UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:10-cv-23235/HOEVELER

DAVID KARDONICK, JOHN DAVID, and MICHAEL CLEMINS, individually and on behalf of all others similarly situated and the general public,

Plaintiffs,

v.

JPMORGAN CHASE & CO. and CHASE BANK USA, N.A.

Defendants.

CHASE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SHOW CAUSE ORDER

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INTRODUCTION

This Court's order enjoins settlement class members and anyone "actually or purportedly acting on behalf of" class members from reasserting settled claims. Respondents Golomb & Honik and Baron & Budd nevertheless have reasserted claims substantially identical to the claims at issue in the settled actions on behalf of the very same consumers who released their claims as part of the settlement. Respondents thereby violated the Court's injunction and deprived Chase of the finality that the settlement was intended to secure. None of the defenses that Respondents offer for this conduct withstand scrutiny.

Respondents argue that the claims asserted in the state attorney general actions are asserted in the "name" of the state and are not among the claims released by the settlement, but this argument overlooks the fact that the claims at issue are being asserted on behalf of private consumers. Where, as here, a state attorney general seeks relief as a representative of private consumers, the attorney general stands in privity with those consumers and is bound by any settlements entered into by those consumers. Respondents' contrary argument is rejected by on-point decisions of the Second, Third, Fifth and Ninth Circuits as well as several district courts. As these decisions recognize, any other result would expose settling defendants to precisely the type of double-dipping and duplicative litigation that Respondents have initiated here.

Respondent Baron & Budd also argues that it need not comply with this Court's injunction because it is entitled to the same immunities and defenses that allegedly apply to the state attorneys general. (B&B Opp. at 1, 14.) It further asserts that "Chase concedes the Court's injunction does not apply" to attorneys general. (*Id.*) Baron & Budd is mistaken on both counts.

As an initial matter, Baron & Budd made up Chase's supposed "concession" out of thin air. Chase argued at length in its opening memorandum that the attorneys general *are* subject to this Court's injunction. (Chase's Motion for Show Cause Order and Supporting Memorandum

of Law ("Mem.") at 14-18.) Furthermore, if the attorneys general do not voluntarily conform their conduct to the injunction following the adjudication of this motion, the Court may eventually have to render a decision on whether the attorneys general are bound. For now, however, the only question before the Court is whether Respondents Baron & Budd and Golomb & Honik are subject to the Court's injunction. The answer is clear: as private law firms that practice before this Court, both firms must abide by this Court's order.

For these reasons, as more fully set forth below, a show cause order should issue.

ARGUMENT

I. RESPONDENTS HAVE VIOLATED THIS COURT'S INJUNCTION.

A. The Consumer Relief Claims Were Filed "On Behalf Of" Settlement Class Members.

This Court's injunction bars "any person actually or purportedly acting on behalf of any Settlement Class Member(s)" from reasserting settled claims in any type of "representative" action. (Dkt. # 384, ¶ 17.) Here, Respondents have plainly asserted claims "on behalf of" settlement class members in representative actions. Indeed, Respondents' own Complaints acknowledge that they were filed "on behalf of the State *and its citizens.*" (Mem., Ex. A, ¶ 9; *id.*, Ex. B, ¶ 8; *see also id.*, Ex. C at 20.) Furthermore, each of the Complaints expressly seeks a monetary recovery payable directly to settlement class members.[1]

Undaunted by the language of their own Complaints, Respondents argue that the consumer claims asserted in the state attorney general actions were filed on behalf of state attorneys general and not on behalf of consumers. (G&H Opp. at 4-5.) This is empty semantics.

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[1] *See* Mem. at 5-6; *id.*, Ex. A at 21-22 (seeking "restitution" and recovery of "excess charges" on behalf of affected West Virginia consumers); *id.*, Ex. B at 22-23 (seeking "restitution ... for all Hawaii consumers injured by Defendants' acts" and "restitution ... of monies obtained" as a result of alleged misconduct); *id.* ¶ 88 ("consumers within the State should be made whole"); *id.*, Ex. C at 20 (seeking "restitution" to Mississippi consumers).

Although the Complaints were filed in the name of state attorneys general, the attorneys general are serving as *parens patriae* representatives of consumers. As in any other representative action, moreover, the actions were filed on behalf of both the *representative* parties (state attorneys general) and the *represented* parties (individual consumers). That is why the Complaints explicitly state that they were filed "on behalf of" state citizens and why they seek monetary recoveries payable directly to those citizens.

State law reinforces these aspects of the Complaints by *mandating* that any recovery on the relevant claims be paid to consumers. For example, the West Virginia Complaint seeks recovery of "excess charges" paid by consumers under W. Va. Code § 46A-7-111(1), a statute which expressly states that courts should "order the [defendant] to *refund to the consumer*" any excess charges proven by the state attorney general. *Id.* (emphasis added); *see also West Virginia ex rel. McGraw v. Scott Runyan Pontiac*, 461 S.E.2d 516, 524 (W. Va. 1995) (confirming that § 46A-7-111(1) claims are asserted "on behalf of" consumers). Hawaii and Mississippi law likewise require that the restitution sought by the attorneys general must be paid to the affected consumers.[2]

B. The Consumer Relief Claims Were Released By The Settlement.

The consumer relief claims asserted in the state attorney general actions are substantively identical to the claims asserted in the settled actions: they rely on the same factual allegations,

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[2] *See, e.g.,* Miss. Code § 75-24-11 (a court may order "restitution[] as may be necessary to restore to *any person in interest* any monies ... which may have been acquired by means of any practice prohibited by this chapter" (emphasis added)); *Kersey v. Fernald*, 911 So. 2d 994, 997 (Miss. Ct. App. 2005) (holding that restitution seeks "to refund the money ... to the person to whom in good conscience it ought to belong"); *Hawaii v. Honolulu Univ. of Arts, Sciences & Humanities*, 135 P.3d 113, 124-25 (Haw. 2006) (under state law, a consumer who accepts restitution "'shall bar recovery by the person of any other damages in any action on account of the same acts or practices against the person making restitution'" (quoting Haw. Rev. Stat. § 487-14)); *see also* RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. e (restitution seeks to "restore[] something to someone, or restore[] someone to a previous position").

they are brought under the same consumer protection statutes, and they are premised on the same legal theories.[3] Respondents nevertheless assert that these claims were not released by the settlement because the claims supposedly belong to the states and not to consumers. (B&B Opp. at 7.) Respondents further assert that the relevant state statutes deny consumers the right to settle any claims that the state attorneys general are empowered to assert on their behalf. (G&H Opp. at 6-7; B&B Opp. at 10-11.) None of these arguments has merit.

Contrary to Respondents' assertion, consumers *do* have the power to settle the claims at issue here. Under settled law, a class action settlement may extinguish not only the particular claims asserted in the lawsuit, but also any claims arising out of the same set of operative facts, even if the claims "could not have been presented [] in the class action itself." (Mem. at 9, quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001).) Consistent with these principles, courts consistently hold that class action settlements may release representative claims that state attorneys general otherwise could assert on behalf of consumers. *See* Mem. at 9-10 & n. 4 (collecting cases); *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985) (holding that a class action settlement may bar state attorney general claims that are "derivative of the plaintiffs' rights"); *FTC v. AMREP Corp.*, 705 F. Supp. 119, 124-25 (S.D.N.Y. 1988) (rejecting the FTC's argument that "private litigants cannot foreclose the Government's right to bring an independent action" because "private parties can release the right to have an action brought on their behalf by a representative"); *Esslinger v. HSBC Bank USA, Inc.*, No. 10-cv-2313-BMS (E.D. Pa. Oct. 1, 2012) (attached hereto as Exhibit L) (rejecting

[3] Mem. at 8; Dkt. #15 ¶ 101 (alleging violations of state consumer protection statutes); *id.* ¶ 112-19 (alleging unjust enrichment).

argument by Baron & Budd and Golomb & Honik that a class action settlement cannot extinguish a state attorney general's right to seek additional relief for settling consumers).[4]

Respondents counter that state attorney general actions are brought in the "name" of the state (B&B Opp. at 10-11), but it makes no difference that the state is the named representative in such actions. For example, class action litigation is filed in the name of a named plaintiff, but the claims asserted on behalf of absent class members in such actions are not the property of the named plaintiff; rather, such claims continue to belong to the absent class members. Likewise here, the mere fact that attorneys general are authorized to file representative actions in the "name" of the state does not divest consumers of ultimate ownership of these claims.

Respondents also assert that none of the relevant state statutes "authorizes a citizen to bring, much less release, any of the claims that the State is authorized to bring." (B&B Opp. at 10.) That assertion, however, is both erroneous and irrelevant. It is erroneous because the relevant statutes *do* permit consumers to assert and release the types of claims available to state attorneys general.[5] It is irrelevant because although "there may be some laws not available to

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[4] In *Esslinger*, Baron & Budd and Golomb & Honik appeared for the attorneys general of West Virginia, Hawaii, and Mississippi and made exactly the same argument they are advancing here: they asserted that a class action settlement could not bar the attorneys general from seeking additional relief on behalf of settling consumers. The court rejected the argument, noting that a settlement would be an "illusory bargain" if the court could not "bar an individual from getting paid twice." Ex. F, Tr. of Fairness Hearing, at 29, 48; *see also id.* at 43-47.

[5] For example, the statute at issue in West Virginia provides:

> If a consumer brings an action against a creditor to recover an excess charge or civil penalty, an action by the attorney general to recover for the same excess charge shall be stayed while the consumer's action is pending and shall be dismissed if the consumer's action is dismissed with prejudice or results in a final judgment granting or denying the consumer's claim.

W. Va. Code § 46A-7-111(1). In other words, individual consumers may sue for the "same excess charges" that the attorney general seeks to recover for consumers in the West Virginia action, and such a suit will preclude any excess charge suit by the attorney general. *Id.* Similar principles apply in Hawaii and Mississippi. *See supra* at 3 n.2.

private plaintiffs that enable a given state to bring proceedings," those laws do not cause the restitution claims "to lose [their] representative character." *Baldwin-United*, 770 F.2d at 341. Put differently, it makes no difference if state attorneys general are authorized to sue on behalf of consumers under different statutory provisions than the provisions that authorize suits by consumers themselves. These separate statutory provisions do not divest consumers of the ability to assert or settle the relevant claims; they merely authorize an additional party to sue on a consumer's behalf.

For all of these reasons, the consumer claims at issue here fall within the scope of the claims released by the settlement. The undisputed intent of the settlement was to extinguish any and all payment protection claims that class members were capable of releasing. The settlement thus releases all claims "arising out of or in any way relating to" Chase's payment protection plans. (Dkt. #16, § II(jj).) It also specifies that released claims include, without limitation, any right to "restitution" or to "any other type of equitable, legal or statutory relief" available under "the unfair and deceptive acts and practices statutes of any of the states." (*Id.* §§ II(n), (jj).) Finally, the settlement reinforces this language by prohibiting class members and anyone acting "on behalf of" class members from reasserting settled claims "directly or indirectly" in any "representative or other action." (*Id.*, Ex. C, ¶ 10.)

Taken as a whole, this language was plainly intended to foreclose the types of representative claims that Respondents have asserted in the state attorney general actions. Indeed, Chase would not have settled the underlying class actions on any basis: it makes no sense to pay millions of dollars for a class action release if virtually identical claims may then be re-asserted on behalf of the very same class members – and even by the same class action lawyers – as part of a state attorney general action.

Baron & Budd fares no better with its argument that state attorneys general are not "persons" subject to this Court's injunction. (B&B Opp. at 7.) Even if that were correct as to the attorneys general (and it is not[6]), it would not change the fact that Baron & Budd and Golomb & Honik are "persons" subject to the injunction. The injunction incorporates the settlement agreement's definition of "person," which "includes, without limitation, natural persons, *firms*, banks, corporations, and businesses." (Dkt. #16, § II(hh) (emphasis added).) As private "firms," Respondents unquestionably are "persons" subject to the Court's injunction.

C. The Cases Cited By Respondents Are Inapplicable.

Respondents largely ignore an extended line of authority holding that government actors are not entitled to circumvent private settlements by seeking additional relief on behalf of settling parties. (*See* Mem. at 10 & n.4, 15 (collecting cases).) Instead of coming to grips with this authority, Respondents rely on a separate line of authority interpreting the removal provisions of the Class Action Fairness Act ("CAFA"). (G&H Opp. at 7-13; B&B Opp. at 8-12.)[7] Respondents go so far as to assert that one of these CAFA removal cases "resolves the very issue

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[6] Even apart from the broad definition of "person" that appears in the Settlement, the state attorneys general are "persons" in the context of claims for injunctive relief. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) ("[A] state official in his or her official capacity, when sued for injunctive relief, [is] a person under § 1983."); *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1524 (11th Cir. 1995) ("[A] state official sued in his official capacity is a person for purposes of § 1983 when prospective relief, including injunctive relief, is sought."); *see also* Mem. at 14-17.

[7] *See, e.g.*, *Nevada v. Bank of Am. Corp.*, 672 F. 3d 661 (9th Cir. 2012); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2011); *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984 (S.D. W. Va. 2012). Respondents also cite other cases addressing whether states were the real party in interest for purposes of determining diversity jurisdiction. *See Tradigrain, Inc. v. Mississippi State Port Auth.*, 701 F.2d 1131 (5th Cir. 1983) (holding that a state agency was an alter ego of the state for purposes of determining diversity jurisdiction); *New York v. Gen. Motors Corp.*, 547 F. Supp. 703 (S.D.N.Y. 1982) (holding that the state was the real party in interest for purposes of determining diversity jurisdiction).

[that Chase] presents to this Court." (B&B Opp. at 8, citing *JPMorgan Chase & Co.*, 842 F. Supp. 2d at 995-98.)

Respondents are fundamentally mistaken. The question here is whether this Court's injunction bars Respondents from seeking monetary relief "on behalf of" the same consumers who released their claims as a part of the settlement. The cases cited by Respondents address an entirely different question: whether state attorney general actions are removable to federal court as "mass actions" under CAFA. In answering that question, the cited cases apply an arcane analysis of whether consumers who stand to benefit from a representative action can be taken into account for purposes of satisfying CAFA's diversity of citizenship and numerosity requirements. *See, e.g., JPMorgan Chase & Co.*, 842 F. Supp. 2d at 995-98.[8] None of this has anything to do with whether Respondents have asserted consumer relief claims "on behalf of" members of the settlement class.

Although Respondents also cite a handful of cases from outside the removal context, these cases miss the mark as well. As discussed in Chase's opening memorandum, the decisions in *Spinelli v. Capital One Bank (USA) N.A.*, No. 8-cv-00132, 2012 WL 3609028 (M.D. Fla. Aug. 22, 2012), and *Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998), are easily

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[8] To determine whether attorneys general suits are removable under CAFA, some courts have held that "the appropriate inquiry ... is to examine the whole complaint, and decide the real party in interest based on the 'essential nature and effect of the proceeding.'" *JPMorgan Chase & Co.*, 842 F. Supp. 2d at 997-98 (quoting *LG Display Co.*, 665 F.3d at 773); *but see Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 429 (5th Cir. 2008). Although the "whole complaint" analysis may be appropriate for determining whether a suit is a CAFA "class action," assessing the scope of a settlement agreement and release is inherently claim specific and requires a claim-by-claim analysis. *See, e.g., Citibank N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990) ("When claim preclusion does not apply to bar an entire claim or set of claims, the doctrine of collateral estoppel, or issue preclusion, may still prevent the relitigation of particular issues which were actually litigated and decided in a prior suit."); *Baldwin-United*, 770 F.2d at 336 (distinguishing between state attorney general claims asserted on behalf of the state and "state law claims derivative of the plaintiffs' rights").

distinguished from this action. (Mem. at 18-19.) Most of the other cases cited by Respondents are equally inapposite.[9] Finally, Respondents' citation to *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), actually undermines their position.

Waffle House held that an arbitration clause contained in an individual employment contract did not require the EEOC to arbitrate its claims relating to the individual's employment. *Id.* at 283-84. Significantly, the Court distinguished this arbitration holding from the situation presented here, noting that if an employee "had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly." *Id.* at 296-97. The Court supported that statement with a citation to *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990), a decision that squarely rejects Respondents' arguments.

In *U.S. Steel Corp.*, the EEOC argued that an employee's private settlement could not bar the EEOC from seeking additional restitution to the employee because the government allegedly had "a broader independent public interest different from that of an individual grievant." *Id.* at 496. The Third Circuit disagreed, holding that the EEOC had "fail[ed] to distinguish between [its] role in protecting the public interest and its role in vindicating specific private claims." *Id.* The court concluded that the "doctrine of representative claim preclusion" ordinarily precludes governmental actors from seeking additional relief on behalf of private parties who have already entered into private settlements. *Id.* Likewise here, the state attorneys general were properly

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[9] *Spinelli*, *Herman*, and the other cases cited by Respondents typically involve overbroad attempts to bar a government official from asserting any claims at all as a result of a class action settlement. For example, in *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986), the court noted that a settlement agreement did not bar the Secretary of Labor from bringing an enforcement action under ERISA because "the Secretary and the Secretary *alone* may bring a suit to collect a civil penalty." *Id.* at 691. Likewise, in *United States v. Katz*, No. 10 Civ. 3335, 2011 WL 2175787 (S.D.N.Y. June 2, 2011), the court noted that private litigation could not bar the government from seeking "civil penalties in court 'to vindicate the public interest' and injunctive [relief for i]ndividuals who flout the Act." *Id.* at *6. Here, Chase seeks only to bar Respondents from seeking monetary relief payable to settlement class members.

barred from seeking additional relief on behalf of settling class members. *See, e.g.*, Mem. at 10 & n.4, 15 (collecting cases); *EEOC v. Jefferson Dental Clinics*, 478 F.3d 690, 699 (5th Cir. 2007) (under *Waffle House*, "[t]he EEOC's public interest does not justify giving the plaintiffs two chances to receive make-whole relief."); *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 834 N.Y.S. 2d 558 (N.Y. App. Div. 2007) (*Waffle House* "distinguished claims for injunctive relief, where the regulatory body serves in a distinct, nonrepresentative capacity, and those for monetary damages on behalf of individuals who have already been compensated.").

II. GOLOMB & HONIK'S ADDITIONAL DEFENSES FAIL.

Golomb & Honik properly refrains from arguing that lack of personal jurisdiction, lack of due process, or sovereign immunity would provide it with a defense to a violation of this Court's injunction. Any such argument would be untenable given the firm's role as class counsel in the underlying action. (Mem. at 5.) Golomb & Honik does assert, however, that Chase has waived the right to enforce the injunction and that the injunction threatens to interfere with its ethical responsibilities. Neither of these assertions has merit.

A. Chase Did Not Waive Its Right To Enforce The Injunction.

Golomb & Honik argues that Chase waived the right to enforce this Court's injunction, but it fails to meet the standard required for waiver. Waiver requires an "*intention* to relinquish [the] right, privilege, advantage, or benefit" in question. *Dade Cnty. v. Rohr Indus., Inc.*, 826 F.2d 983, 990 (11th Cir. 1987) (emphasis added); *see also Air Prods. & Chems., Inc. v. Louisiana Land & Exploration Co.*, 867 F.2d 1376, 1379 (11th Cir. 1989) (burden is on the party asserting waiver to "make out a clear case" of "an intentional or voluntary relinquishment of a known right"). Here, far from intentionally relinquishing its right to insist on compliance with this Court's injunction, Chase actively asserted that right as soon as Respondents initiated substantive litigation of their consumer relief claims.

Golomb & Honik's waiver argument rests on an inaccurate factual premise: that Chase "actively litigated" the attorney general actions for over a year without asserting the injunction as a defense. (G&H Opp. at 14.) The actual facts are as follows:

- The Hawaii and Mississippi actions were not even filed until April and July 2012, respectively, and no substantive litigation has yet occurred in either action. Chase has removed both actions to federal court; the plaintiffs have moved for remand; and briefing on the remand motions is not yet complete in either court. (Second Declaration of Robert D. Wick ("Second Wick Decl.") ¶¶ 6-11.)

- In the West Virginia action, the questions of removal and remand were not settled until February 2012, and the attorney general first attempted to serve discovery in April 2012. Chase promptly responded to these discovery requests by asserting this Court's injunction as a bar to any attempt to litigate consumer relief claims. (*Id.* ¶¶ 2-4.)

- Chase followed up on April 17, 2012 by asking the attorney general to enter into a voluntary stipulation confirming that he would abide by this Court's injunction. (*Id.* ¶¶ 12-13.) Opposing counsel never provided a clear response. (*Id.* ¶ 13.)

- Chase continued to hold out hope that Respondents would voluntarily agree to abide by the Court's injunction until August of this year, at which point Respondents made clear that they were unlikely to do so in a filing submitted in related litigation. *See Esslinger*, No. 10-cv-2313-BMS (Dkts. #84, 93, 94).

- After reviewing the position taken by Respondents in the related litigation, Chase drafted and filed the instant motion for a show cause order. (Second Wick Decl. ¶ 15.)

- Finally, although Golomb & Honik asserts that Chase did not object to its representation of West Virginia "between the filing of the West Virginia action and the Final Approval Order in this case," it neglects to inform the Court that (a) Chase was not served with the Complaint in that action until September 1, 2011, and (b) at the final approval hearing that took place less than ten days later, Golomb & Honik informed Chase's counsel that it would be withdrawing from the West Virginia action. (*Id.* ¶¶ 2, 5.)[10]

In sum, in the only case in which the parties have engaged in substantive litigation – the West Virginia action – Chase asserted the injunction as a bar to consumer relief claims as soon as the plaintiff served discovery. Golomb & Honik's waiver argument thus boils down to an assertion that Chase waived its rights merely by waiting until a plaintiff actually attempted to

[10] Golomb & Honik withdrew from the West Virginia action on October 6, 2012.

litigate a consumer relief claim before raising the injunction as a defense. This falls far short of anything approaching an "intentional" surrender of the right to enforce the injunction. *See Irvine v. Cargill Investor Servs., Inc.*, 799 F.2d 1461, 1463-64 (11th Cir. 1986) ("mere delay" is insufficient to demonstrate "an intention to relinquish [a] right, privilege, advantage or benefit").

Furthermore, even if it were true that Chase had "actively litigated" the attorney general actions for over a year before invoking the injunction, that would not be sufficient to establish a waiver. *See, e.g., Pac. Shinfu Tech. Co. v. Pinnacle Research Inst., Inc.*, No. C-00-21034 RMW, 2008 WL 4669906, at *4 (N.D. Cal. Oct. 22, 2008) (holding that a "four-year delay [in asserting contempt] is not unreasonable"); *Drywall Tapers & Pointers of Greater N.Y., Local 1974 v. Local 530 of the Operative Plasters' & Cement Masons' Int'l Ass'n*, Nos. 93-CV-0154, 98-CV-7076, 2002 WL 31641597, at *43 (E.D.N.Y. Nov. 19, 2002) (holding that a delay of over two years did not prevent a party from filing a contempt proceeding); *Citizens for Lawful & Effective Attendance Policies v. Sequoia Union High Sch. Dist.*, No. C 87-3204 MMC, 1998 WL 305513, at *6 (N.D. Cal. June 4, 1998) (holding that "any delay in initiating contempt proceedings was reasonable" where the moving party voices an objection shortly after the violation occurs); *McGuffin v. Springfield Housing Auth.*, 662 F. Supp. 1546, 1550 (C.D. Ill. 1987) (holding that a delay of two years did not prevent a party from initiating a civil contempt proceeding for violating a consent decree).[11]

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[11] The cases Golomb & Honik cites are entirely irrelevant to the waiver of a civil contempt claim. In *Nat'l Union Fire Ins. Co. of Pittsburgh v. Beta Constr. LLC*, the court noted that a party could waive a personal jurisdiction defense by failing to raise it in a motion to dismiss or entering an appearance without objecting to personal jurisdiction. No. 8:10-cv-1541, 2010 WL 4316573, at *1 (M.D. Fla. Oct. 26, 2010). In *Williams v. Marriott Corp.*, the court held that "a party waives any objection to a court's response to juror misconduct unless it makes a timely objection." 864 F. Supp. 1168, 1173 (M.D. Fla. 1994). Finally, in *Townhouses of Highland Beach Condominium Ass'n, Inc. v. QBE Ins. Corp.*, the court held that a party waived a defense by failing to raise it in a motion to dismiss. 504 F. Supp. 2d 1307, 1312 (S.D. Fla. 2007).

B. The Court's Injunction Does Not Interfere With Golomb & Honik's Ethical Obligations.

Golomb & Honik next argues that enforcing the injunction against it would violate Rule 5.6(b) of the ABA Model Rules of Professional Conduct, which "prohibits a lawyer from agreeing not to represent *other persons* in connection with settling a claim on behalf of a client." Model Rules of Prof'l Conduct 5.6 cmt. b (2012) (emphasis added). The flaw in this argument is obvious: the Model Rule prohibits surrendering the right to represent *other* parties as part of a settlement; it does not prohibit counsel from giving up the right to assert duplicative claims on behalf of *settling* parties. *Id.*

Where, as here, lawyers assert duplicative claims on behalf of settling parties, courts are free to sanction the lawyers for engaging in duplicative litigation. *See Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1068 (11th Cir. 2001) (affirming assessment of attorneys' fees against plaintiffs' counsel for "efforts to undermine" federal class action settlement by prosecuting related claims in state court). Courts are likewise free to enjoin state attorneys general and their counsel from asserting duplicative claims on behalf of consumers. (*See* Mem. at 9-10, 14-17.)

III. BARON & BUDD'S ADDITIONAL DEFENSES FAIL.

Baron & Budd argues that it did not receive contemporaneous notice of the *settlement*, but it does not deny – nor could it – that it has long had notice of this Court's *injunction*.[12] It offers no valid defense to its ongoing violation of that injunction.

A. The Court Has Personal Jurisdiction Over Baron & Budd.

Baron & Budd argues that it is not subject to this Court's personal jurisdiction because it was not a party to the underlying action (B&B Opp. at 5-6, 15-16), but its absence from that

[12] Baron & Budd's opposition to the instant motion confirms that it is *now* aware of the injunction, and that is enough for purposes of this motion. In any event, Chase communicated with Baron & Budd about the injunction several months ago. (Second Wick Decl. ¶¶ 12-13.)

action is irrelevant. Under Eleventh Circuit law, this Court has jurisdiction over anyone in a position to frustrate its injunction, regardless of whether they were a party to the original action. *See Burr & Forman v. Blair*, 470 F.3d 1019, 1026-27 (11th Cir. 2006). In fact, as explained in Chase's opening brief, a district court's power to enforce its own injunction "extends to the whole world, to any person who comes in contact with" the injunction. (Mem. at 16-17, quoting *Alderwoods Group, Inc. v. Garcia*, 682 F.3d 958, 971-72 (11th Cir. 2012).) This Court thus has jurisdiction over both the attorneys general and Respondents because both of them have violated the Court's injunction.

This Court also has two additional sources of jurisdiction over Baron & Budd. First, this Court unquestionably has jurisdiction over the settlement class members, and this jurisdiction extends to Baron & Budd to the extent that the firm seeks relief on behalf of those class members. (Mem. at 14-16.) Second, this Court has jurisdiction over Baron & Budd because the firm is a frequent practitioner before the Court. (*Id.* at 12-13 & n.5.) Indeed, Baron & Budd lawyers appear on a regular basis in ongoing class action litigation before Judge King, and they doubtless intend to apply to Judge King for a multi-million-dollar attorneys' fee award at the conclusion of the litigation. Baron & Budd cannot selectively avail itself of the right to practice before this Court while simultaneously ignoring this Court's injunctions. (*Id.* at 11-12.)

B. Sovereign Immunity Does Not Bar The Court From Enforcing The Injunction.

Baron & Budd's sovereign immunity defense fails as well. Baron & Budd does not dispute that it receives no funding from the states, that its lawyers are not state employees, and that a civil contempt sanction would not be paid from a state treasury. (*Id.* at 13-14.) These facts are fatal to its sovereign immunity defense. (*Id.*) Because a judgment against Baron & Budd "would not impose any liability upon the [states]," the Eleventh Amendment confers no

immunity from a civil contempt sanction. *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039, 1046 (11th Cir. 2007).

Furthermore, even the state attorneys general would not be able to establish a sovereign immunity defense to a violation of this Court's injunction. As explained in Chase's opening brief, state officials stand in the shoes of settlement class members where, as here, they seek monetary relief on behalf of the class members. (Mem. at 15-16.) Thus, just as settlement class members could not assert sovereign immunity as a defense to a violation of this Court's injunction, state officials cannot do so when asserting claims on a class member's behalf. *See id.*; *Baldwin-United*, 770 F.2d at 341 (holding that "sovereign immunity is not a bar" to an injunction that "only precludes state officials from bringing actions in a de facto or de jure representative capacity on behalf of [private] plaintiffs").

Finally, even if the Eleventh Amendment were applicable here (and it is not), this Court could enforce the injunction under the *Ex parte Young* doctrine that allows federal courts to require state officials to conform their conduct to federal law. (*See* Mem. at 17 & n.9.) Contrary to Baron & Budd's assertion (B&B Opp. at 15), the *Ex parte Young* doctrine is not limited to instances in which state officials violate the Constitution; it also applies when state officials violate a pre-existing federal court injunction. (Mem. at 17 & n.9.)

C. Due Process Does Not Bar The Court From Enforcing The Injunction.

Baron & Budd next argues that applying the Court's injunction to the state attorneys general would deprive them of due process. (B&B Opp. at 15-16.) Even if Baron & Budd were entitled to assert the due process interests of the attorneys general, however, its argument would fail because the attorneys general have no due process rights at stake here. The Court's injunction prohibits only the assertion of claims that seek recovery for *class members*; it does not

bar claims that seek recovery for *states*. Accordingly, the injunction did not deprive the states of any property and does not implicate any due process rights the states might have. (Mem. 16-17.)

The only property interests at issue here are those of class members, all of whom have received adequate due process protections during the notice and opt-out process. (*See* Dkt. #384, ¶ 10.) To the extent that state attorneys general seek to assert claims on behalf of these settlement class members, they stand in privity with the class members and are deemed to have received the same notice and opportunity to object to the settlement that the class members received. *See* Mem. at 14-16; *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 894 N.E.2d 1, 13 (N.Y. 2008) (rejecting state attorney general's argument that he "was not provided with notice of the settlement" because he stood in privity with class members). For all these reasons, Baron & Budd's due process arguments should be rejected.

D. The Court That Enters An Injunction Has Jurisdiction To Enforce It.

Baron & Budd contends that Chase is required to enforce the injunction in the courts where the state attorneys general filed their lawsuits (B&B Opp. at 17), but that is not the law. In *Alderwoods*, the Eleventh Circuit concluded that "[i]t would wreak havoc on the federal courts to leave enforcement of [an] injunctive order" issued by one court "to the interpretative whims of" another. 682 F.3d at 970. Thus, "the court that issued the injunctive order *alone* possesses the power to enforce compliance with and punish contempt of that order." *Id.* (emphasis added) This Court therefore has the authority to issue an order requiring Respondents to appear and show cause why they should not be held in contempt of the Court's injunction.[13]

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[13] Baron & Budd relies on *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), but that case confirms that this Court may enforce the injunction. In *Kokkonen*, the Supreme Court held that a district court may enforce a settlement agreement if it retains jurisdiction over the agreement or incorporates the agreement into its final order of dismissal. 511 U.S. at 380-81. This Court unquestionably took both of those steps. (Dkt. #384, ¶¶ 1, 17).

Baron & Budd fares no better with its argument that federal courts cannot enjoin pre-existing state court proceedings in the course of enforcing a settlement agreement. (B&B Opp. at 17-18.) Chase is not asking the Court to issue a *new* injunction that would interrupt the course of a pre-existing state court proceeding; it is merely seeking to enforce an *existing* injunction that issued before Respondents filed their lawsuits.[14] Federal courts have ample power to enforce such injunctions. (Mem. 19-20.)

Baron & Budd's reliance on *Sandpiper Village Condominium Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831 (9th Cir. 2005), is therefore misplaced. In *Sandpiper*, the court held that the Anti-Injunction Act bars federal courts from enjoining state court proceedings when "the terms of the settlement were approved and finalized long before the district court issued the injunction." *Id.* at 846. Here, by contrast, the Anti-Injunction Act does not apply because the Court issued its injunction *before* Respondents filed their lawsuits. (Mem. at 19.)[15]

IV. THE COURT SHOULD ENTER A SHOW CAUSE ORDER REQUIRING RESPONDENTS TO APPEAR.

Golomb & Honik complains that Chase fails to specify the sanction that it seeks (G&H Opp. at 4 n.2), but that argument rests on a misunderstanding of the show cause procedure. To support a show cause order, Chase is merely required to "cite the injunctive provision at issue and *allege*[] that the defendant refused to obey its mandate." *Alderwoods*, 682 F.3d at 968 n.20 (internal quotations omitted) (emphasis added). So long as a court is "satisfied that the plaintiff's

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[14] Although Respondents filed the West Virginia action before the Court entered final approval of the settlement, the Court had already issued a preliminary injunction barring settlement class members from re-asserting payment protection claims. (Dkt. #23, ¶ 28.)

[15] *Sandpiper* is distinguishable for an additional reason. In *Sandpiper*, the court cabined its holding to litigants who are "not a party or in privity with a party to a prior federal action and who assert[] claims that were not resolved in the prior action." 428 F.3d at 853. Here, Respondents are in privity with settlement class members to the extent they seek restitution for such class members. (*See* Mem. at 14-16.)

motion states a case of non-compliance," the court should order the respondent "to show cause why he should not be held in contempt and schedule[] a hearing for that purpose." *Id.* (quoting *Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir. 2000)). Here, Chase's motion adequately alleges that Respondents have violated the Court's injunction. The Court should therefore order Respondents to appear and show cause why they should not be held in contempt. Of course, if Respondents bring themselves into compliance with the injunction by the time of the show causing hearing, there would be no need for contempt sanctions.

Respondents also argue that Chase has failed to provide "clear and convincing evidence" that Respondents violated the Court's injunction (B&B Opp. at 5; G&H Opp. at 4), but that standard applies only to "whether in fact their conduct complied with the order at issue." *Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990); *see also FTC v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010) ("The decisions of our Court and our predecessor court have held that substantial, diligent, or good faith efforts are not enough; the only issue is compliance."). Because Respondents do not deny that they have filed lawsuits that seek monetary relief payable to settlement class members, Chase has met the standard for issuance of a show cause order.

CONCLUSION

For the foregoing reasons, Chase respectfully asks the Court to order Respondents to show cause why they should not be held in contempt of this Court's injunction.

Dated: October 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2012, I electronically filed Chase's Reply Memorandum In Support Of Its Motion For Show Cause Order using the ECF system, which will send a notification of such filing to the counsel of record who have entered appearances in this action. In addition, I served a true and correct copy of Chase's Reply Memorandum In Support Of Its Motion For Show Cause Order via e-mail and first-class mail on the following individuals:

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