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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

<p>NANCY INIGUEZ, on behalf of herself and all others similarly,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>THE CBE GROUP, INC.,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No: 2:13-cv-00843-JAM-AC</p> <p>ORDER DENYING DEFENDANT THE CBE GROUP, INC.’S MOTION FOR RECONSIDERATION, OR, IN THE ALTERNATIVE, MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)</p> <p>Judge: Hon. John A. Mendez</p>
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1 This matter came before the Court on a motion for reconsideration brought
2 by the Defendant, The CBE Group, Inc. (“CBE” or “Defendant”), or, in the
3 alternative, a motion for certification of interlocutory appeal (Dkt. No. 32).
4 Plaintiff, Nancy Iniguez (“Plaintiff”) has opposed the motion (Dkt. No. 34).
5 Defendant has asked the Court to reconsider its order from September (Dkt. No.
6 18), in which the Court denied CBE’s motion to dismiss. CBE’s motion to dismiss
7 was premised on the belief that the Telephone Consumer Protection Act of 1991,
8 47 U.S.C. § 227 *et seq.* (the “TCPA”) does not apply to debt collection calls, and
9 therefore Plaintiff had no actionable TCPA claim against CBE as a matter of law.

10 CBE urges this Court to specifically reconsider the issue of whether the
11 TCPA applies to debt collection calls on the basis that recent case law establishes
12 that debt collection calls are categorically exempt from TCPA, and allowing the
13 case to proceed on the prior ruling would be manifestly unjust.

14 In the alternative, CBE has requested this Court to certify its prior order
15 under 28 U.S.C. § 1292(b), arguing there is substantial ground for difference of
16 opinion as to a pure question of controlling law the resolution of which will
17 materially affect this litigation.

18 CBE has argued that three “recent federal district court opinions have held
19 that debt collection calls, similar to those underlying plaintiff’s TCPA claim, are
20 exempt from TCPA, and thus these calls cannot give rise to a TCPA violation.”
21 Def.’s Memo., p. 3, lns. 5-7 (Dkt. No. 32).

22 First, the three cases cited by CBE were all decided before the Court made
23 its order on the motion to dismiss, and even before CBE filed its reply to plaintiff’s
24 opposition to CBE’s motion to dismiss. Thus, the Court finds these three cases are
25 not recent and should have been included in the original motion to dismiss.

26 The three cases cited and briefly discussed by CBE in this motion for
27 reconsideration fail to show how manifest injustice would result if the Court
28 declines to reconsider its order, and certainly do not support CBE’s contention that

1 debt collection calls are categorically exempt from the TCPA.

2 In *Martinez v. Johnson*, a case out of the District of Utah,¹ the plaintiffs
3 alleged a violation of TCPA based on calls made by defendant for debt collection
4 purposes arising out of an established business relationship. Although plaintiffs
5 contended that the calls were made to a cell phone, that court found that there was
6 no evidence that the phone contacted was, in fact, a cell phone rather than a
7 landline.

8 The Court found that a regulatory exemption applied to the calls, and
9 therefore the TCPA did not prohibit them. However, the provision relied on by the
10 district court in *Martinez* shows that it is inapplicable to the case at hand.

11 In *Martinez*, the Court cited 47 CFR 64.1200(a)(2)(iii-iv) as the source of
12 the exemption. The provision in effect at the time, recently amended and recodified
13 as 47 CFR 64.1200(a)(3), specifically stated that no person may “initiate any
14 telephone call to any residential line unless the call is made for a commercial
15 purpose but does not include or introduce an unsolicited advertisement, or
16 constitute a telephone solicitation, or is made to any person with whom the caller
17 has an established business relationship at the time the call is made.”

18 By the explicit language of the regulation, the exemption relied on by the
19 court in *Martinez* applies to residential lines. It does not reference calls made to
20 cell phones, which are discussed elsewhere in the regulation. As stated, the TCPA
21 makes a clear distinction between the provisions that apply to residential lines and
22 those that apply to numbers assigned to a cellular telephone service.

23 Comparing 47 U.S.C. § 227(b)(1)(A)(iii), which prohibits calls to any
24 telephone number assigned to a cellular telephone service, unless with prior
25 express consent or for emergency purposes, to 47 U.S.C. § 227(b)(1)(B), that
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28 ¹ *Martinez v. Johnson*, 11-CV-157-DN, 2013 WL 1031363 (D. Utah Mar. 14, 2013).

1 prohibits calls to any residential telephone line unless it is for emergency purposes,
2 with consent, or expressly exempted.

3 As such, the *Martinez* case does not apply to the claims at issue in the case
4 before this Court, and it provides no support for CBEs motion for reconsideration.

5 The second case cited by CBE in the motion for reconsideration is *Roy v.*
6 *Dell Financial Services, LLC*.² That is out of the Middle District of Pennsylvania.
7 In that case, the district court relied on the same exemptions as the *Martinez* Court
8 to find that the Plaintiff's allegations regarding debt collection calls did not state a
9 claim for a violation of the TCPA.

10 Again, there is no evidence in that opinion that the plaintiff claimed, or that
11 the court assumed, that the calls were being made to a cellular telephone.

12 CBE relies on, in the motion for reconsideration, perhaps one poorly worded
13 sentence in *Roy* that states, "The FCC has determined that all debt-collection
14 circumstances are excluded from the TCPA's coverage." *Roy*, 2013 WL 3678551
15 at *8. In the *Roy* opinion, the district court cited to two cases to support this
16 conclusion. Again, the cases that the district court in *Roy* cited do not support the
17 conclusion reached by the *Roy* Court.

18 The first case the district court cited to is *Meadows v. Franklin Collection*
19 *Services, Inc.*,³ an Eleventh Circuit case. In that case, the Eleventh Circuit found
20 that the debt collection calls at issue did not violate the TCPA, but clearly based its
21 ruling on the fact that the calls were exempt from the TCPA prohibitions on such
22 calls to residences. This does not stand for the proposition that no debt collection
23 calls can violate the TCPA or that the exemption relied on applies to calls to cell
24 phones. Rather, the debt collection calls generally are assumed to involve an

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26 ² *Roy v. Dell Fin. Servs., LLC*, 3:13-CV-738, 2013 WL 3678551 (M.D. Pa. July
27 12, 2013).

28 ³ *Meadows v. Franklin Collection Servs., Inc.*, 414 F. App'x 230, 236 (11th Cir.
2011).

1 existing business relationship, and thus they fall into the landline exemption
2 involving existing business relationships provided in § 64.1200(a).

3 The second case relied on by the *Roy* Court is *Gager v. Dell Financial*
4 *Services, LLC*, a district court case out of the Middle District of Pennsylvania.⁴ In
5 that case, the Court found that debt collection calls were exempt regardless of what
6 type of phone is called. However, this holding was directly overturned by the Third
7 Circuit, so the district court opinion has no precedential value.

8 In discussing the 64.1200(a) exemptions, and the district court's erroneous
9 application of them, the Third Circuit held that "exemptions do not apply to
10 cellular phones; rather, these exemptions apply only to autodialed calls made to
11 land-lines." *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 273 (3d Cir. Pa. 2013).

12 The Third Circuit further held that the "only exemptions in the TCPA that
13 apply to cellular phones are for emergency calls and calls made with prior express
14 consent." *Id.* at 273.

15 Therefore, the holding in *Roy* does not support CBE's contention that the
16 federal regulations categorically exempt debt collection calls to cellular phones,
17 and therefore, again, does not support the motion for reconsideration.

18 The third decision submitted is the *Rafala v. Nelson, Watson and Associates,*
19 *LLC* case out of the Eastern District of New York.⁵ First, that is an unpublished
20 order. In *Rafala*, the Court relies on a portion of an FCC declaratory ruling
21 regarding debt collection calls to conclude: "Reasoning that 'calls solely for the
22 purpose of debt collection are not telephone solicitations and do not constitute
23 telemarketing.' The FCC has exempted them from the TCPA's restrictions," citing
24 Rules and Regulations Implementing the Telephone Consumer Protection Act of
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26 ⁴ *Gager v. Dell Fin. Servs., LLC*, 11-CV-2115, 2012 WL 1942079 (M.D. Pa. May
27 29, 2012) rev'd, *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265 (3d Cir. Pa. 2013).

28 ⁵ *Rafala v. Nelson, Watson & Assoc., LLC*, 10-CG-173 (RJD) (MDG) (E.D. NY
Jan. 28, 2013).

1 1991, 23 FCCR 559.

2 The phrase quoted from this FCC ruling, however, is followed by:
3 “Therefore, calls regarding debt collection or to recover payments are not subject
4 to the TCPA’s separate restrictions on ‘telephone solicitations.’” *In re Rules &*
5 *Regulations Implementing the Telephone Consumer Protection Act of 1991,*
6 *Declaratory Ruling, 23 FCC Rcd 559, 565 (2008).*

7 The FCC ruling cited in *Rafala* then cites a provision not applicable in
8 *Rafala* or in the present case before this Court. Nevertheless, the *Rafala* Court
9 relied on the FCC ruling to attempt to declare that debt collection calls do not give
10 rise to a cause of action under the TCPA. *Rafala* clearly involves an overextension
11 or misinterpretation of a FCC ruling, and that makes the *Rafala* decision
12 questionable persuasive authority, and it certainly does not warrant reconsideration
13 in this case.

14 The FCC ruling did expand the scope of the express consent exception as
15 applied to debt collection calls to cell phones; however, it does not change the
16 reasoning applied in this Court’s ruling on CBE’s motion to dismiss, or support
17 CBE’s contention that debt collection calls can never violate the TCPA. In fact,
18 courts discussing this issue have concluded that the FCC ruling does not exempt all
19 debt collection calls, and certainly not all calls to cell phones, including in cases in
20 which CBE made these same arguments.

21 The *Robinson v. Midland Funding* case,⁶ Southern District of California
22 case, that found that the “FCC has already issued a declaratory ruling stating debt
23 collectors who make autodialed or prerecorded calls to a wireless number are
24 responsible for any violation of the TCPA.” *Robinson*, 2011 U.S. Dist. LEXIS
25 40107 at *13.

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28 ⁶ *Robinson v. Midland Funding, LLC*, 2011 U.S. Dist. LEXIS 40107 (S.D. Cal. Apr. 13, 2011).

1 The court in *Blair v. CBE Group, Inc.*,⁷ the 2013 case out of the Southern
2 District of California, in which Judge Anello denied CBE’s motion to dismiss,
3 relied on the theory that the TCPA does not apply to debt collection calls.

4 The Court therefore finds that the case law cited in the motion for
5 reconsideration does not in any way support CBE’s broad contention that debt
6 collection calls are categorically exempt from the TCPA restrictions.

7 I further find that CBE has failed to meet the standards required for a
8 successful motion for reconsideration as required under Federal Rule of Civil
9 Procedure 60(b) and Local Rule 230(j), and accordingly the Court denies the
10 motion for reconsideration.

11 CBE has also requested this Court to certify its order for an interlocutory
12 appeal pursuant to 28 U.S.C. § 1292(b). This section provides that when a district
13 judge, in making in a civil action an order not otherwise appealable under this
14 section, shall be of the opinion that such order involves a controlling question of
15 law as to which there is substantial ground for difference of opinion and that an
16 immediate appeal from the order may materially advance the ultimate termination
17 of the litigation, he shall so state in writing in such order.

18 “The standard to certify a question of law is high and a district court
19 generally should not permit such an appeal where it ‘would prolong the litigation
20 rather than advance its resolution.’” *Davis Moreno Constr., Inc. v. Frontier Steel*
21 *Bldgs. Corp.*, 2011 U.S. Dist. LEXIS 10083, *3 (E.D. Cal. Feb. 1, 2011) (quoting
22 *Syufy Enter. v. Am. Multi-Cinema, Inc.*, 694 F. Supp. 725, 729 (N.D. Cal.1988).

23 Even assuming the question as posited by CBE is a controlling question of
24 law in this case that would materially affect this litigation, this Court finds that
25 there is not “substantial ground for difference of opinion” with regard to whether
26 the TCPA applies to debt collection calls made to cellular telephones.

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28 ⁷ *Blair v. CBE Group, Inc.*, 2013 WL 2029155 (S.D. Cal. May 13, 2013).

1 Much of CBE's argument for certification focuses on the same cases
2 discussed in its motion for reconsideration. And, as the Court has found, these
3 cases do not provide adequate, if any, support for CBE's contention that the TCPA
4 does not apply to debt collection calls. A proper reading of the FCC ruling, the
5 TCPA and the § 64.1200(a) exemptions rules out CBE's theory.

6 In addition, the case law that actually deals with this question of law before
7 the Court has almost unanimously found that debt collection calls are not
8 categorically exempt from the TCPA, and debt collectors can be found liable for
9 offending calls. The *Robinson* case, the *Blair* case, and the *Gager* case (the Third
10 Circuit opinion), all support that conclusion.

11 Therefore, this Court finds that CBE has failed to show a substantial ground
12 for difference of opinion, and therefore has failed to meet the high standard placed
13 upon a moving party. Accordingly, the Court also denies CBE's motion for
14 certification.

15 For those reasons, the entire motion is DENIED.

16 **IT IS SO ORDERED.**

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18 Dated: 12/4/2013

/s/ John A. Mendez

19 **HON. JOHN A. MENDEZ**

20 **UNITED STATES DISTRICT COURT JUDGE**