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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. KOBY, an individual; MICHAEL SIMMONS, an individual; JONATHAN W. SUPLER, an individual; on behalf of themselves and all others similarly situated, Plaintiffs, vs. ARS NATIONAL SERVICES, INC., a California Corporation; and JOHN AND JANE DOES 1 through 25 inclusive, Defendants.	Case 09cv0780 JAH JMA **PLAINTIFFS'MEMORANDUM OF POINTS AND AUTHORITIES PURSUANT TO CivLR 7.1(f)(3)(b) OPPOSING DEFENDANT'S MOTION [Docket Doc. 28]** DATE: Under submission (see Docket 32) The Honorable John A. Houston

I. INTRODUCTION

By Order (Docket 25) entered on July 27, 2010, the Court amended its Order (Docket 19) to certify questions for an interlocutory appeal under 28 U.S.C. §1292(b). Defendant failed to timely file the petition for permission to appeal with the Ninth Circuit and now moves for a second order under §1292(b) so as to re-start the time within which to file the petition with the appellate court.

Due to events on and after July 27, 2010, the reasons which had prompted the initial certification no longer exist and Plaintiffs now oppose Defendant's Motion to amend the Order [Docket Doc. 19] to certify questions for appeal. There no longer is a basis to conclude either that substantial grounds for difference of opinion exists or that there is any likelihood an immediate appeal will materially advance the ultimate termination of this lawsuit.

Contemporaneous with the filing of this opposition, Plaintiff Michael Simmons moves to modify the Order [Docket Doc. 19] to reinstate his claim alleging violation of 15 U.S.C. §1692e(11). Plaintiffs request that Motion [Docket Doc. 35] be decided prior to deciding Defendant's present Motion.

II. THE FACTORS UNDER §1292(b) DO NOT EXIST.

"Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare." *Semeneck v. Ahlin*, 2010 U.S. Dist. LEXIS 68621, *5 (E.D.Cal. June 17, 2010) quoting *Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 573 (1st Cir. 2004). There are three factors under §1292(b) to be considered:

"(1) that there be a controlling question of law,

"(2) that there be substantial grounds for difference of opinion, and

> "(3) that an immediate appeal may materially advance the ultimate termination of the litigation."

In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983).

Here, the questions do not involve issues of fact; consequently, Plaintiffs concede that the first factor has been met. Plaintiffs do not agree, however, that there are substantial grounds for difference of opinion or that judicial economy will be promoted by an immediate appeal.

A. No "Substantial Ground for Difference of Opinion".

In this Circuit,

> To determine if a "substantial ground for difference of opinion" exists under § 1292(b), courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." 3 *Federal Procedure, Lawyers Edition* §3:212 (2010) (footnotes omitted). However, "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Id*. (footnotes omitted)

Couch v. Telescope Inc., 611 F.3d 629, 2010 U.S. App. LEXIS 13937, *8 - *9 (9th Cir. 2010). There is no dispute amongst the Circuits and the issues neither involve foreign law nor novel or complicated issues.

There is not even a bona fide dispute amongst the District Courts. The sole District Court decision which holds that a voice mail message left by a debt collector for a consumer need not contain the §1692e(11) disclosures is the unpublished opinion in *Biggs v. Credit Collections,*

Inc., No. CIV-07-0053-F, 2007 U.S. Dist. LEXIS 84793, *13, 2007 WL 4034997 (W.D. Okla. Nov. 15, 2007). In denying the consumer's summary judgment motion, the court concluded, without analysis, that "[t]he transcript of the voice mail messages demonstrates that the voice mails 'convey[ed]' no 'information regarding a debt.'" No court has followed *Biggs*.

With the exception of *Biggs*, all of the courts addressing the issue – which number in excess of twenty – have concluded that a voice mail message left by a debt collector for a consumer is a "communication" under the FDCPA.

The courts' reasonings have varied. Many courts consider that the inclusion of "indirectly" in the statutory definition justifies a conclusion that a message conveyed information indirectly when the purpose of the call was to collect a debt. See, e.g., *Chalik v. Westport Recovery Corp.*, 677 F. Supp. 2d 1322, 1327 (S.D. Fla. 2009), and *Costa v. Nat'l Action Fin. Servs.*, 634 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007). Other courts concluded that the message is a communication because it was the first step in a process designed to communicate with the consumer. See, e.g., *Foti v. NCO Financial Systems, Inc.*, 424 F.Supp.2d 643, 655 (S.D.N.Y. 2006), and *Hosseinzadeh v. M.R.S. Assocs*, 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005).

Two decisions subsequent to this Court's July 27, 2010 Order (Docket 25) reveal that the appropriate analysis in this Circuit was laid down a dozen years ago. *Romine v. Diversified Collection Servs.*, 155 F.3d 1142 (9th Cir. 1998) applied a purpose-and-context analysis which provides a sound jurisprudential basis for determining when the conveyance of words between a debt collector and a consumer constitute a "communication" under the FDCPA.

Romine did not address voice mail messages or the meaning of "communication." Rather, it addressed whether Western Union's voicegram program which was marketed to debt collectors and designed specifically to lure debtors into disclosing their otherwise unavailable telephone

numbers, rendered Western Union a "debt collector" under the FDCPA. Based on the purpose and context of Western Union's program, the Ninth Circuit concluded that Western Union met the FDCPA's "debt collector" definition.

The recent decisions from the Seventh Circuit concretize *Romine*'s application here.

In *Gburek v. Litton Loan Servicing LP*, __ F.3d __, 2010 U.S. App. LEXIS 15346 (7th Cir. July 27, 2010), the Seventh Circuit, like the Ninth Circuit in *Romine*, applied a purpose-and-context analysis. There, it concluded that letters which were sent in connection with an attempt to collect a debt triggered the application of the FDCPA.

The Central District of Illinois sits within the Seventh Circuit. *Hutton v. C.B. Accounts*, 2010 U.S. Dist. LEXIS 77881 (C.D.Ill. August 3, 2010), like the instant lawsuit, was a voice mail message case. The *Hutton* court, recognizing that it was bound to follow *Gburek*'s purpose-and-context analysis, concluded that a voice mail message is a "communication" when it is left for a consumer-debtor by a debt collector in an attempt to collect a debt. "In this case, the only reason that Defendant called Plaintiff was to attempt to collect on her outstanding debt."*Hutton* at *7.

Thus, a message which is left for the *purpose* of attempting to collect in the *context* of debt collector-consumer relationship is, by virtue of that purpose and context, "information regarding a debt" and, therefore, a "communication." 15 U.S.C. §1692a(2).

These two new decisions now eliminate any doubt that there is a basis to conclude that there is "substantial grounds for difference of opinion" within the meaning of §1292(b).

B. An Immediate Appeal Will Not Materially Advance this Lawsuit's Ultimate Termination.

An appeal at this stage will not materially advance the proceedings here. There are two extreme outcomes on appeal – the Order [Docket Doc. 19] will be affirmed or reversed. "A single violation of any provision of the Act is sufficient to establish civil liability under the FDCPA." *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997). Thus, only a complete reversal would short-circuit this case. Given this Court's decision [Docket Doc. 19], the overwhelming weight of authority, and the lack of any dispute amongst the Circuits, a complete reversal is unlikely. Thus, diversion to an interlocutory appeal will likely serve only to delay the resolution of the case.

If the case proceeds in this court, merits discovery should not be protracted and the case could be ready for dispositive and class certification motions in a matter of months – in part because Defendant's Answer admitted several core facts. See, Docket Doc. 4 at ¶¶33-36.

Finally, allowing this case to proceed in the ordinary course will allow for a more complete record should either party seek appellate review after final judgment. One particularly thorny issue is Defendant's failure to give notice to the Attorney General under Fed.R.Civ.P. 5.1. Defendant stated that it was not challenging the constitutionality of the FDCPA. See, Docket Doc. 6, page 14, line 4. Defendant argued, however, that the FDCPA needed to be interpreted in a particular manner to avoid questioning the FDCPA's constitutionality. Such an argument nevertheless triggers notice because it "draw[s] into question the constitutionality of a federal…statute." Fed.R.Civ.P. 5.1(a).

In *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2291 (2008), the court quoted Justice Brandeis' concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, at 348 (1936):

> When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will . . . ascertain whether a construction of the statute is fairly possible by which the

> [constitutional] question may be avoided (internal quotation marks omitted).

Thus, invoking statutory construction to avoid a constitutional question draws into question the constitutional validity of the statute and triggers the application of Fed.R.Civ.P. 5.1. Denying certification avoids addressing how to allow the Attorney General's opportunity to intervene on an interlocutory appeal after being deprived of that opportunity here. Furthermore, any issue as to the applicability of Fed.R.Civ.P. 5.1 may be rendered moot depending how this case concludes.

Under these circumstances, it cannot be concluded that an interlocutory appeal will materially advance the ultimate termination of this lawsuit.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Recertify Order Granting Permission To Appeal Pursuant to 28 U.S.C. § 1292(b).

SCHROTH & SCHROTH
and
PHILIP D. STERN & ASSOCIATES, LLC
Attorneys for Plaintiffs, Michael P. Koby, Michael Simmons, Jonathan W. Supler, and all others similarly situated
s/Philip D. Stern
Philip D. Stern

Dated: September 13, 2010

PROOF OF SERVICE

I, Philip D. Stern, declare as follows:

I am, and was at the time of service of the papers herein referred to, over the age of 18 years, and not a party to the action. I one of the attorneys for the Plaintiffs, and I am admitted to practice *pro hac vice* in this case. I am registered with this Court's CM/ECF System.

On September 13, 2010, I caused the foregoing **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES PURSUANT TO CivLR 7.1(f)(3)(b) OPPOSING DEFENDANT'S MOTION [Docket Doc. 28]**, to be served upon the parties listed below via the Court's Electronic Filing System:

VIA ECF:

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Counsel for Defendant

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 13th day of September 2010, at Maplewood, New Jersey.

s/Philip D. Stern
Philip D. Stern