THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILLITTERI v SECURITIES AMERICA, INC., ET AL. (Provident Royalties Litigation)	**3:09-cv-01568-F AND RELATED CASES**
THIS DOCUMENT RELATES TO: ALL ACTIONS	
C. RICHARD TOOMEY, et al v. SECURITIES AMERICA, Inc., et al	**3:10-cv-01833**
IN RE: MEDICAL CAPITAL SECURITIES LITIGATION	**Case No. ML 10-2145 DOC (RNBx) (C.D. Cal.)**
THIS DOCUMENT RELATES TO: *McCoy,* SAV09-1084 DOC (RNBx) C.D. Cal.)	**Limited Transfer for settlement purposes as Case No. 3-11-cv 00191-F (N.D. Tex)**

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT

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The North American Securities Administrators Association, Inc. ("NASAA") through their undersigned counsel hereby files this Brief in Opposition to Plaintiffs' Motion for Preliminary Approval of Partial Class Action Settlement.

INTRODUCTION

On February 18, 2011, this Court entered an order (Order Granting Plaintiffs' Motion for Temporary Restraining Order, "Order") temporarily restraining various arbitration proceedings against Securities America, Inc. and Securities America Financial Corporation ("Settling Defendants"). In a subsequent scheduling order, the Court indicated that any interested non-party could submit a brief for the Court's consideration of the Plaintiff's Motion for Preliminary Approval of Partial Class Action Settlement. NASAA is just such an interested non-party and, as more fully explained below, opposes the entry of any order the effect of which would be to prohibit state securities regulators from carrying out their statutory duties.

NASAA is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

The members of NASAA include the state agencies that are responsible for regulating securities transactions under state law. Their fundamental mission is protecting investors, and they have broad authority to regulate the offer and sale of securities within their respective jurisdictions. This authority includes the express

statutory power to conduct investigations and, where necessary, initiate administrative or civil proceedings designed to punish those who violate the law and deter future misconduct. The authority of state regulators expressly extends to the very types of violative conduct that the defendants have allegedly perpetrated.

NASAA supports the work of its members by coordinating multi-state enforcement actions, offering training programs, publishing investor education materials, and presenting the views of its members in testimony before Congress on matters of securities regulation. Another core function of the association is to represent the membership's position, generally as *amicus curiae* in significant cases involving the interpretation of securities laws and the rights of investors. Recently, NASAA has submitted amicus briefs to the U.S. Supreme Court (*Matrixx Initiatives, Inc., et al., v. Siracusano, et al.*[1]*:* NASAA amicus brief in support of an investor's right to state a claim under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 based on a company's nondisclosure of "adverse event" reports, even though the reports are not alleged to be statistically significant; *Janus Capital Group, et al., v. First Derivative Traders*[2]: NASAA amicus brief in support of respondent, First Derivative Traders, in determining the extent to which a person or entity must be involved in drafting false statements to trigger §10(b) liability), in the Colorado Court of Appeals (*Mathers Family Trust, et al., v. Cagle, et al.*[3]: NASAA amicus brief arguing that choice of law provisions in securities

[1] Brief of AARP and North American Securities Administrators Association, Inc., as *Amici Curiae* in Support of Respondents, *Matrix Initiatives, Inc., et al. v. Siracusano, et al.*, No. 09-1156 (U.S. Nov. 12, 2010), *available at http://www.nasaa.org/content/Files/Amicus_Matrixx.pdf*

[2] Brief of AARP and North American Securities Administrators Association, Inc. as *Amici Curiae* in Support of Respondents, *Janus Capital Group, et al. v. First Derivative Traders*, No. 09-525 (U.S. Nov. 2, 2010), *available at* http://www.nasaa.org/content/Files/Janus_FINAL.pdf

[3] Brief of *Amicus Curiae* North American Securities Administrators Associations, Inc., *Mathers Family Trust, et al. v. Cagle, et al.*, No. 2010CA0093 (Colo. Ct. App. June 21, 2010), *available at* http://www.nasaa.org/content/Files/Amicus_Mathers.pdf

agreements are void), and in the Supreme Court of North Dakota (*State of North Dakota v. Hager*[4]: NASAA amicus brief in support of the State of North Dakota regarding North Dakota's authority to license individuals who engage in non-public securities offerings).

The Plaintiffs are now asking the Court to preliminarily approve a proposed settlement and to enter a preliminary injunction to halt administrative proceedings brought by state regulators against Securities America.[5] For the following reasons, NASAA urges the Court to deny the Plaintiffs' request for a preliminary injunction prohibiting states from pursuing lawful actions against Securities America and other defendants for violations of state securities laws.

ARGUMENT

I. The States' Role In Protecting Investors Under The Joint State Federal Regulatory Scheme Is Vital and Should Not Be Limited.

The historical and important role of state securities regulators, the language that Congress adopted to limit that role only under certain circumstances, and the case law interpreting the statutory language all support the axiomatic proposition that state securities regulators carry out a critical mission in protecting the interests of investors. Consequently, where state regulators have reason to believe that state laws have been violated, they have the authority to conduct investigations and, where appropriate, take action to correct errant behavior. That is precisely what the state securities regulators have done in this matter.

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[4] Brief of *Amicus Curiae*, North American Securities Administrators Association, Inc., In Support of Plaintiff and Appellee State of North Dakota and Affirmance, *State of North Dakota v. Hager*, No. 20100090 (N.D. July 2, 2010), *available at* http://www.nasaa.org/content/Files/NASAA_AmicusBrief_ND_070210.pdf

[5] Securities regulators in Massachusetts and Montana have pending administrative actions against Securities America. The facts of these administrative proceedings are fully laid out within the states' brief filed with this Court.

The regulation of securities by the states preceded federal regulation by more than twenty years with the passage of a state securities statute in Kansas in 1911. THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 367 (2d ed. 1990). Other state legislatures began enacting laws regulating securities transactions in the early twentieth century, and today every state has enacted a securities act. ALAN R. PALMITER, SECURITIES REGULATION § 1.4 (2d ed. 2002). The federal securities laws were passed in the 1930s in the wake of the market crash of 1929 and they were viewed as a supplement to, rather than a substitute for, state securities laws, in order to help address the widespread abuses that led to the crash. Richard H. Walker, *Evaluating the Preemption Evidence: Have the Respondents Met Their Burden?,* 60 LAW & CONTEMP. PROBS. 237 (1997). Both the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") contain express savings clauses preserving state law rights and remedies. *See* Securities Act of 1933 § 16, 15 U.S.C. § 77p; Securities Exchange Act of 1934 § 28, 15 U.S.C. § 78bb.

In the matter at hand, state securities regulators in Massachusetts and Montana initiated investigations into allegations of wrong-doing perpetrated by Securities America, and others, involving the offer and sale of securities. The regulators undertook this investigation in full compliance with their authority under state law. The allegations leveled by these regulators against Securities America, and others, demonstrates the need for securities regulation at both the state and federal levels. The state regulators have dedicated significant resources and expended great effort in the course of these investigations and now face the potential of having this Court halt those proceedings. The request by the Plaintiffs to enjoin the state regulators will not only terminate the efforts of

the Massachusetts and Montana regulators, but it will have a chilling effect on all state securities regulators in that, despite their clear statutory authority to take steps necessary to police illicit conduct in their states, they potentially face having that authority impaired by defendants who would run to federal courts to plead poverty. The Court should, therefore, refrain from interfering with the states proceedings as they seek to fulfill their critical function.

A. The States' Sovereign Immunity, Guaranteed Under The Eleventh Amendment, Allows The States To Proceed With Their Cases.

The United States' system of dual sovereignty of federal and state government is a defining feature of our Constitution. See *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991). Upon its ratification, the states did not consent to become mere appendages of the federal government; rather, the states kept "their sovereignty intact." *Blatchford v. Native Vill. of Noatak,* 501 U.S. 775, 779 (1991). This was not a trivial point, "[t]he leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Alden v. Maine,* 527 U.S. 706, 716 (1999).

The Eleventh Amendment provides, that:

> [T]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Under the Eleventh Amendment, a non-consenting state is immune from private lawsuits in federal court. *Nev. Dept. of Human Res. v. Hibbs,* 538 U.S. 721, 726 (2003), citing to *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 363 (2001); *Kimel v. Florida. Bd. of Regents,* 528 U.S. 62, 72-73 (2000); *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 669-670 (1999); *Seminole Tribe of Fla. v.*

Florida, 517 U.S. 44, 54 (1996); *Hans v. Louisiana,* 134 U.S. 1, 15 (1890). As the Supreme Court noted in *Seminole Tribe*, "[t]he Eleventh Amendment does not exist solely in order to prevent federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the *coercive process of judicial tribunals at the instance of private parties*." 517 U.S. at 58 (emphasis added)(citations and internal quotation marks omitted).

One of the central purposes of the doctrine of sovereign immunity is to "accord the States the respect owed them as" joint sovereigns. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993). As such, this respect requires "sovereign immunity [be] applie[d] regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief[,]" *i.e.*, injunctive relief. *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 765-766 (2002) (citing *Seminole Tribe,* 517 U.S., at 58, 116 S.Ct. 1114 ("[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment")).

The Supreme Court has made it clear that, for the states, sovereign immunity "provides an immunity from suit." *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 766 (2002). Given the case law, the state securities regulators' overwhelming interest in protecting their sovereignty, and the states' interest in avoiding the indignity of being subjected "to the coercive process of judicial tribunals at the instance of private parties," this Court must rule that sovereign immunity bars the granting of the requested injunction and the states should be allowed to proceed with their cases. *Seminole Tribe*, 517 U.S. at 58.

B. The Court Should Also Abstain From Interfering With The States' Proceedings Under *Burford* and *Younger*.

The idea that a federal court should abstain from interfering with ongoing state judicial proceedings is based on a recognition that the United States is "made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). The Supreme Court has observed that "[a]lthough a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-318 (1943) (internal citations omitted).

i. The Court Should Abstain From Issuing The Requested Injunction Under *Burford*.

In *Burford*, Sun Oil sought an injunction from a federal court to enjoin an order by the Texas Railroad Commission which granted Burford a permit to drill oil wells. 319 U.S. at 315. The sole issue in Sun Oil's lawsuit was whether the Texas Railroad Commission had improperly applied its oil and gas regulations. Motivated by the highly technical and complicated regulatory issues which affected Texas' oil and gas conservation system, and the fact that the State of Texas had created a comprehensive centralized system for judicial review of the Commission's orders, the Supreme Court

held that abstention was proper to protect the state's administrative process from undue federal influence. *Id.* at 320-324, 332-333.

As set forth in *Burford*,

> "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; *or* (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"

New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989)(emphasis added)(citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813-814 (1976)). A review of the facts of this case demonstrates that the required elements of *Burford* are present. The first *Burford* element is fulfilled because state securities regulation is a complex regulatory scheme of the outmost concern to a state's respective citizens. The States of Massachusetts and Montana have issued administrative orders against Securities America under their respective state securities laws. The Massachusetts case has been tried and the parties are preparing post hearing briefs. The Montana regulators have completed discovery in their case and have scheduled a hearing for mid-April. What remains, and what will be prevented if the injunction is granted, is for both Massachusetts and Montana to interpret and enforce their securities laws and protect the rights of investors as they are obligated to do under their regulatory framework. As such, state securities regulators have a substantial, legitimate interest in regulating the offer and sale of securities within their state, a matter of "substantial public import."

The second element of *Burford* is also present under the instant facts. In the

present case, an injunction would have a chilling effect on the core function of state securities regulators, that of investor protection. State securities regulators have an overriding interest in the uniform and orderly regulation of the offer and sale of securities within their states. The development and implementation of a coherent, unified securities regulatory policy through the enforcement of state securities laws is an important state interest and it would be severely undermined if state securities regulators were prohibited from pursuing improper conduct. A disruption of state securities enforcement actions by injunction would so disrupt states' regulatory policies that, across the board, investors would be negatively affected. Thus, the requirement for a federal court to decline from interfering due to a disruption "of a state['s] efforts to establish a coherent policy with respect to a matter of substantial public concern" has been satisfied. *New Orlenes Pub. Serv.*, 491 U.S. at 361, *Colorado River*, 424 U.S. at 814.

Under *Burford*, only one of the elements must be satisfied for a federal court to "decline to interfere with the proceedings or orders of state administrative agencies." *New Orleans Publ. Serv. Inc. v. Council of New Orleans,* 491 U.S. 350, 361 (1989)(citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813-814 (1976)). Since both the tenets of *Burford* are met in this case, this Court must "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest" and recognize "the rightful independence of state governments in carrying out their domestic policy." *Burford*, 319 U.S. at 317-318 (internal citations removed). For the reasons set forth above, this Court "must decline to interfere with the proceedings or orders of state administrative agencies" and must abstain from issuing the requested injunction. *Id*.

ii. In The Alternative, The Court Should Abstain From Issuing The Requested Injunction Under *Younger*.

As noted above, the Supreme Court has long recognized that there are circumstances where it may be appropriate for a federal court to defer to a pending state court proceeding. In *Younger v. Harris,* 401 U.S. 37 (1971), the Supreme Court held that an injunction against a state criminal proceeding was not warranted absent a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54. The Court's holding was based on "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of States." *Younger*, 401 U.S. at 44.

As set forth in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*., 457 U.S. 423 (1982), there are three requirements that must be present before a court will abstain from exercising jurisdiction under *Younger*. Specifically, the court must determine whether (1) there is an ongoing state judicial proceeding; (2) whether those proceedings involve an important state interest; and, (3) whether the state forum offers an adequate opportunity to raise constitutional challenges. *Middlesex,* 457 U.S. at 432. A review of the facts of this case demonstrates that all three prongs are satisfied and, therefore, this court must abstain from issuing the requested injunction.

There can be no serious argument that the first element of *Younger* is satisfied and that there are ongoing state judicial proceedings in the instant case. As mentioned *supra*, the Montana and Massachusetts have commenced proceedings under their respective securities statutes against Securities America. The fact that Massachusetts's and

Montana's[6] actions are civil administrative proceedings does not bar the application of the *Younger* abstention doctrine. Although *Younger* dealt with an injunction against a state criminal proceeding, the Supreme Court has recognized that the concern for comity and federalism is equally applicable to certain *civil* proceedings in which important state interests are implicated, and thus, it has extended *Younger* abstention to state civil enforcement proceedings and state administrative proceedings which are judicial in nature. *See, e.g., Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975)(state nuisance proceeding against theater lessee); *Juidice v. Vail,* 430 U.S. 327 (1977) (state civil contempt proceeding of judgment debtor); *Trainor v. Hernandez,* 431 U.S. 434 (1977)(state civil enforcement action in a welfare proceeding); *Moore v. Sims,* 442 U.S. 415, 423 (1979) (state child custody proceeding); *Middlesex.,* 457 U.S. 423 (1982) (state attorney disciplinary hearing); and, *Ohio Civil Rights Comm'n v. Dayton Christian Sch.., Inc.,* 477 U.S. 619 (1986)(state administrative proceeding). Thus, in the instant case, the first element of *Younger* is satisfied.

The second element of *Younger* is also satisfied. The "important state interest" here is at the very core of the purpose of the state securities laws – the protection of investors. Of course, the states' interest in this case extends far beyond the states' right to protect investors in an enforcement action. At stake also is the right of the states to investigate violations, initiate administrative proceedings, and then prosecute those proceedings through to a final order. Finally, of course, is the states' general interest in preventing what amounts to a preemption of state securities regulation. Clearly, the "important state interest" of the states in regulating securities for the promotion of fair

[6] It should be noted that some state securities regulators have criminal authority, e.g., Alabama, Kansas, and New York.

and open markets as well as protection of its citizens from dishonest conduct is unquestionably important. Therefore, there can be no doubt that the second element of *Younger* is met.

Finally, the third element of *Younger* is satisfied because the states' administrative process offers an adequate opportunity for Securities America, should it so choose, to raise constitutional challenges. There is no reason to doubt that Securities America, or any defendant for that matter, will receive an adequate opportunity to raise their claims. Just as the plaintiffs in *Dayton Christian Schools,* had the "full and fair opportunity" to litigate their claims in the state administrative proceedings, so to here in the instant case, the Settling Defendants have the same full and fair opportunity to litigate their claims in the state administrative proceedings. *Dayton Christian Schools*, 477 U.S. at 627.

Since the three elements have been met, the instant case is brought within the realm of *Younger*. Therefore, *Younger* and its progeny mandate this Court abstain from issuing the requested injunction.

II. Enjoining State Securities Regulators Is Not Warranted Where State Administrative Remedies Have Not Been Exhausted.

In *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the National Association of Securities Dealers, Inc. ("NASD") appealed from the district court's grant of a preliminary injunction[7], which barred the NASD from proceeding with a disciplinary hearing against Merrill Lynch, Pierce, Fenner & Smith, Inc. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Association of Securities Dealers, Inc*., 616 F.2d 1365

[7] The United States Fifth Circuit Court of Appeals recognizes that "[t]he grant of injunctive relief is an extraordinary remedy which requires the movant to unequivocally show the need for its issuance." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997), citing to *Allied Mktg. Group v. CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989). For that reason, "[t]he decision to grant a preliminary injunction is to be treated as the exception rather than the rule." See, *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994); and *House the Homeless, Inc. v. Widnall*, 94 F.3d 176, 180 (5th Cir. 1996).

(5th Cir. 1980). In its analysis, the Court examined the "complex, congressionally mandated scheme" of the NASD's regulation and outlined the NASD's administrative remedies. *Id.* at 1365-1368. The Court acknowledged that "Courts should interrupt the orderly flow of administrative proceedings only under extraordinary circumstances. 'Only rarely … will 'preliminary (or) procedural … agency action' threaten so irreparable an injury as to justify interlocutory resort to corrective judicial process.'" *Id*. at 1370 (internal citations omitted). Recognizing that the NASD played an important role in securities regulation, with both a broad range of powers and administrative remedies, the Court held that the district court erred when it intruded upon the NASD's administrative scheme. *Id.* at 1368.

Similarly, state securities regulators play a critical role in our nation's complex securities regulatory scheme. As discussed earlier, states securities laws predated the first federal laws by more than two decades. THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 367 (2d ed. 1990). In the one hundred years since the enactment of the first securities act in Kansas, the states have been actively developing and refining their regulatory framework so as to provide, to both investors and registrants, the full panoply of administrative, civil, and criminal remedies.

NASAA respectfully submits that an injunction of state securities regulators would be an extraordinary remedy that is not warranted in this case. As the Fifth Circuit stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc*., a litigant should "exhaust [their] administrative remedies *before* invoking judicial relief." *Id.* at 1370 (emphasis added)(internal citations omitted). Unlike the *Merrill Lynch, Pierce, Fenner & Smith, Inc*. case, an exhaustion of state administrative remedies has not occurred here. If this

Court enjoins state securities regulators from exercising their statutorily mandated jurisdiction, then this ruling will stand well outside the mainstream of state and federal securities laws and will accordingly narrow the jurisdiction of the state securities regulators and weaken the deterrent effect vital to state securities regulation. Enjoining state securities regulators will have a far-reaching impact by undermining investor protection not only in Massachusetts and Montana, but in other jurisdictions as well. As a result, in a very real sense, the citizens of all the states will be more vulnerable to fraud and abuse in the offer and sale of securities.

III. The All Writs Act Cannot Be Used To Enjoin State Enforcement Actions And Thus Preempt Their Authority.

The Supreme Court has clearly held that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). Citing *Penn Bureau*, a Federal District Court found that the All Writs Act could not be used to enjoin a FINRA arbitration because the Federal Arbitration Act specifically addressed the resolution of a customer complaint where the customer had contracted with the broker to enter into an arbitration. *Oppenheimer &. Co. Inc. v. Deutsche Bank AG*, No. 09 Civ. 8154, 2009 WL. 4884158 (S.D.N.Y. Dec. 16, 2009).

Though it is contrary to Supreme Court precedent, the Plaintiffs in the instant case are asking this court to usurp the statutory authority of the states to regulate instances of fraud within their jurisdiction. The National Securities Markets Improvement Act of 1996 specifically addresses the enforcement of state securities laws:

> "(c) PRESERVATION OF AUTHORITY … the securities commission (or any agency or officer performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions with

> respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions."

National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996). Thus, it would be improper to invoke the All Writs Act to prevent any state securities regulators from going forward with their enforcement actions against the Defendants.

IV. Enjoining Pending State Court Proceedings Would Violate Supreme Court Precedent Preventing Federal District Courts From Invoking The All-Writs Act Where There Is No In Rem Jurisdiction.

Supreme Court precedent has explicitly and consistently limited the power of Federal Courts to invoke the All Writs Act to only in rem actions. *See Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922); *Vendo Co. v. Lektro Vend Corp*., 433 U.S. 623, 641 (1977). Generally, state administrative proceedings involving securities laws violations like the Massachusetts and Montana administrative actions at issue in this matter are in personam actions because they involve "mere question[s] of personal liability" under a state's securities laws. *In re Baldwin-United Corp.*, 770 F.2d 328, 336-338 (2d Cir. 1985), and its progeny suggest that parallel in personam proceedings can be enjoined only where a district court is sitting in a multi-district litigation; presiding over a limited fund, tantamount to a res; and is facing attacks upon its jurisdiction from outside parties. However, the instant case is materially distinguishable from *Baldwin* and its progeny because there is no limited fund and this Court's jurisdiction is not under attack. Therefore, the Court should refrain from exacerbating the untested *Baldwin* divergence from Supreme Court precedent and allow the parallel in personam state administrative actions to proceed.

A. The Supreme Court Has Consistently Held That Parallel In Personam State Actions Do Not Interfere With The Jurisdiction Of A Federal Court.

i. Cases interpreting the Anti-Injunction Act's "necessary in aid of jurisdiction" exception are instructive when interpreting the "necessary in aid of jurisdiction" power under the All-Writs Act.

The All Writs Act provides federal courts with the power 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 grant of authority is limited by the Anti-Injunction Act which bars a federal court from enjoining a proceeding in state court unless that action is "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Moreover, the Fifth Circuit has held that the All Writs Act must be narrowly construed and utilized "only under 'such extraordinary circumstances … that indisputably *demand* such a course of action as absolutely necessary to vouchsafe the integrity of the federal court judgment." *Singh v. Duane Morris LLP*, 538 F.3d 334, 341 (5th Cir. 2004).

The All Writs Act contains substantially the same "necessary in aid of jurisdiction" language as the second of the three exceptions in the Anti-Injunction Act. Newby v. *Enron Corp.*, 338 F.3d 467, 474 (5th Cir. 2002). Thus, federal courts consider cases interpreting the Anti-Injunction Act's "necessary in aid of … jurisdiction" exception instructive when interpreting the "necessary … in aid of…jurisdiction" power under the All-Writs Act. *See Baldwin*, 770 F.2d at 335. Moreover, federal courts have done this even when they were seeking to enjoin a proceeding other than one "in state court," *See Amaranth* [*U.S. Commodity Futures Trading Comm'n v. Amaranth Advisors, LLC*, 523 F.Supp.2d 328 (S.D.N.Y. 2007)] (quoting *Baldwin*, 770 F.2d at 355, S.D.N.Y.

case ruling on proposed injunction against a federal administrative agency held that "cases interpreting [the necessary in aid of jurisdiction] clause of the Anti-Injunction Act have been helpful in understanding the meaning of the All-Writs Act"), even though the All-Writs Act technically only applies to state court proceedings. *See Shortess v. Louisiana*, 2010 U.S. Dist. LEXIS 65833, at *5-6 (M.D.L.A. 2010).

ii. Supreme Court Precedent Narrowly Limits The All-Writs Act In Regard To In Personam Actions.

The Supreme Court has consistently held that a court is said to be acting "in aid of jurisdiction" only "where the effect of [a parallel proceeding] would be to defeat or impair the jurisdiction of the federal court." *Kline*, 260 U.S. at 229. Moreover, the Supreme Court has consistently held that parallel in personam proceedings do not require an injunction to aid a court's jurisdiction. *See Id.*; *Vendo Co. v. Lektro Vend Corp.*, 433 U.S. 623, 641 (1977) ('The traditional notion is that in personam actions in federal and state court[s] may proceed concurrently, without interference from either court, and there is no evidence that the exception to §2283 [the Anti-Injunction Act] was intended to alter this balance.'). Accordingly, the Supreme Court, has long distinguished in rem from in personam actions in analyzing the power of district courts to issue writs – with the court allowing the issuance of a writ for in rem actions, but not for in personam actions. *Kline*, 260 U.S. at 229; *Vendo*, 433 at 641. Thus, in order for the court to proceed with enjoining the State proceedings, the Defendants must be able to demonstrate that the actions before this court are in rem. They are not.

B. The Proceedings Can Only Be Properly Characterized As Parallel In Personam Actions.

The Massachusetts, Montana, and instant proceedings are clearly separate in personam actions. An in personam action is one which involves controversy over

liability. Conversely, an in rem proceeding is one wherein the court seeks to adjudicate rights to a particular piece of property. In the Massachusetts and Montana actions, the states are administratively seeking to establish that the Defendants are civilly liable for violations under their respective state securities laws. Similarly, in the instant action, the Plaintiffs are seeking to establish that the Defendants are liable for violating securities laws pertaining to their sale of private placement securities using false and misleading statements. Clearly, none of the actions involve a dispute over the rights to a particular piece of property. Moreover, the complex, multi-district character of the instant case also does not change its classification. *Ret. Sys. of Ala. v. J.P. Morgan*, 386 F.3d 419, 423 (2d Cir. 2004)(wherein the court held that "a complex, multidistrict litigation, [wa]s [still] an in personam action"). Therefore, the state actions and the instant case are clearly parallel in personam proceedings.

C. The Instant Case Is Materially Distinguishable From The Baldwin Line Of Cases That Diverge From Supreme Court Precedent.

As explained above, this is not an in rem proceeding because it does not seek to adjudicate rights to a particular piece of property. Nonetheless, in their request to this court to preliminarily approve the settlement, Plaintiffs seek to rely upon a line of cases following the Second Circuit Court of Appeals decision in *Baldwin* that created a legal fiction wherein a proceeding can be deemed tantamount to an in rem proceeding for the purposes of the "in aid of jurisdiction" exception. The cases diverge from Supreme Court precedent to hold that a parallel in personam proceeding can be enjoined only where a district court is sitting in a multi-district litigation, presiding over a limited fund, tantamount to a res, and is facing attacks upon its jurisdiction from outside parties. *Baldwin*, 770 F.2d at 336-38.

The instant case is materially distinguishable from *Baldwin* and its progeny. First, there is no limited fund in the instant case because: (1) the fund is simply a product of negotiation; (2) Securities America's funds are not limited as evidenced by the fact that the very "limited fund" settlement requests Securities America to continue operation in order to fund a significant portion of the settlement; and (3) Ameriprise, also a named Defendant, is a multibillion-dollar enterprise that could easily satisfy all pending claims. Second, unlike *Baldwin*, the court's jurisdiction is not being attacked because: (1) at the time of the proposed settlement, the Massachusetts action had already been tried; and (2) the instant case does not involve state court Plaintiffs attempting to thwart a federal settlement, but rather a federal court Defendant trying to avoid state enforcement proceedings. Thus, although like *Baldwin* in that this is a multi-district litigation involving securities claims, the cases are materially different. Therefore, the court should abstain from intensifying the untested *Baldwin* divergence from Supreme Court precedent and allow the parallel in personam proceedings to continue.

i. There Is No "Res-Like" Limited Fund Settlement That Would Transform An Otherwise In Personam Action Into A Virtual In Rem Action.

The crux of the Plaintiff's *Baldwin* argument is that an injunction "is necessary to protect the Securities America limited fund from further depletion." (Mem. Supp. Pls. Mot. Prelim. 26.) However, there is no limited fund in the instant case because the fund is simply a product of negotiation that does not exhaust all of the proceeds of Securities America and does not seek contribution from Ameriprise, a named Defendant in position to satisfy all claims.

A limited fund, such as trust assets or a bank account, is "a 'fund' with a definitely ascertained limit that [i]s inadequate to pay all claims against it." *Ortiz v.*

Fibreboard, Corp., 527 U.S. 815, 817 (1999). As to negotiated settlements represented as a limited fund, the Supreme Court has noted, "[o]ne may take a settlement amount as good evidence of the maximum available [only] if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged … probably in any class action settlement with the potential for gigantic fees." *Id.* at 852.

In the instant case, the proposed settlement is simply a manufactured product of negotiation that never existed independently of the litigation. Moreover, this case reflects an instance, like the situation warned of in *Ortiz*, wherein the prospect of gigantic fees has set the terms of the negotiations. Presumably to effectuate a speedy resolution to collect fees that would have otherwise been lost to other actions, Plaintiffs' counsel has offered Securities America terms that allow Securities America to maintain the minimum net capital to be able to continue to operate after the settlement. Thus, the fund is not truly limited because its assets have clearly not been exhausted. Additionally, there is no "definitely ascertained" limit because the case simply seeks to determine liability amongst the parties. This liability, though impossible to precisely determine, is certainly an amount that under even the most extreme circumstances would be less than the total assets of Ameriprise, a multibillion-dollar enterprise that is a named Defendant in the instant case. Therefore, because there is no limited fund, the action is simply in personam, and, thus, unlike *Baldwin*, no injunction is necessary to aid the court's jurisdiction.

ii. This Case Does Not Involve A State Attack On The Jurisdiction Of The Federal Court.

In *Baldwin*, the federal court was faced with a situation wherein "multiple and harassing actions by the states" were threatened only after the majority of the parties in a multi-district securities action had settled the case. *Baldwin*, 770 F.2d at 337. Thus, the court issued an injunction to prevent the "commencing of any [subsequent] action or proceeding" that would potentially attack the court's jurisdiction over the res. *Id.* at 331.

This time, the attack has been reversed. Unlike Baldwin, the instant case does not involve state court Plaintiffs attempting to thwart a federal settlement, but rather a federal court Defendant trying to attack state regulation. Defendants are fully aware that if this court enjoins state proceedings, the Defendants can limit their liability and prevent further negative publicity. Moreover, it would be impossible for the states to be considered attacking the settlement in the instant case because the Massachusetts proceeding is already near a decision on the merits. Therefore, unlike the situation in *Baldwin*, the situation at hand does not warrant an injunction of the already pending state actions.

CONCLUSION

For all the reasons set forth herein, the Court should deny the Plaintiffs' Motion For Preliminary Approval of Partial Class Action Settlement With Securities America, Inc. and Securities America Financial Corporation in its entirety and allow the states to proceed unfettered.

Respectfully submitted,

/s/ Tina G. Stavrou

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CETIFICATE OF SERVICE

I hereby certify that on March 14, 2011, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of the electronic filing to all counsel of record.

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