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

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

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

17 Plaintiffs,

18 vs.

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

21 Defendants.

Case 09cv0780 JAH JMA

**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES
IN FURTHER 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)**

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

THE HONORABLE JOHN A. HOUSTON

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ARGUMENT

Defendant concedes the underlying premise of Plaintiff's argument: ARS *intended* to contact Plaintiffs to collect debts for the *purpose* of encouraging them to pay those debts. [Doc. 38 at page 3]. Defendant also recognizes that a reading of *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010) "echoes what the Ninth Circuit said" in *Romine v. Diversified Collection Servs.*, 155 F.3d 1142 (9th Cir. 1998). The *Romine* analysis dictates reinstatement of Simmons' §1692e(11) claim.

Defendant objects, however, and, for its lead argument, contends that Plaintiffs' request is time-barred. By insisting on strict enforcement of the local rule, Defendant contends that the Court cannot correct an error and, instead, should send the case up on appeal. Furthermore, "those who live in glass houses shouldn't throw stones;" Defendant's pending motion to re-certify was the result of Defendant's own failure to comply with a strictly applied deadline. Unlike the rule applicable to Defendant's appeal, the local rule on reconsideration is subject to this Court's inherent authority to reconsider its rulings while a case remains pending – an authority which Defendant concedes. The important thing is that all pertinent authorities be properly considered.

Defendant also argues that there is no controlling authority. *Romine* is binding and its controlling effect became apparent after *Hutton v. C.B. Accounts, Inc.*, 2010 U.S. Dist. LEXIS 77881 (C.D. Ill. Aug. 3, 2010) relied on *Gburek* which, using Defendant's words, "echoes what the Ninth Circuit said" in *Romine*.

It is noteworthy that the Court's decision on the Simmons message is also in conflict with the informed, though not controlling, *Federal Trade Commission Staff Commentary of the Federal Trade Commission*, 53 Fed. Reg. 50097, 50107 (December 13, 1988), available at

1 <http://www.ftc.gov/os/statutes/fdcpa/commentary.htm>, where, with respect to §1692e(11), at
2 Comment 2, the FTC concluded that:

3 A debt collector may not send the consumer a note saying only “please call me
4 right away” unless [circumstances not relevant to the complaint exist].

5 Plaintiffs merely ask that the Court consider the *Romine* analysis and if, as Plaintiffs
6 contend, it concludes that the analysis applies here, then the Simmons §1692e(11) claim should
7 be reinstated.

8 For the reasons stated here and in Plaintiffs’ Motion, Plaintiffs respectfully request that
9 the Court reinstate Simmons’ claim under 15 U.S.C. §1692e(11).

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

17 Dated: October 8, 2010

18 _____
19 Philip D. Stern

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 October 8, 2010, I caused the foregoing **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER 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)**, to be served upon the parties listed below via the Court's Electronic Filing System:

VIA ECF:

Tomio B Narita, Esq.
tnarita@snullp.com, sschmitt@snullp.com
Counsel for Defendant

Jeffrey Alan Topor, Esq.
jtopor@snullp.com, sschmitt@snullp.com
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 8th day of October 2010, at Maplewood, New Jersey.

s/Philip D. Stern

Philip D. Stern