UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

DAVID KARDONICK, JOHN DAVID, And MICHAEL CLEMINS, individually and on behalf of all others similarly Situated and the general public,	§	**No. 1:10-cv-23235-WMH**
Plaintiffs,	§	**ORAL ARGUMENT REQUESTED**
v.	§	
JP MORGAN CHASE & CO., and CHASE BANK USA, N.A.,	§	
Defendants.	§	

NON-PARTY RESPONDENT BARON & BUDD, P.C.'S
RESPONSE IN OPPOSITION TO CHASE'S
MOTION FOR SHOW CAUSE ORDER

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I. INTRODUCTION & SUMMARY

Non-Party Respondent, the law firm of Baron & Budd, P.C., without submitting to jurisdiction or waiving sovereign immunity as the legal representative of the states of West Virginia, Mississippi, and Hawaii (the "States"), respectfully submits this Response in Opposition to Chase's Motion for Show Cause Order [Docket No. 456] (the "Motion").

This matter arises out of an injunction issued by this Court at the conclusion of *Kardonick v. JP Morgan Chase & Co.*, No. 1:10-cv-23235 ("*Kardonick*"), precluding the parties—injured consumers of Chase's credit cards—from bringing future claims over the same facts. Currently pending are three enforcement actions by the Attorneys General of the States of West Virginia, Mississippi, and Hawaii against Chase for injunctive relief, civil penalties and ancillary relief.[1] Rather than moving to dismiss these actions on *res judicata* grounds or "satisfaction and release," or seeking to enforce the injunction in the courts where the actions are pending, Chase asks this Court to sanction one of the States' law firms that was never before this Court as a party or as legal counsel in *Kardonick,* for bringing claims that were never brought nor settled—nor could they have been—on behalf of sovereign parties to whom Chase concedes the Court's injunction does not apply.

There are several reasons to reject Chase's position:

First, Chase has not established that this Court has, or ever had, personal jurisdiction over Baron & Budd. Chase admits that the firm was not, and did not represent, a party in *Kardonick,* did not sign the settlement agreement, and never received adequate prior notice. Chase's contention that the *States* received CAFA notice is irrelevant because this sanction is directed at Baron & Budd, not the States. Furthermore, Chase's sole basis for finding "minimum contacts" is that the firm "regularly practices in the Southern District of Florida." However, under established law, such appearances do not count as *in personam* contacts.

Second, Chase is unable to show that the injunction was violated. The core issue Chase raises—that the States represent, and are "in privity" with, absent class members who released their claims—has already been litigated and decided favorably to the States and against Chase.

[1] *State of West Virginia ex rel. Darrell McGraw, Attorney General v. JP Morgan Chase & Co., et al.*, Civil No. 11-c-94-N (Cir. Ct. Mason Cty.); *Jim Hood, Attorney General of the State of Mississippi, ex rel. State of Mississippi v. JP Morgan Chase & Co., et al.*, Civil No. G-2012-1085-T1 (Chancery Ct., 1st Jud. Dist., Hinds Cty.); *State of Hawaii ex rel. David Louie, Attorney General v. JP Morgan Chase & Co., et al*, Civil No. 12-1-0985-04 (1st Cir. Ct., Hawaii).

Chase conveniently overlooks the fact that the statutes authorizing the Enforcement Actions vest the claim in the States themselves, and specifically authorize the Attorneys General to bring the claims on the States' behalf. These statutes do not authorize any citizen to raise, much less settle, the States' claims. The case law overwhelmingly holds that where the right of action vests in the State, then the claim is a sovereign one and the State is the real party in interest. Moreover, the Supreme Court has held that a private litigant cannot compromise or dismiss sovereign claims. Chase seizes on only one of several elements of requested damages in the States' actions, but even there Chase misstates the operative state laws. Chase's suggestion that only the States' penalties and injunctive claims are sovereign rests on a mistaken conflation between absent class members' claim for restitution and the States' other equitable remedies, such as disgorgement. They are not equivalents, and nor is the State *in privity with* or representing the Settlement Class Members.

Third, there is no basis for sanctioning Baron & Budd as the States' agent in the Enforcement Actions for violating the injunction—an injunction which Chase agrees does not and cannot be applied to the States. Moreover, the law is clear that a law firm, while representing its client, acts in its client's capacity and not in its own. The States' Eleventh Amendment and due process rights invalidate the application of this Court's injunction as to them. Thus, Baron & Budd cannot be sanctioned for purportedly violating an invalid injunction.

Finally, Chase has no basis for invoking this Court's jurisdiction to enjoin non-parties to the underlying action. Chase cites no case where the court issued a post-suit order against non-parties to the litigation, *after* the litigation was finally closed, for allegedly bringing a non-party's claims in another action. Every court to address the question—including most recently the Middle District of Florida in another payment protection plan case—has refused to issue such an order, finding that the scope of a Court's preclusive order should be decided in the later court that currently has the case.

II. BACKGROUND

A. The Kardonick Settlement

In late 2010, three customers of Chase Bank (USA), N.A. and its parent, JP Morgan Chase & Co. (together "Chase"), sued Chase for misleading them about Chase's payment protection products, and other incidental and ancillary credit card features. Chase charged them monthly fees for products and services that they never agreed to, did not understand, and could not capitalize on or redeem. *See generally*, Docket No. 16-1 (Amended Complaint).

The three matters were consolidated in this Court for settlement purposes, and soon thereafter, the parties filed a comprehensive global class settlement on December 20, 2010. Docket No. 16. The case pending in this Court, *Kardonick v. JP Morgan Chase & Co. et al.*, No. 1:10-cv-23235, became the lead matter. None of the States, nor Baron & Budd, was a party to the matter, nor was Baron & Budd legal counsel to any of the parties.

The Plaintiffs then moved for final approval of the settlement, which was granted by this Court on September 16, 2011. *See* Docket No. 384 ("Final Approval"). The Court certified the following settlement class which are also defined as "Settlement Class Members":

> All Chase Cardholders who were enrolled or billed for a Payment Protection Product at any time between September 1, 2004 and November 11, 2010. Excluded from the class are all Chase Cardholders whose Chase Credit Card Accounts that were enrolled or billed for a Payment Protection Product were discharged in bankruptcy.

Id. at p. 2 ¶3.

The Court concluded that "Notice was disseminated to members of the *Settlement Class* in accordance with the terms set forth in the Settlement Agreement" as well as to each of the states under CAFA. *Id.* at p. 3 ¶9 (emphasis added). The Court then dismissed all claims in the Amended Complaint with prejudice, stating that "the Settlement Class Representatives and each and every one of the Settlement Class Members unconditionally, fully, and finally releases and forever discharges [Chase] from the Released Claims." *Id.* at p. 4 ¶16.

The Court also entered the following anti-suit injunction:

> 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. at 5 ¶17. Other provisions limit the scope of the settlement to "persons."[2]

B. The Enforcement Actions

Independent of the *Kardonick* matter, the Attorneys General of the states of West Virginia, Mississippi, and Hawaii instituted their own enforcement actions in their respective state courts (the "Enforcement Actions").[3]

The Enforcement Actions seek to prosecute and punish Chase for its actions related to its marketing, sales, enrollment and administration of its payment protection schemes to each State's consumers. *Id.* The Enforcement Actions seek to impose State-designated and crafted injunctive relief and civil penalties, as well as seek all other remedies to which the States are entitled. *Id.* Each of the Enforcement Actions is brought in the name of the State. *Id.*

Rather than move to dismiss or stay the actions in their respective courts on preclusion grounds, Chase removed each of them to federal Court. The West Virginia remand motion has already been granted. *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984 (S.D. W. Va. 2012). The others are currently pending. Now, nearly a year after the first Enforcement Action was filed, and again instead of filing motions to dismiss or stay and without even attempting to show how the court's anti-suit injunction was violated, Chase moves to sanction Baron & Budd, one of the law firms representing the States.

For the reasons assigned below, Chase's self-serving attempt to obstruct Baron & Budd's practice of law is unfounded. And, while the other firm subjected to Chase's Motion, Golomb &

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[2] For example, the stay only applies to actual class members or a "Person". *Id*. at 6 ¶20 (stay applies to "proceeding brought by a Settlement Class Member or any *Person* actually or purportedly acting on behalf of any Settlement Class Member(s)") (emph. supp.). In addition, the preliminary approval order only stayed "all Settlement Class Members, and any *person* actually or purportedly acting on behalf of any Settlement Class Member(s)." *See* Stipulation and Agreement of Class Action Settlement, Docket No. 16, p. 14 ¶III.C.7 (emph. supp.). Repeatedly, the stipulated class action settlement by its terms is limited to "persons". *Id*. at p. 16 ¶IV.A.4 (referencing "all Persons who have timely and properly opted out"), *id*. at p. 16 ¶IV.A.7 ("permanently bars and enjoins all Settlement Class Members, and any Person actually or purportedly acting on behalf of any Settlement Class Members").

[3] *See Exhibits A-C to Chase Motion, State Court Enforcement Action Petitions (State of West Virginia ex rel. Darrell McGraw, Attorney General v. JP Morgan Chase & Co., et al.,* Civil No. 11-c-94-N (Cir. Ct. Mason Cty.); *Jim Hood, Attorney General of the State of Mississippi, ex rel. State of Mississippi v. JP Morgan Chase & Co., et al.*, Civil No. G-2012-1085T1 (Chancery Ct., 1st Jud. Dist., Hinds Cty.); *State of Hawaii ex rel. David Louie, Attorney General v. JP Morgan Chase & Co., et al*, Civil No. 12-1-0985-04 (1st Cir. Ct., Hawaii)).

Honik, P.C., is responding separately, the undersigned notes that Chase's challenge to that firm is equally invalid.

III. ARGUMENTS AND AUTHORITIES

To hold a party in contempt, the moving party must prove by clear and convincing evidence that: (1) a valid court order was in effect; (2) the order was clear and unambiguous; and (3) the alleged violator could have complied with the court's order, had he chosen to do so. *See Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002). On the other hand, it is a root principle that a party cannot violate a court order that does not apply to it, and therefore cannot be held in contempt. *See McDonald v. Redstone Fed. Credit Union*, 374 Fed. App'x. 937, 939 (11th Cir. 2010).

Chase has no evidence, much less "clear and convincing evidence" that (1) the injunction has been violated at all, or (2) the injunction is valid as applied to Baron & Budd in its personal capacity or as an agent of the States.

A. Baron & Budd is a Complete Stranger to These Proceedings—Therefore, Enforcing the Injunction Against Baron & Budd Would Violate the Firm's Right to Due Process

This Court cannot sanction Baron & Budd either in its personal capacity or as the agent of the States. Where a court lacks personal jurisdiction over a party, that party cannot be bound by the Court's rulings. *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 845 (1999). An attempt to bind a party without obtaining personal jurisdiction over it violates due process. *Id.* While Rule 23's class notice requirement can be grounds for asserting personal jurisdiction over a non-party, it only applies to identified class members who receive proper class notice. *See Ortiz*, 527 U.S. at 848 (cite om.).

Here, due process is not satisfied because Chase effectively concedes from the outset that, among other things:

- Baron & Budd has not submitted to the jurisdiction of this Court;
- Baron & Budd was not a party to *Kardonick*, did not represent any of the *Kardonick* parties, and neither negotiated nor signed the settlement agreement;
- Baron & Budd was not given Class Notice, CAFA Notice, and was not even mentioned in a single paper filed in support of the Court's Final Approval Order;
- Baron & Budd was not offered the opportunity—and would have had no standing—to object to the scope of the settlement; and

- Baron & Budd was not representing the States at the time the Opt-Out period ended.

That Baron & Budd was neither a party nor counsel to a party to the *Kardonick* settlement agreement is dispositive. "It goes without saying that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc*., 534 U.S. 279, 294 (2002). Because Baron & Budd was never defined as a class member and never received class notice, this Court cannot exercise personal jurisdiction over the firm. *See In re Diet Drugs Prods. Liab. Litig*., 369 F.3d 293, 310 (3d Cir. 2004) ("due process considerations counsel against binding absent potential class members to understandings that were not made express in the class notice or settlement agreement"). Still further, Chase's contention that the *States* received a CAFA notice is irrelevant: Chase's Motion is intentionally *not* directed at the States—it is directed at Baron & Budd, whom Chase admits did not receive the notice.[4]

The only "evidence" Chase makes as to Baron & Budd's "minimum contacts" is that the firm has practiced in the Southern District of Florida. This is hardly "clear and convincing." Moreover, a law firm that appears in the state to represent a party is not there in its personal capacity, and therefore, another court cannot claim personal jurisdiction over the firm based upon those contacts. *See Sawtelle v. Farrell*, 70 F.3d 1381 (1st Cir. 1995); *Mayes v. Leipziger*, 674 F.2d 178 (2d Cir. 1982). *See also Bona Fide Demolition & Recovery, LLC v. Crosby Constr. Co. of La., Inc*., 2010 U.S. Dist. LEXIS 52236, at *10-11 (E.D. La. May 13, 2010) ("an attorney's choice to represent a client in another forum does not automatically confer personal jurisdiction [over the attorney] if the claim does not arise from the lawyer's contacts with the forum.") (cit. & quote om.).

Therefore, Chase's Motion fails to establish that the Court had personal jurisdiction over Baron & Budd when it issued the injunction, nor does it have jurisdiction over the firm now. Sanctioning Baron & Budd would violate the firm's right to due process.

[4] It is improper on several levels to impute notice to a non-party or its counsel. *See Blaylock v. Guarini*, 2011 U.S. Dist. LEXIS 47323, at **2-3 (E.D. Pa., May 2, 2011). And there is no basis for imputing Golomb & Honik's knowledge as lead counsel to Baron & Budd just because they became co-counsel representing the States. *See cf. Baybrook Homes v. Banyan Constr. & Dev*., 991 F. Supp. 1440, 1441-42 (M.D. Fla. 1997) (rejecting imputation of knowledge from counsel for a client in prior case to mere co-counsel in subsequent case).

B. Chase Fails To Prove That The Injunction Was Violated

1. Chase Cannot Prove That Baron & Budd is Representing Any "Released Claims" In Violation of the Injunction

This Court's Final Judgment and Order of Dismissal was expressly limited to "Parties to the Litigation, including all members of the following Settlement Class," which was defined as:

> All Chase Cardholders who were enrolled or billed for a Payment Protection Product [] between September 1, 2004 and November 11, 2010.

See Docket No. 384 at p. 2 ¶3. Plainly, neither Baron & Budd nor the States were included within the scope of the Class Definition. Therefore, neither is a "Settlement Class Member" subject to the settlement agreement or the Court's Final Approval Order.

While the Court's anti-suit injunction extends to "[e]ach and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s)," it only bars suits that raise "Released Claims." *See* Docket No. 384, p. 5. The Final Order and injunction do not define "Released Claims," however, the Settlement Agreement does.

The "Released Claims" include "any and all Claims, which the Settlement Class Representatives or any Settlement Class Member ever had, now have, or may have in the future." *See* Docket No. 16, p. 10. Because all Released Claims must belong only to Class Members, and because neither Baron & Budd nor the States are Class Members, Baron & Budd, in asserting the States' claims, have not asserted any "Released Claims" by definition.

Independently, the *Kardonick* settlement injunction does not enjoin the States because the injunction only applies to a "person" (*see* Background §II.A and note 2 *supra*). The States were not placed on notice that the term "person" is allegedly defined to include the States.[5] Nor are

[5] *See Rine v. Imagitas, Inc*., 590 F.3d 1215, 1219 n. 4 (11th Cir. 2009) (the State of Florida is not a person; citing Driver's Privacy Protection Act); *State v. French*, 77 Haw. 222, 230 (Haw. Ct. App. 1994) ("a 'person' is defined, 'in general usage, [as] a human being (i.e. natural person).' Black's Law Dictionary 1143 (6th ed. 1990)."); *Pruitt v. W. Va. Dep't of Pub. Safety*, 222 W. Va. 290, 295-296, 664 S.E.2d 175, 180-81 (2008) ("in common usage, the term 'person' does not include the sovereign, and statutes employing the word 'person' are ordinarily construed to exclude it."); Haw. Rev. Stat. § 480-1 ("'Person' or 'persons' includes individuals, corporations, firms, trusts, partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies, and incorporated or unincorporated associations, existing under or authorized by the laws of this State, or any other state, or any foreign country."); W. Va. Code § 46A-1-102(31) ("'Person' or 'party' includes a natural person or an individual, and an organization.").

Moreover, the judgment refers to the definitions in the stipulated Settlement Agreement, which defines person as follows: "'Persons' includes, without limitation, natural persons, firms, banks, corporations, and businesses." Settlement Agreement, Docket No. 16, p. 9 ¶II(hh); *cf.*

attorneys the type of "representative" contemplated by the language of the settlement agreement and order. Rather, that term was intended to mean such persons as personal representatives of the estates, guardians, conservators, parents, and other persons acting *as the party* in the action, not their attorneys.

Therefore, Chase has failed to demonstrate a *prima facie* violation of the injunction that would warrant sanctions.

2. The States Attorneys General are Neither Representing the Claims of, Nor "In Privity" With, the Settlement Class Members

Chase's secondary position is that the Court's injunction applies to the Parties, the Settlement Class Members, *and* "any person actually or purportedly acting on behalf of" a Class Member. *See* Chase Motion at p.2. Chase contends that Baron & Budd is "acting on behalf of" a Class Member by representing the States Attorneys General who are representing Class Members' released claims and who are "in privity" with absent class members. Yet, Chase cannot dispute the facts that (1) it has already litigated this very issue and lost; (2) the Enforcement Actions have only raised statutory claims vested in the States, and for which the Attorneys General are statutorily authorized to bring; and (3) no absent class member was authorized to bring, much less settle, the States' claims.

3. Chase Has Already Litigated And Lost the Question of Whether The West Virginia Attorney General is Representing or "In Privity" With Absent Class Members

Chase has already litigated the very issue it presents to this Court against West Virginia and *lost*. That decision is the law of the case in West Virginia and cannot be disturbed here. Chase's cohort, Capital One, likewise attempted to litigate the same question in *Spinelli v. Capital One Bank, USA*, No. 8:08-cv-132 (M.D. Fla.), and *lost*. Both courts found the same thing: the Enforcement Actions raised sovereign claims and were not representative actions. Chase provides no meaningful way to distinguish the issues it raises here from these two decisions.

West Virginia ex rel. McGraw v. JP Morgan Chase & Co.

Before it sought to collaterally attack the West Virginia action in this forum, Chase removed the West Virginia Enforcement Action to the Federal Court under CAFA. Chase

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also 1 Del. C. § 302(15) (defining "persons" as "corporations, companies, associations, firms, partnerships, societies and joint-stock companies, as well as individuals.").

contended that the action is a class action on behalf of West Virginia consumers. The district court granted the Attorney General's motion for remand. *See West Virginia ex rel. McGraw v. JPMorgan Chase & Co*., 842 F. Supp. 2d 984, 995 (S.D. W. Va. 2012).

The district court held that "consumer protection actions brought by the Attorney General under the WVCCPA [West Virginia Consumer Credit and Protection Act] are *parens patriae* actions, not class actions." *Id.* (citing *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.,* 646 F.3d 169 (4th Cir.), *cert. denied,* 132 S. Ct. 761 (2011)). The Court further observed that "[t]he WVCCPA specifically authorizes the West Virginia Attorney General to seek both injunctive and monetary relief for violations of the Act… as a *parens patriae,* that is, as the legal representative of the State to vindicate the State's sovereign and quasi-sovereign interests, as well as the individual interests of the State's citizens." 842 F. Supp. 2d at 995 (quoting *CVS Pharmacy,* 646 F.3d at 176). The court concluded that, "when the Attorney General brings a WVCCPA action, he does not act as one representative of a larger class of plaintiffs, but rather as a trustee or a regulator." *Id.* at 997.

That decision is now the law of the case in West Virginia, and Chase cites no justification for this Court to collaterally undermine the district court in West Virginia.

Spinelli v. Capital One Bank (USA) N.A.

In *Spinelli v. Capital One Bank, USA*, No. 8:08-cv-132, 2012 U.S. Dist. LEXIS 118667 (M.D. Fla. Aug. 21, 2012), Capital One settled a class action raising similar claims as those in the Enforcement Actions against itself and against Chase. Capital One, argued—as Chase does here—that the court should enjoin prosecution of the Mississippi and Hawaii Enforcement Actions pursuant to its global class settlement because they were fundamentally representative actions, and were effectively relitigating released claims.

The district court there denied the injunction just two days after briefing closed. The Court held that a consumer class action settlement and final approval order simply did not bind the States or the Attorneys General. "The Court's Order approving the settlement and closing this case did not bind the States of Mississippi and Hawaii. The Attorney General of Mississippi and Hawaii were not defined as class members and did not have an opportunity to participate in the litigation or opt out of the class. It would be a violation of the Due Process clause to now enjoin such Attorney General via the requested injunction." *Id.* at *9 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)). The court further elaborated that the "relitigation" exception

to the All Writs Act did not apply because the "relitigation prong does not authorize injunctions against non-parties." *Id.* at *10 (citing response brief of the State of Mississippi). And the court agreed with the States that "the States' sovereign interests were neither raised, actually litigated, nor resolved in the Spinelli action." *Id.* at 11.

Chase does not meaningfully distinguish its own circumstances from those in *Ex rel. McGraw* or *Spinelli*. Nor does Chase show how those District Court Judges got it wrong.

4. The States' Claims Are Statutorily Distinct from the Absent Class Members' Claims.

Chase's Motion is conspicuously lacking in any citation to the statutes underlying the States' Enforcement Actions. Each of the States of West Virginia, Mississippi, and Hawaii, statutorily vests in the State the right to sue to prosecute, enjoin and seek penalties for consumer frauds. *See* W.Va. Code Ann. § 46A-7-108, § 46A-7-109, and § 46A-7-111(1)–(2); Miss. Code Ann. § 75-24-9, § 75-24-11, and § 75-24-19; Hawaii Rev. Stat. § 661-10, § 480-15 and § 480-3.1. Incident to these actions, each of the States' consumer protection acts authorizes the States' agency—the Attorney General or consumer protection department—to ask for and receive such ancillary equitable remedies and relief. *See* W.Va. Code Ann. § 46A-7-108 and § 46A-7-109; Miss. Code Ann. § 75-24-11 and § 75-24-23; Hawaii Rev. Stat. § 480-3.1.

On the other hand, in each State, private consumer actions and remedies are authorized under separate provisions that only apply to private citizens. *See* W.Va. Code Ann. § 46A-6-106(a); Miss. Code Ann. § 75-24-15(1) and (4); Hawaii Rev. Stat. § 480-13.[6] None of these provisions in West Virginia, Mississippi or Hawaii authorizes a citizen to bring, much less release, any of the claims that the State is authorized to bring.

Therefore, the States' statutes themselves rebut Chase's position that the Attorneys General are bringing Class Members' released claims, or that the Released Claims could have included those that are being raised in the Enforcement Actions. Nothing in Chase's Motion—not even the disembodied excerpts from the States' pleadings—can change the fact that as a

[6] Chase's oblique reference to Haw. Rev. Stat. § 480-14(b), which authorizes the State to bring a representative class action on behalf of injured consumers, is a red herring and highlights the issue: the State has not invoked this provision as a basis for suit in the Enforcement Action. The express inclusion of the representative nature of a suit under § 480-14(b) is sufficient grounds to conclude that the exclusion of those grounds in other provisions means the other provisions are not representative in nature.

matter of State law, the Attorneys General have a right to bring the claims raised in the Enforcement Actions in the name of the State.

5. All of the States' Enforcement Action Claims are Sovereign—None of the States' Claims Was Brought in their Representative Capacity

It is settled law that where the State has an interest in the action, then it is the real party in interest in a lawsuit, and the attorney general bringing the lawsuit is deemed the alter ego of the State. *See Tradigrain, Inc. v. Mississippi State Port Authority*, 701 F.2d 1131, 1132 (5th Cir. 1983). The Fourth and Ninth Circuits have recently held that in an action like the States' Enforcement Actions, the state is the real party in interest when it sues *in parens patriae*.[7]

This is not a novel legal development. The Supreme Court has long recognized that states may bring cases in *parens patriae*, using a private individual's injury as a vehicle for the purpose of advancing the state's sovereign interest and general welfare. In *Georgia v. Tennessee Copper Co*., 206 U.S. 230, 237 (1907), Justice Holmes held that Georgia was the real party in interest in a suit brought under its *parens patriae* authority to vindicate the interest of the state in remedying a pollution injury to a group of citizens, because the state "has an interest independent of" the titles of its citizens. In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the Supreme Court held that the state of Pennsylvania was the real party in interest, and could sue on behalf of private citizens not merely to protect them, but to vindicate the state's sovereign interest in unburdening interstate commerce.

Even if the States' Enforcement Actions could be characterized as a hybrid, brought on behalf of public and private interests simultaneously, that would not change the ultimate conclusion that the settlement reached in this matter does not preclude the States' independent Enforcement Actions. The Eleventh Circuit, in *Herman v. South Carolina Nat'l Bank*, 140 F.3d

[7] *See West Virginia v. CVS Pharm., Inc*., 646 F.3d 169, 176 (4th Cir. 2011) (holding that where attorney general files suit "independently of any consumer complaints, as a *parens patriae*, that is, as the legal representative of the State to vindicate the State's sovereign and quasi-sovereign interests, as well as the individual interests of the State's citizens" then the state is the real party in interest); *Nevada v. Bank of Am. Corp*., 672 F.3d 661, 670 (9th Cir. 2012) (same); *West Virginia v. Morgan Stanley & Co*., 747 F. Supp. 332, 338 (S.D. W. Va. 1990) ("So long as the state is more than a nominal or formal party and has a real interest, pecuniary or otherwise, in the outcome of the litigation, it has been held that the State is a real party to the controversy[.]"). *La. ex rel. Caldwell v. Allstate Ins. Co*., 536 F.3d 418 (5th Cir. 2008), similarly recognized that where the attorney general brings suit on behalf of the state, then the state is the real party in interest. *See* 536 F.3d at 430. While *Caldwell* found, on the facts before it, that the state was asserting the private claims of Louisiana citizens, making the latter the real parties in interest, here, the opposite is the case.

1413, 1425 (11th Cir. 1998), recognized the "well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a [] statute that implicates both public and private interests." Other courts agree.[8]

Nor can a state's sovereign interests be compromised or impeded by a private agreement—even one entered into by an aggrieved individual. For example, in *E.E.O.C. v. WaffleHouse, Inc*., 534 U.S. 279 (2002), the Supreme Court concluded that a government entity's interest in vindicating a wrong could not be vitiated or compromised by the aggrieved private party's agreement. There, the E.E.O.C. had filed an enforcement action against an employer on behalf of a former employee for violations of the Americans with Disabilities Act. The Supreme Court held that a mandatory arbitration clause in the former employee's employment contract did not bar the E.E.O.C. from pursuing victim-specific judicial relief on behalf of the employee. The Court reasoned that even when the E.E.O.C. pursues entirely victim-specific relief, this also vindicates a public interest. *Id*. at 296.

Chase attempts to distinguish these cases by contending that the Enforcement Actions seek to revive the settled Claims of absent class members. *But no-where does Chase show that the States' causes of action are being brought on behalf of consumers.* Chase instead relies on semantics to conflate the so-called "restitution" that the Settlement Class Members received in settlement, with the method of *calculating* the equitable relief the States may seek incident to their Enforcement Actions. It has long been understood that even though different equitable remedies may be calculated the same way, they are still separate remedies. *See FTC Policy Statement on Monetary Equitable Remedies in Competition Cases*, July 23, 2003 (explaining that although restitution and disgorgement can be calculated the same way, they serve different

[8] *See also Commodity Futures Trading Comm'n v. Commercial Hedge Serv.*, Inc., 422 F. Supp. 2d 1057 (D. Neb. 2006) (federal agency not barred from seeking additional restitution for private parties who had entered into settlement agreements with the defendant company). *See also Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (en banc) ("The Government is not barred by the doctrine of res judicata from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded."); *Buffalo Laborer Sec. Fund v. J.P. Jeanneret Assocs. (In re Beacon Assocs. Litig.)*, 09 Civ. 8362, 2012 U.S. Dist. LEXIS 63549, **38-39 (S.D.N.Y. May 3, 2012) ("In the event that the private plaintiffs prevail on their claims against Defendants, the Secretary will not be barred by the doctrine of res judicata from pursuing her action.") (citing *Fitzsimmons*); *United States v. Katz*, No. 10 Civ. 3335, 2011 U.S. Dist. LEXIS 59159, at *15 (S.D.N.Y. June 2, 2011) ("governmental agencies are not bound by private litigation when the agency's action seeks to enforce a federal statute that implicates both public and private interests.").

policy purposes).[9] In other words, incident to the States' Enforcement Actions for injunctive relief and civil penalties (which Chase expressly says it is not challenging), they may seek to disgorge Chase's ill-gotten gains. That remedy may necessitate *calculating* what was taken from the citizens of the States. That does not, however, convert the equitable relief that the States are entitled to pursue in their sovereign capacities into a resurrection of the absent class members' released restitution claims.

Moreover, Chase *admits* that to the extent the *States* seek injunctive relief and civil penalties, they have not violated the Court's Final Order. Yet, federal courts have long recognized that where, as here, the primary driver of the state's suit is seeking to deter and punish a bad actor to protect the state's marketplace, seeking ancillary relief does not alter the character of the case. The district court in *New York v. General Motors Corp.*, 547 F. Supp. 703, 706-07 (S.D.N.Y. 1982) rightly observed that "[r]ecovery of damages for aggrieved consumers is but one aspect of the case. The focus is on obtaining wide-ranging injunctive relief designed to vindicate the State's quasi-sovereign interest in securing an honest marketplace for all consumers. That recovery on behalf of an identifiable group is also sought should not require this Court to ignore the primary purpose of the action and to characterize it as one brought solely for the benefit of a few private parties."

Therefore, Chase's false equivalency between the equitable relief that the States are entitled to seek in their sovereign capacities, and the class members' private restitution claims, is baseless. Chase has failed its prima facie burden of proving the basic refrain on which it continually relies: That the claims in the Enforcement Actions are Released Claims, brought in a representative capacity or "in privity" between the Attorneys General and the Class Members.

C. Baron & Budd is the States' Agent for the Enforcement Actions—Therefore, Chase's Attempt to Avoid the States' Eleventh Amendment and Due Process Defenses Fails

1. Because the Injunction is Invalid as Applied to the States Under the Eleventh Amendment or Due Process Clause, Baron & Budd Cannot be Sanctioned for Representing Claims in Violation of an Invalid Injunction

In its brief, Chase continually contends that the "claims Respondents [i.e., Baron & Budd] have asserted," violated the Court's injunction. What Chase obfuscates—perhaps

[9] Available online at http://www.ftc.gov/os/2003/07/disgorgementfrn.htm.

intentionally so—is the fact that Baron & Budd's entire role is as the States' legal counsel—i.e., their agent—in their Enforcement Actions.

Because the attorney is the litigant's agent, the attorney's acts (or failures to act) within the scope of the representation are treated as those of his client. *See Link v. Wabash R.R. Co*., 370 U.S. 626, 633-34 & n.10 (1962); *Barger v. City of Cartersville*, 348 F.3d 1289, 1295 (11th Cir. 2003) (citing same). Chase never explains how it is possible that Baron & Budd—the State's legal counsel in their Enforcement Actions—can be subject to and liable for violating the Court's injunction while simultaneously contending that the States are not subject to the injunction.

Moreover, Chase's attempt to maneuver around the States' Eleventh Amendment and due process defenses by suggesting that only Baron & Budd's coffers would be invaded is a straw man. Because Baron & Budd is the States' agent, the issue is not who would be paying the sanction; rather, the issue is whether the injunction that Baron & Budd is accused of violating legitimately and validly applies to the States in the first place. It does not.

Here, because the injunction does not bar the States' Enforcement Action—whether because it does not apply to them or because its application as to them is invalid—then Baron & Budd cannot be held liable for violating the injunction in representing the States.

2. The Injunction is Invalid Under the Eleventh Amendment's Broad Grant of Sovereign Immunity to Equitable Actions

The States enjoy immunity under the United States Constitution, Eleventh Amendment, from actions at law *and equity*. U.S. CONST. Amend. 11. The Supreme Court recently reiterated the sanctity of state sovereign immunity:

> [W]e have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant…. [A]bsent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State.

Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1637-38 (2011) (cit. om.).

As a mere *statutory* grant of injunctive authority, the All Writs Act is not grounds for abrogating sovereign immunity. *See Horne v. Flores*, 557 U.S. 433, 440 n.1 (2009) ("We have previously held that Congress may validly abrogate the States' sovereign immunity only by doing so (1) unequivocally and (2) pursuant to certain valid grants of constitutional authority.").

Moreover, a century of Supreme Court jurisprudence has held that there is a strong presumption against a federal court entertaining an action for, or issuing, an injunction against a state official in his official capacity, as this is tantamount to an injunction against the state itself. The Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), first held that an exception to sovereign immunity existed where the state official sought or threatened to enforce a law that was being challenged as unconstitutional. *See* 209 U.S. 150-51. The Court then reiterated in *Massachusetts State Grange v. Benton*, 272 U.S. 525, 527 (1926), that "no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." The Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37, 46-50 (1971) observed that such "irreparable injury"—one of the traditional elements for issuing an injunction—requires raising an issue of *constitutionality*, and is not met by allegations of the "the cost, anxiety and inconvenience of having to defend against" a state enforcement action. There has to be a challenge to the constitutionality of the statute sought to be enforced.

Chase raises no constitutional issue, and the States have not waived sovereign immunity. Therefore, the States are absolutely immune from the prayed-for injunction. *See cf. Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1207 (11th Cir. 2012) (dismissing injunctive suit against state due to absence of allegation of past or imminent constitutional violation).

3. Applying the Injunction to the States or their Agents Would Violate the States' Due Process Rights

To enter a valid, enforceable injunction precluding a litigant from proceeding with civil litigation in another forum, the enjoining court must possess personal jurisdiction over the party. *See In re Rationis Enter., Inc. of Panama*, 261 F.3d 264, 267-68 (2d Cir. 2001) (vacating anti-suit injunction for determination of objection that Court lacked personal jurisdiction). As the *Rationis* Court emphasized, a "court may not grant a final, or even an interlocutory, injunction over a party over whom it does not have personal jurisdiction." *Id*. at 270 (citing *Weitzman v. Stein*, 897 F.2d 653, 659 (2d Cir. 1990)).

Neither Chase's pleadings, the settlement documents, nor the final order recites any basis for the exercise of personal jurisdiction over the State, thus, denial of this Motion is appropriate. *See Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1344 (Fed. Cir. 2006) (dismissal of claims against State officials acting in official capacity appropriate when no allegations of contact between officials and forum were made).

Chase also has set forth no facts supporting the States' minimum contacts with the State of Florida. There are none. Because West Virginia, Mississippi, and Hawaii have not submitted to Florida's jurisdiction, and minimum contacts do not exist between them and the State of Florida, there is no personal jurisdiction over any State. Any injunction or sanction order would be unconstitutional.

Furthermore, the States were not parties to the *Kardonick* litigation or settlement. Therefore, they cannot be bound by either the settlement or the injunction. *See E.E.O.C.*, 534 U.S. at 294. And because the States were not class members and did not receive class notice, they cannot be bound to the settlement under Rule 23's class notice scheme. *See Ortiz*, 527 U.S. at 845 (that "no reading of the Rule can ignore the [Rule Enabling] Act's mandate that 'rules of procedure 'shall not abridge, enlarge or modify any substantive right'."). [10]

Nor does the fact that CAFA notices were sent bind the States' claims or activity to the Court. *See* CAFA Notice statute, 28 U.S.C. § 1715(f) ("Rule of construction. **Nothing in this section shall be construed to** expand the authority of, or **impose any obligations, duties, or responsibilities upon**, Federal or **State officials**.") (emphasis added).

Perhaps most significantly, Chase never shows how the States received adequate representation. To bind a non-party through class representation requires not only representation, but *adequate* representation. *See Ortiz, supra;* Fed. R. Civ. P. 23(a)(4). The States, as non-class members, could not possibly have received any representation here, much less adequate representation. The States' sovereign interests give them discretion as to the injunctive relief fashioned, and exclusive authority over the monetary remedies they may seek. Regardless of whether the settlement is sufficient consideration for the release of the class claims, the settlement provides no consideration for the release of the States' sovereign claims.

In sum, there is no basis for this Court to exercise personal jurisdiction over the States. *See cf. Spinelli*, 2012 U.S. Dist. LEXIS 118667, at *9 ("The Court's Order approving the settlement and closing this case did not bind the States of Mississippi and Hawaii. The Attorney General of Mississippi and Hawaii were not defined as class members and did not have an

[10] Even if the Class Notice had been sent to the States, the Class Notice by its own terms only applied to "Chase cardholders." (Docket No. 16-5 (Copy of Class Notice)). Thus, the class notice by its own terms did not address the States' interests. *See In re Diet Drugs*, 369 F.3d at 310 ("due process considerations counsel against binding absent potential class members to understandings that were not made express in the class notice or settlement agreement").

opportunity to participate in the litigation or opt out of the class. It would be a violation of the Due Process clause to now enjoin such Attorney General via the requested injunction.").

Accordingly, the injunction cannot validly be applied to the States or their sovereign claims—to do so would violate both the States' Eleventh Amendment immunity and their right to due process of law. Baron & Budd likewise cannot be found to have violated the invalid injunction when it represents the States in their Enforcement Actions. *Cf. Link v. Wabash, supra.*

D. The All Writs Act Does Not Apply Here—There Is Nothing Being "Relitigated"

A party cannot seek an injunction to enjoin a separate proceeding merely to enforce the terms of a settlement agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994). When a party seeks to use a final judgment in one court to enjoin or dismiss the action in a second court, it is for the second court, not the first one, to determine whether the first judgment bars the second case. *See id.; see also* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4405 (2d ed. 2010).

For example, in *Sandpiper Vill. Condo. Ass'n v. Louisiana-Pacific Corp.*, 428 F.3d 831 (9th Cir. 2005), *cert. denied*, 548 U.S. 905 (2006), the appeals court applied the Anti-Injunction Act and reversed a federal district court's All Writs anti-suit injunction. The defendant invoked the injunction issued after a nationwide class settlement that purportedly released all claims arising out of the injuries to the class members. One distributor sued the defendant in a Minnesota state court and obtained a favorable jury verdict, which the federal district court enjoined. The *Sandpiper Village* court found the All Writs Act inapplicable because the prior action was completed and the settlement obligations had been discharged. *See* 428 F.3d at 844. Thus, there was no "continuing jurisdiction" to protect. The *Sandpiper Village* court also held that an injunction is not necessary to protect or effectuate a court's final judgment unless the issues were in fact litigated in the federal court in the first instance. *See id.* at 848*; see also Estate of Brennan v. Church of Scientology Flag Serv. Org.*, 645 F.3d 1267, 1273 n.3 (11th Cir. 2011) (citing *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); further cit. om.).

The Ninth Circuit found that the distributor's claims had not actually been litigated because, "[s]ignificantly," the distributor "was not named as a party to the class action and was not a member of the nationwide class." *See* 428 F.3d at 848 (fn. om.). And the court expressly rejected the contention that because the distributor's claim was predicated on the injuries to the

class members, that made the distributor's claim a released claim. 428 F.3d at 849. A number of courts have followed *Sandpiper Village* in denying requests for injunctions.[11]

The cases Chase relies on are inapposite. They either involved matters of *continuing* settlement administration, or injunctions issued post-final settlement against the *original class members*. For instance, Chase relies heavily on *In re Baldwin-United Corp.,* 770 F.2d 328 (2d Cir. 1985), for the proposition that a district court may bind non-parties to a global settlement. However, unlike here, the district court in *In re Baldwin-United* noted that the attorneys general were asserting actions for restitution *directly on behalf of* class members, and therefore the attorneys general were essentially acting as private attorneys directly asserting the claims of private citizens. 770 F.2d at 337. Moreover, the court was faced with trying to marshal the diverse parties to a global settlement that the district court found was *imminent*, and the injunction was necessary to bring order out of chaos. *Id.* [12] That is plainly not the issue here.

Here, the face of the Final Order states in large letters: "CLOSED CIVIL CASE." There is no money left to be paid to any plaintiff or defendant, no injunction being violated by any party or absent class member, and no court oversight needed whatsoever. No case that Chase cites has held that it was proper for a court to issue an injunction against a non-party to litigate its claims. *See Spinelli,* 2012 U.S. Dist. LEXIS 118667, *10-11 (observing that the All Writs Act

[11] *See Hinds County, Mississippi v. Wachovia Bank N.A.,* 790 F. Supp. 2d 125, 132 (S.D.N.Y. 2011); *Sohal v. Fed. Home Loan Mortg. Corp*., No. C 11-01941, 2011 U.S. Dist. LEXIS 53278, at *9 (N.D. Cal. May 18, 2011); *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc*., No. 2:10-cv-01396, 2010 U.S. Dist. LEXIS 109908, at ** 19-20 n.8 (E.D. Cal. Oct. 15, 2010); *Rio v. Credit Answers, LLC,* No. 10cv346, 2010 U.S. Dist. LEXIS 31826, at *4 (S.D. Cal. Apr. 1, 2010); *Hernandez v. SmithKline Beecham Pharm*., No. 02-2750, 2006 U.S. Dist. LEXIS 72846, at ** 20-21 (D.P.R. June 6, 2006).

[12] Moreover, in *In re Baldwin* the question of interference with another court was not present since the injunction was merely *prospective* to stop threatened suits. Here, Chase seeks to prevent pending suits that it believes involve the "relitigation," of released claims from the closed *Kardonick* settlement.

Furthermore, The Second Circuit has clarified that the court's entertainment of a large class action or multi-district litigation does not per se vest the court with jurisdiction over all potential parties. Consistent with the terms of the All Writs Act and Anti-Injunction Act, the court's jurisdiction is only triggered when there is a necessity of judicial oversight. *See Ret. Sys. of Alabama v. J.P. Morgan Chase & Co*., 386 F.3d 419, 427 n.7 (2d Cir. 2004). In *Ret. Sys. of Alabama* the Second Circuit rejected an argument similar to the one made here—that *In re Baldwin-United* stands for the proposition that any injunction can issue at any time against any third party to protect the settlement of a large case. The circuit court held that "defendants' contention that *Baldwin-United* created a presumption that multidistrict class actions" confer such universal jurisdiction was "unfounded."

does not justify an "injunction to prevent a non-party from litigating its claims."). Thus, the rule in *Sandpiper* and *Spinelli*, and not *In re Baldwin*, applies here.

IV. CONCLUSION

As Chase has not carried its burden of demonstrating that non-party Baron and Budd, P.C. violated any applicable court order binding against Respondents, Chase's motion to show cause should respectfully be denied in its entirety, and with prejudice.

Dated: October 12, 2012

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of October, 2012, I filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day by Notice of Electronic Filing generated by CM/ECF on all counsel of record entitled to receive service.

s/ Lewis S. "Mike Eidson Jr.
Lewis S. "Mike" Eidson Jr.