

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
45
6 RICHARD CHEN, et al.,

7 Plaintiffs,

No. C 13-0685 PJH

8 v.

**ORDER AMENDING JUNE 10, 2013
ORDER; ORDER STAYING ACTION**

9 ALLSTATE INSURANCE COMPANY,

10 Defendant.
11 _____/

12 Before the court is the motion of defendant Allstate Insurance Company (“Allstate”) for an order amending the June 10, 2013 order to certify it for interlocutory appeal under 28 U.S.C. § 1292(b), and for an order staying this action pending the Ninth Circuit’s decision on interlocutory appeal. Plaintiffs oppose the motion. Having read the parties’ papers and carefully considered their arguments, and the relevant legal authority, the court hereby GRANTS the motion.

18 **BACKGROUND**

19 This is a case filed as a proposed class action, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (“TCPA”). The complaint asserts that 20 defendant Allstate Insurance Company engaged in unlawful activities by contacting the two 21 named plaintiffs and the members of the proposed class on their cell phones without their 22 consent.

24 Allstate made a Rule 68 offer of judgment to the two named plaintiffs, Richard Chen 25 (“Chen”) and Florencio Pacleb (“Pacleb”). Chen accepted the offer, but Pacleb did not. 26 Allstate then filed a motion to dismiss Pacleb’s claims (and the entire case) for lack of 27 subject matter jurisdiction, arguing that because the offer made to Pacleb was in complete 28 satisfaction of his claims, his claims had become moot as there was no longer a case or

1 controversy.

2 On June 10, 2013, the court issued an order denying the motion to dismiss for lack
3 of subject matter jurisdiction. Relying on Pitts v. Terrible Herbst, Inc., 653 F.3d 1081 (9th
4 Cir. 2011), the court held that even if Pacleb's claims were moot, the entire case could not
5 be dismissed because it was filed as a proposed class action, and Pacleb could still move
6 for class certification on behalf of the members of the proposed class.

7 In its motion, Allstate argued that Pitts had been overruled "sub silentio" by the
8 Supreme Court's recent decision in Genesis Healthcare Corp. v. Symczyk, ___ U.S. ___, 133
9 S.Ct. 1523 (2013). In that case, the Court held that in a collective action under the Fair
10 Labor Standards Act ("FLSA"), where the employer extends a Rule 68 offer of judgment in
11 full satisfaction of the named plaintiff-employee's claimed damages and fees, the named
12 plaintiff's FLSA claim becomes moot and the collective action is no longer justiciable
13 because the named plaintiff no longer has any personal interest in representing others in
14 the collective action.

15 On July 2, 2013, Allstate filed the present motion to amend the June 10, 2013 order
16 to certify it for interlocutory appeal under 28 U.S.C. § 1292(b), and to stay this litigation
17 pending the interlocutory appeal.

18 DISCUSSION

19 A. Legal Standard

20 The rule allowing a party to seek certification to appeal an interlocutory order, 28
21 U.S.C. § 1292(b), is a departure from the normal rule that only final judgments are
22 appealable, and therefore it must be construed narrowly. James v. Price Stern Sloan, Inc.,
23 283 F.3d 1064, 1067-68 n.6 (9th Cir. 2002). A district court may certify an order for
24 interlocutory review pursuant to § 1292(b), but "only in exceptional situations in which
25 allowing an interlocutory appeal would avoid protracted and expensive litigation." In re
26 Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982) (emphasis added).

27 To obtain interlocutory review under § 1292(b), the party seeking relief must satisfy
28 certain requirements. Couch v. Telescope, 611 F.3d 629, 633 (9th Cir. 2010). The district

1 court must find that the party has established the existence of a controlling question of law,
2 and substantial grounds for difference of opinion, and that the party has shown that an
3 immediate appeal may materially advance the ultimate termination of the litigation. In re
4 Cement, 673 F.2d at 1026 (citing 28 U.S.C. § 1292(b)).

5 An issue is “controlling” if “resolution of the issue on appeal could materially affect
6 the outcome of litigation in the district court.” Id. (citation and quotation omitted). “Although
7 resolution of the issue need not necessarily terminate an action in order to be ‘controlling,’ .
8 . . it is clear that a question of law is ‘controlling’ if reversal of the district court’s order would
9 terminate the action.” Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (1990).

10 A substantial ground for difference of opinion is not established by a party’s strong
11 disagreement with the court’s ruling; the party seeking an appeal must make some greater
12 showing. Mateo v. M/S Kiso, 805 F.Supp. 792, 800 (N.D. Cal. 1992), abrogated on other
13 grounds by Brockmeyer v. May, 361 F.3d 1222, 1226-27 (9th Cir. 2004). Substantial
14 grounds for a difference of opinion required to certify an order for interlocutory review arise
15 when an issue involves one or more difficult and pivotal questions of law not settled by
16 controlling authority. See 28 U.S.C. § 1292(b).

17 The third requirement – that the appeal be likely to materially speed the termination
18 of the litigation – is linked to the question whether an issue of law is “controlling,” in that the
19 district court should consider the effect of a reversal on the management of the case.
20 Mateo, 805 F.Supp. at 800 (citing In re Cement, 673 F.2d at 1026). If, on the other hand,
21 an interlocutory appeal would delay resolution of the litigation, it should not be certified.
22 See Shurance v. Planning Control Int’l, Inc., 839 F.2d 1347, 1348 (9th Cir. 1988).

23 B. Defendant’s Motion

24 Allstate argues that the requirements for certification under § 1292(b) are met. First,
25 Allstate contends that the June 10 order involves a controlling issue of law because if the
26 Ninth Circuit holds that this putative class action is rendered moot by Allstate’s Rule 68
27 offer, this case will be dismissed for lack of subject matter of jurisdiction.

28 Second, Allstate asserts that there are substantial grounds for a difference of

1 opinion. Allstate contends that before Genesis Healthcare, the Circuits were divided on this
2 issue – e.g., the Seventh Circuit differed from the Ninth Circuit. In addition, district court
3 opinions issued after Genesis Healthcare have reached different conclusions as to the
4 Genesis decision’s applicability to Rule 23 putative class actions. Allstate notes that even
5 this court acknowledged that the question whether a Rule 68 offer moots a Rule 23 putative
6 class action where a class has not yet been certified “remains unsettled.” Allstate argues
7 that certification will enable the Ninth Circuit to determine whether Pitts is good law in light
8 of Genesis Healthcare – an issue on which there is substantial difference of opinion, and
9 which is also an important jurisdictional issue that will affect other cases.

10 Third, Allstate contends that an immediate appeal may materially advance the
11 ultimate termination of this litigation because, if the Ninth Circuit determines that Pacleb’s
12 claim is moot, there will be no subject matter jurisdiction over the case and it will be
13 dismissed.

14 In opposition, plaintiffs assert that the Ninth Circuit has already determined (in Pitts)
15 that a Rule 68 offer of judgment that fully satisfies a named plaintiff’s individual claim before
16 a class is certified does not moot the entire case. Plaintiff contends that because Genesis
17 did not address whether an unaccepted offer that fully satisfies a plaintiff’s claim is
18 sufficient to render the claim moot – finding that that specific issue was not before it – it is
19 impossible for Genesis to have overruled Pitts.

20 Second, plaintiffs contend that there are no grounds for a difference of opinion – that
21 neither the fact that Allstate disagrees with the court’s June 10, 2013 order, nor the fact that
22 some other Circuits (such as the Seventh) have taken a different approach than the Ninth
23 Circuit is sufficient to establish a substantial ground for difference of opinion, as the
24 standard requires. Plaintiffs also cite two district court decisions from within the Ninth
25 Circuit, in which the courts held that Genesis did not overrule Pitts, and that the Supreme
26 Court’s ruling regarding FLSA collective actions is not clearly applicable in Rule 23 class
27 actions.

28 In reply, Allstate argues that the Ninth Circuit has not decided the exact issue posed

1 by Allstate – whether Genesis overruled Pitts. Allstate also reiterates that there are
2 substantial grounds for a difference of opinion, primarily based on this court’s comment that
3 the controlling law is unclear, but also based on the split in the Circuits. Allstate also notes
4 that plaintiffs have not opposed Allstate’s request for a stay pending appeal.

5 The court finds that the motion must be GRANTED. While the Supreme Court did
6 not clearly overrule Pitts, it did take issue with the precedent on which Pitts relies. Thus,
7 resolution of the issue raised by Allstate on appeal could materially affect the outcome of
8 the litigation in this court – even to the point of materially speeding the outcome of the
9 litigation. Moreover, while it is not entirely clear that there is a substantial ground for
10 difference of opinion within the Ninth Circuit, the lack of decisions by other courts on this
11 issue is no doubt attributable to the fact that the decision in Genesis Healthcare was issued
12 only three and a half months ago.

13 The court would welcome the Ninth Circuit’s view as to whether its Pitts decision
14 remains good law in light of Genesis Healthcare.

15 **CONCLUSION**

16 In accordance with the foregoing, the motion is GRANTED. Further, the case is
17 STAYED pending a decision by the Ninth Circuit. Defendant shall advise the court
18 immediately regarding the Ninth Circuit’s decision whether to permit the appeal.

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20 **IT IS SO ORDERED.**

21 Dated: July 31, 2013



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23 PHYLLIS J. HAMILTON
24 United States District Judge
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