IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULIE SU, Acting Secretary of the United States Department of Labor, et al. Plaintiffs, v. ESTATE OF FRANK E. FITZSIMMONS, et al., Defendants.	)	No. 78 C 342 Judge Thomas M. Durkin
JULIE SU, Acting Secretary of the United States Department of Labor, Plaintiff, v. LORAN W. ROBBINS, et al., Defendants.	)	No. 78 C 4075
JULIE SU, Acting Secretary of the United States Department of Labor, Plaintiff, v. ALLEN M. DORFMAN, et al., Defendants.	)	No. 82 C 7951

ACTING SECRETARY OF LABOR'S SUPPLEMENTAL FILING IN OPPOSITION TO DISSOLUTION OF THE CONSENT DECREES IN CASE NOS. 78-C 342, 78 C 4075, AND 82 C 7951 REGARDING THE CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HEALTH AND WELFARE FUND

Plaintiff Julie Su, Acting Secretary of the United States Department of Labor ("the Secretary"), submits this supplemental brief in response to the Court's May 30, 2023, Minute Order requiring the Secretary to address "whether the Secretary believes that the consent decrees' objectives have been achieved." The Secretary acknowledges that the consent decrees have worked to achieve their purposes, but the Secretary respectfully disagrees that it is time to dissolve the decrees. The consent decrees have achieved their purposes while in effect. If the consent decrees are dissolved, the Secretary cannot assure the Court that their salutary effects will continue. In the Secretary's view, the consent decrees continue to provide benefits to the participants and beneficiaries of the Central States, Southeast and Southwest Areas Pension Fund and Health & Welfare Fund (collectively "the Funds").

1. In 1978, the Department filed suit against Frank E. Fitzsimmons and others (currently captioned in the ECF system as Reich v. Fitzsimmons, et al., No. 78-C-342 (N.D. Ill.), alleging, among other things, that the trustees of the Central States, Southeast and Southwest Areas Pension Fund (the "Pension Fund") had summarily approved huge loans to applicants who were alleged to be fronts for organized crime. Many of the loans were delinquent and the Pension Fund trustees were not taking action to protect the Pension Fund. The Pension Fund consent decree, entered in September of 1982 (the "Pension Consent Decree"), was primarily focused on preventing a recurrence of such conduct. The Consent Decree accomplished this by requiring that all Fund assets "except for those liquid assets held in reserve for payment of benefits and administrative expenses, . . . shall . . . be managed for the duration of this Consent Decree by a named fiduciary, as defined in section 402(a)(2) of ERISA" appointed by the Court. See 1982 Pension Consent Decree at 5. (Exh. A.)

2. In 1978, the Department also filed suit against Loran W. Robbins and others (currently captioned in the ECF system as Marshall v. Robbins, et al., No. 78-C-4075 (N.D. Ill.), and in 1982, the Department filed suit against Allen M. Dorfman and others (currently captioned in the ECF system as Marshall v. Dorfman, et al., No. 78-C-7951 (N.D. Ill.). The Robbins and Dorfman cases alleged mismanagement of plan assets by the trustees of the Central States, Southeast and Southwest Areas Health and Welfare Fund (the "Health & Welfare Fund"). The Health & Welfare Fund consent decree, entered in February of 1985 (the "H&W Consent Decree"), was primarily focused on preventing a recurrence of such conduct. As with the Pension Consent Decree, the H&W Consent Decree accomplished this by requiring that all Health & Welfare Fund assets be managed by a named fiduciary, as defined in section 402(a)(2) of ERISA appointed by the Court. Hereinafter, the Pension Consent Decree and the H&W Consent Decree are collectively referred to as the "Consent Decrees."

3. The Independent Special Counsel's April 4, 2023, Quarterly Report, "recommended that the consent decrees in 78 C 342, 78 C 4075, and 82 C 7951 be dissolved, and this Court's jurisdiction over these cases be terminated, because the consent decrees' objectives have been fully achieved." The Secretary views this recommendation as equivalent to a motion under Rule 60(b)(5) to dissolve the injunction. Rule 60(b)(5) provides for relief from a final order "if it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). "Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments." *Tapper v. Hearn*, 833 F.3d 166, 170 (2d Cir. 2016) (internal quotation omitted). Rule 60(b)(5) "may not be used to challenge the legal conclusions on which a prior judgment or order rests," however a party may seek relief under the "no longer equitable" criterion by making a showing of "'a *significant* change either in factual conditions or

in law'" such that the order's continued enforcement is "'detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (emphasis added, quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). "A change in the facts qualifies as significant if it makes compliance with the decree 'substantially more onerous,' 'unworkable because of unforeseen obstacles,' or 'detrimental to the public interest.'" *Salazar by Salazar v. D.C.*, 896 F.3d 489, 492 (D.C. Cir. 2018) (quoting *Rufo*, 502 U.S. at 384). Because relief under Rule 60(b) is "extraordinary," it may be invoked only upon a showing of exceptional circumstances. *McCormick v. City of Chicago*, 230 F.3d 319, 327 (2000) (internal citation omitted); *Eskridge v. Cook County*, 577 F.3d 806, 810 (2009) (internal citation omitted).

4. The Secretary respectfully disagrees that "changed", or "exceptional circumstances" exist in this case to justify relief under Rule 60(b)(5). Neither the Independent Special Counsel, nor the Funds have demonstrated any changed or exceptional circumstances warranting the dissolution of the Consent Decrees. In addition, neither the Independent Special Counsel, nor the Funds have offered any assurances that the Consent Decrees' specific objective of protecting the Funds' assets can be maintained if the Consent Decrees are dissolved. *See Flores*, 557 at 447. The conduct underlying the Consent Decrees involved repeated violations of ERISA when the Funds made inappropriate loans with unfavorable terms spanning many years. Dissolution of the Consent Decrees and placing management of the Funds' assets back in the hands of the Boards of Trustees without any constraints on their actions, places the participants and beneficiaries at greater risk than they currently face. Further, "the mere passage of time does not provide a sufficient reason to terminate [an] injunction," *SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001), and "obedience to a mandate 'provides no justification for dissolving the injunction,'" because "[c]ompliance is just what the law expects." *SEC v. Worthen*, 98 F.3d 480,

482 (9th Cir. 1996) (quoting *SEC v. Advance Growth Capital Corp.*, 539 F.2d 649, 652 (7th Cir. 1976)). As one court has noted, "to permit modification of the injunction here based on mere compliance would threaten the efficacy of this remedy as a tool in furtherance of the public interest," and "[t]he fact that the risk of future violations has not materialized to date does not, by itself, indicate that the injunction no longer serves the public interest." *CFTC v. Kelly*, 736 F. Supp. 2d 801, 804 (S.D.N.Y. 2010); accord *SEC v. Alexander*, 2013 WL 5774152, at *3–4 (E.D.N.Y. Oct. 24, 2013) (in case with "a remorseful defendant who has conducted himself well, even admirably, since his conviction," court held that "[t]he passage of time is not a sufficient change in factual circumstances to alter the equities in this case"). Likewise, as the Supreme Court held in *Rufo*, Rule 60(b)(5) does not permit relief from an injunction merely because "it is no longer convenient" to abide by the terms of the decree. *Rufo*, 502 U.S. at 383.

5. Moreover, there are no "collateral consequences of the [Consent Decrees that] [] demonstrate that [their] [] continued application is inequitable." The Third Circuit has observed that because "it is unlikely that all of the factors will tilt in one direction, the court must balance the hardship to the party subject to the injunction against the benefits to be obtained from maintaining the injunction." *Bldg. & Const. Trades Council v. N.L.R.B.*, 64 F.3d 880, 888 (3d Cir. 1995), citing 7 James W. Moore, Moore's Federal Practice ¶ 60.26[4], at 60–258 to 60–260 (2d ed. 1995) ("A continuing injunction may be modified when the modification would work no harm to the one for whom the injunction ran and would serve a beneficial purpose for the movant. A subsequent change in the controlling facts on which the injunction rested . . . may warrant a modification or vacation of the continuing restraint."). In making this determination, "the court should determine whether the objective of the decree has been achieved and whether continued enforcement would be detrimental to the public interest," keeping in mind that "the

interest in finality of judgments . . . should not be either deprecated or ignored." *Id.* Here, although, the primary objective of the Consent Decrees has been achieved, continued enforcement is not detrimental to the public interest. On the contrary, there are significant benefits to the public in maintaining the Consent Decrees. The primary purpose of the Consent Decrees is to avoid and deter future instances of egregious fiduciary misconduct. The Consent Decrees have served that purpose, and their dissolution, without a greater justification, would be contrary to the public interest. *See, e.g.*, *SEC v. Tsao*, 317 F.R.D. at 34-35 (noting that modifying decree over SEC's objections could lead to numerous defendants with lifetime bars seeking to have their bars lifted or reduced, and "[t]his would be detrimental to the public interest in the finality of judgments, and, in particular, to the [agency's] ability to negotiate settlement agreements that include permanent injunctions"); *CFTC v. Kelly*, 736 F. Supp. 2d at 804 ("The fact that the risk of future violations has not materialized to date does not, by itself, indicate that the injunction no longer serves the public interest.").

6. This is especially true here, where the Pension Fund has recently received $35.8 billion in taxpayer assistance through the Pension Benefit Guaranty Corporation's (PBGC) Special Financial Assistance (SFA) program. The American Rescue Plan Act of 2021 authorized the PBGC to provide assistance through the SFA program to multiemployer pension plans at risk of insolvency if they met the criteria established by the PBGC. In December 2022, the PBGC approved the Pension Fund's application, resulting in $35.8 billion in taxpayer assistance flowing to the Pension Fund. Under the terms of the Consent Decrees, the Secretary consults with the Funds on the appointment of trustees to their respective Board of Trustees, the appointment of their Independent Fiduciary who manages the Funds' assets, and their respective investment policy statement (IPS), among other things as specified in the Consent Decrees. The

Court recently approved the Pension Fund's IPS addressing how the $35.8 billion in taxpayer provided SFA monies and the Pension Fund's legacy assets will be managed. The Secretary consulted with the Pension Fund on its IPS. The Secretary also consults with Health & Welfare Fund on its IPS. The Secretary has also objected to trustee candidates proposed by the Funds over the years. In those instances, the Secretary and the Fund have worked together to secure the appointment of a candidate acceptable to both parties, without requiring Court intervention. The Secretary has also intervened with the Funds where questionable conduct by a trustee has come to light and the Secretary was able to negotiate the trustee's amicable resignation, again without the need for the Court's involvement.

7. The Consent Decrees have worked to achieve their purposes and objectives while in place, specifically because they have been in effect. The Consent Decrees have worked to prevent misconduct because their existence serves as a check on the Funds' operations and management. The Secretary respectfully suggests that the time to test whether the Consent Decrees can be safely dissolved is not when the Pension Fund has just received an unprecedented infusion of $35.8 billion taxpayer funds.

According, the Secretary believes that the Consent Decrees continue to serve the public interest of protecting the benefits provided by ERISA-covered plans, are a useful check on the Funds, and provide benefits to the Funds' participants and beneficiaries, and should remain in place. Therefore, the Secretary objects to the dissolution of the Consent Decrees.

Dated: June 2, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing:

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was served upon the following named individuals both by arranging Notice of Electronic Filing by the Electronic Filing System of the Court upon each of these individuals who is a registered E-Filer (pursuant to the General Order on Electronic Case Filing)

this 2nd day of June 2023.

/s/Wayne R. Berry
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