UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK D. RUSSO, ET AL.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 4:20-cv-4818-YGR

ORDER GRANTING DEFENDANT MICROSOFT CORPORATION'S MOTION FOR LEAVE TO FILE A MOTION FOR PARTIAL RECONSIDERATION; GRANTING MICROSOFT'S MOTION TO DISMISS WASHINGTON PRIVACY ACT CLAIM WITHOUT LEAVE TO AMEND

RE: DKT. NO. 46

Pending before the Court is defendant Microsoft Corporation's motion for leave to file a motion for partial reconsideration of the Court's December 17, 2021 order ("Court's order") granting in part and denying in part defendant's motion to dismiss. (Dkt. No. 46.) Having considered the motion, the parties' argument, the pleadings filed in this action, and the Court's order, the Court hereby **GRANTS** Microsoft's Motion for Reconsideration, and hereby **DISMISSES** plaintiffs' cause of action under the Washington Privacy Act, Wash. Rev. Code 973.010 *et seq.* ("WPA") **WITHOUT LEAVE TO AMEND**.

Where a district court's ruling has not resulted in a final judgment or order, reconsideration of the ruling may be sought under Rule 54(b) of the Federal Rules of Civil Procedure, which provides that any order which does not terminate the action is subject to revision at any time before the entry of judgment. *See* Fed. R. Civ. P. 54(b). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

In the Northern District of California, no motion for reconsideration may be brought without leave of court. *See* Civil L.R. 7–9(a). Under Civil Local Rule 7–9, the moving party must specifically show: (1) that at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the court before entry of the interlocutory order for which the reconsideration is sought, and that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or (2) the

emergence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the court to consider material facts which were presented to the court before such interlocutory order. *See* Civil L.R. 7–9(b).

Here, Microsoft challenges the portion of the Court's order denying Microsoft's motion to dismiss plaintiffs' WPA claim. Specifically, Microsoft argues that the Court failed to address its argument that plaintiffs' WPA claim should be dismissed for failure to state a claim because plaintiff failed to sufficiently allege facts showing that plaintiffs' own emails were scanned.

In the Court's order, the Court correctly dismissed plaintiffs' Wiretap Act ("WTA") and Stored Communications Act ("SCA") claims because plaintiffs did not sufficiently allege that Microsoft scanned their emails. (Court's order at 3, 5.) However, plaintiffs' WPA claim is also premised on the theory that Microsoft scanned their emails. That is because all three claims, the WPA, WTA, and SCA, require interception or disclosure of a communication in order for the conduct to be actionable. Thus, consistent with the Court's ruling on the WTA and SCA claims, the Court should have dismissed plaintiffs' WPA claim for failure to sufficiently allege that plaintiffs' emails were scanned.

Accordingly, Microsoft's motion for reconsideration is **GRANTED** and plaintiffs' WPA claim is **DISMISSED WITHOUT LEAVE TO AMEND**.[1]

This Order terminates Docket Number 46.

IT IS SO ORDERED.

Dated: April 26, 2022

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

[1] This order does not impact plaintiffs' Washington Consumer Protection Act and intrusion upon seclusion claims, both which survived defendant's motion to dismiss.