IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JENNIFER TAYLOR, BRENDA A. ARTTUS, QUIN A. ECHARD, CHRISTOPHER D. TRIDEL, and DAVID K. OLSON, on behalf of themselves and a class of employees and/or former employees similarly situated,

Plaintiffs,

v.

COPPER FAMILY COMMUNITY CARE, INC. (F/K/A COPPER FAMILY TREATMENT SERVICES, INC.), QUALITY LIFE INVESTMENTS, LLC, and BRIAN A. COPPER, D/B/A/ QUALITY LIFE SERVICES,

Defendants.

OPINION AND ORDER

12-cv-86-slc

This is a hybrid putative collective action for unpaid wages and overtime brought under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, and state law class action brought under Wisconsin's Wage Payment and Overtime Law, Wis. Stat. §§ 103, 104, 109.01 *et. seq*. The named plaintiffs were employed by defendants as Resident Managers of various group homes owned and operated by defendants. As Resident Managers, they generally worked in 24-hour shifts, three to four times a week. Plaintiffs allege that defendants violated the wage and hour provisions of the FLSA and Wisconsin's analog statute by failing to pay them overtime wages or wages for interrupted sleep time.

After plaintiffs filed their complaint but before they moved for class certification, defendants tendered a settlement offer to the named plaintiffs, which plaintiffs rejected. Relying on the Seventh Circuit's opinions in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) and *Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994), defendants have moved to dismiss plaintiffs' case pursuant to Fed. R. Civ. P. 12(b)(1), arguing that this court lacks subject matter jurisdiction because plaintiffs' claims have been rendered moot by defendants' offer of

settlement. Plaintiffs respond that their case is not moot because defendants did not clearly offer full relief on their claims, and even if they did, the existence of other opt-in plaintiffs prevents a finding of mootness. Alternatively, plaintiffs argue that public policy and legislative intent counsel that collective FLSA actions should be exempt from the mootness doctrine.

The crux of the parties' dispute concerning the scope of relief offered by defendants is the "catchall" provision, in which defendants promise to provide plaintiffs with

> any other relief that is determined by the Court to be necessary to fully satisfy all of the claims that are or that could have been asserted by the plaintiffs in the Lawsuit.

According to defendants, this provision precludes any argument by plaintiffs that defendants failed to make an offer of complete relief. Plaintiffs disagree, arguing that the catchall is ambiguous if not an outright sham.

I agree with plaintiffs, at least in part: although a catchall settlement provision like the one at issue here might suffice to moot a group of plaintiffs' legal claims in some situations, I am not convinced that it does so in this case. Keeping in mind the standard of review governing motions to dismiss, I cannot conclude from the context in which defendants' offer was made that defendants' offer eliminates any and every stake that plaintiffs have in this controversy. Notwithstanding the broad language of the catch-all provision, it is too early in this case to say that plaintiffs have "won," given the various factual questions that remain, including questions about the accuracy of defendants' time calculations, the adequacy of defendants' sleeping arrangements and whether and how defendants intend to compensate plaintiffs for their claims related to the allegedly artificial overtime payment scheme. Accordingly, I am denying defendants' motion.

Because I conclude that defendants have failed to offer plaintiffs complete relief on their claims, it is unnecessary to address plaintiffs' arguments that the case is not moot because

additional plaintiffs have opted-in to the suit or that an exception to the Seventh Circuit's mootness doctrine should be created for collective actions brought under the FLSA.

When considering a motion to dismiss for lack of subject matter jurisdiction, a court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the non-movant, but it may also "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 701 (7th Cir. 2003). When a complaint is formally sufficient but a contention is made that the court lacks subject-matter jurisdiction, the movant may use affidavits and other material to support its motion. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003). The plaintiff has the obligation to establish jurisdiction by competent proof. *Sapperstein v. Hager*, 188 F.3d 852, 855 (7th Cir. 1999).

BACKGROUND

I. **Federal and State Wage and Hour Laws**

The Fair Labor Standards Act and Wisconsin's analog statute require covered employees to be paid time and one-half the regular rate of pay for compensable hours worked in excess of 40 hours during the workweek. 29 U.S.C. § 207(a); Wis. Admin. Code § DWD 274.03. Under both statutes, employers are allowed to exclude up to eight hours of sleep time from hours worked by employees who work shifts of 24 hours or more. 29 C.F.R. § 785.22; Wis. Admin. Code DWD § 272.12(2)(d). Specifically, the FLSA provides:

> (a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is of more than 8 hours, only 8 hours will be

> credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.
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> (b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

Wisconsin's sleep time regulations for employees who work 24-hour shifts are nearly identical to those in the FLSA. Wis. Admin. Code DWD § 272.12(2)(d)3 (for employees on duty for 24 consecutive hours or more, "the employer and the employee pursuant to a written mutual agreement may agree to exclude . . . a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked per 24-hour period, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep.")

The FLSA and Wisconsin's statute have similar penalties for employers who violate wage and hour laws. The FLSA provides that:

> Any employer who violates the [minimum and overtime wage provisions] 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. . . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b).

Likewise, Wisconsin law allows employees to recover damages in the amount of any unpaid wages, costs, attorney's fees and liquidated damages. Wis. Stat. §§ 109.03(6), 109.11(2)(a). If, as in this case, an employee files a wage claim action under state law before the

Wisconsin Department of Workforce Development has completed an investigation of the claim, the liquidated damages are limited to 50% of the amount of the unpaid wages. Wis. Stat. § 109.11(2)(a).

An action under 29 U.S.C. § 216(b) "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." 29 U.S.C. § 216(b). The FLSA states 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." *Id*.

II. Allegations of the Complaint

Plaintiffs filed their complaint on February 21, 2012, asserting that defendants violated the FLSA and Wisconsin law by refusing to pay them for 5 hours of personal sleep time on each 24-hour shift. According to plaintiffs, defendants do not provide its Resident Managers adequate unpaid sleep hour arrangements and do not pay for interrupted sleep time. Complaint, dkt. 1, at ¶¶22-23. In addition, plaintiffs allege that defendants adjust each employee's wages on a week-to-week basis, depending on the amount of overtime hours the employee worked. *Id*., ¶ 24. By using this scheme, plaintiffs allege, defendants have avoided paying overtime wages. *Id*. Plaintiffs' complaint also includes a number of class allegations, indicating that plaintiffs are seeking to assert their claims on behalf of similarly-situated individuals, whom plaintiffs describe as current and former employees of defendants who provide or have provided personal care services to residents on behalf of or for the benefit of defendants without proper compensation within the last three years.

Citing the statutes and regulations set out above, plaintiffs demanded judgment against defendants for: 1) their unpaid regular hourly rate of pay for hours of work up to 40 hours per

week and their unpaid overtime rate of pay for hours of work in excess of 40 hours per week; 2) liquidated damages in an amount equal to their unpaid regular and overtime wages under the FLSA; 3) liquidated damages in an amount equal to 50% of the amount of their regular and overtime wages under Wisconsin law; and 4) costs and attorney's fees. They also ask the court to declare that defendants violated the FLSA and Wisconsin law by failing to maintain accurate time records and to permanently enjoin defendants "from violating the FLSA and Wisconsin law by not paying wages and overtime."

III. Materials Outside the Complaint

A. Defendants' Settlement Offer

On March 29, 2012, a day after filing their answer, defendants mailed plaintiffs a settlement letter, offering to resolve "all claims that the plaintiffs have or had against Copper Family arising from or related to the alleged nonpayment of regular and overtime wages." Rule 26(f) Report, dkt. 13, exh. 1, at 1. In their letter, defendants offered to pay each of the named plaintiffs amounts equal to: (1) all back wages (calculated at the overtime rate) for sleep periods in which they got less than five hours of sleep and for which they were not already paid; (2) liquidated damages under the FLSA equal to 100% of the back wages; and (3) liquidated damages under Wisconsin law equal to 50% of the back wages, plus costs and reasonable attorney's fees. Defendants proposed a specific number to which each named plaintiff was entitled, explaining that it had derived this number from the plaintiffs' time sheets. Defendants also offered to agree to the injunctive relief sought by the plaintiffs in their complaint.

As for plaintiffs' allegation that defendants adjusted each employee's wages on a week-to-week basis so as to deny plaintiffs overtime wages, defendants asserted that plaintiffs' accusation was "simply untrue." *Id.*, at 4. As proof, defendants attached a copy of their wage structure,

which they alleged showed that "overtime wages are built into the daily rates that 24-hour employees used to fill out their time sheets." *Id*.

Defendants concluded their letter with this "catchall" offer:

> The offers made to the plaintiffs in this letter fully satisfy their claims and provide them with all the relief to which they would be entitled were they to prevail in the Lawsuit. To the extent that the offers extended do not do so, Copper Family hereby offers to provide the plaintiffs with any other relief that is determined by the Court to be necessary to fully satisfy all of the claims that are or that could have been asserted by the plaintiffs in the Lawsuit.

Id. at 5.

On April 9, 2012, plaintiffs rejected the offer. On April 17, 2012, defendants amended their answer to include the defense that the action is moot and this court therefore lacks subject matter jurisdiction. Defendants then filed the instant motion to dismiss for lack of subject matter jurisdiction, asserting that their offer of full relief to plaintiffs renders this case moot.

In response to the motion to dismiss, plaintiffs filed affidavits in which each asserts that he or she rarely obtained five hours of uninterrupted sleep during an overnight shift because of noisy and uncomfortable sleeping quarters and work-related interruptions. Aff. of Jennifer Taylor, dkt. 29, at ¶¶10-12; Aff. of Brenda Arttus, dkt. 30. at ¶¶ 13-15; Affidavit of Quin Echard, dkt. 31, at ¶¶ 11-13; Affidavit of Chris Tridle, dkt. 32, at ¶¶ 13-14; Affidavit of David Olson, dkt. 33, at ¶¶ 10-11. They also allege that although they kept track of time that they were interrupted during their sleep period to perform job duties, they do not know if they were ever paid for such time because Steven Jensen, an employee of defendants, would often adjust their time sheets for them. Taylor Aff., ¶¶14-15; Arttus Aff., ¶¶ 15-16; Echard Aff., ¶15.; Tridle Aff, ¶15; Olson Aff., ¶13.

On May 5, 2012, plaintiffs filed notices from three additional individuals who consented to join plaintiffs' suit. Dkts. 19-21. On May 31, 2012, plaintiffs filed a motion to add one of these individuals, Dan Underwood, as a representative plaintiff.

OPINION

Defendants base their dismissal motion on Article III's "case or controversy" requirement, which limits federal court jurisdiction to "actual, ongoing controversies." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 626 (7th Cir. 2007) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). "When the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case is (or the claims are) moot and must be dismissed for lack of jurisdiction." *Id*. (internal quotations and citations omitted). When a defendant offers a plaintiff "all the damages due him," the dispute between the parties evaporates and there is no longer any live case to adjudicate. *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994). As Judge Posner has put it, "You cannot persist in suing after you've won." *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999).

Defendants argue that plaintiffs "won" this case when defendants tendered their settlement letter to plaintiffs. According to defendants, no live controversy remains because they have offered to pay plaintiffs all they could expect to recover under the FLSA or Wisconsin's analog statute, namely, their unpaid back wages (calculated at the overtime rate) for sleep periods in which they got less than five hours of sleep and for which they were not already paid, liquidated damages under the FLSA equal to 100% of the back wages, liquidated damages under Wisconsin law equal to 50% of the back wages, costs and reasonable attorney's fees. In response, plaintiffs argue that the settlement letter does not offer complete relief, or at best, is

ambiguous, because: (1) defendants' calculations of wages owed for sleep time are premature because the time records undergirding those calculations are unreliable; (2) defendants have flatly rejected plaintiffs' overtime claim based on defendants' (alleged) bookkeeping ruse; and (3) the offer forces plaintiffs to continue with litigation. Thus, plaintiffs argue, live, actual controversies remain.

Plaintiffs rely heavily on *Reed v. TJX Companies, Inc.*, 2004 WL 2415055 (N.D. Ill. 2004), a Fair Labor Standards Act case filed in the U.S. District Court for the Northern District of Illinois. The plaintiff in that case alleged that while he was employed at Marshalls discount clothing store, he was required to clock in and out during his lunch break, but to continue working without pay for that time. He further alleged that, because of this practice, he sometimes worked more than 40 hours per work week without adequate compensation. Defendant offered plaintiff $500 in settlement of his claim, then moved to dismiss the case because it was moot.

The court denied defendant's motion. The court observed that it was impossible to tell whether the defendant's $500 settlement offer would fully compensate Reed for his claim because Reed disputed the accuracy and completeness of defendant's calculations. *Id*. at *1. Further, it was not clear how the defendant had determined which of Reed's time records had been edited or how it had accounted for time that Reed had worked that was not reflected on any time sheet because of defendant's requirement that he clock in and out for a lunch break even if he did not take one. *Id*. Answering such questions demanded a "far-reaching and supposition-laced inquiry" that was not appropriate at the dismissal stage of the case. *Id*. In addition, the court contrasted Reed's FLSA case with cases brought under a statute that capped the amount of damages recoverable if a violation is shown, noting that "when a defendant makes

a [settlement] offer equal to the statutory cap or the amount of damages claimed by plaintiff, there is nothing further a plaintiff can recover." *Id*. at *2. From the record before it, however, the court found it reasonable to infer that Reed would be able to show that he was entitled to more than $500 in back pay and overtime. *Id*.

Plaintiffs argue that *Reed* is directly on point: as here, it was a FLSA case in which the plaintiff disputed the accuracy of the defendant's settlement calculations. In response, defendants admit that plaintiffs' reliance on *Reed* might have had traction but for one key difference: the offer in *Reed* did not include the catch-all, "any other relief" necessary language that defendants have offered plaintiffs in this case. Because of this language, argue defendants, any disagreements about the particular amount or scope of relief due plaintiffs are immaterial: "By offering 'any other relief' necessary, Copper Family tendered everything the plaintiffs could have hoped to win at trial, regardless of its own calculations or opinions as to what the scope of relief should be." Br. in Reply, dkt. 28, at 3. By rejecting this all-inclusive offer, say defendants, plaintiffs lose outright.

In support of their position, defendants call the court's attention to the decision in *Martin v. PPP, Inc.*, 719 F. Supp. 2d 967 (N.D. Ill. 2010). In that case, the plaintiff brought a putative class action against defendants PPP, Inc. and Fidelity Communications Corporation for alleged violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, alleging that defendants had used an automatic telephone dialing system (ATDS) to make a call featuring a prerecorded promotional message for Papa John's Pizza to his cell phone in July 2009. In Count I of his complaint, plaintiff sought statutory damages of $500 for each violation of the Act; Count II sought to treble that amount for each violation on the ground that the defendants' violation of the Act was willful; and Count III sought a permanent injunction

prohibiting the defendants from making future calls to cell phones using ATDSs or prerecorded voice messages. *Id*. at 969. Before Martin filed a motion for class certification, Fidelity presented him with a settlement offer that offered him "$1,500 for each and every pre-recorded call which [Fidelity] or PPP, Inc. sent to any cell phone" owned or paid for by Martin and any costs that Martin would recover if he were to prevail at trial. In addition, Fidelity agreed "to the entry of a stipulated injunction against it as requested in Count III of the Complaint," prohibiting Fidelity "from placing prerecorded calls to cellular phones in violation of the TCPA." *Id*. Finally, Fidelity's offer included a catchall clause that agreed to provide "Plaintiff with any other relief which is determined by the Court to be necessary to fully satisfy all of the individual claims of Plaintiff in the Lawsuit or the similar claims of any other person to whom this offer is extended." *Id*.

After plaintiff rejected the offer, Fidelity moved to dismiss the case on the ground that it was moot. Martin countered that the offer was deficient because the call violated 47 U.S.C. § 227(b)(3) in two distinct ways—by using a prerecorded message and by using an ATDS—which entitled him to compensation for each violation. *Id*. at 973. After reviewing the statutory language and other cases, the court rejected Martin's position and determined that he could recover statutory damages of only $500 per call, and therefore defendant's offer of $1,500 was the largest sum that Martin could recover if he were to prevail on his claim for money damages at trial. *Id*. In addition, the court found it worth noting that even if Martin were entitled to recover on a per-violation basis or "if he were entitled to greater monetary compensation for any other reason," Fidelity's offer would remain adequate given its catchall promise to provide "any other relief" deemed necessary by the Court. *Id*. In a footnote, the court rejected Martin's contention that the catchall provision was not definite enough to be accepted, explaining:

> Here, somewhat paradoxically, Fidelity's blanket agreement to provide any additional necessary relief makes the offer at once more vague and more definite. On one hand, the catchall provision does not specify what particular relief, if any, might be added to the offer; on the other hand, it is precisely by virtue of its open-ended character that the catchall provision ensures that Fidelity's offer will indeed provide Martin with complete relief. In this context, the offer's indefiniteness does not render it invalid.

719 F. Supp. 2d at 975, n.4.[1]

Defendants ask this court to employ this same reasoning to find that their catchall offer to provide plaintiffs with "any other relief that is determined by the Court to be necessary to fully satisfy all of [their] claims" renders this case moot.

Martin, however, is not on all fours with this case. *Martin* was brought pursuant to a statute that provided a fixed amount of damages ($500) for each violation, which could be trebled upon a finding of willfulness. Defendant offered to fully satisfy plaintiff's demands and pay him $1,500 per call, and there was no disputing the call count. The only dispute in the case was a legal one that could be resolved at the outset: whether plaintiff could recover damages on a per-violation or a per-call basis. Thus, the parties could calculate the maximum damages with precision and exactness without conducting discovery to quantify variables or disambiguate differing views of the relevant numbers. In the context of that legal dispute, it was reasonable to conclude that defendant's offer to provide plaintiff with "any other relief" deemed necessary by the Court to satisfy his claims was meant to manifest defendant's intent to provide plaintiff with the full scope of relief that he could recover under the law.

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[1] Although defendants say identical "catchall" language was included in the settlement offer at issue in *Damasco v. Clearwire Corp.*, 2010 WL 3522950 (N.D. Ill. 2010), *aff'd* 662 F.3d 891 (7th Cir. 2011), neither the district court nor appellate court addressed that language in its decision.

The context in which defendants made their catchall offer in this case is different. This is not a statutory damages case involving a single legal question, it is a wage-and-hours case in which there are disputes of fact about the nature of defendant's overtime rate scheme, the adequacy of its sleeping quarters and the reliability of plaintiffs' time sheets. The defendants have flat-out denied plaintiffs' claim related to defendant's overtime compensation scheme. As plaintiffs point out, it is unclear from defendants' offer whether the catch-all language encompasses the overtime claims, whether defendants are conceding liability, whether they would accept a proposal from plaintiffs regarding unpaid sleep time without conducting further discovery or how they intend to arrive at the final amount owed to plaintiffs.

"To eliminate the controversy and make a suit moot, the defendant must satisfy the plaintiffs' *demands*; only then does no dispute remain between the parties." *Gates v. Towery*, 430 F.3d 429, 432 (7th Cir. 2005) (emphasis in original). Here, defendants have not satisfied plaintiffs' demands. They have rejected plaintiffs' overtime claim and have reached a damages calculation on plaintiffs' sleep time claim that plaintiffs say is premature. In this situation, it is hard to see how the statement"we'll pay you more so long as the court orders us to do so" eliminates all controversy. Put more succinctly, this case has not settled, and not just because plaintiffs said "no."

Although not directly on point, *Gates* is instructive. In that case, two plaintiffs, Gates and Nelson, challenged the procedures that the city of Chicago used for dealing with property seized by police during custodial arrests. Plaintiffs filed suit on behalf of themselves and others similarly-situated, contending that Chicago violated the due process clause of the Fourteenth Amendment by retaining property to which it had no right, failing to notify the owners and making return depend on the whim of the arresting officer. Plaintiffs sought the following relief:

(a) return of the seized property ($113 in cash for Gates and $59 in cash for Nelson); (b) prejudgment interest; (c) compensatory damages for any injury attributable to loss of the property's use; and (d) compensation for the value of their time devoted to its retrieval. *Id*., at 430-31. Before the court certified the class, counsel for the City sent Gates $113 and Nelson $59, with a cover letter promising that interest would follow. Counsel for plaintiffs returned these checks because the City had omitted costs, damages and attorneys' fees. Agreeing that the City's tenders did not make the plaintiffs whole, the district court found the plaintiffs' claims were not moot and granted their motion for class certification.

The court of appeals affirmed the district court's decision. It noted that plaintiffs had demanded not only the return of their cash, but also costs, interest and compensatory damages. *Id*. at 431. Responding to the City's contention that the plaintiffs had not established any compensable loss, the court wrote:

> [T]his gets the cart before the horse. A court may resolve such an issue if and only if there is a live controversy. A defendant cannot demand and receive an opinion on the merits of some aspect of plaintiffs' claims, pay off the rest, and then contend the whole suit is moot and must be dismissed, consigning the opinion to advisory status.
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> * * *
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> Chicago is unwilling to satisfy plaintiffs' demands. Gates, Nelson, and others similarly situated are entitled to a judge's decision on what if any relief (in addition to return of the seized funds) is appropriate. Perhaps the City is right in thinking that prejudgment interest is all the compensation due and makes nominal damages unavailable because interest represents actual damages from loss of the property's use. Still, this is a question for the district judge to resolve on the merits. A defendant cannot simply assume that its legal position is sound and have the case dismissed because it has tendered everything it *admits* is due. Mootness occurs when no more relief is possible. That point has not been reached.

Id. at 432.

So it is in this case: "that point has not been reached." Notwithstanding the seemingly all-inclusive scope of the "any other relief" language, the only *actual* relief that defendants have offered plaintiffs is the portion that defendants agree is proper; the rest, they say, will be up to the court. As the court made clear in *Gates*, however, such an offer does not moot the case. In the context of the case at bar, defendants' offer to provide "any other relief that is determined by the Court to be necessary to fully satisfy all of the claims" offers plaintiffs nothing more than what they are entitled to as a matter of course: a court proceeding to determine the scope and amount of damages, if any, to which plaintiffs are entitled. Such a proceeding implies the existence of a controversy. This case is not moot.

ORDER

IT IS ORDERED that the motion of defendants to dismiss this case, dkt. 16, is DENIED. The Clerk of Court is directed to calendar a telephonic status conference with the parties to re-set the schedule in this case.

Entered this 13th day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge