UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

SPRINT CORPORATION,

Defendant.

14 Civ. 9931 (WHP)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States, by its attorney, Joon H. Kim, Acting United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,[1] in opposition to the motion to intervene and modify the stipulated final judgment and order ("Consent Order") filed by the Attorneys General of Connecticut, Vermont, Indiana, and Kansas (collectively, the "Proposed Intervenors" or "State AGs"). As an initial matter, contrary to the Proposed Intervenors' assertion (Dkt. No. 40 at 5), plaintiff Consumer Financial Protection Bureau (the "CFPB") also opposes the proposed modifications to the Consent Order, as set forth in the CFPB's separate response. Further, as set forth below, the Proposed Intervenors' motion to intervene is untimely under Fed. R. Civ. P. 24(b), and the Proposed Intervenors identify no grounds that would allow modification of the judgment under Fed. R. Civ. P. 60(a). Accordingly, the Court should deny the Proposed Intervenors' motion.

[1] Section 517 provides that "any officer of the Department of Justice . . . may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

First, the Court should deny the motion to intervene because it is untimely. Rule 24(b)(2) of the Federal Rules of Civil Procedure provides that, "[o]n a *timely* motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . . a statute or executive order administered by that officer or agency . . . or any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2)(A)-(B) (emphasis added). The determination whether a motion to intervene is timely is committed to the discretion of the district court, and timeliness is evaluated "against the totality of the circumstances before the court." *Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Markets*, 847 F.2d 1038, 1043-44 (2d Cir. 1988). The factors that should guide a court in this determination include "(1) the length of time the applicant knew or should have known of his interest before making the motion; (2) prejudice to existing parties resulting from the applicant's delay; (3) prejudice to the applicant if the motion is denied; and (4) the presence of unusual circumstances militating for or against a finding of timeliness." *Id.* at 1044.

Of the factors considered in determining the timeliness of a motion to intervene, the first factor—the length of time the applicant knew or should have known of his interest—is "[a]mong the most important." *Catanzano by Catanzano v. Wing*, 103 F.3d 223, 232 (2d Cir. 1996). In this case, the States of Connecticut, Kansas, Vermont, and Indiana were well aware of this action, and their interest in it, long before the State AGs filed their motion to intervene. To the extent the State AGs contend that their interest is tied to the terms of the Consent Order, they were aware of that specific interest, too, at the time the Consent Order was entered on June 30, 2015, over eighteen months before they filed their motion. (*See* Dkt. No. 25). The Consent Order was concluded in conjunction with a separate agreement with the 50 States and the District of Columbia. (*See* Dkt. No. 18-7, ¶¶ 20-24). The State AGs therefore knew, at the time the Consent Order was submitted

to the Court, that any funds not used for redress or other equitable relief for consumers would be deposited in the U.S. Treasury as disgorgement. (*See* Dkt. No. 18-5, ¶ 29). The State AGs also knew, eighteen months before they sought to intervene, that beyond being consulted by the CFPB if remaining funds were to be devoted to further equitable relief, the Consent Order afforded the States no role with respect to distribution of the remaining Redress Amount funds. (*See generally id.*). Indeed, the State AGs do not contend otherwise.

Under these circumstances, the motion to intervene is untimely and should be denied. *See, e.g.*, *Farmland Dairies*, 847 F.2d at 1044 (motion to intervene filed shortly after parties reached settlement agreement was untimely where movants, who had "intervened and participated fully in [related] administrative proceedings," had been aware of the case for six months before seeking intervention); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994) (motion to intervene was untimely where movant had constructive knowledge of its potential interest in the action at least 15 months before filing its motion); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 183 (2d Cir. 2001) (finding denial of motion to intervene proper where denial was based on the movant's "nearly one year delay before making its motion, the late stage of litigation, and the unusual circumstance of the heretofore cooperative relationship between [the movant] and [the plaintiff]").

Second, even if intervention were permitted, the Court should deny the State AGs' application to modify the Consent Order because it does not satisfy the requirements of Rule 60(a), the rule on which they rely. (*See* Dkt. No. 29 at 11-13). Rule 60(a) allows the Court to "correct a clerical mistake or a mistake arising from an oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). A Rule 60(a) motion is appropriate "'where the judgment has failed accurately to reflect the actual decision of the decision

maker.'" *Robert Lewis Rosen Assocs. v. Webb*, 473 F.3d 498, 504 (2d Cir. 2007) (quoting *In re Frigitemp Corp.*, 781 F.2d 324, 327 (2d Cir. 1986)). Changes to a judgment under Rule 60(a) are limited to those that "implement the result intended by the court at the time the order was entered." *Rezzonico v. H & R Block*, 182 F.3d 144, 151 (2d Cir. 1999). Rule 60(a) does not allow changes that "alter the original meaning" of the judgment, even if such changes are meant to "correct a legal or factual error." *Id.*

Here, the Proposed Intervenors have identified no clerical error or mistake arising from an omission or oversight in Consent Order. Indeed, the provision at issue—specifying that redress funds not used for redress or other consumer equitable relief be deposited in the U.S. Treasury as disgorgement—is a standard term that appears in numerous CFPB consent orders. *See, e.g.*, *CFPB v. Harper*, No. 14-80931-CIV, 2015 U.S. Dist. LEXIS 69126, at *24 (S.D. Fla. May 28, 2015); *CFPB v. Jalan*, No. SACV1202088AG (ANX), 2013 WL 12114068, at *5 (C.D. Cal. July 23, 2013); *CFPB v. Am. Debt Settlement Solutions, Inc.*, No. 9:13-cv-80548-DMM, 2013 U.S. Dist. LEXIS 192448 (S.D. Fla. June 6, 2013); *Ally Financial Inc. and Ally Bank*, No. 2013-CFPBCO-0010, 2013 WL 9008333, ¶ 56 (Dec. 20, 2013); *Security Nat'l Automotive Acceptance Co., LLC*, No. 2015-CFPBCO-0027, 2015 WL 10372387, ¶ 10 (Oct. 28, 2015). These funds belong to the U.S. Treasury, consistent with the parties' intent as plainly reflected in the Redress Plan. The Proposed Intervenors seek to divert funds away from the U.S. Treasury to fund the National Attorneys General Training Research Institute ("NAGTRI") within the National Association of Attorneys General ("NAAG"). Nothing in the Consent Order suggests that NAGTRI or NAAG is an intended beneficiary. As the Court recognized in its order of April 10, 2017, the Proposed Intervenors' motion, contrary to Rule 60(a), "seeks to alter the Consent Order in a fundamental way by redirecting elsewhere" $15.14 million that would otherwise be deposited in the U.S.

Treasury as disgorgement. (Dkt. No. 41 at 3). Accordingly, even if intervention were permitted, the motion to modify the Consent Order should be denied.

This Office consulted with the CFPB after receiving a copy of the Court's order of April 10, 2017 (Dkt. No. 41). As noted above, while this Statement of Interest is submitted on behalf of the United States as a whole, the CFPB is submitting a separate response opposing modification of the Consent Order. Because the CFPB does not consent to modification of the Consent Order, and there is no ground under Rule 60(a) to allow such modification, and because the CFPB intends to direct Sprint to deposit the remaining Redress Amount funds in the U.S. Treasury as disgorgement as set forth in the Redress Plan, the Court need not address whether the State AGs' proposed modification of the Consent Order would implicate the Miscellaneous Receipts Act, 31 U.S.C. § 3302. However, the United States notes that, because the funds at issue have been constructively received by the United States, the Miscellaneous Receipts Act in any case would preclude the CFPB from directing the funds anywhere but the U.S. Treasury, including to NAAG or NAGTRI. If NAAG wishes to fund its program with federal dollars, it may seek a Congressional appropriation, but no portion of the Redress Amount may be diverted for that purpose.

Dated: New York, New York
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Respectfully submitted,

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