



1 On July 21, 2010, the parties filed a joint motion to certify the Court's order for  
2 appeal which this Court granted by order filed July 27, 2010. See Doc. Nos. 24, 25.  
3 Defendant filed an appeal with the United States Court of Appeals for the Ninth Circuit  
4 on August 9, 2010, and later withdrew the petition.<sup>1</sup> See Doc. Nos. 26, 30.

5 On August 18, 2010, Defendant filed the pending motion to recertify the order for  
6 appeal. See 28. Plaintiff filed the pending motion to correct the Court's order and filed  
7 an opposition to Defendant's motion to recertify on September 13, 2010. See Doc.  
8 Nos. 35, 36.

9 Defendant filed its reply in support of its motion to recertify on September 20,  
10 2010 and filed an opposition to Plaintiff's motion to correct the Court's order on October  
11 4, 2010. See Doc. Nos. 27, 38. Plaintiff filed a reply in support of its motion to correct  
12 the Court's order on October 8, 2010. See Doc. No. 39. The motions were taken under  
13 submission without oral argument.

## 14 DISCUSSION

### 15 I. Plaintiff's Motion to Modify

16 Plaintiffs seeks an order modifying this Court's previous order granting in part  
17 Defendant's motion for judgment on the pleadings. Specifically, Plaintiffs seek an order  
18 reinstating the claim asserted by Plaintiff Simmons. Plaintiffs maintain their counsel  
19 became aware of a Ninth Circuit case which establishes the appropriate analysis with  
20 respect to whether Plaintiff Simmons message is a communication under the FDCPA.  
21 They maintain pursuant to this Ninth Circuit precedent and utilizing the purpose-and-  
22 context analysis discussed therein, the Simmons message was a communication because  
23 the message was left for a consumer by a debt collector and the purpose of the call was to  
24 collect a debt. Plaintiffs contend the late filing of Defendant's petition with the Ninth  
25 Circuit gives this Court the opportunity to re-analyze the issue prior to appellate review.  
26 Citing Romine v. Diversified Collection Servs., 155 F.3d 1142 (9th Cir. 1998), Plaintiffs

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28 <sup>1</sup>Defendant maintains it withdrew the petition because it was one day late. See  
Topor Decl. ¶ 5 (Doc. No. 28-1).

1 request this Court modify its order and reinstate the claim brought on behalf of Plaintiff  
2 Simmons pursuant to a “purpose and context” analysis.

3 Defendant argues the motion to modify is untimely because it was filed six months  
4 after the order was filed, well beyond the 28 day deadline permitted by the local rule for  
5 seeking reconsideration of orders. Defendant further argues the motion is meritless  
6 because the three cases relied upon by Plaintiffs in support of their motion are irrelevant  
7 and not binding precedent.

8 In reply, Plaintiffs suggest the Court should reconsider its ruling in spite of the fact  
9 the motion was not timely filed. Plaintiffs also argue Romine is binding upon this Court.

10 Rule 60(b) of the Federal Rules of Civil Procedure permits the Court to relieve a  
11 party from an order for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly  
12 discovered evidence; (3) fraud, misrepresentation or misconduct; (4) the judgment is void;  
13 (5) the judgment has been satisfied, released or discharged; or (6) any other reason that  
14 justifies relief. However, “no motion or application for reconsideration shall be filed more  
15 than 28 days after the entry of the ruling, order or judgment sought to be reconsidered.  
16 CivLR 7.1.i.2. Plaintiffs’ request filed almost six months after the order was filed is  
17 untimely.

18 Even if the Court addresses the merits of the request to modify its prior order,  
19 Plaintiffs’ motion should be denied. Contrary to Plaintiffs’ contention, the decision in  
20 Romine does not demonstrate this Court’s prior ruling was in error. In Romine, the Ninth  
21 Circuit reversed the district court’s dismissal of Western Union from the FDCPA action  
22 upon finding Western Union’s conduct amounted to a direct or indirect attempt to collect  
23 a debt and therefore Western Union was a debt collector subject to the FDCPA. In the  
24 instant matter, the Court made a determination as to whether a message left by a debt  
25 collector was a “communication” under the FDCPA. As such, the Ninth Circuit’s analysis  
26 and holding surrounding whether a defendant was a debt collector subject to the FDCPA  
27 is not directly relevant to the issue involved with the case at bar. Furthermore, although  
28 Romine does not require a “purpose and context” analysis as suggested by Plaintiffs, the

1 Court applied such an analysis when making its determination that the message left for  
2 Plaintiff Simmons did not directly or indirectly convey information regarding a debt. See  
3 Order at 4-5.

4 Plaintiffs also rely on the holding of Gburek v. Litton Loan Servicing LP, 614 F.3d  
5 380 (7th Cir. 2010). Initially, the Court notes the case is not binding precedent as it is  
6 from the Seventh Circuit. Additionally, it does not demonstrate this Court's previous  
7 order was in error. In Gburek, the Seventh Circuit reversed the district court's ruling that  
8 a letter sent by a debt collector that did not contain an explicit demand for payment was  
9 not a communication made in connection with the collection of any debt under the  
10 FDCPA. In reaching its decision, the court recognized that the FDCPA did not apply to  
11 every communication between a debt collector and a debtor and the absence of a demand  
12 for payment is just one of several factors in determining whether the communication falls  
13 under the FDCPA. Id. at 384-85, 386. Looking to the context and content of the letters,  
14 the court found the fact the plaintiff was in default on her mortgage, the letters offered to  
15 discuss alternatives to foreclosure and asked for her financial information were sufficient  
16 to bring the communications within the scope of the FDCPA. Id. at 386. As discussed  
17 above, this Court did consider the context and content of the message in making its  
18 determination, and specifically found the message left for Plaintiff Simmons included no  
19 information regarding the debt and therefore was not a communication for purposes of the  
20 FDCPA.

21 Finally, Plaintiffs' reliance on a district court order outside this Circuit is unavailing.  
22 The court in Hutton v. C.B. Accounts, Inc., 2010 WL 3021904 (C.D.Ill. 2010),  
23 specifically discussed and disagreed with this Court's reasoning in its order dismissing the  
24 claim based upon the message left Plaintiff Simmons in determining a message similar to  
25 the one left Plaintiff Simmons was a communication. Disagreement with this Court by  
26 another district court outside this circuit is insufficient to support reconsideration of the  
27 order.

28 Accordingly, Plaintiffs' motion for reconsideration styled as a motion to modify the

1 Court's order is DENIED.

## 2 **II. Defendant's Motion to Recertify**

3 Defendant requests this Court recertify the order granting in part and denying in  
4 part Defendant's motion for judgment on the pleadings for immediate appeal pursuant to  
5 28 U.S.C. section 1292(b). Defendant maintains the reasons that prompted the parties  
6 to jointly seek certification still exist and recertification will advance the purposes of  
7 section 1292(b). Specifically, Defendant argues the action involves questions of law about  
8 which there are substantial grounds for difference of opinion, and immediate appeal will  
9 advance the ultimate termination of the litigation. Defendant further maintains Plaintiffs  
10 previously agreed to certification, they will not be prejudiced by recertification and  
11 Defendant is not seeking to delay or harass Plaintiffs.

12 Plaintiffs oppose the motion. They argue there are no substantial grounds for  
13 difference of opinion and judicial economy will not be promoted by an immediate appeal.  
14 Plaintiffs maintain there is no dispute amongst the circuits and no bona fide dispute  
15 amongst the district courts, as only one court, the Western District of Oklahoma, found  
16 a voice mail message conveyed no information regarding a debt. Relying on the reasoning  
17 of Hutton, Plaintiffs maintain a message left for the purpose of attempting to collect in the  
18 context of a debt collector-consumer relationship is information regarding a debt and  
19 therefore a communication. As such, they argue there is no basis to conclude substantial  
20 grounds for difference of opinion. They further argue only a complete reversal of the  
21 Court's order would short circuit the case and complete reversal is unlikely given the  
22 weight of authority. So, an interlocutory appeal will likely delay resolution of this case and  
23 permitting the case to proceed in ordinary course will allow for a more complete record.

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25 In reply, Defendant argues none of the cases cited by Plaintiff help them, in fact,  
26 they argue the cases confirm that substantial grounds for a difference of opinion exists.  
27 Defendant maintains allowing the Ninth Circuit to resolve the issues will bring guidance  
28 and clarity and will materially advance the litigation by possibly avoiding an expensive

1 class action.

2 28 U.S.C. § 1292(b)<sup>2</sup> permits a district judge to certify an issue for interlocutory  
3 appeal where the issue (1) involves a controlling question of law; (2) to which there is  
4 substantial ground for difference of opinion; and (3) an immediate appeal may materially  
5 advance the ultimate termination of the litigation. Certification of interlocutory orders  
6 under Section 1292(b) requires exceptional circumstances to be present to “justify a  
7 departure from the basic policy of postponing appellate review until after the entry of a  
8 final judgment.” In re Cement Antitrust Litigation, 673 F.2d 1010, 1026 (9th Cir.  
9 1982).

10 The parties do not dispute the fact the issue constitutes a controlling question of  
11 law. A reversal of this Court’s order as to whether the messages were communications  
12 subject to the FDCPA would materially affect the outcome of the litigation by possibly  
13 terminating all or portions of the litigation and, therefore, constitutes a controlling  
14 question of law. See id. Additionally, the lack of controlling precedent as to when a  
15 message qualifies as a “communication” subject to the provisions of the FDCPA and the  
16 various district court decisions<sup>3</sup> demonstrate substantial grounds for a difference of

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18 <sup>2</sup> Section 1292(b) states, in its entirety:

19 When a district judge, in making in a civil action an order not otherwise  
20 appealable under this section, shall be of the opinion that such order involves  
21 a controlling question of law as to which there is substantial ground for  
22 difference of opinion and that an immediate appeal from the order may  
23 materially advance the ultimate determination of the litigation, he shall so  
24 state in writing in such order. The Court of Appeal which would have  
25 jurisdiction of an appeal of such action may thereupon, in its discretion,  
26 permit an appeal to be taken from such order, if application is made to it  
27 within ten days after the entry of the order: *Provided, however,* That  
28 application for an appeal hereunder shall not stay proceedings in the district  
29 court unless the district judge or the Court of Appeals or a judge thereof shall  
30 so order.

28 U.S.C. § 1292(b)(emphasis in original).

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<sup>3</sup> See Biggs v. Credit Collections, Inc., 2007 WL 4034997 (W.D.Okla.); Berg v.  
Merchants Ass’n Collection Div., Inc., 586 F.Supp.2d 1336 (S.D.Fla. 2008); Berlin v.  
Litton Loan Serving, LP, 2006 WL 1992410 (M.D.Fla. 2006); Foti v. NCO Fin. Sys., Inc.,  
424 F.Supp.2d 643 (S.D.N.Y. 2006); Hosseinzadeh v. M.R.S. Associates, Inc., 387  
F.Supp.2d 1104 (C.D.Cal. 2005).

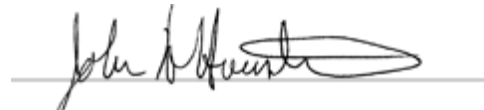
1 opinion exists. Finally, the interlocutory appeal may materially advance the litigation in  
2 that a decision by the Ninth Circuit will likely simplify the issues to be tried and may  
3 determine the appropriateness of a class action or limit the class. The Court finds  
4 exceptional circumstances exist to support certification under section 1292(b).  
5 Accordingly, the motion is GRANTED. The Court further finds a stay of the proceedings  
6 pending the outcome of the appeal is appropriate.

7 **CONCLUSION AND ORDER**

8 Based on the foregoing, IT IS HEREBY ORDERED:

- 9 1. Plaintiff's motion for reconsideration styled as a motion to modify the  
10 Court's order is **DENIED**;
- 11 2. Defendant's motion to recertify is **GRANTED**;
- 12 3. Further proceedings in this matter are **STAYED** pending the completion of  
13 the interlocutory review process in the Ninth Circuit.

14 DATED: December 22, 2010

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16 JOHN A. HOUSTON  
17 United States District Judge

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