IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL NO. 1:12-cv-00361-RMC**
v.	)	
	)	**UNITED STATES' OPPOSITION TO WRAY'S MOTION TO INTERVENE**
BANK OF AMERICA CORP., *et al.*,	)	
	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO WRAY'S MOTION TO INTERVENE, PETITION FOR A TEMPORARY RESTRAINING ORDER, AND MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Raymond Wray has sought to intervene in the present action brought by the United States and forty-nine states under the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. app. § 501, *et seq*. Wray seeks to intervene to set aside or amend the Consent Order with Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc. (collectively "Citi") with the goal of removing the release provision of the Consent Order relating to interest rate relief. The United States opposes the motion. First, Wray is not an aggrieved person alleging a violation related to this action under Section 597(c) of the SCRA because his request for interest rate protection occurred in November 2002, over five years prior to the period under review pursuant to the Consent Order, January 1, 2008 through April 4, 2012. Second, this case concluded amid significant, nationwide publicity over a period of months in a Consent Order issued by this Court twenty months prior to this motion. Consequently, Wray's intervention is untimely because, through counsel, he knew or should have known of the settlement. Intervention would unduly delay the

implementation of the Consent Order, prejudicing the United States in its ability to obtain relief on behalf of the servicemembers who requested interest rate relief within the scope of the Consent Order.

Wray has also sought a temporary restraining order and preliminary injunction to prevent Citi from sending the releases and letters approved by the United States and this Court. First, Wray's motion should fail because he is unlikely to succeed on a motion to set aside or modify the judgment, having filed outside the time required by Fed. R. Civ. P. 60(c)(1) for a Fed. R. Civ. P. 60(b)(1) motion. Second, Wray and other servicemembers are unlikely to suffer irreparable harm because the Consent Order only binds servicemembers who voluntarily choose to participate. Moreover, the United States' approval of the letter and release, as well as this Court's approval of those documents, serve to safeguard the servicemembers' interests. Finally, the balance of equities tips in favor of preventing undue delay in the implementation of the Consent Order, and the public interest would be best served by not prejudicing the United States in its ability to satisfy its claims on behalf of the servicemembers.

II. BACKGROUND

The United States and the Attorneys General of forty-nine states filed their Complaint and Consent Orders on March 12, 2012, alleging, among other claims, that Defendants Bank of America Corp, *et al.*, violated the provisions of the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. app. §§ 521, 527, and 533, related to foreclosures and the reduction of interest rates in connection with residential mortgages. Complaint ¶¶ 97-101, ECF 1. On April 4, 2012, the Court entered the negotiated Consent Orders. ECF 10-14.

The Consent Order with Citi releases:

the United States' potential civil claims under the Servicemembers Civil Relief Act

> ("SCRA"), 50 U.S.C. app. § 501, *et seq.*, arising prior to the date of this agreement against Servicer [Citi] with respect to the servicing of residential mortgages, under the provisions of the SCRA related to (a) mortgage foreclosure and (b) the prohibition against charging more than 6% interest on SCRA-covered mortgaged debt after a valid request by a servicemember to lower the interest rate and receipt of orders.

Consent Order, Ex. H 1, ECF 12. The interest rate review established by the Consent Order relates only to individuals who "submitted a request either orally or in writing for protection under Section 527 of the SCRA, from January 1, 2008 – present [entry of the Consent Order on April 4, 2012]." Consent Order, Ex. H(II)(b), ECF 12. Pursuant to the Consent Order, the United States will identify, through an audit process, servicemembers who did not receive their reduced interest rates under the SCRA. Consent Order, Ex. H(II)(b) 6-7. Once the United States identifies to Citi a group of individuals as aggrieved persons and the amounts of the payments to be made to each, the Consent Order requires that Citi send the letter and release attached as exhibits to the Consent Order within sixty days. *Id*. at 7. Upon receipt of this notice, the servicemember may elect to sign the release approved by this Court in exchange for the payment negotiated for him or her under the terms of the Consent Order. *Id*. at 7-8.

On December 21, 2012, Wray filed a Complaint in the District of South Carolina against CitiMortgage, Inc., alleging violation of the interest rate provision of the SCRA, 50 U.S.C. app. § 527. *Wray v. CitiMortgage, Inc.*, Case No. 3:12-cv-3628-CMC (D.S.C. 2012). Wray alleges that in November 2002, Citi recognized his entitlement to interest rate relief under the SCRA but issued a subsidy each month in an amount intended to equal the excess interest owed on Wray's account, rather than re-amortizing the mortgage at an interest rate of six percent. Wray Compl. ¶ 13-14, ECF 126 Ex. 2. On December 24, 2013, Wray filed his motion to intervene in the present action seeking a temporary restraining order, a preliminary injunction and, ultimately, modification of the previously negotiated and entered Consent Order to remove the release

provision of the Citi Consent Order at Exhibit H(II)(b) . Pl.'s Mem. in Support of Mot. Intervene, ECF 126.

III. ARGUMENT

Federal Rule of Civil Procedure 24(a)(1) and Section 597(c) of the SCRA provide an aggrieved person an unconditional right to intervene, provided that the motion to intervene is timely filed and alleges a violation the civil action is commenced to address. Rule 24(a) provides that "[o]n timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute." The SCRA provides such an unconditional right, stating, "[u]pon timely application, a person aggrieved by a violation of this Act with respect to which the civil action is commenced may intervene in such action." 50 U.S.C. app. § 597(c). *See United States v. Marsten Apartments*, 175 F.R.D. 265, 269 (E.D. Mich. 1997) (finding an unconditional right to intervene where the Fair Housing Act stated that "any person may intervene in a civil action commenced by the Attorney General which involves an alleged discriminatory housing practice with respect to which such person is an aggrieved party"); *United States v. Henry,* 519 F. Supp. 2d 618, 621-22 (E.D. Va. 2007).

A. Wray's Motion to Intervene Should Be Denied Because He Is Not Aggrieved by a Violation Addressed by this Action

Wray does not allege a violation of the SCRA that this civil action was commenced to address and, therefore, is not an "aggrieved person" who may intervene in this action pursuant to Section 597(c) of the SCRA. Wray admits that his motion to intervene concerns only the interest rate portions of the Consent Order. Mot. to Int. ¶ 8, ECF 126. Although the Complaint does not specifically limit the time period of the alleged interest rate violations, the Consent Order, which was filed simultaneously with the complaint, specifically limits the scope of the interest rate

review to individuals who "submitted a request either orally or in writing for protection under Section 527 of the SCRA, from January 1, 2008 – present [entry of the Consent Order on April 4, 2012]." Consent Order, Ex. H(II)(b), ECF 12. Wray's Proposed Complaint alleges a request in 2002, over five years prior to the review period in this action. Wray Compl. ¶ 13, ECF 126. Wray seeks to represent "all persons entitled to SCRA relief possessing a mortgage, trust deed, or other security in the nature of a mortgage with CitiMortgage, Inc. from November 1, 2002 to the present whose mortgage, trust deed, or other security bore interest in excess of six percent." *Id.* at ¶ 17. A class of this breadth, were it to be certified, could include individuals who requested protection within the review period provided in this action. However, since motions for class certification are not due in *Wray v. CitiMortgage, Inc.* until August 29, 2014, it will be over seven months before we know if a class will be certified. *Wray v. CitiMortgage, Inc.*, Consent Amended Scheduling Order, ECF 34.

B. Wray's Motion to Intervene Should Be Denied Because It Is Untimely

Plaintiff's motion to intervene is untimely under Section 597(c) of the SCRA and Fed. R. Civ. P. 24(a). The timeliness of an intervention motion "is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). The trial court has discretion to determine the timeliness of a motion to intervene. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (citations omitted). Where the motion is deemed untimely, "there is no need for the court to address the other factors that enter into an intervention analysis." *Associated Builders*

& Constr., Inc. v. Herman, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (citing *NAACP v. New York*, 413 U.S. 345, 369 (1973)). Even keeping in mind that "a court should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right than if it is permissive intervention," *AT&T*, 642 F.2d at 1295, Plaintiff's motion to intervene must fail when all the circumstances are considered.[1]

i. Plaintiff, through Counsel, Knew or Should Have Known that the Consent Order Could Affect His Rights Long Before He Moved to Intervene

The United States Court of Appeals for the District of Columbia Circuit has held that the relevant date with regard to whether a motion to intervene is timely is when the party seeking to intervene "knew or should have known that any of its rights would be directly affected by this litigation." *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 433-34 (D.C. Cir. 1989) (*rev'd on other grounds sub nom. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)). Plaintiff's intervention motion was filed twenty months after the Court entered the Consent Order, and twenty-two months after the nationwide media coverage of the settlement began. As explained below, his motion is untimely because Plaintiff's counsel has known or should have known since at least April 2012, and arguably since February 2012, that the SCRA relief in the Consent Order could affect Plaintiff's rights.

Plaintiff protests that he was not aware of the SCRA relief in the Consent Order until opposing counsel in the class action lawsuit explained in a telephone conference with the Court

[1] Wray does not allege that he meets the standards of Fed. R. Civ. P. 24(a)(2) or (b)(1)(B), nor can he. Rule 24(a)(2) and (b)(1)(B) each require that the motion be timely filed; Wray's motion is untimely as explained at subsection III(B) *infra*. Wray's motion also fails under Rule 24(a)(2) for lack of an "interest relating to the property or transaction that is the subject of the action." As explained at subsection III(A) *supra*, Wray's interest relates to a claim that is outside the scope of the Consent Order.

that the SCRA review process under the Consent Order had been available in public documents since 2012. *See* Pl.'s Mem. in Support of Mot. Intervene 21-22, ECF 126 (quoting transcript). However, it is clear that Plaintiff's counsel Richard Harpootlian had actual or constructive knowledge about the Consent Order as early as April 2012 because this Consent Order partially settled a lawsuit in which Mr. Harpootlian represented a whistleblower, Lynn Szymoniak, in a lawsuit brought under the South Carolina False Claims Act. *See* Consent Order, Ex. A 45-46, ECF 14-1 ("The Federal Payment Settlement Amount includes resolution of the following qui tam actions: . . . (iii) $95,000,000 from those claims in *United States ex rel. Szymoniak v. [SEALED]*, Civ No. 0:10-cv-01465 (D.S.C.) and in *United States ex rel. Szymoniak v. [SEALED]*, Civ No. 3:10-cv-575 (W.D.N.C.) that are expressly released by the United States in this litigation"); *see also* Exhibit A. Although Ms. Szymoniak's lawsuit did not relate to the SCRA portion of the Consent Orders, it is not unreasonable to assume that an attorney would familiarize himself with the entire settlement under which his client received $18 million. *See* Exhibit B.

Even assuming, *arguendo*, that Mr. Harpootlian was not actually aware of Exhibit H to the Consent Order after his own client received money from the settlement, he had constructive notice of the settlement, which should have prompted a duty to investigate the details upon his retention by Wray. The D.C. Circuit Court has held that "[t]he appropriate starting point for the timeliness inquiry is not the date that the would-be intervener became aware of the existence of the litigation, but the date the intervener became aware of the implications of the litigation." *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 156 (D.D.C. 2002) (citing *Nat'l Wildlife Federation v. Burford*, 878 F.2d 422, 433–34 (D.C. Cir.1989), *rev'd on other grounds*, 497 U.S. 871 (1990)). On February 9, 2012, ten months before Plaintiff filed his class action lawsuit, the United States announced and the national media reported extensively on the negotiated settlement, including the

SCRA relief. *See* Exhibits C-F. The coverage began before the Court had approved entry of the Consent Order – in fact, before the Complaint had even been filed – and media coverage continues to this day. Much of the coverage publicized the website for the Consent Order, http://www.nationalmortgagesettlement.com , which thoroughly describes the SCRA relief. It is not unreasonable to require a party, through his counsel, to timely investigate whether such a settlement could affect his case. An attorney who intended to file a lawsuit alleging an SCRA violation should have been aware of the very public discussion of the largest SCRA-related relief in history, and the related publicly-available Consent Order.

In *Burford*, the prospective intervenor filed its motion seventy-three days after obtaining actual notice that the lawsuit affected its rights. 878 F.2d at 434. The D.C. Circuit Court affirmed the district court's denial of intervention for all but one claim on the ground that publication of a preliminary injunction order in the Federal Register was sufficient to provide constructive notice of the prospective intervenor's general claims, and a motion to intervene filed four months later was untimely. *Id*. In the instant case, the extensive media coverage of the settlement provided more prominent notice than publication in the Federal Register, and Plaintiff's twelve to twenty-month delay2 in moving to intervene was much longer than the delay in *Burford*.

Plaintiff next contends that even if he had knowledge "in a general sense" of the SCRA portions of the settlement, "there is no reason why he should have known or suspected that the DOJ had negotiated in his absence for the resolution of servicemembers' individual SCRA claims" because the website describing the settlement does not provide specific information about the relief. Pl.'s Mem. in Support of Mot. Intervene at 28. Yet, the "Benefits to Servicemembers and

2 The United States is unaware of how far in advance of the filing of the complaint in December 2012 Wray retained Mr. Harpootlian as his counsel.

Veterans" fact sheet - which is prominently available on the very page of the settlement website that Plaintiff cites, as well as on the website's home page - thoroughly explains the SCRA interest rate relief in the settlement:

> **Interest Charged in Excess of 6 percent:** To resolve allegations of liability that have not been previously settled, Bank of America, Citi, Wells Fargo, and Ally have agreed to conduct a thorough review, overseen by the Department of Justice's Civil Rights Division, to determine whether any service member, from Jan. 1, 2008 to the present, was charged mortgage interest in excess of 6 percent after a request to lower the interest rate in violation of the SCRA. Servicers are required to provide a payment equal to a refund plus interest of any amount in excess of 6 percent, plus triple the amount refunded or $500 (whichever is larger). This compensation is in addition to the $25 billion settlement.

Exhibit G.

In sum, despite his contentions otherwise, Plaintiff's counsel has had either actual or constructive knowledge that the Consent Order included SCRA relief at least since the Court's approval of the Consent Order in April 2012 – eight months before Plaintiff's class action suit was filed. Reasonable due diligence would have revealed that the details of this relief could affect Wray's rights. For these reasons, Plaintiff's motion to intervene should be denied as untimely.

ii. Wray's Motion to Intervene Should Be Denied as Untimely Because There Has Been No Change in the Adequacy of the United States' Representation

Plaintiff cites *Smoke v. Norton*, 252 F.3d 468 (D.D.C. 2001) for the proposition that the D.C. Circuit Court of Appeals allows parties to intervene even after a judgment has been entered. Yet *Smoke* actually illustrates that the D.C. Circuit Court of Appeals generally grants post-judgment interventions only for the limited purpose of appeal due to a change in the adequacy of representation. In *Smoke*, tribal officers moved to intervene to pursue an appeal after the district court granted summary judgment against the United States, which had been representing the officers' interests but had indicated it might not appeal. *Id*. at 470. The D.C. Circuit Court

reversed the district court's denial of the intervention motion, holding that "[i]n these circumstances a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because 'the potential inadequacy of representation came into existence only at the appellate stage.'" *Id.* at 471 (quotation omitted); *See also Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (granting intervention to appeal after judgment and explaining that the determinative factor was the change in the adequacy of representation due to the representative's failure to appeal). The *Smoke* court predicated the timeliness of a post-judgment motion to intervene on the specific fact that the prospective intervenors' representation in the case did not become inadequate until after the summary judgment order was issued and the United States "equivocated" as to whether it would appeal. *Id.* In contrast to the *Smoke* case, Wray seeks to intervene in the absence of any change in the United States' representation, nearly two years after the case has reached settlement and the Consent Order has been entered. In contrast to the intervenors in *Smoke* and *Smuck*, in the instant post-judgment intervention motion, Plaintiff cannot make a strong showing – or any showing at all – that he has a cognizable interest in this case because, as discussed previously, he does not allege an SCRA violation that is in the scope of the Consent Order. As a result, Plaintiff's interests cannot be represented, adequately or inadequately, in this lawsuit.

iii. Wray's Motion to Intervene Is Untimely Due to Its Broad Purpose of Amending the Consent Order

Wray's motion to intervene should be denied because it seeks intervention for the broad purpose of delaying and modifying the Consent Order to the benefit of his putative class action litigation. In *United States v. AT&T*, the D.C. Circuit Court of Appeals connected the issue of timeliness with the purpose of the intervention, stating that a post-judgment intervention motion

would be untimely for a broad purpose during the pendency of the action, but was timely for a limited purpose such as taking an appeal. *Id*. at 1294. In contrast to the limited purpose of the intervention in *AT&T*, Plaintiff asks no less than for the Court to amend the SCRA relief set forth in the Consent Order, provisions that have been final since the Court approved them twenty months ago.

iv. Wray's Motion to Intervene Is Untimely Due to the Prejudice to Existing Parties Presented by Amending the Consent Order

The D.C. Circuit Court of Appeals has denied intervention motions that would interfere with a settlement. In *Moten v. Bricklayers, Masons and Plasterers International Union of America, et al.,* 543 F.2d 224, 226-27 (D.C. Cir. 1976), the district court denied an employer's motion to intervene in a class action settlement between its employee unions so as to consolidate a different lawsuit that the unions were bringing against it. The employer moved to intervene just before the settlement agreement was to become final, and the district court denied the motion without explanation and entered the settlement. *Id.* at 227. The circuit court affirmed the district court's denial of intervention as untimely, due to the prejudice to the existing parties:

> any measure of timeliness of the motion to intervene must be cast against the backdrop of two years of controversy between the unions which now have reached settlement. The District Court would have been well within the bounds of appropriate judicial discretion had it chosen to deny intervention to avoid risk of the hard-won settlement package becoming undone.

Id. at 228.

The risk of prejudice to the existing parties in the instant case is more profound than in *Moten* because the settlement has been in effect for nearly two years. Furthermore, the implementation of the Consent Order is well underway: the independent consultants have been retained for over sixteen months and have been conducting reviews for violations of the

foreclosure and/or interest rate provisions for over eight months. Consequently, Plaintiff's intervention at this late stage could undo the finality of the judgment, substantially impair the implementation of the Consent Order, and delay relief to the aggrieved persons.

C. Even if Wray's Motion to Intervene is Granted, His Motion for a Temporary Restraining Order and a Preliminary Injunction Should Be Denied

"Preliminary injunctive relief is an extraordinary measure, and . . . the power to issue such exceptional relief should be exercised 'sparingly.'" *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003). In order to obtain a preliminary injunction, a petitioner must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest. *Winter v. Natural Resources Defense Counsel, Inc., et al.*, 555 U.S. 7, 20 (2008). The same standard applies to both preliminary injunctions and temporary restraining orders. *Experience Works, Inc.*, 267 F. Supp. 2d at 96.

i. Wray Is Unlikely to Succeed on the Merits of a Motion to Alter or Amend the Judgment

Wray is unlikely to succeed on the merits of a Fed. R. Civ. P. 60(b) motion to alter or amend the Consent Order because such a motion would be filed over twenty months after the Consent Order was entered by the Court. Fed. R. Civ. P. 60(c)(1) specifically requires that motions based upon "surprise" under Rule 60(b)(1) be filed "no more than a year after the entry of the judgment or order or the date of the proceeding." Wray states that "but for subsection (c)(1) . . . Wray would be entitled to relief from the Consent Judgment due to 'surprise' as contemplated in subsection (b)(1)." Pl.'s Mem. in Support of Mot. Intervene

33, ECF 126. In an attempt to avoid the application of Fed. R. Civ. P. 60(c)(1), Wray argues that his motion can be heard under subsection 60(b)(6). "Rule 60(b)(6) permits a court to grant relief from a final judgment for 'any other reason justifying relief. . . .' The courts have universally interpreted 'other' to mean other than the reasons specified in subsections 60(b)(1)–60(b)(5). . . .d *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 249 (D.C. Cir.1987). Wray's motion by his own admission falls under the "surprise" category of subsection 60(b)(1). Controlling precedent from this Circuit forbids the use of Rule 60(b)(6) to obviate the requirements of Rule 60(c)(1). "[I]t is generally accepted that cases falling under Rule 60(b)(1) cannot be brought within the more generous Rule 60(b)(6) in order to escape the former's one year time limitation." *Williamsburg Wax*, 810 F.2d at 249. Likewise, the district court has held:

> someone proceeding under one of the first three subsections of Rule 60(b) must file his motion within one year after entry of the judgment at issue. Fed. R. Civ. P. 60(c)(1). . . . [H]e cannot rely on the 60(b)(6) catchall provision to circumvent the 60(c)(1) limitations on 60(b)(1)-(3). . . .[a]ny other interpretation of 60(b)(6) would render the limitations on motions under 60(b)(1)-(3) meaningless.

S.E.C. v. Bilzerian, 729 F. Supp. 2d 9, 14 (D.D.C. 2010).

Wray cites only one case in support of his request that the Court consider his request under Rule 60(b)(6) rather than Rule 60(b)(1). In *Bituminous Casualty Corp. v. Garcia*, 223 F.R.D. 308, 310, 314 (N.D. Tex. 2004), the court considered a motion to set aside a default judgment that had been filed just over one month after entry of default judgment, "well within one year of the judgment." The court held "that Intervenors' claim fits within the ambit of Rule 60(b)(1)." 223 F.R.D. at 313. Therefore, *Bituminous Casualty* does not stand for the proposition that a motion appropriately filed under Rule 60(b)(1) may be

considered a Rule 60(b)(6) motion if outside the time requirement of Rule 60(c)(1). Moreover, *Bituminous Casualty* concerned intervenors whose claim was practically "resolved against them on a default judgment," a default judgment that resulted from "no intentional choice" of the intervenors. 223 F.R.D. at 313. In contrast, the current Consent Order does not "releas[e] the Wray class's individual SCRA claims," as Wray argues. Pl.'s Mem. in Support of Mot. Intervene 34, ECF 126. Rather, the Consent Order offers each servicemember the option of participation. Absent the individual's intentional choice to sign a release and receive the compensation negotiated on his or her behalf by the United States, there is no release of his or her claim.

ii. Wray Is Unlikely to Suffer Irreparable Harm in the Absence of a Preliminary Injunction or Temporary Restraining Order

Wray cannot satisfy the requirement to demonstrate that he will suffer irreparable harm in the absence of a preliminary injunction or temporary restraining order. Neither Wray nor any other servicemember is bound, nor are their rights adjudicated, by the Consent Order unless he or she voluntarily chooses to participate. Consequently, there is no harm to Wray, and he may still pursue an independent action to adjudicate his own individual rights under the SCRA.

a) Fed. R. Civ. P. 23 Class Action Standards Do Not Apply to Enforcement Actions by the Attorney General

As the Supreme Court has explained, the requirements of Fed. R. Civ. P. 23 are inapplicable to cases brought by the Attorney General to enforce the law, even where such cases award specific relief to particular individuals. *See General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity*, 446 U.S. 318, 327 (1980) (collecting cases).

Nevertheless, Wray relies on Fed. R. Civ. P. 23 class action standards to assert that the Consent Order will cause irreparable damage to him and other servicemembers. He argues that "due process has always required that the disposition of class claims be predicated on full and fair notice to the affected class members so they have an opportunity to present their objections to the proposed settlement *before* it is approved." Mt. to. Int. 38, ECF 126. Wray refers to this standard as a "basic constitutional threshold." *Id*. However, all of the cases that Wray cites in support of this "basic constitutional threshold" concern class action litigation under Rule 23. *See Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1196 (11th Cir. 1985); *Cobell v. Salazar*, 679 F.3d 909, 912 (D.C. Cir. 2012); *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 220 (2d Cir. 2012); *Fidel v. Farley*, 534 F.3d 508, 510 (6th Cir. 2008). Moreover, the class action standards, which seek to preserve an individual's access to the right to withdraw, *see Kleiner*, 751 F.2d at 1201-2, are particularly ill-suited to this case. Unlike class actions under Fed. R. Civ. P. 23, which bind all class members unless the individual elects to withdraw from the class, *see Kleiner*, 751 F.2d at 1202, the compensation process outlined in the Consent Order requires each individual servicemember's intentional, voluntary choice to participate.

b) The Notice and Release to Be Provided to the Aggrieved Servicemembers Were Negotiated by the Parties and Approved by the Court

Wray argues that the release and accompanying letter included in the Exhibits to the Consent Order constitute *ex parte* communications by Citi and allow Citi to "opportunistically discharge" the individual rights of servicemembers. Pl.'s Mem. in Support of Mot. Intervene 37-40, ECF 126. Wray rests this argument upon *Kleiner v. First Nat. Bank of Atlanta*, a class-action case upholding sanctions against a bank that had solicited

requests from class members to be excluded from the class in violation of a protective order and without notice to opposing counsel or the court. 751 F.2d 1193 (11th Cir. 1985). In *Kleiner,* at the time that the bank made the communications, the court had issued a protective order limiting communications and had taken the bank's solicitation program under advisement. 751 F.2d at 1196-97. Nevertheless, the bank engaged in a telephone campaign to solicit exclusions during the judge's two-week vacation. *Id.* at 1197. The court upheld the lower court's ruling that the communication violated the protective order as well as a local court rule prohibiting "opt out" solicitations. *Id.* at 1199-1201. In this case, the letters and releases have been approved by the Court as exhibits to the Consent Order. In contrast to having been "shrouded" in "secrecy and haste" as in *Kleiner*, 751 F.2d at 1197, the negotiated Consent Order has been memorialized in public record since April 2012. Wray's reliance on *Kleiner* is misplaced; the communications required by the Consent Order constitute neither *ex parte* communications nor an opportunistic attempt to discharge servicemembers's individual rights.

iii. The Balance of Equities Does Not Tip in Favor of Delaying Implementation of the Negotiated Consent Order as Approved by the Court, and an Injunction Would Not Be In the Public Interest

The balance of the equities does not tip in favor of Wray's motion for a temporary restraining order and preliminary injunction. Rather, the balance of equities favors preventing undue delay in the implementation of the Consent Order entered over twenty months ago. The prejudice to the existing parties is extensive, as explained in subsection III(B)(iv), *supra*. Consequently, the public interest would best be served by not prejudicing the United States in its ability to obtain relief on behalf of servicemembers who requested interest rate relief within the scope of the Consent Order.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court deny Wray's Motion to Intervene in this case.

Dated this 22nd day of January, 2014.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General
Civil Division

JOCELYN SAMUELS
Acting Assistant Attorney General
Civil Rights Division

STEVEN H. ROSENBAUM
Chief
Housing and Civil Enforcement Section

ELIZABETH A. SINGER
Director, U.S. Attorneys' Fair Housing Program
Housing and Civil Enforcement Section

/s/ William C. Edgar
WILLIAM C. EDGAR
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
601 D Street, N.W., Room 9554
Washington, DC 20004
Tel: (202) 353-7950
Fax: (202) 514-0820
Email: William.Edgar@usdoj.gov
Counsel for Plaintiff

/s/ Amber R. Standridge
AMBER R. STANDRIDGE
HOLLY LINCOLN
Trial Attorneys
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - G St.
Washington, DC 20530
Tel: (202) 514-4713
Fax: (202) 514-1116
Email: Amber.Standridge@usdoj.gov
Holly.Lincoln@usdoj.gov
Counsel for Plaintiff