TOMIO B. NARITA (SBN 156576)
JEFFREY A. TOPOR (SBN 195545)
SIMMONDS & NARITA LLP
44 Montgomery Street, Suite 3010
San Francisco, CA 94104-4816
Telephone: (415) 283-1000
Facsimile: (415) 352-2625
tnarita@snllp.com
jtopor@snllp.com

Attorneys for Defendant
ARS National Services, Inc.

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, Defendant.	CASE NO. 09 CV 0780 JAH JMA **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF MICHAEL SIMMONS' MOTION TO MODIFY ORDER [Doc. No. 19] TO REINSTATE CLAIM FOR VIOLATION OF 15 U.S.C. § 1692e(11)** Date: October 18, 2010 Time: 2:20 p.m. Ctrm: 11 The Honorable John A. Houston

I. INTRODUCTION

Almost six months after this Court issued its order granting Defendant's motion for judgment on the pleadings as to his claim under section 1692e(11) of the Fair Debt Collection Practices Act, plaintiff Michael Simmons ("Plaintiff") moves to modify the Court's order. Not only is his motion untimely, it is meritless.

Plaintiff relies on three cases. The first case was decided by the Ninth Circuit over a decade ago and had nothing to do with the issues presented here. The second was decided by the Seventh Circuit after the Court issued its order; beyond not being binding on this court, however, it did not address the issues presented in this action. At best it merely echoed the first case. The third case was also decided after this Court issued its order, but is a non-binding district court opinion that simply disagreed with this Court. In short, Plaintiff has not carried his burden of showing a change in the controlling law that would justify reconsideration. His motion should be denied.

II. ARGUMENT

A. Plaintiff's Motion Should Be Denied Because It Is Untimely

Plaintiff has not cited any statutory authority for his motion, relying solely on *United States v. Smith*, 389 F.3d 944, 948 (9th Cir. 2004) (per curiam), which simply acknowledged the unremarkable proposition that "a district court may reconsider its prior rulings so long as it retains jurisdiction over the case." This Court's local rules contemplate that a party may file a motion to reconsider, but they require any such motion to "be filed within twenty-eight (28) days after entry of the ruling, order or judgment sought to be reconsidered." *See* S.D. Cal. L.R. 7.1.i.2.[1]

The Court entered the order that Plaintiff seeks to modify on March 29, 2010. Plaintiff filed his motion to modify that order almost six months later, on September

[1] Subject to any different deadline that "may be allowed for under Rules 59 and 60 of the Federal Rules of Civil Procedure." *See id.* Again, Plaintiff has not sought relief under either of those rules.

13, 2010. The motion is untimely, and Plaintiff has not shown good cause for his failure to file it timely or sooner. *See, e.g., Luna Gaming–San Diego, LLC v. Dorsey & Whitney, LLP*, 2010 WL 99078, *2 (S.D. Cal. Jan. 6, 2010).[2] Plaintiff's motion should be denied as untimely.

B. Plaintiff Has Not Shown That Reconsideration Or Modification Of The Court's Order Is Warranted

A motion to reconsider is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Absent new facts or law "of a strongly convincing nature," the court should not "reverse its prior decision." *Arteaga v. Asset Acceptance, Inc.*, 2010 WL 3590161, *4 (E.D. Cal. Sept. 15, 2010), citing *Kona Enters, Inc.*, 229 F.3d at 890. Nor should a motion to reconsider be granted "unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the **controlling** law." *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1989) (emphasis added). Plaintiff has not made the requisite showing.

Plaintiff suggests that three cases – one decided a dozen years ago (*Romine*), one decided the same day as the Court's original certification order (*Gburek*), and one decided a week later (*Hutton*) – require the Court to modify that portion of its order granting Defendant's motion for judgment on the pleadings on his claim under section 1692e(11) of the FDCPA. None of these authorities compel such a result.

---

[2] Plaintiff offers no explanation for his failure to bring *Romine*, a case decided in 1998 – to the Court's attention in his opposition to Defendant's motion for judgment on the pleadings. As explained below, although the other two cases upon which Plaintiff relies were decided after this Court issued its March 29 order, neither of those cases warrant modification of the Court's order. Plaintiff claims that one of these cases, *Gburek*, an out-of-circuit decision, "complements" *Romine*. Given that it is not binding here (and is not on point, as discussed below), and at best only echoes what the Ninth Circuit said twelve years ago, *Gburek* does not demonstrate good cause for departing from the 28-day deadline. Nor does the other case, *Litton*, because it is nothing more than another district court opinion that decided the issue differently than this Court.

Although counsel for Simmons "apologizes" for not bringing *Romine v. Diversified Collection Servs.*, 155 F.3d 1142 (9th Cir. 1998), to the Court's attention earlier, they do not explain why they failed to do so. *See Kona Enters., Inc.,* 229 F.3d at 890 (motion to reconsider "may not be used to raise arguments or present evidence for the first time when they could reasonably have been used earlier in the litigation"). Regardless, the case does not even apply here given that, as the Plaintiffs recently conceded, it "did not address voice mail messages or the meaning of 'communication.'" *See* Doc. No. 36 at 4:21. Rather, *Romine* addressed whether the actions of Western Union rendered it a "debt collector" within the meaning of section 1692a(6) of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6). *See Romine*, 155 F.3d at 1145-46. Simply put, *Romine* is irrelevant.

Plaintiff describes *Romine* as "dictat[ing] a purpose-and-context analysis" for determining whether a voice mail message left by a debt collector for a consumer constitutes a "'communication' under the FDCPA." *See* Doc. No. 35-1 at 2:4-9. But there is no such test outlined in *Romine*. Indeed, the word "context" does not even appear in the opinion. Even if *Romine* required such an analysis, the Court already examined the "purpose and context" of Defendant's voice mail messages when it ruled on the motion for judgment on the pleadings. *Romine* adds nothing.

Specifically, the Court noted that the "purpose of [section 1692e(11) is] to prevent misleading representations in connection with collecting a debt," and that "[t]he intention of ARS was to contact Plaintiffs, or be contacted by Plaintiffs, in order to attempt to collect a debt and served no purpose other than encouraging the Plaintiffs to pay their debt." *Koby v. ARS Nat'l Servs., Inc.*, 2010 WL 1438763, *3 (S.D. Cal. Mar. 29, 2010) (underlining added). The Court observed that the messages left for Koby and Supler mentioned, respectively, "a reference number" and "documents in the caller's office." *See id.* Based on this, the Court found those messages were "communications." *See id.* The Court, however, found that the message left for Simmons was not a "communication" because it only "included the

caller's name and asked for a return call," but did "not convey, directly or even indirectly, any information regarding the debt owed." *See id.* Thus, the Court carefully considered the purpose and context of the messages to determine if they were "communications." Assuming that *Romine* applies here (it does not), the Court followed it. Reconsideration is not an opportunity for the Court to "rethink what it has already thought." *See Arteaga*, 2010 WL 3590161 at *4.

Next, Plaintiff relies on a case from the Seventh Circuit, *Gburek v. Litton Loan Service, LP*, __ F.3d __, 2010 WL 2899110 (7th Cir. July 27, 2010), which was issued the same day as this Court issued its certification order. *Gburek* involved collection letters, not voice mail messages. More importantly, the opinion did not address whether the letters were "communications" (it assumed they were), but rather whether they were sent "in connection with the collection of any debt," a prerequisite to liability under sections 1692c, 1692e and 1692g of the FDCPA. *See id.* at *3 ("The issue in this appeal is whether the communications Gburek challenges were made in connection with the collection of her debt.").

Surveying its prior decisions, the Seventh Circuit explained that "these cases establish that the absence of a demand for payment is just one of several factors that come into play in the commonsense inquiry of whether a communication from a debt collector *is made in connection with the collection of any debt*. The nature of the parties' relationship is also relevant, . . . [and] the purpose and context of the communications-viewed objectively-are important factors as well." *Id.* at **3-5 (italics added). Although the Seventh Circuit did look to the "purpose and context" of the letters, this analysis was not done as part of determining whether the letters constituted "communications" under section 1692a(6).[3] Even if *Gburek* is relevant, it does not change the analysis here, because the Court examined the purpose and

[3] Plaintiffs submit that *Gburek* is "complement[ed]" by *Romine*. Doc. No. 35-1 at 2:10. *Gburek*, however, did not mention *Romine*.

context of the voice mail messages when it made its prior ruling. *See Koby*, 2010 WL 438763 at *3. It is not a change in the law, let alone controlling law.

The third case, *Hutton v. C.B. Accounts*, 2010 WL 3021904 (C.D. Ill. Aug. 3, 2010), simply disagreed with this Court, rejecting its reasoning when finding that a message similar to the message left for Simmons did constitute a "communication" under the FDCPA. *See id.* at *3. Mere disagreement is not a sufficient basis for reconsideration or modification. *See Hill v. Premier Healthcare Servs., LLC*, 2010 WL 3523072, *1 (D. Ariz. Sept. 3, 2010). Regardless, *Hutton* does not represent a change in controlling law. *See, e.g., 389 Orange Street Partners,*, 179 F.3d at 665; *Luna Gaming-San Diego*, 2010 WL 99078 at *2. Neither reconsideration nor modification is not warranted.

III. CONCLUSION

For each of the foregoing reasons, Defendant respectfully requests that Plaintiff's motion to modify the order on Defendant's motion for judgment on the pleadings be denied.

DATED: October 4, 2010

SIMMONDS & NARITA LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

By: s/Jeffrey A. Topor
Jeffrey A. Topor
Attorneys for Defendant
ARS National Services, Inc.

PROOF OF SERVICE

I, Jeffrey A. Topor, hereby certify that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 44 Montgomery Street, Suite 3010, San Francisco, California 94104-4816. I am counsel of record for the defendant in this action.

On October 4, 2010, I caused the **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF MICHAEL SIMMONS' MOTION TO MODIFY ORDER [Doc. No. 19] TO REINSTATE CLAIM FOR VIOLATION OF 15 U.S.C. § 1692e(11)** to be served upon the parties listed below via the Court's Electronic Filing System:

VIA ECF

Robert E. Schroth, Jr.
robschrothesq@sbcglobal.net
Counsel for Plaintiffs

Philip D. Stern
pstern@philipstern.com
Counsel for Plaintiffs

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on this 4h day of October, 2010.

By: s/Jeffrey A. Topor
Jeffrey A. Topor
Attorneys for Defendant
ARS National Services, Inc.