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6 Attorneys for Defendant  
ARS National Services, Inc.

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

**DEFENDANT’S MOTION TO  
RECERTIFY ORDER GRANTING  
PERMISSION TO APPEAL  
PURSUANT TO 28 U.S.C. § 1292(b)**

Date: October 18, 2010  
Time: 2:30 p.m.  
Ctrm: 11

The Honorable John A. Houston

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:  
2 PLEASE TAKE NOTICE THAT on October 18, 2010, at 2:30 p.m., in  
3 courtroom 11 of the above Court, located at 940 Front Street, San Diego, California,  
4 the Honorable John A. Houston presiding, defendant ARS National Services, Inc.,  
5 will and hereby does move this Court for an Order recertifying its July 27, 2010  
6 Order (“the July 27 Order”) amending its March 29, 2010 Order Granting In Part and  
7 Denying In Part Defendant’s Motion For Judgment On The Pleadings (“the March 29  
8 Order”), and certifying the March 29 Order for interlocutory appeal, pursuant to 28  
9 U.S.C. § 1292(b) and Rule 5(a)(3) of the Federal Rules of Appellate Procedure.

10 This motion is made on the grounds that, due to a calendaring error, resulting  
11 from the mistaken reliance on an earlier version of the relevant rule, Defendant filed  
12 its petition for permission to appeal in the Ninth Circuit one day late, thereby  
13 depriving the Ninth Circuit of jurisdiction to consider the petition. Recertification of  
14 the July 27 Order will advance the purposes of section 1292(b) and foster judicial  
15 efficiency, by allowing the Ninth Circuit to resolve controlling questions of law  
16 under the Fair Debt Collection Practices Act, as to which there is substantial ground  
17 for difference of opinion, and may materially advance the ultimate termination of the  
18 litigation. *See In re Benny*, 812 F.2d 1133 (9th Cir. 1987).

19 The Motion will be based on this Notice of Motion and Motion, the  
20 Memorandum of Points and Authorities, the supporting Declaration of Jeffrey A.  
21 Topor, all of the other papers on file in this action, and such other and further  
22 evidence or argument as the Court may allow.

23  
24 DATED: August 18, 2010

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

25  
26  
27 By: s/Jeffrey A. Topor  
Jeffrey A. Topor  
Attorneys for Defendant  
ARS National Services, Inc.  
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1 **I. INTRODUCTION**

2 Defendant ARS National Services, Inc. (“ARS” or “Defendant”) moves this  
3 Court to recertify its order granting in part and denying in part Defendant’s motion  
4 for judgment on the pleadings (Docket 19) (“the Order”), by recertifying the Order  
5 for immediate appeal pursuant to 28 U.S.C. § 1292(b).

6 Pursuant to the parties’ joint motion, the Court previously amended the Order,  
7 certifying its Order for immediate appeal under section 1292(b). *See* Docket No. 25.  
8 Defendant subsequently filed a petition for permission to appeal in the Ninth Circuit.  
9 Unfortunately, due to a calendaring error, the petition was filed one day late, thereby  
10 depriving the appellate court of jurisdiction to consider the opinion. Defendant’s  
11 motion to withdraw the petition is pending before the Ninth Circuit.<sup>1</sup>

12 Under *In re Benny*, 812 F.2d 1133 (9th Cir. 1987), this Court may recertify the  
13 Order if doing so will advance the purposes of section 1292(b) and foster judicial  
14 efficiency. Defendant respectfully submits that recertification is appropriate because  
15 all the grounds for certification still exist. Allowing the Ninth Circuit to resolve the  
16 issues decided by the Court in the Order will materially advance the litigation by  
17 possibly avoiding the need for protracted and expensive class action litigation,  
18 thereby fostering judicial efficiency. The order authorizing the appeal by this Court  
19 should not be thwarted due to counsel’s inadvertent calendaring error. Accordingly,  
20 Defendant requests that the Court recertify its prior order for immediate appeal  
21 pursuant to section 1292(b).

22 **II. PROCEDURAL HISTORY AND STATEMENT OF FACTS**

23 On April 15, 2009, Plaintiffs filed their Complaint, alleging violations of the  
24 Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* Defendant moved for  
25 judgment on the pleadings. On March 29, 2010, the Court issued its order denying in

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26  
27 <sup>1</sup> Despite joining the earlier motion to certify, Plaintiffs have now indicated that  
28 they will not join the present motion to recertify. It is unclear whether Plaintiffs will  
oppose this motion.

1 part and granting in part Defendant's motion. *See* Docket No. 19, reported at *Koby v.*  
2 *ARS Nat'l Servs., Inc.*, 2010 WL 1438763 (S.D. Cal. Mar. 29, 2010) ("the March 29  
3 Order"). The parties then filed a joint motion requesting that the Court amend its  
4 March 29, 2010 order and certify it for immediate appeal under 28 U.S.C. § 1292(b).  
5 On July 27, 2010, the district court granted the parties' joint motion, issuing its Order  
6 Granting Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) ("the July 27  
7 Order"). The order was entered on the docket the same day. *See* Docket No. 25.

8       Upon receiving the July 27 Order, counsel for Defendant reviewed the relevant  
9 rules and statutes to determine the deadline for Defendant to file its petition in the  
10 Ninth Circuit. *See* Declaration of Jeffrey A. Topor In Support of Joint Motion To  
11 Recertify Order Granting Permission To Appeal ("Topor Decl."), at ¶ 2. When a  
12 district court enters an order granting permission to appeal pursuant to section 1292,  
13 a petition for permission to appeal must then be filed in the Ninth Circuit "within ten  
14 days after the entry of the order." *See* 28 U.S.C. § 1292(b); Fed. R. App. 5(a)(2).  
15 Federal Rule of Appellate Procedure 26(a) governs how days are counted for  
16 purposes of calculating the ten day deadline set forth in section 1292(b). *See* Fed. R.  
17 App. P. 26(a) ("Computing Time. The following rules apply in computing any time  
18 period specified in these rules, in any local rule or court order, or in any statute that  
19 does not specify a method of computing time.").

20       Utilizing the Internet, counsel reviewed section 1292(b), as well Rules 5 and  
21 26 of the Federal Rules of Appellate Procedure and the corresponding Ninth Circuit  
22 Rules. Unfortunately, counsel mistakenly relied on a former version of Rule 26(a)(2)  
23 that he found online, which provided as follows: "Exclude intermediate Saturdays,  
24 Sundays, and legal holidays when the period is less than 11 days, unless stated in  
25 calendar days." *See* Topor Decl. at ¶ 3. This was the rule in effect following a 2002  
26 amendment to Rule 26(a)(2). *See* Fed. R. App. P. 26, 2002 Amendments, subd.  
27 (a)(2). Effective December 1, 2009, however, Rule 26(a) was again amended, so that  
28 intermediate weekends and holidays were no longer excluded when computing any

1 period of time; in other words, every day was counted (except the day that triggered  
2 the event, *i.e.*, July 27, was not counted). *See id.*, 2009 Amendments, subs. (a) &  
3 (a)(1).

4 Mistakenly relying on the outdated version of Rule 26(a)(2), counsel  
5 calculated and calendared the deadline to file the petition as Monday, August 9,  
6 2010, and circulated this information to another attorney and a paralegal in his office.  
7 *See Topor Decl.* at ¶ 4. Under the correct version of the rule, the intervening  
8 weekends should have been counted, making the petition due on Friday, August 6,  
9 2010.

10 Although the petition was ready to be filed in the Ninth Circuit on August 6, it  
11 was not filed until August 9. On Friday, August 13, 2010, counsel for Plaintiffs  
12 advised Defendant's counsel that Defendant's petition might be untimely. After  
13 discussing the matter with Plaintiffs' counsel, as well as with a member of the  
14 Motions Unit at the Ninth Circuit (the unit responsible for reviewing section 1292(b)  
15 petitions and presenting them to the Court), Defendant concluded that its Ninth  
16 Circuit petition had, indeed, been filed one day late. Accordingly, on Tuesday,  
17 August 17, Defendant promptly filed a motion to withdraw its petition with the Ninth  
18 Circuit. *See id.* at ¶ 5.

### 19 **III. ARGUMENT**

20 In *In re Benny*, the Ninth Circuit held that a district court could "recertify" an  
21 earlier order granting permission to appeal pursuant to section 1292(b). There, after  
22 the Ninth Circuit dismissed an earlier appeal, finding that it had improvidently  
23 granted permission to appeal because the appellant had not timely filed its petition  
24 for permission to appeal, the district court "recertified its order for interlocutory  
25 appeal." *See* 812 F.2d at 1136. Adopting the "middle road" approach taken by the  
26 Seventh Circuit, the Ninth Circuit stated:

27 If recertification will foster judicial efficiency and the district court recertifies  
28 the order, then the appellate court ought not to deny review solely because the  
petitioner failed to take advantage of the original certification. We therefore

1 hold that if, as in this case, a district court on reconsideration recertifies for  
2 interlocutory appeal an order that was previously certified for appeal but from  
3 which the appellant failed to timely petition to appeal, the court of appeals  
may exercise jurisdiction over the appeal if it determines that jurisdiction over  
the appeal would serve judicial efficiency.

4 *Id.* at 1137. Recertification is appropriate here.

5 First, recertification is appropriate where, as here, the reasons that prompted  
6 certification in the first instance still exist. *See Abraham v. Volkswagen of Am., Inc.*,  
7 1991 WL 89133, \*1 (W.D.N.Y. May 28, 1991) (recertifying where “the previous  
8 justification for a certification continues to exist,” quoting *Aparicio v. Swan Lake*,  
9 643 F.2d 1109, 1112 (5th Cir. 1981)); *Jack v. Transworld Airlines, Inc.* 1993 WL  
10 226096, \*1 (N.D. Cal. 1993) (granting request to recertify where “the factors that  
11 prompted the initial certification are still in effect”). Similar to this case, the petition  
12 in *Abraham* was filed one day late after counsel “mistakenly believed that the  
13 computation of time provided by Rule 6 of the Federal Rules of Civil Procedure  
14 controlled when, in fact, Rule 26 of the Federal Rule of Appellate Procedure controls  
15 the computation and extension of time.” *See Abraham*, 1991 WL 89133 at \*1; *see*  
16 *also Marisol A. by Forbes v. Guiliani*, 104 F.3 524, 529 (2d Cir. 1997) (rejecting  
17 argument that defendant’s negligence precluded recertification, and noting that  
18 “defendants have candidly admitted from the outset that their failure to timely  
19 petition this court resulted from their miscalculation of the 10-day period”).

20 Second, recertification will advance the purposes of section 1292(b), by  
21 allowing the Ninth Circuit to resolve controlling questions of law about which there  
22 are substantial grounds for difference of opinion, and an immediate appeal will  
23 materially advance the ultimate termination of the litigation. In addition, there has  
24 been virtually no delay since the expiration of the original ten-day period and this  
25 motion. *See Marisol A.*, 104 F.3 at 529 (district court did not err in recertifying  
26 where recertification was sought within three days after ten-day period expired and  
27 petition was filed in appellate court less than one week later). Further, although they  
28 joined in the earlier motion to certify but do not join in the present motion, Plaintiffs

1 will not be prejudiced by recertification,<sup>2</sup> and Defendant is not seeking to misuse an  
2 interlocutory appeal for the purposes of delay or to harass Plaintiffs. *See id.*

3 **IV. CONCLUSION**

4 For each of the foregoing reasons, Defendant respectfully requests that the  
5 Court issue an recertify its July 27, 2010 Order for immediate appeal pursuant to 28  
6 U.S.C. § 1292(b).

7  
8 DATED: August 18, 2010

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

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10  
11 By: s/Jeffrey A. Topor  
12 Jeffrey A. Topor  
13 Attorneys for Defendant  
14 ARS National Services, Inc.

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21 \_\_\_\_\_  
22 <sup>2</sup> Plaintiffs would in fact benefit greatly from recertification, because they did not  
23 file a petition for permission to appeal in the Ninth Circuit, taking the position that  
24 pursuant to Rule 5(b)(2) of the Federal Rules of Appellate Procedure, their “cross-  
25 petition” was due ten days after Defendant’s petition. *See Fed. R. App. P. 5(b)(2)* (“A  
26 party may file an answer in opposition or a cross-petition within 10 days after the  
27 petition is served.”). However, because this Court previously granted the parties’ joint  
28 motion for permission to appeal, it appears that Plaintiffs’ petition was due at the same  
time as Defendant’s, but was never filed. Even if Plaintiffs were entitled to file a “cross-  
petition” in the Ninth Circuit, it is unlikely that they will be able to so now that  
Defendant has moved to withdraw its petition in that court.

**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 August 18th, 2010, I caused the **DEFENDANT’S MOTION TO RECERTIFY 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**

Robert E. Schroth, Jr.  
[robschrothesq@sbcglobal.net](mailto:robschrothesq@sbcglobal.net)  
Counsel for Plaintiffs

Philip D. Stern  
[psfern@philipstern.com](mailto:psfern@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 18th day of August, 2010.

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



1 TOMIO B. NARITA (SBN 156576)  
JEFFREY A. TOPOR (SBN 195545)  
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5 [jtopor@snllp.com](mailto:jtopor@snllp.com)

6 Attorneys for Defendant  
ARS National Services, Inc.  
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

**DECLARATION OF JEFFREY A.  
TOPOR IN SUPPORT OF  
DEFENDANT’S MOTION TO  
RECERTIFY ORDER GRANTING  
PERMISSION TO APPEAL  
PURSUANT TO  
28 U.S.C. § 1292(b)**

Date: October 18, 2010  
Time: 2:30 p.m.  
Ctrm: 11

The Honorable John A. Houston

1 I, Jeffrey A. Topor, declare:

2 1. I am an attorney duly licensed to practice in this district court and before  
3 all courts of the State of California. I am associated with Simmonds & Narita LLP,  
4 counsel of record for defendant ARS National Services, Inc. in this action. I make  
5 this declaration in support of Defendant's Motion To Recertify Order Granting  
6 Permission To Appeal Pursuant To 28 U.S.C. § 1292(b). I have personal knowledge  
7 of the facts set forth below, and could and would testify thereto if called upon to do  
8 so.

9 2. On July 27, 2010, the District Court entered its order granting the  
10 parties' joint motion for permission to appeal pursuant to 28 U.S.C. § 1292(b). Upon  
11 receiving the Court's Order, I reviewed the relevant rules and statutes to determine  
12 the deadline for Defendant to file its petition for permission to appeal in the Ninth  
13 Circuit. When a district court enters an order granting permission to appeal pursuant  
14 to section 1292, a petition for permission to appeal must then be filed in the Ninth  
15 Circuit "within ten days after the entry of the order." *See* 28 U.S.C. § 1292(b); Fed.  
16 R. App. 5(a)(2). Federal Rule of Appellate Procedure 26(a) governs how days are  
17 counted for purposes of calculating the ten day deadline set forth in section 1292(b).  
18 *See* Fed. R. App. P. 26(a) ("Computing Time. The following rules apply in  
19 computing any time period specified in these rules, in any local rule or court order, or  
20 in any statute that does not specify a method of computing time.").

21 3. Utilizing the Internet, I reviewed section 1292(b), as well Rules 5 and  
22 26 of the Federal Rules of Appellate Procedure and the corresponding Ninth Circuit  
23 Rules. Unfortunately, I mistakenly relied on a former version of Rule 26(a)(2) that I  
24 found online, which provided as follows: "Exclude intermediate Saturdays, Sundays,  
25 and legal holidays when the period is less than 11 days, unless stated in calendar  
26 days." This was the rule in effect following a 2002 amendment to Rule 26(a)(2). *See*  
27 Fed. R. App. P. 26, 2002 Amendments, subd. (a)(2). Effective December 1, 2009,  
28 however, Rule 26(a) was again amended, so that intermediate weekends and holidays



**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 August 18, 2010, I caused the **DECLARATION OF JEFFREY A. TOPOR IN SUPPORT OF DEFENDANT’S MOTION TO RECERTIFY 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**

Robert E. Schroth, Jr.  
[robschrothesq@sbcglobal.net](mailto:robschrothesq@sbcglobal.net)  
Counsel for Plaintiffs

Philip D. Stern  
[psstern@philipstern.com](mailto:psstern@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 18th day of August, 2010.

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