CASE NO. 13-16816

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD CHEN and FLORENCIO PACLEB,
on behalf of themselves and all others similarly situated,

Plaintiffs - Appellees,

v.

ALLSTATE INSURANCE COMPANY,

Defendant - Appellant.

On Appeal from the United States District Court for the
Northern District of California
Civil Case No. 4:13-cv-00685-PJH

OPENING BRIEF OF DEFENDANT-APPELLANT ALLSTATE INSURANCE COMPANY

Mark J. Levin
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 864-8235
Facsimile: (215) 864-8999
levinmj@ballardspahr.com

Daniel M. Benjamin
Ballard Spahr LLP
655 West Broadway, Suite 1600
San Diego, California 92101-8494
Telephone: (619) 696-9200
Facsimile: (619) 696-9269
Email: benjamind@ballardspahr.com

CORPORATE DISCLOSURE

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Defendant-Appellant Allstate Insurance Company states that it is a wholly-owned subsidiary of Allstate Insurance Holdings, LLC, which is a Delaware limited liability company. Allstate Insurance Holdings, LLC is a wholly-owned subsidiary of The Allstate Corporation, which is a Delaware corporation. The stock of The Allstate Corporation is publicly traded. No publicly-held entity owns 10% or more of the stock of The Allstate Corporation.

Respectfully submitted,

Dated: December 19, 2013

By: s/ Mark J. Levin
MARK J. LEVIN
Attorneys for Appellant
Allstate Insurance Company

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Defendant-Appellant Allstate Insurance Company ("Allstate") respectfully submits its opening brief in support of this 28 U.S.C. § 1292(b) interlocutory appeal of the District Court's Order denying Allstate's motion to dismiss this lawsuit by Plaintiff-Appellee Florencio Pacleb ("Pacleb") for lack of subject matter jurisdiction.

INTRODUCTION

If, prior to a class certification motion being filed, a defendant makes a standing offer that a named plaintiff can have a judgment entered for the complete individual relief sought in the complaint, is there still a live case or controversy under Article III of the U.S. Constitution simply because the plaintiff wants to pursue that lawsuit as a class action? Allstate submits that Article III and the Supreme Court's recent decision in *Genesis HealthCare Corp. v. Symczyk*, __ U.S. __, 133 S. Ct. 1523 (2013), demonstrate that the answer to that question is "no."

In this Fed. R. Civ. P. 23 putative class action, Allstate served Pacleb and his co-plaintiff Richard Chen ("Chen") with a Fed. R. Civ. P. 68 offer of judgment that fully satisfied their individual claims under the Telephone Consumer Protection Act ("TCPA"). Chen accepted the offer. Pacleb did not. When Pacleb did not accept the offer, Allstate extended it (while still within the 14-day period specified in Rule 68) until such time as it is accepted by Pacleb or Allstate withdraws the offer in writing. This has not occurred. Thus, Allstate's Rule 68 offer of complete

relief did not lapse, but instead remains open and available.

At the time the Rule 68 offer was made, Pacleb had yet to move for class certification. He still has not. As the only remaining plaintiff, Pacleb is the only party in this case who can potentially satisfy Article III's requirement that there be an actual, live controversy between some party and Allstate. However, he has no individual interest in that controversy because he has been offered complete relief and has no personal stake in the litigation going forward.

Because Pacleb, nevertheless, continued to pursue this lawsuit, Allstate moved to dismiss for lack of subject matter jurisdiction under the Supreme Court's recent decision in *Genesis HealthCare*. In that case, the Supreme Court held that a Rule 68 offer made before the plaintiff filed a conditional certification motion mooted the plaintiff's Fair Labor Standards Act ("FLSA") collective action and deprived the federal courts of subject matter jurisdiction. As a result of the offer, the plaintiff had "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." 133 S. Ct. at 1532; *see also id.* at 1529 ("the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied").

The District Court denied Allstate's motion to dismiss. It relied on a pre-*Genesis HealthCare* decision by this Court, *Pitts v. Terrible Herbst, Inc.*, 653 F.3d

1081 (9th Cir. 2011). In *Pitts*, the court held "that an unaccepted Rule 68 offer of judgment – for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification – does not moot a class action." 653 F.3d at 1092-93.

The District Court concluded that *Pitts* was the applicable law because the Supreme Court in *Genesis HealthCare* "emphasized that [FRCP 23] class actions are different than [FLSA] collective actions." (ER[1] 20:1-2). Nevertheless, the District Court acknowledged that *Genesis HealthCare* "did reject the reasoning that the Ninth Circuit in Pitts used … in the class action context" (ER 19:28-20:1) and that other courts disagreed with *Pitts*. (ER 14:10-20 (noting split between Seventh and Ninth Circuits, among others)). The District Court further acknowledged that *Genesis HealthCare* may presage a change in the governing law. (ER 20:2-5 ("[W]hile the Supreme Court might at some future date actually overrule Pitts and decisions from other Circuits holding that the rule articulated in Genesis also applies in class actions, as of now that has not happened and Pitts remains good law as far as the court can ascertain")).

Nonetheless, given the uncertainty created, the District Court subsequently granted Allstate's motion to certify its Order for interlocutory appeal under 28

[1] Appellant Allstate's Excerpt of Record, filed concurrently herewith ("ER").

U.S.C. § 1292(b). (ER 6:13-14 (stating that the District Court "would welcome the Ninth Circuit's view as to whether its Pitts decision remains good law in light of Genesis Healthcare")). On September 10, 2013, this Court granted Allstate's petition for permission to appeal. (ER 1).

As will be demonstrated, *Genesis HealthCare* has in fact "undercut the theory or reasoning underlying" the *Pitts* decision "in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). In particular, *Genesis HealthCare* analyzed and rejected application of the very Supreme Court cases that formed the basis for the *Pitts* decision. Instead, *Genesis HealthCare* relied on bedrock principles under Article III to conclude that a case must be dismissed where, because of a Rule 68 offer, a plaintiff has "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." 133 S. Ct. at 1532. That same logic applies here, and should dictate the dismissal of this case.

The District Court erred in not reaching this conclusion because it focused upon the Supreme Court's discussion in *Genesis HealthCare* that FLSA collective actions are different than Rule 23 actions. However, the principal difference is that, in FLSA collective actions, a plaintiff must first obtain preliminary certification and then potential collective action members still must separately opt-in to the action. In comparison, under Rule 23, class members are joined to an

action for monetary damages once certification is granted, though they have the right to opt-out. That distinction might matter in different factual circumstances. Here, however, the distinction is irrelevant because no class certification motion has been filed (much less granted). Once Pacleb's individual claims were mooted, there were no absent class members with the requisite Article III standing to keep the case or controversy alive.

Lastly, Pacleb will no doubt make the same argument made – unsuccessfully – by the plaintiff in *Genesis HealthCare* that holding this case moot would allow a defendant to "pick off" plaintiffs and thereby deprive the absent class members of relief. The simple answer to that objection is that the Supreme Court considered that very argument in *Genesis HealthCare* and rejected it. 133 S. Ct. at 1531-32. In addition, however, the fact is that the TCPA is a statute specifically designed to incentivize individual plaintiffs to bring actions in federal or state court for minimum statutory damages *per violation* of at least $500 (and up to $1500), or actual damages, whichever are higher. Thus, while the outcome of this case is dictated by Article III and *Genesis HealthCare*, the rights of consumers who believe they have been wronged under the TCPA will still be preserved even if this case is dismissed for lack of subject matter jurisdiction.

Allstate asks that the Court reverse and remand with direction to the District Court to enter judgment in favor of Pacleb, individually, consistent with the Rule 68 offer, and to then dismiss this action for lack of subject matter jurisdiction.

STATEMENT OF JURISDICTION

Federal question jurisdiction over this action, which alleges that Allstate violated the TCPA, 47 U.S.C. § 227(b), was founded on 28 U.S.C. § 1331. (ER 71, 79). *See Mims v. Arrow Fin. Servs., LLC,* __ U.S. __, 132 S. Ct. 740, 744-45 (2012) (holding that federal and state courts have concurrent jurisdiction over TCPA actions).

Allstate moved to dismiss this action for lack of subject matter jurisdiction on the ground that its offer of judgment to Pacleb, which Allstate extended until Pacleb accepts it or Allstate withdraws it in writing, renders Pacleb's claims moot. The District Court denied Allstate's motion to dismiss by Order dated June 10, 2013. (ER 7-22). On July 2, 2013, Allstate filed a motion to certify the June 10, 2013 Order for interlocutory appeal under 28 U.S.C. § 1292(b). (ER 2, 89-90). The District Court granted that motion by Order dated July 31, 2013 and amended the June 10, 2013 Order to permit an interlocutory petition to be filed. (ER 2-6).

On August 8, 2013, Allstate filed a petition for permission to appeal in this Court within ten days of the District Court's Order granting certification as required by 28 U.S.C. § 1292(b). (ER 1, 90). By Order dated September 10, 2013,

this Court granted Allstate's petition, establishing appellate jurisdiction under 28 U.S.C. § 1292(b). (ER 1).

STATEMENT OF THE ISSUE PRESENTED

In light of *Genesis HealthCare Corp. v. Symczyk*, __ U.S. __, 133 S. Ct. 1523 (2013), did Allstate's Rule 68 offer of judgment, which afforded the named plaintiff in this Rule 23 putative class action complete relief on his individual claims and was made before the filing of a class certification motion, moot the entire action and thus deprive the court of federal subject matter jurisdiction?

STATEMENT OF THE CASE AND OF THE FACTS

A. The Original and Amended Complaints

This putative nationwide class action was initially filed against Allstate by Plaintiff Chen on February 14, 2013. (ER 78, ER 87). On March 8, 2013, an amended complaint was filed adding Pacleb as a named plaintiff. (ER 70, 87).

Plaintiffs alleged that Allstate violated the TCPA by placing unauthorized calls to their cellular phones using an automatic dialing system. (ER 71-73). They sought statutory damages under the TCPA of $500 per call for a negligent violation of the TCPA, and $1500 per call for a willful violation. (ER 76-77). They did not seek any actual damages. (*Id.*)

Plaintiffs sued on behalf of themselves and all persons in the United States who allegedly received telephone calls from Allstate that violated the TCPA within

the four years prior to the filing of the complaint. (ER 73:24-27). The putative class allegedly contains "tens of thousands of members." (ER 74:12).

B. The Fed. R. Civ. P. 68 Offer

On April 10, 2013, without admitting liability, Allstate made a Rule 68 offer of judgment to Plaintiffs on their individual claims. (ER 8:15-20; ER 62-64). On May 8, 2013, Chen accepted Allstate's Rule 68 offer, and he is not a party to this appeal. (ER 8:25-27).

Although Pacleb did not accept the offer, on April 24, 2013, Allstate extended its offer of judgment until such time as it is accepted by Pacleb or Allstate withdraws the offer in writing. (ER 8 at 2:21-23; ER 69). It is undisputed that Allstate's offer affords Pacleb complete relief on his only remaining *individual* claim. (*See* ER 50:13-52:2 (colloquy between the District Court and Pacleb's counsel in which counsel states that the only way in which the offer is "insufficient" is that Pacleb wants to pursue class claims)).[2]

C. The June 10 and July 31, 2013 Orders

When Pacleb did not accept the Rule 68 offer, Allstate filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil

[2] Allstate's Rule 68 offer is based on Pacleb's original request for treble damages (*i.e.*, $1,500 per call). Pacleb's subsequent withdrawal of that claim and its dismissal by the District Court (ER 21:19-26) makes Allstate's offer all-the-more generous as Pacleb otherwise is now limited to recovering $500 per telephone call.

Procedure 12(b)(1). (ER 7-9). On June 10, 2013, the District Court denied the motion, concluding that *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), was the applicable law in the Ninth Circuit notwithstanding *Genesis HealthCare*, but acknowledging that the jurisdictional issue "remains somewhat unsettled." (*See* ER 12:7-8, 22).

On July 2, 2013, Allstate filed its motion to certify the June 10, 2013 Order for interlocutory appeal and to stay the action pending appeal. (ER 89-90). By Order dated July 31, 2013, the District Court granted Allstate's motion and amended the June 10, 2013 Order to permit this appeal. (ER 2-6).

D. Granting of the Petition to Appeal

Allstate filed its section 1292(b) petition for permission to appeal in this Court on August 8, 2013. (ER 1, 90). The petition was granted by Order of this Court dated September 10, 2013. (ER 1).

STANDARD OF REVIEW

The issue on appeal is whether Allstate's offer of judgment rendered Pacleb's claims moot, thus requiring dismissal of this action for lack of subject matter jurisdiction. "Mootness presents a question of law reviewed de novo." *Alvarez v. Hill*, 667 F.3d 1061, 1063 (9th Cir. 2012) (citing *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011)).

SUMMARY OF ARGUMENT

The Order of the District Court should be reversed and remanded with instructions that the court dismiss this action as moot, after first entering judgment on the Rule 68 offer, on the following grounds:

Article III of the U.S. Constitution limits the jurisdiction of the federal courts to live cases and controversies between the parties to litigation. Once Allstate made its Rule 68 offer of complete relief and prevented it from lapsing by extending it, there was no longer a live case or controversy between it and Pacleb. Because Pacleb had not even filed a class certification motion, the putative class members were not parties to the action and could not provide the required Article III standing. Hence, this case had to be dismissed as moot.

The District Court's reliance on *Pitts* was erroneous because of the intervening decision in *Genesis HealthCare*. *Pitts* relied heavily on five earlier Supreme Court cases in concluding that the mooting of the named plaintiff's individual claims did not moot the plaintiff's class action claims. However, in *Genesis HealthCare*, the Supreme Court held that those same five cases did not prevent dismissal of the named plaintiff's FLSA collective action once the defendant's Rule 68 offer mooted the named plaintiff's individual claims.

The District Court distinguished this case from *Genesis HealthCare* because it is a Rule 23 class action, whereas *Genesis HealthCare* was an FLSA collective

action. The Court observed that in *Genesis HealthCare*, the Supreme Court stated that FLSA collective actions are fundamentally different from Rule 23 class actions. However, the fundamental difference between FLSA cases and Rule 23 cases relates to the certification process itself, a distinction that is irrelevant here because Pacleb has not even filed a class certification motion. Hence, the putative class members are not parties to this action for Article III purposes and cannot supply the case or controversy needed to sustain this action now that Pacleb's claims have been mooted.

ARGUMENT

I. Under Article III of the U.S. Constitution, Federal Courts Lack Subject Matter Jurisdiction over a Moot Claim

Article III of the U.S. Constitution limits the jurisdiction of the federal courts to "Cases" or "Controversies." *See* U.S. Const. art. III, § 2, cl. 1. It is axiomatic that subject matter jurisdiction must exist before a federal court can decide a case. As this Court stated in *Pitts*: "The doctrine of mootness, which is embedded in Article III's case or controversy requirement, requires that an actual, ongoing controversy exist at all stages of federal court proceedings." *Pitts*, 653 F.3d at 1086 (citing *Burke v. Barnes*, 479 U.S. 361, 363 (1987)). "Whether 'the dispute between the parties was very much alive when suit was filed ... cannot substitute for the actual case or controversy that an exercise of this [c]ourt's jurisdiction requires.'" *Id*. (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)).

As *Pitts* further explained, "[a] case becomes moot 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome' of the litigation." *Id*. at 1086-87 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Thus, "if events subsequent to the filing of the case resolve the parties' dispute, we must dismiss the case as moot, *see Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1167 (9th Cir. 2008); *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1174 (9th Cir. 2005), because '[w]e do not have the constitutional authority to decide moot cases,' *Foster v. Carson*, 347 F.3d 742, 747 (9th Cir. 2003) (citation and internal quotation marks omitted)." *Id*. at 1087.

II. In a Non-Class Action, an Unlapsed Offer of Complete Relief to the Named Plaintiff Deprives the Court of Subject Matter Jurisdiction

Before turning to the question of whether an unlapsed Rule 68 offer of judgment can moot a putative class action, it is necessary to address whether an unlapsed Rule 68 offer can moot the named plaintiff's individual claim. Federal Rule of Civil Procedure 68 permits a defendant, at least 14 days before the date set for trial, to serve the plaintiff with "an offer to allow judgment on specified terms." Fed. R. Civ. P. 68. "The plain purpose of Rule 68 is to encourage settlement and avoid litigation." *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

On April 10, 2013, Allstate made its Rule 68 offer of complete relief to Pacleb, making an offer that exceeded the monetary relief sought in his complaint as to his individual claims. (ER 62-64). On April 24, 2013, Allstate extended that

offer until such time as it is accepted by Pacleb or Allstate withdraws it in writing. (ER 68). Neither of those events has occurred. Therefore, Allstate's offer to allow judgment to be taken against it remains open and has not lapsed or expired under Rule 68 or the terms of the offer.

The fact that Allstate's offer has ***not*** lapsed is significant because of a recent decision by a panel of this Court, *Diaz v. First Am. Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013). In *Diaz*, after the court denied Diaz's motion for class certification, First American made a Rule 68 offer of judgment to Diaz individually. The offer stated that if it was not accepted, it would be "null and void, and be deemed withdrawn." 732 F.3d at 950. Diaz did not accept the offer.

The *Diaz* court held that "once First American's offer lapsed, it was, by its own terms and under Rule 68, a legal nullity." *Id.* at 955. Although the court acknowledged that prior Ninth Circuit decisions had come to the opposite conclusion, *id.* at 951-52, it instead followed Justice Kagan's dissenting opinion in *Genesis HealthCare*, which focused on the fact that the offer made to plaintiff Symczyk had "expired" and "lapsed." *Id.* at 954. *Diaz* held that First American's unaccepted Rule 68 offer was insufficient to render the claim moot even though it would fully satisfy the plaintiff's claim. *Id.* at 954-55.

According to *Diaz*, ***once an offer expires or lapses***, the plaintiff has an unsatisfied claim and cannot obtain redress except by moving forward in court.

The court expressed concern that if the claim is dismissed as moot based upon a lapsed offer, the plaintiff will be sent away "empty-handed." *Id.* It stated that "'[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatsoever to the prevailing party.'" *Id.* at 955 (citation omitted).

Unlike *Diaz* and *Genesis HealthCare*, Allstate's offer to Pacleb has not lapsed. Pacleb will not walk away empty-handed, even if he does not accept Allstate's offer and the district court enters judgment upon it. In that case, Pacleb will be fully compensated for his claims and, in fact, will receive a windfall since the amount of Allstate's offer was based on Pacleb's treble damages claim that was subsequently withdrawn by plaintiff and dismissed by the District Court.

This outcome is consistent with *Diaz*, which "recognize[d] that a court may have 'discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Id*. at 955 (citation omitted). Although "[t]hat did not occur" in *Diaz*, *id.*, the District Court in this case has grounds for entering judgment in favor of Pacleb based upon Allstate's continuing Rule 68 offer. Indeed, since Allstate has offered Pacleb ***more*** than he could recover on an individual basis, it is only "obstinacy or madness" that prevents him from accepting total victory on his individual claim. *See id.*

In any event, Pacleb has no remaining personal stake in this litigation and

his claim against Allstate is moot, as made clear by other decisions of this Court. *See, e.g., Back v. Sebelius*, 684 F.3d 929, 933 (9th Cir. 2012) ("'Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case .... Action by the defendant that simply accords all the relief demanded by the plaintiff may have the same effect as settlement or an offer of settlement. So long as nothing further would be ordered by the court, there is no point in proceeding to decide the merits.'") (quoting 13B C.A. Wright, A.R. Miller & E.H. Cooper, *Federal Practice and Procedure* § 3533.2 (3d ed. 2008)); *GCB Communications, Inc. v. U.S. S. Communications, Inc.*, 650 F.3d 1257, 1267 (9th Cir. 2011) (citing, *inter alia*, *Spencer–Lugo v. INS*, 548 F.2d 870, 870 (9th Cir. 1977) (per curiam) (where INS agreed to relief that petitioners sought, no case or controversy remained)); *Marschall v. Recovery Solution Specialists, Inc.*, 399 Fed. Appx. 186, 187, 2010 U.S. App. LEXIS 20541, at *2 (9th Cir. Oct. 5, 2010) ("[t]he district court properly dismissed Marschall's individual claims against Recovery Solution Specialists, Inc. ('RSS') for lack of subject matter jurisdiction because RSS's offer of judgment was for more than Marschall was legally entitled to recover") (citing, *inter alia*, *Chang v. United States*, 327 F.3d 911, 919 (9th Cir. 2003) (case is moot where there remains "no effective relief … for the court to provide")).[3]

[3] In addition, the Supreme Court has long recognized that a named plaintiff (continued...)

Diaz expressly did not reach the plaintiff's argument that her claims were not moot because she retained a personal stake in appealing the district court's denial of class certification. *Id.* at 952. Here, by contrast, since Pacleb's individual claims are moot, this Court will be able to reach the issue of whether his class action claims are also moot – which is the issue certified by the District Court.

Lastly, because *Diaz* is plainly distinguishable from this case, Allstate anticipates that the panel of this Court that hears this appeal will not reach the issue of the correctness of the *Diaz* holding. However, to ensure the record is preserved, Allstate respectfully submits that *Diaz* was incorrectly decided. Although *Diaz* characterized prior Ninth Circuit panel decisions as merely "assuming" that an unaccepted offer for complete relief will moot an individual claim, 732 F.3d at 952, in fact *Diaz* contradicts prior panel decisions of this Court regarding

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(...continued)
cannot represent a putative class absent an individualized injury sufficient to demonstrate the existence of an Article III case or controversy. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class"); *Simon v. Eastern Kentucky Welfare Rights Orgs.*, 426 U.S. 26, 40 n. 20 (1976) ("[t]hat a suit may be a class action … adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent'") (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)).

mootness, including those cited above. Such a conflict can only be resolved by en banc review unless the conflict can be avoided (as in the present case, where *Diaz* can be distinguished on its facts). *See Vasquez v. Astrue*, 572 F.3d 586, 595 & n.5 (9th Cir. 2009); *U.S. v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam); *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987).

Moreover, *Diaz* relied heavily on Justice Kagan's dissenting opinion in *Genesis HealthCare* and "was persuaded that Justice Kagan has articulated the correct approach," 732 F.3d at 954, even though the five-justice majority openly disagreed with Justice Kagan's dissent and strongly suggested that it would be inclined to reach the exact opposite conclusion on the issue of whether a Rule 68 offer that fully satisfies the plaintiff's claims moots the action. *See Genesis HealthCare*, 133 S. Ct. at 1529 n.4. Even if the majority's comments were dicta, this Court's practice is to "treat Supreme Court dicta with due deference." *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). Because Supreme Court dicta "have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold," this Court does "not blandly shrug them off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring and dissenting). *Diaz* took the opposite approach, disregarding dicta in

a majority opinion of the Supreme Court while following dicta in a dissenting opinion.

III. *Pitts* Declined to Extend the Mootness Principle to Putative Class Actions Where a Rule 68 Offer Precedes a Filing for Class Certification

In *Pitts*, the plaintiff filed a putative class action complaint alleging that his employer failed to pay overtime and minimum wages.[4] The employer made Pitts an offer of judgment in the amount of $900.00, which satisfied his alleged damages claim of $88.00, and moved to dismiss the action for lack of subject matter jurisdiction. 653 F.3d at 1085. The district court held that the action was not moot. *Id.* This Court affirmed, holding that "an unaccepted Rule 68 offer of judgment – for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification – does not moot a class action." *Id.* at 1091-92.

The *Pitts* court observed that while the Supreme Court has described mootness as a "constitutional impediment to the exercise of Article III jurisdiction, the Court has applied the doctrine flexibly, particularly where the issues remain alive, even if 'the plaintiff's personal stake in the outcome has become moot.'" *Id.* at 1087 (citation omitted). In reaching this conclusion, the *Pitts* court analyzed five Supreme Court mootness decisions involving class actions:

[4] Pitts originally also brought an FLSA claim, but he abandoned that claim, leaving only the Rule 23 class action. *See* 653 F.3d at 1085-86, 1093-94.

1. *Sosna v. Iowa*, 419 U.S. 393 (1975). In *Sosna*, the Supreme Court held that a class action does not become moot when the named plaintiff loses her personal stake in the outcome of the litigation after the district court certifies a class. In that case, the plaintiff filed a class action challenging the constitutionality of Iowa's one-year durational residency requirement for invoking the state's divorce court jurisdiction. After the district court certified a class and ruled in favor of the plaintiff on the merits, the defendant sought Supreme Court review. While that appeal was pending, the plaintiff obtained a divorce in another state and resided in Iowa for more than one year. Although the Supreme Court acknowledged that the plaintiff's individual claim was moot, it refused to dismiss the action because the district court had already certified a class, which gave the putative class members "a legal status separate from the interest asserted by [plaintiff]." *Pitts*, 653 F.3d at 1087 (quoting *Sosna*, 419 U.S. at 399). The Court also anticipated the possibility that a case might become moot with respect to the named plaintiff's individual claim before the district court could rule on class certification. In such a case, "'whether the certification can be said to 'relate back' to the filing of the complaint may depend on the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.'" *Pitts*, 653 F.3d at 1087

(quoting *Sosna*, 419 U.S. at 402 n. 11).

2. *Gerstein v. Pugh*, 420 U.S. 103 (1975). *Gerstein* involved a challenge to the constitutionality of state pretrial detention procedures. By the time the case reached the Supreme Court, the named plaintiffs had been convicted and their pretrial detention had ended. Nevertheless, the Court held that the case belonged to that "narrow class" of cases in which the termination of a class representative's claim does not moot the claims of the putative class members. The Court reasoned that because the time of pretrial custody was short, "it was 'most unlikely' that any named plaintiff or potential class representative 'would be in pretrial custody long enough for a district judge to certify a class' …. Accordingly, the named plaintiff's substantive claim was one 'distinctly "capable of repetition yet evading review'" and, therefore, not moot." *Pitts*, 653 F.3d at 1088 (quoting *Gerstein*, 420 U.S. at 110).

3. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980). In *Roper*, the named plaintiffs filed a class action alleging that the defendant charged them usurious fees in violation of federal law. The district court denied class certification. Thereafter, the defendant tendered an offer of judgment that the plaintiffs declined. The offer included the maximum amount of damages, legal interest and court costs, but not attorneys' fees or

other litigation expenses. The district court entered judgment and dismissed the case. On appeal, the Fifth Circuit reversed the denial of class certification. Subsequently, the Supreme Court granted certiorari on the issue of whether the offer of judgment terminated the named plaintiffs' right to appeal the denial of class certification. The Court held that the case was not moot because the named plaintiffs retained "'an economic interest in class certification …, including 'their desire to shift part or all of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails.'" *Pitts*, 653 F.3d at 1088 (quoting *Roper*, 445 U.S. at 333, 336). In addition, "the Court expressed concern at the ability of defendants to 'buy off' proposed class representatives before a court can certify a class, thereby 'frustrat[ing] the objectives of class actions.'" *Id.* at 1088 (quoting *Roper*, 450 U.S. at 339).

4. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). In *Geraghty*, a federal prisoner brought a class action challenging the constitutionality of certain parole release guidelines. The district court denied class certification and ruled against the plaintiff. While the appeal was pending, the plaintiff completed his sentence and was released from prison. The Supreme Court held that the release did not moot his appeal of the order denying class certification and if the denial of class certification

was reversed on appeal, the corrected ruling would "'relate[] back' to the date of the original denial." *Pitts*, 653 F.3d at 1089 (quoting *Geraghty*, 445 U.S. at 404 n. 11).

5. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). In *McLaughlin*, the plaintiffs brought a class action challenging the county's policy of combining probable cause determinations with its arraignment procedures. The Court held that, although the named plaintiffs' claims were moot because they had received a probable cause determination or had been released, that did not moot the class claims. "Where the claims are 'inherently transitory' 'the "relation back" doctrine is properly invoked to preserve the merits of the case for judicial resolution.'" *Pitts*, 653 F.3d at 1090 (quoting *McLaughlin*, 500 U.S. at 52).

The *Pitts* court found that although these five Supreme Court decisions did not specifically address a situation in which an offer of judgment is made before the named plaintiff files a class certification motion, they provided three guiding principles. 653 F.3d at 1090. First, if a class has been certified, an offer of judgment will not moot the class action because the class acquires an independent legal status upon certification. Second, if class certification has been denied, mooting the named plaintiff's claim will not necessarily moot the class action because the named plaintiff retains an interest in appealing the denial of

certification. Third, even if the district court has not addressed class certification, mooting the named plaintiff's claim will not necessarily moot the class action. If the claim is "inherently transitory" and capable of repetition yet evading review, the "relation back" doctrine preserves the merits of the case for judicial resolution. *Id.*

Applying these principles to Pitts' case, the Court concluded that the unaccepted offer of judgment "did not moot Pitts' case because his claim is transitory in nature and may otherwise evade review. Accordingly, if the district court were to certify a class, certification would relate back to the filing of the complaint." *Id.* at 1090-91. The court explained further:

> [W]e see no reason to restrict application of the relation-back doctrine only to cases involving *inherently* transitory claims. Where, as here, a defendant seeks to "buy off" the small individual claims of the named plaintiffs, the analogous claims of the class – though not *inherently* transitory – become no less transitory than inherently transitory claims. Thus … Pitts's claims … are 'acutely susceptible to mootness' in light of [the defendant's] tactic of "picking off" lead plaintiffs with a Rule 68 offer to avoid a class action.

653 F.3d at 1091 (italics in original). In addition, the court found that "[i]nvoking the relation back doctrine in this context furthers the purpose of Rule 23," explaining that:

> Where the class claims are so economically insignificant that no single plaintiff can afford to maintain the lawsuit on his own, Rule 23 affords the plaintiffs a "realistic day in court" by allowing them to pool their claims …. *[S]ee also Roper,* 445 U.S. at 339, 100 S. Ct. 1166 ("Where it is not economically feasible to obtain relief within

> the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). A rule allowing a class action to become moot "simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs" before the named plaintiffs have a chance to file a motion for class certification would thus contravene Rule 23's core concern: the aggregation of similar, small, but otherwise doomed claims. *Roper*, 445 U.S. at 339, 100 S. Ct. 1166 ….
>
> Accordingly, we hold that an unaccepted Rule 68 offer of judgment -- for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification -- does not moot a class action. If the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the class certification issue. Then, if the district court certifies the class, certification relates back to the filing of the complaint. Once the class has been certified, the case may continue despite full satisfaction of the named plaintiff's individual claim because an offer of judgment to the named plaintiff fails to satisfy the demands of the class. *See Sosna*, 419 U.S. at 402-03, 95 S. Ct. 553. Conversely, if the district court denies class certification, under *Roper* and *Geraghty*, the plaintiff may still pursue a limited appeal of the class certification issue. Only once the denial of class certification is final does the defendant's offer -- if still available -- moot the merits of the case because the plaintiff has been offered all that he can possibly recover through litigation.

653 F.3d at 1091-92.[5]

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[5] Prior to *Genesis HealthCare*, three other Circuit Courts concurred with the reasoning of *Pitts*. *See Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1249-50 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004). However, the Seventh Circuit disagreed with the reasoning of these decisions. *See Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) ("That the complaint identifies the suit as a class action is not enough by itself to keep the case in federal court. Even when a 'complaint clearly and in great detail describes the suit as a class action suit,' if the plaintiff does not seek class

(continued...)

IV. *Genesis HealthCare* Must Control the Outcome of this Case Because *Pitts* Cannot Be Reconciled with *Genesis HealthCare*

A. The Panel Can Reexamine Prior Precedent Where a Supreme Court Opinion Undercuts Its Reasoning

In this Circuit, a panel can re-examine existing precedent if the Supreme Court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d at 900. As stated in *Miller*:

> [I]n *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002), we … recognized that circuit precedent, authoritative at the time that it issued, can be effectively overruled by subsequent Supreme Court decisions that "are closely on point," even though those decisions do not expressly overrule the prior circuit precedent. *Id.* at 1123 (internal quotation marks omitted). We cited our decision in *United States v. Lancellotti*, 761 F.2d 1363 (9th Cir. 1985), for the proposition that "we may overrule prior circuit authority without taking the case en banc when an 'intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.'" *Galbraith*, 307 F.3d at 1123 (quoting *Lancellotti*, 761 F.2d at 1366); *see also United States v. Nachtigal*, 507 U.S. 1, 2-6, 113 S. Ct. 1072, 122 L. Ed. 2d 374 (1993) (per curiam) (holding that the Ninth Circuit erred by not finding the case controlled by intervening Supreme Court authority even though circuit authority was not expressly overruled); *LeVick v. Skaggs Cos.*, 701 F.2d 777, 778 (9th Cir. 1983) ("[W]hen existing Ninth Circuit precedent has been undermined by subsequent Supreme Court decisions, this court may reexamine that precedent without the convening of an *en banc* panel."); *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 495 (9th Cir. 1979) (holding that an

(...continued)
certification, then 'dismissal of the plaintiff's claim terminates the suit.'") (citation omitted).

> intervening Supreme Court decision "undercut the ... theory" of the Ninth Circuit decision).
>
> * * *
>
> We must recognize that we are an intermediate appellate court. A goal of our circuit's decisions, including panel and en banc decisions, must be to preserve the consistency of circuit law. The goal is codified in procedures governing en banc review. *See* 28 U.S.C. § 46; Fed. R. App. P. 35. That objective, however, must not be pursued at the expense of creating an inconsistency between our circuit decisions and the reasoning of state or federal authority embodied in a decision of a court of last resort. We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable. The present case is an example where intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority.

Id. at 899-900.

As will be shown, the issue in this appeal falls squarely within the rule established in *Miller*.

B. *Genesis HealthCare* Held that the Authorities Relied on by *Pitts* Are Inapplicable Where the Rule 68 Offer Precedes the Filing of a Certification Motion

In *Genesis HealthCare*, plaintiff Symczyk, a registered nurse, sued her employer, Genesis HealthCare, under the FLSA and sought statutory damages. *See Symczyk v. Genesis HealthCare*, 656 F. 3d 189, 190 (3d Cir. 2011). The defendant served a Rule 68 offer of judgment and moved to dismiss the case as moot. *Id*. at 191. Symczyk opposed the motion, arguing that the defendant was trying to "pick off" the named plaintiff before the FLSA's collective action process

under 29 U.S.C. § 216(b) could unfold.[6] *Id*. The district court dismissed the action because no other individuals had joined Symczyk's suit, but the Third Circuit reversed.

The appellate court acknowledged that, under Third Circuit law, an unaccepted offer of judgment that fully satisfies the named plaintiff's claim moots the claim. *Id*. at 195. It concluded, however, that the defendant's attempt to "pick off" the named plaintiff with a Rule 68 offer could short-circuit the process and thereby "frustrate the goals of collective actions." *Id*. at 195, 201. The Third Circuit remanded the case to the district court so that Symczyk could seek

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[6] 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.

conditional certification. *Id.* at 201. It further held that, if she succeeded, the certification motion would relate back to the date of her complaint. *Id.*

The Supreme Court granted certiorari and reversed the Third Circuit, holding that putative collective action allegations are not enough to keep a case alive where the plaintiff's individual claims have been made moot by service of a Rule 68 offer of judgment before the filing of a certification motion. The Court ruled that the plaintiff had "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." 133 S. Ct. at 1532; *see also id.* at 1529 ("the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied").

In so holding, the Supreme Court found the authorities that *Pitts* had relied on – namely, the *Sosna* line of cases – to be inapplicable in the pre-certification context. The Supreme Court commenced its analysis by reaffirming "well-settled mootness principles." 133 S. Ct. at 1529. Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." *Id.* at 1528. To invoke federal court jurisdiction, "a plaintiff must demonstrate that he possesses a legally cognizable interest, or 'personal stake,' in the outcome of the action." *Id.* (citation omitted). "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual

and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Id.* Moreover, "'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Id.* (citation omitted). Thus, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* (citations omitted).

The Court assumed, without deciding, that an unaccepted offer of judgment that fully satisfies a plaintiff's individual claim renders the individual claim moot.[7] The Court then addressed Symczyk's argument, based upon *Sosna*, *Gerstein*, *Roper*, *Geraghty* and *McLaughlin*, that an unaccepted Rule 68 offer made before a conditional certification motion has been filed does not moot an FLSA collective action.

The Court first held that *Sosna* and its progeny were "by their own terms, inapplicable" in such a situation because in those cases class certification proceedings had already taken place, and certification had either been granted or improperly denied. 133 S. Ct. at 1529. By contrast, Symczyk had not filed a

[7] That was the law in the Third Circuit. As discussed above, *Diaz* concluded differently, but it is distinguishable because Allstate's offer remains open. Unlike the offers in *Genesis HealthCare* and *Diaz*, it has not "lapsed without entry of judgment." *See* 133 S. Ct. at 1528.

conditional certification motion: "Here, respondent had not yet moved for 'conditional certification' when her claim became moot, nor had the District Court anticipatorily ruled on any such request. Her claim instead became moot prior to these events …. There is simply no certification decision to which respondent's claim could have related back." *Id.* at 1530.

The Court further rejected Symczyk's reliance on the *Sosna* line of cases on the ground that "[o]ur cases invoking the 'inherently transitory' relation-back rationale do not apply." *Id.* at 1531. Symczyk had argued that "defendants can strategically use Rule 68 offers to 'pick off' named plaintiffs before the collective-action process is complete, rendering collective actions 'inherently transitory' in effect." *Id.* However, that rationale, the Court explained, "was developed to address circumstances in which the challenged conduct was effectively unreviewable because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Id.* It does not apply to a claim seeking statutory damages:

> [A] claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations. Nor can a defendant's attempt to obtain settlement insulate such a claim from review, for a full settlement offer addresses plaintiff's alleged harm by making the plaintiff whole. While settlement may have the collateral effect of foreclosing unjoined claimants from having their rights vindicated in *respondent's* suit, such putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all.

Id. (emphasis in original).

The Supreme Court also rejected Symczyk's argument that the policies underlying the collective action provision justified keeping the case alive. Symczyk argued that "the purposes served by the FLSA's collective-action provisions – for example, efficient resolution of common claims and lower individual costs associated with litigation – would be frustrated by defendants' use of Rule 68 to 'pick off' named plaintiffs before the collective-action process has run its course." 133 S. Ct. at 1531. She relied on the statement in *Roper* that "allowing defendants to 'pick off' party plaintiffs before an affirmative ruling was achieved 'would frustrate the objectives of class actions.'" However, the Court characterized that statement in *Roper* as mere "*dicta*" and even questioned *Roper*'s "continuing validity." *Id.*[8]

In *Pitts*, this Court found that *Sosna*, *Gerstein*, *Roper*, *Geraghty* and *McLaughlin* "provide several principles that guide our decision" not to dismiss a class action as moot when the named plaintiff receives a Rule 68 offer before a class certification motion is filed. 653 F.3d at 1090. Indeed, *Sosna* and its progeny were the very foundation for *Pitts*' analysis. In *Genesis HealthCare*, the Supreme

[8] The Court also observed that this portion of *Roper* likely was abrogated by its subsequent holding that an interest in recovering attorneys' fees is "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

Court held that those same decisions are "inapplicable" where the Rule 68 offer fully satisfies the named plaintiff's claim and precedes the filing of an FLSA conditional certification motion. 133 S. Ct. at 1529. As discussed above, the Supreme Court specifically refused to apply the "relation back," "inherently transitory," and "pick-off" theories of the *Sosna* line of cases in the pre-certification context and to claims seeking damages. Yet, *Pitts* cited no authorities other than those cases to justify the holding in that case. Accordingly, *Pitts* and *Genesis HealthCare* are irreconcilable as there is nothing else in *Pitts* that would justify a departure from the "well-settled mootness principles" that an action must be dismissed where there is no longer a live case or controversy. 133 S. Ct at 1529.

Notably, in her Supreme Court brief, Symczyk had urged the Court to follow the reasoning of the *Sosna* line of cases and this Court's decision in *Pitts.* *See* No. 11-1059, Brief for Respondent, 2012 WL 5195827, at *37-38 (U.S., filed Oct. 19, 2012) (citing *Roper* and *Sosna* and emphasizing that *Pitts* held that "a timely motion for class certification made after the individual plaintiffs received a Rule 68 offer of judgment would relate back to the time the action was filed"). The Supreme Court declined to do so and held that Symczyk's case was moot. The analysis of this Court in *Pitts* cannot be squared with the holding of the Supreme Court in *Genesis HealthCare*.

C. The Reasoning of *Genesis HealthCare* Is Not Limited to FLSA Actions and Applies in Rule 23 Class Actions

In rejecting Symczyk's arguments, the Supreme Court stated that "Rule 23 actions are fundamentally different from collective actions under the FLSA." 133 S. Ct. at 1529. The District Court in this action and some other district courts have taken that phrase out of context and concluded that *Genesis HealthCare* does not apply at all in Rule 23 class actions.[9] Such a conclusion is not supported by *Genesis HealthCare*.

The Supreme Court made its statement in the context of rejecting Symczyk's reliance on *Sosna* and its progeny because those were cases in which Rule 23 class certification proceedings were ***actually conducted***:

> [E]ssential to our decisions in *Sosna* and *Geraghty* was the fact that a putative class acquires an independent legal status ***once it is certified*** under Rule 23. Under the FLSA, by contrast, "conditional certification" does not produce a class with an independent legal status, or join additional parties to the action.

133 S. Ct. at 1530 (emphasis added). Thus, when properly read in context, the "fundamental differences" between FLSA collective actions and Rule 23 class actions to which the Court referred in *Genesis HealthCare* relate to the legal

[9] *See, e.g.*, *Craftwood II, Inc. v. v. Tomy Int'l, Inc.*, No. SA CV 12-1710 DOC, 2013 WL 3756485, at *3 (C.D. Cal. July 15, 2013) ("*Genesis* is distinguishable because it considered a claim filed as a collective action under Section 16(b) ... of the FLSA .... A ruling in the context of a collective action does not directly apply to a class action.").

consequences of certification, not pre-certification proceedings. *See also Genesis HealthCare*, 133 S. Ct. at 1527 n.1 ("there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b) [of the FLSA]").

The major difference between an FLSA collective action and a Rule 23 class action is that, in an FLSA collective action, only plaintiffs who affirmatively opt-in are bound by the judgment, whereas in a typical Rule 23 class action seeking monetary damages, potential class members are bound by the judgment unless they opt-out. *Compare* 47 U.S.C. § 216(b) *with* Fed. R. Civ. P. 23(c)(2)(B). *See also Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1123 (9th Cir. 2009) (noting the "key difference between a Rule 23 opt-out class and a FLSA opt-in collective action").

Thus, understood in context, the "fundamental difference" between a Rule 23 class action and an FLSA collective action becomes manifest only after initial certification is granted. In the Rule 23 context, once certification is granted, absent class members have gained an interest in the case and a Rule 68 offer made solely to the named plaintiff should not moot the class claims as the individual class members are parties with Article III standing. In comparison, in the FLSA context, even preliminary certification will not join the absent potential collective action members – only their affirmatively opt-in will do so – and hence a Rule 68 offer made solely to the named plaintiff prior to such joinder of absent class members

can moot the case as the named plaintiff remains the only possible source of Article III standing until others opt-in.

But the distinction between FLSA opt-in collective actions and Rule 23 opt-out class actions is irrelevant where a Rule 23 certification motion has not been filed in the first instance. Prior to the filing of a certification motion, unnamed putative class members do not have an independent legal interest in the case or controversy. They are in the same position as persons who had yet to opt-in to Symczyk's FLSA action in *Genesis HealthCare*.

In *Genesis HealthCare*, the Supreme Court emphasized that "nothing in the nature of FLSA actions precludes satisfaction – and thus the mooting – of the individual's claim before the collective-action component of the suit has run its course." 133 S. Ct. at 1529 n. 4. The same is true of a Rule 23 class action before a class certification motion has been filed because putative class members are not parties to the litigation.

As stated by Chief Justice Marshall, any possible dispute between Allstate and the still absent putative class members "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 *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 175-76 (Scalia, J., dissenting)). Putative class members in Rule 23 class actions have no rights as parties prior to

certification of a class. *See Smith v. Bayer Corp.*, __ U.S. __, 131 S. Ct. 2368, 2379 (2011) (Kagan, J.) ("[W]e have further held that an unnamed member of a *certified* class may be 'considered a "party" for the [particular] purpos[e] of appealing' an adverse judgment. *Devlin v. Scardelletti*, 536 U.S. 1, 7, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002). But as the dissent in *Devlin* noted, no one in that case was 'willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*.' *Id.*, at 16, n. 1, 122 S. Ct. 2005 (opinion of SCALIA, J.).") (emphasis by the Court). *See also Standard Fire Ins. Co. v. Knowles*, __ U.S. __, 133 S. Ct. 1345, 1346 (2013) ("a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified"); *Damasco v. Clearwire Corp.*, 662 F.3d at 896 ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III …. That the complaint identifies the suit as a class action is not enough by itself to keep the case in federal court. Even when a 'complaint clearly and in great detail describes the suit as a class action suit,' if the plaintiff does not seek class certification, then 'dismissal of the plaintiff's claim terminates the suit.'").

Further to this point, Rule 23 was amended in 2003 to clarify that, prior to class certification, there is no class to protect insofar as settlement of the named plaintiff's individual claim is concerned. Under present Rule 23(e), a named plaintiff can resolve his or her individual claims prior to the filing of a class certification motion without court approval.[10] Indeed, putative class actions routinely settle on an individual basis before class certification proceedings commence. Accordingly, there is nothing in Rule 23 that would prevent a plaintiff who has not filed a class certification motion from resolving his or her own individual claims before a certification motion has been filed. There also is nothing in Rule 23 that would preclude the dismissal of a named plaintiff's claim that has been mooted by a Rule 68 offer that fully satisfies the claim and is made prior to the filing of a class certification motion.[11]

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[10] The Committee Notes to the 2003 amendments explain: "Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be – and at times was – read to require court approval of settlements with putative class representatives that resolved only individual claims. *See* Manual for Complex Litigation Third, §30.41. The new rule requires approval only if the claims, issues, or defenses of a ***certified*** class are resolved by a settlement, voluntary dismissal, or compromise. Fed. R. Civ. P. 23(e).

[11] Moreover, it is unclear how Rule 23 could be read differently, as it is a rule of civil procedure, and certainly cannot be read to overcome the constitutional requirements of Article III as discussed *infra*.

This Court has held that a district court may dispose of the named plaintiff's individual claims on a motion for summary judgment filed by the defendant before class certification is decided. *Wright v. Schock*, 742 F.2d 541, 545 (9th Cir. 1984) (district court may dispose of named plaintiff's claims on summary judgment, before class certification proceedings requiring extensive discovery are undertaken, because "[p]utative class members remain entirely free to file suit against the banks and title companies .... [T]hey do not face a statute of limitations problem because the bringing of a class action tolls the statute of limitations as to all asserted members of the class") (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974); *Pavlak v. Church*, 727 F.2d 1425, 1426 (9th Cir. 1984)); *accord Saeger v. Pacific Life Ins. Co.*, 305 Fed. Appx. 492, 493 (9th Cir. 2008); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1013 n. 1 (9th Cir. 2000) ("In the Anderson case, Pirelli's motion for summary judgment was filed against an uncertified class of plaintiffs. When a motion is maintained against an uncertified class, only the named plaintiffs are affected by the ruling. There is no res judicata effect as to unnamed members of the purported class…. Thus, the Appellants in the instant case remained free to assert their rights against Pirelli despite the Anderson ruling.").

If a named plaintiff's individual claims in a putative class action can be adjudicated on the merits by a dispositive motion before class certification proceedings are held, there is no reason why they cannot be dismissed as moot before a class certification motion has been filed. In either case, there is no harm or prejudice to the unnamed putative class members because they are not bound by the ruling and are free to bring their own actions.

Rule 23 also cannot be read to alter constitutional mootness principles. The Rules Enabling Act, 28 U.S.C. § 2072, specifies that the Federal Rules – including Rule 23 – "shall not abridge, enlarge, or modify any substantive right." Accordingly, before a class has been certified, the happenstance that a plaintiff styled his or her complaint as a putative class action cannot alter substantive constitutional principles regarding mootness. As the Supreme Court stated in *Roper*, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs." 445 U.S. at 332.[12]

[12] In *Genesis HealthCare*, the Supreme Court rejected Symczyk's argument that her claims were not moot because she had a sufficient personal stake in the case due to the "statutorily created collective-action interest in representing other similarly situated employees under § 216(b)." 133 S. Ct. at 1530. If (continued...)

Moreover, in 1983 and 1984, Congress considered amending Rule 68 to exclude Rule 23 class actions, but decided not to do so. The proposed amendments to Rule 68 provided in relevant part that "[t]his rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." *See Weiss v. Regal*, 385 F.3d 337, 344 n. 12 (3d Cir. 2004). Congress' rejection of the proposed amendments shows that it intended Rule 68 to apply to Rule 23 class actions such as this action. As the U.S. Supreme Court recently held in *CompuCredit Corp. v. Greenwood*, __ U.S. __, 132 S. Ct. 665, 672-73 (2012), when Congress wants to create an exception, it knows how to do so and does so expressly. There is no exception in Rule 68 for class actions, and there is no logical reason why the Supreme Court's reasoning in *Genesis HealthCare* does not apply fully to Rule 23 class actions, such as the present case, where a class certification motion has not been filed.

Several district courts have recently concluded that the reasoning of *Genesis HealthCare* does apply to Rule 23 class actions and is not limited to FLSA actions. The U.S. District Court for the Southern District of Florida recently dismissed a Rule 23 TCPA class action (the same type of action that Pacleb has brought) as

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(...continued)
Symczyk had brought a TCPA claim, her argument would have been even weaker. The TCPA does not itself create a right to a class action. Indeed, as discussed *infra*, Congress envisioned the private right of action section of the TCPA as incentivizing individuals to bring suit without the need for a class action. Pacleb's class action allegations are based solely on procedural Rule 23.

moot based upon the principles articulated in *Genesis HealthCare*. *See Keim v. ADF Midatlantic, LLC*, No. 12-80577, 2013 U.S. Dist. LEXIS 98373 (S.D. Fla. July 15, 2013). The court in *Keim* rejected the same argument made by Pacleb that *Genesis HealthCare* is restricted to FLSA collective actions:

> That *Genesis* dealt with an FLSA collective action and its corollary "conditional" class certification … does not support an attempt to distinguish it materially from the facts of this case, which deals with traditional Rule 23 class certification in a TCPA case: both cases present a situation where a lone plaintiff was offered full relief before a class acquired independent legal status. In fact, any distinction between an FLSA conditional certification and a Rule 23 traditional certification … arguably cuts in favor of Defendants ….

Id. at *19-20 & n. 10. Citing *Genesis HealthCare*, the *Keim* court concluded that "filing a 'class action' complaint does not prevent a claim from being rendered moot where the sole plaintiff is offered full relief before he moves for class certification." *Id.* at *27. Accordingly, the court dismissed the action for lack of subject matter jurisdiction. *Id.* at *33-34; *accord Delgado v. Collecto, Inc.*, No. 8:13-cv-2711(M.D. Fla. Dec. 5, 2013) (following *Keim* and dismissing Rule 23 Fair Debt Collection Practices Act class action as moot).

The U.S. District Court for the Western District of Texas has also concluded that *Genesis HealthCare* applies to Rule 23 class actions. In *Masters v. Wells Fargo Bank South Central*, No. A-12-CA-376-SS, 2013 U.S. Dist. LEXIS 101171 (W.D. Tex. July 11, 2013), the court dismissed a TCPA class action (like the one brought by Pacleb) after concluding that Wells Fargo's Rule 68 offer of judgment

mooted the plaintiff's individual claims. The court concluded, based upon *Genesis HealthCare*, that the plaintiff's class action claim under the TCPA was also moot. The court observed:

> In *Genesis*, the United States Supreme Court held "the mere presence of collective-action allegations in the complaint cannot save [a Fair Labor Standards Act] suit from mootness once the individual claim is satisfied." 133 S. Ct. at 1529. Although the Court recognized Rule 23 class actions "are fundamentally different from collective actions under the FLSA," it went on to review (and distinguish) the precise Rule 23 cases Masters relies on in support of his argument. *See id.* at 1529-32 (discussing *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980); and *Sosna v. Iowa*, 419 U.S. 393 (1975)).

2013 U.S. Dist. LEXIS 101171, at *14-15. Applying *Genesis HealthCare* in the Rule 23 context, the court in *Masters* concluded that: (a) prior to class certification, the named plaintiff in a Rule 23 class action has no interest in the class claims; (b) claims for money damages are not inherently transitory; and (c) a named plaintiff whose individual claim is mooted by a Rule 68 offer of judgment has no personal interest in representing putative class members. *Id.* at *17-18; *see also Scott v. Westlake Services, LLC*, No. 12-C-9289, 2013 WL 2468253 (N.D. Ill. June 6, 2013) (holding after *Genesis HealthCare* that a putative TCPA class action was mooted by a Rule 68 offer of judgment); *Bank v. Spark Energy Holdings LLC*, No. 4:11-CV-4082, 2013 U.S. Dist. LEXIS 150733, at *38 (S.D. Tex. Oct. 18, 2013) (Rule 68 offer that fully satisfies the named plaintiff's claims and is made before a class certification motion has been filed moots the putative class claims); *Stein v.*

Buccaneers Ltd. P'ship, No. 8:13-cv-02136 (M.D. Fla. Oct. 24, 2013) (dismissing putative TCPA class action as moot).

V. Pacleb's TCPA Action Should Be Dismissed as Moot

A. Pacleb No Longer Has Article III Standing because He Has Been Offered Complete Relief

The District Court viewed *Pitts* as precedential and denied Allstate's motion to dismiss on that basis. (*See* ER 19:22-20:5). As shown above, this conclusion was in error because the reasoning of *Pitts* has been undercut by the Supreme Court in *Genesis HealthCare* to the point where the two decisions are irreconcilable. *See Miller*, 335 F.3d at 899-900. As held in *Genesis HealthCare*, the reasoning underlying the "inherently transitory," "relation back" and "pick off" theories simply does not apply in a damages case where the named plaintiff has not filed a certification motion.

Accordingly, *Pitts* does not preclude this Court from finding that the instant case should be dismissed as moot for lack of subject matter jurisdiction and, indeed, *Genesis HealthCare* dictates just that outcome. Specifically, Allstate's unexpired Rule 68 offer fully satisfies Pacleb's claims and includes reasonable attorneys' fees associated with Pacleb's individual claim. When a case ceases to affect "'the legal relations of parties having adverse legal interests,'" the case is at that moment moot, because "federal courts are without power to decide questions that cannot affect the rights of litigants in the cases before them." *North Carolina*

v. Rice, 404 U.S. 244, 246 (1971) (per curiam) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

As the Supreme Court recently clarified, a "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only' …. In order to justify a departure from that rule, 'a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.'" *Wal-Mart Stores, Inc. v. Dukes*, __ U.S.__, 131 S. Ct. 2541, 2550 (2011) (citations omitted); *accord Comcast Corp. v. Behrend*, __ U.S. __, 133 S. Ct. 1426, 1432 (2013). Here, it is undisputed that Allstate's Rule 68 offer of judgment fully compensated Pacleb for any alleged injuries he suffered as a result of Allstate's alleged conduct. By definition, he no longer possesses the same interest or suffers the same injury as the putative class members. *See Dukes*, 131 S. Ct. at 2550.

B. Neither Plaintiff's Counsel nor the Unnamed Putative Class Members Have Article III Standing

Nor are there any other interests in this litigation that would establish the requisite continued case or controversy under Article III.

First, any desire of Pacleb's lawyers to generate class action fees does not create a "case" or "controversy" within the meaning of Article III. *Lewis*, 494 U.S. at 480; *see also Diamond v. Charles*, 476 U.S. 54, 70-71 (1986) ("The fee award is wholly unrelated to the subject matter of the litigation, and bears no relation to the

statute whose constitutionality is at issue here …. [T]he mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III").

Second, dismissal of the named plaintiff's claim will not harm or prejudice the putative class members. They "remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all." *Genesis HealthCare*, 133 S. Ct. at 1531.

Indeed, unnamed class members are incentivized to pursue their individual TCPA claims if they desire. Specifically, any individual may bring a claim under the TCPA in state or federal court. *See* 47 U.S.C. § 227(b)(3); *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. at 747. A plaintiff who succeeds on a claim that the defendant negligently violated the TCPA recovers statutory damages of $500 per call even if there are no actual damages. 47 U.S.C. § 227(b)(3). If a willful violation is proven, the plaintiff can recover $1,500 per call. *Id*. A private right of action also exists for a violation of the Federal Communication Commission's ("FCC's") implementing regulations. 47 U.S.C. § 227(c)(5).[13]

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[13] In addition, the TCPA envisions civil actions instituted by the FCC for violations of the implementing regulations. *See* 47 U.S.C. § 227(g)(7) (Supp. 2011). The FCC may also seek forfeiture penalties for willful or repeated failure to comply with the Act or regulations. 47 U.S.C. § 503(b) (2006 ed. and Supp. IV), § (continued...)

Thus, the TCPA incentivizes individual litigation by offering these generous statutory damage awards to plaintiffs. *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008); *see also Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*, 421 N.J. Super. 268, 23 A.3d 469, 476-77 (N.J. App. 2011) ("[h]ere, by imposing a statutory award of $500, a sum considerably in excess of any real or sustained damages, Congress has presented an aggrieved party with an incentive to act in his or her own interest without the necessity of class action relief"); *West Concord v. Interstate Mat Corp.*, 31 Mass. L. Rep. 58; 2013, Mass. Super. LEXIS 22 (Mass. Super. Ct. March 5, 2013) ("[t]o the extent that it is argued that a class action is consistent with the Congressional intent to deter the sending of unsolicited faxes, courts have recognized that Congress sought to achieve a

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(...continued)
504(a) (2006 ed.). The FCC routinely pursues TCPA enforcement actions. *See* http://transition.fcc.gov/eb/tcd/eaby date.html.

Moreover, state attorneys general may "bring a civil action on behalf of [State] residents," if the attorney general "has reason to believe that any person has engaged … in a pattern or practice" of violating the TCPA or FCC regulations thereunder. 47 U.S.C. § 227(g)(1) (Supp. 2011). The FCC also may intervene in those suits. *Id.* § 227(g)(3). This threat of state government enforcement is real, and a number of state attorneys general have brought suit under the TCPA. *See, e.g., State of Wash. v. Fac.Com, Inc. and Fax ID, Inc.*, No. C01-0396, Consent Decree (D. Wash. Mar. 13, 2001), *available at* http://www.junkfaxes.org /news/ fax-wa.pdf; *Texas v. American Blastfax*, 121 F. Supp. 2d (W.D. Tex. 2000); *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 196 F. Supp. 2d 920 (E.D. Mo. 2002), *rev'd by* 323 F. Supp. 2d 649 (8th Cir. 2003); *Maryland v. Universal Elections*, 787 F. Supp. 2d 408 (D. Md. 2011).

balance by creating a specific personal remedy that could easily be obtained in a local court and establishing a level of damages that would provide incentive for those aggrieved by the receipt of unsolicited faxes, but be proportional to the harm caused"); *Kim v. Sussman*, No. 03 CH 07663, 2004 WL 3135348, at *3 (Ill. Cir. Ct. 2004) ("[w]here, as here, Congress has designed a statutory scheme to 'incentivize' the holder of such a claim to file suit, the necessity of invoking a class action to redress these alternative claims is diminished").

Indeed, the private action remedy in the TCPA is the result of an amendment to Senate Bill S. 1462, the purpose of which was to permit, in states willing to allow such actions, a consumer to appear without an attorney in a small claims court to recover not merely actual damages, but a minimum of $500 for each violation. *See Int'l Sci. & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152–53 (4th Cir. 1997). The drafters recognized that damages from a single violation would ordinarily amount to only a few pennies worth of ink and paper usage, and so believed that the $500 minimum damage award would be sufficient to motivate private redress of a consumer's grievance through a relatively simple small claims court proceeding, without an attorney. *See* 137 Cong. Rec. S16205–06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("[I]t would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages.").

In short, although TCPA claims can be brought as class actions in appropriate circumstances, the TCPA is a statute that encourages individual claims as well. Dismissal of a putative TCPA class action as moot prior to certification being sought will not harm or prejudice the named plaintiff or the putative class members. Dismissal also will not exculpate or immunize the defendant because there are substantial monetary incentives for putative class members to bring their own individual suits (as well as governmental and administrative enforcement powers). Most importantly, however, dismissal of the instant case is required because the federal courts cannot preside over a matter that lacks a "case" or "controversy" under Article III of the U.S. Constitution.

CONCLUSION

Allstate respectfully requests that the Court hold that this case is moot, and that it reverse and remand with direction that the case be dismissed for lack of subject matter jurisdiction after judgment has been entered in favor of Pacleb individually in accordance with the terms of Allstate's Rule 68 offer.

Respectfully submitted,

Dated: December 19, 2013

By: s/ Mark J. Levin

MARK J. LEVIN
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 864-8235
Facsimile: (215) 864-8999

levinmj@ballardspahr.com

Daniel M. Benjamin
Ballard Spahr LLP
655 West Broadway, Suite 1600
San Diego, California 92101-8494
Telephone: (619) 696-9200
Facsimile: (619) 696-9269
Email: benjamind@ballardspahr.com

Attorneys for Appellant
Allstate Insurance Company

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as this brief contains 12,336 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2012, Time New Roman, 14-point font.

Respectfully submitted,

Dated: December 19, 2013

By: s/ Mark J. Levin
MARK J. LEVIN
Attorneys for Appellant
Allstate Insurance Company

STATEMENT OF RELATED CASES

Allstate is not aware of any related cases pending in this Court.

Respectfully submitted,

Dated: December 19, 2013

By: s/ Mark J. Levin
MARK J. LEVIN
Attorneys for Appellant
Allstate Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 19, 2013

By: s/ Mark J. Levin

MARK J. LEVIN
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 864-8235
Facsimile: (215) 864-8999
levinmj@ballardspahr.com

Daniel M. Benjamin
Ballard Spahr LLP
655 West Broadway, Suite 1600
San Diego, California 92101-8494
Telephone: (619) 696-9200
Facsimile: (619) 696-9269
Email: benjamind@ballardspahr.com

Attorneys for Appellant
Allstate Insurance Company