

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 10-2007 DMG (AJWx)** Date June 3, 2016

Title ***Jose Gomez v. Campbell-Ewald Co.*** Page 1 of 3

Present: The Honorable **DOLLY M. GEE, UNITED STATES DISTRICT JUDGE**

KANE TIEN
Deputy Clerk

NOT REPORTED
Court Reporter

Attorneys Present for Plaintiff(s)
None Present

Attorneys Present for Defendant(s)
None Present

**Proceedings: IN CHAMBERS—ORDER RE DEFENDANT’S MOTIONS TO DISMISS
AND FOR LEAVE TO DEPOSIT FUNDS WITH THE COURT [248, 249]**

**I.
PROCEDURAL BACKGROUND**

On March 19, 2010, Plaintiff Jose Gomez filed a class action complaint in this Court alleging a single cause of action against Defendant, the Campbell-Ewald Company (“C-E”), for violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.* [Doc. # 1.]

On April 8, 2011, this Court denied C-E’s motion to dismiss, finding, *inter alia*, that C-E’s settlement offer did not moot Gomez’s class or individual claims. [Doc. # 67.] On February 22, 2013, this Court granted C-E’s motion for summary judgment on the basis that, as a Navy contractor, C-E was shielded from liability under the TCPA under the doctrine of derivative sovereign immunity (“MSJ Order”). [Doc. # 231.] A final judgment was entered on February 22, 2013. [Doc. # 232.]

On March 22, 2013, Gomez appealed the MSJ Order to the Ninth Circuit Court of Appeals. [Doc. # 238.] On September 19, 2014, the Ninth Circuit vacated and remanded, holding that (1) the defense of derivative sovereign immunity was not available to C-E as a matter of law, (2) the plaintiff’s failure to accept defendant’s offer of judgment did not render the action moot; and (3) the TCPA restriction on automated calls did not violate the First Amendment. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 882 (9th Cir. 2014).

On May 18, 2015, the United States Supreme Court granted Gomez’s petition for writ of certiorari. *Campbell-Ewald Co. v. Gomez*, ___ U.S. ___, 135 S. Ct. 2311, 191 L. Ed. 2d 977 (2015). On January 20, 2016, the U.S. Supreme Court affirmed the Ninth Circuit’s judgment, holding that (1) C-E’s status as a federal contractor did not entitle it to sovereign immunity from suit under the TCPA as a factual matter because there was evidence in the record to suggest that it

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had exceeded its authority under the Government's instructions, and (2) an unaccepted settlement offer of judgment does not moot a plaintiff's case. *Campbell-Ewald Co. v. Gomez*, ___ U.S. ___, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), *as revised* (Feb. 9, 2016). The case was remanded back to this Court for further proceedings consistent with this opinion, and was reopened on March 18, 2016. [Doc. # 257.]

On March 15, 2016, C-E filed a motion to dismiss for lack of jurisdiction or, in the alternative, entry of judgment for the plaintiff ("MTD") [Doc. # 248] and a motion for leave to deposit funds with the Court ("MLD") [Doc. # 249]. On April 22, 2016, Gomez filed an opposition to the motions ("Opp."). [Doc. # 267.] On May 20, 2016, C-E filed a reply ("Reply"). [Doc. # 270.]

II.
DISCUSSION

C-E contends that, "[c]onsistent with guidance from the United States Supreme Court, [it] has now paid \$10,000 (in two separate ways) to Gomez . . . by sending Gomez's counsel a certified check and, separately, by asking the Court to accept a payment in the same amount." (MTD at 1-2.)

The Ninth Circuit has recently ruled on this very issue, in the context of a TCPA class action. In *Chen v. Allstate Ins. Co.*, the court stated:

Under Supreme Court and Ninth Circuit case law, a claim becomes moot when a plaintiff actually receives complete relief on that claim, not merely when that relief is offered or tendered. Where, as here, injunctive relief has been offered, and funds have been deposited in an escrow account, relief has been offered, but it has not been received. [Plaintiff's] individual claims, therefore, are not now moot.

___ F.3d ___, 2016 WL 1425869, at *1 (9th Cir. Apr. 12, 2016).¹

¹ C-E contends that, because a petition for rehearing *en banc* is pending in *Chen*, "it is possible that *Chen* will not control the Court's analysis." (Reply MTD at 5.) Unless and until the Ninth Circuit votes to rehear the matter *en banc*, *Chen* remains binding on this Court. See Federal Rules of Appellate Procedure, Ninth Circuit Rule 35-3, Advisory Note ("When the Court votes to rehear a matter *en banc* . . . the three-judge panel opinion shall not be cited as precedent by or to this Court or any district court of the Ninth Circuit, except to the extent adopted by the *en banc* court.") (emphasis added).

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C-E attempts to split hairs by arguing that, because it has sent an “unconditional, irrevocable” payment to Gomez’s counsel, Gomez has “actually received” the relief at issue. (MTD Reply at 4.) C-E contends that, because the check has never been rejected or returned, Gomez has “actually received” a full tender of the funds. (*Id.*)

While the Supreme Court reserved the question as not before it, 136 S. Ct. at 672, *Chen* makes explicit that funds deposited in an escrow account have not been “actually received” for purposes of mooting an individual plaintiff’s claims. 2016 WL 1425869, at *1 (“Where, as here, injunctive relief has been offered, and funds have been deposited in an escrow account, relief has been offered, but it has not been received.”). Nothing in the Supreme Court’s *Campbell-Ewald* opinion precludes this holding.

Nor may C-E force Gomez to accept a settlement which has not been negotiated for or accepted merely by sending his counsel an unsolicited check and deeming it “unconditional” and “irrevocable.” The *Chen* court ruled that, even “[a]ssuming arguendo a district court could enter a judgment according complete relief on a plaintiff’s individual claims over plaintiff’s objections, thereby mooting those claims, such action is not appropriate [because the] would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted.” *Id.* The court ruled that, because plaintiff had not yet had a fair opportunity to move for class certification, the district court should not enter judgment on plaintiff’s individual claims. *Id.*

In short, Gomez’s matter remains “live” because he has not accepted the settlement offer, and because this Court has not entered judgment in his favor. Gomez has not yet had a fair opportunity to show whether or not class certification is warranted, and it would not be appropriate under the circumstances for the Court to enter judgment for Plaintiff against his wishes. Because depositing funds with this Court will not render Gomez’s claim moot, C-E’s motion for leave to deposit funds with the Court is denied.

III.
CONCLUSION

In light of the foregoing, Defendant C-E’s motions to dismiss and for leave to deposit funds with the Court are **DENIED**. Defendant C-E shall file its Answer within 15 days after the date of this Order.

IT IS SO ORDERED.