IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KELLIE PEARSON, ROGER BURRELL, BRIAN GIVENS, 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, Individually and In His Official Capacity as Sheriff Of Bristol County	)	
and	)	
SECURUS TECHNOLOGIES, INC.	)	
Defendants.	)	

Motion to Alter or Amend Order of Judgment and
Motion to Certify Question of Law to Massachusetts Supreme Judicial Court

Introduction

Pursuant to Federal Rule of Civil Procedure 59(e), Plaintiffs respectfully request that this Court alter or amend its June 22, 2020 Judgment (ECF No. 115) in which it allowed Defendants' Motions for Judgment on the Pleadings and denied Plaintiffs' Motions of Partial Summary Judgment on Count I (ECF No. 70).

In its Memorandum and Order (ECF No. 114), the Court conceded that the reference to telephone revenue in Section 12(a) of the 2009 Session law was not by itself enough to authorize a sheriff to collect telephone revenue. ECF No. 114 at 11-12.

Nonetheless, it went on to hold that, when read in harmony with language in G.L. c. 127, § 3, referring to "revenues generated by the sale or purchase of goods or services to persons in correctional facilities," which it also acknowledged did not clearly apply to telephone revenue, the 2009 law "confirmed the Legislatures' grant of authority to Sheriffs to derive revenue in this way, and that the Sheriff therefore did not act outside his authority." *Id*.

As the parties stated during the June 11, 2020 Motion Hearing, neither Plaintiffs nor Defendants believed Mass. G.L. c. 127, § 3 was pertinent to the legal questions presented in this case. Tr. at 6–8, 18, 20–22; Appendix at 3-5, 8-11. Although the Court requested oral argument as to Section 3's applicability and the statute was at the heart of the Courts legal conclusion, neither party addressed the proper interpretation of Section 3 in their briefs. Plaintiffs now seek relief from the Judgment because the Court's analysis misconstrues Section 3, as well as its relationship to the 2009 Session Law, and the overall Massachusetts statutory framework dealing with the authority of sheriffs to demand payment from prisoners or their families to support jail services. In light of the arguments they make below, that were not previously made, they request that the Court amend the Judgment to allow their Motion for Partial Summary Judgment.

Alternatively, since the ultimate outcome of this case will be determined solely by resolving significant and complicated questions of Massachusetts law, Plaintiffs request that this Court certify two determinative legal questions to the Massachusetts Supreme Judicial Court pursuant to SJC Rule 1:03(2):

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.?

Factual and Procedural Background

The relevant facts in this case are set forth in detail in Plaintiffs' Statement of Undisputed Facts in Support of Their Motion for Partial Summary Judgment. *See* ECF No. 72. Plaintiffs initiated this action in state court in Massachusetts, and it was removed to this Court on May 30, 2018. (Certified Notice of Removal, ECF No. 6). Following the Court's denial of their Motions to Dismiss on December 20, 2018 (ECF No. 45), Defendants moved for judgment on the pleadings (ECF Nos. 61, 65) on the basis of a newly discovered 2009 Session Law that was not before the Court at the Motion to Dismiss stage. Plaintiffs filed a cross motion for partial summary judgment as to Count I of their Complaint. ECF No. 70. Plaintiffs also moved for class certification. ECF No. 76.

The March 23, 2020 in-person hearing on these motions was cancelled because of the COVID-19 pandemic. ECF No. 109. In scheduling a virtual motion hearing for June 11, 2020, the Court instructed the parties to prepare oral argument regarding an additional Massachusetts statute, Section 3. ECF No. 111. On June 22, 2020, the Court

allowed the Motions for Judgment on the Pleadings based primarily on its reading of the 2009 Session Law and Section 3. ECF No. 115.

ARGUMENT

I. The Court's decision rests on an erroneous interpretation of G.L. c. 127, Section 3, that conflicts with the plain language of Section 3, the SJC's interpretation of Section 3 in *Souza*, as well as with the Defendants' own interpretation of Section 3 and the interpretation of the Department of Correction.

A. Section 3 by its express terms only applies to revenue from the sale of goods and services to prisoners.

Even Defendants rejected the Court's interpretation of Section 3, stating at oral argument that it is irrelevant to this case because Section 3 applies only to "the sale or purchase of goods or services *to persons in correctional facilities*," (emphasis supplied). Tr. at 6-8; Appendix at 3-5. Since it is undisputed that telephone calls at Bristol are paid for exclusively by the recipients of the calls, and not by prisoners, telephone revenue is outside the scope of Section 3. Indeed, when § 3 was passed in 1994, and until sometime after 2008, DOC regulations required that all inmate calls be collect. See 103 CMR 482.07(3)(a) ("All inmate calls shall be one-way collect calls only, utilizing an automated operator") (1994 and 2008).[1] Appendix at 21-24. Thus, when it enacted Section 3, the

1 The Order recites that the 2011 RFR called for the possibility of both collect and debit card calling. Order at 5. Bristol County, however, has in fact never allowed debit calling. The Court's comments at oral argument suggests it may nonetheless have believed § 3 was applicable because some county prisoners may have been able to use a debit card with a personal identification numbers (PIN) to pay for calls. Tr. at 10. See also, *Com. v. Fitzpatrick*, 1322008 WL 2357239 (Massachusetts Superior Court, 2008). However, PINs, were introduced into the Massachusetts prison system simply to allow for monitoring of prisoner calls and to ensure prisoners could only call people on their approved list. *Cacicio v. Secretary of Public Safety*, 422 Mass. 764,767; 665, N.E.2d 85, 88 (1996). Significantly, prisoners were "limited to one-way collect calls," and so could not

Legislature could not have considered telephone calls to be a service sold to prisoners.

Even if prisoners did pay the phone bills, the money at issue here is paid by Securus to the Sheriff as a condition of the contract, and not by prisoners for a service provided to them. Prisoners are not parties to the contract with Securus and get no benefit from the provisions requiring payments to the Sheriff; in fact, they are harmed by them. Certainly, nothing in Section 3 authorizes sheriffs to demand that a phone company generate revenue to help them pay for facility operations by charging its customers more than the cost of the calls to the company.[2]

B. Section 3 by its express terms only applies to "monies earned or received by any inmate and held by the correctional facility."

Section 3 regulates money that is in an inmate's correctional account. As the Court recognized, Order at 12, it makes the superintendent essentially a trustee over an inmate's money, directing that, with limited exceptions, she must deliver it back to him upon his release or at some earlier time. By its plain terms, the only funds that the superintendent can spend on the general welfare must (1) be earned or received by a prisoner, and (2) held in his custodial prison account. The revenue Securus pays the Sheriff fails both tests. Since the recipients paid the bills, the money was never earned or received by the

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use their PIN to access their inmate account to pay for phone calls. See also, *Com. v. Ennis*, 439 Mass. 647; 85 N.E.2d 677 (2003) (DOC regulations requiring all calls to be collect applied to Plymouth House of Correction**).** There is no evidence that any prisoners could pay for their own calls in 1994.

2 Without § 3, correctional officials would have had return to the General Fund all proceeds the institution might receive from the sale of commissary goods to prisoners, regardless of whether it made a profit, and therefore couldn't even use this money to replenish its inventory. See G.L. c. 29, § 2.

prisoner, and was never at any point held in his inmate account.

C. The Court's interpretation of Section 3 conflicts with the SJC's interpretation of that statute in *Souza*.

At issue in *Souza* were fees for a variety of different kinds of "services" provided to prisoners, including the whole gamut of services encompassed by the cost-of-care fees at the heart of that case.[3] 918 N.E.2d 823, 825 (Mass. 2010). Nonetheless, the SJC specifically cited Section 3 to support its conclusion that: "[h]ad the Legislature intended to authorize the sheriff to impose the challenged fees, it would have said so expressly as it had done with other fees, such as fees for service of process, and as it had done by authorizing particular deductions from inmate funds." *Id*. at 833. Therefore, this Court was incorrect when it said that: "Whether [Section 3] included authority to generate revenue from inmate telephone services or canteen is not readily apparent and would require the court to engage in the same analysis the SJC performed in *Souza*." Order at 14. In fact, the SJC had already engaged in that analysis, concluding in *Souza* that Section

3 In *Souza*, the BCSO explained the cost-of-care fee as follows:
"BCSO provides quality services for inmates committed to its facilities, which includes nutritious *food services, medical and mental health care, recreational, educational and vocational programming opportunities*, fire safety and hygiene control, as well as overall care, custody and control of inmates, which *services* are costly to the taxpayers of the Commonwealth and its communities. The standards set by the BCSO for the *delivery of services* in its correctional facilities in many cases far exceeds those that our inmates enjoy within the free community. The BCSO Inmate Financial Responsibility Program places a portion of the financial obligations for these costs onto the inmate population, encouraging personal responsibility and defraying the cost of incarceration, *while still maintaining quality programs and services*." See *Souza v. Hodgson*, 2004 WL 5540569 (Mass.Super.) (Memorandum of Decision and Order on Parties Cross Motions for Summary Judgment). (emphasis supplied).

3 only authorizes deductions of interest and victim-witness assessments. 918 N.E.2d at 833-34. The general reference in Section 3 to "goods and services" no more allows the Sheriff to demand payments for inmate phone calls, than it allowed him to charge the cost-of care fees that the SJC struck down in *Souza*.

The Court recognized that under its reasoning the fees at issue in *Souza* could fall within the scope of § 3, but distinguished at least some of those fees by pointing out that "the Legislature had enacted statutory provisions relating to haircuts, medical care, and GED testing critical to Souza's analysis." Order at 15, n. 7. Although the Court did not mention the cost-of-care fees, which also were arguably been covered by Section 3, the SJC specifically cited Section 3 to support its conclusion that there was no statutory authorization for them. 918 N.E.2d at 833. Furthermore, if the general language in Section 3 meant sheriffs could charge for services without explicit authority, there would have been no need for it to enact statutes expressly authorizing charges for haircut fees, medical copayments, or account administration fees See M.G.L. c. 124, § 1 (r), (s) and (u).

The Court reconciled its decision with *Souza* by pointing out that § 12(a) of the 2009 Law only mentions telephone and commissary revenue, and not the cost-of-care or any other fee challenged in *Souza*. But the Court's conclusion that the broad reference to "the sale or purchase of goods and services" in § 3 really means " the sale or purchase of goods [at the commissary] or [telephone] services to persons in the correctional facilities," Order at 12-13, reads into the statute words that are not there. See *Dartt v. Browning-Ferris Indus.*, 691 N.E.2d 526, 531 (1998) ("we will not add to a statute a word that the Legislature had the option to, but chose not to, include"). Moreover, there is no significance to the fact

that the Legislature did not mention cost-of-care revenue in the 2009 Session law. There was no need to address what should happen to any such revenue because there wasn't any; the Superior Court had enjoined the Sheriff from collecting the challenged fees in 2004. See *Souza v. Hodgson*, *supra,* 2004 WL 5540569.

D. The legislative history of Section 3 supports the conclusion that it does not authorize correctional officials to impose a fee on prisoners, let alone their families, for using the telephone.

The pertinent provisions of Section 3 were enacted in 1994 as part of broader legislation that included two of the other statutes that were also crucial to the SJC's analysis in *Souza*, and which also expressly deal with when a prisoner's funds can be taken from his account. See St. 1994, c. 60, §§ 125-128 (amending M.G.L. c .127, §§ 3, 48A, and 86F). Appendix at 28-29. Section 86F was amended to give a detailed list of all the expenses sheriffs can deduct from the earnings of a work-release prisoner, including court fees and services provided by the sheriffs. And § 48A, like § 3, was amended to provide only for deductions for victim witness assessments. Significantly, all three statutes also state that the account balance, after subtraction of the permitted deductions, must be paid to the inmate upon his discharge.

The fact that the language in Section 3 relating to "goods and services" was part of this package undercuts the Court's broad reading of Section 3 because it suggests: (1) the Legislature was dealing exclusively with money in inmate accounts and was not authorizing sheriffs to collect money from families; (2) if it had intended "services" in Section 3 to include phone calls, it would have said so, as it did for all other deductions for fees and services it expressly authorized at that time; (3) Even if phones were arguably

a service under Section 3, the charges for phone access could not be taken from funds a prisoner earned in a prison job or work-release because the list of deduction in § 48A and §86F is comprehensive. Significantly, when the Legislature subsequently authorized fees for haircuts and medical care, it expressly said such fees had to come from income earned under 48A, as opposed to money given him by friends and family. If it had intended Section 3 to allow the Sheriffs to make money from phone calls, it would almost certainly also have required these fees also to come from earned income. And if had wanted sheriffs to be able to collect money from families, it surely would have said so.

E. Section 3 doesn't grant the Sheriff any authority to charge prisoners for any specified service, but tells him how he must spend revenue he may have the express authority to collect.

The Court's conclusion that "in 1994 the Legislature authorized correctional facility superintendents to generate revenue from the sale of goods and services to inmates" misreads Section 3. Order at 14. Like the 2009 Special Law, Section 3 does not provide superintendents authority to charge prisoners for any particular service, as is required by *Souza*, 918 N.E.2d at 833-34, but merely provides instructions for what must be done with revenue the Legislature has actually given sheriffs an express right to collect from prisoners, directing them to spend it on the general welfare of all inmates.

The Superior Court decision in *Welsh v Commissioner*, 2004 WL 5540569, (Mass. Super., July 28, 2004), further demonstrates the high level of specificity that Massachusetts courts require of legislation purporting to grant correctional officials the authority to take money from prisoners. There, the court held that DOC lacked statutory authority to deduct DNA sampling and testing costs from a prisoner's account, despite

the fact that prisoners are expressly required by a separate statute, M.G.L. c. 22E, § 4(b), to pay those costs unless they are indigent. *Id.* at 6-7. The court reasoned that "authorized deductions are specified in Sections 3, 48, 48A and 86F and M.G.L. c. 124, § 1(r) and (s)," and because none of the specified deductions encompassed DNA charges, correctional officials could not take the money from the prisoner's account even though he owed it. Id. at 6. Significantly, Section 3 was an important part of the court's decision. It stated: "the existence of such implied authority [to introduce new deductions not enumerated by statute] is inconsistent with the statutory scheme, designed to ensure that inmate property and earnings are safeguarded, see § 3. . . ." *Id*. at 7. The *Welsh* court's analysis of the Massachusetts statutory scheme is exactly the same as the one later adopted by the Supreme Judicial Court in *Souza.*

F. If the Court's interpretation of Section 3 were correct, there would have been no need for the 2009 Session law to give sheriffs authority to retain telephone revenue because Section 3 itself would require them to spend it on "the general welfare of all the inmates."

The issue confronted by the Legislature in 2009 was whether sheriffs of the transferred counties should be allowed to keep the specified revenues, or whether, like revenue collected by the sheriffs of the abolished counties (and all other Commonwealth agencies), it should be paid into the Commonwealth's General Fund as is required by G.L. c 29, § 2, unless some other law provides otherwise.[4] But if Section 3 applied to

4 Specifically, Chapter 29, Section 2, of the General Laws states, in part: All revenue payable to the commonwealth shall be paid into the general fund, except revenue required by law to be paid into a fund other than the general fund and revenue for or on account of sinking funds, trust funds, trust deposits and agency funds, which funds shall be maintained and the revenue applied in accordance with law or the purposes of the fund…

telephone revenue, all sheriffs not just transferred sheriffs, as well as the DOC, would be mandated to spend it on the general welfare of all the inmates instead of placing it in the General Fund. In that case, there would have been no need for Section 12(a) because § 3 itself would authorize retention of such revenue.

G. The Court's interpretation of Section 3 clashes with the DOC's interpretation of that statute.

As explained above, if telephone revenue was derived from a "service" sold to prisoners within the meaning of Section 3, then the express language of the statute would *require* DOC to spend it on items that benefit the general welfare of all inmates. DOC regulations, however, provide that it must return telephone commissions to the General Fund. See 103 CMR 482.06 ("All Commissions received that are derived from inmate calling shall be returned to the General Fund of the Commonwealth."). As the agency charged with primary responsibility for interpreting and administering § 3, DOC's interpretation is entitled to deference. See *Buckman v. Commissioner of Correction*, 484 Mass. 14, 24, 138 N.E.3d 996, 1005 (2019).

Furthermore, even though Section 3 requires that expenditures be for the "general welfare of all the inmates," that is not how Sheriff Hodgson spends the telephone revenue Securus pays him. Although site commissions may have been used to support inmate programs, the Sheriff acknowledges that the lump sum "generated from the inmate telephone service were utilized for IT and investigatory services which supported and safeguarded the inmate telephones system."

https://www.facebook.com/BristolCountySheriff/posts/3773049529388614.

Appendix at 31-32.

Investigations and security measures do not qualify as expenditures for the general welfare of all inmates, which are limited to things that directly benefit inmates, such as books for the library, programs, athletic equipment, etc..[5]

H. Section 3 is most reasonably construed to apply to revenue a prisoner may earn from selling articles to other prisoners.

The language and structure of Section 3 suggests that the revenues superintendents can expend on the general welfare of the inmate population must be money that is still in the prisoner's account, as opposed to money he has spent. The phrase "revenues generated by the sale or purchase of goods or services to persons in correctional facilities," appears twice in Section 3. First, the statute says that, unlike any other money "earned or received by any inmate and held by the correctional facility," these funds cannot be used to satisfy the inmate's victim witness assessment. Section 3 then goes on to state the *same* revenue that can't be taken from his account to pay court fees must be expended for the general welfare of inmates.

This indicates that the revenue referred to in Section 3 is money that has been

[5] For example, 103 DOC 476.10 and 476.11 dictate that the Department of Corrections maintain certain accounts that are intended to provide services or benefits to prisoners using canteen revenue. The accounts are funded by monthly assessments of fixed percentages from the revenues taken in by each institution. One account, the Program Account (103 DOC 476.11(1)), receives 10 percent of said revenues each month; the Law Library Account (103 DOC 476.10(2)) receives 35 percent. The remaining 55% us in a third account, the (103 DOC 476.12) that is used to maintain and enhance delivery of services to the inmate population. Appendix at 40-43.

deposited in the prisoner's account, as opposed to money that has been withdrawn from it, and thus the term applies only to revenue that the *prisoner* himself has earned by selling goods and services to other persons in correctional facilities, as opposed to revenue the institution receives by selling things to the prisoner. Obviously, the Legislature would have no need to specify that the superintendent can't use money she collected from the prisoner by selling him goods or services to pay the prisoner's victim witness fee.

Construing § 3 to refer to revenue received by the prisoner is consistent with the fact that prisoners are authorized to earn money by selling things to other prisoners. See 103 CMR 477.08(10), which allows prisoners to have "avocations," or hobbies, and to sell articles they make at a fair market price, including to other prisoners). See also, 103 CMR 911.08(3) which allows for financial transactions between prisoners. And it would be reasonable for the Legislature to require that the money prisoners earn by selling articles they make in their spare time be used for the benefit of all inmates.[6] This interpretation is especially reasonable given that in 1994, when § 3 was drafted, all telephone calls from correctional facilities had to be collect so were not a source of revenue that might be collected from prisoners.

II. Although the 2009 Session Law demonstrates the Legislature knew that sheriffs were receiving telephone revenue, this does not mean it was interpreting

6 This interpretation of Section 3 is supported by the fact that DOC returns to the General Fund the money prisoners pay for services where fees are expressly authorized by statute. See 103 CMR 40.06(3)(f) (administrative fees for maintenance of inmate accounts must be returned to General Fund); 103 DOC 762.02 (3) (haircut revenue must be returned to the General Fund); 103 DOC 763.04(3) (medical co-pay revenue must be returned to the General Fund). If Section 3 covered services purchased by prisoners, all this revenue would have to be spent by the superintendents on the general welfare of all the inmates.

Section 3 to authorize telephone charges.

A. The Court misunderstood Plaintiffs' description of Section 12(a) as providing for a "one-time transfer" of funds during the transition.

Based on their use of the phrase "one-time transfer" in their briefs, the Court believed Plaintiffs were arguing that Section 12(a) authorized the transferred sheriffs to retain only the telephone revenues that were in their possession at the time the transfer to the Commonwealth took place. But Plaintiffs were simply referring to the one-time restructuring of county government that wasn't intended to expand or change the powers of the Sheriff. As Plaintiffs' counsel stated at oral argument, they agree that the Legislature intended that sheriffs could keep any such revenue going forward, rather than start turning it over to the Commonwealth's general fund once the transfer had been accomplished. Tr. at 44, Appendix at 14. Hence, the Court erroneously believed that "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.'" Order at 13. Just because the Legislature contemplated that sheriffs could retain a stream of incoming telephone revenue does not mean it was deciding, or even thinking about, whether they had the authority to collect that money in the first place. The critical point is that the 2009 Session law dealt only with how to handle these funds, as opposed to making any kind of statement about the lawfulness of collecting them.

B. The Legislature's awareness of the fact that sheriffs were collecting telephone revenue does not mean they were interpreting Section 3 (or any other statute) to allow it.

Even if the Legislature assumed in 2009 that the sheriffs could lawfully collect

telephone revenue (based on Section 3 or for some other reason), that does not mean that it had, in fact, ever given them such authority, or was doing so in 2009. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (The Supreme Court held that continued appropriations for a dam construction project halted by the passage of the Endangered Species Act did not indicate Congress intended to repeal the Act's application to the dam project because "when voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden.").

Furthermore, the Court's use of the 2009 Session Law to interpret Section 3 conflicts with the well-established principle of statutory interpretation that "the views of a subsequent [Legislature] form a hazardous basis for inferring the intent of an earlier one." *Massachusetts Com. against Discrimination v. Liberty Mut. Ins. Co.*, 356 N.E.2d 236, 240 (Mass. 1976) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

Fundamentally, the Court's decision rests on its conclusion that it needed to harmonize what it believed where two ambiguous statutes: Section 3 and the 2009 Session law. It did this by concluding that the 2009 Session law in effect amended Section 3 to make it say superintendents may spend "revenues generated by the sale or purchase of **[commissary]** goods or **[telephone**] services to persons in correctional facilities." Order at 12. This not only distorts and limits what § 3 actually says, it also conflicts with express provisions in the 2009 Session law stating that it was making no change in the sheriffs' substantive powers, and that they remained subject to exactly the same statutory and common law rights, duties, and responsibilities as before. See Section 15 (sheriffs shall

continue to "operate under all established common law power and authority consistent with chapters 126 and 127 of the General Laws and any other relevant General Laws"). It also runs afoul of the principle that amendments by implication, like repeals by implication, are particularly disfavored. *United States v. Welden*, 377 U.S. 95, n.12 (1964). "Absent an affirmative legislative expression of intent to alter the earlier statute, a court should only rely on the later statute to alter the earlier one "when the earlier and later statutes are irreconcilable," which here they are not. *St. Martin Evangelical Lutheran Church v. S.D.*, 451 U.S. 772, 788 (1981).

C. If the Legislature had intended to use the 2009 Session law to interpret Section 3, let alone to tacitly or impliedly amend it, it would not have limited the change to just the sheriffs of the transferred counties.

Nothing in Section 3 suggests that it should be interpreted differently by different sheriffs. By contrast, allowing some sheriffs to retain revenue that other sheriffs must return to the General Fund was perfectly reasonable considering the purpose and scope of the 2009 Session law. Thus, there was no need for this Court to "harmonize" Section 3 with the 2009 law since the two laws address two distinct topics and are not in conflict.

Furthermore, given the Legislature's micro-managing of all other fees that it has authorized sheriffs to charge prisoners and others, if it had intended to give transferred sheriffs the authority to collect, as opposed to retain, telephone revenue, it would have written a statute that says so expressly, and would not have used ambiguous language in an uncodified Session law to make such a momentous policy decision.

III. The Court should alter or amend its judgment because it made errors of law based on its incomplete understanding of key questions of Massachusetts state law.

A. Legal Standard for Motion to Alter or Amend Judgment

Fed. R. Civ. P. 59(e) allows for a judgment to be amended or altered if there is a clearly established manifest error of law or a presentation of newly discovered evidence. *Mehic v. Dana-Farber Cancer Inst., Inc.*, No. 1:15-CV-12934-IT, 2020 WL 2992049, at *1 (D. Mass. June 4, 2020) (citing *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006)). Repetition of arguments made prior to the court's judgment is not sufficient to prevail on a motion for reconsideration. *Id.* (citing *Prescott v. Higgins*, 538 F.3d 32, 45 (1st Cir. 2008)).

In the First Circuit, a Court may grant a Rule 59(e) motion upon a showing of: (1) manifest errors of law or fact; (2) newly discovered evidence; (3) manifest injustice; or (4) an intervening change in controlling law. *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 7 (1st Cir. 2005). A Rule 59(e) motion may also be granted where a Court has "patently misunderstood a party ... or has made an error not of reasoning but apprehension." *Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 82 (1st Cir. 2008). "A motion to reconsider is appropriate where the Court has misunderstood a party, where the Court has made a decision outside the adversarial issues presented to the Court by the parties, where the Court has made an error of apprehension (not of reasoning), where significant new facts have been discovered." *Rivera v. Melendez*, 291 F.R.D. 21, 23 (D.P.R. 2013) (citing *Dugdale, Inc. v. Alcatel–Lucent USA, Inc., et al.*, 2011 WL 3298504 (S.D. Ind. Aug. 11, 2011)).

For the reasons explained above, the Court's analysis of Section 3 and the 2009 Session law meets this standard.

B. Alternatively, the Court should certify the determinative legal questions regarding state law to the Massachusetts Supreme Judicial Court.

Certification of legal questions to the Massachusetts Supreme Judicial Court is proper "where there are questions of Massachusetts law that: (1) 'may be determinative of the cause then pending in the certifying court,' and (2) are not subject to 'controlling precedent' from the decisions of the SJC. SJC Rule 1:03(1). Beyond the scope of the SJC's own two-step rule for certification, this court also considers other factors such as the dollar amounts involved, the effects of a decision on future cases, and federalism interests when deciding whether certification is appropriate. *Easthampton Savings Bank v. City of Springfield*, 736 F.3d 46, 52 (1st Cir. 2013)." *D'Allessandro v. Lennar Hingham Holdings, LLC*, 17-cv-12567-IT, 2020 WL 248988 (D. Mass. Jan. 16, 2020).

All the criteria for certification are met. First, there is no dispute that the outcome of this case rests entirely on the interpretation of Massachusetts state law. While Plaintiffs believe that the principles articulated in *Souza* make Massachusetts law clear, no Massachusetts court has spoken on the application of *Souza* to telephone charges. And the Court itself has acknowledged that the meaning of Section 3 and Section 12(a) of the 2009 law is not clear. Indeed, in attempting to harmonize the statutes, it read Section 3 in a manner that even the Defendants rejected. Since there is no controlling SJC precedent mandating the outcome in this case, and the case "presents a close and difficult legal issue," "the course a state court would take is not reasonably clear," certification is warranted. *Easthampton Savings Bank, supra* at 51.

Other factors also weigh heavily in favor of certification. The answers to the questions proposed for certification raise important issues of public policy that will impact prisoners and their family members, as well as significant issues concerning how

correctional operations are financed. Where the answers to the questions have implications that go beyond the parties, and where the Federal Court's ruling on the issue is not binding on the Massachusetts courts and may just generate further litigation, certification is proper to give the SJC the final answer.

Finally, there is a strong federalism interest in the SJC deciding unsettled questions of state law, especially those related to important matters of state policy. *Easthampton Savings Bank*, 736 F.3d at 52. Where the court must identify the intent of the Massachusetts Legislature, that judgment is best left to the SJC. *Id.* at 53.

Given the importance and complexity of these questions, the absence of controlling precedent, and the impact of the resolution of the determinative questions far beyond just the parties, certification of the questions to the SJC is appropriate.

Conclusion

For these reasons, Plaintiffs respectfully request that this Court grant their motion to alter or amend the judgment by vacating its allowance of Sheriff Hodgson's Motion for Judgment on the Pleadings [#61] and Securus's Motion for Judgment on the Pleadings [#65], and allowing Plaintiffs' Motion for Partial Summary Judgment on Count I [#70].

In the alternative, Plaintiffs request that the Court certify the determinative questions of law to the Massachusetts Supreme Judicial Court.

Dated: July 20, 2020

Respectfully submitted,

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LOCAL RULE 7.1(A)(2) CERTIFICATION

I, Stuart Rossman, counsel for Plaintiffs, hereby certify that I conferred with counsel for Defendants on July 20, 2020 and attempted in good faith to narrow or resolve the issue presented in this motion.

/s/ Stuart Rossman

CERTIFICATE OF SERVICE

I, James R. Pingeon, 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 July 20,2020.

/s/James R. Pingeon