UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

**DEFENDANT HODGSON'S OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND ORDER OF JUDGMENT AND MOTION TO CERTIFY QUESTION OF LAW TO THE SUPREME JUDICIAL COURT**

## INTRODUCTION

After having had a full and fair opportunity to litigate their claims, Plaintiffs now file a Rule 59(e) motion contending that this Court made a "manifest error of law" that justifies reversing its decision, but Plaintiffs' argument is nothing more than a contention that this Court's interpretation of the governing statutes differs from Plaintiffs' preferred view. Plaintiffs do not cite a single controlling precedent to support their claim that this Court made any error in law, let alone a manifest one. Rather, Plaintiffs' motion rehashes arguments already considered and rejected by this Court and falls far short of meeting the high standard necessary for post-judgment relief under Rule 59.

Then, before Plaintiffs can catch their breath from arguing that this Court committed a manifest error of law, they abruptly about-face to argue that this case presents matters of first impression that should be certified to the Massachusetts Supreme Judicial Court. But Plaintiffs' motion to certify comes only after they already lost in this Court. Plaintiffs could have asked this Court to certify questions of law to the S.J.C. at any time in this case, such as in connection with the motions to dismiss, for judgment on the pleadings, or for summary judgment, each of which the parties and this Court devoted substantial time and resources to litigating and adjudicating. But Plaintiffs waited to see how those motions were resolved by this Court first, and now after having received adverse decisions, are cynically seeking to have the case referred to a different decision maker to try to get a different result. Plaintiffs' request to certify questions of law to the S.J.C. is precisely the type of forum-shopping that is not permitted. Plaintiffs' proper forum for addressing its disagreements with this Court's judgment and order is through an appeal to the U.S. Court of Appeals for the First Circuit.

Finally, Plaintiffs' motion should be denied because it was not timely filed. A Rule 59(e) motion is one of the very few motions for which the Federal Rules require strict adherence to deadlines without the usual flexibility for parties or the Court to extend deadlines.

For these reasons, as further discussed below, Plaintiffs' motion to alter or amend the order of judgment, or in the alternative, to certify a question of law to the Massachusetts Supreme Judicial Court should be denied.

## ARGUMENT

### I. PLAINTIFFS' MOTION TO ALTER OR AMEND SHOULD BE DENIED BECAUSE THE COURT'S DECISION IS NOT A MANIFEST ERROR OF LAW

The First Circuit has stated that "it is very difficult to prevail on a Rule 59(e) motion," *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, n.2 (1st Cir. 2005), and that "[t]he granting of a motion for reconsideration is 'an extraordinary remedy which should be used sparingly.'" *Palmer v. Champion Mortgage*, 465 F.3d 24, 30 (1st Cir. 2006) (internal citations omitted). Rule 59(e) should be granted *only* if there is a clearly established manifest error of law or a presentation of newly discovered evidence. *Mehic v. Dana-Farber Cancer Institute, Inc.*, No. 1:15-cv-12934-IT, 2020 WL 2992049 at *1 (D. Mass. June 4, 2020) (denying plaintiff's motion to alter or amend because newly proffered evidence was available to plaintiff before the court's order and judgment, and because plaintiff was repeating arguments it had made before to the court); *see also Palmer*, 465 F.3d at 30. The repetition of arguments made before the court's judgment is not enough to prevail on a motion for reconsideration. *Mehic*, 2020 WL 2992049 at *1, *citing Prescott v. Higgins*, 538 F.3d 32, 45 (1st Cir. 2008). In June, the U.S. Supreme Court noted that federal courts generally use Rule 59(e) to only "reconsider matters properly encompassed in a decision on the merits" and "will not address new arguments or evidence that the moving party could have raised before the decision issued." *Banister v. Davis*, 140 S.Ct. 1698, 1703 (2020) (citing *White v. New Hampshire Dep't. of Employment Security*, 455 U.S. 445, 450 (1982)).[1]

[1] Plaintiffs' memorandum of law also cites a federal case in the District of Puerto Rico that cites a federal case in the Southern District of Indiana for the proposition that a Rule 59(e) motion is also appropriate when the court has decided outside the adversarial issues presented to it by the parties and when the Court has made an error of apprehension. Mot. at 17, citing *Rivera v. Melendez*, 291 F.R.D. 21, 23 (D.P.R. 2013) (citing *Dugdale, Inc. v. Alcatel-Lucent USA, Inc., et*

Plaintiffs' motion here does not meet the extraordinarily high standard because Plaintiffs cannot show a manifest error by this Court in interpreting the 2009 Session Law, and they do not proffer any newly discovered facts or recent changes in law.

### A. Plaintiffs' Arguments Have Already Been Made or Could Have Been Made to this Court Prior to the Order and Judgment

The Plaintiffs make eleven arguments in support of their motion, none of which show a manifest error and all of which either repeat arguments already made and rejected by this Court or could have been presented to this Court before its Order.

First, the Plaintiffs argue that the Court erred in interpreting M.G.L. c. 127, Sec. 3 because, they contend, the statute applies only to the sale or purchase of goods or services to prisoners, and not to a service that is paid by the recipients of calls for ICS. Mot. at 4. This is the same argument Plaintiffs made at oral argument. *See* Dkt No. 116, Tr. at 18:15-16 (Plaintiffs' counsel argues that Section 3 "…does not apply to telephone commissions because those commissions are not paid by inmates.").

Second, Plaintiffs argue that the Court erred in interpreting M.G.L. c. 127, Sec. 3 because, they contend, it applies only to "monies earned or received by any inmate and held by the correctional facility." Mot. at 5. But the Court's Order specifically addresses this argument by citing the 1994 amendment as evidence that the Legislature "recognized a further source of revenue relating to these funds" as Sheriff would control "'revenue generated by the sale or purchase of goods or services.'" Order at 12.

---

*al.*, 2011 WL 3298504 (S.D. Ind. Aug. 11, 2011). The Sheriff is unaware of any controlling cases in the First Circuit or cases in this district that include such a concept as part of its 59(e) analysis.

Third, Plaintiffs argue that the Court's interpretation of G.L. c. 127, Sec. 3 conflicts with the S.J.C.'s interpretation of the same statute in *Souza* because, they contend, the statute does not explicitly authorize telephone charges and that "the court reads into the statute words that are not there." Mot. at 7. But the Plaintiffs made this same argument to the Court at the hearing. Tr. at 42:2-5 ("…*Souza* looked at Section 3, and it said 'services' is a term that you might think would cover all these things, but it doesn't.") And the Court addressed this argument in its decision, holding that when read "in harmony" with the 2009 Session Law such a reading shows the Legislature's express authorization, required under *Souza*, of the Sheriff's office to collect revenue from ICS. Order at 12.

Fourth, Plaintiffs argue that the legislative history of G.L. c. 127, Sec. 3 supports their interpretation. Mot. at 8-9. But the Court considered and rejected Plaintiffs' view of legislative history, holding that the 2009 Session Law made clear that the Legislature authorized the Sheriff's office to receive telephone revenue. Order at 12.

Fifth, Plaintiffs argue that G.L. c. 127, Sec. 3 does not grant any new authority to the Sheriff. Mot. at 9. But Plaintiffs made this argument and the Court addressed it. The Court held that the 2009 Session Law made it "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." Order at 14.

Sixth, Plaintiffs argue that if Section 3 applied to telephone funds, then the sheriffs of the abolished counties would also be able to collect revenue from ICS rather than place it in the general fund. Mot. at 10-11. Again, this is a repeated argument that the Court addressed. Order at 14 ("Plaintiffs' argument is not persuasive considering that the 2009 Session Law was directed

specifically towards these seven sheriffs' offices and, presumably, arose from negotiations between these seven sheriffs' offices and the Legislature.").

Seventh, Plaintiffs argue that the Court's interpretation clashes with the Department of Corrections' interpretation because G.L. c. 127, Sec. 3 requires revenue to be spent on the general welfare of all inmates, while DOC regulations require revenue from ICS to be returned to the General Fund of the Commonwealth. Mot. at 11. This Court addressed this argument casting doubt on the DOC's interpretation in footnote 6 if its Order.[2]

Eighth, Plaintiffs argue that the use of the term "revenues generated by the sale or purchase of goods or services to persons in correctional facilities" in G.L. c. 127, Sec. 3 can only mean "revenue that the prisoner himself has earned by selling goods and services to other persons in correctional facilities" in part because, they contend, "it would be reasonable for the Legislature to require the money prisoners earn by selling articles they make in their spare time be used for the benefit of all inmates." Mot. at 12-13. [3] Plaintiffs did not raise this new argument

---

[2] *See* Order at n. 6. ("The more interesting question may be the status of any revenue generated from inmates at facilities in the previously transferred counties or from inmates at state facilities. If this court is correct that the authority to generate revenue from inmate calls derives in part from Mass. Gen. Laws ch. 127, § 3, that same statute would limit the use of such revenue to 'the general welfare of all the inmates at the discretion of the superintendent.' However, a regulation adopted shortly after the 2009 Session law was enacted provides, as to state-operated facilities, that '[a]ll commissions received that are derived from inmate shall be returned to the General Fund of the Commonwealth . . . . on a monthly basis.' 103 Code Mass. Regs. § 482.06; 1136 Mass. Reg. 53 (Aug. 7, 2009). However, this question and the validity of that regulation are not before the court.").

[3] The DOC regulation cited by Plaintiffs authorizes prisoners to earn money at a fair market price for their products, subject to "the maximum income an inmate may earn in one year" and requiring that the price allow for Massachusetts sales tax. *See* 103 CMR 477.08(10).

in any prior motion or brief, and at the Rule 59(e) stage, this new argument is exactly the type that courts do not consider. *Banister*, 140 S.Ct. at 1703.

Ninth and tenth, Plaintiffs repeat arguments that the Legislature's contemplation and awareness of the sheriffs' retention of telephone revenue in the 2009 Session Law did not mean that the Legislature was granting sheriffs the authority collect that revenue. Mot. at 14-15; *see also* Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 71 at 11 (arguing "Section 12(a)'s passing reference to the possible existence of 'telephone … funds' does not meet the standard of express authorization required by *Souza*."). This Court has already addressed these arguments. *See* Order at 14 ("The 2009 Session Law effectively answered [whether the Legislature had authorized the collection of revenue from ICS] by making 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.").

Finally, Plaintiffs argue again that the 2009 Session Law would not have limited the authority to collect and retain revenue to the seven sheriffs of the transferred counties. Mot. at 16. This argument is once again a repeat of prior arguments already made here that the Court has already addressed. *See* Order at 14-15 ("Plaintiffs argue that Defendants' interpretation of the 2009 Session Law 'make[s] no sense' insofar as it would authorize the sheriffs of these seven counties to charge telephone fees while failing to address the authority of sheriffs of the previously transferred counties to do the same.) (citing Dkt No. 71 at 17–18). Plaintiffs' argument is not persuasive considering that the 2009 Session Law was directed specifically towards these seven sheriffs' offices and, presumably, arose from negotiations between these seven sheriffs' offices and the Legislature.").

**B. Plaintiffs Ask the Court to Read Section 3 in a Vacuum**

In the Order, the Court makes clear that it reads in G.L. c. 127, Sec. 3 and the 2009 Session Law "in harmony." Order at 12. ("The court reads Section 12(a) of the 2009 Legislation in harmony with Mass. Gen. Laws. ch. 127 § 3, understanding "revenue . . . for . . . inmate telephone and commissary funds" to include both the interest on these inmate funds and "revenue generated by the sale or purchase of goods [at the commissary] or [telephone] services to persons in the correctional facilities."). In its Rule 59(e) motion, Plaintiffs argue that when G.L. c. 127, Sec. 3 is read in isolation, it does not authorize the collection of revenue from ICS. *See* Mot at 4-13 (arguing that (a) Section 3 only applies to revenue from the sales of goods and services *to prisoners* rather than recipients of calls; (b) Section 3 applies to monies earned or received by any inmate and held by the correctional facility; (c) Section 3 does not specify telephone charges; (d) Section 3's legislative history does not specify telephone charges; (e) Section 3 does not grant the Sheriff authority to charge prisoners for any specified service; (f) Section 3 makes the 2009 Session Law irrelevant if the Court's interpretation is correct; (g) the Court's interpretation of Section 3 clashes with the state Department of Corrections interpretation of the statute, and (h) Section 3 only applies to revenue a prisoner earns form selling articles to other prisoners). But the Court should reject these arguments because its own Order never relied on G.L. c. 127, Sec. 3 in isolation, but "in harmony" with the 2009 Session Law, where the 2009 Session Law made clear that the Legislature was fully aware that the seven county sheriffs were generating revenue from ICS and intended to have those revenues remain with the Sheriff while transferring revenues from other sources.

## II. PLAINTIFFS' REQUEST TO CERTIFY QUESTIONS OF LAW SHOULD BE SUMMARILY DENIED BECAUSE IT COMES *AFTER* THIS COURT'S ADJUDICATION AND DECISION

The Court should also deny Plaintiffs' request to certify two questions of law to the S.J.C. because Plaintiffs cannot have two bites at the cherry, especially after specifically asking for declaratory relief on a sole issue of state law from this Court. The questions of state law have been known to the Plaintiffs from the inception of this litigation, which gave them plenty of time to request that this Court certify these questions instead of first asking this Court to expend its valuable time and energy issuing a decision on the dispositive motions filed by the parties in this case.

Under the S.J.C. rules, this Court may certify questions of law to the S.J.C. when they (1) "may be determinative of the cause then pending in the certifying court," and (2) are not subject to "controlling precedent" from the decision of the SJC. SJC Rule 1:03(2). Plaintiffs note that the Court will also consider the dollar amounts involved, the effects on future cases, and federalism interests when deciding wither certification is appropriate. *Easthampton Sav. Bank v. City of Springfield*, 736 F.3d 46, n.4 (1st Cir. 2013) (certifying question of state law sua sponte after advising the parties at oral argument that the court was considering certification).

This Court has discretion as to whether to certify a question. *Fischer v. Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988). And "[i]n the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.'" *Id.*, quoting *Michelin Tires, etc. v. First National Bank of Boston*, 666 F.2d 673, 682 (1st Cir. 1981).

The First Circuit has repeatedly stated that courts "do not look favorably…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." *See Fischer*, 857 F.2d at 8 (affirming district court's denial of motion to certify question of state law when raised for the first time on appeal) (quoting *Cantwell v. Univ. of. Mass.*, 551 F.2d 879, 880 (1st Cir. 1977) (affirming district court's denial of motion to certify raised after the court's judgment); *see also Clarke v. Kentucky Fried Chicken of California, Inc.*, 57 F.3d 21, (1st Cir. 1995) (denying motion to certify question of state law newly on appeal); *Nieves v. Univ. or P.R.*, 7 F.3d 270, 278 (1st Cir. 1993) ("We are rarely receptive to … requests for certification newly asserted on appeal); *Boston Car. Co., Inc. v. Acura Auto. Div.*, 971 F.2d 811, n.3 (1st Cir. 1992) ("We agree with the Eighth Circuit that '[t]he 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.'") (quoting *Perkins v. Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir.1987)). Here, the Plaintiffs do not provide this Court with a justification for the after-the-fact timing of their motion to certify or even attempt to distinguish their motion from the overwhelming case law in this circuit discouraging such an action. Thus, the motion should be denied.

## III. PLAINTIFFS' MOTION WAS NOT TIMELY FILED

Plaintiffs' Rule 59(e) motion should also be denied because it was not timely filed. The time for moving to alter or amend a judgment under Rule 59(e) is 28 days from the entry of judgment with "no possibility of extension." *Banister*, 140 S. Ct. at 1703. Federal Rule of Civil Procedure 6 expressly prohibits courts from extending the time to act under Rule 59(e). *See* Fed. R. Civ. P. 6(b)(2). Our Local Rule 5.4(d) states that "[a]ll electronic transmissions of documents must be completed prior to 6:00 p.m. to be considered timely filed that day."

Here, judgment was entered on June 22, 2020, which means that any Rule 59(e) motion was required to be filed by July 20, 2020. Plaintiffs' motion was filed after 6:00 p.m. on July 20, 2020. Under Local Rule 5.4(d), Plaintiffs' motion is thus considered filed on July 21, 2020, which is outside the deadline. Under Fed. R. Civ. P. 6(b)(2), Defendants lack the ability to agree to an extension and this Court lacks the discretion to allow an extension for Plaintiffs' motion. Accordingly, it must be denied as untimely.

## CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion to alter or amend the judgment or in the alternative, to certify questions of law to the Massachusetts Supreme Judicial Court.

Dated: August 3, 2020

Respectfully submitted,

/s/ Ian D. Roffman
Ian D. Roffman (BBO # 637564)
As Special Assistant Attorney General
for this matter
iroffman@nutter.com
Nutter McClennen & Fish LLP
Seaport West, 155 Seaport Blvd.
Boston, Massachusetts 02210
Tel. (617) 439-2000

*Counsel for Defendant Thomas M. Hodgson, in his official capacity as Sheriff of Bristol County*

**CERTIFICATE OF SERVICE**

I certify that on August 3, 2020, this document (filed through the ECF system) will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Ian D. Roffman
Ian D. Roffman