UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 1:10-cv-23235/HOEVELER

DAVID KARDONICK, JOHN DAVID, and MICHAEL CLEMINS, individually and on behalf of all others similarly situated and the general public,

Plaintiffs,

v.

JPMORGAN CHASE & CO. and CHASE BANK USA, N.A.

Defendants.

CHASE'S MOTION FOR SHOW CAUSE ORDER AND SUPPORTING MEMORANDUM OF LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MOTION

Defendant Chase Bank USA, N.A. ("Chase") hereby moves this Court for entry of a show cause order requiring Respondents Golomb & Honik, P.C., and Baron and Budd, P.C., to show cause why they should not be held in contempt of the anti-suit injunction entered in this action.

INTRODUCTION AND SUMMARY OF ARGUMENT

In September 2011, this Court approved a class action settlement relating to Chase's "payment protection" plans – plans that provide relief from credit card debt under certain circumstances. The settlement releases Chase from any and all claims relating to its payment protection plans. In addition, this Court's order approving the settlement contains a standard provision enjoining members of the settlement class – and anyone acting on their behalf – from reasserting settled claims.

The Respondent law firms nevertheless have filed a series of state attorney general actions in which they seek to reassert payment protection claims on behalf of the very same consumers who released their claims as part of the settlement. Actions have been filed to date in West Virginia, Hawaii, and Mississippi; two additional actions reportedly are in the works. Each of the actions filed to date seeks relief payable directly to members of the settlement class, and each is based on precisely the same factual allegations that were at issue in this action.

Respondent Golomb & Honik filed these duplicative lawsuits despite the fact that it served as class counsel in this action. In its capacity as class counsel, Golomb & Honik urged this Court to approve the settlement, supported the issuance of the anti-suit injunction, and shared in a lucrative attorneys' fee award approved by the Court. Golomb & Honik then turned around and recruited state attorneys general to reassert claims virtually identical to those it settled. Contrary to Golomb & Honik's apparent assumption, it cannot avoid its obligations

under this Court's anti-suit injunction merely by taking on state attorneys general as clients; nor is its co-counsel Baron & Budd immune from the Court's injunction.

The anti-suit injunction applies not only to settlement class members but also to "any person actually or purportedly acting on behalf of" a class member. Respondents indisputably have acted "on behalf of" class members: their lawsuits seek money damages payable *directly* to members of the settlement class. Furthermore, any assertion that Respondents are excused from complying with this Court's injunction because they filed their suits for state attorneys general would be mistaken for several reasons.

First, abundant case law holds that state attorneys general stand in privity with individual consumers where, as here, they seek relief on behalf of such consumers in representative actions. Accordingly, the state attorneys general and their outside lawyers are bound by this Court's injunction to the same extent as the settlement class members they seek to represent. *Second*, Respondents are mere private law firms that served as counsel in this action or that routinely appear in this Court. As private lawyers who practice before this Court, Respondents are bound to abide by the Court's injunction even if their state attorney general clients allegedly would not be. *Finally*, none of the defenses that Respondents might attempt to assert here – lack of personal jurisdiction, sovereign immunity, due process, and the Anti-Injunction Act – provides a valid basis for violating this Court's injunction.

It bears emphasis that this motion is directed solely at the claims that Respondents have asserted *on behalf of members of the settlement class.* Chase does not contend that this Court's injunction bars Respondents from seeking civil penalties to be paid into a state treasury or from seeking injunctive relief in a law enforcement capacity. The Court's injunction does, however, bar Respondents from asserting duplicative claims on behalf of settling consumers, and both

Respondents have done so. This Court should therefore issue an order directing Respondents to show cause why they should not be held in contempt of this Court's injunction.

BACKGROUND

A. The Settlement.

In the Fall of 2010, Chase was served with three class action lawsuits directed at its payment protection plans.[1] Payment protection plans are plans that cancel or suspend a consumer's obligation to repay credit card debt in the event of a contingency such as death, disability, or unemployment. (Dkt. #15 (*Kardonick* amended complaint) ¶¶ 36-38.) The three lawsuits accused Chase of using unfair and deceptive practices to market its payment protection plans, enrolling customers in payment protection plans without their consent, and enrolling customers even when the customers were ineligible for certain benefits offered by the plans. (*E.g., id.* ¶ 102.)

Although Chase regarded these accusations as meritless, it agreed to an early mediation to explore the possibility of a global settlement of all three actions. The parties then engaged in two full days of hard-fought settlement negotiations supervised by a nationally respected mediator. (Dkt. #366, Ex. 2, ¶¶ 6-23.) Chase also provided plaintiffs' counsel with extensive informal discovery in connection with the mediation. (*Id.*, Ex. 1, ¶¶ 4-5, 8, 11, 13-17, 19-25; Dkt. #298, Ex. 1, ¶¶ 12-13.) These efforts eventually culminated in a class action settlement agreement under which Chase agreed to pay $20 million in exchange for a nationwide release from any and all claims directed at its payment protection plans (the "Settlement"). (Dkt. #16, § VI, XIII.)

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[1] *See Kardonick v. JPMorgan Chase & Co. et al.*, No. 1:10-cv-23235-WMH (S.D. Fla.), *David v. JPMorgan Chase & Co. et al.*, No. 4-10-cv-1415 (E.D. Ark.), and *Clemins v. JPMorgan Chase & Co. et al.*, No. 2:10-cv-00949-PJG (E.D. Wisc.).

This Court granted preliminary approval of the Settlement on February 2, 2011. (Dkts. #23, 24.) The Court's preliminary approval order certified a settlement class, appointed the Golomb & Honik firm to serve as class counsel, and directed the parties to mail individual notice of the Settlement to class members. (Dkt. #24 ¶¶ 4, 6, 15.) It also enjoined class members from filing or prosecuting any claims released by the Settlement pending a determination on the Settlement's fairness. (*Id.* ¶ 28.)

Following the distribution of class notice and a fairness hearing, this Court granted final approval of the Settlement on September 16, 2011. (Dkt. #384.) The final approval order found, among other things, that the notice and opt-out procedures afforded to class members "fully satisf[ied] Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process." (*Id.* ¶ 10.) The order also included a standard anti-suit injunction barring the reassertion of claims released by the Settlement:

> Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties.

(*Id.* ¶ 17 (emphasis added).) The Court held that this "permanent bar and injunction is necessary to protect and effectuate the Settlement Agreement" and "is ordered in aid of this Court's jurisdiction and to protect its judgments." (*Id.*)

More than eight months before the Settlement received final approval, Chase sent notice and a copy of the Settlement to the attorneys general of all fifty states pursuant to the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715. (Dkt. #333 ¶ 3.) No attorney general objected to the Settlement.

B. Respondents' Reassertion of Payment Protection Claims On Behalf of Settlement Class Members.

After negotiating a $20 million settlement with Chase in exchange for a promise of global peace, Respondent Golomb & Honik and its co-counsel, Respondent Baron & Budd, proceeded to file three duplicative lawsuits on behalf of state attorneys general. Each of these lawsuits reasserts payment protection claims on behalf of settlement class members.

Respondents filed the first of these suits in August 2011 on behalf of the Attorney General of West Virginia, Darrell McGraw. (*See* Ex. A (*McGraw* complaint).)[2] The *McGraw* complaint accuses Chase of essentially the same unfair and deceptive practices that were at issue in the settled actions. (*See id.*) Indeed, many of the allegations in the *McGraw* complaint were cut-and-pasted verbatim from the amended complaint in this action.[3]

In April and June of 2012, respectively, Respondents filed additional suits on behalf of the Attorney General of Hawaii, David Louie, and the Attorney General of Mississippi, Jim Hood. (*See* Exs. B and C.) These suits likewise assert essentially the same factual allegations and legal theories as the settled actions. (*See id.*)

All three suits seek relief on behalf of some of the same consumers who settled their payment protection claims as part of the Settlement. For example, the *McGraw* complaint seeks "restitution" and recovery of "excess charges" on behalf of all West Virginia consumers who enrolled in a Chase payment protection plan. (Ex. A at 21-22; *see also id.* ¶¶ 74, 84-85.) Under West Virginia law, any "excess charges" recovered in *McGraw* must be refunded directly to the

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[2] After initially appearing on the complaint filed in West Virginia, Golomb & Honik withdrew its appearance in that action on October 6, 2011. Baron & Budd continues to serve as counsel in that action.

[3] *Compare, e.g.*, Dkt. #15 (*Kardonick* amended complaint) ¶¶ 5, 14, 33, 39, 56, *with* Ex. A (*McGraw* complaint) ¶¶ 21, 51, 57, 65, 67.

affected consumers. *See* W. Va. Code. § 46A-7-111(1) ("If it is found that an excess charge has been made, the court shall order the [defendant] to refund to the consumer the amount of the excess charge."); *West Virginia ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 524 (W. Va. 1995) (observing that the Attorney General is acting "on behalf of a consumer" when he seeks recovery of excess charges under W. Va. Code § 46A-7-111(1)).

Similarly, the *Louie* complaint seeks "restitution ... for all Hawaii consumers injured by Defendants' acts" and "restitution ... of monies obtained" as a result of the alleged misconduct. (Ex. B. at 22-23; *see also id.* ¶ 88 ("consumers within the State should be made whole").) The *Hood* suit, in turn, seeks "restitution" to Mississippi consumers of "monies acquired by Defendants by means of any practice prohibited by" the Mississippi Consumer Protection Act. (Ex. C at 20.)

ARGUMENT

Respondents are violating this Court's injunction. The Court's order approving the Settlement enjoined "any person actually or purportedly acting on behalf of" settlement class members from reasserting released claims relating to Chase's payment protection plans. Respondents nevertheless have ignored that injunction and reasserted payment protection claims on behalf of *all* settlement class members residing in West Virginia, Hawaii, and Mississippi. This Court should order Respondents to appear and show cause why they should not be held in contempt for violating the injunction.

I. An Order To Show Cause Should Issue When A Movant Alleges A *Prima Facie* Case Of Non-Compliance With An Injunction.

Federal courts are empowered by the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This authority includes the power to enjoin a party "from

prosecuting an action in contravention of a settlement agreement over which the district court has retained jurisdiction." *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1068 (11th Cir. 2001). Courts often issue such anti-suit injunctions in the course of approving class action settlements. *See id.*; *Kelly v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir. 1993) (per curiam); *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 236 (3d Cir. 2002).

Here, the Court issued such an injunction in the course of approving the Settlement, *supra* at 4, and reserved jurisdiction over both the Settlement and its injunction (Dkt. # 384 ¶ 18). Accordingly, the Court "has the power to enforce [its] ongoing order against relitigation so as to protect the integrity of a complex class settlement over which it has retained jurisdiction." *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 367-68 (3d Cir. 2001); *see also Alderwoods Group, Inc. v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012) (district court "that enters an injunctive order retains jurisdiction to enforce its order").

Under Eleventh Circuit law, the proper procedure for enforcing injunctions is through a court's civil contempt power. *See Alderwoods*, 682 F.3d at 968 n.20; *Faught v. Am. Home Shield Corp.*, 660 F.3d 1289, 1293 (11th Cir. 2011); *Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir. 2000). When the party that obtained an injunction believes that an enjoined party (the "respondent") is failing to comply with the court's mandate, the complaining party moves the court to issue an order to show cause. *Alderwoods*, 682 F.3d at 968 n.20 (citing *Reynolds*, 207 F.3d at 1298). If satisfied that the motion states a case of non-compliance, the court orders the respondent to show cause why the respondent should not be held in contempt. *Id.* After the respondent has an opportunity to respond, the court decides whether the injunction has been violated and whether sanctions are necessary to ensure compliance. *Id.*

As shown below, a show cause order should issue here because this motion states a *prima facie* case that Respondents are violating this Court's injunction.

II. Respondents Have Violated This Court's Injunction.

Under the terms of the Settlement, class members agreed to release all claims "arising out of or in any way relating to" Chase's payment protection plans. (Dkt. #16, § II(jj).) To enforce this release, the Court issued an injunction prohibiting all class members—"and any person actually or purportedly acting on [their] behalf"—from filing any "representative or other action" asserting released claims:

> Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties.

(Dkt. #384, ¶ 17 (emphasis added).)

Respondents nevertheless violated this injunction by filing a series of "representative actions" on behalf of members of the settlement class. All three of Respondents' lawsuits challenge the manner in which Chase markets, sells, and administers its payment protection plans. (*See* Exs. A, B, C.) All three lawsuits mimic and repeat the same factual allegations that appear in the amended complaint in this action. *Supra* at 5 n.3. And all three lawsuits seek restitution payable directly to consumers who were members of the settlement class. (*See supra* at 5-6; Ex. A, at 21; Ex. B, at 22; Ex. C, at 20.) By seeking monetary relief "on behalf of" members of the settlement class in representative actions, Respondents have defied this Court's injunction and jeopardized the finality of the Settlement. The Court should therefore order Respondents to show cause why they should not be held in contempt.

It makes no difference that Respondents are acting as outside counsel to state attorneys general or that the state attorneys general have asserted slightly different causes of action from those asserted in the settled actions. So long as the claims arise out of the same *facts* as were at issue in the settled actions – as indisputably is the case – the claims were properly barred by the Settlement. *See, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2d Cir. 1985); *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 135 (2d Cir. 2011) ("[C]lass action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." (internal citation and quotations omitted)); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d at 365 ("[A] class settlement can bar later claims" arising out of the same allegations "even though the precluded claim was not presented, and could not have been presented, in the class action itself.").

Baldwin-United is instructive. There, the parties had entered into a nationwide settlement of a series of class actions against broker-dealers who had sold securities in bankrupt corporations. 770 F.2d at 336. After the settlement was announced, but before the final approval hearing had taken place, a number of state attorneys general declared their intention to file additional actions "in their representative capacities to seek restitution and monetary recovery from the defendants *to be paid over to those of the states' citizens who are plaintiffs in the consolidated class actions ...* ." *Id.* at 333 (emphasis added). At the defendants' request, the district court then enjoined the attorneys general and anyone acting on their behalf from filing representative actions on behalf of members of the settlement class. *Id.* at 334.

On appeal, the attorneys general argued that the district court lacked the power to enjoin them. The Second Circuit disagreed, reasoning that "the injunction protecting the settling

defendants was unquestionably 'necessary or appropriate in aid of' the district court's jurisdiction." *Id.* at 338. The Second Circuit explained:

> Were this not the case, the finality of virtually any class action involving pendent state claims could be defeated by subsequent suits brought by the states asserting rights derivative of those released by the class members. For instance, as a practical matter no defendant in the consolidated federal actions in the present case could reasonably be expected to consummate a settlement of those claims if their claims could be reasserted under state laws, whether by states on behalf of the plaintiffs or by anyone else, seeking recovery of money to be paid to the plaintiffs. Whether a state represented itself to be acting as a "sovereign" in such a suit or described its prayer as one for "restitution" or a "penalty" would make no difference if the recovery sought by the state was to be paid over to the plaintiffs.

Id. at 336-37. Several other courts have reached the same conclusion.[4]

Here, as in *Baldwin-United* and its progeny, this Court properly issued an injunction to protect and effectuate its judgment approving the Settlement. In the absence of the power to issue and enforce such orders, state attorneys general and their outside counsel "could

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[4] *See, e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951, 963 (9th Cir. 2006) (holding that "the private nature of the remedy sought by the DOL demonstrates that the agency is in privity" with a consumer); *Mitchell v. Securities Am., Inc.*, No. 11-cv-01948-F (N.D. Tex. Feb. 13, 2012) (Dkt. #22, at 4) (attached hereto as Exhibit F) ("Montana does not dispute that it intends to pursue restitution on behalf of the Montana investors who are part of the Settlement Class. As such, it appears that the same result in *Baldwin* should obtain here."); *FTC v. AMREP Corp.*, 705 F. Supp. 119, 125 (S.D.N.Y. 1988) (holding that "private parties can release the right to have an action brought on their behalf by a representative," including actions filed by government agencies); *New York ex rel. Spitzer v. Applied Card Systems, Inc.*, 894 N.E.2d 1, 13-14 (N.Y. 2008) (holding that a class action settlement barred New York attorney general from seeking additional relief payable to settling class members); *Pennsylvania v. BASF*, No. 3127, 2001 WL 1807788, at *8 (Pa. Ct. Cmm. Pls. Mar. 15, 2001) ("In order to ensure the finality of the Class Action settlement and to adhere to the District Court's exclusive jurisdiction over the settlement, this court cannot now allow the Commonwealth to assert *parens patriae* claims on behalf of Pennsylvania citizens who released the Defendants for the same conduct alleged in this action."); *cf. EEOC v. Jefferson Dental Clinics, PA*, 478 F.3d 690, 699 (5th Cir. 2007) (government agency's "interests are not sufficiently independent to avoid being in privity" when seeking damages payable to consumers); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (individuals who litigated their own claims "are precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims").

derivatively assert the same claims on behalf of the same class or members of it," and "there could be no certainty about the finality of any federal settlement." *Baldwin-United*, 770 F.2d at 337. Respondents are therefore in clear violation of a properly-issued injunction.

III. Respondents' Purported Defenses Lack Merit.

Based on positions that Respondents have taken in correspondence and in other cases, Chase anticipates that Respondents may assert a number of technical defenses of their violation of this Court's injunction, including lack of personal jurisdiction, sovereign immunity, due process, and the Anti-Injunction Act. None of these defenses has merit.

A. Respondents Cannot Invoke The Sovereign Immunity, Personal Jurisdiction, Or Due Process Defenses Claimed By The State Attorneys General.

For three independent reasons, Respondents cannot invoke the sovereign immunity, personal jurisdiction, and due process defenses that the state attorneys general might raise as an alleged justification for failing to comply with the Court's injunction.

First, Golomb & Honik is bound by this Court's injunction *because that firm served as class counsel in the case in which the injunction issued.* Indeed, Golomb & Honik actively urged this Court to issue its preliminary and final approval orders and the accompanying anti-suit injunctions. (*See* Dkts. #18, 367.) Accordingly, Golomb & Honik cannot possibly argue that this Court lacks jurisdiction over it or that applying the injunction to the firm would violate due process.

Nor can Golomb & Honik argue that sovereign immunity shields it from the injunction. By appearing before this Court in the underlying action, Golomb & Honik subjected itself to this Court's inherent authority to issue orders binding the counsel who appear before it. *See Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1244 (11th Cir. 2009) ("A federal court may wield its inherent powers over the lawyers who practice before it. This control derives from

a lawyer's role as an officer of the court."); *Newby v. Enron Corp.*, 302 F.3d 295, 303 (5th Cir. 2002) (enjoining a law firm from bringing a duplicative state court action, and noting that "the court has the power, indeed the duty, to remind counsel that they are professionals and order their return to the playing field"). The lawyers at Golomb & Honik did not cease to be officers of this Court or shed their pre-existing obligation to abide by this Court's orders merely by taking on a new set of clients. *See generally Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993) ("An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly.").

Second, Baron & Budd is likewise subject to this Court's authority as a frequent practitioner before this Court and a firm that is engaged in ongoing litigation here.[5] The firm's lawyers cannot avail themselves of the right to practice in this Court when it suits them while simultaneously thumbing their noses at orders issued by the Court in other cases. *Cf. Sahyers*,

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[5] Baron & Budd is currently before this Court in the ongoing multi-district litigation before Judge King. *See In re Checking Account Overdraft Litigation*, No. 1:09-MD-02036-JLK (S.D. Fla. filed June 10, 2009). The firm's other appearances in this Court and other federal courts in Florida include *Mid-Continent Casualty Co. v. Paul Homes, Inc. et al.*, No. 2:10-cv-00191-JES-DNF (M.D. Fla. filed Mar. 26, 2010); *Mid-Continent Casualty Co. v. Active Drywall South, Inc.*, No. 10-cv-20859-PAS (S.D. Fla. filed Mar. 19, 2010); *Cotilla et al. v. New NGC, Inc.*, No. 10-cv-60172-WJZ (S.D. Fla. filed Feb. 4, 2010); *Mitchell et al. v. Wells Fargo Bank, N.A. et al.*, No. 09-cv-23560-JLK (S.D. Fla. filed Nov. 19, 2009); *Emerald Coast Utilities Authority v. 3M Company et al.*, No. 09-cv-00361-MCR-MD (N.D. Fla. filed Aug. 21, 2009); *General Fidelity Ins. Co. v. Foster*, No. 09-cv-80743-KMM (S.D. Fla. filed May 15, 2009); *Foster v. Northstar Holdings, Inc. et al.*, No. 09-cv-80535-KMM (S.D. Fla. filed Apr. 3, 2009); *Garcia et al v. Lennar Corporation et al.*, No. 09-cv-20739-KMM (S.D. Fla. filed Mar. 23, 2009); *Strohl, et al. v. Armstrong World Industries Inc., et al.*, No. 91-cv-14097-NCR (S.D. Fla. filed Apr. 30, 1991); *Goff, et al. v. Armstrong World Industries Inc., et al.*, No. 88-cv-06708-JCP (S.D. Fla. filed Sept. 14, 1988); *Moore, et al. v. Armstrong World Industries Inc., et al.*, No. 88-cv-00446-KLR (S.D. Fla. filed Mar. 14, 1988); *March, et al. v. Armstrong World Industries Inc., et al.*, No. 88-cv-00448-KLR (S.D. Fla. filed Mar. 14, 1988).

560 F.3d at 1244; *Malautea*, 987 F.2d at 1546.[6] Baron & Budd is also subject to this Court's nationwide jurisdiction over any entity that interferes with its injunction. *See infra* at 16-17.

Third, neither Golomb & Honik nor Baron & Budd is a state agency entitled to invoke the sovereign immunity conferred by the Eleventh Amendment. "The Eleventh Amendment bars suits in federal court against state agencies 'when the action is in essence one for the recovery of money from the state ... .'" *Hufford v. Rodgers*, 912 F.2d 1338, 1341 (11th Cir. 1990) (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)). Federal courts are "extremely hesitant to extend this fundamental and carefully limited immunity to private parties whose only relationship to the sovereign is by contract." *Del Campo v. Kennedy*, 517 F.3d 1070, 1075-1076 (9th Cir. 2008). In determining whether a private entity is entitled to Eleventh Amendment immunity, "the most important factor ... is who is responsible for judgments against the entity." *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039, 1046 (11th Cir. 2007).

Here, a civil contempt sanction levied against Golomb & Honik and Baron & Budd would not be paid from a state treasury; it would be paid from the private coffers of those law firms. In fact, as Baron & Budd has already acknowledged in the action in West Virginia, the firm receives no funding whatsoever from the State, and its lawyers "meet ... none of the indicia of [state] employee[s]."[7] In short, because a civil contempt sanction against these private law

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[6] Baron & Budd has had abundant notice of the Court's injunction: among other things, it received correspondence regarding the injunction in the ongoing West Virginia litigation and in the meet and confer communications that preceded this motion. *See* Decl. of Robert D. Wick ¶ 5.

[7] State of West Virginia's Response to Defendants' Motion to Disqualify Private Counsel Appointed by the Attorney General, at 18 n.8, *State of West Virginia ex rel. McGraw v. HSBC Bank Nevada, N.A. et al.*, No 11-C-039-N (W.Va. Cir. Ct. filed June 29, 2012); *see also id.* at 12 (outside counsel must "advance all expenses associated with the maintenance of this action").

firms "would not impose any liability upon the [states]," the firms have no Eleventh Amendment immunity from such a sanction. *See Rosario*, 506 F.3d at 1046.

B. Even if Respondents Were Entitled To The Same Defenses As The State Attorneys General, Those Defenses Would Fail.

As shown above, Respondents are categorically ineligible to assert the sovereign immunity, personal jurisdiction, and due process defenses that the state attorneys general might assert if this motion were directed at them. Even if Respondents stood on precisely the same footing as the state attorneys general, however, they still would be bound by this Court's injunction because the attorneys general themselves are bound by that injunction with respect to the claims they assert on behalf of class members.

1. Privity forecloses Respondents' personal jurisdiction, sovereign immunity, and due process defenses.

A federal injunction "not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, [or] represented by them." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). Here, the state attorneys general are "identified in interest" and "in privity" with class members because they seek recoveries payable directly to class members. *See, e.g.*, *Leon*, 464 F.3d 951.

In *Leon*, the Department of Labor ("DOL") argued that a final judgment rejecting the claims brought by an individual employee could not preclude additional restitution claims that DOL wished to assert on the employee's behalf because DOL "represents a 'broad public interest,' whereas [the employee] was seeking only money damages." *Id.* at 962. Although the district court accepted DOL's argument, the Ninth Circuit reversed, reasoning that "the private nature of the remedy sought by DOL demonstrates that the agency is in privity with [the employee]." *Id.* at 963. The Ninth Circuit went on to hold that "all of the requirements of res

judicata are satisfied" and that the district court therefore had the authority to enjoin the DOL action under the All Writs Act. *See id.*

Similarly, in *Baldwin-United*, the Second Circuit reasoned that state attorneys general were not entitled to sovereign immunity when "the recovery sought ... was to be paid over to [private] plaintiffs." 770 F.2d at 337. When a state seeks relief for private citizens, "its claim is essentially derivative. Any recovery would not go to the state but ultimately to the plaintiffs[] in the federal action, who are the real parties in interest." *Id.* at 341-342. Other decisions likewise hold that government officials stand in the shoes of private citizens when seeking monetary relief on their behalf. *See, e.g., Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 923 (9th Cir. 2003) ("The [government] is suing for employee-specific rights of precisely the sort [the plaintiff] already pursued; the 'requisite closeness of interests' for privity is present."); *U.S. Steel Corp.*, 921 F.2d at 495 (holding that "the doctrine of representative claim preclusion must be applied" when EEOC seeks recovery payable to individual employee who has already sought recovery on his or her own behalf); *AMREP*, 705 F. Supp. at 123, 125 (rejecting the government's argument that "private litigants cannot foreclose the Government's right to bring an independent action" because "private parties can release the right to have an action brought on their behalf by a representative"); *Applied Card Systems*, 894 N.E.2d at 13 ("[O]ne specific portion of the relief [the Attorney General] seeks here—restitution for pre-January 1, 2002 claims—is identical to that which the New York members of the *Allec* settlement class have already pursued to a final and binding judgment. As to that measure of relief alone, we hold that there is privity.").

Respondents thus stand in privity with class members where, as here, they seek monies payable to class members as opposed to a governmental entity. Respondents' privity with class members, moreover, is fatal to their sovereign immunity, due process, and personal jurisdiction

defenses. Just as individual class members could not assert those defenses as a basis for violating this Court's injunction,[8] Respondents may not do so when asserting claims for relief on behalf of class members. *See, e.g.*, *Baldwin-United*, 770 F.2d at 341 (holding that "sovereign immunity is not a bar" to an injunction that "only precludes state officials from bringing actions in a de facto or de jure representative capacity on behalf of [private] plaintiffs"); *Hinds County v. Wachovia Bank N.A.*, 790 F. Supp. 2d 125, 135 (S.D.N.Y. 2011) ("Eleventh Amendment sovereign immunity therefore does not prevent the issuance of injunctive relief against a state acting in a representative capacity."); *Applied Card Systems*, 894 N.E.2d at 13 (rejecting state attorney general's argument that he had "not been provided notice of the settlement" because he stood in "privity" with class members).

2. Respondents' defenses fail for additional reasons.

Each of Respondents' personal jurisdiction, due process, and sovereign immunity defenses also would fail for an additional reason even if asserted by a state attorney general himself or herself.

First, as to personal jurisdiction, Respondents overlook the fact that this Court has jurisdiction over anyone who violates its injunction. A court's power to enforce its own injunction is analogous to its *in rem* jurisdiction over a *res*, which "extends to the whole world, to any person who comes into contact with the res." *Alderwoods*, 682 F.3d at 971-72. It therefore is "of no moment" that the "alleged contemnors are without the territorial jurisdiction" of the forum that issued the injunction. *Id.* at 971. In short, this Court has jurisdiction over

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[8] *See, e.g.*, Dkt. # 384, ¶ 20 ("[T]he Parties irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court, or that the Court is, in any way, an improper venue or an inconvenient forum.").

Respondents because Respondents have engaged in conduct that is inconsistent with the Court's injunction. *See id.* at 971-72; *United States v. New York Tel Co.*, 434 U.S. 159, 174 (1977); *Burr & Forman v. Blair*, 470 F.3d 1019, 1026-27 (11th Cir. 2006).

Second, as to due process, the state attorneys general have no due process rights at stake here because this Court's injunction does not deprive *them* of liberty or property. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978) (observing that procedural due process confers protections "from the mistaken or unjustified deprivation of life, liberty, or property."). The Court's injunction prohibits only the assertion of claims on behalf of *class members*; it does not prevent the recovery of civil penalties or other relief payable into a state treasury. Accordingly, the only property interests at issue here are those of class members, and class members already received appropriate due process protections before the settlement was approved. (*See* Dkt # 384 ¶ 10 (finding that the settlement procedures "fully satisfy ... the requirements of due process").)

Finally, as to sovereign immunity, although the Eleventh Amendment immunizes states from suits that threaten to siphon funds from a state treasury, it does not permit state officials to violate federal law, *see Ex parte Young*, 209 U.S. 123 (1908), and it therefore does not authorize state officials to violate pre-existing federal court injunctions.[9] For these additional reasons, Respondents' various excuses for their violation of this Court's injunction are defective.

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[9] This Court's injunction is a valid exercise of its federal authority under Article III and the All Writs Act, and therefore has the force of federal law. *See Procup v. Strickland*, 792 F.2d 1069, 1073 (11th Cir. 1986) ("Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions."). The injunction may therefore be enforced against state officials in their individual capacities. *See, e.g., Frew v. Hawkins*, 540 U.S. 431, 440 (2004) (holding that federal courts may enforce a consent decree against state officials under the *Ex parte Young* exception); *Hutto v. Finney*, 437 U.S. 678, 690-691 (1978) ("[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced."); *Baldwin-United*, 770 F.2d. at 340-41 (noting that *Ex parte Young* allows federal (continued...)

3. *Spinelli* and *Herman* do not support a contrary conclusion.

Respondents likely will invoke *Spinelli v. Capital One Bank (USA) N.A.*, 2012 WL 3609028 and *Herman v. South Carolina*, 140 F.3d 1413 (11th Cir. 1998), in defense of their conduct, but neither of those cases excuses their violation of this Court's injunction.

In *Spinelli*, the defendants sought to prohibit state attorneys general from bringing *any* claim relating to the subject matter of a class action settlement, including claims for civil penalties payable into state treasuries. 2012 WL 3609028, at *1-2. Furthermore, the defendants were not attempting to enforce a pre-existing injunction, but instead were asking the court to issue a *new* injunction in a closed case in which the court had "declined to retain jurisdiction after disposing of the claims." *Id.* at *1. For these and other reasons, the *Spinelli* court declined to issue a new injunction directed at pre-existing state court proceedings. *Id.* at *2-3.

Herman likewise involved an overbroad attempt to bar a government official from asserting any claims at all as a result of a class action settlement. There, the Secretary of Labor brought an action for injunctive relief, civil penalties, and restitution against certain defendants who had engaged in prohibited transactions with an ERISA plan. 140 F.3d at 1417, 1423-1426. Significantly, the restitution claims involved relief payable to the *plan*, not to individual class members. *Id.* at 1424 (observing that private ERISA plaintiffs "are not charged with representing[] the broader national public interests represented by the Secretary"); *see also Mertens v. Hewitt Assoc.*, 508 U.S. 248, 260 (1993) (restitution recovered by the Secretary under ERISA Section 502(a)(5) is payable to the plan). The defendants nevertheless argued that all of the Secretary's claims – even the civil penalties and injunctive relief claims – were barred by the

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courts to hear "suits for injunctive relief against government officials who act in violation of the U.S. Constitution or federal law").

res judicata effects of a class action settlement. *Id.* at 1417, 1423-26. In the context of ERISA's unique enforcement scheme, however, the court found that res judicata did not bar the Secretary's claims because the relief sought by the Secretary did not place her in privity with members of the settlement class. *Id.* at 1424 ("[T]he Secretary's national public interests in bringing an ERISA enforcement action are wholly distinct and separate from those of private litigants ... .").

This case, by contrast, involves the wholly separate question of whether a pre-existing injunction should be enforced. Thus, unlike *Spinelli*, this case does not involve a request to issue a new injunction in a closed case, and unlike *Herman*, the question here is not merely whether res judicata bars the Secretary of Labor from carrying out her unique role in ERISA's enforcement scheme. Furthermore, unlike both of those cases, this case does not involve an overbroad attempt to bar government officials from asserting any claims at all, including claims for civil penalties payable into a government treasury. Instead, Chase's motion is directed solely at relief payable to settlement class members. This case therefore falls squarely within the ambit of *Baldwin-United* and its progeny, rather than *Herman* or *Spinelli*.

C. The Anti-Injunction Act Does Not Apply Here.

The Anti-Injunction Act, 28 U.S.C. § 2283, also presents no obstacle to enforcement of this Court's injunction. *First*, this Court issued its injunction *before* Respondents filed their lawsuits. Specifically, the Court issued its final anti-suit injunction before the filing of the Hawaii and Mississippi lawsuits, and issued its preliminary anti-suit injunction before the filing of the West Virginia lawsuit. *Supra* at 4-6. Under settled law, the Anti-Injunction Act does not apply to injunctions issued prior to the filing of state court lawsuits. *See Dombroski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Martingale LLC v. City of Louisville*, 361 F.3d 207, 303 (6th Cir. 2004); *Newby*, 302 F.3d at 301; *Diet Drugs Prods. Liab. Litig.*, 282 F.3d at 233 n.10; *Baldwin-*

United, 770 F.2d at 335; CHARLES A. WRIGHT, JR., ET AL., 17A FEDERAL PRACTICE & PROCEDURE 3D § 4222, at 64 (2007).

Second, even if the Anti-Injunction Act applied here, this case would fall within a well-established exception to the Act authorizing courts to "issue an injunction under the All Writs Act to prevent prosecution of a state court action that had already been settled under the terms of a federal settlement agreement." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1104 (11th Cir. 2004); *accord Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880-83 (11th Cir. 1989) (enjoining state court plaintiffs from pursuing claims released by class action settlement under the aid-of-jurisdiction and re-litigation exceptions to the Anti-Injunction Act); *Baldwin-United*, 770 F.2d at 335-36 (enjoining actions under aid-of-jurisdiction exception).

Finally, the Anti-Injunction Act does not bar the enforcement of this Court's injunction with respect to the Hawaii and Mississippi actions because those cases have been removed to federal court,[10] and the Act does not apply to cases in federal court. *See* 28 U.S.C. § 2283 (restricting injunctions issued "to stay proceedings in a State court"); *Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1255 (11th Cir. 1988) (recognizing "the power of federal courts to enjoin state courts from proceeding in a removed case" under the Anti-Injunction Act).

CONCLUSION

For the foregoing reasons, Chase respectfully asks the Court to order Respondents to show cause why they should not be held in contempt for violating this Court's injunction.

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[10] *See Louie v. JPMorgan Chase & Co. et al.*, No. 12-00263 LEK-KSC (D. Hi. filed May 17, 2012); *Hood v. JPMorgan Chase & Co et al.*, No. 12-cv-565-WHB-LRA (S.D. Mi. filed Aug. 7, 2012).

LOCAL RULE 7.1(a)(3) CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), the undersigned hereby certifies that Chase's counsel has communicated with Respondents in a good faith effort to resolve the issues raised in this Motion and has been unable to do so. *See* Decl. of Robert D. Wick ¶ 5.

Dated: September 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2012, I electronically filed Chase's Motion For Show Cause Order And Supporting Memorandum and the Declaration Of Robert D. Wick using the ECF system, which will send a notification of such filing to the counsel of record who have entered appearances in this action. In addition, I served a true and correct copy of Chase's Motion For Show Cause Order And Supporting Memorandum and the Declaration Of Robert D. Wick via e-mail and first-class mail on the following individuals:

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