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No. 110092

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IN THE SUPREME COURT OF THE STATE OF ILLINOIS

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After an Opinion by the Court of Appeal  
First Appellate District, Division Six  
(Case No. 1-09-0952)

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ANDREA BARBER,

Plaintiff-Appellee,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellant.

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On Appeal from the Circuit Court of Cook County  
(Case No. 08 CH 29860, Honorable Rita M. Novak, Judge)

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**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF DEFENDANT-APPELLANT**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Founded in 1973, Pacific Legal Foundation (PLF) provides a voice in the courts for thousands of mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, and Hawaii.

In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from mercenary tort litigation which burdens the investment necessary for economic innovation for the benefit of the plaintiffs' bar. PLF has appeared before the courts in several states, as well as the United States Courts of Appeals and Supreme Court, in cases involving the abuse of the class action procedure. *See, e.g., Marshall v. Burger King Corp.*, 222 Ill. 2d 422 (2006); *Soualian v. Int'l Coffee & Tea*, No. 07-56377 (9th Cir. filed Sept. 24, 2007); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009). PLF attorneys have also published scholarly writings on the abuse of tort law and its impact on business. *See* Timothy Sandefur, *The Right to Earn a Living* (2010); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645, 647 (2003). PLF believes that its public policy perspective and litigation experience in support of free enterprise principles will provide a useful additional viewpoint on the issues presented in this case.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The rule adopted in *Gelb v. Air Con Refrigeration & Heating, Inc.*, 326 Ill. App. 3d 809 (2001), which allows courts to keep open a moot case to furnish a plaintiff with a "reasonable opportunity to file a motion for certification" lacks any legal foundation, is

indefensible on public policy grounds, and should be abandoned. A defendant's tender of settlement to a plaintiff should moot a case at any time up to the actual filing of a motion for class certification. Before that motion is filed, the only parties before the court are the named plaintiffs and defendants; where all plaintiffs are made whole before judicial resolution, and there is no reason to believe the defendant will go back to injuring the plaintiff, the court has no further interest in the case and must dismiss it, regardless of the "diligence" with which the plaintiff has acted in preparing to move for class certification. Courts should "look to the time of certification of the class as the line for considering whether a defendant is attempting to 'pick off' a potential class action litigant." *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 780 So. 2d 231, 232 n.1 (Fla. Dist. Ct. App. 2001). The *Gelb* rule should be abandoned, and the Court should hold that defendants may tender judgment to plaintiffs and thus moot a case at any time before the filing of the motion for class certification.

## **ARGUMENT**

### **I**

#### **WHERE A FULL SETTLEMENT IS TENDERED, THE CASE SHOULD BE DISMISSED EXCEPT IN EXTRAORDINARY CIRCUMSTANCES NOT PRESENT HERE**

The purpose of the judicial forum is principally to resolve disputes between private parties, not to redress large-scale grievances or to serve as an insurance mechanism. *Landau, Omahana & Kopka, Ltd. v. Franciscan Sisters Health Care Corp.*, 323 Ill. App. 3d 487, 493 (2001). Where parties have a dispute, the court should focus only on the legal issues necessary to resolving that specific dispute, and if the case or controversy disappears before judicial resolution, the court must dismiss the case (unless the "voluntary cessation" or

“capable of repetition yet evading review” mootness exceptions apply). The law is equipped with corollaries to this principle to help ensure that courts resolve only specific controversies and do not resolve matters beyond the scope of their jurisdiction. It is for this reason, for example, that language in an opinion that is not necessary to the conclusion is considered non-binding dictum, why courts avoid addressing constitutional issues when possible, and why courts are barred from considering injuries allegedly committed to parties who are not present in the case. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (emphasis omitted) (courts may not “punish the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)”). *Stallings v. Fajardo*, 157 Ill. App. 3d 913, 917 (1987) (“An appellate court will not review a case merely to render a judgment to guide potential future litigation . . . thus cases that fail to present live issues will not ordinarily be entertained.”).

The court can consider only the asserted injury of the plaintiff properly before the court; when a defendant makes that plaintiff whole for that injury, the case is moot, and the court must dismiss, because “there is no longer an actual controversy pending.” *Akinyemi v. JP Morgan Chase Bank, N.A.*, 391 Ill. App. 3d 334, 339 (2009). A plaintiff may not “perpetuate the controversy” by refusing a defendant’s tender. *Hillenbrand v. Meyer Med. Group, S.C.*, 308 Ill. App. 3d 381, 389 (1999). In short, “[y]ou cannot persist in suing after you’ve won.” *Greisz v. Household Bank, N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999).

In a case in which one plaintiff sues one defendant, only that specific dispute is before the court, and satisfaction of that dispute renders the case moot. Once a class is certified, its members become parties to the case, and full satisfaction to all members of a certified class would also render the case moot. If the defendant tenders full payment only to a single

plaintiff *after* class certification, the case should proceed, because the remaining members of the class have not been made whole. *Sosna v. Iowa*, 419 U.S. 393, 398-99 (1975).<sup>1</sup> But *before* a class is certified, neither the class as a whole nor its members are yet within the court’s cognizance, and their circumstances or injuries cannot be considered at all, except as necessary to rule on a motion for certification. Certainly the members of a purported but uncertified class would not have power to file any dispositive motions, or to conduct discovery, or to be dismissed from a case, prior to certification—because they would not yet be parties to the case. For the same reason, courts may not keep a moot case open indefinitely to allow other potential plaintiffs time to bring new claims of which the court has not taken, and cannot yet take, any official notice.

Exceptions to the mootness doctrine such as “voluntary cessation” and “capable of repetition but evading review” exist to prevent a defendant from deceptively or accidentally making the plaintiff whole just long enough to end the lawsuit, and then resuming the injurious conduct. But these exceptions are still grounded on remedying the specific injuries complained of by those plaintiffs who are properly before the court. *In re A Minor*, 127 Ill. 2d 247, 259 (1989). These exceptions do *not* exist to keep cases open after the defendant tenders satisfaction, or to keep the door open for the inherently speculative possibility of weighing potential injuries allegedly suffered by parties who are not yet before the court. A party has no right

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<sup>1</sup> Once a class is certified, a class representative who is fully satisfied by a defendant would not be typical of the members of the class, “but that is not a matter of jurisdiction and would not disqualify him from continuing as class representative until a more suitable member of the class was found to replace him.” *Wiesmueller v. Kosobucki*, 513 F.3d 784, 786 (7th Cir. 2008).

to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.

*Parsons Inv. Co. v. Chase Manhattan Bank*, 466 F.2d 869, 871 (6th Cir. 1972) (quoting *Ex Parte Steele*, 162 F. 694, 701 (N.D. Ala. 1908)).

In short, “a class action defendant is allowed to deal with members of the potential class (in this case, its customers) in the ordinary course of business.” *Taran v. Blue Cross Blue Shield of Fla., Inc.*, 685 So. 2d 1004, 1007 (Fla. Dist. Ct. App. 1997). If the defendant chooses to tender a full remedy to all of the plaintiffs who are then before the court, the case should be dismissed.

## II

### **THE HILLENBRAND RULE KEEPING THE CASE OPEN PENDING DECISION ON THE CERTIFICATION MOTION IS SUFFICIENT TO PROTECT THE RIGHTS OF THE CLASS**

In *Hillenbrand*, 308 Ill. App. 3d at 391-92, the court of appeals held that when a motion for class certification is pending, a defendant may not moot the case by a tender to the named plaintiff. This rule fits within the general rules of jurisdiction. As the Supreme Court explained in *United States Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980), a class representative may appeal the denial of class certification even if the named party’s own claims become moot, because the plaintiff obtains “a ‘personal stake’ in obtaining class certification” upon the filing of the certification motion. *Id.* at 404. Likewise, in *Deposit Guar. Nat’l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326 (1980), the Court allowed the named plaintiffs, despite having been made whole, to appeal the denial of their motion for

class certification because once they filed that motion, they had an “*individual* interest” in certification. *Id.* at 340.

But in *Bd. of Sch. Comm’rs of the City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975) (*per curiam*), by contrast, the plaintiffs filed a purported class action lawsuit, yet failed to certify the class properly. The Supreme Court found that when the named plaintiffs’ claims were rendered moot, the case should have been dismissed. *Id.* at 130. Although Justice Douglas, in dissent, pointed out that “[a] continuing dispute therefore exists between the Board and the members of the class,” *id.* at 133 (Douglas, J., dissenting), the Court ruled that there were no remaining live issues between the only parties of whom the court could take notice, and therefore the case was properly dismissed. *Accord, Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) (“[I]f the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot.”); *Ambalu v. Rosenblatt*, 194 F.R.D. 451, 453 (E.D.N.Y. 2000) (“If a named representative’s claim becomes moot before class certification, the entire case is to be dismissed for lack of subject matter jurisdiction.”).

A plaintiff in a purported class action lawsuit has two distinct interests: his or her own personal stake in the dispute, and a personal interest in class certification. While a mere tender to the plaintiff that does not satisfy the second interest leaves the case within the court’s jurisdiction, a settlement that does satisfy both renders the case moot. *Compare Walsh v. Ford Motor Co.*, 945 F.2d 1188, 1191 (D.C. Cir. 1991) (“Whatever the precise contours of the ‘procedural’ right, recognized in *Geraghty* . . . it, no less than any ‘substantive’ right, may be released as part of a plaintiff’s voluntary settlement.”) *with Shores v. Sklar*, 885 F.2d 760, 764 (11th Cir. 1989) (Class action could proceed where named plaintiff explicitly reserved the right to represent a class while accepting satisfaction of her

own claims.). But a plaintiff does not gain that interest in class certification before filing the motion.

Indeed, the *Roper* Court pointedly declined to affirm the Fifth Circuit's holding that "the very act of filing a class action [complaint]" gives the plaintiff an interest in certification, and that, as a consequence, the case is not rendered moot by a defendant's tender to the plaintiff. *See Roper v. Conserve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978). Finding that this approach would raise "[d]ifficult questions," 445 U.S. at 340 n.12, the Supreme Court refused to endorse it, and refused to rely on the "representative responsibilities to the putative class" that according to the Fifth Circuit comes about the moment the complaint is filed in a purported class action case. *Id.* at 340.

Under *Roper*, *Geraghty*, and their progeny, courts will hold the door open for class plaintiffs after the certification motion is filed, so that even if a defendant offers tender to the named plaintiff, the case is not rendered moot. This rule protects the interest of class members against bad-faith defendants whose tenders are intended simply to avoid being called to account for their wrongful conduct.

*Gelb* goes too far, however, holding off dismissal to allow the plaintiff to file the certification motion itself. This step is not justified by concern for the interest of class members, because there is no class prior to certification, and its purported members cannot be prejudiced by a dismissal. *See Bertrand v. Maram*, 495 F.3d 452, 455 (7th Cir. 2007) ("Without a certified class, any other Medicaid applicant is free to file another suit and present the same arguments; decisions of district courts do not block successive litigation by similarly situated persons."); *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) ("Class action settlements typically leave intact the legal claims of others."). Whoever the members

of an as-yet uncertified class may be, they remain free to file a lawsuit and remedy their injuries, whatever those might be.

### III

#### **THE *GELB* RULE IS NOT WARRANTED BY PUBLIC POLICY CONSIDERATIONS**

The court below refused to dismiss the case for policy reasons: to allow a defendant to moot a purported, but uncertified, class action by tender to the named plaintiff would, the court said, “allow a party to avoid ever defending a class action [] by simply tendering payment to the named plaintiffs.” *Barber v. American Airlines, Inc.*, 398 Ill. App. 3d 868, 885 (2010) (quoting *Hillenbrand*, 308 Ill. App. 3d at 392). But this conclusion is unwarranted, for three reasons.

First, all settlement offers are, in principle, attempts by defendants to avoid defending the case at hand, and courts are not opposed to all such efforts; on the contrary, settlement is encouraged. *Jankousky v. Jewel Cos., Inc.*, 182 Ill. App. 3d 763, 767 (1989) (“[C]ourts have uniformly allowed defendants, prior to class certification, to communicate with and settle the claims of proposed class members.”). The court’s goal should be to favor good-faith settlement offers and the resolution of disputes while barring bad-faith settlement offers. The Court must draw a line between these two, and the clearest line is the filing of the certification motion. While there may be cases where a worthwhile class action lawsuit is delayed through application of this rule, courts routinely require that plaintiffs be vigilant and not sleep on their rights. *Harshman v. DePhillips*, 218 Ill. 2d 482, 504 (2006).

Second, the *Gelb* rule actually creates a perverse incentive that discourages defendants from making good-faith tender offers. In *Ramon v. Aries Ins. Co.*, 769 So. 2d

1053 (Fla. Dist. Ct. App. 2000), the plaintiff filed a class action lawsuit against an insurance company alleging that the company improperly applied a deductible against his claim. *Id.* at 1054. Within a month of the filing of the complaint, and before the filing of a certification motion, the company paid the claim in full. *Id.* The court ruled that the case was rendered moot by the defendant's tender. "Presented with an error in the payment of Ramon's medical bills, the insurer immediately corrected its error by prompt payment and a stipulation to pay Ramon's fees and costs. We have previously held such actions to be totally appropriate." *Id.* at 1055. The court did not hold off the determination of mootness to allow the plaintiff to file a motion for certification.

Likewise, in *Taran*, 685 So. 2d 1004, the plaintiffs filed a class action lawsuit arguing that the defendants had overcharged for health care premiums for children's health insurance. *Id.* at 1005. The defendants issued refunds to some of the members of the purported class prior to the filing of a certification motion. *Id.* at 1007. The court held that the case was moot, and that the tenders had been in good faith:

It appears that the filing of the class action complaint caused the insurers to review their internal procedures to be sure that their billing complied with the Newborn Statutes. The insurers discovered that in certain cases there had been billing errors. They issued refunds to the affected customers . . . . In the absence of an order prohibiting it, a class action defendant is allowed to deal with members of the potential class (in this case, its customers) in the ordinary course of business. Where a defendant, prior to class certification, recognizes billing errors and desires to correct them, it may do so. The insurers did not seek releases or otherwise interfere with the potential class action, but instead repaid those insureds who had been overcharged. We see no impropriety.

*Id.* (citation omitted). These cases were properly dismissed. If any other persons were harmed by the insurance companies' policies, they remained free to file suit, and were not prejudiced by the settlements. The plaintiffs were made whole, and the dispute was resolved.

Applying a rule like that established in *Gelb*, by contrast, would have discouraged the insurance companies in these cases from paying the plaintiffs the money to which they were entitled. Had the Florida courts kept the case open to allow the plaintiffs time to file a class certification motion, there would have been less incentive for the defendants to settle, and more incentive for the insurance companies to devote their resources to preparing for a long legal fight instead.

This Court should avoid taking steps that increase the burden imposed on defendants by a certification motion. The motion for class certification is already disproportionately costly to defendants. Although it should be nothing more than a determination of whether the purported class satisfies the requirements for certification, the reality is that the decision on class certification often operates as a virtual judgment on the merits. The potential cost of losing a class action lawsuit is so immense that defendants usually seek to settle the case with the class after certification, even where they did not commit any actual injury, or where they have valid defenses. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (“Certification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.”); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (“[A]n adverse certification decision will likely have a dispositive impact on the course and outcome of the litigation.”); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (“In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle.”). *See also* Stephen Berry, *Ending Substance’s Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299, 300-01 (1980) (“The enormous potential

damage exposure that flows from a certification decision often pressures defense counsel into early settlements regardless of their perception of the merits of the case.”); John K. Rabiej, *The Making of Class Action Rule 23: What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 354 (2005) (“Even though the defendant would likely prevail if the class action went to trial, defendants often [are] not willing to accept the small risk of defeat, which might ruin their companies.”). Armed with the enormous advantage of class status, a plaintiff frequently need not prove a case or even provide any evidence of duty, breach, causation, or damages, before obtaining a windfall settlement from a business defendant that cannot afford the risk of offering even meritorious defenses and then losing the litigation. Meanwhile, the primary beneficiaries of class action lawsuits tend to be attorneys, not the nominal parties. *See, e.g.*, Patrick M. Garry, et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. Rev. 275, 275 (2004) (“[C]lass action lawsuits . . . can extract huge settlements from business, yet with each class member receiving only a minuscule return. The biggest winners appear to be the lawyers.”).

If a guilty defendant pays off a named plaintiff to avoid a class action lawsuit, the other injured parties remain free to “pick up the spear dropped by the named plaintiffs,” *Wiesmueller*, 513 F.3d at 787, by substituting as a class representative, *cf. Wheatley v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 99 Ill. 2d 481, 487 (1984) (affirming dismissal where settlement was reached with named plaintiff and no class member sought to substitute), or filing a new lawsuit, *Bertrand*, 495 F.3d at 455 (“[I]n the absence of class certification any other applicant may start over.”). Presumably, in a case involving meritorious claims, it would not be difficult to bring a class action lawsuit despite the defendant’s efforts to “pick off” a named plaintiff. The deleterious consequences of the opposite rule—exaggerating still

further the *in terrorem* effect of a motion for class certification—is more dramatic. This Court should resist this tendency by holding that courts may not keep a case open to entertain a motion for class certification when the defendant has fully satisfied the injured plaintiff.

Third and finally, even if the *Gelb* rule did not have negative policy implications, that rule must be abandoned as inconsistent with the strict principles of jurisdiction. Mootness is jurisdictional in nature, *Du Page County Election Comm'n v. State Bd. of Elections*, 345 Ill. App. 3d 200, 205 (2003), and although there are exceptions to the mootness rule that allow courts to render decisions in moot cases, those exceptions must be construed “very narrowly.” *Id.* Policy concerns alone cannot override the prohibition on hearing moot cases. *Id.*; *accord, Stallings*, 157 Ill. App. 3d at 916-17.

### CONCLUSION

The distinction between a case in which a motion for class certification has been brought and one in which it has not been brought is important, because keeping open a case after the defendant makes the plaintiff whole, and before the plaintiff moves to certify the class, would blur jurisdictional boundaries. The court would then be retaining power over a case in which there are no longer any live disputes between the actual parties, but in which there remains only a speculative judicial interest: a *potential* class with *potential* injuries.

To acquire any interest in class certification, a named plaintiff must file a certification motion, as the plaintiff in *Geraghty* did. Where tender occurs before such a motion, the plaintiffs have no further “personal stake” in the case. To hold that a plaintiff has an individual stake in the existence of a class that has not only not been certified, but for which a certification motion has not been made would give plaintiffs a “stake” in a purely speculative possibility and thus keep cases open even after a defendant has acknowledged

wrongdoing and remedied the plaintiff's injury. Thus, in addition to rendering the court's jurisdiction nebulous, this would reduce the incentive for the defendant to settle the case, since the defendant would not be thereby assured of the lawsuit's termination.

DATED: August \_\_\_\_, 2010.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13 pages.

DATED: August \_\_\_\_, 2010.

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MELANIE JO TRIEBEL

**DECLARATION OF SERVICE BY MAIL**

I, Melanie Jo Triebel, declare as follows:

I am a resident of the State of Illinois, residing or employed in Chicago, Illinois. I am over the age of 18 years and am not a party to the above-entitled action. My business address is Evan Law Group LLC, 600 West Jackson Boulevard, Suite 625, Chicago, Illinois 60661.

On August \_\_\_\_, 2010, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Chicago, Illinois.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this \_\_\_\_ day of August, 2010, at Chicago, Illinois.

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MELANIE JO TRIEBEL