

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
United States District Court
Northern District of California

SERGIO L. RAMIREZ, on behalf of
himself and all others similar situated,

Plaintiff,

v.

TRANS UNION, LLC,

Defendant.

Case No.: 3:12-cv-00632 JSC

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION (Dkt. No. 52)**

In this putative class action, Plaintiff Sergio Ramirez alleges that he was denied an auto loan after Defendant Trans Union, LLC mistakenly informed a car dealership that Plaintiff was on the federal government's Office of Foreign Assets Control ("OFAC") list. Plaintiff contends that Defendant violated the Federal Credit Reporting Act ("FCRA") and the California Consumer Credit Reporting Agencies Act ("CCRAA") by failing to ensure "maximum possible accuracy" of its credit reports, and failing to provide consumers with proper disclosures. (Dkt. No. 1 ¶ 1.) Now pending before the Court is Defendant's motion to dismiss for lack of subject matter jurisdiction ("Motion"). (Dkt. No. 52.) Defendant

1 insists that this Court does not have subject matter jurisdiction because it has offered to pay
2 Plaintiff all of his alleged monetary damages, an offer Plaintiff did not accept. After
3 carefully considering the pleadings and evidence submitted by the parties, and having had
4 the benefit of oral argument on March 13, 2013, the Court concludes that Defendant’s
5 argument is foreclosed by binding Ninth Circuit precedent and therefore DENIES the motion
6 to dismiss.

7 **FACTUAL & PROCEDURAL BACKGROUND**

8 Defendant Trans Union is a credit reporting agency that sells consumer reports about
9 millions of consumers annually. (Dkt. No. 1 ¶¶ 6-7.) These reports occasionally include
10 what is known as an “OFAC alert.”

11 An OFAC alert is a specific type of data provided by consumer reporting
12 agencies on credit reports signifying that the subject of the report is purportedly
13 included in the list of the Office of Foreign Assets Control, Specifically
14 Designated National and Blocked Persons, which includes terrorists, money
launderers and narcotic traffickers.

15 (*Id.* at ¶ 16.)

16 On February 27, 2011, Plaintiff submitted a credit application with his wife to secure
17 financing to purchase a car at Dublin Nissan (“Nissan”). (*Id.* at ¶ 48.) Nissan transmitted
18 Plaintiff’s name, address, social security number, and date of birth to Defendant in order to
19 obtain a credit report from Defendant. (*Id.* at ¶¶ 49, 51.) Defendant then provided Nissan
20 with Plaintiff’s credit report. (*Id.* at ¶¶ 49.) Thereafter, Nissan refused to provide Plaintiff
21 with an auto loan because there was an “OFAC alert” on his credit report. (*Id.* at ¶ 55.)
22 Plaintiff is not, in fact, an individual included on the OFAC list. (*Id.* at ¶ 54.)

23 Plaintiff promptly contacted Defendant to inquire as to the OFAC alert and was told
24 that he did not appear on the OFAC list. (*Id.* at ¶¶ 56-58.) Upon Plaintiff’s request,
25 Defendant sent him a copy of his credit report which did not include an OFAC alert. (*Id.* ¶¶
26 58-62.) Plaintiff also separately received a letter from Defendant indicating that he
27 “potentially matched to the OFAC list.” (*Id.* ¶¶ 65-67.) Upon receipt of the letter, Plaintiff
28 contacted legal counsel, spoke with Defendant “a lot of times,” and sent Defendant a letter

1 asking that it take him “off the OFAC list.” (Dkt. Nos. 51-2 at 54:6-11, 60-2 at 43:11-25.)
2 Plaintiff then received a letter from Defendant stating that “we have removed your name
3 from the OFAC name screen alert list.” (Dkt. No. 60-2 at 46:15-47:4.) Plaintiff
4 subsequently filed this putative class action. Seeking to represent six distinct classes
5 Plaintiff brings six causes of action, three each under the FCRA and the CCRAA.

6 On December 21, 2012, Defendant sent Plaintiff an offer of judgment in the amount
7 of \$5,001.00, plus court costs and reasonable attorney fees pursuant to Federal Rule of Civil
8 Procedure 68 (“Offer”). (Dkt. Nos. 52-1 at ¶ 4; 52-4.) Plaintiff did not accept the Offer and
9 so, by its own terms and the provisions of Rule 68, the Offer lapsed after 14 days. (*Id.*)
10 Defendant argues that the amount of the offer of judgment is more than Plaintiff seeks to
11 recover in this lawsuit and therefore the Court lacks subject matter jurisdiction.

12 LEGAL STANDARD

13 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Ins. Co. of*
14 *America*, 511 U.S. 375, 377 (1994). It is therefore presumed that a claim is not within the
15 jurisdiction of the federal court “and the burden of establishing the contrary rests upon the
16 party asserting jurisdiction.” *Kokkonen*, 511 U.S. at 377; *see also St. Clair v. City of Chico*,
17 880 F.2d 199, 201 (9th Cir. 1989) (finding that it is “necessary for the party opposing the
18 motion to present affidavits or any other evidence necessary to satisfy its burden of
19 establishing that the court, in fact, possesses subject matter jurisdiction”).

20 Article III requires that the party purporting to represent a class must be able to prove
21 actual injury to himself. *O’ Shea v. Littleton*, 414 US 488, 494 (1974). At least one named
22 plaintiff must satisfy the actual injury component of standing in order to seek relief on behalf
23 of himself or a class. *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993) (internal citation
24 omitted). “The inquiry is whether any named plaintiff has demonstrated that he has
25 sustained . . . a direct injury as the result of challenged conduct.”

26 DISCUSSION

27 I. Defendant’s Rule 68 Offer is Properly Before the Court

28

1 At the outset, the Court must determine whether consideration of Defendant’s Rule 68
2 Offer of Judgment is appropriate. Rule 68 specifies that “[e]vidence of an unaccepted offer
3 is not admissible except in a proceeding to determine costs.” Fed. R. Civ. P. 68(b). Plaintiff
4 argues that Defendant’s submission of the Offer in support of its motion to dismiss therefore
5 violates Rule 68 and requires that Defendant’s Motion to be stricken from the record. The
6 Court disagrees. “[F]ederal courts may adjudicate only actual, ongoing cases or
7 controversies,” *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990), and Federal Rule of
8 Civil Procedure 82 dictates that the other Federal Rules of Civil Procedure cannot “extend or
9 limit the jurisdiction of the district courts.” Therefore, Rule 68(b) cannot prevent this Court
10 from considering Defendant’s offer of judgment to determine whether there is subject matter
11 jurisdiction; to hold otherwise would potentially allow the Federal Rules to expand the
12 federal court’s jurisdiction beyond what is allowed by the Constitution. It is thus
13 unsurprising that the federal appellate courts have considered Rule 68 offers in deciding
14 subject matter jurisdiction motions. *See Pitts v. Terrible Herbst, Inc.*, 653 F. 3d 1081, 1086
15 (9th Cir. 2011) (considering the effect of a pre-certification Rule 68 offer on a named
16 plaintiff’s standing to pursue his claims); *O’Brien v. Ed Donnelly Enterprises, Inc.*, 575 F. 3d
17 567, 574 (6th Cir. 2009) (“a Rule 68 offer can be used to show that the court lacks subject-
18 matter jurisdiction”).

19 **II. *Pitts* Disposes of Defendant’s Motion**

20 The Ninth Circuit has squarely addressed “whether a rejected offer of judgment for
21 the full amount of a putative class representative’s individual claim moots a class action
22 complaint where the offer precedes the filing of a motion for class certification.” *Pitts*, 653
23 F. 3d at 1084. It does not. *Id.* In *Pitts*, the defendant made a Rule 68 offer to the named
24 plaintiff for more than ten times the amount claimed as individual damages, “plus costs and a
25 reasonable attorney’s fee.” *Id.* at 1085. The defendant argued that this unaccepted offer
26 mooted the named plaintiff’s claim and thus deprived the court of subject matter jurisdiction.

27 The *Pitts* court first undertook a thorough survey of the Supreme Court’s rulings on
28 the issue of mootness and determined that “though *Sosna* [*v. Iowa*, 419 U.S. 393 (1975)],

1 *Gerstein* [*v. Pugh*, 420 U.S. 103 (1975)], [*Deposit Guaranty Nat'l Bank v. Roper* [445 U.S.
2 326 (1980)], [*U.S. Parole Comm'n v. Geraghty* [445 U.S. 388 (1980)], and [*County of*
3 *Riverside v. McLaughlin* [500 U.S. 44 (1991)]] do not address the precise issue before
4 us...they provide several principles that guide our decision.” The court then identified three
5 such principles: (1) upon certification of a class, mooting a class representative’s individual
6 claims will not moot the class action because the class has “acquire[d] a legal status separate
7 from the [individual] interest” of the class representative (quoting *Sosna*, 419 U.S. at 399);
8 (2) even “if the district court has denied class certification, mooting the putative class
9 representative’s claim will not necessarily moot the class action” because the class
10 representative retains an interest in certifying the class on appeal (citing *Roper*, 445 U.S. at
11 336-37 and *Geraghty*, 445 U.S. at 403-04); and (3) “even if the district court has not yet
12 addressed the class certification issue, mooting the putative class representative’s claims will
13 not necessarily moot the class action” because subsequent certification of the class will relate
14 back to the filing of the complaint (citing *McLaughlin*, 500 U.S. at 52 and *Gerstein*, 420 U.S.
15 at 110 n.11). 656 F. 3d at 1090.

16 The *Pitts* court applied these principles to the facts before it and concluded that
17 allowing a Rule 68 offer to moot a class action by satisfying the class representative’s
18 individual claims would allow a defendant to “pick off” lead plaintiffs and “effectively
19 ensure that claims that are too economically insignificant to be brought on their own would
20 never have their day in court.” *Id.* at 1091. The court therefore held that “an unaccepted
21 Rule 68 offer of judgment—for the full amount of the named plaintiff’s individual claim and
22 made before the named plaintiff files a motion for class certification—does not moot a class
23 action.” *Id.* at 1091-1092. Thus, under binding Ninth Circuit precedent, Defendant’s Rule
24 68 Offer does not defeat Plaintiff’s claims.

25 Defendant nonetheless asks that this Court stay disposition of the present motion
26 pending the United States Supreme Court’s ruling in *Genesis HealthCare Corp. v. Symczyk*,
27 No. 11-1059 (*arg’d* Dec. 3, 2012). The Court declines Defendant’s invitation. Even if the
28 Supreme Court were to reverse the Third Circuit’s ruling in *Symczyk v. Genesis HealthCare*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Corp., 656 F. 3d 189, 190 (3d Cir. 2011), it is far from clear that such ruling would overrule *Pitts*.

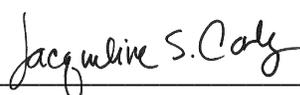
CONCLUSION

In light of *Pitts v. Terrible Herbst, Inc.*, 653 F. 3d 1081 (9th Cir. 2011), the Court DENIES Defendant’s Motion to dismiss for lack of subject matter jurisdiction.

This Order disposes of Docket No. 52.

IT IS SO ORDERED.

Dated: March 15, 2013



JACQUELINE SCOTT CORLEY
UNITED STATES MAGISTRATE JUDGE