IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:15-cv-00358-O**
	§	
NOVINGER et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Combined Motion to Reopen and for Relief from Judgment Pursuant Fed. R. Civ. Procedure 60(b) and Subsections (4) and (5) (ECF Nos. 40–41), filed June 17, 2021; and Plaintiff's Memorandum in Opposition ("Response") (ECF No. 43), filed July 2, 2021. Having considered the motion, briefing, and applicable law, the Court **DENIES** Defendants' Motion.

I. BACKGROUND

In May 2015, the Securities and Exchange Commission ("Commission") brought this civil enforcement action against Defendants Christopher Novinger; Brady Speers; NFS Group, LLC; ICAN Investment Group, LLC; and Speers Financial Group, LLC, alleging that Defendants violated the antifraud and registration provisions of the securities laws by offering and selling $4.3 million worth of life-settlement securities to Texas investors. Compl. ¶¶ 1–9, 64–78, ECF No. 1 (citing the Securities Act of 1933 §§ 5(a), 5(c), 17(a); the Securities Exchange Act of 1934 §§ 10(b), 15(a)). After a year of litigation, the parties requested, and the Court entered, a series of final judgments resolving the action ("Consent Judgments"). ECF Nos. 33–39. One provision of the consent judgment—the Commission calls a "no-deny" provision and Defendants call a "gag

order"—gives the Commission an option to vacate the judgment and re-open the case, if in the future, Defendants deny the allegations in the Complaint (the "Challenged Provision"). *Id.*

Now, five years later, Defendants Novinger and ICAN Investment Group, LLC ("Defendants") move for reconsideration of the Court's entry of the Consent Judgments against them (ECF Nos. 36–37) because the Challenged Provision runs afoul of the First Amendment free speech clause. *See* Mot. 1, ECF No. 41 (citing Fed. R. Civ. P. 60(b)(4)–(5)). The Court re-opened the case and ordered briefing. Order, ECF No. 42. The Commission responded, Defendants replied, and the motion is ripe for the Court's consideration. *See* ECF Nos. 43, 44.

II. LEGAL STANDARD

"Under Rule 60(b), a district court can grant relief from a final judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) a void judgment; or (5) a judgment that has been reversed or otherwise vacated." *Evenson v. Sprint/United Mgmt. Co.*, No. 3:08-cv-0759-D, 2011 WL 3702627, at *4 (N.D. Tex. Aug. 23, 2011) (Fitzwater, J.) (citing Fed. R. Civ. P. 60(b)). The burden of establishing at least one of the Rule 60(b) requirements is on the movant. *See id.* at *4 (citing *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990), *abrogated on other grounds* by *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075–76 n.14 (5th Cir. 1994) (en banc)). A Rule 60(b) motion for relief from a final judgment or order must be filed "within a reasonable period of time" unless good cause can be shown for the delay. Fed. R. Civ. P. 60(c)(1); *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017), cert. denied, 138 S. Ct. 358 (2017).

III. ANALYSIS

Defendants contend that the Consent Judgments should be set aside under Rule 60(b)(4) for constitutional defects resulting in a due-process violation and that, alternatively, Rule 60(b)(5)

provides grounds for relief. Mot. 1, ECF No. 41. The Commission disagrees, arguing that Defendants failed to meet their burden of showing entitlement to relief under Rule 60(b)(4) or 60(b)(5). Resp. 5, ECF No. 43. The Court addresses each rule in turn, concludes that Defendants have failed to meet their burden of showing entitlement to relief under Rule 60(b), and, thus, declines to set aside the Consent Judgments.

A. Federal Rule of Civil Procedure 60(b)(4)

Defendants argue the Court should exercise its discretion under Rule 60(b)(4) because the Consent Judgments' Challenged Provision: (1) violates the First Amendment as "an impermissible 'prior restraint' on speech," an unconstitutional content-based speech restriction, a ban on truthful speech, compelled speech, and an unconstitutional condition; (2) was issued without due process based on "unconstitutional vagueness"; (3) violates of Defendants' right to petition; and (4) was incorporated based on an unlawfully promulgated rule. Mot. 4, ECF No. 41. The Commission contends that no ground provides relief under Rule 60(b)(4). Resp. 5–25, ECF No. 43. The Court finds the arguments largely intertwined and unpersuasive for the same reason: Rule 60(b)(4)'s limited scope.

Under Rule 60(b)(4), a district court may set aside a judgment if it lacked jurisdiction or if the court acted in a manner inconsistent with due process of law. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270–71 (2010); *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003). Although courts are not required to subject 60(b)(4) motions to time limitations, courts must still weigh the "balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute." *Id.* at 276; *see Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998). Due process is violated under Rule 60(b)(4) when a judgment lacks notice "reasonably calculated, under all the circumstances,

to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . .." *Id.* at 272 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Thus, "[w]here . . . a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief." *Id.* at 275–76 ("Rule 60(b)(4) does not provide a license for litigants to sleep on their rights."). "A judgment is not void merely because it is erroneous." *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996) (quoting 11 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2862 (2d ed. 1995)) (internal quotation marks omitted).

Here, Defendants' contention that a First Amendment violation is sufficient to trigger Rule 60(b)(4)'s due process and vagueness review relies heavily on *Crosby v. Bradstreet Co.*, 312 F.2d 383 (2nd Cir. 1963) (holding that a court's order constituting an impermissible "prior restraint" on speech in violation of the First Amendment is "void, and under Rule 60(b)(4) . . ., the parties must be granted relief therefrom").[1] But Defendants' reliance on this caselaw is misplaced. In *Espinosa*, the Supreme Court expressly limited Rule 60(b)(4) relief to two circumstances: a "certain type of jurisdictional error" or "violation of due process." 559 U.S. at 270–71; *accord Brumfield v. La. Bd. of Educ.*, 806 F.3d 289, 298 (5th Cir. 2015) (An order "is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or it acted in a manner inconsistent with due process of law.") (internal quotation marks omitted).

To the extent Defendants argue a due process violation occurred, the Court disagrees. Defendants appeared in this case, knew of the Consent Judgments' effects, consented willingly to

[1] The Court finds troubling Defendants' reliance on this out-of-circuit precedent without any mention of the Supreme Court's recent holding in *Espinosa*.

them without any due process objection, and possessed ample time to voice any objections during the litigation process. "[T]he need for finality of judgments" factor weighs heavily in favor of the Commission, and Defendants' failure to act does not warrant Rule 60(b)(4) relief. *See Espinosa*, 559 U.S. at 276.[2] Thus, the Court concludes that Defendants have failed to meet their threshold burden under Rule 60(b)(4) and declines to proceed on that ground. Accordingly, the Court will deny the motion in this respect.

B. Federal Rule of Civil Procedure 60(b)(5)

Alternatively, Defendants argue that Rule 60(b)(5) provides a basis for relief because the Challenged Provision "harm[s] the public interest." Mot. 24, ECF No. 41 (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 368, 393 (1992)). The Commission contends that Defendants have not shown any grounds for relief. Pl.'s Mot. 12 (citing *Frew v. Janek*, 780 F.3d 320, 326–27 (5th Cir. 2015)). The Court concludes that Defendants are not entitled to relief under Rule 60(b)(5).

Under Rule 60(b)(5), a court may set aside or modify a judgment if it was satisfied, released, or discharged; was based on an earlier judgment that has been reversed or vacated; or is no longer equitable to apply prospectively. *See Frew*, 780 F.3d at 326–27 (citing Fed. R. Civ. P. 60(b)(5)). To obtain Rule 60(b)(5) relief, the movant must show that: (1) a significant change in the facts or law warrants modification of an order; and (2) "the proposed modification is suitably tailored to the changed circumstances." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383–84 (1992). However, "[m]odification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385; *see also U.S. v. Swift &*

[2] Similarly, the Court rejects Defendants' attempts to conjure a jurisdictional error without particularity in their reply. *See* Reply 2–3, ECF No. 44; *see also Espinosa*, 559 U.S. at 271 (citing *Nemaizer v. Baker*, 793 F.2d 58, 65 (2nd Cir. 1986)) (judgments can be voided on these grounds when they lack "an 'arguable basis' for jurisdiction."). Defendants conceded, and the Court agreed, that it had jurisdiction. *See* Proposed Am. Consents ¶¶ 1–2, ECF No. 33-1; 15 U.S.C. §§ 77(t), 78(u), 78(aa) (2018); 28 U.S.C. § 1331 (2018). Thus, an arguable basis for jurisdiction was present when the Court entered the Consent Judgments.

Co., 286 U.S. 106, 119 (1932) ("Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."). "[O]nce a party carries this burden, a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997)).

Here, Defendants do not present any significant changes in the facts or law, and the Challenged Provision was anticipated at the time of the Court entered the Consent Judgments. Defendants fail to demonstrate either a significant change in facts or law to warrant modification. Thus, the Court concludes that Defendants cannot obtain relief under Rule 60(b)(5), and the Court will deny the motion in this respect.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' Combined Motion to Reopen and For Relief from Judgment Pursuant Fed. R. Civ. Procedure 60(b) and Subsections (4) and (5) (ECF No. 43).[3]

SO ORDERED on this **10th day** of **August, 2021**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

[3] While the Court is mindful of the litany of First Amendment concerns presented in Defendants' briefing, Federal Rule of Civil Procedure 60 is not an appropriate avenue by which to address those concerns.