UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION	:	MDL NO. 1355
	:	SECTION: L
	:	JUDGE FALLON
	:	MAGISTRATE JUDGE AFRICK

MDL PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM IN OPPOSITION TO MOTION FOR INJUNCTION

The relief defendants' seek in their Motion for Injunction is unprecedented. In the name of administrative ease and economy, defendants, urging this Court to summarily usurp the jurisdiction of thirty-seven state courts, invite this Court to go where no federal court has previously gone before at this stage in litigation. As there is neither Constitutional nor Congressional authority for such an act, defendants encourage a distorted and impermissibly broad interpretation of the All Writs Act. 28 U.S.C. § 1651 However, "[t]oo elastic an interpretation of the All Writs Act perverts it . . . into a device for judicially re-equilibrating a state-federal balance that is Congress's to strike." *Henson v. CIBA-Geigy Corp.*, 261 F.3d 1065, 1071 (11th Cir. 2001). There is no basis for defendants' position.

Defendants concede that this Court has no authority to issue "an injunction against trials or other proceedings on the merits of pending state cases." Def. Mem. at 18. Yet, defendants' proposed

injunctions would do exactly that and more.[1] There should be no ambiguity about the injunctions sought by defendants. Defendants seek an order compelling coordination of pretrial discovery in both individual and class state court cases, and an injunction against all state court class action proceedings so that this Court can first rule on class certification. Def. Mem. at 2, 25. These injunctions, which contravene the prohibitions of the Anti- Injunction Act, would usurp control over all state court pretrial proceedings, including discovery. 28 U.S.C. § 2283. This would effectively halt all individual and class actions in the state courts. Yet, defendants admit that "[n]either the All Writs Act nor the Anti-Injunction Act permits a federal court to enjoin a state court for the sole purpose of being the first court to reach final judgment." Def. Mem. at 18.

Defendants claim "[t]here is no overall authority providing management or coordination among the 37 states in which these actions are pending." Def. Mem. at 2. It is true that there is no precedent authorizing the relief defendants seek. The reason is simple: the applicable law is to the contrary. There is, however, no lack of authority regarding defendants' request. The All Writs Act and the U.S. Constitution are the controlling authorities concerning federal court intervention in parallel state court proceedings. These authorities leave no doubt as to the impropriety of defendants' request. "The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives the court in which the first was brought *no power* to enjoin the prosecution of the others. Each may take its normal course." *Kline v. Burke Construction Co.*, 260 U.S. 226, 232 (1922) (emphasis added).

[1] "The scope of the injunction sought by defendants is extraordinarily broad." Report of Dean Edward F. Sherman, October 24, 2001, ¶ 13 ("Sherman Report"), Exhibit 1 to Declaration of Russ M. Herman.

ARGUMENT

Defendants contend that the injunctions they seek are authorized primarily because an MDL constitutes a *res* under the Anti-Injunction Act. Defendants alternatively argue that the injunctions are authorized to protect the Court's "continuing superintendence" over the Propulsid MDL, and to protect its discovery orders. Def. Mem. at 10-19.[2] These arguments fail for two reasons.

First, the Court lacks personal jurisdiction over the majority of state court litigants defendants seek to enjoin. Without jurisdiction, this Court simply cannot prohibit those individuals from pursuing claims in state court. Second, strict application of the Anti-Injunction Act permits injunctions "in aid of [the court's] jurisdiction" only where a *res* is at issue in both the state and federal court that only one can decide. This case concerns no *res* nor can defendants show that a quasi-*res* exists, such as a settlement fund. There being no exception to the Anti-Injunction Act, an order enjoining state proceedings may not properly issue.

In the end, this Court is being asked to do that which can only be accomplished through legislation. The determination of whether federal jurisdiction should be extended over state court class actions is left solely to Congress under Article III, not to the courts. In fact, Congress is considering legislation which would grant federal courts original jurisdiction over class action lawsuits, for ease of coordination and management. *See* "The Class Action Fairness Act of 2001,"

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[2] Defendants correctly argue that their request for injunctive relief cannot be afforded under Fed.R.Civ.P. 23(d). However, in the cases cited to describe this Court's supervisory powers, defendants neglect to mention that those courts had pending before them either certified class actions or issues of communications with potential class members. *See e.g., Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *In re School Asbestos Litig.*, 842 F.2d 671 (3d Cir. 1988); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977). The impetus behind these cases is not present here, as notice to the class is not at issue.

H.R. 2341, 107th Cong. §4, 5 (2001).[3] There being no authority supporting the relief defendants seek, defendants' Motion must be denied.

I. DEFENDANTS' MOTION MUST BE DENIED BECAUSE THE COURT LACKS PERSONAL JURISDICTION OVER PUTATIVE CLASS MEMBERS

Defendants' requested injunctions would, by express design, prohibit thousands of individuals from prosecuting claims in state courts across the country. Specifically, defendants seek an injunction against every person in the United States who ever "purchased and/or used Propulsid." *See* Def.'s Proposed Order ¶ 3(c).[4] Yet defendants' memorandum is, incredibly, devoid of any meaningful analysis of this Court's jurisdiction over putative members of the class. Before enjoining any aspect of a parallel state court proceeding, the Court must have personal jurisdiction over the out-of-state, nonparty litigants.

The All Writs Act only permits the issuance of otherwise proper injunctions against nonparties where the "jurisdiction over the subject matter and the parties to the litigation is properly acquired." *U.S. v. International Brotherhood of Teamsters*, 948 F.2d 98, 103 (2nd Cir. 1992). *See also*

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[3]The first page of defendants' brief inadvertently alludes to this point. While defendants accurately quote Chief Justice Rehnquist's comments about the "need for coordinating state and federal efforts to adjudicate mass tort claims," they do not quote enough. The full quote reads:

> No thoughtful persons can deny the need for coordinating state and federal efforts to adjudicate mass tort claims. My hope is that this conference, and perhaps other similar ones, can graduate from generalized observations about the desirability of such coordination to rather specific and concrete proposals for *changes in governing statutes and rules in federal and state courts which will accomplish this result.*

Chief Justice William H. Rehnquist, *Welcoming Remarks, National Mass Tort Conference*, 73 Tex. L. Rev. 1523 (June 1995) (emphasis added). Chief Justice Rehnquist was not encouraging federal courts to overtake the management of mass torts; he was encouraging the adoption of *legislation* to address the issue because federal courts currently have no such authority. In contrast to his informal remarks as a commentator, Chief Justice's Rehnquist's binding decisions speak volumes: "injunctive relief under the All Writs Act is to be used 'sparingly and only in the most critical and exigent circumstances.'" *Brown v. Gilmore*, No. 01-34, 2001 WL1056666, *1 (U.S. 2001) (Rehnquist, J.). *See also* Edward H. Cooper, "Reporter's Call for Informal Comments on Overlapping Class Actions," Advisory Committee on the Federal Rules of Civil Procedure, September 2001, p. 18 (proposing an amendment to §2833 which would add an exception to the Anti-Injunction Act providing courts with authority to issue injunctions such as those requested by defendants) (Exhibit 2 to Herman Declaration)

[4]*Winkler v. Eli Lilly & Co.*, 101 F.3d 1996, 1201 (7th Cir. 1996) (an injunction against state court discovery constitutes enjoining a "proceeding" under the Anti-Injunction Act).

Compagnie des Bauxites de Guinea v. Insurance Co. of North America, 651 F.2d 877 (3rd Cir. 1981), *aff'd Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982); *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 199 (3rd Cir. 1993). Personal jurisdiction is a constitutional prerequisite for due process, as "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Insurance Corp. of Ireland*, 456 U.S. at 701; *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). It is a "fundament of personal jurisdiction in a court of law that a [party] be actually domiciled or present within the territory of the forum court, without which the court would lack authority to bind that [party]." *Carlough*, 10 F.3d at 199. In this action, the vast majority of individuals defendants seek to enjoin are neither domiciled nor present within the territory of the MDL court. Yet defendants articulate no cognizable argument for personal jurisdiction over the bulk of nonparties they hope to have this Court enjoin. There is none.

Nor does the fact that the federal plaintiffs have sought to certify a class ameliorate the personal jurisdiction issue. No class has been certified. Defendants' strong resistance to certification of a class (both here and in other venues) leads to the ineluctable conclusion that certification cannot be presumed – at least in defendants' eyes. Personal jurisdiction cannot attach over individual class members located outside of the forum court's territory absent certification, class notice and an opt out period. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). "Thus, prior to notice and the opt out period, and absent minimum contacts with the [state of the federal] forum or consent to its jurisdiction, a federal injunction enjoining state action would violate due process." *Carlough*, 10 F.3d at 201.[5] Defendants nowhere address this fundamental due process issue.

[5] *See also In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir. 1989)("If the [class] member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court."); *U.S. v. International Bhd. of Teamsters*, 948 F.2d at 103; *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 134 F.3d 133, 140-41 (3rd Cir. 1998); John C. Coffee, Jr., "Class Actions: Interjurisdictional Warfare," N.Y.L.J. Sept. 25, 1997 at 35 ("Put simply, short of the judgment stage,

The Sixth Circuit's recent decision in *In re Inter-Op Hip Prosthesis Product Liability Litig.*, Case No. 01-4039 (6th Cir. Oct. 29, 2001) (hereinafter *"Sulzer Hip"*), underscores this due process issue. *See* Exhibit 3 to Herman Declaration. The court in *Sulzer Hip* issued an injunction in connection with a proposed nationwide class settlement prohibiting all putative class members from "initiating or pursuing in any forum related claims against the settling defendants and others." *Id.* at 2. The Sixth Circuit stayed the injunction in its entirety pending appeal out of concern for the due process rights of the putative class members: "[b]ecause . . . the injunction prevents litigation by putative class members prior to any opportunity to opt out of the Rule 23(b)(3) class, the authority of the district court to issue such broad injunctive relief is questionable." *Id.* at 3 (citing *Carlough*, 10 F.3d at 200-201).

Unable to establish the existence of personal jurisdiction over the putative class members they seek to affect, defendants ignore the issue (as well as *International Shoe* and the All Writs Act) in favor of the position that the Court simply has the authority to enjoin nonparties. Def. Mem. at 9-10, n.6. But in each of the cases relied upon by defendants, the court had personal jurisdiction over the nonparty subjected to the injunction.

In *U.S. v. New York Tel. Co.*, 434 U.S. 159, 161 (1977), the District Court for the Southern District of New York entered an order in a criminal case commanding a New York utility company to cooperate with law enforcement. The issue in that case was whether the court could compel the telephone company, a nonparty, to assist law enforcement in criminal investigations. *Id.* There was

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the federal court simply lacks personal jurisdiction over the absent class members."); Sherman Report ¶ 13.

In *General Motors*, the Third Circuit refused an injunction where the district court refused to certify a class settlement and the proponents of the settlement presented the same settlement to a state court in Louisiana, which approved the same. Despite what clearly appeared to be an end run on federal jurisdiction, the Third Circuit could not and did not interfere with the state court action because no judgment had been entered by the district court to justify an All Writs Act injunction and no personal jurisdiction existed over the majority of state court litigants.

no question that the court had personal jurisdiction over the New York company, because it was within the forum state. Personal jurisdiction simply was not addressed.[6]

In *In re Corrugated Container Antitrust Litig.*, M.D.L. 310, 659 F.2d 1332 (5th Cir. 1981), the enjoined state court plaintiffs were also members of the class *certified* by the MDL court. *Corrugated Container*, 659 F.2d at 1333. Class notice had already been provided to these parties and the Court had approved the settlements. *In re Corrugated Container Antitrust Litig.*, 1981 WL 2093 (S.D. Tex. June 4, 1981). The injunction did not affect putative class members, but rather members within the class certified by, and thus properly before, the court. Personal jurisdiction existed and due process was satisfied.[7]

In the other cases relied upon by defendants, including *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196 (7th Cir. 1996) and *In re Baldwin-United Corp.*, 770 F.2d 328 (2nd Cir. 1985), the district court had personal jurisdiction over the enjoined parties prior to issuing the injunction. In fact, the Seventh Circuit in *Winkler*, which reversed the district court's order, in part on jurisdictional grounds, specifically held that the district court had authority to enjoin only those persons whose cases were part of the MDL. *Winkler*, 101 F.3d at 1203.

Defendants' assertion that federal courts may, in limited circumstances, enjoin nonparties does not address whether this Court can enjoin putative class members over whom this Court lacks

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[6]The cases relied upon by the Supreme Court in *New York Telephone* with respect to enjoining nonparties support this conclusion: the courts in each case either had personal jurisdiction over the nonparty or the issue was simply not addressed. *See New York Tel.*, 434 U.S. at 174, citing *Mississippi Valley Barge Line Co. v. U.S.*, 273 F.Supp 1, 6 (E.D.Mo. 1967) (nonparty with actual notice was "alter ego" and acting in concert with enjoined corporate party before the court); *Board of Education v. York*, 429 F.2d 66 (10th Cir. 1970) (enjoined individuals who appeared before the Oklahoma District Court); *U.S. v. McHie*, 196 F. 586 and 194 F. 894 (N.D.Ill. 1912) (Illinois District Court's order directed at company with Chicago, Illinois office); *U.S. v. Field*, 193 F.2d 92 (2nd Cir. 1951) (individuals who appeared before the court and refused to respond to examination held in contempt); *Labette County Comm'rs v. U.S.*, 112 U.S. 217 (1884) (Kansas District Court issued Writ of Mandamus against Kansas county).

[7]With respect to the injunction against indirect purchasers, those individuals were not parties to the state court action. Thus, "the Anti-Injunction Act does not apply." *Corrugated Container*, 659 F.2d at 1336. Furthermore, because final judgments had been entered, the court had the authority to enjoin all claims which might have been asserted under *res judicata* principles. *Id.*

personal jurisdiction. Due process and Supreme Court precedent dictate that it cannot.[8] Lacking personal jurisdiction over the nonparties that defendants seek to enjoin, defendants' Motion must be denied.

II. THE ANTI-INJUNCTION ACT BARS DEFENDANTS' INJUNCTIONS

Defendants' injunctions are prohibited by the Anti-Injunction Act, which prohibits federal courts from enjoining state court proceedings except: (1) as expressly authorized by Act of Congress; (2) where necessary in aid of its jurisdiction; or (3) to protect or effectuate its judgments. 28 U.S.C. § 2283.[9]

Defendants contend that the extraordinary relief sought here is authorized by the second exception to § 2283. They cannot demonstrate, however, that this proceeding is effectively an *in rem* proceeding – a prerequisite for the imposition of an injunction "in aid of [the court's] jurisdiction." Nor can defendants properly advocate a judicial expansion of the exception to the Anti-Injunction Act. The § 2283 exceptions are exclusive and are "not to be whittled away by judicial improvisation," nor expanded by the courts. *Total Plan Services v. Texas Retailers Ass'n*, 925 F.2d 142, 143 (5th Cir. 1991).

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[8]Furthermore, merely enjoining the few state court litigants over whom the Court has jurisdiction would not address nor resolve the "conflicts" which defendants' Motion purports to address. As the Third Circuit held in *General Motors*, 134 F.3d. at 141 n.2, "We note that enjoining the few Louisiana class members that the MDL court does have personal jurisdiction over . . . would serve no purpose . . . it is conceivable that we could direct the district court to enjoin those 200 plaintiffs from pursuing their state damage remedies in Louisiana. As the district court properly pointed out, however, since the appellants' stated goal here is to prevent the Louisiana court from further consideration of the settlement in *toto*, little would be accomplished by enjoining only those 200 plaintiffs . . . and we have not been asked to do so. At all events, the limited injunction would not halt the Louisiana proceedings because the original Louisiana plaintiffs (over whom we have no jurisdiction) could simply continue with the settlement."

[9]The Anti-Injunction was passed in 1793 and represents the delicate balance struck by Congress to protect the "fundamental constitutional independence of the States and their courts," while at the same time ensuring the sovereignty of the federal courts. *Atlantic Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 287 (1970). The Act's "basic purpose is to prevent needless friction between state and federal courts." *Mitchum v. Foster*, 407 U.S. 225, 232-33 (1972); Sherman Report ¶ 9. Of course, some degree of friction is bound to occur under our federal system, as "[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court." *Kline*, 260 U.S. at 230. The Anti-Injunction Act dictates which frictions must be tolerated out of respect for the "constitutional independence of the States and their courts," and which frictions are "needless," and thus intolerable. *See* Sherman Report ¶ 7-9.

A. THE ANTI-INJUNCTION ACT'S "IN AID OF JURISDICTION" EXCEPTION IS LIMITED TO *IN REM* PROCEEDINGS AND THEREFORE IS INAPPLICABLE IN THIS ACTION.

It is well settled that the "in aid of jurisdiction" exception to the Anti-Injunction Act is generally applicable to *in rem* actions only, actions that deal with "specific property or objects." *Kline*, 260 U.S. at 232; *In re Ford Motor Co. Bronco II Products Litig.*, MDL-991, 1995 WL 489480, *2 (E.D. La. August 15, 1995) (hereinafter *Bronco II*); *FBT Bancshares, Inc. v. Mutual Fire, Marine & Inland Ins. Co.*, Civ. A. No. 95-1702, 1995 WL 476188 (E.D. La. August 10,1995).

This exception generally does not apply to *in personam* actions, where a personal judgment is sought. *Kline*, 260 U.S. at 231-32. "Indeed, *in personam* actions in federal and state court should generally be allowed to proceed concurrently without interference from either court." *Bronco II*, 1995 WL 489480 at *2. *See also Vendo Co. v. Lektro-Vend. Corp.*, 433 U.S. 623 (1977) ("We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court."). This rule applies equally to parallel state and federal class actions. "[B]ecause the state-court and federal-court [class] actions are *in personam* proceedings, the . . . injunction does not fit within the Anti-Injunction Act's exception for injunctions in aid of the district court's jurisdiction." *In Re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001).[10]

The Supreme Court in *Kline v. Burke Construction Co.* established the foundation for interpretation of the "in aid of jurisdiction" exception to the Anti-Injunction Act. *Kline* involved a federal injunction against a parallel *in personam* state court action involving the same parties and

[10] In *BankAmerica*, counsel sought to end run the newly enacted Private Securities Litigation Reform Act's requirement that lead counsel be appointed by the client with the largest share holding of the defendant corporation by filing a class action in state court. The district court's injunction was upheld on appeal under the "expressly–authorized" exception to the Anti-Injunction Act because "the lead plaintiff provisions of the PSLRA create significant federal rights that previously did not exist." *Id.* at 801. As the instant defendants do not even suggest that their motion is supported by the "expressly-authorized" exception, this case is inapposite.

"substantially the same issues." *Kline*, 260 U.S. at 227-28. The Supreme Court vacated the injunction, recognizing the constitutional independence of the state and federal judiciaries, in which "[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court." *Id.* at 230.

The Supreme Court held that federal courts may enjoin *in rem* proceedings to protect its jurisdiction because two courts cannot possess or control the same *res* at the same time, "and any attempt to do so would result in unseemly conflict." *Id.* at 234-35. One court's "attempt to seize" an object from another would be "futile and void," as neither is capable of exercising authority over the other; between state and federal courts, "[t]here can be no question of judicial supremacy." *Id.* at 230.

As to *in personam* proceedings, federal courts have no authority to enjoin a parallel state action. "The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Id.* at 230-31. This rule is a recognition that "[t]he rank and authority of [state and federal] courts are equal." *Id.* at 235. *See e.g., Castano v. American Tobacco Co.*, 879 F.Supp. 594 (E.D.La. 1995) (Court denied request for injunction to prohibit discovery in related state court action involving circumstances in which defendants' documents were obtained by a third party).

Indeed, the Fifth Circuit has left no doubt that the "in aid of jurisdiction" exception applies only to *in rem* proceedings, which is simply not present here.[11] "In cases decided under this

[11]The *res* analysis used to invoke federal supremacy is well rooted in our jurisprudence. As an example, in admiralty, where concurrent jurisdiction is often recognized, concentration in a federal forum can occur where a defendant vessel owner places the value of the vessel at issue (a limited fund) and the court, by the issuance of a monition, concentrates the litigation in the federal forum so as to cause an equitable distribution of the *res*. *See*

exception, courts have interpreted the language narrowly, finding a threat to the court's jurisdiction only where a state proceeding threatens to dispose of property that forms the basis for federal in rem jurisdiction, *see, e.g., Signal Properties, Inc. v. Farha*, 482 F.2d 1136, 1140 (5th Cir.1973), or where the state proceeding threatens the continuing superintendence by a federal court, such as in a school desegregation case. *See* Wright & Miller Federal Practice & Procedure § 4225. *In no event may the 'aid of jurisdiction' exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision.*" *State of Tex. v. U.S.*, 837 F.2d 184, 186, n.4 (5th Cir.), *cert. denied*, 488 U.S. 821 (1988) (emphasis added).

Accordingly, the "in aid of jurisdiction" exception has no application to *in personam* actions such as the one before this Court.

B. THE FACTS AND POSTURE OF THIS ACTION DO NOT FALL WITHIN ANY EXCEPTION TO THE ANTI-INJUNCTION ACT

The action pending before this Court does not fit within any exception to the Anti-Injunction Act. Nevertheless, defendants present the following arguments in support of their injunctions:

1. This case is a complex, multidistrict class action which constitutes a *res* under the Anti-Injunction Act (Def. Mem. at 10-12, 17-19)

2. This Court is exercising "continuing superintendence" over the Propulsid MDL (Def. Mem. at 12)

3. Discovery may be enjoined in concurrent state court litigation (Def. Mem. at 12-17)

Each argument lacks merit.

MDL as a "*res*"

Limitation of Liability Act, 46 App. U.S.C.A. §783 *et seq*. *See also* Shermnan Report ¶ 10-11.

Defendants' first argument is based upon the false premise that "a number of federal Courts of Appeals have held that a district court's supervision over protracted, complex litigation forms a matter that is the equivalent of a res, thus establishing *in rem* jurisdiction . . ." Def. Mem. at 10. Not only is this an incomplete statement of the law, but the cases relied upon by defendants do not apply here.

Defendants' reliance upon cases such as *In re Baldwin-United Corp.*, 770 F.2d 328 (2nd Cir. 1985) present two fundamental problems. First, neither the Fifth Circuit nor the Supreme Court has expressed approval of the Second Circuit's opinion in *Baldwin*.[12] Second, even if *Baldwin* were followed in this Circuit, that decision provides no justification whatsoever for the pre-certification, pre-settlement injunctions sought by defendants in this case.

Baldwin involved an MDL in which the district court coordinated talks resulting in settlement agreements between the plaintiffs and most of the defendants. *Id.* at 330. The MDL court provisionally approved the settlements and certified a class for purposes of ruling upon the settlements. *Id.* at 331, 336. Notice of the class and the settlement had been provided and the opt-out period had passed. *Id.* Immediately prior to the final hearing on the settlements, state attorneys general served notices of intent to bring suit in state courts against the defendants. Faced with these competing *parens patriae* suits, the equivalent of class actions, the court issued an injunction. *Id.* at 333.[13]

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[12] In *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1299 (5th Cir. 1992), the Fifth Circuit rejected defendants' argument that a "lengthy, complicated litigation is the 'virtual equivalent' of a res," although it noted that its prior decisions did "not specifically preclude such interpretation."

[13] The Anti-Injunction Act was not implicated because the state court actions had not yet been filed. *Id.* at 335. The Attorneys General's efforts to opt-out their state's citizens from a class action, an inappropriate application of the individual opt out right to the settlement, *see Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998), was further grounds for enjoining their misdirected efforts.

The Second Circuit affirmed, holding that the provisionally approved settlements constituted "the virtual equivalent of a res over which the district judge required full control." *Id.* at 337-38. Although a clear extension of the Supreme Court's decision in *Kline*, the *Baldwin* court found a *res* where there were pending settlements before the federal court, a federal class was certified for settlement purposes, notice had been provided to the federal class, and the subsequent state court actions were filed solely to undermine and frustrate the federal settlements. Accordingly, the *Baldwin* court found the "*res*" to be the provisionally approved settlement and class, so as to justify the exercise of the "in aid of jurisdiction" exception to the Anti-Injunction Act.

The *Baldwin* decision is clearly of limited application. Cases finding the existence of a *res* where no traditional *res* exists share the following fact pattern:

1. A complex, federal action is generally filed first (i.e. class action, MDL);

2. The federal court spends considerable time and resources in attempting to settle or resolve the litigation with the parties;

3. Final settlement/resolution of the federal action is imminent, i.e. an agreement is in place between the parties and the federal court has taken concrete steps toward finalizing the agreement, such as provisional certification and entering an order preliminarily approving of the proposed settlement;

4. The state action is filed, or some significant action is taken in the state court action, soon thereafter;

5. The purpose and/or effect of the state court action is to harass or disrupt the settlement framework established by the court; and

6. One or both of the parties to the federal action would, in all likelihood, back out of the settlement without an injunction.[14]

[14] *See, e.g., Baldwin,* 770 F.2d 328 (Second Circuit) (injunction affirmed where settlement reached, preliminarily approved, class was provisionally certified and "multiple and harassing" actions were threatened on the "eve of settlement"); *Carlough*, 10 F.3d at 203 (Third Circuit) (injunction order affirmed in complex federal class action where settlement was reached, class was conditionally certified and plaintiff's subsequent state action was specifically brought as a "preemptive strike against the viability of the federal suit"); *General Motors*, 134 F.3d at 145 (Third

Here, there is no settlement, nor imminent settlement, and no class has been certified. There is no support in *Baldwin* for the injunctions defendants seek here.

The other cases relied upon by defendants are equally inapplicable. *Battle v. Liberty Nat'l Life Ins. Co.*, like *Baldwin*, involved a federal class action settlement that the court held was "the virtual equivalent of a res." *Battle*, 877 F.2d at 882. In fact, the *Battle* court had already entered a final judgment on the settlement. *Battle* thus confirms the post-*Shutts* jurisprudence that a court lacks jurisdiction to enjoin out-of-state, putative class members unless and until notice issues and the opt-out period expires. *See Carlough*, 10 F.3d at 189; *Hanlon*, 150 F.3d at 1011.

In re Taxable Mun. Bonds Litig., Civ. A. M.D.L. N0863, 1992 WL 205083 (E.D. La. Aug. 12, 1992), is also distinguishable. In that case, the federal court granted an order coordinating discovery in a parallel state court action because the state court plaintiffs agreed to a coordinated discovery plan. *Taxable Mun. Bonds*, 1992 WL 205083 at *3. No such circumstances exist in this case.

The type of injunctions sought by defendants have, in many respects, already been considered and rejected by this Court in *Bronco II*, 1995 WL 489480 (E.D. La. 1995). *Bronco II* involved

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Circuit) (exception is available in "a complex class action . . . where a settlement was imminent; where the federal court had already expended considerable time and resources; and where the pending state action threatened to derail the provisional settlement."); *In the Matter of VMS Sec. Litig.*, 103 F.3d 1317, 1322, 1324 (7th Cir. 1996) (injunction approved in complex federal class action after court had approved settlements, which class members attempted an "end run" around by filing state court lawsuits); *White v. Nat'l. Football League*, 41 F.3d 402, 407 (8th Cir. 1994), *cert. denied subnom. Jones v. Nat'l. Football League*, 515 U.S. 1137 (1995) (injunction affirmed in antitrust class action where court enjoined parallel actions after preliminarily approving of settlement, conditionally certifying class and providing notice); *Flanagan v. Arnaiz*, 143 F.3d 540, 542, 543, 546 (9th Cir 1998) (injunction against plaintiffs' "unjustified attempt" to "dance back and forth between federal and state courts" to avoid court-approved settlement agreement affirmed); *Hillman v. Webley*, 115 F.3d 1461, 1468 (10th Cir. 1997) ("where a state court action threatens to frustrate a settlement order entered by a federal court in a complex class action suit, federal courts have typically utilized the All Writs Act . . ."); *Battle v. Liberty Nat'l. Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989) (injunction affirmed as "necessary in aid of jurisdiction" where class action settlement was reached in complicated antitrust case where state court class action suits "on their face challenge the propriety of the" federal court's judgment, holding the federal litigation was "the virtual equivalent of a res.").

parallel state and federal-MDL products liability class actions. *Id.* at *1. Like the defendants in this case, the MDL defendant moved for "an order enjoining the state court proceedings . . . or coordinating all pretrial proceedings in [the state court action] with the pretrial proceedings in th[e] multidistrict litigation." *Id.* at *2. The grounds for the motion were also the same as here: (1) the state court action posed a threat to the jurisdiction of the MDL court, (2) the injunction was "appropriate because the inherent complexity of th[e] multidistrict litigation create[d] the equivalent of a *res* that require[d] protection by th[e] court," and (3) pretrial coordination would "minimize duplication of effort and avoid unnecessary delay and expense." *Id.*

Although the federal action in *Bronco II* was far more advanced than the instant case -- in that a class had already been certified in the federal court -- this Court denied defendants' motion, holding that the injunctions sought were barred by the Anti-Injunction Act. *Id.* at *3. The Court's rationale and holding apply equally to defendants' Motion here:

> 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. [Cits.] 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. The fact that a federal court may lose its ability to decide a case or have its prior orders nullified by contrary state court orders is in itself no grounds for an injunction. Further, the threat that a state court might reach a competing judgment first is simply not sufficient to invoke the "in aid of jurisdiction" exception . . .
>
> [E]ven if the Alabama court can exercise jurisdiction over the nationwide class claims, the fact that the Alabama court may reach a judgment on those claims before this court does so is insufficient grounds for issuing an injunction. **There is simply no judgment, settlement, or imminent settlement that this court needs to protect from interference by the Alabama Court.**

> Although I agree that coordination of this multidistrict litigation and the [Alabama state] case would alleviate duplication of effort and reduce costs and I would encourage the Alabama court to coordinate its 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.[15]

Id. (emphasis added).

There is no authority for the injunctions sought by defendants. The *Baldwin* decision is simply inapplicable because it applies, if at all, "once judgment, or its virtual equivalent in the form of the approval of a partial or global settlement in a multidistrict class action, is entered" or is imminent. *Id.* at *2. In this case, there is no judgment, no class action has been certified and no settlement is pending or imminent.

"Although the defendants argue that an MDL proceeding can be analogized to a *res*, the only authority appears to be MDL cases in which there were circumstances *other than* the mere fact of an MDL case that demonstrated a threat of serious interference with an existing federal court ruling, decree, order, class action, or other critical aspect of its jurisdiction." Sherman Report ¶ 11 (emphasis added). As the Sixth Circuit has just made clear, a district court's authority to stay all state court proceedings is limited even after conditional approval of a settlement where the validity of the

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[15] *See also Peters v. Brants Grocery*, 990 F.Supp. 1337, 1342 (N.D. Ala. 1998), a case relied upon by defendants but which does not support their request. In *Peters*, the parties initially agreed to enjoin all state litigation and an injunction issued without even a hearing. Id. at 1341. Following an unsuccessful mediation, defendants wanted to extend the injunction. Once contested, the Court found no legal authority for the injunction, holding: "The court has not yet decided how it will rule in such matters as the scope of discovery. It may be that the court issues rulings which the plaintiffs' counsel find objectionable. They may then make good on their threat to file litigation in other courts. That is their right even though it may require the defendants to defend on multiple fronts. The court knows of no case which holds that an injunction against other litigation may issue because the defendants will be called upon to defend their conduct in other states where they do business. Indeed, the fact that a party may be better able to effectuate its rights and duties if a writ is issued never has been, and under the language of the All Writs Act cannot be, a sufficient basis for the issuance of the writ . . . The fact that other litigation may be filed will not affect the ability of this court to hear and determine . . . the motion for class certification.").

settlement the parties seek to approve "is questionable." *In re Inter-Op Hip Prosthesis Product Liability Litig.*, Case No. 01-4039 (6th Cir. Oct. 29, 2001) ("Because the validity of the proposed settlement is questionable, the balance of harms weighs in favor of the putative class members *who are prevented from pursuing claims in other forums.*") (emphasis added).

Defendants' attempt to shoehorn this case into the limited holding of *Baldwin* would have the exception swallow the rule. The Anti-Injunction Act and the Supreme Court's decision in *Kline* prohibit this Court from enjoining any state action. Accordingly, defendants' Motion should be denied.

School Desegregation Cases

Defendants argue that "[e]ven were this Court to reject the characterization of such a massive and complex litigation as a *res* as to which the Court has the equivalent of *in rem* jurisdiction, it cannot be denied that this litigation has and will invoke the 'continuing superintendence' of this Court." Def. Mem. at 12. Defendants' argument is incomplete and legally incorrect. The utter dearth of authority endorsing defendants' "continuing superintendence" arguments is telling.[16]

Defendants' "continuing superintendence" language is derived from cases involving federal injunctions in school desegregation suits, in which final judgments have been rendered. *See, e.g., FBT Bancshares*, 1995 WL 476188 at *2. That line of cases has no application whatsoever to this action.

Federal courts issue injunctions in school desegregation cases to protect their orders implementing complex, desegregation plans where jurisdiction is often retained. *See, e.g., Valley v.*

[16]In fact, the only case cited regarding defendants' "continuing superintendence" argument is this Court's decision in *FBT Bancshares*, 1995 WL 476188, which explicitly rejected the argument.

Rapides Parish School Bd., 646 F.2d 925 (5th Cir. 1981); *U.S. v. State of Tex.*, 356 F.Supp. 469 (E.D. Tex. 1972), *aff'd* 495 F.2d 1250 (5th Cir. 1974); *Thomason v. Cooper*, 254 F.2d 808 (8th Cir. 1958). Such orders are appealable, final judgments over which the federal courts exercise "continuing superintendence."[17] The injunctions in school desegregation cases are authorized under the Anti-Injunction Act to "protect or effectuate its judgments," not solely "in aid of [the court's] jurisdiction." 17 Wright, Miller & Cooper, *Federal Practice & Procedure*, §4225 at 531, n. 9 (2nd Ed. 1988) ("Since in [school desegregation] cases the federal court will typically have already made some orders, the cases may also be regarded as coming within the third exception" to the Anti-Injunction Act, to "protect or effectuate" judgments.)

This case is indisputably not a desegregation case, and there is no basis for an extension of the concept to a case where, as here, the federal court has not entered any final judgment nor established a remedy requiring its "continuing superintendence." The posture of this case simply does not meet the criteria for an injunction. Defendants' reliance upon school desegregation cases is improper and unavailing.

Discovery Injunctions

Defendants' final argument, relying on *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, is that "courts have issued injunctions limiting or entirely enjoining discovery proceedings in concurrent state court litigation." Apart from the fact that *Winkler* goes far beyond the limits of the Anti-

[17] *See Valley*, 646 F.2d at 934 (referring to desegregation order as "final judgment," which was appealed and affirmed by the Fifth Circuit); *U.S. v. Texas*, 356 F.Supp. at 472 (justifying injunction against state court proceeding out of concern for "protecting and effectuating its judgment"); *Thomason*, 254 F.2d at 810 (affirming district court's injunction against state court proceeding because state court order was "in direct conflict with the judgment and decree of the federal District Court and of this Court affirming that judgment and decree.").

Injunction Act, which has never been accepted by this Circuit, defendants manipulate the decision in urging a virtually boundless application of the All Writs Act.

Winkler involved a state court settlement agreement entered into between the MDL defendant and parties represented by one of the MDL plaintiff's counsel. *Id.* at 1198-1200. The MDL court denied the federal plaintiffs access to the agreement, which order was not appealed. *Id.* at 1200. Instead, those plaintiffs filed suit in state court to force the production of the settlement agreement "for the specific purpose of evading [the federal court's] ruling" *Id.* at 1202. The MDL court then issued an injunction precluding all MDL plaintiffs from discovering the agreement in any state or federal court. *Id.* at 1200-01. The Seventh Circuit vacated the injunction.

While the Seventh Circuit suggested, in *dicta*, that MDL courts have the authority to grant injunctive relief against litigants who seek to "make a nullity of the district court's ruling, and render ineffective its efforts effectively to manage the complex litigation at hand," it held that the district court's injunction was an abuse of discretion. *Id.* at 1202, 1204.

While the *dicta* cited by defendants from *Winkler* ignores settled Supreme Court and other precedent, and has never been endorsed by the Fifth Circuit, defendants' argument is contrary to the issue-dispositive language in *Winkler* which they studiously ignore.[18] The Seventh Circuit in *Winkler* vacated the injunction, in part, on the ground that it was too "far-reaching and overly expansive" by including (1) individuals over whom the court had no jurisdiction and (2) individuals who "could not be accused of forum-shopping." *Id.* at 1203. The injunctions requested by defendants in this case would do both. Even under *Winkler*, the relief sought is not proper. Apart from the personal jurisdiction defects inherent in defendants' Motion, they would enjoin *every* Propulsid litigant in the

[18] *Winkler*, 101 F.3d at 1202; *Kline*, 260 U.S. at 232. The *Winkler* court relied upon cases including *Baldwin*, 770 F.2d at 336, *Carlough*, 10 F.3d at 197 and *Corrugated Container*, 659 F.2d at 1334-35. These cases do not, however, support the sweeping language in *Winkler*, because each involved a settlement or imminent settlement. *See* note 14, *infra*.

country from engaging in *any* discovery, without a showing that such individuals engaged in a single instance of discovery abuse or forum-shopping.[19] "[A]n injunction based on nothing but speculation and conjecture is as much an abuse of discretion as an injunction based on clearly erroneous facts." *Winkler*, 101 F.3d at 1204.

Defendants' remaining authorities are equally inapplicable and distinguishable. First, the district court in these cases enjoined actions in which the state court plaintiffs had explicitly entered into agreements to coordinate discovery proceedings in the state actions and the MDL. *See Taxable Mun. Bonds Litig.*,[20] 1992 WL 205083 at *3 (state court plaintiffs agreed "to propose to the state court a discovery plan that would coordinate discovery with [the federal MDL] litigation"); *In re Columbia/HCA Healthcare Corp.*, 93 F.Supp.2d 876, 877-78 (M.D. Tenn. 2000) (state court plaintiffs had specifically entered into a "joint prosecution and confidentiality agreement"). Here,

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[19]Defendants' memorandum is bereft of facts supporting the charge of forum shopping, and the majority of their allegations are mere speculation. *See* Def. Mem. at 22-26 ("...while a number of plaintiffs' counsel and state courts have agreed to coordinate some aspects of discovery in the MDL, *that could change at any time....*"; "...any state court plaintiff that has entered into a coordination agreement *could have a change of mind...*"; "*...it is a foregone conclusion* that attorneys who are unsatisfied with this Court's discovery rulings will look for a second bite at the apple from state courts"). Defendants' "concerns" that state courts plaintiffs have reserved the right to recall Janssen employees for deposition are also misplaced. Def. Mem. at 21-22. First, this Court explicitly authorized parties to conduct supplemental depositions under certain circumstances. Pretrial Order No. 2. Second, defendants have agreed to permit the retaking of non-redundant depositions. *Joint Reports No. 3, 4, 6, 7.* Finally, to the best of plaintiffs' knowledge, no state court plaintiff has requested a second deposition of any of the defendants' employees deposed to date.

Furthermore, defendants' suggestion that the Tennessee class certification in *Jackson v. Johnson & Johnson*, reflects the propensity of state counsel to take inappropriate steps to obtain an expedited review of class certification is baseless. Tennessee civil practice contemplates conditional class certification immediately upon the filing of a class action complaint. *See* Tenn.R.Civ.P. 23.03(1)("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether the action is to be so maintained. An order under this section may be conditional and may be altered or amended before the decision on the merits."). Following this established procedure, the issues on class certification are briefed and the propriety of certification may be revisited. This procedure, while not common, is not unheard of. For example, in Pennsylvania, the filing of a class action complaint immediately creates a class with all the attendant fiduciary duties owed to it by court and counsel, unless and until the class is revoked or the court refuses to certify it as such. *See Bell v. Beneficial Consumer Discount Co.*, 465 Pa. 225, 348 A.2d 734 (Pa. 1975)("The class is in the action until properly excluded"). In any event, established state procedures should be respected under federalism and not negated by federal injunction.

[20]Furthermore, defendants' assertion that the district court in *Taxable Municipal Bonds* issued a broad injunction staying arbitration of related claims is inapposite, as the court specifically held that the Anti-Injunction Act was inapplicable to arbitration proceedings.

defendants make no contention that the litigants in each of the state court actions they seek to enjoin have consented to be bound by the MDL in a coordinated discovery plan.[21]

Second, the state court plaintiffs in those cases had not engaged in independent state court discovery against the defendants, and were, in effect, relying "almost exclusively on the MDL plaintiffs for discovery." *Columbia/HCA Healthcare Corp.*, 93 F.Supp.2d at 878. Here, the various state court litigations have been prosecuted on different tracks and discovery has been conducted independently, in some instances ahead of the MDL litigation.

Defendants' reliance on *Cinel v. Connick*, 792 F.Supp. 492 (E.D.La. 1992) is equally misplaced. First, the federal court had jurisdiction over all parties involved. Second, although the Court's injunction was issued in the infancy of the litigation, it was concerned with the possible destruction of evidence. *Id.* at 497. The loss of that property, or *res*, compelled the court to have the documents produced only in the federal proceedings. *Cinel* is an exceptional case and very dependent

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[21]Plaintiffs in the various state court actions have attempted to coordinate discovery with the MDL to avoid the speculative discovery burdens imagined possible by the Defendants. However, this coordination amongst the state litigants and the PSC is entirely voluntary and *ad hoc*, while remaining within the spirit of the Manual for Complex Litigation (Third), §20.225 (1995). The PSC, New Jersey and Pennsylvania counsel responded to the Defendants' proposal for an injunction following the September 28, 2001, status conference in writing to explain the coordination efforts to stave off Defendants' motion. *See* Letter of Messrs. Herman, Placitella and Weiss to Messrs. Campion and Irwin, October 9, 2001 (Exhibit 4 to Herman Declaration). Therein counsel identified specific measures, such as not to re-ask deponents questions at subsequent depositions, to avoid duplicative and cumulative discovery. Although cross-noticed depositions are not the norm, *see In re Diet Drugs (Phentermine/Fenfluramine/Desfenfluramine) Products Liability Litig.*, PTO No. 467, 1999 WL 124414, *6 (E.D.Pa. Feb. 10, 1999), they are occurring in the Propulsid litigation. Despite Plaintiffs' good intentions, Defendants' lapses in their efforts to coordinate discovery may be at the root of their frustration. For example, in June 2001, they agreed to post state court depositions on Verilaw to avoid duplicative depositions amongst state and federal litigants. As of October 15, 2001, that task was never accomplished. *See* Letter of Mr. Irwin to Mr. Davis, October 15, 2001 (Exhibit 5 to Herman Declaration). Even so, the prospect of conflicting discovery obligations can be expected whenever a large corporation is engaged in national commerce and may be hailed into several different forums at once. It is a bedrock principle of federalism that "a state court may have concurrent jurisdiction with a federal court over the same claims [and this] does not give a federal court the power to prohibit a party from simultaneously pursuing claims in both courts." *Bronco II*, 1995 WL 489480 at *2.

Here, the state court litigants are properly lodged in their respective jurisdictions where they are entitled to the application of the laws of those jurisdictions. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Therefore, Defendants cannot seriously argue that the state litigants, for example, are forum shopping. At best, Defendants speculate that these litigants may seek to obtain an order available under their state's law, but once again, that inconsistency is not a valid basis to prohibit a state court proceeding. Rather, it is a product of the underlying federalist system envisioned by the founding fathers. The only recourse under these circumstances is not to expand the exceptions of the Anti-Injunction Act to the breaking point, but to seek a remedy with Congress. *See generally Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

on its facts. However, it clearly does not support the broad interpretation attributed to it by the defendants. Plaintiffs submit that the *Cinel* opinion is *sui generis* and very fact dependent.

Finally, defendants' reliance on *Harris v. Wells*, 764 F.Supp. 743 (D.Conn. 1991), is also misplaced. *Harris* involved a federal shareholder suit in which plaintiffs requested certain corporate documents, the non-production of which would have triggered plaintiffs' ability to apply to a Delaware state court for relief. Defendants successfully sought to enjoin the filing of such a state court action. The *Harris* court not only had jurisdiction over the enjoined parties, but the injunction only prohibited individuals from filing a state court action *before* its commencement. *Id.* at 745. By definition, the Anti-Injunction Act applies only to pending state court actions, and thus the district court was not restrained by the Act, as is the Court in this case. *See Baldwin*, 770 F.2d at 335.

The injunctions sought by defendants in this case present the same issues and concerns raised in *Bronco II*, discussed *infra*. Defendants in that case also sought an injunction against all state court proceedings or the coordination of all state pretrial proceedings by the MDL court, after a settlement had been reached and provisional certification had been granted. As this Court held, "[t]he state proceedings must present a direct and immediate threat to the federal court's ability to manage and effectuate an imminent or final compromise of the claims before the court." *Id.* at *2. This case simply is not ripe for such an order, and accordingly the Anti-Injunction Act prohibits the injunctions defendants seek.

CONCLUSION

For the foregoing reasons, defendants' Motion should be denied.

Date:

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PLAINTIFFS' STEERING COMMITTEE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Plaintiff's Steering Committee's Memorandum in Opposition to Motion for Injunction has been served on Liaison Counsel, James Irwin, by U. S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by uploading the same to Verilaw in accordance with Pre-Trial Order No. 4, on this 2nd day of November, 2001.