THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION	:	**MDL NO. 1335**
	:	
	:	**SECTION: L**
	:	
	:	**JUDGE FALLON**
THIS DOCUMENTS RELATES TO ALL CASES	:	**MAG. JUDGE AFRICK**

NEW JERSEY PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR INJUNCTION

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INTRODUCTION

This Memorandum is submitted on behalf of Plaintiffs in New Jersey state Propulsid cases.

> It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used "'sparingly and only in the most critical and exigent circumstances.'"
>
> Brown v. Gilmore, ___ S.Ct.___, 2001 WL 1056666, *1 (U.S., Sept. 12, 2001) (Rehnquist, C.J., in chambers)(citations omitted).

Defendants Janssen Pharmaceutical, Inc. and Johnson & Johnson asked this Court to overstep the bounds of Its authority, and to issue an injunction compelling coordination of state pretrial discovery and class certification proceedings with the proceedings in this Court, in violation of the law. This case is not a most critical and exigent circumstance in which Chief Justice Rehnquist would authorize use of the All Writs Act. There has been no forum-shopping by New Jersey Plaintiffs. There have been no abuses of discovery. This Court should deny the Defendant's Motion.

ARGUMENT

I. THIS COURT HAS NO AUTHORITY TO COMPEL COORDINATION OF PRETRIAL DISCOVERY PROCEEDINGS AND CLASS CERTIFICATION PROCEEDINGS IN STATE AND FEDERAL PROPULSID CASES.

A. The Court's Power Under The All Writs Act Does Not Provide Authority for the Mandatory Coordination Requested In This Case.

Defendants cite a number of cases purporting to give this Court broad authority under the All Writs Act, 28 U.S.C. §1651, Defendants' Memorandum, pp. 3-7. Not one of the cases cited by Defendants, nor any other All Writs Act case known to counsel, authorizes the mandatory coordination of pretrial discovery and state class certification proceedings requested by Defendants in this case. Many of the cases cited by the Defendants in this section of their Memorandum are cases decided under Fed. R. Civ. P. 23(d), and these cases are irrelevant, Defendants admit they are not contending that Rule 23(d) provides independent authority for issuance of their injunction, see Defendants' Memorandum, p. 5 n.2.

Defendants do not address the admonition of Chief Justice Rehnquist that injunctive relief under the All Writs Act may be used "'sparingly and only in the most critical and exigent circumstances,'" Brown, supra, 2001 WL 1056666 at *1 (Rehnquist, C.J., in chambers). Defendants also do not address Chief Justice Rehnquist's reminder that an All Writs Act injunction is appropriate only if "the legal rights at issue are 'indisputably clear, '" id. (citations omitted). In short, the Defendants disregard the Supreme Court guidance concerning limitations on the powers of the All Writs Act.

Plaintiffs agree with Defendants that "the Anti-Injunction Act and its exceptions govern this Court's power to order coordination of pretrial discovery and class certification proceedings in all

pending Propulsid cases," Defendants' Memorandum, p.8. Therefore, the question of any potential authority for the requested injunction depends ultimately not on the All Writs Act but on the Anti-Injunction Act, 28 U.S.C. §2283.

B. The Anti-Injunction Act Prohibits The Requested Injunction.

Defendants recognize that the Anti-Injunction Act is an "absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions," Defendants' Memorandum, pp.7-8 (quoting Atlantic Coast Line Railroad Co v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286, 90 S. Ct. 1739, 1743, 26 L. Ed. 2d 234 (1970)). Nonetheless, Defendants rely on the "in aid of its jurisdiction" exception to the prohibition in the Anti-Injunction Act, [1] against a court of the United States issuing an injunction to stop proceedings in a state court. Defendants ignore how narrow those exceptions are, and mislead this Court down the path to reversal.

The Supreme Court's leading opinion interpreting the Anti-Injunction Act, Atlantic Coast Line, supra, has three statements strictly limiting the exceptions to the absolute prohibition. The first is the following:

> Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States

---

[1]The Anti-Injunction Act reads as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
>
> 28 U.S.C. §2283.

> and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.
>
> Id., 398 U.S. at 287, 90 S. Ct. at 1743 (emphasis added).

Second, the Supreme Court stated that this exception, and the protection or effectuation of judgments exception,

> imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.
>
> Id., 398 U.S. at 295, 90 S. Ct. at 1747 (emphasis added).

The third limitation from the Supreme Court is that

> [a]ny doubts as to the propriety of the federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.
>
> Id., 398 U.S. at 297, 90 S. Ct. at 1748 (emphasis added).

These three limitations – (1) do not enlarge by loose statutory construction, (2) enjoin only if there is a serious impairment, and (3) any doubts must be resolved in favor of permitting the state courts to proceed – are still the law. In Vendo Co. v. Lektro Vend Corp., 433 U.S. 623, 97 S. Ct. 2887, 53 L. Ed. 2d 1009 (1977) (plurality opinion), the Court said that it is "clear beyond cavil that the prohibition [of Section 2283] is not to be whittled away by judicial improvision," id., 433 U.S. at 631, 97 S. Ct. at 2887 (quoting Amalgamated Clothing Workers of America v. Richman Bros. Co., 348 U.S. 511, 514, 75 S. Ct. 452, 454, 99 L. Ed. 600 (1955)). More recently, the Supreme Court

stated that the exceptions to the Anti-Injunction Act's prohibition "are narrow and are 'not [to] be enlarged by loose statutory construction,'" Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146, 108 S. Ct. 1684, 1689, 100 L. Ed. 2d 127 (1988)(quoting Atlantic Coast Line, supra).

These strict limits on the exceptions to the Anti-Injunction Act have been emphasized by Courts of Appeals, see In re: Temple, 851 F.2d 1269, 1272 n.4 (11th Cir., 1988) (the necessary in aid of jurisdiction exception "has been construed extremely narrowly") (citation to Atlantic Coast Line omitted); In re: Federal Skywalk Cases, 680 F.2d 1175, 1181-82 (8th Cir.) (the Anti-Injunction Act imposes a "flat and positive prohibition"; "The Supreme Court has narrowly interpreted the 'necessary in aid of jurisdiction' exception, and a pending state suit must truly interfere with the federal court's jurisdiction") (emphasis added) cert. den. , sub nom. Stover v. Rau, 459 U.S. 988, 103 S.Ct. 342, 74 L. Ed. 2d 383 (1982). The loose statutory construction to permit enjoining all discovery, especially with no serious impairment of the authority of this Court and the dubious propriety of stopping state court litigation dead in its tracks, all require denial of granting an injunction.

1. This Court does not have in personam jurisdiction over New Jersey Plaintiffs

Defendants wisely do not claim that this Court has in personam jurisdiction over absent class members such as the New Jersey Plaintiffs. In a case arising from a state class action, but which is equally applicable to this Court, the Supreme Court held that in order to bind an absent plaintiff who does not have minimum contacts with the forum which would support personal jurisdiction, a court must provide minimal procedural due process protection which includes notice and an opportunity

to opt out, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 2974, 86 L. Ed. 2d 628 (1985). New Jersey Plaintiffs do not have minium contacts with Louisiana; no notice has been sent to absent class members; and there has not been and will never be (as presently pled) an opportunity to opt out of the MDL Master Complaint, Jones v. Johnson and Johnson, et al., MDL No. 1355, No. 01-3051, E.D.La., because it is a proposed mandatory class action. Therefore, neither a traditional minimum contacts personal jurisdiction analysis, nor a Shutts notice and opt out analysis, affords this Court personal jurisdiction.

2. This Court has neither in rem jurisdiction nor continuing superintendence jurisdiction.

Defendants' main argument for this Court's jurisdiction is that this court has in rem jurisdiction, see Defendants' Memorandum, pp. 10-12. Defendants add a "continuing superintendence" argument for jurisdiction, see id., p. 12. Both arguments fail. They are disingenuous efforts by the Defendants to mislead this Court.

First, the in rem argument fails under traditional in rem analysis. In rem jurisdiction requires that a res be subject to this Court's jurisdictional control, and since the Defendants have neither declared bankruptcy nor have otherwise given their assets to the control of this Court, in rem jurisdiction does not apply, see In re: Temple, supra, 851 F.2d at 1272 & n.4.

Second, the Defendants' proposal founders on temporality. The Supreme Court has acknowledged a historical exception to the Anti-Injunction Act "in cases where the federal court has obtained jurisdiction over the res, prior to the state-court action," Vendo, supra, 433 U.S. at 641, 97 S. Ct. at 2893 (emphasis added). New Jersey Plaintiffs' cases, like almost all state cases Defendants

are seeking to enjoin, were filed before the Jones class action complaint was filed in this Court on October 5, 2001.

Third, the Fifth Circuit has never accepted the argument proposed by the Defendants that a District Court's supervision over protracted, complex litigation would form a matter that is equivalent to a res, see Defendants' Memorandum p.10, and wise precedent in this very Court rejects this argument.

Defendants cite Royal Ins. Co. of America v. Quinn-L Capital Corp., 960 F.2d 1286 (5th Cir. 1992), as recognizing the "potential validity" of this argument, and as also permitting an injunction if a state proceeding threatens the continuing superintendence by a federal court, Defendants' Memorandum, p. 11. The Fifth Circuit in Royal did not accept the argument that lengthy litigation is a res, and specifically noted that in order to do so, they would have to broaden that exception:

> But even if we were to broaden the "in aid of jurisdiction" exception to include "lengthy, complicated litigation" that is the "equivalent of a res," we would not put the present action in that category.
>
> Royal, supra, 960 F.2d at 1299 (emphasis added).

The only example of continuing superintendence by a federal court cited in Royal is a school desegregation case, id., 960 F.2d at 1298 (quoting Texas v. United States, 837 F.2d 184, 186 n.4 (5th Cir.), cert denied, sub nom. Interstate Commerce Com'n v. Texas, 488 U.S. 821, 109 S. Ct. 65, 102 L. Ed. 2d 42 (1988)). Defendants argue that this litigation will evoke the "continuing superintendence" of this Court, Defendants' Memorandum, p. 12, but Defendants cite no case that has applied the superintendence doctrine in a factual situation at all similar to the present case.

Defendants cite opinions by Chief Judge Sear as wise precedent for this Court to follow. In In re: Ford Motor Co. Bronco II Products Lit., 1995 WL 489480 (E.D. La. 1995), Ford argued inter

alia, that an injunction against state proceedings was appropriate because the inherent complexity of that multi-district litigation created the equivalent of a res that required protection by the court, id., 1994 WL 489480 at *2. That is, of course, the same argument Defendants raise here. Chief Judge Sear declined to accept this argument:

> Some courts have held that the general rule of non-interference should also not apply when federal courts have jurisdiction over lengthy, complex litigation. These courts reason that extremely complex litigation is the equivalent of a res because a parallel state court action will necessarily impair the federal court's ability to control and decide the action. The Fifth Circuit, however, has declined to expressly adopt such a broad interpretation of the "in aid of jurisdiction" exception to the Anti-Injunction Act.
>
> Id., 1995 WL 489489 at *3 (emphasis added; footnotes omitted).

Fourth, acceptance of the res argument of the Defendants would violate every Supreme Court prohibition, cited above, against loosening the exceptions to the Anti-Injunction Act. Royal admits that accepting this argument would "broaden" the exception, Royal, supra, 960 F.2d at 1299. Chief Judge Sear, who quoted a number of the strict limitations on the in aid of jurisdiction exception noted above, see Ford, supra, 1995 WL 489480 at *2, refused to broaden the exception. This Court should also so refuse.

C. This Court Has No Authority To Issue An Injunction In Aid Of Discovery In This Case.

Defendants rely heavily on Winkler v. Eli Lilly & Co., 101 F.3d 1196 (7th Cir. 1996), and on opinions by Chief Judge Sear in support of their argument that this Court has the authority to issue an injunction in aid of discovery, see Defendants' Memorandum, pp. 12-15. Neither Winkler nor Chief Judge Sear's opinions support an injunction here.

Winkler is clearly not this case. In Winkler, as Defendants concede, the parties sought to be enjoined commenced their state court action after the federal action and after the MDL Judge had denied their discovery request, see Defendants' Memorandum, p. 13. Here, the New Jersey Plaintiffs and other absent class members started their suits before the class action complaint was filed in this Court and before this Court issued any discovery orders.

Secondly, Winkler commands that any injunction be "narrowly crafted to prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly," Winkler, supra, 191 F.3d at 1203. There are no specific abuses in the instant case, only fears of future problems, see Argument II, infra. Furthermore, Winkler meant what it said about narrow crafting , because it narrowed the injunction in that case, id. Here, by contrast, there is no attempt to request a narrow injunction, and in fact the requested injunction broadly sweeps in all discovery proceedings and all state class certification proceedings.

We disagree with Defendants as to the relevance of certain of Chief Judge Sear's opinions. Ford, which Defendants relegated to a footnote and attempted to distinguish, see Defendants' Memorandum, p. 15 n.8, could not be more on point. As discussed above, Ford refused to broaden the in rem definition. In addition, Ford rejected exactly the argument raised by Defendants here. One of Ford's arguments was that "coordination of the [state] case with this multi-district litigation would minimize duplication of effort and avoid unnecessary delay and expense," Ford, supra, 1995 WL 489480 at *2. In rejecting Ford's request for an injunction against the state action, Chief Judge Sear noted that "[t]here is simply no judgment, settlement, or imminent settlement that this court needs to protect from interference by the Alabama court," id., 1995 WL 489480 at *3. The same is true in this case.

Chief Judge Sear then addressed head-on "present Defendants'" argument about minimizing duplication of effort and avoiding unnecessary delay and expense:

> Although I agree that coordination of this multi-district litigation and the [state] case would alleviate duplication of effort and reduce costs and I would encourage the Alabama court to coordinate its pretrial proceedings with the pretrial proceedings before this court, I decline to interfere with the Alabama court's management and direction of the claims pending before it. Plaintiffs are therefore free to pursue their claims in the forum of their choosing until a judgment, or its essential equivalent, is reached in this court.
>
> Id.

Chief Judge Sear's comments and holding in Ford are exactly on point with the instant case. Plaintiffs respectfully urge that this Court follow Ford.

Defendants describe In re: Taxable Municipal Bonds Litigation, 1992 WL 205083 (E.D. La., Aug. 12, 1992) as a "prime example" of a case enjoining parallel state court discovery proceedings in aid of jurisdiction, Defendants' Memorandum, p.14. This opinion by Chief Judge Sear addresses a factual situation significantly different from the present one. First, the state court that was enjoined stated that its action "must proceed with matters presented to it without regard to the Multi-District Litigation," id., 1992 WL 205083 at *1. No state court judge in the present case has expressed such open hostility to the MDL. Second, Chief Judge Sear, aware that the Manual for Complex Litigation encourages the MDL court to attempt to coordinate cases with state court cases, spoke informally with the state court judge, but that attempt at cooperation appeared fruitless id. Plaintiffs know of no similar attempt by this Court to contact any state court regarding cooperation.

Third, the orders issued by Chief Judge Sear were not broad injunctions, as Defendants claim, see Defendants' Memorandum, p. 14. The first order was an injunction for only one month, Taxable

Municipal Bonds, supra, 1992 WL 205083 at *1. The second was an order coordinating discovery, but apparently not affecting in any way state trial dates, see id., 1992 WL 205083 at *3. According to this opinion, defendants requested the issuance of an order coordinating discovery, and the state plaintiff agreed to propose to the state court a coordinated discovery plan "if such a plan would not unreasonably delay or interfere with its state court claims," id. The injunction requested here goes much further and would also enjoin state court class action proceedings, see Defendants' Memorandum, pp. 27-28.

Fourth, Defendants imply clearly that Chief Judge Sear's order staying arbitration was part of his injunction issued in aid of jurisdiction, see Defendants' Memorandum, p. 14. That is not correct. Injunctions against arbitration proceedings do not implicate the Anti-Injunction Act or federalism concerns generally, because arbitration proceedings are pending before arbitration boards, rather than state courts, Taxable Municipal Bonds, supra, 1992 WL 205083 at *3.

Three years after Taxable Municipal Bonds, Chief Judge Sear issued his opinion in Ford, in which, as quoted above, he declined to issue an injunction even though coordination would have alleviated duplication of effort and reduced costs, Ford, supra, 1995 WL 489480 at *3. A similar result, in the class certification context, was reached in Federal Skywalk Cases, supra. The court there reviewed a challenge under the Anti-Injunction Act to the propriety of a mandatory class certification order that enjoined pending state proceedings, see Federal Skywalk Cases, supra, 680 F.2d at 1181. The court, citing Vendo Co., supra, noted that "a simultaneous in personam state action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter," Federal Skywalk Cases, supra, 680 F.2d at 1183. That court vacated the class certification order for violation of the Anti-Injunction Act:

> In the present case the federal and state actions are in personam claims for compensatory and punitive damages. Therefore, based on the foregoing principles, we are compelled to hold that despite Judge Wright's legitimate concern for the efficient management of mass tort litigation, the class certification order must be vacated.
>
> Id., 680 F.2d at 1183 (emphasis added).

The efficient management of mass or complex tort litigation is not sufficient to overcome the strong prohibition of the Anti-Injunction Act.

The three remaining cases cited by Defendants are equally inapplicable. Two, In re: Columbia/HCA Healthcare Corp., Billing Practices Lit., 93 F. Supp. 2d 876, 881(M.D. Tenn. 2000), and Harris v. Wells, 764 F. Supp. 743, 746 (D. Conn. 1991), involved only preliminary injunctions. A preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held," National Credit Union Administration Board v. Johnson, 133 F.3d 1097, 1103 n. 5 (8th Cir. 1998) (quoting University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L. Ed. 2d 175 (1981)). The injunction requested here is not preliminary, and is much more far-reaching.

Columbia and Harris are also distinguishable on their facts. Plaintiffs in the state and federal court cases in Columbia filed nearly identical motions to compel production of documents, Columbia, supra, 93 F. Supp. 2d at 878. The federal court was concerned that the state court could frustrate its case management order by granting the state plaintiffs' motion to compel, id., 93 F. Supp. 2d at 880. The federal court did not enjoin all state court discovery proceedings, as is requested here, but only preliminarily enjoined the state court from ruling on the motion to compel, id., 93 F. Supp. 2d at 881. Defendants here do not claim that similar motions to compel are pending in state and federal courts.

Harris does not address the Anti-Injunction Act at all. It addresses only the All Writs Act. Harris involved a preliminary injunction against commencement of a state court suit that would involve discovery, where the federal suit was not only filed first, but the federal court had ruled on "countless discovery motions," Harris, supra, 764 F. Supp. at 744-46. That is not the present case.

Defendants' last case, Cinel v. Connick, 792 F. Supp. 492 (E.D. La. 1992), repeatedly stated its concern that absent an injunction, possibly relevant evidence could be destroyed or made unavailable, see Cinel, supra, 792 F. Supp. at 497-98. This focus of Cinel was recognized in Castano v. American Tobacco Co., 879 F. Supp. 594 (E.D. La., 1995), where the Court said the following:

> The Court finds that Cinel is inapposite factually, for there the district court found that there was a danger of destruction or loss of documents that defendants could use to establish their defense, Cinel, 792 F. Supp. at 497-98. Plaintiffs have not presented this Court with any evidence of loss of documents. Indeed, the documents appear to be in the hands of numerous media, according to plaintiffs' memorandum.
>
> Id., 879 F. Supp. at 598 n. 2.

Nor have Defendants here presented this Court with any evidence of loss of documents. Cinel was inapposite in Castano and it is inapposite here.

Defendants concede that the recurring theme of a majority of the cases it cites for the alleged authority to issue an injunction in aid of discovery is "the prevention of forum shopping," Defendants' Memorandum, p.16. A fortiori, if there is no evidence of forum shopping, there is no need for and no justification for an injunction. Since almost all the state Propulsid cases were filed prior to the instant federal class action, there can by definition be no forum shopping in the state courts. In addition, how can one be guilty of forum shopping where the case is filed in the "home" state of the Defendant? One cannot.

D. This Court Has No Authority Under The Facts Of The Present Case To Issue An Injunction To Protect Federal Supervision Over Class Action Cases.

Defendants' last argument for this Court's power to issue an injunction is derived from cases protecting federal supervision over class actions, see Defendants' Memorandum, pp. 17-18. Defendants admit that "most often" their cases involve settlements in the federal court, id., p. 17. There is no settlement here, nor any public indication of any likelihood of a settlement. Therefore, cases justifying state court injunctions based on federal settlements are irrelevant. The reason why those cases are irrelevant here is that an approved settlement leads to a judgment, and the Anti-Injunction Act has a specific exception allowing a court to protect or effectuate its judgments.

For example, in the lead case cited by Defendants, In Re: Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981), cert. den. sub nom. Three J Farms, Inc. v. Plaintiffs' Steering Committee, 456 U.S. 936, 102 S.Ct. 1993, 72 L. Ed. 2d 456 (1982), the Multi-District Court had approved the settlements and the final judgments "were predictable if not assured," Corrugated Container, supra, 659 F.2d at 1335. Furthermore, Corrugated Container had evidence of hostility from the state court litigation, which included an order by the state court judge enjoining the state court defendants, many of whom were also federal defendants, from utilizing any settlement document if the document contained the release of any state antitrust claims, without the prior approval of the state court, id., 659 F.2d at 1335. No such hostility is alleged here. This hostility justified the court's actions in Corrugated Container, utilizing the Anti-Injunction Act's in aid of jurisdiction exception in addition to the exception to protect or effectuate its judgments, see id., 659 F.2d at 1334-35.

The non-settlement case primarily cited by Defendants as authorizing an injunction in these circumstances, see Defendants' Memorandum, p.18, is In Re: BankAmerica Corp. Securities Lit., 95 F. Supp. 2d 1044 (E.D. Mo., 2000) (BankAmerica Corp. I), aff'd, 263 F.3d 795 (8th Cir. 2001) (BankAmerica Corp. II). The most important fact about BankAmerica Corp. I, which Defendants have not told this Court, is that BankAmerica Corp. I was decided under a different exception to the Anti-Injunction Act, namely the "expressly authorized by Act of Congress" exception, see BankAmerica Corp. I, supra, 95 F. Supp. 2d at 1048-51.

The court noted explicitly that the majority of Eighth Circuit precedent concerned the second and third exceptions to the Anti-Injunction Act, namely the instant aid of jurisdiction exception and the protection or effectuation of judgments exception, and the court further noted that Eighth Circuit precedent for both of those exceptions "contain[ed] language to the effect that the mere existence of a parallel state court proceeding does not justify an injunction," BankAmerica Corp. I, supra, 95 F. Supp. 2d at 1051 (footnote omitted). The court quoted in a footnote that the Supreme Court had narrowly interpreted the necessary in aid of jurisdiction exception, and that the pending state suit must truly interfere with the federal court's jurisdiction, BankAmerica Corp. I, supra, 95 F. Supp. 2d at 1051 n.9 (quoting In Re: Federal Skywalk Cases, supra, 680 F.2d at 1182-83). The court also held that the Eighth Circuit cases dealing, inter alia, with the necessary in aid of jurisdiction exception were "inapplicable" to this case, BankAmerica Corp. I, supra, 95 F. Supp. 2d at 1051. Since the in aid of jurisdiction exception is the only exception relied upon by Defendants here to justify their requested injunction, BankAmerica Corp. I, expressly not granting an injunction on that ground, and implying that it might well not have granted an injunction on that ground (because that exception is

narrowly interpreted and because a pending state suit must truly interfere with the federal court's jurisdiction), is inapposite and undermines Defendants' case here.

Defendants have not told this Court that BankAmerica Corp. I was affirmed in BankAmerica Corp. II. BankAmerica Corp. II makes even stronger Plaintiffs' argument that this Court does not have the power to issue an injunction in this case. That opinion quickly disposes of the in aid of jurisdiction exception as follows:

> Because both state-court and federal-court actions are in personam proceedings, the [federal court's] injunction does not fit within the Anti-Injunction Act's exception for injunctions in aid of the district court's jurisdiction.
>
> Id., 263 F.3d at 801 (emphasis in original) (citation omitted).

The same holds true here: all cases are in personam actions, so the Anti-Injunction Act in aid of jurisdiction exception does not apply.

II. ISSUING THE REQUESTED INJUNCTION WOULD BE A CLEAR ABUSE OF DISCRETION BY THIS COURT UNDER THE FACTS OF THIS CASE.

This Court simply does not have the power in the instant case to issue the requested injunction. Nonetheless, assuming arguendo that Court had the power, It would abuse Its discretion if It issued the injunction requested.

Many of the reasons why this Court should not issue an injunction have been presented above and in other briefs. None of the reasons for the issuance of the injunction are present in this case. (1) There is not the slightest iota of forum shopping alleged here, nor could there be, because the state court cases were filed first. (2) Nor is there any evidence of state court hostility to this Court.

(3) Nor is there evidence of a lack of coordination between federal and state plaintiffs. Plaintiffs' voluntary coordination of discovery has been entered into between state Plaintiffs and MDL Plaintiffs.

The Defendants effectively concede this, because their argument supporting the use of this Court's discretion to issue the injunction is based hardly at all on what has happened, and almost exclusively on a parade of horribiles that might happen at some point in the future. The Defendants admit that most Plaintiffs have been happy to accept the benefits of coordinating document discovery, and that domestic document produciton is essentially complete (N.O.T. 9/28/01 - p. 5). Defendants' Memorandum, p. 21. Defendants do not claim that their employees have been redeposed, but only that Plaintiffs have reserved the right to recall the witnesses for subsequent testimony, id. Defendants admit that state court Plaintiffs have entered into discovery coordination agreements, see id., p. 22, but speculate that such a state court Plaintiff could have a change of mind in the future and petition its home court for an accelerated discovery schedule, id.

These potential problems are problems only to Defendants, not to this Court, and do not affect this Court's jurisdiction nor its case management. The potential problems to Defendants are not necessarily problems affecting this Court's jurisdiction. The only direct claim made by the Defendants that addresses this Court's jurisdiction is that it is a "foregone conclusion" that attorneys dissatisfied with this Court's discovery rulings will look to the state courts for "a second bite at the apple," Defendants' Memorandum, p. 23. That may be a foregone conclusion in the Defendants' minds, but it has not happened yet and they do not claim it has.

Remembering the repeated strict language from the United State Supreme Court concerning the narrowness of the exceptions of the Anti-Injunction Act, and remembering particularly the Supreme Court's admonition not to broaden the exceptions by loose statutory construction, Atlantic

Coast Line, supra, 398 U.S. at 287, 90 S. Ct. at 1743, the conclusion is inescapable that this Court should not take radical action based upon "what ifs" and other possible problems that might or might not arise at some future date. At the very least, this Court should withhold action until those future actions occur in such a quantity and quality as to seriously impair this Court's jurisdiction.

Having addressed the arguments presented by the Defendants under the facts of the case, at this time we now turn to the concerns expressed by this Court which were articulated at a hearing on September 28, 2001. At that time the Defendants, for the first time, notified the Plaintiffs, and presumably the Court, that they intended to file a motion for injunction. During the hearing, the Court articulated the concerns it had involving its management of the litigation. As expressly stated by the Court, it was concerned as follows: "duplication" of work on the part of the parties (p. 6); "wasted time and effort" (p. 6); "feasibility" of case management (p. 8); "harassment" (p. 8); "plethora of foreign discovery" (p. 13); "consistency of rulings" in state and federal courts (p. 19); and the "imminent problem of state depositions or certification hearing dates" (pp. 13, 14, 15).

None of the above concerns of the Court require the issuance of an injunction since they are unfounded and not supported by the facts of the case but by the hypothetical conjecture misleadingly presented to the Court by the Defendants. In fact, the issuance of an injunction will create more future problems rather than less and will result in some of the concerns of the Court being realized, not eliminated..

First, there is no duplication because Plaintiffs have entered into discovery coordination agreements. Discovery produced in the MDL is also discovery produced in state cases, and vice-versa.

Second, there has been and will be no wasted time and effort, both because the document discovery is applicable in both federal and state courts and because, more generally, all discovery is applicable in both courts.

Third, discovery proceeding in state courts at the same time as it proceeds in federal courts does not affect the feasibility of this Court's management of its litigation and, in fact, enhances the more orderly resolution of issues involving state law versus federal law on various matters.

Fourth, there has been no harassment of defendants' employees by unnecessarily repeated depositions and there will be none, since the various courts have coordinated in the past and will continue in the future.

Fifth, when the foreign discovery occurs, it will be coordinated between federal and state plaintiffs as has been done with domestic discovery.

Sixth, any rulings made in state court litigation which deal with state court issues will obviously be consistent with the law of the state. In almost all instances, the applicable rulings on various state law issues will be, if not binding by res judicata, persuasive for rulings that might be made in this Court. They may, in fact, save time and effort by not requiring this Court to address state law issues with which it generally does not have familiarity. To the extent that any decisions of the state courts are contrary to the opinions or view of this Court, the Court is free to act accordingly, subject to its authority to manage its litigation.

Lastly, the imminence of state court certification hearings does not cause any problem to this Court for the reasons articulated above and can only be helpful in the Court's management, rather than harmful, in managing the sprawling class action that has been filed before it.

CONCLUSION

If this Court issues the requested injunction, it puts Federalism on a pedestal and stands states' rights on its head. Without doubt, all state court plaintiffs will be severely prejudiced and irreparably harmed if the injunction were to issue.

This brief has attempted to address the issues raised by both the Defendants and this Court regarding the injunctive relief that Defendants have requested. It has not attempted to present other examples or circumstances which argue against such an injunction.

For the above reasons, and for the reasons raised by other Plaintiffs in their oppositions to the Defendants' Motion for Injunction, Plaintiffs respectfully request that this Court not fall prey to the siren song of economy, and that Defendants' Motion for Injunction be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the date below, a true and correct copy of the foregoing New Jersey Plaintiffs' Memorandum in Opposition to Motion for Injunction has been served on Liaison Counsel, James Irwin, at the address below by U.S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by Verilaw in accordance with Pre-Trial Order No. 4.

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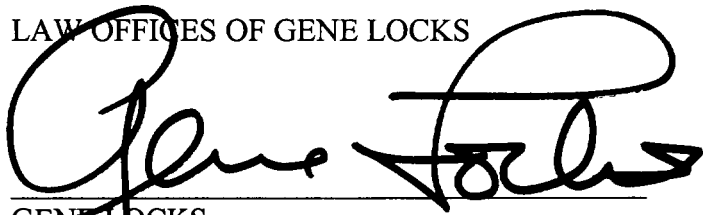

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