORANDUM RE: MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Baylson, J.

In this action, Plaintiff Laura Symczyk alleges that Defendants Genesis HealthCare Corporation and ElderCare Resources Corporation (collectively, "Defendants") violated the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), and Pennsylvania law, by implementing an automatic meal break deduction policy. (Compl. ¶ 1, Docket No. 1.) Symczyk brought the action as a collective action under 29 U.S.C. § 261(b), on behalf of herself and similarly situated individuals. Presently before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 12), pursuant to Federal Rule of Civil Procedure 12(b)(1). The pending Motion seeks dismissal based on Defendants' offer of judgment, which, according to Defendant, exceeds all damages Symczyk can recover under the FLSA, in accordance with Federal Rule of Civil Procedure 68 ("Rule 68").

I. *Factual and Procedural Background*

Symczyk worked as a Registered Nurse at Pennypack Center, and was an employee of Defendants from April 2007 to December 2007. Symcyzk commenced this FLSA collective action on December 4, 2009, which identified the class as comprising "all

non-exempt employees of Defendants whose pay is subject to an automatic meal break deduction even when they perform compensable work during their meal breaks." (Compl. ¶ 14, Docket No. 1.)[1]

On February 18, 2010, Defendants filed an Answer to the Complaint. (Docket No. 8.) The same day, Defendants served Symczyk's counsel with an offer of judgment, pursuant to Rule 68, in the amount of "$7,500.00 in alleged unpaid wages, plus attorneys' fees, costs and expenses as determined by the Court." (Mot. to Dismiss, Ex. A, at 2.) Defendants contend, and Symczyk does not contest, that Symczyk "never responded, effectively rejecting the Offer." (Mot. to Dismiss 2; *see also* Resp. (Docket No. 19).)

On March 11, 2010, this Court entered an Order providing for "an initial ninety-day period of discovery, at the close of which [Symczyk] will move for

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[1] The Complaint further provides,

> These persons include, but are not limited to, secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical nurses, nurses' aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse technicians, trainers, and transcriptionists employed at any of Defendants' facilities during the three years preceding the filing of this action.

(Compl. ¶ 14.)

conditional certification under § 216(b) of the FLSA." (Docket No. 10, ¶1.) On March 23, 2010, Defendants filed the pending Motion to Dismiss for Lack of Subject Matter Jurisdiction. Subsequently, on April 23, 2010, Symczyk filed an Amended Class/Collective Action Complaint (Docket No. 22), which differed from the Complaint by adding allegations pursuant to Federal Rule of Civil Procedure 23 on behalf of a class seeking relief under Pennsylvania state law. Symczyk's Amended Complaint provides the same definition of the class as the Complaint (Am. Compl. ¶ 20).

II. *The Parties' Contentions*

Defendants' Motion to Dismiss is based upon their Rule 68 offer of judgment. In support of their Motion, Defendants assert that they offered Symczyk "compensation that is equal to or greater than the potential relief she could obtain at trial." (Mot. to Dismiss 5.) According to Defendants, "a defendant's offer to pay the full amount of the plaintiff's potential recovery . . . renders the plaintiff's claim moot because she loses a legally cognizable interest in the outcome of the litigation," thereby rendering this case subject to dismissal. (Mot. to Dismiss 3.)

In response, Symczyk contends that courts "heavily disfavor[ ]" "Defendants' strategic attempt to 'pick-off' the Plaintiff before the Court can meaningfully consider and decide the [§] 216(b) motion." (Resp. 1.) Symczyk argues that "the Third Circuit has considered and rejected the use of such tactic in the

context of other representative actions, in particular a Rule 23 class action," and that courts have recognized that there is no distinction between Rule 23 and § 216(b) cases for purposes of "strategic mooting by defendants through the use of a Rule 68 offer of judgment." (Resp. 7.) Symczyk thereby concludes that the Court, rather than dismissing the action as moot, should permit Symyczk to "file a class certification motion, and that motion would 'relate back' to the filing of the complaint, thereby eliminating any concerns that the representative plaintiff lack[s] standing to sue." (Resp. 4-5.)

Defendants reply that dismissal is appropriate even though "this case is an opt-in collective action under § 216(b)," because "the opt-in procedure under § 216(b) is fundamentally different from the opt-out procedure in Rule 23 class actions," and both the "plain language of the FLSA and its legislative history," as well as "the great weight of authority" indicate that Defendants' Offer moots Symczyk's claim. (Mot. to Dismiss 7; *see also* Reply 2-13 (Docket No. 24).)

III. *Discussion*

Symczyk does not take issue with Defendants' assertion that the damages offered exceed any amount of unpaid wages sought; thus, the only legal question the Court must address is whether the rejected Rule 68 offer renders this case moot and divests this Court of subject matter jurisdiction over the action.

For a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). The Court "may not presume the truthfulness of [P]laintiff's allegations, but rather, must evaluate for itself the merits of the jurisdictional claims." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (internal quotation marks and alterations omitted).

Article III of the United States Constitution limits the jurisdiction of federal courts to "actual cases and controversies." U.S. Const. art. III, § 2. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *L.A. County v. Davis*, 440 U.S. 623, 631 (1979) (internal quotation marks omitted). Many Courts, including the Third Circuit, have held that an offer of settlement under Rule 68, if undoubtedly sufficient to compensate the plaintiff for all damages, will result in dismissal for lack of jurisdiction, regardless of whether the offer is accepted. "An 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." *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004).[2] In cases

[2] *See also Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff

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in which the mootness doctrine applies, subject matter jurisdiction no longer exists and the case is properly dismissed. *See L.A. County,* 440 U.S. at 631.

As both parties recognize, neither the Supreme Court nor the Third Circuit has addressed the specific question presented by Defendants' Motion to Dismiss, of whether a Rule 68 offer of judgment made to the named plaintiff in a FLSA action moots the collective action claims. (Resp. 5; Reply 2.) Instead, the Third Circuit held in *Weiss*, a class action commenced pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"), that when the defendants "use[ ] the Rule 68 offer to thwart the putative class action before the certification question could be decided," the class action is not mooted, the plaintiff should be permitted to file the certification motion, and "the appropriate course is to relate the certification motion back to the filing of the class complaint." 385 F.3d at 348-49. It is not implausible that Symczyk filed the Amended Complaint, which added allegations of a class seeking relief under Pennsylvania Law, but pursuant to Rule 23, to come under the *Weiss* holding.

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who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake." (internal citations omitted)); 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Jurisdiction 2d § 3533.2, at 236 (2d ed. 1984) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

Although the Third Circuit has not determined whether *Weiss's* "relation back" doctrine applies to FLSA collective actions, numerous other courts have addressed the issue. Symczyk points the Court to a Fifth Circuit decision as well as multiple district court cases from the Second Circuit, which held that Rule 68 Offers of Judgment do not moot the underlying FLSA collective actions.[3]

In 1980, the Supreme Court explained that allowing a defendant to use a Rule 68 offer of judgment to "pick-off" an individual claimant in a Rule 23 class action "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."

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[3] *See Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913, 920 (5th Cir. 2008); *Nash v. CVS Caremark Corp.*, No. 09-0079, 683 F. Supp. 2d 195, 2010 U.S. Dist. LEXIS 50831; 2010 WL 446178, at *1-3 (D.R.I. Feb. 9, 2010); *Bah v. Shoe Mania, Inc.*, No. 08-9380, 2009 U.S. Dist. LEXIS 40803; 2009 WL 1357223 (S.D.N.Y. May 13, 2009); *Bowens v. Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 58 (E.D.N.Y. 2008); *Yeboah v. Cent. Parking Sys.*, No. 06-0128, 2007 U.S. Dist. LEXIS 81256, 2007 WL 3232509, at *3-6 (E.D.N.Y. Nov. 1, 2007); *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178, 181 (W.D.N.Y. 2007); *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1013 (D. Minn. 2007); *Guerra v. Big Johnson Concrete Pumping, Inc.*, No. 05-1427, 2006 U.S. Dist. LEXIS 58973, 2006 WL 2290517, at *2-3 (S.D. Fla. June 16, 2006); *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109, 2006 U.S. Dist. LEXIS 10903, 2006 WL 704933, at *3 (D. Kan. Mar. 14, 2006); *Reyes v. Carnival Corp.*, No. 04-21861, 2005 U.S. Dist. LEXIS 11948, 2005 WL 4891058, at *3 (S.D. Fla. May 25, 2005).

Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). In light of this concern, the Fifth Circuit applied the "relation back" doctrine articulated in *Weiss* to the FLSA collective action at issue, reasoning as follows:

> 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. Although the differences between Rule 23 class actions and FLSA § 216(b) collective actions alter the conceptual mootness inquiry, each type of action 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.

Sandoz v. Cingular Wireless, LLC, 553 F.3d 913, 920 (5th Cir. 2008).

The opposite conclusion, however, has been reached by numerous other district courts[4] in the

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[4] Defendants also point out that the Eleventh Circuit similarly concluded that an action was moot because "[i]n contrast to the Rule 23 plaintiff, [the] § 216(b) plaintiff [in the case] has no claim that he is entitled to represent other plaintiffs." *Cameron-Grant v. Maxim Health Care Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (per curiam). *Cameron-Grant* is distinguishable from the present case, however, because the plaintiff

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Second Circuit.[5] For example, in *Darboe v. Goodwill Industries of Greater New York & Northern New Jersey, Inc.*, 485 F. Supp. 2d 221 (E.D.N.Y. 2007), the District Court for the Eastern District of New York took care to distinguish *Weiss* from FLSA collective actions on the basis that, in contrast to a Rule 23 action where "once a class is certified, all those falling within the description of the class certified are deemed a part of the case and will be bound by the outcome unless they take the affirmative action of opting out of the matter," members of a FLSA class must take the "affirmative step of 'opting in' to the action to be a part of the action and bound by its terms." *Id.* at 223-24. The *Darboe* court reasoned that this distinction indicated that under the FLSA, "the named plaintiff is deemed to represent himself only," and thus, "application of Rule 68 to moot a single plaintiff's claim creates no conflict with the policy

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who contended that the action was not mooted by a Rule 68 offer from the defendant, previously stipulated to dismiss his claims in their entirety, and thus, had voluntarily dismissed his claims. *See id.* at 1244.

[5] *Louisdo v. Am. Telecomms., Inc.*, 540 F. Supp. 2d 368, 373-73 (E.D.N.Y. 2008); *Darboe v. Goodwill Indus. of Greater N.Y. & N. N.J., Inc.*, 485 F. Supp. 2d 221 (E.D.N.Y. 2007); *Briggs v. Arthur T. Mott Real Estate LLC*, No. 06-0468, 2006 U.S. Dist. LEXIS 82891, 2006 WL 3314624, at *4 (E.D.N.Y. Nov. 14, 2006); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 268-70 (S.D.N.Y. 2006); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 127-28 (D. Conn. 2005); *Thomas v. Interland, Inc.*, No. 02-3175, 2003 U. S. Dist. LEXIS 27664, 2003 WL 24065651, at *3-4 (N.D. Ga. Aug. 25, 2003); *Mackenzie v. Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d. 1211, 1219 (M.D. Fla. 2003).

underlying the collective action procedure." *Id.* at 224.

In *Briggs v. Arthur T. Mott Real Estate LLC*, the district court for the Eastern District of New York reconciled the contrary conclusions reached by various courts, by explaining that "courts have held that a Rule 68 offer of judgment moots an FLSA collective action," in cases in which (1) "no other similarly situated individuals have opted in," and (2) "the offer of judgment satisfies all damages of the plaintiff, plus all costs and attorney's fees." 2006 U.S. Dist. LEXIS 82891, 2006 WL 3314624, at *2. Indeed, all of the district court cases[6] cited by Symczyk declined to dismiss a FLSA collective action because other individuals had already opted in to join the collective

[6] The only other case cited by Symczyk, *Sandoz*, a Fifth Circuit decision, did not involve any of the factors articulated above. Instead, the Fifth Circuit recognized that "in theory a Rule 68 offer of judgment could moot a FLSA collective action," and declined to apply the "relation back" doctrine to the case at hand. 555 F.3d 921-922. The *Sandoz* court clarified that "relation back is warranted only when the plaintiff files for certification without undue delay." *Id.* at 921. Because the plaintiff in *Sandoz* filed her motion to certify thirteen months after filing her complaint, the doctrine would only be applied if, on remand, the district court determined that the named plaintiff "timely sought certification of her collective action." *Id.* Unlike *Sandoz*, no motion to certify the class action is pending in this case. In addition, given the differences between this case and all the district court cases cited by Symczyk, the Court declines to follow *Sandoz*.

action,[7] it was unclear whether the Rule 68 offer fully satisfied the plaintiff's claims,[8] or the plaintiff had

[7] *See Nash*, 2010 U.S. Dist. LEXIS 50831, 2010 WL 446178, at *1 ("[O]ther parties have opted into this action and wish to have their claims resolved as part of a 'collective action' with Plaintiff."); *Yeboah*, 2007 U.S. Dist. LEXIS 81256, 2007 WL 3232509, at *5 (concluding that the presence of an additional individual in the collective action "requires the conclusion" that the Court retains subject matter jurisdiction over the action); *Rubery*, 494 F. Supp. 2d at 181 (finding dismissal to be premature when "more than fifty individuals ha[d] executed and filed forms consenting to join the action as a party plaintiff"); *Reyes*, 2005 U.S. Dist. LEXIS 11948, 2005 WL 4891058, at *3 (distinguishing the case at hand from a prior case finding a collective action to be moot, because "two other persons . . . have opted in to this suit, and [the defendant] has not made offers of judgment to them"); *see also Bowens*, 546 F. Supp. 2d at 79 ("[T]here was clear evidence at the outset of this case that other individuals were interested in joining. Indeed, at one time, there were no fewer than six . . . employees who had filed notices of consent. . . ."); *Roble*, 627 F. Supp. 2d at 1013 (declining to find the action to be moot, because "the named plaintiffs in this action have identified other potential . . . employees with an interest in this litigation"); *Guerra*, 2006 U.S. Dist. LEXIS 58973, 2006 WL 2290517, at *2-3 (declining to find a FLSA action to be moot when another employee had joined the collective action before the offer of judgment was made); *Geer*, 2006 2006 [sic] U.S. Dist. LEXIS 10903, [sic] WL 704933, at *3 (finding that "dismissal is not appropriate" because "the court received notice of a third plaintiff who has not received an offer of settlement").

[8] *See Geer*, 2006 U.S. Dist. LEXIS 10903, 2006 WL 704933, at *3 (finding dismissal to be inappropriate because the defendants did not explain how they arrived at the settlement amount they offered to the plaintiffs, the "plaintiffs argue that the offers are not sufficient," and thus, the "court is uncertain whether [the offer of judgment] amount constitutes full judgment").

already filed a motion for conditional certification under § 216(b).[9]

The present case does not involve any such facts. Symczyk does not contend that other individuals have joined her collective action. Thus, this case, like each of the district court cases cited by Defendants, which concluded that a Rule 68 offer of judgment mooted the underlying FLSA collective action, involves a single named plaintiff.[10] In addition, Symczyk does

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[9] *See Bah*, 2009 U.S. Dist. LEXIS 40803, 2009 WL 1357223, at *1-2 (declining to dismiss when the plaintiff had a motion for certification pending, and had attached an affidavit identifying a "friend and former co-worker, along with other employees" whom the plaintiff had observed as being potential members of the class); *Bowens,* 546 F. Supp. 2d at 80 (denying a motion to dismiss based on an offer of judgment when a motion for conditional certification was pending); *Roble*, 627 F. Supp. 2d at 1013 (same); *see also Morales-Arcadio v. Shannon Produce Farms*, 237 F.R.D. 700, 702 (S.D. Ga. 2006) (striking an offer of judgment when it was made after the court had conditionally certified the class).

[10] *See Darboe*, 485 F. Supp. 2d at 224 (concluding that the collective action had been mooted "[w]here no class action has opted in to the collective action"); *Briggs*, 2006 U.S. Dist. LEXIS 82891, 2006 WL 3314624, at *4 ("[T]here are no putative class members or collective action plaintiffs to represent. No collective plaintiffs have opted into this action and class certification has not been sought or granted. Thus, only Plaintiff's individual claims are at stake."); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 127 (D. Conn. 2005) ("[W]ithout the inclusion of other active plaintiffs who have 'opted-in' to the suit, the section 216(b) plaintiff simply presents only her claims on the merits.") Section 216(b) provides that "no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become

(Continued on following page)

not contest Defendants' assertion that the Rule 68 offer of judgment fully satisfied her claims. Under the Court's March 11, 2010 Scheduling Order, Plaintiff was given until June 10, 2010 to file a motion of conditional class certification. (Docket No. 10, ¶1.) The Court, however, was unaware when it issued the Scheduling Order that Defendants had already made Symczyk a Rule 68 offer of judgment. In view of the Rule 23 allegations now in the Amended Complaint, the Court will set the same date, June 10, 2010, for Symczyk to file a Motion for Rule 23 Certification, to be accompanied by a brief explaining how this Court retains jurisdiction over this action. The Court has tentatively concluded that Defendants' Rule 68 offer of judgment moots this collective action, and thus, that this collective action should be dismissed for lack of subject matter jurisdiction. In that event, the Court would likely decline, in its discretion, to exercise supplemental jurisdiction over Symczyk's claims under Pennsylvania law, which can be re-filed in state court. Although Symczyk will be given an opportunity to justify continued federal jurisdiction under Rule 23, the Court expresses doubt as to whether Symczyk can make such a showing, because the Rule 23 allegations in the case are limited to the state law claims, and Rule 23 does not itself confer jurisdiction. An appropriate Order follows.

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such a party and such consent is filed in the court in which action is brought." 29 U.S.C. § 216(b).

ORDER

AND NOW, on this 19th day of May, 2010, for the reasons stated in the foregoing Memorandum, upon due consideration of Defendants Genesis Healthcare Corporation and Eldercare Resources Corporation's (collectively, "Defendants") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket No. 12), it is hereby ORDERED as follows:

1. Plaintiff Laura Symczyk shall file a brief in support of continued federal jurisdiction and a motion to certify a class under Federal Rule of Civil Procedure 23, by June 10, 2010;

2. Defendant shall have seven (7) days to respond; and

3. The Court will hold the Motion to Dismiss under advisement.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAURA SYMCZYK	:	CIVIL ACTION
v.	:	
GENESIS HEALTHCARE CORPORATION, et al.	:	NO. 09-5782

ORDER

(Filed Jun. 24, 2010)

For the reasons stated in the Court's May 19, 2010 Memorandum (Docket No. 19), upon consideration of the parties' submissions acknowledging that an independent basis for federal jurisdiction over Plaintiff's state law claims no longer exists, and the parties' agreement that the statute of limitations for the state law claims is tolled from the date of the originally filed state complaint[1], it is hereby **ORDERED** by agreement as follows:

1. The Court's Order dated June 11, 2010 is **VACATED**;

2.. Plaintiff's FLSA claim is dismissed with prejudice for the reasons stated in the Court's May 19, 2010 Memorandum;

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[1] See *Symczyk v. Gensis Healthcare Corp*, No. 10-cv-1378 – MMB

3. In accordance with 28 U.S.C. § 1367© [sic], the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims and therefore dismisses those claims without prejudice; and.

4. The Clerk of the Court shall mark this case **CLOSED**.

FOR THE COURT:

June 24, 2010	/s/ Michael M. Baylson
Date	Michael M. Baylson, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-3178

LAURA SYMCZYK, an individual, on
behalf of herself and others similarly situated,

Appellant

v.

GENESIS HEALTHCARE CORPORATION;
ELDERCARE RESOURCES CORPORATION
d/b/a GENESIS ELDERCARE

(D.C. Civ. No. 09-cv-05782)

SUR PETITION FOR REHEARING

(Filed Oct. 20, 2011)

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*.

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: October 20, 2011
LML/cc: All counsel of record