No. 13-16816

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD CHEN, ET AL.,

Plaintiffs-Appellees,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

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

The Honorable Phyllis J. Hamilton, United States District Judge

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CDIA IN SUPPORT OF DEFENDANT-APPELLANT ALLSTATE INSURANCE COMPANY

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

The Consumer Data Industry Association is an industry trade association that has no parent corporation, and no publicly held corporation owns 10% or more of CDIA's stock.[1]

[1] Fed. R. App. P. 26.1(a), 29(c)(1).

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

INTEREST OF THE *AMICI CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business. Cases raising significant questions for employers subject to potential class actions are of particular concern to the Chamber and its members. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (addressing standard for class certification in case where Chamber submitted petition- and merits-stage *amicus* briefs advocating strict compliance with Rule 23 requirements).

Amicus curiae the Consumer Data Industry Association (CDIA) is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its

kind in the world with a membership of approximately 150 consumer credit and other specialized CRAs operating in the United States and throughout the world.

CDIA is vitally interested in the outcome of this appeal because CDIA's CRA members are subject to an intricate and comprehensive regulatory scheme under the Fair Credit Reporting Act ("FCRA"), which governs the collection, use, maintenance, and dissemination of consumer report information.[2] With limited regulatory guidance in interpreting the FCRA, CRAs often face private litigation based on novel theories of liability. Litigation risk is compounded by the potential for unlimited statutory damages that successful plaintiffs may recover in class action lawsuits under the FCRA. Moreover, in the electronic age, any CRA business practice is likely to be repeated millions of times each year (perhaps even millions of times each day).[3] Given such factors, CDIA's members' interest in the outcome of this appeal is significant in that this Court's decision may impact the

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[2] 15 U.S.C. § 1681 *et seq.*

[3] *See, e.g., Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) (noting that one CRA "processes over 50 million updates to trade information each day"); *see also,* Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 28 (May 2003) (the credit reporting system "deals in huge volumes of data – over 2 billion trade line updates, 2 million public record items, an average of 1.2 million household address changes a month, and over 200 million individual credit files.") available at http://faculty.msb.edu/prog/CRC/pdf/WP67.pdf

members' ability to settle the putative class action lawsuits frequently pursued against the members under the FCRA.[4]

Because CDIA has been involved in the consumer reporting industry for more than a century, and because its member CRAs and their furnishers and users are all subject to potential claims under the FCRA's class action provisions, CDIA is uniquely qualified to assist this Court as it considers the appeal of Allstate Insurance Company.

[4] The FCRA provides for "any actual damages sustained by the consumer as a result of the [willful violation] or damages of not less than $100 and not more than $1,000" from those who have willfully failed to comply with the FCRA "with respect to" consumers. 15 U.S.C. § 1681n(a)(1)(A).

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amici curiae*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents two related yet distinct questions of law. The first is whether a Rule 68 offer that would provide the plaintiff with full relief moots a plaintiff's individual claims so long as the offer is extended indefinitely. Allstate persuasively argues that such an offer does render an individual's claims moot, notwithstanding this court's recent decision in *Diaz v. First American Home Buyers Protection Corporation*, 732 F.3d 948 (9th Cir. 2013). *See* Appellant's Opening Brief at 12-18. *Amici* agree and will not repeat Allstate's arguments here.

The second question is whether the presence of class claims under Rule 23 preserves federal jurisdiction when the named plaintiff's individual claims become moot before the district court rules on class certification.[5] *Amici* are concerned primarily with this second question.

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[5] There are several other ways (besides an unaccepted Rule 68 offer) that a plaintiff's individual claims may become moot before the district court's resolution of a motion for class certification. For example, a plaintiff may accept a defendant's settlement offer. *See, e.g., Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1244 (11th Cir. 2003) ("The general rule is that settlement of a plaintiff's claims moots an action."). Alternatively, the court may enter judgment in favor of the plaintiff after the defendant makes a Rule 68 offer that fully satisfies the plaintiff's individual claims. *See, e.g., O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009) (holding that an individual claim becomes moot once a defendant makes a Rule 68 offer that would completely satisfy a claim, but stating that the "the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment"). Less commonly, the court may enter judgment in

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The Court ostensibly answered that second question in *Pitts v. Terrible Herbst, Inc*., 653 F.3d 1081 (9th Cir. 2011), which held that when a plaintiff files a Rule 23 class action seeking damages, "mooting the putative class representative's claims will not necessarily moot the class action," even when "the district court has not yet addressed the class certification issue." *Id.* at 1090. The court concluded that when a defendant attempts to "pick off" a named plaintiff through an early settlement offer, the claims become "transitory in nature." *Id.* at 1091 (quotation marks omitted). The court held that the district court may continue to exercise jurisdiction over such "transitory" claims, notwithstanding the mootness of the plaintiff's individual claims, and stated that "if the district court were to certify a class, certification would relate back to the filing of the complaint." *Id.*

But the rule announced in *Pitts* cannot stand in light of the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). In *Genesis Healthcare*, the Supreme Court held, in the context of a collective

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favor of the plaintiff where the defendant defaults or the plaintiff prevails on the merits. *See, e.g., McCauley v. Trans Union, L.L.C*., 402 F.3d 340, 342 (2d Cir. 2005) ("entry of a default judgment against [defendant] for $240 plus reasonable costs . . . would remove any live controversy from this case and render it moot."); *Clark v. State Farm Mut. Auto. Ins. Co.,* 590 F.3d 1134, 1138 (10th Cir. 2009) ("We . . . lack power to hear moot claims, including those that have been fully satisfied by a monetary judgment." (citation and internal quotation marks omitted)).

action under the Fair Labor Standards Act ("FLSA"), that if a plaintiff's individual claims become moot before conditional certification under the FLSA, the entire action must be dismissed. The Court reasoned that dismissal of the plaintiff's claims moots the collective action claims because the plaintiff has "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." *Id.* at 1532. The Court further explained that because actions for damages are not "inherently transitory," they are not candidates for the relation back doctrine. *Id.* at 1531.

Genesis Healthcare thus explicitly rejected the core reasoning on which *Pitts* was based. In a Rule 23 damages class action, no less than in a FLSA collective action, a putative class representative has no personal interest in representing unnamed class members before a court decision on certification. Moreover, damages claims brought under Rule 23 are no more inherently transitory than damages claims brought under the FLSA. The relation back doctrine is therefore inapplicable to such claims. Accordingly, when a putative class representative's individual claims become moot before a ruling on class certification under Rule 23, the entire case—class claims and all—must be dismissed.

ARGUMENT

I. When an Individual's Claims Become Moot Before Class Certification, the Presence of Class Claims Under Rule 23 Does Not Preserve Federal Jurisdiction

The "Case" or "Controversy" requirement of Article III, § 2 restricts the authority of federal courts to resolving "the legal rights of litigants in actual controversies." *Valley Forge Christian College v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (quotation marks omitted). A plaintiff may invoke federal-court jurisdiction only if he possesses a legally cognizable interest, or "personal stake," in the outcome of the action. *Genesis Healthcare*, 133 S.Ct. at 1528 (quotation marks omitted). This personal stake must "be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). "If 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." *Genesis Healthcare*, 133 S. Ct. at 1528 (quotation marks omitted). Therefore, if the named plaintiff's claims on the merits become moot before the district court rules on class certification, the entire class action must be dismissed. *See Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 389 (5th Cir. 2003) ("As a general rule, a purported class action becomes moot when the personal claims of all named

plaintiffs are satisfied and no class has been properly certified.") (internal quotation marks omitted).

To date, the Supreme Court's cases recognize only two limited exceptions to that rule. Those cases—discussed below—permit a class action to continue despite the mooting of the named plaintiff's claims when the mooted plaintiff has a legally cognizable interest in obtaining class certification, *see infra* Section I.A, or the relation-back doctrine applies, *see infra* Section I.B. But *Genesis Healthcare* substantially undermined the rationales supporting those exceptions, and made clear both that plaintiffs have no legally cognizable interest in obtaining class certification and that the relation-back doctrine does not apply to claims for money damages.

A. When a Plaintiff's Individual Claims Become Moot Before a Court's Ruling on Class Certification, the Plaintiff Has No "Personal Stake" in Obtaining Class Certification

The Supreme Court has twice suggested that a named plaintiff possesses a legally cognizable interest in obtaining class certification when his individual claims are moot. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). However, *Roper* and *Geraghty* both addressed situations where the named plaintiffs' claims became moot *after* the district court denied class certification. They thus do not apply to the situation presented here, where the named plaintiff's claim became moot *before*

the district court ruled on class certification. Furthermore, both cases have been substantially repudiated by *Genesis Healthcare* and other recent Supreme Court precedent.

In *Roper*, the Court held that class representatives whose individual claims had become moot after the district court denied class certification had standing to appeal the denial of class certification on the theory that they possessed an ongoing, personal *economic* stake in the substantive controversy—to shift a portion of attorney's fees and expenses to successful class litigants. 445 U.S. at 332-34. The Court held that this "personal stake" could "be satisfied fully once effect is given to the decision of the Court of Appeals setting aside what it held to be an erroneous District Court ruling on class certification."[6] *Id.* at 336-37. *Roper*'s conclusion was thus predicated on the notion that the plaintiffs' interest in recovering a portion of their attorneys' fees satisfied Article III's case or controversy requirement. The Court rejected this proposition ten years later in *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), which held that an "interest in attorney's fees is, of course, insufficient to create an Article III case or

[6] The personal economic stake recognized in *Roper* would not preserve jurisdiction in this case since Allstate offered to pay the plaintiff's attorneys' fees and costs in addition to the full value of his TCPA claims.

controversy where none exists on the merits of the underlying claim."[7] *Id*. at 480. Thus, once the underlying claim has become moot, the plaintiff's interest in recovering attorney's fees does not confer a personal stake in the litigation sufficient for ongoing federal jurisdiction.

In *Geraghty*, the Court extended *Roper* to cases where the named plaintiff lacks any economic interest in appealing the denial of class certification. In concluding that the court of appeals had jurisdiction over the appeal, notwithstanding the mootness of the plaintiff's individual claims, the court stated that "[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." 445 U.S. at 402. The Court also stated 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. This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." *Id.* at 403 (emphasis added). The Court therefore concluded, on the basis of this supposed "right" to have a class certified, that a putative class representative has a "'personal

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[7] *Genesis Healthcare* recognized the tension between *Roper* and *Lewis* but declined to decide whether *Roper* has any "continuing validity" in light of *Lewis* because such resolution was unnecessary to the decision in the case. 133 S. Ct. at 1532 n.5.

stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404.

Geraghty's odd notion that a plaintiff enjoys a "right" to have a class certified—a right which ostensibly arises the moment he files a class action complaint—conflicts with the Rules Enabling Act and has been rejected by recent Supreme Court precedent. The Rules Enabling Act provides that the "rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). And the Supreme Court has recently explained that "[a] class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). "Nor does congressional approval of Rule 23 establish an entitlement to class proceeding for the vindication of statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). Indeed, far from creating rights, Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Id.*, at 2310; *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) ("The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." (quotation marks and citation omitted)). Rule 23 does nothing more than set forth

the conditions under which "a class action *may* be maintained." Fed. R. Civ. P. 23(b) (emphasis added).

Furthermore, in *Genesis Healthcare*, the Court implicitly rejected the claim that the filing of a class complaint grants the plaintiff a legally cognizable interest in pursuing claims on behalf of others. There, the plaintiff contended that she had "a sufficient personal stake in this case based on a statutorily created collective-action interest in representing other similarly situated employees" to keep her class claims alive despite the mootness of her individual claims. 133 S. Ct. at 1530. The Court disagreed, explaining that the plaintiff's nascent hope of representing others did not "preserve her suit from mootness." *Id.* at 1530; *see also id.* at 1529 ("[T]he mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied."); *Cf. Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) ("That the complaint identifies the suit as a class action is not enough by itself to keep the case in federal court."). *Genesis Healthcare* puts to rest the notion that a putative class representative has a "personal stake" in obtaining class certification.

In this case, the district court concluded that *Genesis Healthcare* applies only to FLSA collective actions and not to Rule 23 class actions. This conclusion was incorrect. The "fundamental" difference between FLSA collective actions and Rule 23 class actions identified in *Genesis Healthcare* is that in a Rule 23 action,

"a putative class acquires an independent legal status once it is certified under Rule 23," whereas "conditional certification [under the FLSA] does not produce a class with an independent legal status." *Id*. at 1530. However, before a district court makes a decision on class certification, a named plaintiff bringing class claims under Rule 23 is in the exact same position as a plaintiff bringing collective action claims under the FLSA—neither possesses a "personal stake" in representing other people that would "preserve [the] suit from mootness." *Id*. Put simply, under existing Supreme Court precedent, the fundamental difference between FLSA collective actions and Rule 23 class actions emerges after certification, not before. There is thus no legal basis for limiting the holding in *Genesis Healthcare* to collective action claims under the FLSA.

Because a plaintiff lacks any legally cognizable interest in obtaining class certification, the mooting of a plaintiff's individual claims before the court rules on class certification deprives the court of jurisdiction to hear class claims.[8]

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[8] Several courts have recognized, post-*Genesis*, that a plaintiff whose individual claims become moot before class certification has no remaining "personal stake" in the litigation. *See, e.g., Masters v. Wells Fargo Bank S. Cent., N.A*., 2013 WL 3713492 at *5 (W.D. Tex. July 11, 2013) ("Prior to certification, the named plaintiff has no interest in the class claims."); *Keim v. ADF MidAtlantic, LLC*, 2013 WL 3717737 at *7 (S.D. Fla. July 15, 2013) ("Notwithstanding Plaintiff's request in his complaint for an order certifying the class, Plaintiff did not move for class certification, so the putative class never acquired an independent legal status that would give rise to responsibilities on Plaintiff's

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B. The Relation Back Doctrine Does Not Apply to Class Action Claims for Monetary Damages

Neither can the "relation back" doctrine preserve federal jurisdiction over class claims when the putative class representative's claims become moot before certification. The notion that the relation back doctrine could preserve such claims derives from the Supreme Court's decision in *Geraghty*. There, the Court narrowly extended its holding in *Sosna v. Iowa*, 419 U.S. 393 (1975)—that once a class action has been certified under Rule 23, the "class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]," *id.* at 399, such that a live controversy may continue to exist even after the named plaintiff's claim becomes moot, *id.* at 399-402—to situations where the named plaintiff's claims become moot *after* the district court denies the plaintiff's motion for class certification. *Geraghty*, 445 U.S. at 404. *Geraghty* thus held that the named plaintiff could still appeal the denial of class certification, even though his individual claim was moot, because the class action *would have* acquired an independent legal status but for the district

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part."); *Scott v. Westlake Servs., LLC*, 2013 WL 2468253 at *20 (N.D. Ill. June 6, 2013) ("Because [defendant] made a complete offer of relief to [plaintiff] *before* she moved for class certification, the . . . [plaintiff's] personal interest in both of her claims under the TCPA was eliminated, and . . . she lacks a legally cognizable interest in the outcome of the case." (citation and internal quotation marks omitted)).

court's erroneous denial of class certification. *Id.* at 407. In that situation, a corrected ruling on appeal "relates back" to the time of the erroneous denial of the certification motion—a time when the named plaintiff's claim was still live. *Id.* at 404 n.11. The court noted, however, that "[i]f the named plaintiff has no personal stake in the outcome *at the time class certification is denied*, relation back of appellate reversal of that denial still would not prevent mootness of the action." *Id.* (emphasis added).

Recognizing *Geraghty*'s narrow scope, the Supreme Court made clear in *Genesis Healthcare* that the relation back doctrine does not apply when the named plaintiff's individual claim becomes moot *before* the district court's ruling on certification. 133 S. Ct. at 1530 ("[T]he Court [in *Geraghty*] explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the district court denies class certification"). Where, as here, the district court has not yet ruled on class certification by the time the individual's claim becomes moot, "[t]here is simply no certification decision to which [the plaintiff's] claim could . . . relate[] back." *Id.*

But even if a certification decision could somehow "relate back to the filing of the complaint," *Pitts*, 653 F.3d at 1091, *Genesis Healthcare* made clear that the relation back doctrine applies only to inherently transitory claims. And damages claims, by their very nature, are not inherently transitory.

The Supreme Court has applied the relation-back doctrine exclusively in the context of constitutional challenges where the plaintiff seeks to enjoin government action. For example, in *Sosna*, the petitioner challenged an Iowa law that prohibited individuals from filing petitions to dissolve marriages until those individuals had resided in Iowa for one full year. 419 U.S. at 395. By the time the petitioner's case went up on appeal, she had resided in Iowa for more than one year, making the challenged statute inapplicable as to her. As the Court recognized, if petitioner "had sued only on her own behalf, . . . the fact that she now satisfies the one-year residency requirement . . . would make this case moot and require dismissal." *Id.* at 399. Nevertheless, the Court recognized that "state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion." *Id.* at 400. Because the claim was such that no "single challenger" could litigate the issue through "appellate review," the Court held that "[a]though the controversy is no longer alive as to . . . Sosna, it remains very much alive for the class of persons she has been certified to represent." *Id.* at 401. In other words, when a claim is inherently transitory—i.e., no single plaintiff can successfully challenge the allegedly unconstitutional conduct—the case "does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiff[]." *Id.*

The Court was careful to point out, however, that "the same exigency that justifies this doctrine serves to identify its limits. In cases in which the *alleged harm would not dissipate* during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation." *Id*. at 402 (emphasis added).

Sosna thus teaches that the key questions in deciding whether a case is inherently transitory, and thus subject to the relation back doctrine, are (1) whether the defendant's conduct will continue to harm members of the putative class absent judicial intervention, and (2) whether that harm would be of such short duration that no individual would be able to pursue the claim to resolution before his claim becomes moot. When the named plaintiff's claim is inherently transitory, the fact that it becomes moot before class certification "does not deprive [the court] of jurisdiction." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *see also Geraghty*, 445 at 399 ("Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."). "In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52. As *Sosna, Geraghty*, and *McLaughlin* make clear, the relation back doctrine for "inherently transitory"

claims "was developed to address circumstances in which *the challenged conduct* was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Genesis Healthcare*, 133 S. Ct. at 1531 (emphasis added). Significantly, "this doctrine has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." *Id.* *Genesis Healthcare* thus leaves no doubt that the relation back doctrine applies only to situations where the inherently transitory nature of *the defendant's conduct* would prevent a court from ever retaining jurisdiction over a claim long enough to determine whether the conduct is unlawful.

Ignoring those clearly defined limits on the relation-back doctrine, *Pitts* extended the doctrine to cases involving "transitory claims," which it defined as claims "acutely susceptible to mootness in light of the defendant's tactic of picking off lead plaintiffs with a Rule 68 offer to avoid a class action." 653 F.3d at 1091 (quotation marks omitted). *Pitts* thus shifted the focus from the nature of the harm inflicted by the defendant's unlawful conduct to the litigation strategy employed by the defendant in the context of a particular lawsuit. But under this definition, the relation-back doctrine would apply to *every* claim filed as a class action, thereby obliterating the "limits" demarcated in *Sosna* and *Geraghty*.

In *Genesis Healthcare*, the plaintiff also argued that a claim for damages is "inherently transitory in effect" where the defendant attempts to "strategically use Rule 68 offers to 'pick off' named plaintiffs" before conditional certification. *Id.* at 1531. Rejecting this argument, the Court explained that claims for damages are not inherently transitory and thus are not candidates for the relation back doctrine. *Id.* ("Unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations."). The Court further clarified that it makes no sense to describe a settled damages claim as "evading review," because "a full settlement offer addresses plaintiff's alleged harm by making the plaintiff whole." *Id.* And, unlike inherently transitory claims where *no* plaintiff would be able to obtain a judicial decision on the lawfulness of the defendant's conduct, when the named plaintiff settles a damages claim with the defendant, the other "putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following [the named plaintiff's suit] than if her suit had never been filed at all." *Id.* Accordingly, *Genesis Healthcare* teaches that the relation back doctrine does not apply to claims for monetary damages, thereby undermining *Pitts*'s central rationale for allowing the class claims to go forward.

* * *

The fact that a plaintiff may maintain a class action if he can satisfy Rule 23's stringent requirements does not give the plaintiff a "personal stake" in obtaining a certification decision. And the relation-back doctrine does not apply to putative class actions seeking money damages. Thus, if the plaintiff's individual claim on the merits becomes moot before a decision on class certification the lawsuit is at an end. *See Damasco*, 662 F.3d at 896 ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.").

II. *Pitts*'s Concern that Defendants Will "Pick Off" Plaintiffs Is Unfounded and Contradicts Judicial Policy Favoring Settlement

Pitts invoked a policy concern to justify its extension of the relation-back doctrine to "transitory" claims: the suggestion that defendants would "pick off" representative plaintiffs by making Rule 68 offers of full relief, thereby "'undercut[ting] the viability of the class action procedure, and frustrat[ing] the objectives of this procedural mechanism for aggregating small claims.'" 653 F.3d at 1091 (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir. 2004)). The court worried that this tactic "would effectively ensure that claims that are too economically insignificant to be brought on their own would never have their day in court." *Id.* This policy concern is unfounded.

When a plaintiff's class claims have merit, "picking off" the class representative by making a Rule 68 offer fully satisfying his individual claims is unlikely to be an effective long-term strategy. A savvy attorney who has already drafted a class action complaint should have little difficulty recruiting new putative class representatives and refiling a slightly modified complaint once his original client has received the full value of his claims. The defendant must then decide whether to defend itself or to "pick off" these second-generation class representatives (by paying the full value of their claims). A defendant that continues to offer 100 percent of the amount claimed to every successive would-be class representative will invite a feeding frenzy of litigation. Eventually, a defendant confronted with meritorious claims may conclude that it would *benefit* from class certification so that it can attempt to settle all of the claims against it for something less than 100 cents on the dollar. From the defendant's perspective, this outcome is arguably more economically rational than "picking off" each individual plaintiff one by one, which the defendant must reasonably expect to do when the claims are meritorious.

Pitts's rationale is also problematic because it undermines the well-established judicial policy to "promote settlement before trial." *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989). Settlement "eases crowded court dockets and results in savings to the litigants and the judicial system," and should

therefore "be facilitated at as early a stage of the litigation as possible." *Id.* (quotation marks and citation omitted); *see also Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of *all lawsuits*." (emphasis added)).

Defendants consider making Rule 68 offers of full relief because they believe that fully compensating the plaintiff will bring certainty and put an end to the litigation. If, however, the plaintiff purports to represent a class, and the class claims remain alive despite a full settlement with the putative class representative, defendants have no incentive to make such offers. The rule in *Pitts* requires defendants to fight every class action complaint all the way through certification, even where the plaintiff's claims are meritless. Such a result wastes judicial resources, generates excessive litigation costs, and prevents class representatives from timely receiving any compensation for their perceived injury.

Finally, the policy concern animating *Pitts* carries even less weight in cases where the plaintiff seeks statutory damages. The Telephone Consumer Protection Act, which prohibits certain unauthorized phone calls, makes defendants liable for $500 per negligent violation and up to $1,500 per knowing and/or willful violation. *See* 47 U.S.C. § 227(b)(3). Thus, a plaintiff who has been subjected to only a handful of unlawful phone calls may claim statutory damages worth thousands of

dollars. That is precisely what happened here. The statutory damages claimed by Richard Chen totaled $15,000 and those claimed by Florencio Pacleb totaled $10,000. There is no reason to think that such sums are an insufficient incentive for individual actions. *Pitts*'s contention that defendants may somehow avoid accountability for their allegedly illegal conduct by "picking off" class representatives in such cases is simply implausible.

CONCLUSION

The Chamber agrees with Allstate that *Diaz* does not apply to this case because Allstate extended its Rule 68 offer of full relief indefinitely. Because the individual claims are moot, the presence of class claims does not give rise to a "Case" or "Controversy" sufficient for federal jurisdiction over the class claims. To the extent that *Pitts* held otherwise, this court should recognize that *Genesis Healthcare* has overruled *Pitts*.

Dated: December 23, 2013

Respectfully submitted,

By: /s/ Theodore J. Boutrous, Jr.
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 5486 words up to the signature lines that follow the brief's conclusion, not including the corporate disclosure statement, table of contents, and table of authorities.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 23, 2013 in Los Angeles, California.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on December 23, 2013.

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

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