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7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 MICHAEL P. KOBY, an individual;  
12 MICHAEL SIMMONS, an individual;  
13 JONATHAN W. SUPLER, an  
individual; on behalf of themselves  
and all others similarly situated,

14 Plaintiffs,

15 vs.

16 ARS NATIONAL SERVICES, INC.,  
17 a California Corporation; and JOHN  
AND JANE DOES 1 through 25  
18 inclusive,

19 Defendant.  
20 \_\_\_\_\_

CASE NO. 09 CV 0780 JAH JMA

**JOINT MOTION FOR ORDER  
GRANTING PERMISSION TO  
APPEAL PURSUANT TO  
28 U.S.C. § 1292(b)**

The Honorable John A. Houston

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:  
2 PLEASE TAKE NOTICE THAT the plaintiffs Michael P. Koby, Michael  
3 Simmons and Jonathan W. Supler, along with defendant ARS National Services, Inc.  
4 (“ARS”), will and hereby do jointly move this Court for an Order amending its  
5 March 29, 2010 Order Granting In Part and Denying In Part Defendant’s Motion For  
6 Judgment On The Pleadings (“the Order”), and certifying the Order for interlocutory  
7 appeal, pursuant to 28 U.S.C. § 1292(b) and Rule 5(a)(3) of the Federal Rules of  
8 Appellate Procedure.

9 This motion is made on the grounds that the Order involves controlling  
10 questions of law as to which there is substantial ground for difference of opinion and  
11 that an immediate appeal from the Order may materially advance the ultimate  
12 termination of the litigation.

13 The Motion will be based on this Notice of Motion and Motion, the  
14 Memorandum of Points and Authorities, all of the other papers on file in this action,  
15 and such other and further evidence or argument as the Court may allow.

16  
17 DATED: July 21, 2010

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1 **I. INTRODUCTION**

2 Defendant ARS National Services, Inc. (“ARS” or “Defendant”) and Plaintiffs  
3 Michael Koby, Michael Simmons and Jonathan Supler (collectively, “Plaintiffs”)  
4 jointly move this Court to amend its order granting in part and denying in part  
5 Defendant’s motion for judgment on the pleadings (Docket 19) (“the Order”), by  
6 certifying the Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).  
7 Certification is warranted because the Order involves controlling questions of law as  
8 to which there is substantial ground for difference of opinion and an immediate  
9 appeal from the Order may materially advance the ultimate termination of the  
10 litigation.

11 This case concerns the content of voice mail messages. The Complaint alleges  
12 ARS employees left Plaintiffs voice mail messages that failed to disclose that ARS  
13 was attempting to collect a debt from Plaintiffs, and that failed to provide  
14 “meaningful disclosure” of ARS’s identity. The messages allegedly violate sections  
15 1692e(11) and 1692d(6) of the Fair Debt Collection Practices Act (“FDCPA”), 15  
16 U.S.C. §§ 1692e(11) & 1692d(6). ARS moved for judgment on the pleadings,  
17 arguing that the messages did not constitute “communications” within the meaning of  
18 the FDCPA, and that they did meaningfully disclose who was calling.

19 The Court held that, as alleged, the messages left for all three Plaintiffs  
20 violated 1692d(6)’s requirement for meaningful disclosure of the caller’s identity.  
21 The Court also held that the messages left for Koby and Supler were  
22 “communications” under the FDCPA, but that the message left for Simmons –  
23 “which merely included the caller’s name and asked for a return call” – was not a  
24 “communication,” even though it was left in connection with ARS’s attempt to  
25 collect a debt.

26 No circuit court has directly addressed whether, or how, the FDCPA should be  
27 applied to voice mail messages. In making its ruling, the Court relied, in part, on  
28 district court decisions cited by Plaintiffs, holding that a voice mail message is a

1 “communication” under section 1692a(2) of the FDCPA even if the message does not  
2 convey any information regarding a debt. The Court also relied upon district court  
3 cases holding that a message does not “meaningfully disclose” the caller’s identity  
4 unless the message expressly states that it is from a debt collector seeking to collect a  
5 debt. Interlocutory review is warranted here.

6 First, both of the issues raised here are controlling questions of law. If the  
7 Ninth Circuit concludes that the messages allegedly left by ARS for plaintiffs Koby  
8 and Supler did not constitute “communications” within the meaning of section  
9 1692a(2), this would materially affect the outcome of this litigation. Similarly, a  
10 contrary ruling finding that the Simmons messages was a “communication” would  
11 also materially affect the outcome of this litigation. An appellate ruling would either  
12 eliminate Plaintiffs’ claims under section 1692e(11), because absent a  
13 “communication,” there can be no violation of that provision, or would provide even  
14 treatment of all Plaintiffs’ claims, as well as providing guidance with respect to any  
15 voice mail message left in an attempt to collect a debt. Likewise, an appellate  
16 decision that ARS “meaningfully disclosed” its identity in the messages would  
17 negate Plaintiffs’ claim under section 1692d(6) of the FDCPA.

18 Second, there are substantial grounds for difference of opinion. As to the  
19 section 1692e(11) claim, no circuit court has addressed the question and district  
20 courts have reached conflicting and contradictory opinions. In addition, Plaintiffs  
21 respectfully contend that the Court’s ruling under section 1692e(11) regarding the  
22 message left for plaintiff Simmons creates an anomaly.

23 No circuit court has addressed the requirements of section 1692d(6).  
24 Defendant respectfully contends that the Court’s ruling that ARS did not  
25 “communicate” with Simmons, while holding that ARS was nevertheless required to  
26 state it was a “debt collector” to comply with section 1692d(6), creates an  
27 inconsistency. ARS also contends that to the extent the Court reasoned that a  
28 collector can avoid liability under 1692d(6) by merely electing not to leave any voice

1 mail message, this conflicts with a recent opinion of the Northern District of  
 2 California, discussed herein, which effectively ruled that a collector must leave a  
 3 voice mail message in order to avoid liability under section 1692d(6). The existence  
 4 of such varying district court decisions justifies the guidance an appellate ruling  
 5 would provide.

6 Finally, allowing an appeal at this juncture will materially advance the ultimate  
 7 termination of this litigation. Resolution of the questions presented, which are easily  
 8 separated from the rest of the case, present an opportunity to terminate the litigation  
 9 completely if the Ninth Circuit agrees with ARS, and would obviate the need for the  
 10 parties and the Court to engage in expensive class-action litigation and a trial.

11 Accordingly, the parties jointly request that the Court certify its prior order for  
 12 immediate appeal pursuant to section 1292(b).

## 13 **II. PROCEDURAL HISTORY**

14 On April 15, 2009, Plaintiffs filed their Complaint, alleging that they are  
 15 “consumers” and that ARS is a “debt collector” within the meaning of the FDCPA.  
 16 See Complaint ¶¶ 21, 25, 30, and 33. According to Plaintiffs, employees of ARS left  
 17 messages on Plaintiffs’ voice mail machines in connection with an attempt to collect.  
 18 *Id.* ¶¶ 34-36.

19 At paragraph 39 of the Complaint, Plaintiffs purported to transcribe examples  
 20 of the voice mail messages, as follows:

21 This is Robin calling for Michael Koby, if you could return my call at 800-  
 22 440-6613; my direct extension is 3171. Please refer to your Reference Number  
 as 15983225. [Received October 14, 2008].  
 \*\*\*

23 Hey John, uh, it’s Mike Mazzouli with ARS National. Umm, there appears to  
 24 be some documents here in my office, uh, John at this point your [sic]  
 25 involved. Call me as soon as you can. My direct number and direct extension  
 is 800-440-6613; I’m at extension 3697. Thank you. [Received on or about  
 26 December 23, 2008].  
 \*\*\*

27 This is Brian Cooper. This call is for Mike Simmons, I need you to return this  
 28 call as soon as you get this message 877-333-3880, extension 2571. [Received  
 on April 9, 2009].



1 *Id.* ¶ 39. Plaintiffs alleged that the messages failed to provide meaningful disclosure  
2 of the caller’s identity, and failed to disclose they were from a debt collector. *Id.* ¶  
3 37. According to Plaintiffs, the messages violated section 1692d(6) and 1692e(11)  
4 of the FDCPA. *Id.* ¶ 57.

5 Defendant moved for judgment on the pleadings. Defendant argued that no  
6 “communication” had occurred, within the meaning of section 1692a(2) of the  
7 FDCPA, because the messages did not convey “information regarding a debt,” and  
8 therefore 1692e(11) was not violated. Defendant also argued that the messages  
9 satisfied the requirements of section 1692d(6) because they included the name of the  
10 caller and an 800-number that could be used to return the calls, and they therefore  
11 “meaningfully disclosed” the callers’ identities. *See* Docket No. 6.

12 The Court subsequently issued an Order that denied in part and granted in part  
13 Defendant’s motion. *See* Docket No. 19, reported at *Koby v. ARS Nat’l Servs., Inc.*,  
14 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010). First, as to Plaintiffs’ claim that the  
15 messages violated section 1692e(11), the Court found that the messages left for  
16 plaintiffs Koby and Supler (but not Simmons) were “communication[s]” within the  
17 meaning of the FDCPA because they “indirectly conveyed information involving the  
18 debts involved.” *Koby*, 2010 WL 1438763 at \*3. Regarding the message left for  
19 plaintiff Simmons, however, the Court found it did not constitute a “communication”  
20 because it “merely included the caller’s name and asked for a return call” but it did  
21 “not convey, directly or even indirectly, any information regarding the debt owed.”  
22 *Id.* at \*4.

23 The only distinction drawn by the Court was the fact that the messages left for  
24 Koby and Supler, respectively, mentioned “a reference number” and referred to  
25 “documents in the caller’s office,” whereas the message left for Simmons “merely  
26 included the caller’s name and asked for return call.” *Id.* at \*\*3-4. As the Court  
27 noted, however, the messages left for Koby and Supler also “contained language  
28 asking the listener to return the call.” *Id.* at \*3.

1 Notwithstanding that all three messages requested a return call, the Court  
2 inferred that, as to Koby and Supler only, “[t]he intention of ARS was to contact  
3 Plaintiffs, or be contacted by Plaintiffs, in order to attempt to collect a debt and  
4 served no purpose other than encouraging the Plaintiffs to pay their debt.” *Id.* Based  
5 on the distinction and the inference, the Court concluded that the messages left for  
6 Koby and Supler were “communications” subject to the FDCPA. *See id.* Because  
7 those messages were ruled to be “communications” and because they allegedly did  
8 not disclose that ARS was attempting to collect a debt and that any information  
9 obtained would be used for that purpose, the Court held that Koby and Supler had  
10 stated a claim under section 1692e(11). *See id.* at \*4.

11 Second, as to Plaintiffs’ claim that the messages violated section 1692d(6), the  
12 Court found that “none of the messages relay to the listener the nature of the call - to  
13 collect a debt - or the caller’s identity as a ‘debt collector.’” *Id.* at \*5. Applying a  
14 definition of “meaningful disclosure” adopted by two other district courts in  
15 California, the Court accordingly held that “in each situation where [Defendant]  
16 failed to disclose that the caller was a debt collector and that the purpose of the call  
17 was to collect a debt, [Defendant] failed to meet the standards prescribed by §  
18 1692d(6). *Id.*

19 The Court rejected Defendant’s argument that requiring it “to state in a voice  
20 mail that [it] is a debt collector and is attempting to collect a debt” would expose it to  
21 potential liability under section 1692c(b) for an improper third party disclosure if  
22 someone other than the debtor heard the message. *See id.* at \*\*5-6. Finally, the  
23 Court concluded that its interpretation of the “meaningful disclosure” requirement of  
24 the FDCPA did not raise “serious constitutional questions.” *Id.* at \*6.

### 25 **III. ARGUMENT**

#### 26 **A. Legal Standard**

27 Generally, a non-final order, such as this Court’s Order denying in part a  
28 motion for judgment on the pleadings, is not immediately appealable. *See, e.g.,*

1 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978); *Kotrous v. Goss-Jewett*  
 2 *Co. of No. Cal., Inc.*, 2005 WL 2452606, \*1 (E.D. Cal. Oct. 4, 2005). In certain  
 3 circumstances, however, an interlocutory appeal may be permitted. For instance:

4       When a district judge, in making in a civil action an order not otherwise  
 5       appealable under this section, shall be of the opinion that such order involves  
 6       a controlling question of law as to which there is substantial ground for  
 7       difference of opinion and that an immediate appeal from the order may  
 8       materially advance the ultimate termination of the litigation, he shall so state  
 9       in writing in such order. The Court of Appeals which would have jurisdiction  
 10       of an appeal of such action may thereupon, in its discretion, permit an appeal  
 11       to be taken from such order, if application is made to it within ten days after  
 12       the entry of the order.

13 28 U.S.C. § 1292(b).

14       Upon motion, a district court may amend a prior order if the court is of the  
 15       opinion that the requirements of section 1292(b) have been satisfied. *See* Fed. R.  
 16       App. P. 5(a)(3). “Under section 1292(b), interlocutory appeal is appropriate where  
 17       the order at issue concerns (1) a controlling question of law; (2) about which there is  
 18       substantial ground for difference of opinion; and (3) an immediate appeal may  
 19       materially advance the ultimate termination of the litigation.” *Suever v. Connell*,  
 20       2008 WL 906243, \*3 (N.D. Cal. Apr. 1, 2008). In sum, section 1292(b) “was  
 21       intended primarily as a means of expediting litigation by permitting appellate  
 22       consideration during the early stages of litigation of legal questions which, if decided  
 23       in favor of the appellant, would end the lawsuit.” *United States v. Woodbury*, 263  
 24       F.2d 784, 787 (9th Cir. 1959). Where the case “involves a question of broad  
 25       applicability that is of considerable importance to the bench and bar,” and there is  
 26       “an enormous volume of litigation” raising the issue, interlocutory appeal is  
 27       particularly appropriate. *See Romea v. Heiberger & Assocs.*, 988 F. Supp. 715, 717  
 28       (S.D.N.Y. 1998). The parties submit that interlocutory review is appropriate here.

29       **B. Whether The Messages Are “Communications” Under The FDCPA  
 30       And Whether The Messages “Meaningfully Disclosed” The Callers’  
 31       Identities Are Controlling Questions Of Law**

32       “[A] question of law is controlling if ‘resolution of the issue on appeal could  
 33       materially affect the outcome of litigation in the district court.’” *Helman v. Alcoa*

1 *Global Fasteners Inc.*, 2009 WL 2058541, \*5 (C.D. Cal. June 16, 2009), quoting *In*  
2 *re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). It is not necessary  
3 that the issue “be dispositive of the lawsuit to be controlling.” *Federal Trade*  
4 *Commission v. Swish Marketing*, 2010 WL 1526483, \*1 (N.D. Cal. Apr. 14, 2010).  
5 Nor is it “necessary that ‘reversal of the district court’s order terminate the  
6 litigation.’” *Helman*, 2009 WL 2058541 at \*5, quoting *In re Cement Antitrust Litig.*,  
7 673 F.2d at 1026. Where, as here, the issue to be decided “is a ‘pure legal question’  
8 involving no factual issues, an interlocutory appeal is especially appropriate.” *Id.*<sup>1</sup>  
9 Both of the questions presented here are controlling questions of law.

10 First, Defendant submits that a Ninth Circuit opinion concluding that the  
11 messages allegedly left by ARS for plaintiffs Koby and Supler did not constitute  
12 “communications” within the meaning of section 1692a(2) would materially affect  
13 the outcome of this litigation. Such a ruling would render Plaintiffs’ claims under  
14 section 1692e(11) non-viable, *see, e.g., Yeager v. Cingular Wireless LLC*, 2010 WL  
15 935431, \*2 (E.D. Cal. Mar. 15, 2010), because absent a “communication,” there can  
16 be no violation of that provision, *see* 15 U.S.C. § 1692e(11) (imposing liability if  
17 debt collector fails to disclose certain information in “initial written *communication*”  
18 or in “initial oral *communication*” (emphasis added)). Given that there can be no  
19 liability unless there was a “communication” within the meaning of section  
20 1692a(2), the question is particularly appropriate for interlocutory appellate review.  
21 *See Romea*, 988 F. Supp. at 717.

22 Similarly, Plaintiffs contend that a Ninth Circuit opinion that the message left  
23 for Simmons did qualify as a “communication” is an issue of law, the outcome of  
24 which would control as to the Simmons message and those similar to it. Plaintiffs  
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26  
27 <sup>1</sup> Interlocutory review is not limited to “pure legal questions.” *See Dalie v. Pulte*  
28 *Home Corp.*, 636 F. Supp. 2d 1025, 1028 (E.D. Cal. 2009) (stating that “the Ninth  
Circuit Court of Appeals has never embraced the rule that only pure legal questions are  
controlling questions of law under § 1292(b)”).

1 observe that non-binding district court decisions have been inconsistent. Some  
2 district courts have looked to the purpose of the voice message and found it to be a  
3 “communication” because it sought to begin a dialogue with the consumer in an  
4 attempt to collect a debt. *See, e.g., Foti v. NCO Financial Sys., Inc.*, 424 F. Supp. 2d  
5 643, 655 (S.D.N.Y. 2006); *Belin v. Litton Loan Svc’g.*, 2006 U.S. Dist. LEXIS  
6 47953, \*12 (M.D. Fla., July 14, 2006). In contrast, this Court’s decision and *Biggs v.*  
7 *Credit Collection Corp.*, 2007 U.S. Dist. LEXIS 84793 (W.D. Okla. Nov. 15, 2007),  
8 have concluded that a message left in connection with an attempt to collect a debt is  
9 not a “communication.” Unlike *Biggs*, this Court also addressed whether the  
10 message complied with section 1692d(6)’s requirement for meaningful identification  
11 of the caller. Plaintiffs contend that compliance with section 1692d(6) would, under  
12 this Court’s ruling, transform the message into a “communication,” which in turn  
13 would trigger section 1692e(11). Thus, appellate guidance would assist in not only  
14 resolving the legal questions but, also, if this class is certified, in resolving potential  
15 issues of typicality and commonality with respect to each of the Plaintiffs’ claims.

16 In addition, Defendant contends that an appellate ruling that each of the  
17 messages allegedly left by ARS “meaningfully disclosed” the identity of the callers  
18 would eviscerate Plaintiffs’ claim under section 1692d(6) of the FDCPA, and would  
19 thereby streamline (if not completely eliminate) the present litigation.

20 **C. There Is A Substantial Ground For Difference Of Opinion As To**  
21 **Both Questions**

22 Given that the Ninth Circuit has never ruled on these important issues, and  
23 district courts have come to differing results, the parties maintain that substantial  
24 grounds for difference of opinion exists. As one district court recently observed:

25 [A] substantial ground for difference of opinion may be demonstrated by  
26 adducing conflicting and contradictory opinions of courts which have ruled on  
27 the issue. Furthermore, the mere fact that a substantially greater number of  
28 judges have resolved the issue one way rather than another does not tend to  
show that there is no substantial grounds for difference of opinion, since it is  
the duty of the district judge faced with the motion for certification to analyze  
the strength of the arguments in opposition to the challenged ruling when

1 deciding whether the issue for appeal is truly one on which there is a  
2 substantial ground for dispute.

3 *See Lucas v. Bell Trans*, 2009 WL 3336112, \*\*3-4 (D. Nev. 2009) (quoting 4 Am.  
4 *Jur. 2d Appellate Review*, § 123 (2009)); *accord APCC Servs., Inc. v. AT & T Corp.*,  
5 297 F. Supp. 2d 101, 107 (D.D.C. 2003). “Indeed, an issue can be a controlling  
6 question of law for which there is a substantial ground for difference of opinion  
7 when it is ‘difficult and of first impression.’” *Brizzee v. Fred Meyer Stores, Inc.*,  
8 2008 WL 426510, \*4 (D. Or. Feb. 13, 2008) (quoting *Klinghoffer*, 921 F.2d at 25).

9 Thus, there does not need to be a large number of conflicting decisions to meet  
10 this prong of the test. A substantial ground for difference of opinion has been found  
11 to exist where one court decided an issue one way and just two other courts decided  
12 the issue the other way, and the governing appellate court has not weighed in on the  
13 issue. *See Suever*, 2008 WL 906243 at \*3 (concluding that substantial ground for  
14 difference of opinion existed where court’s order reached conclusion inconsistent  
15 with only two other district court opinions and appellate court had not issued  
16 decision addressing issue); *see also Klinghofer v. S.N.C. Achille Lauro Ed Altri-*  
17 *Gestione Motonave Achillie Lauro in Amministrazione Straordinaria*, 921 F.2d 21,  
18 25 (2d Cir. 1990) (granting immediate appeal where “the legal issues are difficult  
19 and of first impression”). A substantial basis for disagreement may also exist “where  
20 there is a ‘dearth of precedent within the controlling jurisdiction and conflicting  
21 decisions in other circuits.’” *Swish Marketing*, 2010 WL 1526483 at \*2 (quoted  
22 citation omitted); *accord In re Cal. Title Ins. Antitrust Litig.*, 2010 WL 785798, \*1  
23 (N.D. Cal. Mar. 3, 2010) (concluding substantial ground for difference of opinion  
24 existed where there was a “dearth of precedent on the legal issues presented to the  
25 Court”).

26 Here, the Ninth Circuit has never addressed whether voice mails like those  
27 allegedly left by Defendant are “communications” under the FDCPA. Indeed, no  
28 circuit court has decided the issue. ARS identified a number of “conflicting and

1 contradictory opinions of courts which have ruled on the issue” in its opening  
 2 memorandum. *See* Docket No. 6 at 7:1-7 & n.2.<sup>2</sup> Plaintiffs likewise discussed the  
 3 disparate cases. *See* Docket No. 12 at 7 to 12. The fact this Court’s ruling as to  
 4 Simmons’ section 1692e(11) claim stands beside *Biggs* but in contract to numerous  
 5 contrary decisions evidences that the number of opinions supporting one position is  
 6 neither dispositive, *see Lucas*, 2009 WL 3336112 at \*\*3-4; *APCC Servs., Inc.*, 297  
 7 F. Supp. 2d at 107, nor does it prevent this Court from concluding that a substantial  
 8 ground for difference of opinion exists, *see Suever*, 2008 WL 906243 at \*3  
 9 (concluding that substantial ground for difference of opinion existed where court’s  
 10 order reached conclusion inconsistent with only two other district court opinions and  
 11 appellate court had not issued decision addressing issue).

12 In addition, a substantial ground for difference of opinion exists regarding  
 13 Plaintiffs’ “meaningful disclosure” claim under section 1692d(6). There is no  
 14 appellate decision directly addressing the issue. But as discussed below, a decision  
 15 issued earlier this year by the Northern District of California is in direct conflict with  
 16 the reasoning employed by this Court in the Order.

17 When this Court ruled against ARS on the section 1692d(6) claim, it opined  
 18 that ARS was not required to leave a voice mail message for Plaintiffs. Indeed, the  
 19 Court opined that “nothing in the FDCPA or the Constitution entitles or guarantees a  
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 22 <sup>2</sup> Specifically, ARS urged the Court to follow *Biggs v. Credit Collections, Inc.*,  
 23 2007 WL 4034997, \*4 (W.D. Okla. Nov. 15, 2007) (section 1692e(11) claim failed  
 24 where voice mail messages did not convey any information regarding debt), as opposed  
 25 to *Edwards v. Niagara Credit Solutions, Inc.*, 586 F. Supp. 2d 1346, 1350-51 (N.D. Ga.  
 26 2008) (voice mail messages that did not convey specific information about debt held to  
 27 be “communications” under the FDCPA); *Baker v. Allstate Fin. Servs., Inc.*, 554 F.  
 28 Supp. 2d 945, 952 (D. Minn. 2008) (same); *Costa v. Nat’l Action Fin. Servs.*, 2007 WL  
 4526510, \*5 (E.D. Cal. Dec. 19, 2007) (same); *Belin v. Litton Loan Servicing, LP*, 2006  
 WL 1992410, \*4 (M.D. Fla. July 14, 2006) (same); *Foti v. NCO Fin. Sys., Inc.*, 424 F.  
 Supp. 2d 643, 655-57 (S.D.N.Y. 2006) (same); *Hosseinzadeh v. M.R.S. Assocs., Inc.*,  
 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (same).

1 debt collector the right to leave a message on a debtor’s voice mail,” and that ARS  
2 could not leave voice mail messages just because it concluded that was the “most  
3 efficient” way of reaching consumers. *See Koby*, 2010 WL 1438763, at \*5-6.

4 In *Langdon v. Credit Management, LP*, 2010 U.S. Dist. LEXIS 16138 (N.D.  
5 Cal. Feb. 24, 2010), however, the court held that plaintiff had alleged a viable claim  
6 under section 1692d(6) and section 1692e(11) of the FDCPA because the defendant  
7 collector called and hung up without leaving any message on the plaintiff’s voice  
8 mail. *See id.* at \*6. Thus, contrary to the reasoning of this Court, the ruling in  
9 *Langdon* effectively holds that debt collectors must leave voice mail messages  
10 whenever they call.

11 This Court has ruled that no serious constitutional issues are raised in part  
12 because ARS is neither entitled nor required by the FDCPA to leave a message, but  
13 the *Langdon* opinion differs. ARS submits that in light of the reasoning employed in  
14 *Langdon*, and the reasoning employed by this Court, there are substantial grounds for  
15 difference of opinion as to whether the messages at issue in this case violate section  
16 1692d(6) and section 1692e(11). In addition, ARS contends that reasonable grounds  
17 for difference of opinion exists here because it previously presented strong  
18 arguments why the phrase “meaningful disclosure” meant different things in  
19 different contexts. *See Lucas*, 2009 WL 3336112 at \*\*3-4; *APCC Servs., Inc.*, 297  
20 F. Supp. 2d at 107.

21 Finally, ARS submits that the Court’s ruling that the message left for Simmons  
22 was not a “communication” within the meaning of the FDCPA is inconsistent with  
23 its ruling that all of the Plaintiffs had stated a claim under section 1692d(6). On the  
24 one hand, the Court determined that ARS did not “communicate” with Simmons in  
25 connection with attempting to collect a debt, but on the other hand, the Court  
26 concluded that ARS was required to inform Simmons that ARS was a debt collector  
27 and that it was calling to collect a debt. This incongruity suggests that there is a  
28



1 substantial ground for difference of opinion as to what a debt collector must disclose  
2 to satisfy the requirements of section 1692d(6).

3 **D. Allowing An Immediate Appeal Will Materially Advance The**  
4 **Ultimate Termination Of This Litigation**

5 Resolution of these controlling legal issues will materially advance this  
6 litigation. “This factor is linked to whether an issue of law is ‘controlling’ in that the  
7 court should consider the effect of a reversal by the court of appeals on the  
8 management of the case.” *Kotrous*, 2005 WL 2452606 at \*2. “Immediate appeal  
9 should be granted where there is a ‘highly debatable question that is easily separated  
10 from the rest of the case, that offers an opportunity to terminate the litigation  
11 completely, and that may spare the parties the burden of a trial that is expensive for  
12 them even if not for the judicial system.” *Helman*, 2009 WL 2058541 at \*6. If a  
13 reversal will result in a dismissal of the claim upon which this Court’s jurisdiction is  
14 premised, resolution of the issue would “materially speed the termination of  
15 litigation.” *Koutros*, 2005 WL 2452606 at \*4.

16 Allowing an immediate appeal here would materially advance the termination  
17 of this action. The appeal would present discrete legal questions that are “easily  
18 separated” from the remainder of the case. As this is a putative class action, enabling  
19 the Ninth Circuit to resolve these questions now would spare the Court and the  
20 parties of the burden of proceeding with potentially expensive and time-consuming  
21 litigation, including class-related discovery, class certification briefing and  
22 (possibly) providing class notice. Reversal would result in dismissal of Plaintiffs’  
23 claims, avoiding the need for these expenditures of valuable resources.

24 **IV. CONCLUSION**

25 For each of the foregoing reasons, Plaintiffs and Defendant respectfully  
26 request that the Court issue an Order amending its prior order granting in part and  
27 denying in part Defendant’s motion for judgment on the pleadings by certifying that  
28 Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

1 DATED: July 21, 2010

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**PROOF OF SERVICE**

I, Tomio B. Narita, 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 July 21, 2010, I caused the **JOINT MOTION FOR ORDER GRANTING PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)** to be served upon the parties listed below via the Court's Electronic Filing System:

**VIA ECF**

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Counsel for Plaintiffs

I declare under penalty of perjury that the foregoing is true and correct.  
Executed at San Francisco, California on this 21st day of July, 2010.

By: s/Tomio B. Narita  
Tomio B. Narita  
Attorneys for Defendant  
ARS National Services, Inc.

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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,

Defendant.

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CASE NO. 09 CV 0780 JAH JMA

**[PROPOSED] ORDER GRANTING  
PERMISSION TO APPEAL  
PURSUANT TO 28 U.S.C. § 1292(b)**

The Honorable John A. Houston

1 The Court, having considered the Joint Motion filed by the parties seeking an  
2 Order amending this Court’s Order dated March 29, 2010, Granting In Part and  
3 Denying In Part Defendant’s Motion For Judgment On The Pleadings (Docket 19),  
4 and certifying the Order for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b)  
5 and Rule 5(a)(3) of the Federal Rules of Appellate Procedure, and good cause  
6 appearing,

7 IT IS HEREBY ORDERED AS FOLLOWS:

- 8 1. The joint motion is GRANTED. The Court finds that its Order (Docket  
9 19) involves controlling questions of law as to which there is substantial  
10 ground for difference of opinion, and that an immediate appeal from the  
11 Order may materially advance the ultimate termination of the litigation.
- 12 2. The Order (Docket 19) is hereby amended to certify the following  
13 questions for appeal to the Ninth Circuit Court of Appeals consistent  
14 with 28 U.S.C. § 1292(b): “Do each of the voice mail messages as  
15 alleged in the complaint in this action constitute a ‘communication’  
16 within the meaning of section 1692a(2) of the Fair Debt Collection  
17 Practices Act, 15 U.S.C. § 1692, *et. seq.*, (the “FDCPA”), 15 U.S.C. §  
18 1692, *et seq.*,” and, “Do the voice mail messages as alleged in the  
19 complaint violate section 1692e(11) and/or section 1692d(6) of the  
20 FDCPA?”

21  
22  
23 DATED: \_\_\_\_\_

24  
25 By: \_\_\_\_\_  
26 Honorable John A. Houston