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 U.S. District Court for the Northern District of California
Civil Case No. 4:13-cv-00685-PJH

APPELLEES' BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Appellee Florencio Pacleb ("Mr. Pacleb") respectfully requests oral argument.[i] This appeal raises important questions about application of the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S.__, 133 S. Ct. 1523 (2013), this Court's decisions in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), and *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), and Federal Rule of Civil Procedure 68. Appellant Allstate Insurance Co. ("Allstate") advocates an incorrect reading of the *Genesis* majority opinion that is contrary to that opinion's terms and to other Supreme Court case law, would abrogate *Diaz* and *Pitts*, and would put many plaintiffs out of court with nothing more than unaccepted offers of judgment, *i.e.*, with neither enforceable settlement agreements nor any court-ordered remedies. Accepting Allstate's view would transform Rule 68 from a procedural tool intended to encourage voluntary settlement into a method for denying relief on meritorious claims.

Mr. Pacleb believes oral argument on these matters would assist the Court and is appropriate given the significance of the issues.

[i] As explained *infra*, the claim of Mr. Pacleb's co-plaintiff in the district court, Richard Chen, is not at issue on appeal.

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INTRODUCTION

Appellee Florencio Pacleb has sued on behalf of himself and others to recover for Allstate Insurance Co.'s ("Allstate's") violations of the Telephone Consumer Protection of 1991 ("TCPA"), 47 U.S.C. § 227. There has been no ruling on the merits of Mr. Pacleb's claim; he has received no relief for himself or for the class he seeks to represent; and he has no settlement agreement with Allstate. Mr. Pacleb's stake in the case remains as it has always been.[1]

On these facts, the district court correctly held that Mr. Pacleb's case is not moot, and the district court's decision should be affirmed. As the Supreme Court has recently reiterated, a case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. __, 133 S. Ct. 1326, 1335 (2013) (citation and quotations omitted). In this case, opposite to a moot case, the district court may still provide Mr. Pacleb *all* the relief he seeks because he has received none.

Allstate's contrary arguments for mootness, which rely on the offer of judgment Allstate made to Mr. Pacleb, are foreclosed by settled doctrine and controlling case law. Because Allstate's offer is unaccepted, it provides Mr.

[1] This brief refers to Mr. Pacleb as sole Appellee because the claims of Mr. Pacleb's co-plaintiff, Richard Chen, are not at issue on appeal. Mr. Chen accepted an offer of judgment made by Allstate, ER 8, and his claim will presumably be dismissed by the district court upon entry of judgment consistent with Allstate's offer.

Pacleb no relief and no enforceable right to relief, which means it does not moot his case, as this Court just held. *See Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013) ("[A]n unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."). *Diaz* would be enough to decide this appeal, but Allstate's argument that its offer of individual relief moots Mr. Pacleb's class case is also foreclosed by *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), which holds 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. Allstate's argument is contrary to Rule 68 as well because the Rule provides that unaccepted offers are considered withdrawn and cannot form the basis for either dismissal or entry of judgment.[2] Fed. R. Civ. P. 68(b)

Allstate's arguments for mootness are not only doctrinally flawed but also would lead to unjust results. Allstate sought to have Mr. Pacleb's case dismissed as moot by the district court without entry of judgment in his favor. That approach was mandated by Allstate's incorrect view that its mere offer mooted Mr. Pacleb's case, because once a case becomes moot the district court is without jurisdiction to enter a judgment on the merits. And the apparent injustice of that result—sending

[2] All references to Rules are to the Federal Rules of Civil Procedure unless otherwise noted.

a plaintiff with an unresolved claim away with nothing—confirms that Allstate's understanding of mootness doctrine and Rule 68 cannot be correct.

JURISDICTIONAL STATEMENT

Mr. Pacleb agrees with Allstate's jurisdictional statement.

STATEMENT OF THE ISSUES

Did Allstate's unaccepted offer, which provided Mr. Pacleb no relief or enforceable promise of relief, and which would not have provided complete relief on his individual claim even if accepted, moot that claim? (No.)

Even if Allstate's offer mooted Mr. Pacleb's individual claim, which it did not, did Allstate's offer also moot Mr. Pacleb's class claims even though the offer provided no class-wide relief at all? (No.)

STATEMENT REGARDING ADDENDUM

An addendum setting out relevant statutory provisions and rules is bound together with this brief and begins at page 54.

STATEMENT OF THE CASE

I. Facts and Procedural History

This case arises from Allstate's unlawful practice of using an automatic telephone dialing system to make unsolicited, non-emergency calls to consumers' cellular telephones, thereby invading their privacy and violating the TCPA. ER 71. Allstate makes its unwanted calls in an attempt to sell insurance products. ER 71.

Appellee Florencio Pacleb is one of the many consumers nationwide who has received Allstate's unsolicited calls. ER 72, 74. Allstate began calling Mr. Pacleb's cell phone in February 2013 and by the time Mr. Pacleb joined this case as a plaintiff in early March, Allstate had already called him five times—four times in late February and again on March 5. ER 72–73. Mr. Pacleb is not an Allstate customer, has never provided his cell phone number to Allstate, and has never agreed to be contacted by the insurance company. ER 73. When Mr. Pacleb answered his phone in an attempt to ask that Allstate stop calling, he was unable to speak with a live person and was instead often greeted with "dead air," followed by a pre-recorded message for someone named Frank Arnold. ER 73; *cf. Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012) (calls intended for prior phone owner violate the TCPA unless current owner consents to them).

On February 14, 2013, Mr. Pacleb's co-plaintiff in the district court, Richard Chen, filed a complaint against Allstate on behalf of himself and a putative class of

consumers who have received Allstate's unlawful calls. ER 78–84. Mr. Pacleb joined the case as a named plaintiff when he and Mr. Chen filed their First Amended Complaint ("FAC") on March 8, 2013. ER 70–77.

Plaintiffs' FAC states a claim for relief under the TCPA, ER 76, which prohibits the use of an automatic telephone dialing system or prerecorded voice to make non-emergency, unconsented-to calls to cellular telephones. 47 U.S.C. § 227(b)(1)(A). The FAC seeks certification of a class of consumers similarly situated to Mr. Chen and Mr. Pacleb who have also received Allstate's automated, unconsented-to calls; an injunction prohibiting Allstate from engaging in its unlawful conduct in the future; and statutory damages. ER 73, 76–77.[3] Although the exact size of the class cannot be known prior to discovery, plaintiffs believe tens of thousands of consumers have received Allstate's illegal calls. ER 74.

On April 10, 2013, before plaintiffs had any reasonable opportunity to seek class certification, Allstate sent Mr. Chen and Mr. Pacleb an offer of judgment under Rule 68. ER 62. Allstate offered relief only to Mr. Chen and Mr. Pacleb individually, not any relief to the putative class. ER 62–64. Allstate offered to pay the two named plaintiffs statutory damages, costs, and some of their attorneys' fees, and offered to agree to stop making non-emergency calls to the named

[3] Mr. Chen and Mr. Pacleb originally sought the enhanced statutory damages available under the TCPA for willful violations, ER 76, but the plaintiffs decided not to pursue their willful-violations claim, ER 47, and the district court dismissed that claim with plaintiffs' consent. ER 21–22.

plaintiffs. ER 63. Allstate did not offer to stop its unlawful practice in general, only to stop making calls to Mr. Chen and Mr. Pacleb, and Allstate limited its offer of attorneys' fees by stating that it would pay reasonable fees incurred only up to the date of its offer (in an amount either agreed to by the parties or determined by the court). ER 63. Citing to Rule 68, Allstate provided the plaintiffs 14 days to accept its offer. ER 63.

On the fourteenth day, April 24, 2013, Allstate sent a letter to plaintiffs' counsel purporting to extend its offer indefinitely. ER 69. Although Rule 68 provides only for offers that remain open 14 days, *see* Rule 68(a), (b), and for irrevocable offers, *see, e.g.*, *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 764 (D.C. Cir. 1995), Allstate wrote that its offer would remain open until either accepted by plaintiffs or withdrawn by Allstate, meaning that the offer would remain open indefinitely and that it could be revoked at any time. ER 69. Under the terms of Allstate's letter, its offer would remain open even if the plaintiffs expressly rejected it. *Id*.

The very next day, Allstate made clear that its letter was less a good-faith settlement offer than an attempt to increase Allstate's chances of denying Mr. Chen and Mr. Pacleb relief. On April 25, 2013, Allstate moved to dismiss the FAC on the basis of its offer and purported extension letter. SER 1–17. Allstate argued that its offer mooted the case even though, at that point, neither plaintiff had

accepted the offer, had received any relief, or had any enforceable agreement with Allstate. SER 10–14. And although Allstate had offered entry of judgment in Mr. Chen's and Mr. Pacleb's favor in exchange for early resolution of their case, Allstate's motion sought to have the case dismissed *without* entry of that judgment—in other words, without any relief to the plaintiffs at all. SER 10–14, 17, 18. Allstate conceded that its argument for dismissal was contrary to this Court's decision in *Pitts*, SER 12, but argued that *Pitts*, which involved a putative Rule 23 class action, had been overruled "*sub silentio*" by *Genesis Healthcare Corp. v. Symczyk*, 569 U.S.__, 133 S. Ct. 1523 (2013), which was not a Rule 23 case. SER 14.

After the filing of Allstate's Motion to Dismiss, Mr. Chen accepted Allstate's offer, ER 8, but Mr. Pacleb did not and instead opposed Allstate's motion to dismiss on several grounds.[4] SER 19–43. Mr. Pacleb argued that an unaccepted offer cannot moot a claim, pointing out that *Genesis* had not reached that issue. SER 31–34; ER 48–49, 51. He also argued that an offer for only individual relief cannot moot a class action, as this Court held in *Pitts*, 653 F.3d at 1091–92. SER 34–39; ER 52. At oral argument, counsel for Mr. Pacleb identified

[4] As Mr. Pacleb explained in the district court, his silence in response to Allstate's offer amounted to a rejection of that offer. ER 49. Rule 68 requires that an offer be accepted in writing but not that it be rejected in writing, and a Rule 68 offer that is not accepted is "considered withdrawn." Fed. R. Civ. P. 68(b); SER 28.

Allstate's offer as incomplete as well, both for failing to provide attorneys' fees after the date of the offer and for failing to provide the relief benefitting other consumers that Mr. Pacleb seeks. ER 50–51.

The district court denied Allstate's motion to dismiss the case on the basis of its unaccepted offer. ER 7–22. The district court agreed with Mr. Pacleb that the *Genesis* majority had not reached the question of whether an unaccepted Rule 68 offer moots a plaintiff's claim. ER19. The district court then turned to whether an offer of individual relief moots a putative class action, held that *Genesis* did not silently overrule *Pitts* because *Genesis* did not involve a class action, and denied Allstate's motion as required by *Pitts*. *Id*.

This appeal followed.

II. Statutory and Rule Background

As explained above, Mr. Pacleb states his claim against Allstate under the TCPA, and Allstate contends that Mr. Pacleb's claim is moot because of an offer it made under Federal Rule of Civil Procedure 68. This section provides background about both the statute and the rule.

A. The TCPA

Congress passed the TCPA in 1991 in an effort to reduce invasive and abusive telemarketing practices. *See* TCPA, Pub. L. No. 102–243, § 2, 105 Stat. 2394, 2394 (1991). In the years prior to the law's enactment, technical

advancements in the use of autodialers and other telemarketing techniques had led to a wave of unwanted sales calls to consumers' telephones and fax machines, including "robocalls" that left unsolicited prerecorded messages and "junk faxes" that consumed paper and interfered with the transmission of legitimate messages. *See generally id*. At the time the law was enacted, more than 300,000 solicitors called more than 18 million Americans per day. *Id*. § 2(3).

Congress found based on the evidence presented to it that the use of the telephone to market goods and services to consumers at home had become "pervasive due to the increased use of cost-effective telemarketing techniques." *Id.* § 2(1). Congress also found that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety." *Id.* § 2(5). On the basis of these findings, Congress concluded that a ban on automated unsolicited telemarketing calls was "the only effective means of protecting telephone consumers." *Id.* § 2(12).

To that end, Congress barred the use of "any automatic telephone dialing system" or "artificial or prerecorded voice" to make non-emergency, unconsented-to calls to a cellular telephone service. 47 U.S.C. § 227(b)(1)(A). Congress also provided a private right of action for enforcement of the TCPA. *Id.* § 227(b)(3). Consumer plaintiffs are entitled to recover $500 in statutory damages for each

violation of the Act and may also obtain injunctive relief to force companies to stop their illegal telemarketing practices. *Id*.

Despite passage of the TCPA, unlawful telemarketing continues to be a serious problem for consumers. In 2003, the Federal Communications Commission found that the number of daily telemarketing calls had increased five-fold since 1991 and that telemarketing calls had become "even more of an invasion of privacy than they were in 1991." In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14014, 14054 (F.C.C. July 3, 2003), *available at* 2003 WL 21517853.

B. Rule 68

Federal Rule of Civil Procedure 68 establishes a procedure by which a defendant who wishes to settle a case may extend to the plaintiff an offer of judgment. If the plaintiff does not accept and ultimately obtains a judgment for less than he or she was offered, the plaintiff is responsible for post-offer costs. Fed. R. Civ. P. 68(d). Rule 68's exclusive purpose is "to promote *voluntary* cessation of litigation by imposing costs on plaintiffs who spurn certain settlement offers." *Diaz*, 732 F.3d at 955 (emphasis added) (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J. dissenting)).

A defendant seeking to invoke Rule 68 and its potential cost penalty must comply with specific requirements. The defendant must make its offer in writing

and describe the terms of its offer with specificity, *see* Rule 68(a), and the defendant's offer is considered to be irrevocable. *See, e.g.*, *Richardson*, 49 F.3d at 764. If the defendant's offer is not accepted within 14 days, it is deemed "withdrawn." Fed. R. Civ. P. 68(b); *see also, e.g.*, *Whitehouse v. Target Corp.*, 279 F.R.D. 285, 289 (D. N.J. 2012). At that point the defendant's only option, if it again wants to invoke Rule 68, is to send a second offer that complies with the Rule's requirements, *i.e.*, by describing the offer's terms in writing and with specificity, and by being irrevocable. *See* Fed. R. Civ. P. 68(b).

Rule 68 is also narrowly tailored to limit the effects of an unaccepted offer. "'The text of the Rule contemplates that a court will enter judgment only when a plaintiff accepts an offer.'" *Diaz*, 732 F.3d at 954 (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (citing Fed. R. Civ. P. 68(a))). Consequently, courts are precluded from imposing judgment against a plaintiff on the basis of an unaccepted Rule 68 offer. *Id.* The text of Rule 68 also makes evidence of an unaccepted offer inadmissible for any purpose other than to determine costs. Fed. R. Civ. Proc. 68(b).

STANDARD OF REVIEW

The district court's decision is subject to *de novo* review, *Diaz*, 732 F.3d at 951, and may be affirmed on any basis supported by the record. *Branson v. Nott*, 62 F.3d 287, 291 (9th Cir. 1995).

SUMMARY OF ARGUMENT

The district court was correct in holding that Mr. Pacleb's case is not moot, and its decision should be affirmed for two, independent reasons.

First, Mr. Pacleb's case is not moot because an unaccepted offer of judgment does not moot a plaintiff's claim, as this Court held in *Diaz*, 732 F.3d at 954–55. A claim becomes moot only if it is impossible for the district court to grant relief, *i.e.*, if the plaintiff has received all the relief he or she seeks. An unaccepted offer does not moot a claim under that test because it provides no relief at all: a plaintiff with an unaccepted offer has not received any actual relief and, because an offer becomes an agreement only when accepted, has no enforceable right to relief either. Sending a plaintiff away on the basis of an unaccepted offer would mean sending him or her away with nothing, turning mootness doctrine on its head and leading to profoundly unfair results. Moreover, even if an unaccepted offer of complete relief could moot a claim, which it cannot, Allstate's mootness argument would still fail because the insurance company never offered Mr. Pacleb complete relief.

Second, this case is not moot even if Mr. Pacleb's individual claim is moot. Under this Court's governing decision in *Pitts*, Mr. Pacleb has a cognizable Article III interest in representing the other members of the putative class, and although Allstate contends that *Pitts* has been effectively overruled by the majority opinion in *Genesis*, that contention is flatly wrong. The *Genesis* majority pointedly did not overturn the earlier Supreme Court decisions on which *Pitts* relied. Instead, the *Genesis* majority distinguished those earlier cases on the grounds that (a) they (like this case) were putative Rule 23 class actions, and a Rule 23 action is "fundamentally different" from the Fair Labor Standards Act ("FLSA") opt-in collective action at issue in *Genesis*; and (b) the plaintiffs in the earlier Supreme Court cases (like Mr. Pacleb) had claims for injunctive relief, while the plaintiff in *Genesis* did not. In short, because *Genesis* distinguished but did not overturn the cases on which *Pitts* relied, *Pitts* is still good law, and nothing in *Genesis* requires this Court to disturb its sound holding.

ARGUMENT

I. Mr. Pacleb's Individual Claim Is Not Moot.

Mr. Pacleb's individual claim is not moot for the straightforward but important reason that Mr. Pacleb has received no relief, which means his injury is unredressed and the district court may still grant him all the relief he seeks.

Mootness is a demanding doctrine, and as the Supreme Court has recently emphasized, a "case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Decker*, 133 S. Ct. at 1335 (quoting *Knox v. Serv. Emps. Int'l Union*, 567 U.S. __, 132 S. Ct. 2277, 2287 (2012)); *accord Chafin v. Chafin*, 568 U.S. __, 133 S. Ct. 1017, 1023 (2012). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 132 S. Ct. at 2287 (modifications, quotations, and citation omitted). Thus, even a defendant's agreement on the merits with a plaintiff's claim does not moot a case if the plaintiff's injury remains "concrete, persisting, and unredressed." *United States v. Windsor*, 570 U.S. __, 133 S. Ct. 2675, 2685 (2013).

Mr. Pacleb's claim is not moot under this standard because Mr. Pacleb has not received any relief. He has not received a penny in damages, nor has he been granted the injunctive relief he seeks. He retains the same interest in this case that he has had all along. Accordingly, the district court may still grant Mr. Pacleb relief (indeed, *all* his requested relief), and his claim is not moot. *See Decker*, 133 S. Ct. at 1335; *Chafin*, 133 S. Ct. at 1023; *Knox*, 132 S. Ct. at 2287.

None of Allstate's arguments alter this conclusion or meet Allstate's "heavy burden" of demonstrating mootness. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc) (internal quotation marks omitted).

While it is true that Allstate made Mr. Pacleb an offer of judgment, Mr. Pacleb did not accept Allstate's offer, and his case remains unresolved. An unaccepted offer like Allstate's is a "legal nullity," *Diaz*, 732 F.3d at 954 (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting)), that provides neither relief nor an enforceable promise of relief and does not moot a plaintiff's claim. *Diaz*, 732 F.3d at 954–55 ("[A]n unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot.") And contrary to Allstate's contention, its April 24, 2013 letter purporting to extend its offer makes no difference to the mootness analysis because lapsed or unlapsed, Allstate's offer remains unaccepted and provides no relief.

Allstate's other arguments are similarly without merit. *Diaz*'s holding is not wrong, *contra* Allstate's Br. at 16, but instead entirely consistent with, and indeed mandated by, the Supreme Court's mootness case law. And, contrary to Allstate's contention, *see* Allstate's Br. at 14, 48, this Court cannot direct the district court to enter judgment against Mr. Pacleb's will. Lastly, Allstate's mootness arguments regarding Mr. Pacleb's individual claim fail for the additional reason that even if an unaccepted offer of complete relief could moot a claim, which it cannot, Allstate never made such an offer.

A. Allstate's Unaccepted Offer Did Not Moot Mr. Pacleb's Claim.

Allstate's argument for mootness rests on its offer of judgment, but Mr. Pacleb did not accept Allstate's offer, and an unaccepted offer does not moot a plaintiff's claim, as this Court held in *Diaz*.

As explained above, a claim becomes moot only when it is "'impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Decker*, 133 S. Ct. at 1335 (quoting *Knox*, 133 S. Ct. at 2287). An unaccepted offer does not moot a claim under that test because it provides no relief at all and leaves the district court free to provide relief instead. An unaccepted offer does not provide any actual relief because it is merely an offer, and it does not provide any enforceable right to relief because as a matter of black-letter contract law, an offer becomes an agreement only when it is accepted according to its terms. *See, e.g.*, *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 151 (1886) ("[A]n offer . . . imposes no obligation until it is accepted according to its terms."); *Grimes v. New Century Mortg. Corp.*, 340 F.3d 1007, 1011 (9th Cir. 2013) (no contract is formed without "mutual consent"). An unaccepted offer "is a legal nullity, with no operative effect." *Diaz*, 732 F.3d at 954 (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting)).[5]

[5] *See also, e.g.*, *Blossom v. R.R. Co.*, 70 U.S. 196, 205–06 (1865) ("[u]naccepted offers to enter into a contract bind neither party, and can give rise to no cause of action [for breach]"); *Donovan v. RRL Corp.*, 27 P.3d 702, 709 (Cal.

Simply put, Mr. Pacleb's case is not moot because Allstate's unaccepted offer provides no relief, and the district court can still grant Mr. Pacleb all the relief he seeks. *See Decker*, 133 S. Ct. at 1335.

This Court's recent decision in *Diaz* confirms the correctness of this analysis and controls the outcome here. The plaintiff in *Diaz*, like Mr. Pacleb, filed a putative consumer class action. *Diaz*, 732 F.3d at 950. The defendant, like Allstate, offered judgment on the plaintiff's individual claims. *Id*. The plaintiff, again like Mr. Pacleb, never accepted the defendant's offer. *Id*. On those materially indistinguishable facts, the *Diaz* panel held that the plaintiff's claims were not moot, stating its holding in clear terms that dispose of Allstate's appeal: "We . . . hold that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Id*. at 954–55; *see also Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting) ("an unaccepted offer of judgment cannot moot a case"); *Yaakov v. ACT, Inc.*, No. 12–40088–TSH, __ F. Supp. 2d __, 2013 WL 6596720, at *4 (D. Mass. Dec. 16, 2013) (same); *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524, 2013 WL 5734146, at *3 (N.D. Cal. Oct. 22, 2013) (applying *Diaz* to deny motion to dismiss); *Morris v. CACH, LLC*, No. 2:13–CV–00270–APG–GWF, 2013 WL 5738047, at *1 (D. Nev. Oct. 22, 2013) (same); Br. for the

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2001) (no contract without consent); Cal. Civ. Code § 1550 (same); Restatement (Second) of Contracts § 3 (same).

United States as *Amicus Curiae* Supporting Affirmance at 11, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S.__, 133 S. Ct. 1523 (2013) (an offer of judgment "has no effect on the plaintiff's claim unless and until the plaintiff accepts it").

The Supreme Court's mootness cases and *Diaz* are enough to decide this case, but Allstate's position is contrary to Rule 68 as well. Rule 68 provides that a district court may enter judgment only on the basis of an *accepted* offer, not on the basis of an unaccepted offer like Allstate's. Fed. R. Civ. P. 68(a); *Diaz*, 732 F.3d at 954 ("'Rule 68 precludes a court from imposing judgment for a plaintiff . . . based on an unaccepted settlement offer made pursuant to its terms.'" (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting))). And Rule 68(b) provides that an unaccepted offer "is considered withdrawn" and makes "[e]vidence of an unaccepted offer" inadmissible "except in a proceeding to determine costs." Fed. R. Civ. P. 68(b). Relying on an unaccepted offer to dismiss or enter judgment, as Allstate advocates, would violate that provision because the proceeding would not be merely to "determine costs." *Id*.; *see also Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *Diaz*, 732 F.3d at 954;.

Moreover, Rule 68 imposes only one consequence on a plaintiff who refuses an offer of judgment; namely that the plaintiff pay post-offer costs if he or she ultimately wins a judgment for less than what was offered. *See* Fed. R. Civ. P. 68(d). The Rule does not provide for dismissal or involuntary judgment as a

consequence, and under the well-known canon *expressio unius*, the failure to include them as other consequences "must be presumed intentional." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000); *see also Yaakov*, 2013 WL 6596720, at *4. Accepting Allstate's argument that an unaccepted offer moots a case would undermine Rule 68's purpose as well, since the Rule is intended "to promote *voluntary* cessation of litigation," not involuntary dismissals. *Diaz*, 732 F.3d at 954 (emphasis added) (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting)); *see also id*. ("The Rule provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent." (also quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting)).[6]

Allstate's argument that an unaccepted offer moots a case is not only contrary to Rule 68's terms but would also make the Rule self-defeating.

[6] For the same reason, a ruling for Allstate would undermine rather than promote the general policy favoring settlement. *Contra Amicus* Brief of California Retailers Association ("CRA Br.") at 20. The policy favoring settlement favors "*voluntary* settlements," not involuntary dismissals. *See EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987) (emphasis added); *see also, e.g.*, *Circle Z Fabricators, Ltd. v. Hydro–X, LLC*, No. C–12–190, 2012 WL 3262434, at *5 (S.D. Tex. Aug. 8, 2012) ("[T]o enforce an agreement that never was executed . . . . would be contrary to public policy favoring voluntary settlements."); *Channel v. Loyacono*, 954 So. 2d 415, 427 (Miss. 2007) ("no policy favoring settlement would be undermined by allowing the plaintiffs to go forward with their suit against [defendants with whom they had not agreed to settle]"); *cf. Redmon v. Sinai-Grace Hosp.*, No. 12–CV–15462, 2013 WL 5913985, at *7 (E.D. Mich. Nov. 4, 2013) (policy favoring enforcement of valid settlement agreements is not served if plaintiff "received no real benefit in exchange for her release of claims").

Allstate's position is that a defendant's mere offer moots a case and deprives the presiding district court of subject matter jurisdiction. *See* Allstate's Br. at 14–15. If that is true, then no district court could ever enter the judgment offered by a defendant under Rule 68 (assuming the defendant's offer were accepted) because a district court without subject matter jurisdiction is without authority to enter judgment. *See* Restatement (Second) of Judgments § 1 (first requisite of a valid judgment is that "the court has jurisdiction of the subject matter").[7] Rule 68 would effectively be void.

In sum, an unaccepted Rule 68 offer like Allstate's does not moot a case because it provides no relief and leaves the court free to provide relief instead, *see Decker*, 133 S. Ct. at 1335, and dismissing or granting judgment on the basis of an unaccepted settlement offer would violate Rule 68's terms and make the Rule self-defeating.

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[7] *See also, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) ("'Without jurisdiction the court cannot proceed at all in any cause.'" (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868))); *Elliott v. Perisol's Lessee*, 26 U.S. 328, 340 (1828) ("[I]f [a court] act[s] without authority, its judgments and orders are regarded as nullities."); *Reeb v. Thomas*, 636 F.3d 1224, 1228–29 (9th Cir. 2011) (vacating judgment entered without jurisdiction); *Homestead Ins. Co. v. Casden Co.*, 234 F. App'x 434, 435 (9th Cir. 2007) ("[T]he district court lacked jurisdiction to entertain the action. All subsequent orders issued by the district court . . . are void ab initio."); Rule 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *cf. Tapper v. C.I.R.*, 766 F.2d 401, 403 (9th Cir. 1985) (court without jurisdiction cannot enter judgment even with the parties' consent).

B. Allstate's April 24, 2013 Letter Does Not Change the Analysis.

Allstate's April 24, 2013 letter purporting to extend its offer does not change the mootness analysis. *Contra* Allstate's Br. at 13. Allstate's offer, lapsed or unlapsed, remains unaccepted, which means it provides no relief and does not moot Mr. Pacleb's claim under *Decker* and similar cases. Allstate's unlapsed-offer argument is also contrary to *Diaz* and to Rule 68 and would lead to absurd and unfair results.

As an initial matter, Allstate's unlapsed-offer argument fails under all the mootness cases already cited. As discussed, a case is moot only if it is "impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker*, 133 S. Ct. at 1335 (citation and quotations omitted). Allstate's offer, lapsed or unlapsed, is still unaccepted, which means it provides Mr. Pacleb nothing—no monetary or injunctive relief, and not even an enforceable right to either. *See, e.g.*, *Minneapolis & St. L. Ry. Co.*, 119 U.S. at 151 (an open offer "imposes no obligation upon either party") (cited in both *Diaz* and the *Genesis* dissent). Accordingly, the district court can still grant Mr. Pacleb all the relief he seeks, and his case is not moot. *See Decker*, 133 S. Ct. at 1335.

Allstate's unlapsed-offer argument is also inconsistent with *Diaz*. In stating its holding, the *Diaz* panel focused on whether an offer has been accepted, not on whether it has lapsed: "We therefore hold that an *unaccepted* Rule 68 offer that

would have fully satisfied a plaintiff's claim does not render that claim moot." 732 F.3d at 954–55 (emphasis added); *see also Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting) ("[A]n unaccepted offer of judgment cannot moot a case."). Accepting Allstate's argument would violate the plain terms of *Diaz*'s holding.

Although Allstate makes much of the fact that *Diaz* later refers to the offer at issue as having lapsed (lapse apparently having been undisputed), that reference to lapse cannot bear the weight Allstate puts on it. It is of course true that an unaccepted offer that has also lapsed has no mooting effect, and *Diaz* supports that unremarkable proposition. *See Diaz*, 732 F.3d at 954; *see also Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting). But it is very different to claim, as Allstate does, that an unaccepted offer *has* a mooting effect before the offer lapses. The latter proposition simply does not follow from the former, and nothing in either *Diaz* or *Genesis* supports the proposition that an unaccepted, unlapsed offer moots a case.

On the contrary, *Diaz* states its holding—that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot"—in unqualified terms, with no language suggesting that the holding applies only to "*lapsed*, unaccepted offers," even though such language would have been easy to include. *See* 732 F.3d at 954–55. *Diaz* also states that the plaintiff in that case had a live claim *before* the defendant's offer lapsed as well as after, which cannot be squared with Allstate's view that an unlapsed, unaccepted offer moots a

case. *See* 732 F.3d at 955 ("After the offer lapsed, *just as before*, [Ms. Diaz] possessed an unsatisfied claim . . . ." (emphasis added) (quoting *Genesis*, 133 S. Ct. at 1534 (Kagan, J., dissenting))). Equally important, because *Diaz* rests on the premise that a case is not moot unless it is impossible for a court to grant relief, *Diaz*, 732 F.3d at 953–54, it would make no sense to read *Diaz* to mean that an unlapsed but unaccepted offer, which provides no relief and "imposes no obligation," *Minneapolis & St. L. Ry. Co.*, 7 S. Ct. at 169, moots a plaintiff's case.

In addition to being inconsistent with mootness doctrine and *Diaz*, Allstate's unlapsed-offer argument is inconsistent with Rule 68 for the same reasons given in the preceding section. Allstate's offer, lapsed or unlapsed, remains unaccepted, which means it is inadmissible except in a proceeding to determine costs and cannot support either a judgment or dismissal. *See* Fed. R. Civ. P. 68(a), (b); *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting); *Diaz*, 732 F.3d at 954; *Yaakov*, 2013 WL 6596720, at *4. Forcing Allstate's offer on Mr. Pacleb against his will would also violate the Rule's purpose of promoting "voluntary" settlement. *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting).

Allstate's unlapsed-offer argument is inconsistent with Rule 68 in another respect as well. Allstate's theory is that its April 24, 2013 letter extended its Rule 68 offer indefinitely, but Rule 68 does not permit that kind of indefinite extension. Rule 68 offers are valid for only 14 days and, if not accepted within that 14-day

period, are considered withdrawn. *See* Fed. R. Civ. P. 68(a), (b); *see also, e.g.*, *Whitehouse*, 279 F.R.D. at 289. After 14 days the defendant's only option under Rule 68 is to send a second offer, *i.e.*, a new offer that complies with the Rule's requirements by being in writing, describing its terms with specificity, and being irrevocable. *See* Fed. R. Civ. P. 68(b); *Richardson*, 49 F.3d at 764. Allstate's April 24, 2013 letter was not a second Rule 68 offer because it did not describe the offered terms with specificity and because it made Allstate's offer revocable. ER 69. While a defendant like Allstate may of course make a *non*-Rule 68 settlement offer at any time and on the terms it prefers, Allstate is wrong to claim that its April 24, 2013 letter indefinitely extended a *Rule 68* offer.

Last but not least, accepting Allstate's unlapsed-offer argument would lead to absurd and unjust results. Allstate's theory is that a Rule 68 offer moots a case so long as it is "standing" or remains "open." Allstate's Br. at 1, 2. If that is true, then cases around the country are being mooted whenever defendants send Rule 68 offers, are becoming un-moot when the offers lapse, and are then being re-mooted when new or extended offers are made—an absurd cycling between justiciability and non-justiciability that could go on forever and, if defendants send new offers every fifteenth day, prevent any judicial intervention on the merits of unresolved cases. Perhaps even worse, Allstate's view is that a defendant may go into court and have a case dismissed merely by making a settlement offer and then sending a

letter stating that the offer will remain open until accepted or withdrawn (making rejection impossible). Accepting that view would allow defendants unilaterally to put plaintiffs with meritorious claims out of court. The absurdity and injustice of Allstate's position provide more reasons for rejecting it.

For all these reasons, Allstate's April 24, 2013 letter makes no difference to the mootness analysis and does not meet Allstate's heavy burden of demonstrating that Mr. Pacleb's claim is moot.

C. Allstate's Other Arguments Regarding the Mootness of Mr. Pacleb's Individual Claim Are Without Merit.

Allstate makes two additional, meritless arguments regarding the mootness of Mr. Pacleb's individual claim.

First, Allstate argues incorrectly that even if Mr. Pacleb's case is not now distinguishable from *Diaz*, this Court may make it distinguishable by directing the district court to enter judgment in Mr. Pacleb's favor. *See* Allstate's Br. at 14. Allstate's argument on this point is directly contrary to Rule 68 because the Rule, as discussed, precludes entry of judgment on the basis of an unaccepted offer. *See supra* pp. 16-20. Allstate's argument that this Court should direct the district court to enter judgment is also inconsistent with other sections of Allstate's own brief. Allstate argues elsewhere that its unaccepted offer mooted Mr. Pacleb's case and deprived the district court of jurisdiction. If that is true, the district court is without

authority to enter the judgment Allstate asks this Court to direct. *See* Restatement (Second) of Judgments § 1; *supra* n.7 (citing additional authorities).

Allstate's argument for entry of judgment is waived as well because Allstate never made that argument in the district court. *See, e.g.*, *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007) (arguments not raised in district court waived on appeal). Although Allstate offered the plaintiffs judgment in their favor in exchange for early resolution of their case, ER 63, Allstate then sought dismissal *without* entry of that judgment—presumably because Allstate preferred to put plaintiffs out of court without any relief if possible. *See* SER 17 (Allstate's motion, asking that "a Judgment of *Dismissal* be entered *in its favor and against Plaintiffs*") (emphasis added); SER 18 (Allstate's proposed order). Having never sought entry of judgment in Mr. Pacleb's favor in the district court (and having actually sought the opposite), Allstate cannot seek such a judgment now. Nor can Allstate possibly demonstrate that the district court abused its discretion by not entering a judgment Allstate never sought. *See Diaz*, 732 F.3d at 955 (describing entry of judgment as a discretionary decision).

Allstate's argument that the district court should be directed to enter judgment is not even supported by *Diaz*, which Allstate cites. While *Diaz* states that a district court "may" have discretion in extreme circumstances to enter an involuntary judgment in a plaintiff's favor, the *Diaz* panel declined to consider the

issue or direct entry of judgment in that case because the district court had not done so. 732 F.3d at 955. This case is in the same posture: entry of judgment "did not occur here," ER 22, just as it did not occur in *Diaz*, 732 F.3d at 955. Accordingly, the same result should obtain, and Mr. Pacleb should be permitted to proceed.

Justice Kagan's *Genesis* dissent, quoted by *Diaz*, similarly undercuts Allstate's argument. The *Genesis* dissent explains that while entry of involuntary judgment may be appropriate in some cases, it is *not* permissible in a case like Mr. Pacleb's because the entered judgment would not provide any of the class-wide relief Mr. Pacleb seeks. *See Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (district court may not enter judgment "satisfying an individual claim [that] does not give a plaintiff . . . 'all that [he] has . . . requested in the complaint (*i.e.*, relief for the class'") (quoting *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 325, 441 (1980) (Rehnquist, J., concurring))). Given that *Diaz* relied principally on Justice Kagan's dissent when stating that a district court "may" have discretion to enter an involuntary judgment in some cases, *see* 732 F.3d at 955, the fact that Justice Kagan's dissent would not allow entry of judgment here is significant.[8]

[8] *Diaz* cited two other cases using a "*cf.*" signal, and both are easily distinguishable (and decided in circuits that appear to allow an unaccepted offer to moot a case, *contra Diaz*). In *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340 (2d Cir. 2005), the Second Circuit held that the district court could enter judgment in a case in which the parties agreed to that resolution—unlike in this case. *Id*. at 342. In *Chathas v. Local 134 International Brotherhood of Electrical Workers*, 233 F.3d 508 (7th Cir. 2000), unlike *Diaz* or here, the district court had already

Second, Allstate argues incorrectly that *Diaz* was wrongly decided. In fact, *Diaz*'s holding that an unaccepted offer does not moot a plaintiff's claim is faithful to, and indeed mandated by, the Supreme Court's mootness case law. *See Decker*, 133 S. Ct. at 1335; *Chafin*, 133 S. Ct. at 102; *Knox*, 132 S. Ct. at 2287. *Diaz* is also faithful to the black-letter principle that an unaccepted offer is not an agreement, *see supra* pp. 16–18, and is consistent with Rule 68, *see supra* pp. 18–19, while Allstate's arguments for mootness run counter to both.

Diaz creates no conflict with the *Genesis* majority opinion, contrary to Allstate's and its *amici*'s claims. The *Genesis* majority declined to decide whether an unaccepted offer moots a plaintiff's claim, so *Diaz* cannot possibly conflict with the majority's opinion. *See Genesis*, 133 S. Ct. at 1528–29 & n.4; *Diaz*, 732 F.3d at 952. The *Genesis* majority did note a circuit split on the issue, and described circuits on both sides as allowing involuntary satisfaction of a plaintiff's claim in some circumstances, *see* 133 S. Ct. at 1528–29 & n.4, but that description of the then-existing circuit split was not a holding, as the majority made clear, and is no longer even an accurate summary of circuit law after *Diaz*.

Allstate and its *amici* fare no better in claiming that *Diaz* creates a conflict within Ninth Circuit case law. All the Ninth Circuit decisions Allstate and its

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exercised its discretion to grant the plaintiffs relief. *Id*. at 512. Moreover, the relief granted was the same broad injunction the plaintiffs sought, *id*. at 511–13, whereas in this case Allstate offered a narrower injunction than the one Mr. Pacleb seeks, *compare* ER 63 *with* ER 75–76.

amici cite are distinguishable or non-precedential, and several pre-date the Supreme Court's *Decker*/*Chafin*/*Knox* line of cases. *See Back v. Sebelius*, 684 F.3d 929, 932–33 (9th Cir. 2012) (no Rule 68 offer at issue, and federal regulations already provided the administrative process plaintiff sought, unlike here where Allstate's unaccepted offer provides Mr. Pacleb nothing); *GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1267 (9th Cir. 2011) (case *not* moot because defendant's offer unaccepted); *Marschall v. Recovery Solution Specialists, Inc.*, 399 F. App'x 186, 187 (9th Cir. 2010) (non-precedential); *Chang v. United States*, 327 F.3d 911, 919 (9th Cir. 2003) (no Rule 68 offer at issue and case not moot); *Spencer-Lugo v. INS*, 548 F.2d 870, 870 (9th Cir. 1977) (per curiam) (no case or controversy because plaintiffs could not yet demonstrate injury).

* * * * *

In conclusion, Allstate's unaccepted offer of judgment did not moot Mr. Pacleb's case, and all of Allstate's arguments to the contrary are without merit.

D. Even If an Unaccepted Offer of Complete Relief Could Moot a Claim, Which it Cannot, Allstate Never Made Such an Offer.

All of Allstate's mootness arguments fail for the additional reason that even if an unaccepted offer of complete relief could moot an individual claim, which it cannot, Allstate never offered Mr. Pacleb complete relief.

Even in those circuits that have suggested an unaccepted offer can moot a claim, *contra Diaz*, 732 F.3d at 954–55, an offer must be for the plaintiff's

maximum possible recovery, including everything the plaintiff has requested, in order to moot the plaintiff's case. *See, e.g.*, *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567 (6th Cir. 2013); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1243 (10th Cir. 2011). "An offer limited to the relief the *defendant* believes is appropriate does not suffice." *Hrivnak*, 719 F.3d at 567.

Allstate's offer would not moot Mr. Pacleb's case under this standard, even outside the Ninth Circuit. For one thing, Allstate's offer does not match Mr. Pacleb's request for injunctive relief. Mr. Pacleb seeks a broad injunction prohibiting Allstate from engaging in its unlawful conduct in the future, *see* ER 75, 76, but Allstate offered only to stop making calls specifically to Mr. Pacleb. ER 63; *see also* ER 51 (plaintiff's counsel's argument in the district court that Allstate's offer is insufficient because it provides relief only to Mr. Pacleb); *cf. Chathas*, 233 F.3d at 512 ("Had the injunction that the judge entered been narrower than the plaintiffs wanted, they could have appealed just like any other plaintiff who obtains only partial relief in the trial court and is dissatisfied.").[9]

[9] While Mr. Pacleb phrased his insufficient-offer argument in the district court as being about relief to absent class members, the argument was broad enough to encompass the more specific point being made here—namely, that Allstate's offer to stop making calls to the named plaintiffs does not match the plaintiffs' request for injunctive relief. And the district court may be affirmed on any basis supported by the record. *See Branson*, 62 F.3d at 291.

Also, although any argument by Allstate that Mr. Pacleb is not entitled to the broader injunction is irrelevant under *Hrivnak* and similar cases, Mr. Pacleb notes he has a strong claim to the broader injunction even as an individual plaintiff. A

Allstate also did not offer the maximum attorneys' fees Mr. Pacleb may recover. The TCPA does not itself provide for fees, but Mr. Pacleb may be able to recover his attorneys' fees under California Code of Civil Procedure Code § 1021.5 if his case is successful. *See In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, 11-md-02295-JAH-BGS, 2014 WL 223557, at *4 (S.D. Cal. Jan. 8, 2014); *see also* ER 77 (Mr. Pacleb's prayer for "[a]ny and all other [just and proper] relief"). Allstate, however, offered to pay only attorneys' fees incurred through the date of its offer, not all Mr. Pacleb's fees, and that attorneys' fees limitation makes the offer incomplete. *See Lobianco v. John F. Hayter, Attorney at Law, P.A.*, 944 F. Supp. 2d 1183, 1186–87 (N.D. Fla. 2013) (case not moot because defendant offered only fees through date of offer); *see also* ER 50 (plaintiff's counsel's pointing this out during argument in the district court).

Thus, Allstate's offer is incomplete even vis-à-vis Mr. Pacleb's individual claim, and that incompleteness provides another basis for affirming the district court's decision.

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broad injunction is appropriate in an individual case if necessary to give the plaintiff meaningful relief, *see, e.g.*, *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–02 (9th Cir. 1996), and because Allstate's phone-ownership records are inaccurate (as demonstrated by its messages for a Mr. Arnold left on Mr. Pacleb's phone, ER 73), a narrow injunction prohibiting only calls directed to Mr. Pacleb would not actually protect him. He might still receive unwanted messages nominally sent "to" Mr. Arnold or someone else.

II. Even if This Court Assumes That Allstate's Unaccepted Offer Mooted Mr. Pacleb's Individual Claim, He Retains an Interest in Representing the Putative Class.

Binding precedent of this Court holds that a named class representative maintains a "case and controversy" interest under Article III even if his individual claims have been satisfied, because he retains an interest in representing the other members of a putative class. In *Pitts v. Terrible Herbst*, 653 F.3d 1081, 1089 (9th Cir. 2011), as in this case, a defendant attempted to pick off a named class representative by making a Rule 68 offer of judgment prior to the class being certified, and argued that the presentation of its offer mooted the case. After an extensive discussion, this Court rejected the defendant's argument, 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." *Pitts*, 653 F.3d at 1092.

As Allstate effectively acknowledged in the district court, and as the district court made clear in its orders below, this case is governed by *Pitts* unless this Court were to hold that *Pitts* has been overturned by the U.S. Supreme Court's decision in *Genesis*. ER 6. Accordingly, left with no alternative, Allstate argues that this Court's decision is *Pitts* is no longer good law, on the theory that the Supreme Court rejected its rationale in *Genesis*. SER 14 (arguing "*Genesis Healthcare* has overruled *Pitts sub silentio*").

This Court's thoughtful rationale in *Pitts* relies upon a number of U.S. Supreme Court decisions recognizing a class representative's unique interest in pursuing a Rule 23 class action: *County of Riverside v. McLaughlin*, 500 U.S. 441 (1991); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980); *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980); *Gerstein v. Pugh*, 420 U.S. 103 (1975); and *Sosna v. Iowa*, 419 U.S. 393 (1975). A core failing of Allstate's position is that *Genesis* did not overturn the relevant holdings of any (much less all five) of those decisions as they relate to this case. The majority opinion in *Genesis*, by its express terms, is limited to the context of collective actions under the FLSA, and rather than overturn any of the five prior Supreme Court decisions just named, the *Genesis* majority, again in express terms, declined to address their ongoing validity in this setting.

A. A Named Class Representative Has a Personal Stake In Representing a Putative Class.

Under the Supreme Court's Rule 23 jurisprudence, even if Mr. Pacleb's personal economic claim was mooted by Allstate's unaccepted offer of judgment, the case as a whole is not moot, because Mr. Pacleb maintains a personal stake in representing the class.

First, a named class representative's interest in representing the class is separate from his personal and individual economic interest; he undertakes both a duty and a right to represent the interests of the class. "In a class action complaint,

the named plaintiff, as the putative class representative, has a special role of assuming responsibility for the entire class of persons." *Lamberson v. Fin. Crimes Servs., LLC*, No. 11–98 (RHK/JJG), 2011 WL 1990450, at *4 (D. Minn. April 13, 2011), citing *Johnson v. U.S. Bank Nat'l Ass'n*, 276 F.R.D. 330, 332 (D. Minn. 2011). Put another way, a proper named class representative does not just try to recover money for himself, but instead has a duty to represent the interests of the entire class.

Flowing from that duty is a right. As this Court stated in *Pitts*, "the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met." 653 F.3d at 1089. Accordingly, "special mootness rules apply in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own." *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, No. 8–11–cv–02467, 2013 WL 5476979, at *4 (D. Md. Oct. 2, 2013) (citation and quotations omitted). Thus, *Pitts* makes clear that in the class-action context, "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." *Pitts*, 653 F.3d at 1091–92.

This Court's conclusion in *Pitts* is confirmed and supported by the Supreme Court's decisions in *Roper* and *Geraghty*. *Roper* recognizes that a putative class

representative retains "an economic interest in class certification." 445 U.S. at 333. And as Justice Rehnquist pointed out in his *Roper* concurrence, there is no rule of law "that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims," *id.* at 341 (Rehnquist, J., concurring), because in that situation, "the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class)[.]" *Id.*

Similarly, in *Geraghty*, the Supreme Court held that a named plaintiff maintains the "personal stake" required by Article III in "the right to represent a class." 445 U.S. at 402. The Court explained that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied," because the "proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404. In such cases, not only do the merits of the class's claims remain at issue, but also "[t]he question whether class certification is appropriate," and the putative class representative can "continue[] vigorously to advocate his right to have a class certified" regardless of the status of his personal claim. *Id.* at 403–04.

Application of these principles is particularly appropriate here given Mr. Pacleb's claim for injunctive relief, which supports reliance on the "relation back" doctrine discussed in *Pitts*. *Pitts* explains that a class representative's personal

interest in representing a class exists even before a class is certified and that if a class is ultimately certified, that certification will relate back to the filing of the plaintiff's complaint:

> 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.

Pitts, 653 F.3d at 1092.

The relation-back doctrine discussed in *Pitts* is especially important in a case such as this, where Mr. Pacleb seeks an injunction against illegal activity (the making of unconsented-to calls) that happens briefly, with each call ending long before any lawsuit can be pursued to the point of class certification, much less a final judgment. When a case involves such short-term, transitory illegal acts directed against so many, permitting a defendant to moot a claim for injunctive relief with an offer, like Allstate's, that provides relief only to the individual plaintiffs would make it impossible ever to address the problem of the defendant's unlawful conduct in a broad, forward-looking way. *See, e.g.*, *Pitts*, 653 F.3d at 1087–88. Thus, in *Pitts* this Court noted that "where the claims are inherently transitory, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." 653 F.3d at 1090 (quotations and citation

omitted). This Court cited the Supreme Court's *Sosna* decision to explain that the "relation back" doctrine is particularly robust where, as here, "the issue would evade review." *Pitts*, 653 F.3d at 1087 (quoting *Sosna*, 419 U.S. at 402 n.11).

Pitts also relied on *Gerstein*, which involved a challenge to pretrial detention, to illustrate how issues might evade review and trigger the "relation back" doctrine. *Pitts*, 653 F.3d at 1087–88 (discussing *Gerstein*, 420 U.S. at 110 n.11). Because pretrial detention is quite brief, mooting a class action would permit the defendant always to evade review. *Pitts*, 653 at 1088. In this case, the illegal conduct is far briefer (with most unauthorized phone calls taking far less time than even the briefest allegedly illegal pretrial detention), and thus the concern about illegal conduct that is "capable of repetition but evading review," which lies at the heart of the relation back doctrine, applies with particular force. Indeed, another district court in this Circuit has already applied the "relation back" doctrine, as articulated in *Pitts*, to a TCPA claim, noting that otherwise the defendant could render the question posed in such a case unreviewable. *See Craftwood II, Inc. v. Tomy Int'l, Inc.*, SA CV 12–1710 DOC (ANx), 2013 WL 3756485, at *4 n.4 (C.D. Cal. July 15, 2013) ("'Acceptance [of a Rule 68 pick off offer] need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of

class certification questions unreviewable.'" (quoting *Roper*, 445 U.S. at 341–42 (Rehnquist, J., concurring))).

Second, and separate from the fact that a named class representative has a principled interest in representing the class, Mr. Pacleb has a personal economic interest in attorneys' fees and costs as a class representative. As this Court recognized in *Pitts*, and as the Supreme Court recognized in *Roper*, the class representative has a separate economic interest in pursuing a class action, involving attorneys' fees. *See Roper*, 445 U.S. at 336 n.6 (the individual plaintiffs had an interest in the potential ability to shift attorney fees and expenses they had incurred to the class). Here, Allstate's offer did not fulfill this economic interest because it provides only for payment of attorneys fees and costs related to Mr. Pacleb's individual claims. ER 63 ¶4 (limiting Allstate's payment to expenses recoverable on Mr. Pacleb's "individual claims" only). Mr. Pacleb therefore maintains an interest in shifting these expenses to the other class members.

Finally, and in addition to Mr. Pacleb's interests in representing the class, the Supreme Court has also acknowledged that the class itself has a separate interest that remains vibrant regardless of whether an offer for complete individual relief has been made to a class representative. *Sosna*, 419 U.S. at 399 ("[T]he

ultimate certification of a class creates a juridical entity with "a legal status separate from the interest of [the named plaintiff].").[10]

B. *Genesis* Limited Its Holding to the FLSA Context, Described the Rule 23 Context as "Fundamentally Different," and Did Not Overturn the U.S. Supreme Court Cases This Court Relied Upon in *Pitts*.

Allstate contends that the cases relied upon by this Court in *Pitts*—*County of Riverside*, *Roper*, *Geraghty*, *Gerstein* and *Sosna*—were substantially undermined or even outright rejected in *Genesis*. A plain reading of *Genesis* contradicts Allstate's position. The *Genesis* majority opinion fully distinguishes these cases on the basis that their holdings governed Rule 23 class actions, whereas *Genesis* involved a "fundamentally different" FLSA collective action.

---

[10] A number of other circuits have reached the same conclusion as this Court did in *Pitts* that a class representative has an Article III interest in representing the class, even if his personal economic interest in his individual claim has become moot. *See, e.g.*, *Lucero*, 639 F.3d at 1249 ("We hold that a named plaintiff in a proposed class action for monetary relief may proceed to seek timely certification where an unaccepted offer of judgment is tendered in satisfaction of the plaintiff's individual claim before the court can reasonably be expected to rule on the class certification motion."); *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004) ("Absent undue delay in filing a motion for class certification, . . . were a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint."); *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996) (a named class representative is not required to accept a Rule 68 offer that provides all of the relief to which he is individually entitled, but not all of the relief that his complaint seeks on behalf of the class); and *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920–21 (5th Cir. 2008) (pointing out dangers of allowing a defendant to "pick off" class representatives, citing with approval to *Weiss*).

Genesis holds that the mooting of an individual's FLSA claim moots an FLSA collective action, assuming that no other plaintiff with a live claim has yet opted into the action. 133 S. Ct. at 1529. The *Genesis* majority was able to reach that conclusion not because it overturned any of the earlier Supreme Court decisions discussed above but instead because it distinguished the decisions in those Rule 23 cases as "inapposite" to the question of mootness in an FLSA collective action. *Id*.

The majority in *Genesis* concluded that class actions differ "fundamentally" from FLSA collective actions in large part because of the "unique significance of certification decisions in class-action proceedings." *Id.* at 1529, 1532. The Court explained that a "putative class action acquires an independent legal status once it is certified under Rule 23." 133 S. Ct. at 1530. The difference turns upon the distinction between Rule 23 class actions (where a person falling within the class definition is within the class unless they choose to opt-out) and FLSA collective actions (which are opt-in). In contrast to a Rule 23 class action, where the class has an "independent legal status" after the case is certified, in *Genesis* the majority explained that "Under the FLSA, … 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action." *Genesis*, 133 S. Ct. at 1530. Moreover, in an FLSA collective action, unlike a Rule

23 class action, the named plaintiff has no "personal stake" in the collective action. *Genesis*, 133 S. Ct. at 1247.

In light of Justice Thomas's clear guidance distinguishing Rule 23 class actions from FLSA collection actions in the mootness context, it is not surprising that the vast majority of courts to consider the question post-*Genesis* have declined to apply that decision's holding to Rule 23 class actions. *See, e.g.*, *Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013) ("the Court's decision in [*Genesis*] is not at odds with this determination because it does not involve a class certification under Rule 23, which is 'fundamentally different from collective actions under the FLSA'") (citations omitted); *March v. Medicredit, Inc.*, No. 4:13–CV–1210 TIA, 2013 WL 6265070, at *2 (E.D. Mo. Dec. 4, 2013) (refusing to apply *Genesis* to pick off offer in Rule 23 class action on the grounds that such cases are "fundamentally different from collective actions under the FLSA") (citation and quotations omitted); *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, No. 8–11–cv–02467, 2013 WL 5476979 (D. Md. Oct. 2, 2013) ("[I]t is unclear that the *Genesis* Court's dictum that the relation back doctrine does not apply when the plaintiff's statutory claim becomes moot before class certification applies in the Rule 23 context."); *Sandusky Wellness Ctr. LLC v. Medtox Scientific, Inc.*, No. 12–2066(DSD/SER), 2013 WL 3771397, at *2 (D. Minn. July 18, 2013) ("*Genesis* is inapplicable to a Rule 23 action brought under

the TCPA"); *Canada v. Meracord, LLC*, No. 12–5657, 2013 WL 2450631, at *1 (W.D. Wash. June 6, 2013) ("there is nothing to indicate that the [*Genesis*] holding extends beyond FLSA collective actions"); *Ramirez v. Trans Union, LLC*, No. 3:12–CV–00632 (JSC), 2013 WL 3752591, at *3 (N.D. Cal. July 17, 2013) (concluding that *Pitts* remains good law, because of the Supreme Court's "delineation between Rule 23 class actions and FLSA collective actions"); *Falls v. Silver Cross Hosp. & Med. Cntrs.*, No. 13 C 695, 2013 WL 2338154, at *1 (N.D. Ill. May 24, 2013) (*Genesis* not directly applicable to the class action context).

In short, the majority of courts to consider the issue throughout the U.S. have rejected Allstate's position and concluded that as important as *Genesis* may be in the FLSA context, it does not govern the impact of an individual offer in a Rule 23 case such as this one.

C. Adopting Allstate's Position Would Undermine the Class Action Device.

Allstate and its corporate *amici* have written eloquent briefs extolling grand constitutional principles, but there is an obvious cynical point underlying all these fine words. What Allstate and its *amici* would like this Court to do is allow them to eliminate all class actions by picking off the named class representatives. Many people who are victimized by various types of corporate wrongdoing are not aware of that fact, or are reluctant to come forward, or are difficult to find. Accordingly, if a defendant can pay the class representatives (maybe a few times in a row, if

necessary), there is a terrific chance that even a very large class action involving serious wrongdoing will be killed off.

In *Pitts*, this Court recognized this exact problem. This Court accurately noted that longstanding U.S. Supreme Court precedents have held that class claims may continue even if the individual plaintiff's claim has become moot, in order to "avoid[] the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved." *Pitts*, 653 F.3d at 1090.

And the U.S. Supreme Court decisions discussed in *Pitts* identify the same concern. In *Roper*, for example, the Supreme Court rejected a defendant's suggestion that it could moot a case merely by paying off the named class representative, because doing so would encourage repeated pick off attempts to gut class actions:

> To deny the right to [proceed with a class action] simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Roper, 445 U.S. at 339; *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. 1981) ("in those cases in which it is financially feasible to pay off successive named plaintiffs, the defendants would have the option to preclude a

viable class action from ever reaching the certification stage"); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 386 (S.D. Ohio 2008) ("treating pre-certification settlement offers as mooting the named plaintiffs' claims would have the disastrous effect of enabling defendants 'to essentially opt-out of Rule 23'") (citation omitted).

The fact that accepting Allstate's view would allow defendants to short-circuit class actions, and frustrate the purposes of Rule 23, is another reason to reject its argument.

D. Allstate's and Its *Amici*'s Anti-Class Action Policy Arguments Are Wrong and Beside the Point.

Underscoring that Allstate and its *amici* would like Rule 68 offers to undermine the class-action device, their briefs make a series of sweeping policy arguments directed against class actions in general. Notwithstanding *Pitts*, and its holding that the practice of "picking off" class representatives frustrates the purposes of Rule 23 by denying relief to class members with meritorious claims, 653 F.3d at 1091, Allstate and its *amici* claim that allowing defendants to short-circuit class actions with unaccepted Rule 68 offers is sound policy. Allstate's and its *amici*'s speculative (and at times counter-factual) policy arguments about class actions are wholly unpersuasive.

For example, *Amicus* Pacific Legal Foundation ("PLF") cites a handful of cases, which bear no meaningful similarity to this one, to warn of *cy pres* and

incentive award abuse, *Amicus* Brief of Pacific Legal Foundation at 12–14, and posits that class action settlements constitute "blackmail," *id.* at 15–16. These allegations are colorful but wrong, and are also beside the point since there is no evidence PLF's concerns are reflected in this case.

As an initial matter, *amici* are wrong to claim that class actions benefit only attorneys or named plaintiffs since many class actions have provided real and significant relief to absent class members, either in the form of damage awards or injunctive relief that has changed unlawful corporate practices. For example, a recent class action brought on behalf of African-American and Latino homebuyers charged higher mortgage fees than similarly situated white consumers resulted in a payout of $14,750,000 to the class and approximately $890 to each of the unnamed class members. Unopposed Mot. for Final Approval of Class Action Settlement 17, *Ramirez v. Greenpoint Mortg. Funding, Inc.*, 08–cv–00369–THE(WDB) (N.D. Cal. Mar. 23, 2011); Final Approval Order, *Greenpoint Mortg. Funding, Inc.*, 08-cv-00369-THE(WDB) (N.D. Cal. Mar. 23, 2011) (April 12, 2011). Other class actions have similarly played an important role in enforcing civil rights laws and promoting equal opportunity. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400–02 (1968) (enjoining discrimination against African American customers at a South Carolina restaurant chain); Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate*

Impacts Are Unjustified, 95 Cal. L. Rev. 669, 716 (2007) (settlements with car dealership that marked up costs for African American buyers benefited 1.4 million African American class members to the tune of $800 million).

Moreover, empirical data undermine PLF's claim that class actions benefit only plaintiffs' lawyers and class representatives. One recent study, which looked at every federal class action settlement reached in 2006 and 2007, found that attorneys received only approximately 15% of the total class awards. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. of Empirical Legal Studies 811, 811 (Dec. 2010). And less than a third of class action settlements provide for a class-representative award. Eisenberg, *supra*, at 1322 (incentive awards included in 27.8% of class action settlements).

Also, the claim that class actions are used as "blackmail" is entirely unsupported and ignores even the possibility that class action defendants may have committed the wrongs that gave rise to the class's claims in the first place. Of course, "[n]othing is self evidently wrong with settlement that occurs because a defendant fears losing at trial. Settlements occur every day for this reason and no one questions the desirability." Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U.L. Rev. 1357, 1359 (2003).

And *amici*'s focus on the effect that class actions have on companies' bottom lines ignores that without class actions, innocent consumers would be left

to bear the full cost of defendants' wrongdoing themselves. Unlawful conduct comes with a cost. Fairness and efficiency principles militate in favor of assigning that cost to the wrongdoers who have broken the law and have the power to stop their unlawful conduct—not in favor of allocating the entire cost to consumer and employee victims.

As a fallback policy position, Allstate's *amici* argue that even if some class actions have value, the prospect of defendants' short-circuiting a meritorious class action here or there should cause no concern because savvy attorneys will find other class representatives and file new cases; because the TCPA's $500 statutory damage will incentivize thousands of individual suits; and/or because defendants may decide that their "picking off" strategy is "cost-prohibitive, impractical or otherwise undesirable" in some cases and choose to litigate those disputes. Each of these arguments is easily refuted:

Finding New Class Representatives—Contrary to *amici*'s suggestion, *Amicus* Brief of Chamber of Commerce of the United States ("Chamber's Br.") 21–24; *Amicus* Brief of California Retailers Association 14–15, finding plaintiffs willing to take on the risks and responsibilities of class representation is not as easy as snapping one's fingers. A class representative must be more than just a victim of the defendant's unlawful conduct; a class representative must meet the requirements for adequacy of representation under Rule 23(a)(4), which this Court

has described as one of the touchstones of due process in class-action litigation. *Blackie v. Barrack*, 524 F.2d 891, 910 (9th Cir. 1975), *cert. denied* 428 U.S. 816 (1976). Class representatives also assume financial risks on behalf of the class and, even in a successful case, may "experience a net loss from acting as a class champion because the small recoveries normally gained from the case are not enough to cover the increased costs of serving as the named plaintiffs." Thomas Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1305–06 (2006). Named plaintiffs incur litigation expenses, the opportunity cost of lost time, and the stress and anxiety that come with litigation. *Id.* at 1305. Class representatives also put targets on their chests by stepping forward and face the potential consequences of retaliation or loss of reputation. *Id.* at 1305. These are all considerable sacrifices, considering that named plaintiffs in most cases receive the same award as absent class members. *See id.* at 1322 (only 28% of class action settlements provide class-representative incentive awards).

TCPA's Incentive for Individual Suits— The Chamber's contention that the TCPA's statutory damage provision is incentive enough for thousands of plaintiffs to bring their own individual suits, Chamber's Br. 23–24, runs contrary to the congressional finding that telemarketing abuses rose after passage of the TCPA. *See supra* p. 10. Moreover, thousands of individual suits would undermine Rule

23's goals of efficient adjudication and of preventing inconsistent rulings. Fed. R. Civ. P. 23(b)(1)(a), (b)(3). And of course, *amici*'s idea that the dismissal of Mr. Pacleb's case will be followed by thousands of small-dollar individual suits is pure fantasy. *See Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits")

Picking Off As Disfavored Strategy—In a remarkable display of candor, *Amicus* California Retailers Association ("CRA") implicitly concedes that "picking off" is used as a litigation strategy, but CRA sees no cause for concern because in some cases (*e.g.*, under the Fair Debt Collection Practices Act) defendants may decide that "picking off" is not their best approach and choose to litigate. CRA Br. at 14–16. Of course, the fact that FDCPA defendants may decide to litigate in some cases is cold comfort to a consumer with claims under a different statute or against different defendants. More fundamentally, CRA fails to explain why defendant wrongdoers should have sole control over whether plaintiffs with meritorious claims are able to proceed in court.

Thus, Allstate's and its *amici*'s various policy arguments are without merit and provide no support for Allstate's appeal.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Date: February 20, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Gomez v. Campbell-Ewald Co., Ninth Circuit Docket No. 13-55486, raises some similar issues regarding whether an unaccepted offer to a named plaintiff in a Rule 23 class action moots the plaintiff's case. *See* Cir. R. 28-2.6(c).

Dated: February 20, 2014

PUBLIC JUSTICE, P.C.

s/ Spencer J. Wilson
Spencer J. Wilson
Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 12,493 words, excluding the 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). It has been prepared in a 14-point proportionally spaced typeface using Microsoft Word.

Dated: February 20, 2014

Public Justice, P.C.

s/ Spencer J. Wilson
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CERTIFICATE OF FILING AND 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 February 20, 2014.

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

Dated: February 20, 2014

PUBLIC JUSTICE, P.C.

s/ Spencer J. Wilson
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ADDENDUM

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47 U.S.C.A. § 227
Restrictions on use of telephone equipment
(excerpt)

(a) Definitions

As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

[(3)-(5) omitted]

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any

automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

[(C)-(D) omitted]

[(2) omitted]

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

[remainder omitted]

Cal. Code Civ. Proc. § 1021.5
Attorney fees; important rights affecting public interest; enforcement; public entity award

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in Serrano v. Priest, 20 Cal.3d 25, 49.

Fed. R. Civ. P. 23
Class Actions
(excerpt)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> **(1)** the class is so numerous that joinder of all members is impracticable;
>
> **(2)** there are questions of law or fact common to the class;
>
> **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> **(4)** the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

> **(1)** prosecuting separate actions by or against individual class members would create a risk of:
>
> > **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > **(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> **(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> **(D)** the likely difficulties in managing a class action.

[remainder omitted]

Fed. R. Civ. P. 68
Offer of Judgment

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

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

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

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 U.S. District Court for the Northern District of California
Civil Case No. 4:13-cv-00685-PJH

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

RICHARD CHEN, AND FLORENCIO PACLEB, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

Case No. 4:13-cv-00685-PJH

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: June 5, 2013
Time: 9:00 a.m.
Location: Courtroom 3, 3rd Floor
1301 Clay Street
Oakland, CA 94612

Hon. Judge Phyllis J. Hamilton

Date Action Filed: Feb. 14, 2013
Trial Date: Not yet set

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NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6)

TO PLAINTIFFS AND THEIR ATTORNEYS:

Please take notice that, on June 5, 2013, at 9:00 a.m. before the Honorable Phyllis J. Hamilton in Courtroom 3 at U.S. District Court, 1301 Clay Street, Oakland, California 94612, Defendant Allstate Insurance Company will and hereby does move to dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted.

This Motion is based upon this Notice, the Memorandum of Points and Authorities, the accompanying Declaration of Daniel M. Benjamin, the Amended Complaint, the Proposed Order, the argument of counsel at the hearing, and any further matters as the Court deems proper to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Richard Chen ("Chen") and Florencio Pacleb ("Pacleb") (collectively, "Plaintiffs") bring this putative class action against Defendant Allstate Insurance Company ("Allstate") alleging that Allstate violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by placing non-emergency cellular telephone calls through an automatic telephone dialing system to Plaintiffs and putative class members who did not provide prior express consent for such calls. Plaintiffs do not allege any actual damages, but seek injunctive relief and statutory damages of $500.00 as well as treble damages up to $1,500.00 for each violation of the TCPA.

However, Plaintiffs' claims are moot because Allstate (without admitting liability) made an offer of judgment under Fed. R. Civ. P. 68 in an amount that is more than sufficient to satisfy all of Plaintiffs' alleged individual damages and non-monetary requests for relief. Therefore, as the United States Supreme Court held earlier this month, under Article III of the U.S.

Constitution, there exists no case or controversy, and the Court lacks subject matter jurisdiction. Thus, the Amended Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Alternatively, Pacleb has no standing to bring a cause of action under the TCPA because he admits he was not the intended recipient of the alleged phone calls. Thus, his claims should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1).

Finally, Plaintiffs fail to assert any facts in support of their contention that Allstate "willfully" violated the TCPA. Therefore, Count II of the Amended Complaint, which seeks treble damages pursuant to the TCPA, should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Relevant Procedural History

On February 14, 2013, Chen filed his initial Complaint against Allstate. (Dkt. No. 1.) On that same date, the initial scheduling order was entered. (Dkt. No. 2.) On March 8, 2013, Plaintiffs filed an Amended Complaint, which, aside from adding Pacleb as a plaintiff, contains no substantive changes from the initial Complaint. (Dkt. No. 3.) On April 8, 2013, Allstate declined to proceed before a United States Magistrate Judge and requested that the case be assigned to a District Judge. (Dkt. No. 9.) On April 10, 2013, the Court assigned this case to Judge Hamilton. (Dkt. No. 12.)

B. Allegations of the Amended Complaint

Plaintiffs are California residents and each alleges that Allstate violated the TCPA. Chen alleges that beginning in 2013, Allstate called him on his cellular telephone number ending in 2123 "in an attempt to solicit [Chen] into purchasing one of [Allstate's] many insurance policies available." (Am. Compl., ¶ 7.) Specifically, Chen alleges that Allstate has placed "no less than eight (8) calls" to his cellular phone through the use of an "automatic telephone dialing system," with every call occurring in January 2013. (*Id.* at ¶ 8.) Chen also alleges that he never has been a customer of Allstate and that Allstate never received his "prior express consent" to receive calls using an automatic telephone dialing system on his cellular phone. (*Id.* at ¶ 13.)

Pacleb alleges that beginning in 2013, Allstate called him "no less than five (5)" times on his cellular telephone number ending in 1260. (*Id.* at ¶ 15.) Pacleb alleges that Allstate has placed these calls to his cellular phone through the use of an "automatic telephone dialing system," with every call occurring in February and March 2013. (*Id.* at ¶¶ 15-16.) Pacleb alleges that he never has been a customer of Allstate and that Allstate never received his "prior express consent" to receive calls using an automatic telephone dialing system on his cellular phone. (*Id.* at ¶ 20.)

Pacleb further alleges that he never was able to speak with a "live human representative" from Allstate, but that each call from Allstate was "asking for an individual named Frank Arnold." (*Id.* at ¶ 17.) Pacleb fails to allege how long he held the phone number that Allstate allegedly called.

Plaintiffs allege in conclusory language that Allstate both negligently and willfully violated the TCPA. (*Id.* at ¶¶ 32-39.) Plaintiffs allege no actual damages as a result of Allstate's alleged violations of the TCPA, but seek injunctive relief, as well as statutory damages of $500.00 for each negligent violation of the TCPA and up to $1,500.00 for each willful violation of the TCPA. (*Id.* at ¶¶ 34-35, 38-39.)

Plaintiffs also bring a putative class action on behalf of the following class of individuals:

> All persons in the United States who received any telephone calls from Defendant to said person's cellular telephone made through the use of any automatic telephone dialing system and such person had not previously consented to receiving such calls within the four years prior to the filing of this Complaint.

(*Id.* at ¶ 21.)

C. The Offer of Judgment

On April 10, 2013, Allstate (without admitting liability) made an offer of judgment to Plaintiffs pursuant to Fed. R. Civ. P. 68. A true and correct copy of the offer of judgment is attached as Exhibit 1 to the Declaration of Daniel M. Benjamin, filed concurrently herewith ("Benjamin Dec."). Allstate offered $15,000.00 to Chen and $10,000.00 to Pacleb. Allstate also offered to stop making calls to Plaintiffs in the future and to have the amount of reasonable

attorneys' fees and costs accrued to date determined by the Court if the parties could not agree on the amount. (*See* Benjamin Dec. Exh. 1.) Plaintiffs have not accepted the offer, but Allstate has confirmed in writing that it remains open. (*See* Benjamin Dec. Exh. 2.)

III. ARGUMENT

A. Applicable Legal Standard

When a party moves to dismiss an action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, a court may consider matters outside of the pleadings. As stated in *Jackson v. Olam West Coast, Inc.*, No. CV F 12-0791 LJO MJS, 2012 U.S. Dist. LEXIS 147429, at *12 (E.D. Cal. Oct. 12, 2012):

> When addressing an attack on the existence of subject matter jurisdiction, a court 'is not restricted to the face of the pleadings.' *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir. 1988). In such a case, a court may rely on evidence extrinsic to the pleadings and resolve factual disputes relating to jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.), *cert. denied*, 493 U.S. 993, 110 S.Ct. 541, 107 L. Ed. 2d 539 (1989); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Smith v. Rossotte*, 250 F. Supp. 2d 1266, 1268 (D. Or. 2003) (a court 'may consider evidence outside the pleadings to resolve factual disputes apart from the pleadings').

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the sufficiency of a complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see Neitzke v. Williams*, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson*, 749 F.2d at 534.

In two decisions in the last six years – *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 137 (2009) – the Supreme Court established more rigorous standards for complaints to survive motions to dismiss. Thus, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more

than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly*, 127 S.Ct. at 1964-65. In order to defeat a dismissal motion, a plaintiff must allege facts that are sufficient to raise his right to relief "above the speculative level." *Twombly*, 127 S.Ct. at 1965. In sum, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S.Ct. at 1974; *Iqbal*, 129 S.Ct. at 1960. A complaint is inadequate "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 127 S.Ct. at 1955).

B. Pursuant to Fed. R. Civ. P. 12(b)(1), Plaintiffs' Claims Should be Dismissed as Moot in Light of Allstate's Offer of Judgment

Allstate (without admitting liability) made an offer of judgment to Plaintiffs on April 10, 2013 pursuant to Fed. R. Civ. P. 68.[1] Allstate's offer of judgment was made in an amount sufficient to satisfy all of Plaintiffs' alleged damages on their individual claims, including their costs and attorneys' fees, as well as their claim for injunctive relief, and was more than Plaintiffs could possibly recover in this action.[2] Plaintiffs have not accepted the offer. However, Allstate has left the offer open. This ensures that Plaintiffs can obtain complete relief without further litigation, negating any controversy between the parties. (*See* Benjamin Decl. Exh. 2.) No class certification motion has yet been filed by Plaintiffs.

Under Article III of the United States Constitution, since Allstate's unaccepted offer of judgment is in an amount sufficient to satisfy all of Plaintiffs' claims and was made prior to the filing of a motion for class certification, Plaintiffs' claims are moot, and their Amended

[1] *See* Benjamin Dec. Exh. 1, ¶ 3. The exhibits to the Benjamin Declaration may be considered by the Court in considering a motion to dismiss for lack of subject matter jurisdiction. *Jackson*, 2012 U.S. Dist. LEXIS 147429, at *12.

[2] Plaintiffs allege they are entitled to the maximum statutory damages of $1,500.00 for each call made by Allstate. As stated above, Chen alleges he received eight calls. (Am. Compl., ¶ 8). Pacleb alleges he received five calls. (*Id.* at ¶ 15). Plaintiffs do not allege actual damages. Allstate offered $15,000.00 to Chen and $10,000.00 to Pacleb. This exceeded what Plaintiffs could recover if they prevailed in court. (8 calls x $1,500.00 = $12,000.00 for Chen; 5 calls x $1,500.00 = $7,500.00 for Pacleb). Allstate also offered to stop making calls to Plaintiffs in the future and to have the amount of reasonable attorneys' fees and costs accrued to date determined by the Court if the parties could not agree on the amount. *See* Benjamin Dec. Exh. 1, ¶ 3.

Complaint should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). As the Ninth Circuit explained in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086-87 (9th Cir. 2011):

> Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" or "Controversies." *See U.S. Const. Art. III, § 2, cl. 1*. 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. *See Burke v. Barnes*, 479 U.S. 361, 363, 107 S.Ct. 734, 93 L. Ed. 2d 732 (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." *Honig v. Doe*, 484 U.S. 305, 317, 108 S.Ct. 592, 98 L. Ed. 2d 686 (1988). 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. *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L. Ed. 2d 491 (1969). In other words, 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).

Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake. *See Back v. Sibelius*, 684 F.3d 929, 933 (9th Cir. 2012) ("Because the Secretary has already created the administrative appeals process that Back seeks, 'no present controversy exists as to which [we] can grant effective relief.'") (citation omitted); *see also Spencer-Lugo v. Immigration & Naturalization Serv.*, 548 F.2d 870 (9th Cir. 1977) ("The dismissal of the petition is affirmed on the ground that petitioners can demonstrate no injury as yet from the alleged illegality of the Multiple Accelerated Summary Hearing used by the I&NS. The I&NS's offer allowing petitioners to uncontestedly reopen their cases and thereby receive a full-blown individualized hearing before an Immigration Judge has the effect of mooting any real case or controversy here.").

Prior to the United States Supreme Court's decision last week in *Genesis Healthcare Corp. v. Symczyk*, No. 11-1059, 2013 U.S. LEXIS 3157 (U.S. Apr. 16, 2013), the courts were

divided on whether a Rule 68 offer of judgment or settlement offer made prior to the filing of a class certification motion also mooted the claims of the putative class members. For example, in *Damasco v. Clearwire Corp*., 662 F. 3d 891 (7th Cir. 2011), the U.S. Court of Appeals for the Seventh Circuit held that a settlement offer in full satisfaction of the plaintiff's alleged damages, made before the filing of a class certification motion, mooted the plaintiff's individual and class action claims and required dismissal. The court emphasized that "[t]he doctrine of mootness stems from Article III of the Constitution, which limits the jurisdiction of federal courts to live cases or controversies." *Id.* at 894. The mootness doctrine "demands that the parties to a federal case maintain a personal stake in the outcome at all stages of the litigation." *Id.* at 894-95. As *Damasco* explained, "[t]o 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." *Id*. at 896. Simply put, absent a live case or controversy, the Court lacks jurisdiction.

The Ninth Circuit in *Pitts*, and the Third, Fifth, and Tenth Circuits, disagreed with *Damasco*'s reasoning and concluded that dismissal of a class action based on a Rule 68 offer of judgment to the named plaintiff is inappropriate unless the plaintiff has been given a reasonable opportunity to file and pursue a motion for class certification. *See Damasco*, 662 F.3d at 895 ("[f]our circuits disagree with this approach, but we have not been moved to reverse course").

Genesis Healthcare resolved that circuit split and held that a collective action filed under the Fair Labor Standards Act ("FLSA") is rendered moot if the defendant makes a Rule 68 offer of judgment in the full amount of the representative plaintiff's individual claim before a class certification motion is filed. 2013 U.S. LEXIS 3157, at *22-23 ("we conclude that respondent has no personal interest in representing putative, unnamed claimants, nor any other interest that would preserve her suit from mootness"). The Court reversed the Third Circuit, which had held that a Rule 68 offer of judgment cannot be used to moot the claims of putative class members in an FLSA case. Further, the Court reaffirmed "well-settled mootness principles." *Id.* at *13. Article III, Section 2 of the Constitution limited the jurisdiction of the federal courts to "Cases"

and "Controversies." *Id.* at *10. 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 present at all stages of the litigation, and where an intervening event, such as an offer of judgment eliminates a plaintiff's personal stake, "the action can no longer proceed and must be dismissed as moot." *Id.* at *11. The Court specifically rejected Symczyk's argument that she retained a personal stake through a statutory right to represent the interests of putative members of the collective action. *Id.* at *13 ("the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied").

Notably, *Genesis Healthcare* rejected the reasoning that led the Ninth Circuit in *Pitts* to conclude that putative class allegations were enough to keep the plaintiff's case alive. *Pitts* involved both an FLSA collective action and a Rule 23 class action. The Ninth Circuit formulated a "relation back" theory premised on the assumption that small monetary claims of putative class members are "transitory" in the sense that they would evade judicial review unless they were pooled in a class action. According to *Pitts*, keeping a putative class action alive after the named plaintiff had received a Rule 68 offer of judgment by permitting a later-filed class certification motion to relate back to the filing of the complaint was justified because "[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 contravene Rule 23's core concern: the aggregation of similar, small, but otherwise doomed claims." 653 F.3d at 1091 (citation omitted).

But in *Genesis Healthcare*, the Supreme Court expressly distinguished all of the cases upon which *Pitts* relied because those cases dealt with situations in which class certification had

been granted or improperly denied.[3] Because those cases were ones in which class certification proceedings had already occurred, the Court found that they were, "by their own terms, inapplicable to these facts." 2013 U.S. LEXIS 3157, at *14. The Court noted that in the case before it:

> 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.

Id. at *16. Plaintiffs in this case are in the same procedural posture as the plaintiff in *Genesis Healthcare* because no class certification motion has been filed, and their claims should also be dismissed as moot.

The Supreme Court also specifically rejected Symczyk's argument—the same argument that the *Pitts* court found persuasive—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." *Id.* at *20. The Court rejected that argument because the Rule 68 offer mooted Symczyk's individual claim before a class certification motion was even filed, as it afforded her complete relief. *Id.* at *21. Further undercutting *Pitts*' analysis is *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), in which the Supreme Court rejected the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. Therefore, *Genesis Healthcare* has overruled *Pitts sub silentio*.[4] Thus, Plaintiffs' Amended Complaint should be dismissed for lack of subject matter jurisdiction.

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[3] For example, in finding that the Rule 68 offer of judgment mooted the individual and putative class claims, the Supreme Court distinguished *Sosna v. Iowa*, 419 U.S. 393 (1975); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); and *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980). *See* 2013 U.S. LEXIS 3157, at *15-22. The Ninth Circuit in *Pitts* had relied on all of these cases in concluding that a Rule 68 offer of judgment does not moot a putative class action. *See* 653 F.3d at 1088-90.

[4] The *Genesis HealthCare* Court observed that "Rule 23 actions are fundamentally different from collective actions under the FLSA," 2013 U.S. LEXIS 3157, at *14, a

C. In Any Event, Pacleb Lacks Standing to Assert a Violation of the TCPA

Even if the Court permits the action to go forward, Pacleb lacks standing to assert a violation of the TCPA because he was not the intended recipient of the alleged phone calls at issue. In fact, Pacleb expressly pleads that the alleged phone calls were placed to a man named Frank Arnold. (Am. Compl., ¶ 17.)

Under the TCPA, it is unlawful for any person within the United States "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission. . . . ." 47 U.S.C. § 227(b)(1)(B). Consistent with the plain language of the TCPA, several courts have interpreted the statutory phrase "called party" as being limited to the intended recipient of the telephone call. As a result, unintended recipients, like Pacleb, lack standing to pursue claims under the statute.

For instance, in *Cellco Partnership v. Dealers Warranty, LLC*, No. 09-1814 (FLW), 2010 U.S. Dist. LEXIS 106719 (D.N.J. Oct. 5, 2010), the court interpreted the phrase "called party" as requiring "the party asserting the claim to be the party to whom the call is directed." *Id.* at *31. The court reasoned that this construction was consistent with the statutory scheme of the TCPA, which "simply cannot support an interpretation that would permit any 'person or entity' to bring the claim for a violation, regardless of whether that person or entity was the called party (i.e., the intended recipient of the call)." *Id.* at *34. Thus, as the court concluded, a TCPA claim may be asserted only by "the intended recipient of the call." *Id.* *Accord j2 Global Communs., Inc. v.*

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point that Plaintiffs could attempt to take out of context. However, the context was that the Court was distinguishing three other cases – *Sosna*, *Geraghty* and *Roper*. (*See* footnote 3 *supra*). Those three cases were cited by the plaintiff in *Genesis HealthCare* as support for her argument that her FLSA claims were not moot. Significantly, in those three cases, class certification proceedings actually took place, whereas in *Genesis HealthCare* the plaintiff's claims became moot ***before*** a class certification motion was filed. Although there are procedural differences between Rule 23 class actions and FLSA collective actions, they primarily affect the certification process. Where, as in *Genesis Healthcare* and the present action, the named plaintiff's claims become moot ***before*** a class certification motion has been filed, the logic of *Genesis Healthcare* applies equally to Rule 23 putative class actions as the mootness principles are the same.

Protus IP Solutions, No. 06-00566 DDP, 2010 U.S. Dist. LEXIS 145369, at *18-21 (C.D. Cal. Oct. 1, 2010) ("recipient" is person to whom fax is directed for purposes of standing under TCPA); *Leyse v. Bank of America*, No. 09-7654, 2010 U.S. Dist. LEXIS 58461, at *10-11 (S.D.N.Y. June 14, 2010) (ruling that unintended recipient of telephone call was not "called party" within the meaning of § 227(b)(1)(B) of the TCPA and, thus, could not sue under the statute); *Kopff v. World Research Group, LLC*, 568 F. Supp. 2d 39, 42 (D.D.C. 2008) (wife of addressee of junk fax lacked standing to sue for violation of the TCPA).

In this case, Pacleb alleges that he was not the intended recipient of the calls from Allstate. Indeed, the Amended Complaint makes clear that Pacleb "was unable to speak with a live human representative, as [Pacleb] was routinely greeted by 'dead air' on the other end of the call, followed by a pre-recorded message asking for an individual named Frank Arnold." (Am. Compl., ¶ 17.) Given this allegation, Pacleb, as an unintended recipient, cannot maintain an action under the TCPA.

D. Plaintiffs Fail to State Any Claim for Treble Damages Under the TCPA

The Court should dismiss or strike Plaintiffs' conclusory demand for treble damages. Under the TCPA, a plaintiff may recover either the actual monetary loss sustained as a result of the violation of the statute or "receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(b)(3)(B). "If the court finds that the defendant willfully or knowingly violated this subsection [i.e., 47 U.S.C. § 227(b)] or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph." *Id*. at § 227(b)(3).

Plaintiffs seek the award of treble damages alleging only that Allstate's alleged violations of the TCPA were "willful." (Am. Compl., ¶¶ 37-38.) This bare allegation does not, and cannot, pass muster under *Iqbal*/*Twombly* and Plaintiffs' request for treble damages should be stricken or dismissed for that reason alone. *See Breidenbach v. Experian*, No. 3:12-cv-1548-GPC-BLM, 2013 U.S. Dist. LEXIS 35807, at *7, *18 (S.D. Cal. Mar. 13, 2013) (dismissing TCPA claim for

failure to allege sufficient facts) (citations omitted).

Furthermore, under the TCPA, in order for a violation to be considered willful, a defendant must have made the unsolicited communication knowing or having reason to know that such conduct was a violation of the TCPA. *See, e.g., Adamcik v. Credit Control Servs., Inc.*, No. A-10-CA-399-SS, 2011 WL 6793976, at *9 (W.D. Tex. Dec. 19, 2011) (plaintiff must demonstrate the defendant was "more than negligent in its TCPA violation" and "knew or should have known it was violating the TCPA"); *Manufacturers Auto Leasing, Inc. v. Autoflex Leasing, Inc.*, 139 S.W.3d 342, 346-47 (Tex. Ct. App. 2004) (stating that "[t]he TCPA is willfully or knowingly violated when the defendant knows of the TCPA, knows he does not have permission to send the fax . . . and sends it anyway"). Plaintiffs allege no facts that could support any such conclusion. *See, e.g., Iqbal*, 129 S.Ct. at 1949-51 (allegations that defendants "willfully and maliciously agreed" to violate plaintiff's rights were "bare assertions" that "amount to nothing more than a 'formulaic recitation of the elements'" of claim and were insufficient to state any claim) (citation omitted); *Morgovsky v. AdBrite, Inc.*, No. C 10-05143, 2012 U.S. Dist. LEXIS 62951, at *17-20 (N.D. Cal. May 4, 2012) (bare allegations that defendant "willfully" violated statute were insufficient to state a claim). Therefore, Plaintiffs have not alleged any basis on which the Court could award him treble damages and Allstate's Motion should be granted in that respect.

IV. CONCLUSION

For the foregoing reasons, Defendant Allstate Insurance Company respectfully requests that its Motion to Dismiss be granted and Judgment of Dismissal be entered in its favor and against Plaintiffs with prejudice.

Respectfully submitted,

DATED: April 25, 2013

BALLARD SPAHR LLP

/s/ Daniel M. Benjamin
Daniel M. Benjamin
Attorneys for Defendant,
Allstate Insurance Company

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

RICHARD CHEN, AND FLORENCIO PACLEB, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

Case No. 4:13-cv-00685-PJH

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

[Hon. Judge Phyllis J. Hamilton]

On June 5, 2013, in Courtroom 3 of the above-captioned Court located at 1301 Clay Street, Oakland, California 94612, Defendant Allstate Insurance Company ("Allstate") came before the Court upon its Motion to Dismiss the Amended Complaint.

Upon consideration of all the written submissions, it is hereby ORDERED that, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Allstate's Motion to Dismiss be, and it hereby is, granted and that the Amended Complaint be, and it hereby is, dismissed with prejudice.

Dated: _____

Hon. Phyllis J. Hamilton
UNITED STATES DISTRICT COURT
JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD CHEN; AND, FLORENCIO PACLEB, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

Case No.: 13-cv-685 PJH

PLAINTIFFS' OPPOSITION TO DEFENDANT ALLSTATE INSURANCE COMPANY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

DATE: June 5, 2013
TIME: 9:00 A.M.
COURTROOM: 3

HON. PHYLLIS J. HAMILTON

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I. INTRODUCTION

The U.S. Supreme Court has noted that consumers are outraged over the proliferation of automated telephone calls that are intrusive, nuisance calls, found to be an invasion of privacy by Congress. *See Mims v. Arrow Fin. Servs. LLC,* 132 S. Ct. 740, 745 (U.S. 2012); *see also Czech v. Wall St. on Demand, Inc.*, 674 F. Supp. 2d 1102, 1106 (D. Minn. 2009) ("this Court does not disagree that unwanted text messages, like spam e-mail, are an annoyance").

Allstate Insurance Company's ("Defendant") Motion to Dismiss identifies no basis to justify dismissal of Florencio Pacleb ("Mr. Pacleb") claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (the "TCPA").[1] First, Mr. Pacleb's claims are not mooted by an unaccepted Fed. R. Civ. P. 68 Offer of Judgment. Second, *Genesis Healthcare Corp. v. Symczyk* is a narrow decision that considered a "fundamentally different" situation. Third, Mr. Pacleb has standing to assert a violation of the TCPA.

II. HISTORY OF THE TELEPHONE CONSUMER PROTECTION ACT

Congress enacted the TCPA in 1991 amidst an unprecedented increase in the volume of telemarketing calls to consumers in America; the TCPA combats the threat to privacy[2] being caused by the automated marketing practices, stating:

[1] On May 7, 2013, Plaintiff Richard Chen ("Mr. Chen") accepted Defendant's Offer of Acceptance pursuant to Fed. R. Civ. P. 68. As such, Mr. Chen is no longer a viable plaintiff.

[2] *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (The "TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls," and that "consumers complained that such calls are a 'nuisance and an invasion of privacy.'"). The Federal Communications Commission ("FCC") confirmed in 2003 that "telemarketing calls are even more of an invasion of privacy than they were in 1991," and "we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest." *Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014 (2003), F.C.C. Comm'n Order No. 03-153, modified by 18 F.C.C.R. 16972.

> It shall be **unlawful** for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) **to make any call** (other than a call made for emergency purposes or made with the prior express consent of the called party) **using any automatic telephone dialing system** or an artificial or prerecorded voice—. . .
>
> (iii) **to any telephone number assigned to a** paging service, **cellular telephone service**, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

The TCPA applies with equal force to the making of automated text message calls as it does to the making of voice calls to cellular phones. *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 954 (9th Cir. 2009). The TCPA's prohibition at issue requires the calls to be made with ATDS, which Congress defines as "equipment which has the *capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). The TCPA sets statutory damages at $500 per negligent violation. *See* 47 U.S.C. § 227(b)(3)(B).

III. PRODEDURAL HISTORY & STATEMENT OF FACTS

Pursuant to Plaintiffs' First Amended Complaint ("FAC") filed on March 8, 2013, Mr. Pacleb began receiving telephonic communications from Defendant in February 2013. [FAC, page 3, ¶ 14, lines 23-25]. Defendant used an ATDS in order to initiate the telephonic communications in question. [FAC, page 4, ¶ 16, lines 2-3]. To date, Mr. Pacleb has received at least five calls to Mr. Pacleb's cellular telephone seeking to solicit Mr. Pacleb's business. [FAC, page 3, ¶ 15, lines 26-27]. Mr. Pacleb is not a customer of Defendant and has never provided any personal information, including Mr. Pacleb's cellular telephone number, to Defendant for any purpose whatsoever. [FAC, page 4, ¶ 20, lines 15-19]. As such,

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Mr. Pacleb never provided Defendant with Plaintiff's "prior express consent" to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice on Mr. Pacleb's cellular telephone pursuant to 47 U.S.C. § 227(b)(1)(A). [*Id.*]. The calls at issue were not made for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A) and Mr. Pacleb incurred a charge for said telephonic communications. [*Id.*].

Subsequent to the filing of Plaintiffs' FAC, Defendant made an Offer of Judgment pursuant to Fed. R. Civ. P. 68 on April 10, 2013 to Mr. Pacleb. Said Offer of Judgment allowed judgment to be taken against Defendant by Mr. Pacleb, individually, in the amount of $10,000 plus reasonable attorneys' fees and costs to the date of acceptance. See Exhibit A, Court Document No. 14-2, page 2, ¶ 1, lines 22-26 attached to the Declaration of Daniel M. Benjamin filed with Defendant's Motion to Dismiss on March 25, 2013. Defendant's Offer of Judgment permitted Mr. Pacleb had fourteen days to accept Defendant's Offer of Judgment in writing or the offer was deemed revoked. [*Id.* at page 3, ¶ 6, lines 23-24]. Thereafter, Defendant extended the April 10, 2013 Offer of Judgment until such time as it is accepted by Plaintiffs or withdrawn by Defendant. See Exhibit B, Court Document 14-3, page 3 attached to the Declaration of Daniel M. Benjamin filed with Defendant's Motion to Dismiss on March 25, 2013.

To date, Mr. Pacleb has rejected Defendant's Offer of Judgment and elected to pursue this action individually and on behalf of all others similarly situated.[3] In response to Mr. Pacleb's refusal, Defendant filed the current Motion to Dismiss on March 25, 2013.

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[3] "An unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect. As every first-year law student learns, the recipients rejection of an offer 'leaves the matter as if no offer had ever been made.'" *Genesis Healthcare Corp. v. Symcyzk*, 2013 U.S. LEXIS 3157 (U.S. Apr. 16, 2013), at *26 (Kagan, J., dissenting) quoting *Minneapolis & St. Louis R. Co.* v. *Columbus Rolling Mill*, 119 U. S. 149, 151 (1886).

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IV. LEGAL STANDARD

Defendant seeks to dismiss Mr. Pacleb's Complaint pursuant to (A) Fed. R. Civ. P. 12(b)(1); and, (B) Fed. R. Civ. P. 12(b)(6). [Defendant's Motion, pages 6-7, ¶ 16-9].

A. MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1)

Fed. R. Civ. Pro. 12(b)(1) provides for dismissal of an action if the court lacks jurisdiction over the subject matter of the action. *Narragansett Indian Tribe v. Chao*, 248 F. Supp. 2d 48, 50 (2003). Because federal courts are courts of limited subject matter jurisdiction, "the preferred – and often obligatory – practice is that a court, when confronted with a colorable challenge to its subject-matter jurisdiction, should resolve that question before weighing the merits of a pending action." *Id*. quoting *Morales Feliciano v. Rullan*, 303 F.3d 1, 6 (1st Cir. 2002). See *Donahue v. City of Boston*, 304 F.3d 110, 117 (1st Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 423 U.S. 83, 101-02 (1998).

Challenges to an action, such as mootness and lack of federal question jurisdiction are properly asserted in a Fed. R. Civ. Pro. 12(b)(1) motion to dismiss. See *D.H.L. Assocs., Inc. v. O'Gorman*, 199 F.3d 50, 54 (1st Cir. 1999) (mootness); *BIW Deceived v. Local S6*, 132 F.3d 824, 830-31 (1st Cir. 1997) (federal question jurisdiction). When considering a 12(b)(1) motion, the Court may consider material outside the pleadings. *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) ("The Court can look beyond the pleadings – to affidavits and depositions – in order to determine jurisdiction"). *Narragansett Indian Tribe*, 248 F. Supp at 50.

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B. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)

A Fed. R. Civ. Pro. 12(b)(6) motion to dismiss is properly granted where the complaint fails to assert "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In order to survive a 12(b)(6) motion, a complaint need not state detailed factual allegations. *Id*. at 555. In deciding a 12(b)(6) motion, the court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The Ninth Circuit has held that a complaint should not be dismissed under a Rule 12(b)(6) motion "unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 533-34 (9th Cir. 1984)).[4]

Moreover, in the Ninth Circuit, the Rule 12(b)(6) motion "'is viewed with disfavor and is rarely granted.'" *McDougal v. County of Imperial*, 942 F.2d 668, 676 n.7 (9th Cir. 1991) (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986)). Finally, "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Because Mr. Pacleb's FAC properly and adequately states a claim for relief for violations of the TCPA, Defendant's Motion to Dismiss pursuant to 12(b)(6) should be denied.

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[4] *See e.g.*, *Yang v. DTS Financial Group*, 570 F. Supp. 2d 1257 (S.D. Cal. 2008) (denying motion to dismiss and motion for summary judgment prior to discovery).

V. ARGUMENT

Defendant's Motion to Dismiss should be denied because (A) Evidence of Defendant's Fed. R. Civ. P. 68 is inadmissible for purposes of the present motion; (B) Mr. Pacleb's claims are not mooted by an unaccepted Fed. R. Civ. P. 68 Offer of Judgment; (C) Mr. Mr. Pacleb maintains a concrete interest in the outcome of this litigation; and, (D) Mr. Pacleb has standing to assert a violation of the TCPA.

A. EVIDENCE OF DEFENDANT'S FED. R. CIV. P. 68 IS INADMISSIBLE FOR PURPOSES OF THE PRESENT MOTION.

Pursuant to Fed. R. Civ. P. 68(b), an unaccepted offer is considered withdrawn... Additionally, "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs." *Id*. Pursuant to the United States Supreme Court in *Genesis Healthcare Corp. v. Symcyzk*, 2013 U.S. LEXIS 3157 (U.S. Apr. 16, 2013), the injunction of Fed. R. Civ. P. 68(b) accords with the Rule's "exclusive purpose: to promote voluntary cessation of litigation by imposing costs on plaintiffs who spurn certain settlement offers." *Id*. at *33-34. See also *Marek v. Chesny*, 473 U.S. 1, 5 (U.S. 1985); and, *In re Cool, Cool, Water LLC*, 2007 Bankr. LEXIS 1202, at *45 (Bankr. D.N.J. Apr. 3, 2007) ("[t]he letter is inadmissible under Federal Rule of Civil Procedure 68 as this is not a proceeding to determine costs...").

Here, Defendant impermissibly introduces the April 10, 2013 Offer of Judgment into the record through the Declaration of Daniel M. Benjamin as Exhibit A, Court Document No. 14-2. Since the current Motion was not filed by Defendant to determine costs, Defendant's Offer of Judgment is not admissible. Thus, Mr. Pacleb objects to this evidence and requests this Court to disregard Defendant's Offer of Judgment.

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B. MR. PACLEB'S CLAIMS ARE NOT MOOTED BY AN UNACCEPTED FED. R. CIV. P. 68 OFFER OF JUDGMENT.

Pursuant to Fed. R. Civ. P. 68,

> [a]t least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specific terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. Then clerk must then enter judgment.[5]

Defendant contends that Mr. Pacleb's claims are moot because [Defendant] made an offer of judgment under Fed. R. Civ. P. 68 in an amount that is more than sufficient to satisfy all of Mr. Pacleb's alleged individual damages and non-monetary requests for relief. [Defendant's Motion, page 6, lines 24-26]. Thereafter, Defendant misconstrues the holding of *Genesis* to stand for the proposition that "since [Defendant's] unaccepted offer of judgment is in an amount sufficient to satisfy all of [Mr. Pacleb's] claims and was made prior to the filing of a motion for class certification, [Mr. Pacleb's] claims are moot..." [Defendant's Motion, page 5, lines 17-19]. This argument is flawed for two reasons: (1) *Genesis* explicitly refused to address whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot; and, (2) the Ninth Circuit held that where a defendant makes an unaccepted Fed. R. Civ. P. 68 Offer of Judgment that fully satisfies a named plaintiff's individual claims before the named plaintiff files a motion for class certification, the offer does not moot the case.

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[5] "The Rule provides no appropriate mechanism for a court to terminate a lawsuit with the Plaintiff's consent." *Genesis*, 2013 U.S. LEXIS 3157, at * 33 (Kagan, J., dissenting).

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1. Genesis *explicitly refused to address whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot.*

Defendant's entire Motion is premised upon an inaccurate interpretation of *Genesis* which examined the "fundamentally different" situation of a collective action filed pursuant to the Fair Labor Standards Act ("FLSA").[6] In *Genesis*, plaintiff Laura Symczyk ("Symczyk") brought a collective action pursuant to the FLSA against defendant Genesis Healthcare Corporation ("Genesis"). See *Genesis Healthcare Corp*., 2013 U.S. LEXIS 3157, at *6. When Genesis answered the complaint, Genesis simultaneously served Symczyk with an Offer of Judgment pursuant to Fed. R. Civ. P. 68. *Id*. at *7. Genesis' Offer of Judgment fully remedied all of Symczyk's individual claims; however, the Offer of Judgment was valid for ten days only. *Id*. After Symczyk failed to respond in the allotted time, Genesis filed a Motion to Dismiss for lack of subject-matter jurisdiction. *Id*. Genesis, as Defendant argues here, claimed that Symczyk no longer possessed a personal stake in the outcome of the suit, rendering the action moot. *Id*. at *8.

For purposes of the Court's ruling, *Genesis* assumed, without deciding, that the Offer of Judgment mooted Symczyk's individual claim. *Id*. at *12. However, *Genesis* explicitly refused to analyze whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot because the issue was not properly before the Court.[7] As explained by *Genesis*, Symczyk waived any argument regarding the mootness of Symczyk's claim by conceding on two separate occasions that Symczyk retained no personal interest in the outcome of the litigation. *Id*. To permit Symczyk to argue to the contrary would have impermissibly altered the Court of Appeals' judgment in the absence of a cross-

[6] "Rule 23 actions [like Mr. Macleb's] are fundamentally different from collective actions under the FLSA. *Genesis Healthcare Corp*., 2013 U.S. LEXIS 3157, at *14. See also *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 177-178 (1989)

[7] Defendant's misinterpretation of *Genesis* is, at best, excusable neglect, or in the alternative, a deliberate attempt to mislead this Court.

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petition from respondent. *Id*. Thus, the *Genesis* majority, *sua sponte*, established the crucial premise that Symcyzk's individual claim had become moot. See Justice Kagan's Dissent (with whom Justices Ginsburg, Breyer and Sotomayor joined), *Id*. at *23 (Kagan, J., dissenting).

Here, Mr. Pacleb has made no such concessions, nor waivers of any kind. As discussed above, Mr. Pacleb has not accepted Defendant's Offer of Judgment and does not anticipate accepting said Offer in the future. Since Defendant's Offer of Judgment is unequivocally unaccepted, Defendant's reliance upon *Genesis* is utterly misplaced. By its own terms, *Genesis* is inapplicable to the present situation since *Genesis* did not reach the question of whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot. See *Genesis Healthcare Corp*., 2013 U.S. LEXIS 3157, at *12. Thus, Mr. Pacleb requests that this Court disregard *Genesis* in reaching a decision on Defendant's Motion to Dismiss. As a result, this Court, for guidance, must follow Ninth Circuit precedent as set forth in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011).

2. *The Ninth Circuit held that where a defendant makes an unaccepted Fed. R. Civ. P. 68 Offer of Judgment that fully satisfies a named plaintiff's individual claim before the named plaintiff files a motion for class certification, the offer does not moot the case.*

While *Genesis* bears no relevance to the situation at bar, the Ninth Circuit case of *Pitts* is directly pertinent. In *Pitts*, plaintiff Gareth Pitts ("Pitts") filed a collective action against his employer, defendant Terrible Herbst, Inc. ("Herbst"), for violation of the FLSA. *Pitts*, 653 F.3d at 1084. Thereafter, Herbst made Pitts an offer of judgment pursuant to Fed. R. Civ. P. 68 in an amount that was more than sufficient to satisfy all of Pitts' individual damages and non-monetary requests for relief. *Id*. at 85. After Pitts declined Herbst's Offer of Judgment, Herbst filed a Motion to Dismiss the Action for Lack of Subject Matter

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Jurisdiction. *Id*. "Specifically, [Herbst] argued that its offer of judgment rendered the entire case moot." *Id*. As such, the precise issue pending before the Ninth Circuit was

> whether a rejected offer of judgment for the full amount of a putative class representative's individual claim moots a class action complaint where the offer precedes the filing of a motion for class certification.

In holding that a rejected Offer of Judgment does not moot a putative class representative's class action, the Ninth Circuit rationalized that a "case becomes moot 'when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome of the litigation.'" *Pitts*, 653 F.3d 1081 at 1086 quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

> In other words, 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).

Pitts, 653 F.3d 1081 at 1087.

After considering situations where the district court has either certified a class or, in the alternative, denied class certification, the Ninth Circuit assessed the analogous situation wherein the district court has not yet to address the class certification issue. *Pitts* explained that "some claims are so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representatives individual interest expires." *Id*. at 90 quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (U.S. 1991). Since inherently transitory claims are capable of repetition yet evade review, the Ninth Circuit stated that the "relation back doctrine is properly invoked to preserve the merits of the case for judicial resolution." *Pitts*, 653 F.3d 1081 at 1091 citing to

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Gerstein v. Pugh, 420 U.S. 103, 111 (U.S. 1975); *McLaughlin*, 500 U.S. at 52; *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (U.S. 1980); and, *Sosna v. Iowa*, 419 U.S. 393, 401-402 (U.S. 1975). Thus, "[a]pplication of the relation back doctrine in this context avoids the spectre of plaintiffs filing lawsuit after lawsuit only to see their claims mooted before they can be resolved." *Pitts*, 653 F.3d 1081 at 1090.

Based upon the discussion above, the Ninth Circuit held that the unaccepted "offer of judgment did not moot Pitts' case because his case was transitory in nature and may otherwise evade review." *Id*. at 1091.

Furthermore, *Pitts* stated that "[i]nvoking the relation back doctrine in this context furthers the purposes of Rule 23." *Id*.

> 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 claim.

Id. at 1091 citing to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); and, *Roper*, 445 U.S. at 339.

> Quite logically, the Ninth Circuit explained that '[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.'

Pitts, 653 F.3d 1081 at 1091 quoting *Roper*, 445 U.S. at 339.[8]

Moreover, allowing an unaccepted Offer of Judgment to moot a class representative's case "would effectively ensure that claims that are too

[8] *See also Weiss*, 385 F.3d at 344 ("[A]llowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the class action procedure, and frustrate the objectives of this procedural mechanism for aggregating small claims . . . .").

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economically insignificant to be brought on their own would never have their day in court. *Id.*[9] Thus, after thoroughly reviewing the matter, the Ninth Circuit unambiguously 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. *Pitts*, 653 F.3d 1081 at 1092.

Here, *Pitts* extensively considered the exact situation at bar while such a scenario was not at issue in *Genesis*. After disregarding the inapplicable decision of *Genesis*, it is readily apparent that the Ninth Circuit held that Mr. Pacleb's claims were not rendered moot by an unaccepted Offer of Judgment. Thus, Defendant's Motion to Dismiss should be denied as well.

C. MR. PACLEB MAINTAINS A CONCRETE INTEREST IN THE OUTCOME OF THIS LITIGATION.

The United States Supreme Court held "[a] plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (U.S. 1980). The Ninth Circuit explained the rationale of *Geraghty* by stating that "the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. *Pitts*, 653 F.3d at 1089 quoting *Geraghty*, 445 U.S. at 403.

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[9] *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. 1981) ("[I]n those cases in which it is financially feasible to pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage."); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 386 (S.D. Ohio 2008) ("[T]reating pre-certification settlement offers as mooting the named plaintiffs' claims would have the disastrous effect of enabling defendants 'to essentially opt-out of Rule 23." (citation omitted)). And even if it does not discourage potential claimants, it "may waste judicial resources by 'stimulating successive suits brought by others claiming aggrievement.'" *Weiss*, 385 F.3d at 345 (quoting *Roper*, 445 U.S. at 339).

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> This procedural right to represent a class 'is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement,' but it nevertheless suffices to satisfy Article III concerns because the class certification question 'remains as a concrete, sharply presented issue' even after the named plaintiff's individual claim has expired…

Pitts, 653 F.3d at 1089 quoting *Geraghty*, 445 U.S. at 403.[10]

Here, Defendant attempted to defeat Mr. Pacleb's class action by making an Offer of Judgment on a strictly individual basis.[11] Said Offer entirely neglects to address that Mr. Pacleb brought this action on behalf of himself and others similarly situated due to Defendant's violations of the TCPA. [FAC, page 2, ¶ 1, lines 5-9]. Even had Mr. Pacleb accepted Defendant's individual Offer, Mr. Pacleb would have maintained a concrete interest in the outcome of this litigation with regard to Mr. Pacleb's right to represent the putative class. *Pitts*, 653 F.3d at 1089 quoting *Geraghty*, 445 U.S. at 403. As discussed above, both the United States Supreme Court and the Ninth Circuit held that Mr. Pacleb's class claim alone is enough to satisfy Article III standing requirements. Thus, Defendant's repeated assertion that Defendant's unaccepted Offer of Judgment is specious yet again. Therefore, Defendant's Motion to Dismiss should be denied.

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[10] See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) ("[t]hat the class was not certified until after the named plaintiff's claims had become moot does not deprive [the Court] of jurisdiction") citing *Gerstein v. Pugh*, 420 U.S. 103 (U.S. 1975); and, *Sosna v. Iowa*, 419 U.S. 393 (U.S. 1975). See also *Genesis Healthcare Corp.*, 2013 U.S. LEXIS 3157, at *26 (Kagan, J., dissent) citing *Chafin v. Chafin*, 133 S. Ct. 1017 (2012) ("We made clear earlier this Term that '[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot)"

[11] Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant…hereby offers to allow judgment to be taken against it by Plaintiffs…on [Plaintiffs'] individual claims…" [Defendant's Offer of Judgment, page 1, ¶ 1, lines 21-25].

D. MR. PACLEB HAS STANDING TO ASSERT A VIOLATION OF THE TELEPHONE CONSUMER PROTECTION ACT.

Defendant attempts to argue that unintended recipients of telephone calls, like Mr. Pacleb, lack standing to pursue claims under the TCPA. [Defendant's Motion, page 10, lines 12-13]. In support of Defendant's position, Defendant inexplicably relies upon (1) an irrelevant section of the TCPA; and, (2) unrelated and unpublished authority.

1. *Defendant's reliance upon 47 U.S.C. § 227(b)(1)(B) is incomprehensible.*

Defendant begins this tortured section of Defendant's Motion by stating that

> [u]nder the TCPA, it is unlawful for any person within the United States 'to initiate any telephone call to any **residential telephone line** using an artificial or prerecorded voice to deliver a message within the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications Commission]…." 47 U.S.C. § 227(b)(1)(B)

Defendant's Motion, page 10, lines 6-10.

While legally correct, Defendant has failed to provide any sort of explanation as to why the TCPA's prohibition of telephone calls to landlines has been cited.[12] At all times relevant, both Mr. Chen and Mr. Pacleb have only asserted violations of the TCPA due to Defendant's illegal contact with Plaintiffs on Plaintiffs' respective cellular telephones. See FAC, page 2, ¶ 7, lines 26-28. See also FAC, page 3, ¶ 14, lines 23-25. At no point has either Plaintiff complained of the receipt of unsolicited telephone calls to their residential telephone line. In addition, Defendant has failed to cite case law that discusses this section of the TCPA. Since Plaintiffs' counsel is unable to determine Defendant's purpose for citing to

[12] It should be noted that Plaintiffs' allegations against Defendant for violation of the TCPA are premised upon 47 U.S.C. § 227(b)(1)(A)(iii) and not in fact 47 U.S.C. § 227(b)(1)(B).

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47 U.S.C. § 227(b)(1)(B), Mr. Pacleb is unable to respond to this section of Defendant's Motion.

2. *Defendant's reliance upon unrelated and unpublished authority is equally perplexing.*

To support Defendant's assertion that 47 U.S.C. § 227(b)(1)(B) denies standing to unintended recipients of unsolicited telephone calls, Defendant relies primarily upon the unpublished decisions of *Cellco Partnership v. Dealers Warranty, LLC*, 2010 U.S. Dist. LEXIS 106719 (D.N.J. Oct. 5, 2010); *Accord j2 Global Communs., Inc. v. Protus IP Solutions*, 2010 U.S. Dist. LEXIS 145369; and, *Leyse v. Bank of America*, 2010 U.S. Dist. LEXIS 58461. As a preliminary matter, Defendant's reliance upon *Cellco* is mystifying since *Cellco* begins with:

NOTICE: NOT FOR PUBLICATION

In citing to *Cellco*, Defendant has arguably violated Local Rule 3-4(e), "Prohibition of Citation to Uncertified Opinion or Order," which states in pertinent part that "[a]ny…opinion that is designated: "NOT FOR CITATION"…may not be cited to this court…in written submissions." Thus, Mr. Pacleb requests this Court to disregard *Cellco* in rendering a decision on Defendant's Motion.

Furthermore, in relying upon these unpublished decisions, Defendant failed to acknowledge relevant published decisions that overtly rejected Defendant's authority. For example, *D.G. v. William W. Siegel & Assocs.*, 791 F. Supp. 2d 622 (2011) considered the exact situation where defendant William W. Siegel & Associates, Attorneys at Law, LLC ("Siegel") argued that plaintiff D.G. ("D.G.") lacked standing to allege a violation of the TCPA based upon cellular telephone calls to D.G. that were intended for another consumer, Kimberly Nelson ("Nelson"). *Id*. at 624. Notably, D.G. did not know Nelson, had no relationship with Siegel, and never consented to the calls. *Id*. In Siegel's Motion to Dismiss,

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Siegel, like Defendant, relied upon the unpublished decisions of *Cellco* and *Leyse* to argue that "the unintended recipient of the calls is not the 'called party' under the TCPA." *Id*. at 625. Upon review, *D.G.* held that neither case supported Siegel's argument and found that "[D.G.] was the called party because Siegel intended to call [D.G.'s] cellular telephone number and [D.G.] is the regular user and carrier of the phone. *Id*.

In reaching this decision *D.G.* explained that the "*Leyse* court held that Leyse's roommate, who sued the defendant, was not the called party and lacked standing. *Id.* citing *Leyse*, 2010 U.S. Dist. LEXIS 58461, [WL] at *4. *Leyse* explained that plaintiff Leyse was an unintended and incidental recipient of the call at issue since the defendant called the number associated with the individual that defendant intended to call. *Id*. This decision was disregarded by *D.G.* because *Leyse* dealt with a different TCPA provision[13] and evaluated the plaintiff's Article III standing. Furthermore, *Leyse* is distinguishable because in *D.G.*, Siegel did not call a number actually associated with Nelson, the individual it was attempting to contact, but instead called [D.G.'s] cellular number. Thus, unlike the roommate in *Leyse*, [D.G.] was not the unintended and incidental recipient of Siegel's calls. *D.G.*, 791 F. Supp. at 625.

Similarly, *D.G.* quickly disregarded *Cellco* as well. In *Cellco*, the defendant placed unsolicited telemarketing calls to plaintiffs' subscribers. 2010 U.S. Dist. LEXIS 106719, 2010 WL 3946713, at *1. Thereafter, an issue of statutory standing arose because the plaintiffs were telecommunications vendors and not the subscribers who actually received the phone calls. 2010 U.S. Dist. LEXIS 106719, [WL] at *7.

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[13] Specifically, 47 U.S.C. § 227(b)(1)(B), the landline provision relied upon by Defendant.

> Remarkably different from the plaintiffs in *Cellco*, who did not receive the calls, here, Plaintiff actually received the calls from Siegel. Because Siegel intended to call Plaintiff's cellular phone number, Plaintiff received the calls, and Plaintiff is the regular user and carrier of the phone, Plaintiff qualifies as a "called party" under the TCPA.

D.G., 791 F. Supp. at 625.[14]

Here, Mr. Pacleb does not know Frank Arnold, had no relationship with Defendant, and never consented to the calls. Moreover, Mr. Pacleb was the called party because Defendant intended to call Mr. Pacleb's cellular telephone number and Mr. Pacleb is the regular user and carrier of the phone. As such, this Court should disregard both *Leyse* and *Cellco* in rendering its decision with regard to the Defendant's Motion.

VI. CONCLUSION

In conclusion, Mr. Pacleb respectfully requests the court deny Defendant's Motion to Dismiss. Should the Court grant Defendant's Motion to Dismiss, in whole or in part, Mr. Pacleb respectfully requests leave to cure Mr. Pacleb's First Amended Complaint of any deficiencies.

Dated: May 8, 2013

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: ___/s/ Abbas Kazerounian____
ABBAS KAZEROUNIAN, ESQ.
ATTORNEY FOR PLAINTIFFS

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[14] See also *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 643 (7th Cir. 2012) ("We conclude that 'called party' in § 227(b)(1) means the person subscribing to the called number at the time the call is made.")

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

RICHARD CHEN, AND FLORENCIO PACLEB, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

Case No. 4:13-cv-00685-PJH

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Date: June 5, 2013
Time: 9:00 a.m.
Location: Courtroom 3, 3rd Floor
1301 Clay Street
Oakland, CA 94612

Hon. Judge Phyllis J. Hamilton

Date Action Filed: Feb. 14, 2013
Trial Date: Not yet set

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I. INTRODUCTION

Although the Amended Complaint was filed by two plaintiffs, Richard Chen and Florencio Pacleb, only one plaintiff has chosen to oppose Allstate's Motion to Dismiss. Chen's claims have been mooted by his acceptance of Allstate's Rule 68 offer of judgment. As such, he "is no longer a viable plaintiff." (Brief Opposing Motion to Dismiss ("Pl. Br."), p. 1 n. 1).

The remaining plaintiff, Pacleb, has opted to oppose Allstate's Motion, but his opposition is more notable for what it omits than what it says. In response to Allstate's Rule 12(b)(1) Motion, Pacleb does not dispute that Allstate's Rule 68 offer of judgment is more than sufficient to satisfy his individual Telephone Consumer Protection Act ("TCPA") claims in this action. That in itself is an admission that his individual claims are as moot as Chen's. While he contends that there is still a live case and controversy solely because he has asserted putative class action claims, he ignores that the U.S. Supreme Court decisively rejected that very argument just last month in *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059, 2013 U.S. LEXIS 3157 (U.S. Apr. 16, 2013). His continued reliance on Ninth Circuit authority that has been overruled *sub silentio* by *Genesis HealthCare* cannot save his claims from dismissal for lack of subject matter jurisdiction.

With respect to Allstate's alternative Rule 12(b)(6) Motion, Pacleb's attempt to salvage his TCPA claims fares no better. His admission that he was not the intended recipient of the alleged telephone calls is fatal to his TCPA claims, and he does not even try to respond to Allstate's showing that the Amended Complaint fails to state a claim for willful violation of the TCPA.

Pacleb's brief confirms that this Court lacks subject matter jurisdiction over this action, and even if jurisdiction existed, Pacleb has failed to state a TCPA claim. His Amended Complaint should be dismissed with prejudice.

II. ARGUMENT

A. Pacleb's Claims Are Moot And Must Be Dismissed

Notably, Pacleb does not dispute that Allstate's offer of judgment is more than sufficient to satisfy his individual claims. Indeed, Pacleb reiterates the allegations of the Amended Complaint that he received five cellular telephone calls from Allstate and that Allstate's maximum statutory liability is $500.00 per call if he can prove negligence and $1,500.00 per call if he can prove willfulness. (Pl. Br., p. 2). Pacleb acknowledges that Allstate offered him $10,000.00, which is $2,500.00 more than its potential statutory liability (assuming Pacleb can prove willful violations) and also offered injunctive relief and reasonable attorneys' fees. (Pl. Br., p. 3). Pacleb has all but admitted that Allstate's offer moots his individual claims since he acknowledges that his former co-plaintiff, Chen, did accept Allstate's Rule 68 offer and that, as a result, "Mr. Chen is no longer a viable plaintiff." (Pl. Br., p. 1 n. 1).

Nevertheless, Pacleb argues that Allstate's Rule 68 offer should be "disregarded" because it is not admissible except in a proceeding to determine costs. (Pl. Br., p. 6). This Court rejected the same argument earlier this year in *Ramirez v. Trans Union, LLC*, No. 3:12-cv-00632 JSC, 2013 U.S. Dist. LEXIS 36385 (N.D. Cal. March 15, 2013), explaining as follows:

> *Rule 68* specifies that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b). Plaintiff argues that Defendant's submission of the Offer in support of its motion to dismiss therefore violates Rule 68 and requires that Defendant's Motion to be stricken from the record. The Court disagrees. "[F]ederal courts may adjudicate only actual, ongoing cases or controversies," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990), and Federal Rule of Civil Procedure 82 dictates that the other Federal Rules of Civil Procedure cannot "extend or limit the jurisdiction of the district courts." Therefore, Rule 68(b) cannot prevent this Court from considering Defendant's offer of judgment to determine whether there is subject matter jurisdiction; to hold otherwise would potentially allow the Federal Rules to expand the federal court's jurisdiction beyond what is allowed by the Constitution. It is thus unsurprising that the federal appellate courts have considered Rule 68 offers in deciding subject matter jurisdiction motions. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011) (considering the effect of a pre-certification Rule 68 offer on a named plaintiff's standing to pursue his claims); *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575

F.3d 567, 574 (6th Cir. 2009) ("a Rule 68 offer can be used to show that the court lacks subject-matter jurisdiction").

Id. at *6-7. This Court should likewise reject Pacleb's argument for the same cogent reasons.[1]

Pacleb next argues that Allstate's offer of judgment is no longer effective because it has not been accepted. However, Pacleb acknowledges that Allstate extended its offer until such time as it is accepted by plaintiffs or withdrawn by Allstate. (Pl. Br., p. 3). Therefore, the offer did not expire within the 14-day period specified in Rule 68 and has not been "withdrawn." Pacleb is keeping all of his options open, stating that "[t]o date, Mr. Pacleb has rejected Defendant's offer of Judgment." (*Id.* (emphasis added); *see also id.*, p. 9 ("Mr. Pacleb … does not anticipate accepting said Offer in the future") (emphasis added)). Pacleb ignores that every Rule 68 mootness case that has been decided, including *Genesis HealthCare* and *Pitts*, arose because the Rule 68 offer was not accepted, yet all of those courts, including the Supreme Court and the Ninth Circuit, have addressed the mootness issue. Pacleb's reliance on the dissenting opinion in *Genesis HealthCare* for the proposition that "[a]n unaccepted settlement offer … is a legal nullity, with no operative effect" is therefore misplaced. *See* Pl. Br., p. 3 n. 3. In any event, "'the dissenting opinion's view … is not the law.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362 (1997) (citation omitted). The majority Opinion in *Genesis HealthCare* is the law, and it favors Allstate.

Pacleb argues that Allstate's reliance on *Genesis HealthCare* is "flawed for two reasons." (Pl. Br., p. 7). First, he argues that the Supreme Court "assumed, without deciding, that the Offer of Judgment mooted Symczyk's individual claim." (*Id.*, p. 8). However, Pacleb cites no cases holding that a Rule 68 offer cannot moot an individual plaintiff's claims. That is understandable, since courts in the Ninth Circuit and California federal courts uniformly hold that a Rule 68 offer that exceeds what the plaintiff could hope to recover at trial (such as Allstate's offer here) does

[1] Because *Ramirez* was decided before *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059, 2013 U.S. LEXIS 3157 (U.S. Apr. 16, 2013), the court was constrained by the Ninth Circuit's decision in *Pitts* to deny dismissal of the putative class action claims. However, as discussed herein, *Genesis HealthCare* overruled *Pitts sub silentio*.

moot the individual plaintiff's claim. Thus, while the Ninth Circuit in *Pitts* ruled that the offer would not moot the putative class claims (a ruling that does not survive *Genesis HealthCare*, as discussed below), it observed that if class issues are not involved, the offer of judgment would "moot the merits of the case because the plaintiff has been offered all that he can possibly recover through litigation." 653 F.3d at 1092, citing *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 n. 5 (5th Cir. 2008) (absent class considerations, "the Rule 68 offer of judgment renders the individual plaintiff's claims moot") (and citing numerous authorities). *See also Marschall v. Recovery Solution Specialists, Inc.*, 399 Fed. Appx. 186; 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"); *Goldstein v. The CBE Group, Inc.*, No. CV 12-2540 ODW, 2012 U.S. Dist. LEXIS 132699, at *2 (C.D. Cal. Sept. 17, 2012) ("[w]hen a defendant offers the maximum recovery available to a plaintiff, courts usually hold that the case is moot and 'there is no justification for taking the time of the court and the defendant in the pursuit of minuscule individual claims which the defendant has more than satisfied'") (citation omitted); *Scott v. Federal Bond and Collection Service, Inc.*, No. 10-CV-028250LHK, 2011 U.S. Dist. LEXIS 5278 (N.D. Cal. Jan. 19, 2011) (acknowledging the "basic principle that a case becomes moot once the plaintiff has been offered all that she is legally entitled to recover"); *Reed v. Global Acceptance Credit Co.*, No. C-08-01826 RMW, 2008 U.S. Dist. LEXIS 61738, at *18-19 (N.D. Cal. Aug. 12, 2008) ("[i]f defendants did offer plaintiff the maximum statutory damages that she could possible recover from the litigation, this court would most likely agree with defendants' argument that the claims would become moot").

Second, Pacleb argues that *Genesis HealthCare* does not moot his putative class action allegations because "*Genesis* bears no relevance to the situation at bar, [and] the Ninth Circuit case of *Pitts* is directly pertinent." In particular, Pacleb argues that even if his individual claim has been mooted, his action should not be dismissed because it is also brought on behalf of "others similarly situated" and that the alleged "class claim is enough to satisfy Article III

standing requirements." (Pl. Br., p. 13; *see also id.* (arguing that "[e]ven had Mr. Pacleb accepted defendant's individual Offer, Mr. Pacleb would have maintained a concrete interest in the outcome of this litigation with regard to Mr. Pacleb's right to represent the putative class")). However, the Supreme Court in *Genesis HealthCare* specifically rejected the argument that a named plaintiff retains a personal stake in the outcome by seeking to represent the interests of putative class members. Not only is the logic of *Genesis HealthCare* applicable in this case, but the Supreme Court's decision overruled *Pitts sub silentio*.

Preliminarily, in *Genesis HealthCare*, the Court reaffirmed "well-settled mootness principles." 2013 U.S. LEXIS 3157, at *13. Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." *Id.* at *10. 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.* at *11 (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).

Genesis HealthCare then held that these mootness principles apply to Fair Labor Standards Act ("FLSA") collective actions – a proceeding similar to Rule 23 class actions[2] – if

[2] Pacleb takes the statement in *Genesis HealthCare* that "Rule 23 actions are fundamentally different from collective actions under the FLSA," 2013 U.S. LEXIS, at *14, out of context. (*See* Pl. Br., p. 8 n. 6). Like a Rule 23 class action, a FLSA collective action allows employees to sue on behalf of themselves and similarly situated employees. There is also a certification process. If the court determines that the named plaintiff and putative class members are similarly situated, it conditionally certifies the class and permits notice to be sent to putative class members. The major difference is that in a collective action, only plaintiffs who affirmatively opt in are bound by the judgment, whereas in a typical class action seeking monetary damages potential class members are bound by the judgment unless they opt out. Thus, the "fundamental differences" primarily affect the certification process itself.

the named plaintiff's individual claim becomes moot before a motion for class proceedings has been filed under that statute. In opposing Allstate's Motion, Pacleb relies primarily upon *Pitts*, arguing that it is "directly pertinent." (Pl. Br., p. 9). But in *Genesis HealthCare*, the Supreme Court rejected the reasoning of *Pitts* and held 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. 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." 2013 U.S. LEXIS 3157, at *22-23; *see also id.* at *13 ("the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied").

In *Pitts*, the Ninth Circuit relied heavily on earlier Supreme Court Rule 23 decisions, including *Sosna v. Iowa*, 419 U.S. 393 (1975), *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980), which addressed mootness in the context of class actions in which class certification proceedings had already occurred. Those cases formulated a "relation back" theory premised on the assumption that small monetary claims of putative class members are "transitory" in that they would evade judicial review unless they were pooled in a class action. They held that keeping a putative class action alive after the named plaintiff received a Rule 68 offer by permitting a later-filed class certification motion to relate back to the filing of the complaint was consistent with Rule 23's goal of aggregating similar small claims that might not otherwise be brought.

Notably, Symczyk, the plaintiff in *Genesis HealthCare*, urged the Supreme Court to follow the Ninth Circuit's reasoning in *Pitts*. *See* No. 11-1059, Brief for Respondent, at 37-38 (U.S., filed Oct. 19, 2012) (emphasizing that in *Pitts*, the Ninth Circuit 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") (and citing *Roper* and *Sosna*).

However, in *Genesis HealthCare*, the Supreme Court decisively rejected *Pitts*' reasoning and held that the "relation back" doctrine does not apply where, as here, the named plaintiff's

claims become moot before a certification motion is filed. The Court concluded that its earlier decisions in *Sosna*, *Geraghty* and *Roper* 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. 2013 U.S. LEXIS 3157, at *14. By contrast, the plaintiff in *Genesis HealthCare* (like Pacleb) had not filed a class certification motion, so there was nothing to "relate back" to: "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." 2013 U.S. LEXIS 3157, at *16.

The Supreme Court also distinguished *Sosna* and *Geraghty* because those cases involved "inherently transitory" non-monetary issues that "would otherwise evade review" if the action was dismissed as moot. *Id.* at *17-18. However, in a putative class action seeking monetary damages (like Symczyk's and Pacleb's actions), putative class members' claims are not inherently transitory and will not evade review because they can still be asserted even if the named plaintiff's claims become moot. "[A] claim for damages cannot evade judicial review; it remains live until it is settled, judicially resolved or barred by statute …. [S]uch putative plaintiffs remain free to vindicate their rights in their own suits." *Id*. at *19-20. Here, the TCPA provides significant monetary damages for violations of the statute, and there is a substantial incentive for individuals to pursue relief.

Finally, the Supreme Court rejected the notion that the policies underlying the collective action provision justified keeping the case alive. The plaintiff in *Genesis HealthCare* 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." 2013 U.S. LEXIS 3157, at *20. 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.*

The Ninth Circuit, in *Pitts*, also reasoned that keeping a putative class action alive after the named plaintiff had received a Rule 68 offer of judgment was justified because "[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 contravene Rule 23's core concern: the aggregation of similar, small, but otherwise doomed claims." 653 F.3d at 1091 (citation omitted). That reasoning was rejected by the Supreme Court in *Genesis HealthCare*.

There are also four other reasons why *Genesis HealthCare* requires the dismissal of Pacleb's Rule 23 putative class action claims:

1. 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. Those courts which have declined to dismiss class actions took putative class members into account in assessing whether the named plaintiff could settle his individual claims prior to actual certification. Under present Rule 23(e), a named plaintiff can resolve his individual claims prior to the filing of a class certification motion without court approval.[3] 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 for resolving his or her own individual claims before a certification motion has been filed. The Supreme Court reached the same conclusion regarding FLSA actions, instructing that "nothing in the nature of FLSA actions precludes satisfaction – and thus the

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[3] 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." (Emphasis added).

mooting – of the individual's claim before the collective-action component of the suit has run its course." 2013 U.S. LEXIS 3157, at * 14 n. 4.

2. 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*, 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.

3. The Supreme Court has clarified its jurisprudence governing class actions since *Sosna*, *Geraghty* and *Roper* were decided. For example, in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), the Court enforced class action waivers in small-dollar consumer arbitration agreements. The dissenting opinion in *Concepcion* argued that "class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate …. What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?" *Id.* at 1760-61. However, the *Concepcion* majority ordered individual (non-class) arbitration and specifically rejected the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753.

4. The Supreme Court recently emphasized: "The 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*, 131 S. Ct. 2541, 2550 (2011) (citations omitted); *accord*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, at *16 (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 "'possess[es] the same interest [or] suffer[s] the same injury' as the class members.'"[4]

B. In Any Event, Pacleb's TCPA Claims Fail As A Matter of Law

Allstate demonstrated in its Motion that even if Pacleb's TCPA claims were not moot, they were still subject to dismissal on two independent grounds: 1) Pacleb lacks standing to assert a violation of the TCPA because he was not the intended recipient of the alleged phone calls; and 2) he failed to plead any facts in support of his contention that any alleged violation of the TCPA was "willful" so as to permit the award of treble damages. Pacleb's arguments to the contrary are unconvincing and ultimately fail.

Foremost, Pacleb has failed to respond to the latter argument. Pacleb's allegation of willfulness, which merely parrots the statutory language and adds no factual allegations, fails as a matter of law and, consequently, Count II of the Amended Complaint should be dismissed. *See, e.g.*, *Hanley v. GreenTree Serv., LLC*, __ F. Supp. 2d __, 2013 WL 1189697 (N.D. Ill. March 21, 2013) (dismissing TCPA claims with prejudice: "[Plaintiff] merely states what he understands the TCPA to proscribe, and then goes on to plead threadbare and conclusory facts that allege the elements of a *prima facie* cause of action under the Act, but nothing more. [Plaintiff's] complaint, therefore, is highly suspect because it merely recites naked facts mimicking the elements of a cause of action under the TCPA"); *Faulkner v. ADT Security Servs., Inc.*, 706 F.3d 1017, 1020 (9th Cir. 2013) ("threadbare recital" of elements of a statutory claim

[4] In light of all the foregoing, it is obvious that Allstate has not "deliberately attempted to mislead this Court" concerning the import of *Genesis HealthCare* in this action. (Pl. Br., p. 8 n. 7). It is Pacleb who errs in arguing that "*Genesis* bears no relevance to the situation at bar" and in urging this Court to "follow" *Pitts* rather than *Genesis HealthCare*. (*Id.*, p. 9).

under California privacy law governing taping of phone calls is insufficient to survive a motion to dismiss) (quotation omitted).

Though Pacleb does respond to Allstate's first argument under the TCPA, his response does not withstand scrutiny. Significantly, Pacleb does not dispute that the alleged phone calls he contends he received were placed to a man named Frank Arnold. (Am. Compl., ¶ 17.) Nevertheless, he argues that this does not matter because he received those calls on his cellular telephone and, though he was not the intended recipient of the calls, he has standing to sue. This is incorrect.

The TCPA provides by its express terms that: "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States-- **(A)** to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . **(iii)** to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." 47 U.S.C. § 227(b)(1) (emphasis added).

Whether calls to a cellular telephone or a residential telephone are concerned, the TCPA expressly refers to calls to the "called party" in both contexts. *Compare* 47 U.S.C. § 227(b)(1)(A) and 47 U.S.C. § 227(b)(1)(B). Courts construing the provisions of the TCPA that apply to cellular and residential calls have reached the conclusion that in order to have standing, the plaintiff must be the intended recipient of the call. *See, e.g., Cellco Partnership v. Dealers Warranty, LLC*, No. 09-1814 (FLW), 2010 WL 3946713, 2010 U.S. Dist. LEXIS 106719 (D.N.J. Oct. 5, 2010) (cellular calls);[5] *Leyse v. Bank of America*, No. 09-7654, 2010 U.S. Dist. LEXIS

[5] Pacleb criticizes Allstate for relying on *Cellco* and argues that it should be disregarded because it is a "Not for Publication" decision. As an initial matter, Pacleb's argument fails because neither the Westlaw nor Lexis versions of *Cellco* contain any such statement. In any event, the Local Rules of the District of New Jersey, the federal court which issued the *Cellco* decision, do not contain any such prohibition. *Cf.* Fed. R. App. P. 32.1(a) ("A court may not prohibit or restrict the citation of federal judicial opinions ... that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not

58461, at *10-11 (S.D.N.Y. June 14, 2010) (residential calls).

Those courts have reached that conclusion because the TCPA, by its plain terms, provides an exception for calls made with the prior express consent of the "called party." *See* 47 U.S.C. § 227(b)(1)(A)(iii).[6] Additional support for this interpretation is found in the TCPA's use of the term "call." "While the TCPA does not define 'call,' that operative term quite naturally suggests some kind of direct communication between two parties—the caller and the caller's intended recipient." *Hamilton v. Spurling*, No. 3:11-0102, 2013 WL 1164336, at *3 n. 5 (S.D. Ohio Mar. 20, 2013) (quoting *Ashland Hosp. Corp. v. SEIU, Dist. 1199 WV/KY/OH*, 2013 U.S. App. LEXIS 3616, *9-10 (6th Cir. 2013)).

Accordingly, the only logical reading of § 227(b)(1)(A)(iii) is one that requires the party asserting the TCPA claim to be the party to whom the calls in question were directed. Any other reading, such as that espoused by Pacleb, would render the TCPA's use of "call" and its exception for calls "made with the prior express consent of the called party" a nullity. Pacleb may not read such language out of the TCPA in the guise of interpreting the statute.

Indeed, to the contrary, courts read each statutory provision as having meaning, and to construe the statute so the "meaning of each word inform[s] the others and all in their aggregate tak[e] their purport from the setting in which they are used." *United States National Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993). *See also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citations omitted). The single decision relied upon by

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precedent,' or the like."); *Marracco v. Kuder*, No. 08-713, 2009 WL 235469 (D.N.J. Jan. 30, 2009) (citation to unpublished decisions "permitted" and widespread). Furthermore, this Court's Local Rules expressly permit the citation to decisions appearing in only Westlaw or Lexis. See N.D. Cal. L.R. 3-4(d)(4). Unpublished or not, the reasoning of *Cellco* is persuasive and should be followed by this Court.

[6] Indeed, Pacleb does not, and cannot, dispute that the absence of the consent of the called party is a necessary element of any TCPA claim. *See, e.g., Hanley*, 2013 WL 1189697, at *4 (citing cases).

Pacleb in support of his argument, *D.G. v. William W. Siegel & Assocs.*, 791 F. Supp. 2d 622 (N.D. Ill. 2011), fails to consider the foregoing well-settled principles of statutory construction and should not be followed by this Court.[7]

In short, Pacleb alleges that he was not the intended recipient of the calls from Allstate. Indeed, the Amended Complaint makes clear that Pacleb "was unable to speak with a live human representative, as [Pacleb] was routinely greeted by 'dead air' on the other end of the call, followed by a pre-recorded message asking for an individual named Frank Arnold." (Am. Compl., ¶ 17.) Given this allegation, Pacleb, as an unintended recipient, cannot maintain an action under the TCPA.[8]

III. CONCLUSION

For the foregoing reasons and the reasons set forth in its opening brief, Defendant Allstate Insurance Company respectfully requests that its Motion to Dismiss be granted and Judgment of Dismissal be entered in its favor and against Plaintiffs with prejudice.

Respectfully submitted,

DATED: May 15, 2013

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[7] The *D.G.* Court also predicated its decision upon the conclusion that "Plaintiff was the called party because [Defendant] intended to call Plaintiff's cellular telephone number and Plaintiff is the regular user and carrier of the phone." 791 F. Supp. 2d at 625. In the present case, Pacleb fails to allege any facts which would support any such conclusion.

[8] *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012), cited by Pacleb in a footnote, is inapposite as it merely concerns whether a former subscriber's consent to receive cellular phone calls could bind a subsequent subscriber to the same cellular phone number.

CERTIFICATE OF FILING AND 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 February 20, 2014.

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

Dated: February 20, 2014

PUBLIC JUSTICE, P.C.

s/ Spencer J. Wilson
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