

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

IN RE:	)	CASE NO. 1:08HC60000
	)	MDL NO. 1953
HEPARIN PRODUCTS	)	
LIABILITY LITIGATION	)	Sr. U.S. District Judge James G. Carr
	)	
ALL CASES	)	<b>TEMPORARY RESTRAINING ORDER</b>

On May 20, 2013, Cook County, Illinois Circuit Court Law Division Judge James E. Sullivan issued an order<sup>1</sup> (the May 20th Order) that, *inter alia*, “modifies” this Court’s 1st Amended Pretrial Order No. 6. In the May 20th Order, Judge Sullivan purports to, *inter alia*, waive payments, as previously ordered by this Court, into the Common Benefit Fund. The May 20th Order accomplishes this objective by enjoining Baxter Healthcare from making any further payments into the Common Benefit Fund.<sup>2</sup>

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<sup>1</sup> *In re: Alleged Contaminated Heparin*, No. 08 L 003592, *et al.* (Ill. Cir. Ct., May 20, 2013) (filed under seal).

<sup>2</sup> The Order of May 20th thus relieves Baxter Healthcare of its obligation, which it agreed to following mediation by the Hon. David A. Katz, Sr. U.S. District Judge, and as confirmed by me in one or more orders approving the settlements reached through such mediation, of making its full contribution of \$5,000,000 to cover a significant shortfall in the Common Benefit Fund. The May 20th Order, if implemented by counsel or the parties, will unilaterally abrogate a binding settlement agreement and nullify my Orders approving settlements in the Heparin MDL cases. The practical result would be to shortchange those attorneys who undertook, on behalf of *all* plaintiffs – both federal *and state* – initially to bear massive litigation-related expenses. This would leave those lawyers, whose activities I regularly reviewed, and in which I concurred, less than fully reimbursed for expenses that they reasonably and necessarily incurred in furtherance of the interests of all plaintiffs. The May 20th Order thereby has the effect of relieving the state court plaintiffs’ attorneys of the obligations that they contractually undertook to secure the benefits of the work of the members of the PSC and PEC and those working with them on behalf of all plaintiffs. The May 20th Order would unjustly and unjustifiably endow the state court plaintiffs’ attorneys with the status of free riders.

In addition, the May 20th Order purports to order a refund from the Common Benefit Fund of monies that counsel in the state court proceedings paid into the Common Benefit Fund under their contractual agreements and this Court's orders that they make such payment.<sup>3</sup>

On May 28, 2013, as I directed in an order entered May 23, 2013, Plaintiff's Executive Committee filed a motion for injunctive relief. That motion seeks to avoid implementation of the May 20th Order.

I deem the pending motion to be in the nature of a motion for a temporary restraining order, and as such it shall, for the reasons stated herein, be granted.

### **Discussion**

In my more thirty-eight years of service as a federal Magistrate Judge and District Judge, the only judicial officers who have modified an order that I have issued have been either myself or Judges of the Sixth Circuit Court of Appeals. That a state court judge could do so is a concept unknown to me – and, I believe, to American jurisprudence. Most plainly put, it is my understanding, and the May 20th Order cited no authority to the contrary, that no judge of any state court can modify any order which I or any other federal judges have issued, regardless of the cause or rationale for seeking to do so.

That the May 20th has undertaken to do so necessitates, most unfortunately, that I, pending further proceedings before and Court order by me (or a court with authority to issue such further order), issue this Temporary Restraining Order. I do so under the authority of the All Writs Act, 28 U.S.C. § 1651. That statute authorizes a federal court to issue all writs appropriate to its exercise of

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<sup>3</sup> As I also understand the May 20th Order, the state court plaintiffs' attorneys are to receive this payment, with or without my concurrence and approval, from funds over which I have exclusive jurisdiction and control.

its jurisdiction and to effectuate its orders. To accomplish my purposes, namely, *inter alia*, to uphold the integrity of contracts entered into by counsel and the parties in the MDL litigation, preserve the authority of this Court over monies subject to its control, and protect unwarranted and constitutionally impermissible encroachment on its jurisdiction, this Temporary Restraining Order runs to individuals either affected or benefitted by the May 20th Order.<sup>4</sup> *See, e.g., Atl. Coast Line R.R. Co. v. Bhd. Of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) (order can run to parties rather than state itself); *see also In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 239 (3d Cir. 2002).

I have authority to restrain state court parties even though they have no cases pending in federal court. As stated in *U.S. v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977) (citations omitted):

The power conferred by the [All Writs Act] extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.

*See also Midland Funding, LLC v. Brent*, 2011 WL 1882507, \*2 (N.D. Ohio) (Katz, J.) (“a federal district court overseeing settlement of a nationwide class-action has ample authority under the All Writs Act and Anti-Injunction Act to enjoin parallel litigation in order to preserve its own authority to oversee settlement.”).

Moreover, where a federal court has jurisdiction over a *res* and a state court exercises jurisdiction over that same *res*, the federal court may enjoin the parties from proceeding in state court. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922).

In light of the foregoing, and under the authority of the All Writs Act, 28 U.S.C § 1651, it is hereby

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<sup>4</sup> As I am not enjoining Judge Sullivan, I am not contravening the Anti-Injunction Act, 28 U.S.C. § 2833. I note that plaintiffs have suggested that I may have such authority, despite the general prohibitions of that statute.

**ORDERED, ADJUDGED, AND DECREED:**

1. All persons, including but not limited to the members of Plaintiff's Executive Committee, Baxter Healthcare, Inc., the partners and associates of the Nolan Law Group, Arnold & Itkin, and Audet & Partners, and other state court attorneys of record and their partners and associates in an action captioned *In re: Alleged Contaminated Heparin*, No. 08 L 003592, *et al.*, now pending in the Law Division of the Circuit Court of Cook County, Illinois, and all persons employed by, or affiliated or acting in concert with such individuals, firms, or entities, or at their direction and on their behalf, and all persons (excepting state judicial officers) having notice, actual or constructive, however acquired, be, and the same hereby are temporarily enjoined and restrained from taking any action whatsoever, direct or indirect, in any court, forum, or venue, in furtherance, implementation, or execution of, or in compliance with the Order(s) entered May 20, 2013, by the Hon. James E. Sullivan, Judge of said Court, pending further order of this or another court with jurisdiction over this MDL matter; and
2. Any person seeking to extend (or expand) this Temporary Restraining Order either by a Preliminary or Permanent Injunction, or having cause to oppose entry of such Preliminary (or Permanent) Injunction (or extension of this Temporary Restraining Order) shall file a written motion or opposition on or before Wednesday, June 5, 2013, and appear before the undersigned on Friday, June 7, 2013, at 10:00 a.m. EDT, in the United States Courthouse and Customhouse, 1716 Spielbusch Avenue, Toledo, Ohio 43604, to be heard; if no opposition is received by June 5, 2013, this

order shall be made permanent, pending further Court order;

3. Movants' counsel shall forthwith on receipt of notice of filing of this order, cause it to be served on all counsel of record in the above-referenced state court proceeding, and such other persons as they shall deem appropriate to receive notice and accomplish implementation hereof; they shall also cause a courtesy copy to be served on the Hon. James E. Sullivan and the "Friend of Court," David Gubbins.

So ordered.

/s/ James G. Carr  
Sr. U.S. District Judge

May 28, 2013  
11:06 p.m. EDT