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10 *Attorneys for Plaintiffs, Michael P. Koby,  
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others similarly situated*  
11

12 **UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

13 MICHAEL P. KOBY, an individual; )  
MICHAEL SIMMONS, an individual; )  
14 JONATHAN W. SUPLER, an individual; on )  
behalf of themselves and all others similarly )  
15 situated, )  
16 Plaintiffs, )  
17 vs. )  
18 ARS NATIONAL SERVICES, INC., a )  
California Corporation; and JOHN AND JANE )  
19 DOES 1 through 25 inclusive, )  
20 Defendants. )

Case 3:09-cv-00780-JAH-JMA

**MOTION  
BY PLAINTIFF, MICHAEL SIMMONS  
TO MODIFY ORDER [Doc. No. 19]  
REINSTATING CLAIM FOR  
VIOLATION OF 15 U.S.C. §1692e(11)**

) DATE: OCTOBER 18, 2010

) TIME: 2:20 P.M.

) COURTROOM: 11

) THE HONORABLE JOHN A. HOUSTON

21 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE THAT at 2:30 p.m. on October 18, 2010, in courtroom 11 of  
23 the above Court, located at 940 Front Street, San Diego, California, the Honorable John A.

1 Houston presiding, plaintiff Michael Simmons will and hereby does move this Court for an  
2 Order modifying the Order [Doc. No. 19] which dismissed his claim arising under 15 U.S.C.  
3 §1692e(11) in light of 1) controlling Ninth Circuit precedent that the parties failed to bring to this  
4 Court's attention in the earlier briefing and 2) subsequent caselaw from the Seventh Circuit that  
5 addresses the violation at issue which this Court also may wish to consider.

6 Specifically, this motion is made on the grounds that *Romine v. Diversified Collection*  
7 *Servs.*, 155 F.3d 1142 (9th Cir. 1998), demonstrates that a message left for the purpose of  
8 engaging a consumer in a "communication" is itself a "communication" and thus that the voice  
9 mail message that defendant ARS National Services, Inc. left for Mr. Simmons was a  
10 "communication" as defined by 15 U.S.C. §1692a(2) and required the disclosure mandated by  
11 §1692e(11).

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

15 SCHROTH & SCHROTH  
16 and  
17 PHILIP D. STERN & ASSOCIATES, LLC  
18 Attorneys for Plaintiffs, Michael P. Koby,  
19 Michael Simmons, Jonathan W. Supler, and all  
20 others similarly situated  
21 *s/Philip D. Stern*

22 Dated: September 13, 2010

Philip D. Stern

23 **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 am 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.

1 On September 13, 2010, I caused the foregoing **PLAINTIFF, MICHAEL SIMMONS'**  
2 **MOTION TO MODIFY ORDER [Doc. No. 19] TO REINSTATE CLAIM FOR**  
3 **VIOLATION OF 15 U.S.C. §1692e(11)** along with **MEMORANDUM OF POINTS AND**  
4 **AUTHORITIES IN SUPPORT OF MOTION BY PLAINTIFF MICHAEL SIMMONS TO**  
5 **MODIFY ORDER [Doc. No. 19] TO REINSTATE CLAIM FOR VIOLATION OF 15**  
6 **U.S.C. §1692e(11)** to be served upon the parties listed below via the Court's Electronic Filing

7 System:

8 VIA ECF:

9 Tomio B Narita, Esq.  
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Counsel for Defendant

11 Jeffrey Alan Topor, Esq.  
12 jtopor@snullp.com, sschmitt@snullp.com  
Counsel for Defendant

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

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

16 *s/Philip D. Stern*

Philip D. Stern

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12 **UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

13 MICHAEL P. KOBY, an individual; )  
MICHAEL SIMMONS, an individual; )  
14 JONATHAN W. SUPLER, an individual; on )  
behalf of themselves and all others similarly )  
15 situated, )  
16 Plaintiffs, )  
17 vs. )

Case 3:09-cv-00780-JAH-JMA

**MEMORANDUM OF**  
**POINTS AND AUTHORITIES**  
**IN SUPPORT OF MOTION BY**  
**PLAINTIFF MICHAEL SIMMONS TO**  
**MODIFY ORDER [Doc. No. 19] TO**  
**REINSTATE CLAIM FOR VIOLATION**  
**OF 15 U.S.C. §1692e(11)**

18 ARS NATIONAL SERVICES, INC., a )  
California Corporation; and JOHN AND JANE )  
19 DOES 1 through 25 inclusive, )  
20 Defendants. )

DATE: OCTOBER 18, 2010  
TIME: 2:20 P.M.  
COURTROOM: 11

THE HONORABLE JOHN A. HOUSTON

21 **DISCUSSION**

22 Subsequent to the Court’s July 27, 2010 order for certification under 28 U.S.C. §1292(b),  
23 Plaintiffs’ counsel became aware of *Romine v. Diversified Collection Servs.*, 155 F.3d 1142 (9th

1 Cir. 1998), which establishes the appropriate analysis with respect to whether the Simmons  
2 message is a “communication” under the FDCPA. Counsel apologizes for failing to identify this  
3 decision previously.

4 This Ninth Circuit precedent dictates a purpose-and-context analysis under the FDCPA  
5 which, as applied to voice mail messages, focuses on whether the call was left for a consumer by  
6 a debt collector and whether the purpose of the call was to collect a debt. This Court already  
7 determined that the Simmons message was left for a consumer by a debt collector for the purpose  
8 of collecting a debt. Doc. No. 19, page 8, lines 1-2. Therefore, as alleged, the Simmons message  
9 was a “communication” under the FDCPA.

10 The *Romine* analysis complements the Court of Appeals’ decision in *Gburek v. Litton*  
11 *Loan Servicing LP*, \_\_ F.3d \_\_, 2010 U.S. App. LEXIS 15346 (7th Cir. July 27, 2010), and the  
12 decision in *Hutton v. C.B. Accounts*, 2010 U.S. Dist. LEXIS 77881 (C.D. Ill. August 3, 2010) --  
13 both issued after this Court’s prior certification Order. Defendant’s late filing of the Petition with  
14 the Ninth Circuit and its subsequent withdrawal afford this Court the opportunity to re-analyze  
15 the instant issue prior to appellate review.

16 The analysis followed in *Romine*, *Gburek*, and *Hutton* looks to the purpose and context of  
17 the defendant’s conduct. In *Romine*, the Ninth Circuit looked at the purpose and context of  
18 Western Union’s program designed to obtain otherwise unavailable information about consumer  
19 debtors. The court observed that Western Union developed the program with unique procedures  
20 calculated to obtain information solely for debt collection purposes and marketed the program  
21 for use by debt collectors. Based on the purpose and context, the Ninth Circuit concluded that  
22 Western Union was subject to the FDCPA.  
23

1 In *Gburek*, the Seventh Circuit Court of Appeals concluded, based on the purpose-and-  
2 context analysis, that a letter which was sent in connection with the collection of a debt was  
3 likewise subject to the FDCPA. Like the Ninth Circuit in *Romine*, the Seventh Circuit was  
4 persuaded by the fact that the letter was sent for debt collection purposes in the context of  
5 addressing Gburek's allegedly delinquent payments. Explaining its own prior decisions which  
6 the lower court had read too literally, the court stated that "the purpose and context of the  
7 communications" controlled when determining the FDCPA's application. *Gburek*, 2010 U.S.  
8 App. LEXIS 15346 at \*13.

9 *Hutton* then applied the purpose-and-context analysis to the precise issue now before this  
10 Court: whether a debt collector's voice mail message was a "communication." "Determining  
11 whether something is a 'communication' under the FDCPA involves looking at the would-be  
12 communication's purpose, and the context in which it was made." *Hutton*, 2010 U.S. Dist.  
13 LEXIS 77881, at \*6. Concluding that "the purpose of the messages was to induce Plaintiff to call  
14 Defendant to discuss her outstanding debt" and was therefore a "communication," the court  
15 rejected this Court's analysis: the "*Koby* court's reasoning cannot be reconciled with the Seventh  
16 Circuit's clear statement that the purpose and context of the communications are key factors in  
17 determining whether something is an FDCPA 'communication.'" *Id.* at \*7.

18 Just as the *Hutton* court held this Court's interpretation of "communication" "cannot be  
19 reconciled with" binding Seventh Circuit precedent, this Court's earlier holding cannot be  
20 reconciled with the teaching of *Romine*.

21 The Court retains the inherent power to modify any of its interlocutory orders. *United*  
22 *States v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004) *cert. den.* 544 U.S. 956 (2005). Thus, if this  
23

1 Court is satisfied that the purpose-and-context analysis applies to the determination of this issue,  
2 then Simmons respectfully requests that it accordingly modify its Order [Doc. No. 19].

3 **CONCLUSION**

4 For the foregoing reasons, Plaintiff, Michael Simmons, respectfully requests that the  
5 Court modify its Order [Doc. No. 19] by reinstating his claim under 15 U.S.C. §1692e(11) and  
6 denying Defendant's Motion [Doc. No. 6] in its entirety.

7 SCHROTH & SCHROTH  
8 and  
9 PHILIP D. STERN & ASSOCIATES, LLC  
10 Attorneys for Plaintiffs, Michael P. Koby,  
11 Michael Simmons, Jonathan W. Supler, and all  
12 others similarly situated  
13 *s/Philip D. Stern*

14 Dated: September 13, 2010

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16 Philip D. Stern  
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