IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KELLIE PEARSON and THE LAW OFFICES OF MARK BOOKER, on behalf of themselves and those similarly situated, Plaintiffs, v. THOMAS M. HODGSON, Individually and In His Official Capacity as Sheriff Of Bristol County and SECURUS TECHNOLOGIES, INC. Defendants.	)	Case No. 1:18-cv-11130

DEFENDANT SECURUS TECHNOLOGIES, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND ORDER OF JUDGMENT AND CERTIFY QUESTION OF LAW TO MASSACHUSETTS SUPREME JUDICIAL COURT

This Court made no "manifest error of law" in its June 22, 2020 Order, after its thorough examination of the applicable law and legislative history, the parties' extensive briefing, and an oral argument that lasted more than two hours. Plaintiffs' attempt to rehash arguments in its Motion to Alter or Amend Order of Judgment that this Court has already decided does not constitute manifest error of law. As such, and for the reasons stated in Sheriff Hodgson's Opposition,[1] Plaintiffs' Motion should be denied.

Furthermore, Plaintiffs' last-ditch effort in the alternative to certify questions of law to the Massachusetts Supreme Judicial Court ("SJC") *more than two years* after this case was removed

[1] Securus incorporates by reference the arguments Sheriff Hodgson makes in his Opposition to Plaintiffs' Motion. *See* ECF No. 119.

to this Court must be denied. Plaintiffs' untimely request comes only after Plaintiffs received their first adverse ruling in this matter. Asking the SJC to review questions of law now, after this Court has spent more than two years addressing the very same questions of law Plaintiffs seek to certify, is a waste of judicial resources and contrary to controlling law. The Court should also deny the certification request because Plaintiffs' proposed questions fail to satisfy the requirements under SJC Rule 1:03(1). Accordingly, Plaintiffs' request to certify questions of law to the SJC should also be denied.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' REQUEST TO ALTER THE JUNE 22, 2020 ORDER.

The Court's June 22, 2020 Order should not be altered or amended because the Court made no "manifest error of law." "Rule 59(e) relief is granted sparingly, and only when 'the original judgment evidenced a manifest error of law, if there is newly discovered evidence, or in certain other narrow situations.'" *Biltcliffe v. CitiMortgage, Inc.*, 772 F.3d 925, 930 (1st Cir. 2014) (citation omitted). A motion for reconsideration is "not the venue to undo procedural snafus or permit a party to advance arguments it should have developed prior to judgment, nor is it a mechanism to regurgitate 'old arguments previously considered and rejected.'" *Id.* (citation omitted). Relief under Rule 59 is "narrowly configured and seldom invoked." *United States v. Connell*, 6 F.3d 27, 31 (1st Cir. 1993).

Without explanation, Plaintiffs conclude that "the Court's analysis of Section 3 and the 2009 Session law [in its June 22, 2020 Memorandum and Order, ECF No. 114] meets this standard." Pls.' Mot. to Alter or Amend, ECF No. 118 at 17. Plaintiffs appear to claim that in its Order, the Court made "a clearly established manifest error of law." *See id.* For the reasons stated in Sheriff Hodgson's Opposition to Plaintiffs' Motion, ECF No. 119, however, the Court made no

error of law and correctly allowed Defendants' motions for judgment on the pleadings. For this reason alone, Plaintiffs' Motion should be denied.

Plaintiffs' Motion should also be denied because it impermissibly re-hashes arguments from Plaintiffs' Motion for Partial Summary Judgment – arguments this Court has already considered and rejected. For example, both Plaintiffs' Motion for Partial Summary Judgment and Motion to Alter or Amend argue that "Section 12(a) of the 2009 Session Law does not . . . authorize transferred sheriffs' offices to collect telephone site commissions" but "simply provides accounting instructions regarding how this category of funds should be treated during the one-time transfer." Mem. In Supp. of Pls.' Mot. for Partial Summary Judgment, ECF No. 71 at 10; Pls.' Mot. to Alter or Amend at 9. Both motions further argue that "Sheriff Hodgson's interpretation of Section 12(a) . . . is flawed because it compels the strange conclusion that only the seven sheriffs' offices whose takeover by the Commonwealth was accomplished by the 2009 Session Law are authorized to charge site commissions." Mem. In Supp. of Pls.' Mot. for Partial Summary Judgment at 17–18; Pls.' Mot. to Alter or Amend at 16. But it is well-established that a party cannot repackage arguments that were previously made (and rejected) via a motion to reconsider. *See, e.g.*, *Woo v. Spackman*, No. 1:18-MC-91545, 2020 WL 1939692, at *1 (D. Mass. Apr. 22, 2020) ("The motion for reconsideration 'is not an avenue for litigants to reassert arguments and theories that were previously rejected by the Court.'") (citation omitted); *Andrews v. HSBC Bank USA, N.A. for Fremont Home Loan Tr. 2006-C, Mortg. Backed Certificates, Series 2006-C*, 296 F. Supp. 3d 353, 355 (D. Mass. 2017) ("[Plaintiff's] motion simply rehashes the argument previously rejected by this Court in its September M & O and does not evidence a manifest error of law."); *Coleman v. Massachusetts*, No. 1:14-CV-13032-IT, 2015 WL 4094336, at *1 (D. Mass.

July 7, 2015) ("Reconsideration is not appropriate to 'permit a party to advance arguments it should have developed prior to judgment.'") (citation omitted) (Talwani, J.).

Accordingly, this Court should deny Plaintiffs' request to alter the June 22, 2020 Order.

II. THE COURT SHOULD DENY PLAINTIFFS' ALTERNATIVE REQUEST TO CERTIFY LEGAL QUESTIONS TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

In the alternative, Plaintiffs request that the Court certify two questions to the SJC.[2] Under SJC Rule 1:03(1), this Court *may* certify questions to the SJC when: (1) the proposed questions are questions of Massachusetts law "which may be determinative of the cause then pending in the certifying court"; and (2) the questions present issues "as to which it appears to the certifying court there is no controlling precedent in the decisions of this court."

Here, the Court should deny Plaintiffs' request to certify questions to the SJC because Plaintiffs have not established compelling reasons for certification – which are required where, as here, a party only requests certification *after* an adverse judgment. Plaintiffs' request should also be denied because Plaintiffs fail to meet SJC Rule 1:03(1)'s two requirements.

A. Plaintiffs' Request for Certification Should Be Denied Because It Was Only Made After Plaintiffs Received An Adverse Ruling.

[2] Plaintiffs seek to certify the following questions:

> (1) When the Sheriff of Bristol County procured inmate calling services that were deployed in part to raise revenues for the Office of the Sheriff, did the provisions of 2009 Mass. Legis. Serv. ch. 61 Section 12(a) or M.G.L. ch. 127 Section 3, either taken separately or together, provide him with the express legislative authority required by the Massachusetts Supreme Judicial Court in *Souza v. Sheriff of Bristol County*, 455 Mass. 573, 918 N.E.2d 823 (2010)?
>
> (2) Where Massachusetts law, as set forth by the Massachusetts Supreme Judicial Court in *Souza v. Sheriff of Bristol County*, 455 Mass. 573, 918 N.E.2d. 823 (2010), requires express authorization from the Massachusetts General Court before the Bristol County Sheriff's Office may supplement its budget by generating revenue, has the General Court provided the requisite statutory authority to permit the Sheriff to generate revenue from the inmate calling service contract that he has entered into with Securus Technologies, Inc.?

Pls.' Mot. to Alter or Amend at 3.

Courts "do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort." *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 8 (1st Cir. 1988) (quoting *Cantwell v. University of Massachusetts,* 551 F.2d 879, 880 (1st Cir. 1977)). "The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision." *Bos. Car Co. v. Acura Auto. Div., Am. Honda Motor Co.*, 971 F.2d 811, 817 n.3 (1st Cir. 1992) (quoting *Perkins v. Clark Equipment Co.,* 823 F.2d 207, 210 (8th Cir. 1987)). The history of this case shows that Plaintiffs' request for certification reflects nothing more than an attempt at a "do over," as the request was made only after Plaintiffs received an adverse ruling allowing Defendants' motions for judgment on the pleadings.

Plaintiffs filed their Complaint in state court on May 2, 2018, which was removed to this Court on May 30, 2018. ECF No. 1. Over the two years that have passed since then, Plaintiffs never sought remand or (until now) requested certification of any legal questions to the SJC. Plaintiffs consistently allowed the Court to issue rulings on the merits, without protest. When Defendants moved to dismiss the Complaint on July 20, 2018, ECF Nos. 26–29, Plaintiffs filed opposition briefs without asking the Court to certify questions to the SJC. *See* ECF Nos. 34–35. The Court subsequently issued an Order favorable to Plaintiffs, denying Defendants' motions with respect to Counts I, II, and VI. ECF No. 45 at 11, 13, 20. After discovery began, Defendants filed motions for judgment on the pleadings in July 2019. ECF Nos. 61–62, 65–66. On July 26, 2019, Plaintiffs filed their consolidated opposition to Defendants' motions for judgment on the pleadings, ECF No. 69, and a motion for partial summary judgment regarding Count I. ECF Nos. 70–72. On

August 14, 2019, Plaintiffs sought further relief from this Court by moving for class certification. ECF Nos. 76–77. In none of these filings did Plaintiffs request certification to the SJC.

On June 22, 2020, the Court allowed Defendants' motions for judgment on the pleadings and denied Plaintiffs' motions for partial summary judgment and class certification. ECF No. 115. Only after receiving their first unfavorable ruling did Plaintiffs mention the purported need to certify questions to the SJC. ECF No. 118 at 17–19. The Court should deny Plaintiffs' Motion because their certification request was made only after receiving an adverse judgment. *See, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers v. Verso Corp.*, 121 F. Supp. 3d 201, 223–27 (D. Me. 2015) (denying certification where plaintiffs made request only after "adverse ruling" and where "the plain language of the statute, legislative history and public policy, all . . . tend[ed] convincingly to show how the highest court in the state would decide the issue at hand") (internal quotation marks and citation omitted). The Court should also deny Plaintiffs' Motion because they waited over two years to make their request for certification. *See, e.g.*, *Stewart v. Milford-Whitinsville Hosp.*, 349 F. Supp. 2d 68, 71 (D. Mass. 2004) ("Additional factors in contravention of the plaintiff's request are her long delay in bringing this allegedly central question of certification to the Court's attention and her raising of the issue only after the Court ruled against her objection to the R & R.") (internal quotation marks and citation omitted); *City of Manchester Sch. Dist. v. Crisman ex rel. Kimberli M.*, No. CIV. 97-632-M, 2001 WL 1326636, at *1 (D.N.H. Sept. 17, 2001) (denying certification where plaintiff previously "had ample opportunity to request certification" and where "the issue presented having already been resolved, certification would merely burden the New Hampshire Supreme Court, and, in effect, substitute that court for the court of appeals as reviewer of this court's judgment").

B. The Court Should Deny Plaintiffs' Request for Certification Because Plaintiffs Cannot Satisfy SJC Rule 1.03(1)'s Two Requirements.

The Court should also deny the certification request because Plaintiffs' proposed questions would not "be determinative of the cause then pending in the certifying court," and because the questions do not present issues "as to which it appears to the certifying court there is no controlling precedent in the decisions of this court." SJC Rule 1:03(1).

First, resolution of Plaintiffs' two proposed questions would ***not*** be determinative in this case, as the questions do not resolve Securus's argument that even if Section 3 did not exempt Securus's alleged misconduct from Chapter 93A, the alleged misconduct would not be actionable because it was not "unfair" under Massachusetts law. *See* Mem. In Supp. of Securus's Mot. for Judgment on the Pleadings, ECF No. 66 at 6–8. In other words, even ***if*** the SJC answered Plaintiffs' proposed questions "no" (it would not), those answers would not resolve whether Securus's conduct was "unfair" under Chapter 93A. *See, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 3d at 223–27 (refusing to certify questions that were "not determinative of the cause").

Second, the outcome of Defendants' motions for judgment on the pleadings is "reasonably clear" under Massachusetts law, meaning the second prong of SJC Rule 1.03(1) is not satisfied. *See Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 6 n.3 (1st Cir. 2017) ("We have interpreted the SJC's requirement that there be no controlling precedent to prevent certification in cases when the course [the] state court[ ] would take is reasonably clear. The fact [t]hat a legal issue is close or difficult is not normally enough to warrant certification, since otherwise cases involving state law would regularly require appellate proceedings in two courts.") (internal quotation marks and citations omitted). The Court's Order allowing Defendants' motions for judgment on the pleadings is consistent with well-established law, and it is "reasonably clear" that the SJC would have arrived

at the same conclusion. The Court noted that after *Souza v. Sheriff of Bristol County*, 455 Mass. 573 (2010), was decided, the Massachusetts legislature passed the 2009 Session Law. Mem. & Order at 9. The 2009 Session Law "transferred the offices, duties, and authority of the . . . Bristol . . . county sheriff[] to the commonwealth," *id.* at 10, and provided that: "revenues of the office of sheriff [of the affected counties] for civil process, inmate telephone and commissary funds shall remain with the office of sheriff,'" *id.*; "each sheriff's office shall annually confer with the house and senate committees on ways and means regarding that sheriff's efforts to maximize and maintain grants, dedicated revenue accounts, revolving accounts, fee for service accounts and fees and payments from the federal, state and local governments and other such accounts and regarding which revenues shall remain with the sheriff's office,'" *id.* at 10–11; and "'[a]ny sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county.'" *Id.* at 11.

Based on this background and basic rules of statutory interpretation, the Court concluded that the 2009 Session Law granted "authority to Sheriffs to derive revenue [from inmate calling services], and that the Sheriff therefore did not act outside his authority" by accepting commissions from Securus. *Id.* at 11. The Court used the same reasoning to reject Plaintiffs' arguments to the contrary. *See, e.g.*, *id.* at 13 ("The qualifiers 'during the transition' and 'during the one-time transfer' do not appear in the statute, and Plaintiffs' construction would require the court to conclude that the Legislature also intended that the sheriffs' civil process revenues would also only remain with the sheriff 'during the one-time transfer.'"); *see also Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21, 45–47 (D. Mass. 2015) (denying request for certification where "the question . . . does not present a close and difficult issue of law" and where "the court relied on ordinary rules of statutory construction" to reach its conclusion). Indeed, the Order held that "[t]he 2009 Session

Law . . . ***[made] apparent*** that as to revenue derived from telephone and commissary accounts, the Legislature knew of the revenue and that, until the Legislature further amends the statutory scheme, the revenue would remain with the offices of the county sheriffs," Mem. & Order at 14 (emphasis added), underscoring the fact that the outcome was "reasonably clear."

For these reasons, this case does not present questions of law that require resolution by the SJC, and the Court should deny Plaintiffs' alternative request for certification. *See, e.g.*, *In re Zofran (Ondansetron) Prod. Liab. Litig.*, 261 F. Supp. 3d 62, 81 (D. Mass. 2017) (certification in a case where the "the course a state court would take is clear . . . would waste judicial resources and is inappropriate") (internal citations omitted); *DeSaint v. Delta Air lines, Inc.*, No. CIV.A. 13-11856-GAO, 2015 WL 1888242, at *13–14 (D. Mass. Apr. 15, 2015) (certification not appropriate because "the course [the] state court[ ] would take is reasonably clear") (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Motion to Alter or Amend Judgment and Motion to Certify Question of Law to Massachusetts Supreme Judicial Court.

Dated: August 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth Herrington, hereby certify that the above document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 3, 2020.

/s/ Elizabeth Herrington
Elizabeth Herrington