UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. SPRINT CORPORATION, Defendant.	14-CV-09931 (WHP)

MEMORANDUM OF THE STATE ATTORNEYS GENERAL IN RESPONSE TO STATEMENT OF INTEREST OF UNITED STATES OF AMERICA AND TO CONSUMER FINANCIAL PROTECTION BUREAU'S MEMORANDUM ON JOINT MOTION TO INTERVENE TO MODIFY STIPULATED JUDGMENT AND ORDER

The Court should enter the Proposed Modified Order (ECF No. 40-1) as requested in the Joint Submission Regarding Motion to Intervene and Modification of the Proposed Final Order and Judgment (ECF No. 40) by the Attorneys General for the States of Connecticut, Indiana, Kansas, and Vermont (collectively, "State AGs") and Defendant, Sprint Corporation ("Sprint"). The Court has broad equitable authority under Rule 60(b) to modify the Stipulated Judgment and Order (the "Consent Order") and the Proposed Modified Order best serves the public interest.

No party to the action opposes the State AGs' motion to intervene. Sprint joined in the State AGs' motion and the Plaintiff, the Consumer Financial Protection Bureau ("CFPB"), does not oppose it, even though it was provided with a direct invitation from the Court to do so. Although the United States opposes the State AGs' intervention, it is not a party to this action, nor does it represent a party to this action.

The Court should exercise its equitable authority to modify the Consent Order. The only other party to the Consent Order – the CFPB – now opposes the modification,[1] but solely on the basis that there is no clerical mistake in the Consent Order. Notwithstanding, the Court has broad equitable authority under Rule 60(b)(6) to grant the proposed modification to the Consent Order in the public interest.

I. Even If, As The CFPB Now Claims, There Is No Clerical Mistake In The Consent Order, The Court Should Still Modify The Consent Order In The Public Interest Under Rule 60(b)(6).

The Court should enter the Proposed Modified Order as justified by the public interest, which is best served by directing the Remaining Funds to NAAG to continue and complete the development of the NAGTRI Center for Consumer Protection.

Under Rule 60(b)(6) of Federal Rules of Civil Procedure, "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for any ... reason that justifies relief." "The Rule uses the word 'may,' and hence it is within the court's broad discretion to grant relief under Rule 60(b)." Mazzone v. Stamler, 157 F.R.D. 212, 214 (S.D.N.Y. 1994). Although the Court does not "lightly reopen" final judgments, and the burden of proof is on the party seeking modification, the Court "broadly construes" its authority to modify judgments under Rule 60(b) "to do substantial justice." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986); PG 1044 Madison Assocs., LLC v. Sirene One, LLC, 229 F.R.D. 450, 452-53 (S.D.N.Y. 2005). In particular, Rule 60(b)(6) “represents a grand reservoir of equitable power that should be liberally applied.” United States v. Cirami, 563 F.2d 26, 32 (2d Cir. 1977);

[1] Prior to the filing of its Memorandum on the Joint Motion to Intervene to Modify the Stipulated Judgment (ECF No. 43), the CFPB did not oppose the State AGs' intervention or modification of the Consent Order. The CFPB's non-opposition was reflected in numerous communications with the parties, and by the absence of any prior filing despite notice of the State AG and Sprint filings.

see also Williams v. N.Y. City Dep't of Corr., 219 F.R.D. 78, 86 (S.D.N.Y. 2003) (Relief under Rule 60(b)(6) is available in "extraordinary circumstances" such as where a party had no previous opportunities to act upon a motion or prevent an unfavorable judgment.)

The Second Circuit has imposed a three-prong test to determine the merits of motions to modify final judgments under Rule 60(b). Kotlicky v. United States Fidelity Guar. Co., 817 F.2d 6, 9 (2d Cir.1987); PG 1044 Madison Assocs., LLC, 229 F.R.D. at 452-53. First, there must be highly convincing evidence supporting modification; second, the moving party must show good cause for failing to act sooner; and third, the moving party must show that the modification will not impose an undue hardship on the other party. Id.

Here, all three prongs are satisfied. First, there is highly convincing evidence supporting modification. No party disputes that (1) the Consent Order represents a global settlement, involving the CFPB, Sprint, the Federal Communications Commission ("FCC") and the states (see Stipulated Final Judgment and Order, ECF No. 25 at ¶ 37); (2) an unexpectedly large sum of money remains after full consumer restitution under the Consent Order, (3) under the unmodified terms of the Consent Order Sprint will need to deposit those Remaining Funds in the U.S. Treasury rather than apply them directly in the public interest (see Sprint Consumer Redress Plan, ECF No. 18-5 at ¶ 29), or (4) the Court retains jurisdiction to modify the Consent Order. See Stipulated Final Judgment and Order, ECF No. 25 at ¶ 52.

Second, neither the State AGs nor Sprint could have acted sooner because they were not aware of the unexpectedly large amount of Remaining Funds until late November, 2016. It was then that the CFPB notified the State AGs and Sprint that it (in consultation with the fifty states, the District of Columbia, and the FCC) could not identify any equitable relief reasonably related to the allegations set forth in the Complaint towards which it could apply the Remaining Funds.

Thus, under the terms of the Consent Order, Sprint would need to deposit those Remaining Funds in the U.S. Treasury rather than apply them directly in the public interest. Approximately one month later, the State AGs filed their Motion to Intervene to Modify Stipulated Judgment and Order, and Sprint subsequently joined in the motion. The State AGs and Sprint thus have good cause for not acting sooner to modify the Consent Order. See Vasquez v. Carey, No. 03 CIV. 3905 (RJH), 2010 WL 1140850, at *7 (S.D.N.Y. Mar. 24, 2010) ("Given that there is no indication that defendant … has suffered any prejudice whatsoever from the delay, other than being forced to resume his defense of this action, the Court concludes that plaintiff's request for Rule 60(b) relief was made within a reasonable time ....").

And third, the Proposed Modified Order will not impose any undue hardship on either the CFPB or Sprint. Sprint, in fact, supports the modification, and the CFPB has asserted no claim to the Remaining Funds. It stands to lose nothing should the Court enter the Proposed Modified Order. See id.

By contrast, should the Court deny the proposed modification, consumers, like those harmed by the acts and practices alleged in the Complaint, may not have the full benefit of a valuable resource for consumers – consumer protection attorneys well-trained by the NAGTRI Center for Consumer Protection. As set forth in the "NAGTRI Proposal for the Use of Fund from Sprint Settlement: NAGTRI Center for Consumer Protection, 'Resources, Training and Research for America's Attorneys General in the Fight Against Consumer Fraud and Abuse,'" (ECF No. 29-2), the Remaining Funds would be put to use to train, support and improve the coordination of the state consumer protection attorneys charged with enforcement of the laws prohibiting the type of unfair and deceptive practices.

All three prongs of the test to determine whether the Court should liberally exercise its "grand reservoir of equitable power" under Rule 60(b)(6) are thus met. See, e.g., Kotlicky, 817 F.2d at 9; Cirami, 563 F.2d at 32; Vasquez, No. 03 CIV. 3905 (RJH), 2010 WL 1140850, at *7. The Court should therefore "do substantial justice" by granting the proposed modification to the Consent Order in the public interest. Nemaizer, 793 F.2d at 61.

II. The State AGs' Proposed Intervention is Timely.

No party to this action has challenged the State AGs' proposed intervention as untimely, and the Court did not solicit an opinion from the United States on the timeliness of the State AGs' proposed intervention. The United States nonetheless asserts in its Statement of Interest that the Court should deny the proposed intervention as not timely. See ECF No. 42, pp. 1-3.

As detailed in the State's Memorandum in Support of Joint Motion to Intervene to Modify Stipulated Final Judgment and Order, however, the proposed intervention is timely because the State AGs moved to intervene promptly upon notice that the CFPB, in consultation with the states and the FCC, could not identify any equitable relief reasonably related to the allegations set forth in the Complaint towards which the CFPB could apply the Remaining Funds. See ECF No. 29, p. 6. Moreover, because the CFPB and Sprint have already settled their dispute, intervention cannot cause undue delay or prejudice their rights. See id., citing Diversified Grp., Inc. v. Daugerdas, 217 F.R.D. 152, 158 & n.4 (S.D.N.Y. 2003), quoting United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990) ("Rule 24(b)'s timeliness requirement is to prevent prejudice in the adjudication of the rights of the existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose.").

The United States is not a party to this action, nor does it represent a party to this action. Of the two parties to the action, the CFPB has not opposed the State AGs' motion to intervene,

and Sprint supports it. The Court should therefore reject the United States' opposition and allow the proposed intervention.[2]

III. The State AGs' Proposed Modification Does Not Implicate the Miscellaneous Receipts Act.

In its Memorandum and Order the Court raises a concern that the modification sought by the AGs and Sprint could implicate the Miscellaneous Receipts Act (the "Act"). See ECF No. 41, p. 3. Pursuant to the Act, under many circumstances officials "receiving money for the Government from any source shall deposit that money with the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). The key trigger for purposes of the application of the restrictive requirements of the Act is that the government must "receive money." The U.S. Department of Justice's Office of Legal Counsel ("OLC") has determined that the government does not "receive money" when it enters into settlements that provide for payments by a defendant to third-party programs if certain conditions – present here – are met. The Act would therefore not apply to the proposed modification to the Consent Order.

OLC concluded in 2006 that a federal agency may "enter into settlements involving payments not made in the General Fund of the Treasury" so long as "(1) the settlement [is] executed before an admission or finding of liability in favor of the United States; and (2) the United States [does] not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement." Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 Op. O.L.C. 111, 119

[2] Even if the Court denies the State AGs' motion to intervene, it may nonetheless modify the Consent Order, pursuant to Rule 60(b), on Sprint's motion. See Joint Submission Regarding Motion to Intervene and Modification of the Proposed Final Order and Judgment, ECF No. 40.

(2006) available at https://www.justice.gov/olc/file/477041/download. OLC explained that, "[i]f these two criteria are met, then the governmental control over settlement funds is so attenuated that the government cannot be said to be 'receiving money for the Government.'" Id.

The 2006 OLC opinion is supported by the Ninth Circuit's decision in Sierra Club, Inc. v. Electronic Controls Design, Inc., which concerned a proposed consent judgment in a citizens' suit under which the defendant agreed to pay monies to several environmental organizations. See 909 F.2d 1350 (9th Cir. 1990). The United States objected to the proposed judgment on the ground that "[t]he Clean Water Act authorizes the imposition of civil penalties only if paid to the federal treasury." Id. at 1352. The Ninth Circuit disagreed, concluding that

> the payments are [not] civil penalties. No violation of the Act was found or determined by the proposed settlement judgment. When a defendant agrees before trial to make payments to environmental organizations without admitting liability, the agreement is simply part of an out-of-court settlement which the parties are free to make.

Id. at 1354.

OLC's opinion is also consistent with General Accounting Office ("GAO") opinions stating that the federal government's "discretionary authority to 'compromise, or remit, with or without conditions,' civil penalties … empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question." Docs. of the Comp. Gen., B-247155.2 (1993) (letter from Comptroller General to Hon. John D. Dingell) (quoting 70 Comp. Gen. 17 (1990)), available at http://www.gao.gov/assets/200/195921.pdf. Following those GAO opinions in the early 1990s, the Department of Justice and Environmental Protection Agency established enforcement guidelines for authorizing third-party payments in settlements, which have become commonplace. See Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796 (May 5, 1998) available at https://www.gpo.gov/fdsys/pkg/FR-1998-05-05/pdf/98-

11881.pdf; U.S. Department of Justice, SENTENCING GUIDANCE IN ENVIRONMENTAL PROSECUTIONS, INCLUDING THE USE OF SUPPLEMENTAL SENTENCING MEASURES (2000) available at https://judiciary.house.gov/wp-content/uploads/2016/04/Uhlmann-Supplemental-Material.pdf.

The Congressional Research Service ("CRS") agrees. In a report not publicly available, but quoted in a House Committee Report, CRS concluded that private defendants in federal enforcement actions may distribute relief to third parties, including state and local governments. Those payments are "not for the Government for purposes of the miscellaneous receipts statute" and are "wholly outside the statutory mosaic Congress has enacted to implement its constitutional power of the purse." David Carpenter, Cong. Research Serv., LEGAL PRINCIPLES ASSOCIATED WITH MONETARY RELIEF PROVIDED AS PART OF FINANCIAL-RELATED LEGAL SETTLEMENTS & ENFORCEMENT ACTIONS 6 (2015), quoted in H.R. Report No. 114-694, at 29 (2016) (dissenting views) available at https://www.congress.gov/114/crpt/hrpt694/CRPT-114hrpt694.pdf.

Here, the two OLC criteria are met. The parties entered the Consent Order before the Court issued any rulings on the merits, and Sprint has not admitted liability. See Stipulated Final Judgment and Order, ECF No. 25 at ¶ 3. The United States currently does not have control over the Remaining Funds and would not until Sprint pays the Remaining Funds to the CFPB, pursuant to the terms of the Sprint Consumer Redress Plan. See ECF No. 18-5 at ¶ 22. That has not occurred. Modifying the Consent Order to redirect the Remaining Funds that never came within the control of the United States therefore would not trigger the Act. Moreover, the United States would not retain any post-settlement control over the funds once they are received by NAAG under the Proposed Modified Order. Because those two criteria are met, "the governmental control over settlement funds is so attenuated that the government cannot be said to be 'receiving money for the Government.'" 30 Op. O.L.C. at 119.

The United States asserts that the Act is implicated because it has "constructively" received the unexpended funds. It does not offer any support for that assertion, however, nor can it. The Remaining Funds remain in the possession of Sprint until such time as the Court rules on the Proposed Modified Order. Thus, the Act is not implicated, and the Court should therefore grant the State AGs' Motion to Intervene to Modify the Stipulated Final Judgment and Order.

CONCLUSION

The State AGs respectfully request that the Court enter the Proposed Modified Order.

FOR THE STATES OF CONNECTICUT, INDIANA, KANSAS AND VERMONT:

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Dated: May 24, 2017

CERTIFICATE OF SERVICE

I, Kimberly Massicotte, counsel for the State AGs, hereby certify that on May 24, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses of all counsel of record in this Action.

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