UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KENNETH SPINELLI, et al.,

Plaintiffs,

v.

CAPITAL ONE BANK (USA), N.A. and CAPITAL ONE SERVICES, LLC,

Defendants.

CASE NO.: 8:08-cv-132-T-33EAJ

DEFENDANTS' MOTION TO ENJOIN PROSECUTION OF RELEASED CLAIMS AND FOR SANCTIONS

STATEMENT OF RELIEF REQUESTED

On November 23, 2010, this Court granted final approval of a class action settlement between Capital One Bank (USA), N.A. and Capital One, LLC (collectively, "Defendants"), and a nationwide class ("*Spinelli*"). The settlement agreement that the Court approved contained a broad release of claims, extending to all class members *and* "all those who claim through them or who assert claims on their behalf (including the government in its capacity in parens patriae)." Notwithstanding the scope of the release, certain of the counsel who appeared before this Court and collected substantial fees in connection with the settlement have filed suits on behalf of the Attorneys General of the States of Hawaii and Mississippi, advancing claims that were plainly released in this case.

Defendants respectfully request that this Court enjoin the Attorneys General of the States of Hawaii and Mississippi, and all other persons having actual knowledge of the injunction, from commencing, prosecuting, instituting, continuing, or in any way participating in the commencement or prosecution of any suit asserting claims on behalf of individual consumers which have been settled and released in this action. Specifically, Capital One requests that the Court enjoin the Attorneys General and any others with actual knowledge from asserting any rights on behalf of, or seeking any form of monetary relief to be paid over to, consumers enrolled in Payment Protection on Capital One credit card accounts with respect to causes of action related to Payment Protection that accrued at any time between January 1, 2005, and July 31, 2010. The Court is authorized to enjoin such proceedings, including the Hawaii and Mississippi proceedings, under the All Writs and Anti-Injunction Acts, 28 U.S.C. §§ 1651, 2283, because an injunction will protect and effectuate the Court's orders by preventing relitigation of claims that have already been settled and released.

Capital One also requests that the Court require the law firm Golomb & Honik ("Golomb"), plaintiffs' counsel in the *Spinelli* class action *and* private counsel to the Attorneys General in the Hawaii and Mississippi actions, to pay Capital One its reasonable attorneys' fees incurred in making this motion. *See Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1067-68 (11th

Cir. 2001) (affirming attorneys' fees award as sanction against counsel for undermining class action settlement by pursuing released claims in state court). Golomb's conduct in asserting against Capital One claims released herein violates Golomb's obligations under the settlement agreement approved by this Court.

INTRODUCTION

In 2010, after three years of litigation in this Court and the investment of considerable time, effort, and expense, Capital One reached a settlement with a nationwide class of cardholders to resolve claims related to Capital One's Payment Protection program. Under the terms of the settlement, the consumers released all claims relating the Payment Protection program. In exchange, Capital One agreed to pay claim amounts the depended upon consumers' self-described experience with the sale or administration of the Payment Protection program. This Court examined the settlement for fairness, refined the agreement's release provision, and, on November 23, 2010, granted the settlement agreement final approval.

On April 12, 2012, the Attorney General of the State of Hawaii filed suit against Capital One in Hawaii state court asserting, in his representative capacity, claims related to Payment Protection on behalf of those same Hawaii consumers who previously settled and released those claims before this Court. On June 28, 2012, the Attorney General of the State of Mississippi filed suit in Mississippi state court seeking restitution to Mississippi consumers on the same claims settled here. If allowed to proceed, the Attorneys General suits will "unsettle" that which has been settled and will cast doubt on the finality of this Court's orders. This is the very type of case for which the All Writs Act gives federal courts broad authority to enjoin separate litigation. An injunction is necessary in this case to protect and effectuate this Court's final order approving the *Spinelli* settlement agreement, and to prevent relitigation of claims which have already been settled and released.

Capital One also is entitled to recover its attorneys' fees incurred in bringing this motion. The Attorneys General are represented in the Hawaii and Mississippi suits by Golomb. Golomb served as additional plaintiffs' counsel in the *Spinelli* case before this Court and was awarded

nearly a quarter of a million dollars for its efforts in securing the *Spinelli* settlement agreement. Under the terms of that agreement, as approved by this Court, Golomb is obligated not to undermine the settlement agreement in any way. By prosecuting released claims in a separate proceeding, Golomb has violated its agreement and this Court's order, and has unnecessarily multiplied proceedings before this Court. Golomb should be sanctioned.

BACKGROUND

I. The *Spinelli* Class Action Settlement

On September 28, 2007, a group of cardholders brought an action in Florida state court against Capital One Bank (USA), N.A. and Capital One Services, LLC. (ECF No. 1-2.) The action was removed to this Court on January 18, 2008. (ECF No. 1.) The operative Fourth Amended Complaint, filed on August 11, 2010, asserted a putative class action on behalf of a national class of Capital One cardholders who had enrolled in Payment Protection, an optional amendment to Capital One's customer agreement that provides for debt cancellation under certain circumstances. (ECF No. 142; Exhibit I to Declaration of James F. McCabe ("McCabe Decl.") (settlement agreement; ECF No. 145-1).)

The Complaint asserted claims under all state statutes prohibiting unfair and deceptive trade practices, expressly including the Hawaii unfair and deceptive practices statute, Haw. Rev. Stat. §§ 480-1 through 480-24 ("Hawaii UDAP statute"), and the Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1 *et. seq*. ("Mississippi CPA"). (ECF No. 142, at ¶ 100.) Plaintiffs alleged that (1) customers "paid for Payment Protection and [were] not eligible to receive benefits," (2) the "terms and exclusions for Payment Protection [were] not adequately disclosed to consumers before consumers [purchased] the product," and (3) "coverage [was] so restricted in benefits, and processing claims under the coverage is made so difficult by Capital One, that the product is essentially worthless." (*See* Ex. H to McCabe Decl. (order granting final approval of class action settlement; ECF No. 231), at 2.). During three years of litigation, the parties narrowed the claims through motions practice, engaged in extensive discovery (including

depositions and the review of more than 70,000 pages of produced documents), and conducted extensive settlement negotiations. (Ex. I to McCabe Decl., at Recitals.)

On August 13, 2010, the parties filed a formal notice of settlement. (Ex. I to McCabe Decl.) The Court granted preliminary approval of the settlement on August 16, 2010 (ECF No. 147) and certified the following class for settlement purposes:

> All natural persons who have or had Capital One credit card accounts in the United States and who enrolled in and were charged for Payment Protection on or after January 1, 2005 through July 31, 2010.

(Ex. H to McCabe Decl., at 9.) The settlement agreement contained the following release of claims, as modified by the Court:

> Final Settlement Class Members . . . and all those who claim through them or **who assert claims on their behalf (including the government in its capacity in *parens patriae*)**, will be deemed to have completely released and forever discharged the Released Parties . . . from any claim, right, demand, charge, complaint, action, cause of action, obligation, or liability for actual or statutory damages, punitive damages, **restitution or other monetary relief of any and every kind**, including, without limitation, those based on breach of contract or any other contractual theory, **unjust enrichment**, violation of the Truth in Lending Act, or the **unfair and deceptive acts and practices statutes of any of the states of the United States,** or any other federal, state, or local law, statute, regulation, or common law, whether known or unknown, suspected or unsuspected, under the law of any jurisdiction, which the Class Representatives or any Final Settlement Class Member ever had, now have or may have in the future, whether accrued or unaccrued, arising out of or in any way, directly or indirectly, relating to any act, omission, event, incident, matter, dispute, or injury regarding Payment Protection, including, without limitation, the development, sale, pricing, marketing, claims handling, or administration of Payment Protection.

(Ex. H to McCabe Decl., at 12-13 (emphasis added).)[1] In exchange for releasing their claims, each class member was eligible to receive from Capital One between $15 and $63, with the exact

[1] The Settlement Agreement also "enjoined [class members] from prosecuting any proceeding against any Released Party with respect to the conduct, services, fees, charges, acts, omissions,

payout depending on factors such as whether the class member had ever received Payment Protection benefits. (Ex. I to McCabe Decl., at § 5.1.2.)

The Settlement Agreement also provided that "Class Representatives, Class Counsel, **Additional Plaintiffs' Counsel**, and Capital One each represent and warrant that they **have not made, nor will they (a) attempt to void this Agreement in any way**, or (b) solicit, encourage, assist in any fashion any effort by any person (natural or legal) to object to the settlement under this Agreement." (*Id*., at § 14.4 (emphasis added).) "Additional Plaintiffs Counsel" was defined in the Settlement Agreement to include Golomb. (*Id*., at § 1.1.)

Notice of the proposed settlement was furnished to all class members, and such class members were given an opportunity to be heard on the question of whether the settlement should be approved. (Ex. H to McCabe Decl., at 7-8, 10.) On November 19, 2010, the Court conducted a "fairness hearing" under Rule 23 of the Federal Rules of Civil Procedures.[2] On November 23, 2010, after concluding that the settlement was "fair, reasonable and adequate," this Court granted final approval of the settlement and dismissed the case with prejudice. (*Id*. at 1, 9, 11.) The Court also approved an award of more than $246,000 in attorneys' fees to Golomb for its service as Additional Plaintiffs' counsel. (ECF No. 239 at 4.)

II. The Hawaii Attorney General Action

On April 12, 2012, the Hawaii Attorney General filed suit in the First Circuit Court of Hawaii against Capital One Bank (USA), N.A., and Capital One Services, LLC. *State of Hawaii v. Capital One Bank (USA) N.A.*, No. 12-1-0980-04. (*See* Ex. A McCabe Decl. ("Hawaii Complaint").) The Hawaii Complaint asserts claims under the Hawaii UDAP statute and claims

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events, incidents, matters, disputes, or injuries of any Released Party relating to all matters within the scope of the release." (Ex. I to McCabe Decl., at § 4.2.)

[2] At the fairness hearing, the Court expressed concern that certain of Plaintiffs' counsel were seeking to recover attorney's fees at unacceptably high hourly rates. (ECF No. 229, at 42-44, 47-48.) Golomb was singled out as seeking the highest hourly rate of any plaintiffs' firm involved in the case. (*Id*. at 37, 39, 52.) The Court subsequently rejected the hourly rates sought by plaintiffs' counsel and instead approved a fee award based on a standardized hourly rate schedule. (ECF Nos. 235, 239.)

for unjust enrichment based on Capital One's conduct in selling, marketing, and administering its Payment Protection program. (*Id*., at ¶¶ 70-88.)

The Hawaii Complaint challenges almost exactly the same alleged conduct identified by plaintiffs in the *Spinelli* complaint: like the *Spinelli* plaintiffs, the Hawaii Attorney General alleges that Capital One (1) sold Payment Protection to customers who were not eligible to receive its benefits (*id*., at ¶¶ 39-69), (2) failed to adequately disclose the terms and conditions of Payment Protection to consumers before they purchased it (*id*., at ¶¶ 46, 54), and (3) made the claims process so difficult and the exclusions so confusing as to render Payment Protection "worthless" (*id*., at ¶¶ 66-67). Indeed, several paragraphs in the Hawaii Complaint are copied almost verbatim from the operative *Spinelli* complaint. (*Compare, e.g.*, Ex. A to McCabe Decl. ¶ 66 ("Payment Protection is . . . so restricted in terms of the benefits it provides to subscribers, and processing claims made is so difficult by [Capital One], that it is essentially worthless.)), *with* (ECF No. 142, at ¶ 18 ("coverage [was] so restricted in benefits, and processing claims under the coverage is made so difficult by Capital One, that the product is essentially worthless").) Moreover, the Attorney General **admits** that his complaint concerns the same alleged conduct as that at issue in *Spinelli* by directly citing to this Court's November 23, 2010, order approving the *Spinelli* settlement agreement. (Ex. A to McCabe Decl., at ¶ 39, n.1.)

The Attorney General seeks to recover monetary relief on behalf of Hawaii consumers, and intends that such relief will paid over to those consumers. First, the Attorney General states that he is bringing the suit under the Hawaii UDAP statute and under his *parens patriae* authority on behalf of the citizens of Hawaii. (*See id*., at ¶ 8.) The Hawaii UDAP statute authorizes the Attorney General to "bring a class action on behalf of consumers based on unfair or deceptive acts or practices" and provides that such actions "shall be brought as *parens patriae* on behalf of natural persons residing in the State to secure threefold damages for injuries sustained by the natural persons[.]" Haw. Rev. Stat. § 480-14(b). Second, the Complaint seeks relief in the form of "restitution and disgorgement" to Hawaii consumers of all monies obtained by Capital One as a result of UDAP violations. (*See* Ex. A to McCabe Decl., at Relief ¶¶ 3, 7); *see also* Ex. B to

McCabe Decl. ("State of Hawaii Files Lawsuit Against Seven Major Credit Card Companies," Department of the Attorney General of the State of Hawaii, April 12, 2012) (stating that any funds received as restitution will be paid back to consumers).) Third, the Attorney General asserts a claim for unjust enrichment, stating that "consumers within the State should be made whole." (*See* Ex. A to McCabe Decl., at ¶ 88.)

Although the Hawaii suit is nominally brought by the Attorney General, not a single person from the Attorney General's office is a signatory to the Complaint. Rather, the only attorneys listed on the Complaint are the Attorney General's private counsel, including Golomb. As noted above, Golomb was "Additional Plaintiffs Counsel" in the *Spinelli* matter and was bound by the *Spinelli* settlement agreement to use best efforts to effectuate that agreement. As is the case in most consumer class actions, Golomb is being paid for its work in the Hawaii case on a contingency fee basis. (See Ex. C to McCabe Decl. ("Award," Hawaii State Procurement Office, website last visited July 31, 2012).)

On May 18, 2012, Capital One removed the case to the United States District Court for the District of Hawaii. (Ex. D to McCabe Decl. ("Notice of Removal").) On June 16, 2012, the Attorney General moved to remand the case to state court. (Ex. E to McCabe Decl. ("Motion to Remand").) The Attorney General's motion to remand is set for hearing on September 24, 2012. (Ex. F to McCabe Decl. (docket entry setting hearing).)

III. The Mississippi Attorney General Action

On June 28, 2012, the Mississippi Attorney General filed suit against Capital One in the Chancery Court of the First Judicial District of Hinds County, Mississippi. *State of Mississippi v. Capital One Bank (USA) N.A.*, No. G2012-10795/1 (Ex. G to McCabe Decl. ("Miss. Complaint").) Like the Hawaii Complaint, the Mississippi Complaint asserts claims under the state consumer protection statute and claims for unjust enrichment based on Capital One's conduct related to Payment Protection. (*Id*. at ¶¶ 70-87.) And like the Hawaii Attorney General, the Mississippi Attorney General seeks to recover monetary relief on behalf of consumers in his

state with the intent that such relief be paid over to those consumers. (*Id*. at ¶ 85 (consumers "should be made whole by application of the doctrine of unjust enrichment").)

The Mississippi Complaint is substantially identical to the Hawaii Complaint and, indeed, most allegations are copied from the Hawaii Complaint verbatim. (*Compare* Ex. A to McCabe Decl., at ¶¶ 1-7, 14-42, 45-52, and 54-69 *with* Ex. G to McCabe Decl., at ¶¶ 1-7, 16-44, 46-53, and 54-69.) The Mississippi Attorney General, like the Hawaii Attorney General, admits that his complaint concerns the same alleged conduct as that at issue in *Spinelli* by directly citing this Court's order approving the *Spinelli* settlement agreement. (Ex. G to McCabe Decl., at ¶ 41, n.1.) Unsurprisingly, Golomb is also serving as private counsel to the Mississippi Attorney General. (*Id*. at p. 23.)

ARGUMENT

I. THE COURT SHOULD ENJOIN THE PROSECUTION OF ANY SUIT WHICH ASSERTS CLAIMS RELATED TO PAYMENT PROTECTION THAT ARE DERIVATIVE OF THE RIGHTS OF CONSUMERS WHO WERE PARTIES TO THE *SPINELLI* SETTLEMENT AGREEMENT.

This Court can and should act to protect the *Spinelli* settlement agreement. An injunction is necessary to protect and effectuate this Court's final order approving the *Spinelli* settlement and prevent relitigation of claims already settled and released before this Court. The All Writs and Anti-Injunction Acts give federal courts broad authority to enjoin separate proceedings to protect their own orders and judgments against threats like those presented here by the Attorneys General in Hawaii and Mississippi.

A. The Court has broad power under the All Writs Act to enjoin parties from asserting in a separate proceeding claims which have already been settled and released in federal court.

The All Writs Act confers a broad authority on federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). The Supreme Court has repeatedly recognized the power of a federal court under this statute "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued[.]" *Adams v. S. Farm Bureau Life Ins. Co.*, 493 F.3d 1276, 1284

n.4 (11th Cir. 2007) (citing *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977)). An injunction is proper when it is "'calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it,' and not only when it is 'necessary in the sense that the court could not otherwise physically discharge its . . . duties.'" *Klay v. United Healthgroup*, 376 F.3d 1092, 1100 (11th Cir. 2004) (citing *Adams v. United States*, 317 U.S. 269, 273 (1942)).

A federal court's authority under the All Writs Act includes the authority to enjoin proceedings in both state courts and other federal courts. *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 883 (11th Cir. 1989) (enjoining state court prosecution of claims already settled in federal court); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 441 F.2d 631, 637 (5th Cir. 1971) (enjoining federal court action involving previously-decided issues); *Klay*, 376 F.3d at 1100, 1104 (court may enjoin "[p]roceedings in other courts that involve the same facts as already issued judgments and orders, or that could result in the issuance of an inconsistent judgment"). When the injunction is directed at a state court proceeding, the Anti-Injunction Act, 28 U.S.C. § 2283 – read in conjunction with the All Writs Act – provides that the federal court may enjoin the state court proceeding (1) "where necessary in aid of its jurisdiction," or (2) "to protect or effectuate its judgments." Although this statute does not apply when the injunction is directed at a federal court proceeding, *cf Kelly v. Merrill Lynch, Pierce, Fennder & Smith*, 985 F.2d 1067, 1068-69 (11th Cir. 1993), *overruled on other grounds as stated in Klay*, 376 F.3d at 1109, "[t]he All Writs Act and the Anti-Injunction Act are closely related, and where an injunction is justified under . . . the latter a court is generally empowered to grant the injunction under the former." *Burr & Forman v. Blair*, 470 F.3d 1019, 1027-28 (11th Cir. 2006); s*ee also Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993) ("[D]espite its express language referring to 'aid of . . . jurisdiction,' the All Writs Act also empowers federal courts to issue injunctions to protect and effectuate their judgments."). A court may enjoin proceedings to safeguard "not only ongoing proceedings, but potential future proceedings, as well as already-issued orders and judgments." *Klay*, 376 F.3d at 1099 (citations omitted); *Faught v. Am. Home Shield Corp.*, 660 F.3d 1289, 1292 (11th Cir. 2011) (injunction properly issued "against those who are in a position to frustrate

the implementation of a court order") (citations omitted). An injunction of separate proceedings serves to "protect or effectuate [a federal court's] judgments" where it "prevent[s relitigation] of an issue that previously was presented to and decided by the federal court." *In re Ford Motor Co.*, 471 F.3d 1233, 1253 (11th Cir. 2006) (citations omitted).

This Court has broad power under the All Writs Act "to prevent prosecution of a state court action that [has] already been settled under the terms of a federal settlement agreement." *Klay*, 376 F.3d at 1104. In *Battle* for example, the Eleventh Circuit affirmed a district court's decision to permanently enjoin plaintiffs from pursuing claims in state court which had already been settled in federal court, explaining that "any state court judgment would destroy the settlement worked out over [several] years, nullify this court's work in refining its Final Judgment . . ., add substantial confusion in the minds of a large segment of the state's population, and subject the parties to added expense and conflicting orders." 877 F.2d at 882; *see also Adams*, 493 F.3d at 1278-79 (enjoining state court prosecution of claims released in federal class action settlement agreement); *In re Ford*, 471 F.3d at 1252 ("[C]ontradictory state court judgments, purporting to bind substantially the same litigants on substantially similar claims, would only confuse the parties as to their legally enforceable rights and obligations. The purpose of the district court's judgment [approving settlement] – to determine definitively the rights and obligations of the parties – would have been frustrated, and all of the time and effort put into producing that resolution wasted.").

The Court may direct All Writs Act injunctions "toward not only the immediate parties to a proceeding, but to 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *Klay*, 376 F.3d at 1100 (citing *New York Tel. Co.*, 434 U.S. at 174); *Faught*, 660 F.3d 1291-92 (opt-out class member may be enjoined from bringing claims in state court "through or for the benefit of" persons who settled and released those claims in federal court; court may "permanently enjoin[] 'anyone' from prosecuting a released claim 'for the benefit' of

a class member"). This *includes* state Attorneys General bringing claims in a representative capacity on behalf of citizens who have already settled and released those claims in federal court. *See In re Baldwin-United Corp.*, 770 F.2d 328, 333-41 (2d Cir. 1985) (enjoining Attorneys General and "all other persons having actual knowledge of th[e] Order").

Baldwin involved facts nearly identical to those at issue here: there, the district court approved a class action settlement that included a release of claims under state UDAP statutes that permitted private recovery. 770 F.2d at 331. The district court then enjoined several state Attorneys General who sought to "enforce state law authorizing them in their representative capacities to seek restitution and monetary recovery from the defendants to be paid over to those states' citizens" who were plaintiffs in the federal case. *Id*. at 331-33. The Second Circuit affirmed, holding that the injunction was essential to protecting and effectuating the district court's judgment:

> The success of any federal settlement [is] dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs [have] against the settling defendants based on the same facts. . . . [If a state Attorney General] could derivatively assert the same claims on behalf of the same class or members of it, there could be no finality of any federal settlement.

Id. at 337. The court emphasized that "[w]hether a state represented itself to be acting as a 'sovereign' in such a suit or described its prayer as one for 'restitution' or a 'penalty' would make no difference if the recovery sought by the state was to be paid over to the plaintiffs." *Id*. at 337. Because plaintiffs had already settled and released those claims, and the district court had approved that settlement, an injunction could properly issue to prevent relitigation of the court's order. *Id*. at 336-37; *see also Adams*, 493 F.3d at 1289 (enjoining state court action to prevent relitigation of federal court's final order "adopting in full the terms of the settlement and enjoining the class members from pursuing any further lawsuits based on or relating to the facts" of the federal case).

B. An injunction is necessary to protect and effectuate the Court's order granting final approval of the *Spinelli* settlement agreement and to prevent relitigation of claims already settled and released before this Court.

An injunction is needed to protect and effectuate this Court's order granting final approval of the *Spinelli* settlement agreement. Indeed, this is exactly the kind of case the All Writs and Anti-Injunction Acts were designed to address. As shown above, Capital One and its cardholders, aided by class counsel (including Golomb), spent over three years litigating claims related to Capital One's sales, marketing and administration of Payment Protection, including state common law claims and claims under the Hawaii and Mississippi consumer protection statutes. (*See* pp. 3-5, *supra*.) The parties spent considerable effort and expense on investigation and discovery and conducted extensive settlement negotiations before reaching the settlement agreement ultimately presented to the Court. (*Id*.) The Court examined the proposed settlement for fairness and refined the release provision to make it more favorable to consumers before granting final approval on November 23, 2010. (Ex. H to McCabe Decl., at 4-13.) Allowing the Attorneys General or others to proceed in prosecuting released claims on behalf of the consumers who released them would destroy the settlement agreement, nullify the Court's work in evaluating and refining it, confuse Hawaii and Mississippi consumers about their rights and obligations, and subject the parties to added expense and potentially conflicting orders. *See Battle*, 877 F.2d at 882; *see also Ford*, 471 F.3d at 1252.

It makes no difference that the Attorneys General themselves were not parties to the *Spinelli* settlement agreement. The Attorneys General are seeking relief on behalf and for the benefit of Hawaii and Mississippi consumers who *were* such parties, based on claims that those consumers are bound by this Court's order to have finally settled and released. Both actions interfere with the finality of this Court's order approving the *Spinelli* settlement, and warrant an injunction under the All Writs Act. *See Faught*, 660 F.3d 1291-92 (court may enjoin "anyone" from prosecuting released claims "through or for the benefit of" class members); *Baldwin* 770 F.2d at 334, 336-37 (allowing Attorney General to derivatively assert released claims on behalf of class members under state consumer protection law would destroy finality of federal

settlement agreement; also enjoining "all other persons having actual knowledge" of the court's order).

An injunction in this case will serve to prevent the relitigation of issues covered by this Court's order finally approving the *Spinelli* settlement agreement. As a condition of settlement, consumers agreed to release all claims arising under federal or state law, whether accrued or unaccrued, "arising out of or in any way, directly or indirectly, relating to . . . Payment Protection, including, without limitation, the development, sale, pricing, marketing, claims handling, or administration of Payment Protection." (Ex. H to McCabe Decl., at 13.) That agreement was embodied in this Court's order of final approval. (*Id.*) Since an injunction would bar the Attorneys General and others from bringing state law claims derivative of the rights of consumers who were parties to the settlement, it would properly forestall relitigation of that order; it is therefore warranted under the All Writs and Anti-Injunction Acts. *See Baldwin*, 770 F.2d at 336; *Adams*, 493 F.3d at 1278-79, 1289 n.7.

II. THE COURT SHOULD AWARD CAPITAL ONE ITS ATTORNEYS' FEES INCURRED IN BRINGING THIS MOTION TO SANCTION GOLOMB FOR VIOLATING THE SETTLEMENT AGREEMENT.

The Court should require Golomb to pay Capital One's reasonable expenses, including attorneys' fees, incurred in making this motion. The Court has the power to award attorneys' fees as a sanction against counsel for the willful violation of a court order, including a court-approved settlement agreement. *See Henson*, 261 F.3d at 1068 (affirming assessment of attorneys' fees against plaintiffs' counsel for "efforts to undermine" federal class action settlement by prosecuting released claims in state court); *Wilson v. United States*, No. 86-1029, 1990 U.S. Dist. LEXIS 12651, at *2-4 (S.D. Ala. Sept. 13, 1990) (awarding attorneys' fees as sanction for willful violation of court-approved settlement); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) ("[F]ederal courts have inherent power to assess attorney's fees against counsel . . . for the willful disobedience of a court order.") (citations omitted); *Lexington Nat'l Bail Servs., Inc. v. Spence*, No. 03-cv-2904, 2007 U.S. Dist. LEXIS 22431, at *18 (S.D. Ga. Mar. 28, 2007) (Under 28 U.S.C. § 1927, any attorney who unreasonably multiplies proceedings "may be

required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

Golomb, as Additional Plaintiffs Counsel, specifically agreed in the *Spinelli* settlement to utilize its best efforts to effectuate the settlement agreement. (Ex. I to McCabe Decl., at §§ 1.1, 14.4.) The settlement agreement and final approval order expressly released any claims under "the unfair and deceptive acts and practices statutes of any of the states." (Ex. H to McCabe Decl., at 12.) Golomb was certainly aware that this included claims under Hawaii's UDAP statute and Mississippi's CPA, as those statutes were specifically included in the operative complaint at the time of settlement. (ECF No. 142, at ¶ 100.) Additionally, Golomb collected nearly a quarter million dollars in attorneys' fees for its efforts in securing the settlement. (Ex. I to McCabe Decl., at § 6.2; ECF No. 239, at 3.) Now, despite agreeing not to "attempt to void this Agreement in any way," Golomb has represented parties in two different suits against Capital One for the same claims released in the *Spinelli* settlement. Golomb's actions exhibit willful disobedience of the order approving settlement and should be penalized.

CONCLUSION

For all of the above reasons, Capital One respectfully requests that the Court grant Capital One's Motion to Enjoin Prosecution of Released Claims and For Sanctions, and award Capital One its attorneys' fees incurred in bringing this motion.

Dated: August 3, 2012

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS, CAPITAL ONE BANK (USA), N.A. and CAPITAL ONE SERVICES, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 3, 2012, I filed the following documents with the Clerk of the Court using CM/ECF. I also certify that the following documents are being served this day by Notice of Electronic Filing generated by CM/ECF on all counsel of record entitled to receive service.

DEFENDANT'S MOTION TO ENJOIN PROSECUTION OF RELEASED CLAIMS AND FOR SANCTIONS

DECLARATION OF JAMES F. McCABE

I also certify that the foregoing documents are being served upon the following parties by facsimile and by U.S. mail:

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