November 15, 2019

Via ECF and Facsimile

The Hon. Nelson S. Román
The Hon. Charles L. Brieant Jr.
Federal Building and United States Courthouse
300 Quarropas St.
White Plains, NY 10601-4150
Fax: (914) 390-4179

Re: *Bureau of Consumer Financial Protection v. Law Offices of Crystal Moroney, P.C.*, 7:19-cv-01732-NSR

Dear Judge Román:

The Bureau of Consumer Financial Protection (Bureau) writes in response to the November 12, 2019 letter that Law Offices of Crystal Moroney, P.C. (LOCM) submitted seeking a pre-motion conference in connection with its planned Federal Rule of Civil Procedure 59(e) Motion to Vacate the Court's Order of Dismissal of the Bureau's Petition to Enforce Civil Investigative Demand (CID). *See* ECF 27. Pursuant to Your Honor's Individual Rules of Civil Practice 3(A)(ii), the Bureau submits this opposition to LOCM's letter requesting a pre-motion conference within three business days. While the Bureau respectfully requests that the conference set for November 21 be cancelled because this case is moot, the Bureau writes to inform the Court why LOCM's planned motion is baseless. There is no question that this CID-enforcement proceeding brought by the Bureau became moot when the Bureau withdrew the CID at issue, and LOCM will be unable to meet its burden under Rule 59(e).[1] The fact that the Bureau has now issued a new, revised CID that provides LOCM with the additional information it requested about the purpose and scope of the

[1]LOCM also indicates it will seek attorney's fees from the Bureau pursuant to 28 U.S.C. § 1927 or Rule 11. However, litigants cannot recover attorney's fees from agencies of the United States under 28 U.S.C. § 1927 as that statute does not waive the United States' sovereign immunity. *See Cockerham v. United States*, 140 Fed.Cl. 121, 127 (Ct. Fed. Cl. 2018). Furthermore, LOCM has not provided counsel for the Bureau a copy of any motion for sanctions as required by Fed. R. Civ. P. 11(c)(2). Instead, LOCM asserts the Suggestion of Mootness was a "false claim" (although the petition was indeed moot as described above) and accuses the Bureau of "judge-shopping" (although there is no current case or controversy to adjudicate). These bald assertions do not merit the time or attention of this Court.

Bureau's investigation does not change that analysis, nor will it prevent LOCM from raising any defenses it believes are appropriate in the event that the Bureau seeks to enforce the revised CID in court.

I. Factual Background

On November 4, 2019, the Bureau notified LOCM's counsel by email that it was withdrawing the CID that was the subject of the Bureau's petition. *See* Exhibit 1. That same day, the Bureau filed a Notice of Withdrawal of the CID and Suggestion of Mootness. *See* ECF 26. On November 7, the Court entered an order dismissing the Bureau's petition as moot and cancelling the November 8 show cause hearing. *See* ECF 27. Later that day, the Bureau emailed LOCM's counsel to advise its intent to serve a new, revised CID that would provide additional information about the scope of the Bureau's investigation. *See* ECF 28 Ex. 3. On November 8, 2019, LOCM's counsel left a voicemail for the Bureau's Acting Enforcement Director seeking to discuss Rule 59 relief. That same day, counsel for the Bureau left a voicemail for LOCM's counsel, requesting a call back. Rather than return that call, LOCM sent Your Honor a letter requesting a Pre-Motion Conference.

II. The Court Correctly Concluded That This CID-Enforcement Action Became Moot When the Bureau Withdrew the CID at Issue

The sole issue in this case was whether LOCM was obligated to respond to the CID that the Bureau issued to it on June 23, 2017. When the Bureau withdrew that CID and disclaimed any further intent to compel LOCM's compliance with the CID, this case became moot, as this Court already correctly concluded. *See, e.g., Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1089 (D.C. Cir. 2017) (subpoena-enforcement proceeding became moot after the congressional subcommittee that issued the subpoena completed its investigation and "no longer s[ought] to enforce any part of the subpoena"); *Does 1-4 v. U.S. Attorney Office, Dist. of Nevada*, 407 F. App'x 165, 166 (9th Cir. 2010) (challenge to grand-jury subpoena that government no longer sought to enforce was moot). Given that there is no longer any CID for this Court to enforce, granting the relief that LOCM seeks, *i.e.*, a reinstatement of the show cause hearing in this matter, would require the Court to issue an advisory opinion about the enforceability of a CID that has been withdrawn and that neither party seeks to enforce. *See* ECF 17; ECF 25. *See, also, Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinions advising what the law would be upon a hypothetical state of facts.'").

The fact that the Bureau has now issued a new, different CID to LOCM does not change this analysis. Until such time as the Bureau seeks to enforce the new CID in court—which it has not yet done—LOCM is under no binding legal obligation to comply. *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) ("CIDs are not self-enforcing, and non-compliance triggers no fine or penalty. … If a recipient declines to respond to the CID, the Bureau must obtain a court order to enforce it. In that court proceeding, the recipient can raise any relevant legal objection to enforcement of the CID." (internal citation omitted)). Moreover, should the Bureau determine that it is necessary to seek a court order enforcing that revised CID, LOCM will have every opportunity

to raise any defenses it believes it has to the new CID's enforcement—including its constitutional argument. *See id.* LOCM can hardly complain in the interim that the Bureau has now issued a revised CID giving it exactly what it claimed to want: additional information about the scope and purpose of the Bureau's investigation.

III. LOCM is Not Entitled to Relief under Rule 59(e)

Assuming Rule 59(e) applies, LOCM has not met the standard for relief under that rule. The standard to alter or amend an otherwise final judgment is strict, requiring a movant to point to "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 154 F.Supp.2d 696, 701 (S.D.N.Y. 2001) (quoting *Doe v. N.Y. City Dep't Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)). A motion made under Rule 59(e) "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Here, there is no clear error of law, and the fact that the Bureau has elected to issue a new CID in lieu of enforcing the now-withdrawn CID does not justify altering or amending this Court's Order. Nor can LOCM credibly argue that this Court's order dismissing an action against LOCM constitutes a manifest injustice, when it has consistently opposed the Bureau's enforcement of the CID.

What LOCM seeks now is an opportunity to relitigate the constitutionality of the Bureau's structure, when LOCM previously declined to oppose the Bureau's Suggestion of Mootness, and nowhere argues that the constitutionality question issue remains in controversy. To the extent LOCM suggests the Bureau's issuance of a new CID is "new evidence," such evidence is irrelevant as described above. This attempt to reopen litigation is thus an improper use of Rule 59(e). As this court has long recognized, Rule 59(e) "may not be used to plug gaps in an original argument or to argue in the alternative once a decision has been made." *Horsehead Res. Dev. Co., Inc. v. B. U.S. Envtl. Servs., Inc.*, 928 F.Supp. 287, 289 (S.D.N.Y. 1996) (internal citations and quotation marks omitted).

For these reasons, the Bureau respectfully submits that a Pre-Motion Conference is unnecessary.

Respectfully submitted,

/s/ E. Vanessa Assae-Bille
/s/ Jehan A. Patterson
Enforcement Attorneys

cc: Ronald Canter, Esq. (rcanter@rcanterllc.com)