CASE NO.: 13-80177

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALLSTATE INSURANCE COMPANY,

PETITIONER – DEFENDANT,

V.

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

RESPONDENTS – PLAINTIFFS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
CIVIL CASE NO.: 4:13-CV-685 PJH

PLAINTIFFS RICHARD CHEN; AND, FLORENCIO PACLEB'S ANSWER IN OPPOSITION TO DEFENDANT ALLSTATE INSURANCE COMPANY'S PETITION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

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Respondent-Plaintiff FLORENCIO PACLEB ("Pacleb")[1] hereby files the following Answer in Opposition to Petitioner-Defendant ALLSTATE INSURANCE COMPANY's ("Allstate") request for leave to file an interlocutory appeal from the Honorable Phyllis J. Hamilton's June 10, 2013 Order pursuant to 28 U.S.C. § 1292(b).

I. INTRODUCTION

Allstate demands that this Court reconsider the unambiguous holding of *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011) following *Genesis Healthcare Corp. v. Symczyk*, __ U.S. __, 133 S. Ct. 1523 (2013), a "fundamentally different" United States Supreme Court decision that explicitly refused to analyze whether an unaccepted offer that fully satisfies a plaintiff's individual claim is sufficient to render the claim moot since the issue was not properly before the Court.[2] Such a demand is inappropriate because it is well-settled within the Ninth Circuit 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." *Ramirez, et al. v. Trans* Union,

[1] Plaintiff Richard Chen accepted Defendant's Rule 68 Offer of Judgment on May 8, 2013.

[2] "Rule 23 actions are fundamentally different from collective actions under the FLSA. See *Genesis Healthcare Corp. v. Symczyk*, __ U.S. __, 133 S. Ct. 1523 (2013).

3:12-cv-632 (JSC), Order Re: Defendant's Motion for Reconsideration of The Court's March 15, 2013 Order Denying Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Dkt. No. 100, page 3, lines 7-12 quoting *Pitts*, 652 F.3d at 1091-92. As discussed below, none of the alleged errors meet the heightened standards for interlocutory review. Thus, Allstate's petition should be denied.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1292(b),

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order...That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Certification for an interlocutory appeal is only warranted if the Court determines that (i) there are substantial grounds for a difference of opinion; (ii) the issue to be appealed involves a controlling question of law; and, (iii) an immediate appeal of the issue may materially advance the ultimate termination of the litigation. See 28 U.S.C. § 1292(b); *VIA Technologies, Inc.*, 2011 WL 2437425, at *1 (citing *In re Cement Antitrust Litig.*, 673 F.2d

at 1026); *Dynamic Random Access Memory Antitrust Litigation*, 2008 U.S. Dist. LEXIS 118398, at *31-32 (N.D. Cal. March 28, 2008) (Hamilton, J.).

Section 1292(b) is 'to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation.'" *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). As "[t]he requirements of § 1292(b) are jurisdictional," the statutory prerequisites for granting certification must be met before an appeal can be heard. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). The party seeking review of the district court's order has the burden of showing that the statutory prerequisites exist. See *Assn'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1087 (2008); and, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Moreover, as Section 1292(b) provides "a departure from the normal rule that only final judgments are appealable," it "must be construed narrowly." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n. 6 (9th Cir. 2002). Interlocutory appeal is "applied sparingly and only in exceptional cases." *United States v. Woodbury*, 263 F.3d 784, 788 n.11 (9th Cir. 1959).

III. ARGUMENT

Allstate presents the following question on appeal:

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

Defendant's Petition, page 7.

However, Allstate fails to acknowledge that *Genesis* is drastically different than *Pitts* and every court within the Ninth Circuit, including post-*Genesis* decisions, have affirmed that *Pitts* is still binding authority within the Ninth Circuit.

1. *GENESIS* DID NOT OVERRULE *PITTS* BECAUSE *GENESIS* CONSIDERED A "FUNDAMENTALLY DIFFERENT" SITUATION.

Despite statements to the contrary, Allstate asserts that there exists "a significant unsettled question concerning the impact of *Genesis* on *Pitts*." Defendant's Petition, page 3. However, Allstate fails to explain how an inapplicable case creates any ambiguity in a "fundamentally different" area of the law.

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. 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-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, Pacleb has made no such concessions, nor waivers of any kind. Since Defendant's Offer of Judgment [3] 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.

Based upon the above, Allstate's Petition should be denied since *Genesis* has no effect upon the ruling in *Pitts*. Thus, *Pitts* remains the law in the Ninth Circuit.

2. THERE ARE NOT GROUNDS FOR A SUBSTANTIAL DIFFERENCE OF OPINION.

Allstate's argument that substantial grounds for a difference of opinion exist is flawed for two reasons: (A) binding Ninth Circuit authority controls; and, (B) *Pitts* did not "rely" upon inapplicable precedent.

[3] Whether Allstate believes that Allstate's Offer of Judgment is generous is not relevant. The plaintiff in *Pitts* refused more than ten times the amount prayed for yet the Ninth Circuit ruled that the plaintiff's claim was not moot.

A. Binding Ninth Circuit authority governs.

Judge Hamilton, as other District Court judges, was bound to follow *Pitts* unless "the relevant court of last resort...undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Because the Court's goal "must be to preserve the consistency of circuit law," only if the intervening holding is "irreconcilable" with the prior circuit holding may the Court reverse an opinion that is consistent with Ninth Circuit case law. *Id*. at 900; see also *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) ("The presumption is that our [previous] holding [] is controlling in this case ... and we find that [an intervening holding] does not overcome this presumption."); *Biggs v. Sec'y of California Dep't of Corr. & Rehab*., 2013 WL 2321449 at *10 (9th Cir. May 29, 2013) ("Under our law-of-the-circuit rule, we are bound by *Johnson* unless it is 'clearly irreconcilable' with intervening Supreme Court precedent.").

Here, *Genesis* and *Pitts* considered Rule 68 Offers of Judgment in "fundamentally different" contexts, a collective action filed pursuant to the Fair Labor Standards Act ("FLSA") and a Rule 23 Class Action respectively. *Genesis* called Rule 23 cases "inapposite" and "inapplicable" to an FLSA claim; thus, the Supreme Court declined to apply case law from Rule 23

actions "because Rule 23 actions are fundamentally different from collection actions under the FLSA." See *Ramirez, et al. v. Trans* Union, 3:12-cv-632 (JSC), Order Re: Defendant's Motion for Reconsideration of The Court's March 15, 2013 Order Denying Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Dkt. No. 100, page 5, lines 3-7 quoting *Genesis*, 133 S. Ct. at 1530-32. This clear delineation between Rule 23 class actions and FLSA collection actions precludes a determination that *Genesis* is "clearly irreconcilable" with *Pitts*. Therefore, *Pitts* controls and Allstate's petition should be denied.

i. *District Courts within the Ninth Circuit summarily deny Allstate's claims.*

In the Ninth Circuit, district courts have uniformly disregarded *Genesis* in favor of *Pitts*. To date, Respondent's counsel has identified three post-*Genesis* decisions (a) *Craftwood II, Inc. v. Tomy International, Inc.,* SACV12-1710 DOC (ANx) (N.D. Cal. July 8, 2013); (b) *Canada v. Meracord, LLC*, 2013 WL 2450631 (W.D. Wash. June 6, 2013); and, (c) *Ramirez v. Trans Union, LLC*, 12-cv-632 (JSC) (N.D. Cal. July 17, 2013).

a. Craftwood II, Inc. v. Tomy International, Inc.

On July 8, 2013, the Honorable David O. Carter of the United States District Court, Central District of California, issued an Order Denying defendant Tomy International, Inc.'s ("Tomy") Motion for Summary Judgment regarding plaintiff Craftwood II, Inc.'s ("Craftwood") Complaint. A true and correct copy of Judge Carter's Order is attached hereto as Exhibit A.

After receipt of "junk" faxes, Craftwood filed a putative class action against Tomy alleging violations of the Telephone Consumer Protect Act ("TCPA"), 47 U.S.C. §§ 227(b)(1)(C)(iii); and, (b)(2)(E) on August 13, 2012. See Judge Carter's Order, page 2, lines 8-12. Thereafter, Tomy's counsel sent Craftwood an offer of $1,500 for each faxed advertisement sent to Plaintiff from Tomy, to pay costs, prejudgment interest, and to allow an injunction to be taken against Tomy. *Id*. at lines 22-28. Tomy filed a Motion for Summary Judgment claiming that Plaintiff's lawsuit was moot after Craftwood rejected Tomy's Offer. *Id*., page 3, lines 4-8.

In support of Tomy's position, Tomy relied upon the Seventh Circuit opinion of *Damasco v. Clearwire*, 662 F.3d 891 (7th Cir. 2011) and *Genesis*. First, Judge Carter acknowledged that the Seventh Circuit did hold that a defendant's settlement offer on a TCPA claim did moot the case. However,

Judge Carter noted that four circuits, including the Ninth Circuit, disagree with the approach taken by *Damasco*.[4] After review of *Pitts*, Judge Carter applied Ninth Circuit precedent and held that a rejected offer of judgment for the full amount of a putative class representative's individual claim did not moot a class action where the offer precedes the filing a motion for class certification. *Id*., page 4, lines 15-18.

Tomy also argued that *Genesis* either overruled or severely undermined *Pitts*. Judge Carter's Order, page 5, lines 15-17. Judge Carter rejected Tomy's *Genesis* argument for two reasons:

> First, *Genesis* is distinguishable because it considered a claim filed as a [collective] action under Section 16(b) of the Fair Labor Standard Act of 1938 ("FLSA"), 29 U.S.C. § 201, et seq. 133 S.Ct. at 1257. A ruling in the context of a collective action does not directly apply to a class action, and the Supreme Court clearly distinguished class certification precedent when it came to transitory claims and thwarting class actions by allow defendants to buy off named plaintiffs.

[4] *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1294-50 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir 2008); and, *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004).

> Second, the Court did not actually reach the issue of []whether the settlement offer of judgment under Federal Rule of Civil Procedure 68 mooted the individual claim. It assumed this to be the case, based on the argument having been waived in the courts below, and then moved on to examine what effect a moot individual claim would have on a FLSA action. *Id*. at 1527-29

Id., page 5, lines 15-27.

Ultimately, Judge Carter concluded that *Genesis* did "not cover class actions, nor does it even address how a rejected offer could moot a claim. Like other district courts in the Ninth Circuit to confront Tomy's argument, this Court Concludes that *Pitts* is controlling here. See *Chen v. Allstate Ins. Co.,* C 13-0685 PJH, 2013 WL 2558012 (N.D. Cal. June 10, 2013); *Canada v. Meracord, LLC*, C12-5657 BHS, 2013 WL 2450631 (W.D. Wash. June 6, 2013)." *Id*., page 6, lines 9-13.

Here, there are no grounds for a difference of opinion with regard to the situation at bar. The Ninth Circuit, and district courts within the Ninth Circuit, have repeatedly followed *Pitts*. The Supreme Court in *Genesis* refused to address the issue at bar in *Pitts* and out-of-circuit decisions are not binding upon this Court. Therefore, Allstate's Petition should be denied.

b. Canada v. Meracord, LLC

On June 6, 2013, the Honorable Benjamin H. Settle of the United States District Court, Western District of Washington, issued an Order Denying defendant Meracord, LLC.'s ("Meracord") Motion to Dismiss plaintiff Dinah Canada's ("Canada") Complaint. A true and correct copy of Judge Settle's Order is attached to hereto as Exhibit B.

On July 24, 2012, Canada, along with other plaintiffs, filed a class action complaint against numerous defendants, including Meracord, alleging violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968; the Washington Debt Adjusting Act, RCW Chapter 18.28; the Washington Consumer Protection Act, RCW Chapter 19.86; aiding and abetting the commission of unfair deceptive business conduct; breach of fiduciary duty; and, unjust enrichment. Judge Settle's Order, pages 1-2, lines 22-8. On April 25, 2013, Meracord served plaintiff Marie Johnson-Peredo ("Johnson-Peredo") with an offer of judgment for $13,058.46, plus reasonable attorneys' fees, costs, and expenses. *Id*. at page 2, lines 9-11. After Johnson-Peredo rejected Meracord's Rule 68 Offer of Judgment, Meracord filed a Motion to Dismiss Johnson-Peredo's claims.

Judge Settle quickly denied Meracord's Motion stating that "[t]he law of the Ninth Circuit...is '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 lines 18-21 quoting *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-1092 (9th Cir. 2011).

Furthermore, Judge Settle was also unpersuaded by Defendant's reliance upon *Genesis* since *Pitts* was "directly on point." Id. at pages 2-3, lines 21-2. Like Judge Carter, Judge Settle held that there was nothing to indicate the specific holding of *Genesis* extended beyond FLSA collection actions. *Id*. at page 3, lines 9-10. "In fact, [*Genesis*] explicitly distinguished class certification case law on the issues of significant personal stake, inherently transitory claims, and frustrating the purposes of class actions by allowing a defendant to 'pick-off' named plaintiffs." *Id*. at lines 10-13 (internal citations omitted). Therefore, Judge Settle declined to apply *Genesis* to the facts of *Canada*. *Id*. at lines 13-14.

Here, the Ninth Circuit's position with regard to this issue has been repeatedly reaffirmed. Defendant's attempt to create a difference of opinion by relying on out-of-circuit authority that contradicts binding Ninth Circuit authority should be disregarded. In the Ninth Circuit, a rejected Rule 68 Offer of Judgment does not moot a class representative's claim. Thus, Defendant's Petition should be denied.

c. Ramirez v. Trans Union, LLC

On July 17, 2013, the Honorable Jacqueline Scott Corley of the United States District Court, Northern District of California, issued an Order Denying Defendant Trans Union, LLC's ("Trans Union") Motion for Reconsideration of the Court's March 15, 2013 Order Denying Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. A true and correct copy of Judge Corley's Order is attached to hereto as Exhibit C.

In *Ramirez*, Plaintiff Sergio Ramirez filed suit against Trans Union alleging violations of the Federal Fair Credit Reporting Act and the California Consumer Credit Reporting Agencies Act. Shortly thereafter, Trans Union filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction following Ramirez's refusal to accept Trans Union's Rule 68 Offer of Judgment. *Ramirez, et al. v. Trans* Union, 3:12-cv-632 (JSC), Order Re: Defendant's Motion for Reconsideration of The Court's March 15, 2013 Order Denying Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Dkt. No. 100 ("Judge Corley's Order"), page 1, lines 22-28. Judge Corley denied said Motion pursuant to *Pitts*, a "binding Ninth Circuit holding..." *Id*. at page 3, lines 11-12.

Thereafter, Trans Union filed a Motion for Reconsideration arguing

> (1) that *Pitts* should not control because its facts are too dissimilar from the present action; (2) that [*Genesis*] overrules *Pitts*' holding that Rule 23 class actions are not mooted by unaccepted Rule 68 offers that would satisfy a named plaintiff's individual claims; and (3) that [Ramirez's] individual claim is fully satisfied and therefore is moot.

Id. at pages 2-3, lines 25-1.

In denying each of Trans Union's arguments, Judge Corley stated that "[*Genesis*] is not clearly irreconcilable with *Pitts*..." Judge Corley's Order, page 3, lines 1-5. As such, Judge Corley reaffirmed the binding Ninth Circuit holding in *Pitts* that..."an unaccepted Rule 68 offer of judgment – for the full amount of the name plaintiff's individual claim and made before the named plaintiff files a motion for class certification – does not moot a class action." *Pitts*, 652 F.3d at 1091-92.

Based upon the discussion above, case law within the Ninth Circuit clearly rejects *Genesis*. As such, there are not substantial grounds for a difference of opinion within this Circuit. Thus, Allstate's petition should be denied.

ii. *Out-of-Circuit opinions do not create grounds for a substantial difference of opinion.*

The sole authority relied upon by Allstate to establish grounds for a substantial difference of opinion are all out of this circuit. Since these decisions directly contradict binding authority from the Ninth Circuit that considered the very situation currently at issue, each decision should be disregarded. The Ninth Circuit has repeatedly stated the axiom that "circuit law 'binds all courts within a particular circuit.'" *IBT Int'l v. Banyon Limited Partnership* (In re IBT Int'l), 2012 Bankr. LEXIS 3684, 2012 WL 3264243 (9th Cir. 2012) quoting *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). "Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law (emphasis in original)." *Hart*, 266 F.3d at 1170. Finally, "[b]inding authority must be followed unless and until overruled by a body competent to do so." *Id*.

Here, no competent body has overruled *Pitts*;[5] thus, *Pitts* is the law in the Ninth Circuit. Pursuant to *Pitts*, a rejected Rule 68 Offer of Judgment does not moot the class representative's individual claims. Therefore, Allstate's petition should be denied.

[5] As discussed below, *Genesis* refused to address whether a Rule 68 Offer of Judgment that fully satisfies a class representative's individual claim made before the filing of a Motion for Class Certification moots the class claims because said issue was not before the Supreme Court.

B. *Pitts* did not "rely" upon inapplicable authority.

Allstate misinterprets unambiguous language in *Pitts* in order to claim substantial grounds for the Ninth Circuit to undertake a re-examination of *Pitts* exist because *Genesis* took issue with authority that *Pitts* "relied" upon.[6] Allstate's Petition, page 13. However, Pitts explicitly acknowledged that this authority did not address the precise issue before the Ninth Circuit and merely utilized the principals established in these cases to guide *Pitts*' holding. Quite simply, Allstate's misreading of the weight that *Pitts* gave to *Geraghty*; *Roper*; and, *Sosna* should be disregarded. Thus, Allstate's Petition should be denied.

IV. CONCLUSION

Pacleb respectfully requests that the Court deny Allstate's petition for an interlocutory appeal of Judge Hamilton's June 10, 2013 Order.

[6] Namely, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980); and, *Sosna v. Iowa*, 419 U.S. 393 (1975).