

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

HENRY MITCHELL, et al.

Plaintiffs,

v.

SECURITIES AMERICA, INC., et al.

Defendants.

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Case No. 3:11-cv-1948-F

TEMPORARY RESTRAINING ORDER

BEFORE THE COURT is a Motion for a Temporary Restraining Order and Permanent Injunction to Enforce Settlement Order Against the Montana Commissioner of Securities and Insurance filed by Settling Defendants Securities America, Inc. (“SAI”) and other releasees James D. Nagengast, Steven F. McWhorter, Walter Thomas Cross, Kevin Joseph Miller, Gregg Sautter, Barbara Slobojan and Ernest Hathaway (collectively, the “Releasees”), on February 1, 2012 (Doc. No. 15). The Office of the Commissioner of Securities and Insurance for the State of Montana filed a Response on February 7, 2012 (Doc. No. 19). The Releasees filed a Reply on February 9, 2012 (Doc. No. 20). After reviewing the briefs and evidence presented by the parties, the Court is of the opinion that the Releasees’ Motion is GRANTED IN PART.

I. Factual and Procedural Background

On August 9, 2011, the Court entered an Order of Final Settlement Approval and Judgment (the “Settlement Order”) approving the proposed class action settlement described therein (Doc. No. 2). In the Settlement Order, the Court certified a class

defined as the “Medical Capital Settlement Class,” which included “[a]ll Investors, their successors and assigns, who purchased Medical Capital Notes from SAI and were damaged thereby.” Settlement Order, at ¶ 2(b). Under the Settlement Order, all claims, regardless of whether they are “brought in state or federal court or any other forum, against Releasees, directly or indirectly, based upon, arising out of, or related to: (i) an investment or interest in one or more of the * * * Medical Capital Notes, or (ii) the facts, transactions events, occurrences, acts, or omissions that relate to any of the matters alleged in the Class Actions, are fully and finally released, relinquished and discharged.” *Id.* at ¶ 13. In addition, all claims filed by, on behalf of, for the benefit of, or in the name of, any Settlement Class Member “in any forum against Releasees are or shall be dismissed with prejudice to the extent they assert the Released Claims,” and Settlement Class Members and “any other Persons purporting to act in the name of, or on behalf of, or for the benefit of any Settlement Class Members,” are “barred and permanently enjoined from prosecuting, commencing, or continuing any and all Released Claims” against the Releasees “in any forum.” *Id.* at ¶¶ 14, 15.

The Office of the Commissioner of Securities and Insurance for the State of Montana (“CSI”) will commence an administrative hearing to consider the Defendants’ violations of Montana securities laws on February 15, 2012. The CSI has made clear that at the hearing it will seek to recover restitution for the benefit of Montana investors who are part of the Medical Capital Settlement Class, in addition to administrative remedies. The Montana investors include four individuals, one defined benefit plan, and one ranch limited liability partnership. Their collective total loss amounts to approximately

\$708,000. In the instant Motion, Releasees ask the Court to temporarily restrain and permanently enjoin the CSI from pursuing or awarding restitution or other compensation for Settlement Class Members at the upcoming hearing or any other proceeding.

II. Discussion

“When a federal court has jurisdiction over its case in chief, . . . the All-Writs Act grants it ancillary jurisdiction to issue writs ‘necessary or appropriate in aid of’ that jurisdiction.” *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (quoting 28 USC 1651(a) (2006)). This provision of the Act permits a district court to enjoin state action where necessary to prevent the re-litigation of an existing federal judgment. *Id.* In *In re Baldwin-United Corp.*, the Second Circuit found that states’ pursuit of settling defendants for restitution amounted to just the type of threat to federal jurisdiction that justified the district court’s decision to temporarily restrain and permanently enjoin the states pursuant to its powers under the All-Writs Act. *Baldwin* involved a multi-district class action against broker-dealers who sold securities of Baldwin-United Corporation and its insurance subsidiaries. *Id.* at 331. Thirty-one non-party states appealed an order by the district court enjoining them from pursuing the defendants for restitution while settlement agreements were being finalized. *Id.* The Second Circuit concluded that the district court’s order enjoining the states’ pursuit of restitution on behalf of the plaintiffs did not offend the states’ sovereign immunity because “when the state merely asserts the personal claims of its citizens, it is not the real party in interest and cannot claim *parens patriae* standing.” *Id.* at 341. Were this not the case, the *Baldwin* court explained, “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.” *Id.* at 336.

The situation in *Baldwin* is virtually identical to the facts before the Court. As in *Baldwin*, Montana’s attempt to pursue restitution on behalf of its eight citizen plaintiffs threatens the jurisdiction of this Court and the finality of its judgment. CSI attempts to distinguish *Baldwin* by arguing that the states there were “harassing” the defendants, which, it argues is not the case here. However, the conduct that concerned the court in *Baldwin* is identical to Montana’s conduct here: the states’ objective in *Baldwin* was “to enforce state laws authorizing them 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 333–34. 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. However, given the fact that CSI has had only a week to respond, the Court will delay decision on Releasees’ request for permanent injunctive relief until after both parties have had an opportunity to be heard on the matter.

III. Conclusion

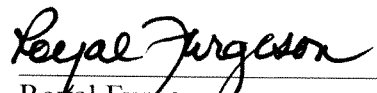
For the aforementioned reasons, Releasees’ Motion for a Temporary Restraining Order and Permanent Injunction to Enforce Settlement Order Against the Montana Commissioner of Securities and Insurance is **GRANTED IN PART**. CSI is free to hold the Administrative Proceeding on February 15, 2012, and is free to pursue Releasees for any and all remedies its state securities laws provide for other than restitution or

compensation for Settlement Class Members. CSI is, however, **TEMPORARILY RESTRAINED** from pursuing restitution or any other form of compensation for the benefit of Settlement Class Members in the upcoming hearing or any other forum, and the Administrative Proceeding is **TEMPORARILY RESTRAINED** from awarding any such relief.

It is **FURTHER ORDERED** that this Temporary Restraining Order shall remain in force and effect until **Monday, February 27, 2012**. A hearing will be set to consider Releasees' request for permanent injunctive relief on further notice of the Court.

IT IS SO ORDERED.

SIGNED this 13th day of February, 2012.



Royal Furgeson
Senior United States District Judge