

Appeal No. 00-2255

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re BankAmerica Corp.
Securities Litigation

Appeal from the United States District Court for the Eastern District of Missouri
MDL Docket No. 1264
The Honorable John F. Nangle, Senior District Judge

NationsBank Classes'
Appellees' Brief

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JURISDICTION

The district court had jurisdiction to enter its injunction against appellants Allison Desmond, *et al.* (the “California group”) even though the California group was not a party to the case. *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977).

This Court has jurisdiction over the California group’s appeal from the injunction of April 24, 2000, pursuant to 28 U.S.C. § 1292(a)(1).

This Court does not have jurisdiction, however, over the California group’s appeal from the order of May 9, 2000, directing publication of an amended initial class notice because the notice order is not “inextricably bound up” with the injunction order such that resolution of the notice order is necessary to effectively review the injunction. *Fogie v. Thorn Americas, Inc.*, 95 F.3d 645, 648 (8th Cir. 1996); *Surgidev Corp. v. Eye Technology, Inc.*, 828 F.2d 452, 457-58 (8th Cir. 1987). Consequently, the portion of the California group’s appeal addressing the May 9 notice order should be dismissed.

STATEMENT OF THE CASE

In October and November, 1998, 24 lawsuits were filed in six federal district courts by shareholders of defendant Bank of America Corporation and its two predecessor entities, defendants BankAmerica Corporation and NationsBank Corporation. (All defendants are referred to jointly herein as the “Bank.”) *Appendix* at 110.¹ BankAmerica and NationsBank merged September 30, 1998. The Multidistrict Litigation Panel ordered the lawsuits consolidated and transferred to the Eastern District of Missouri for all pretrial purposes, and appointed Senior United States District Judge John F. Nangle, chairman of the MDL Panel, to preside over the consolidated cases. *Appendix* at 18.

One of the 24 federal lawsuits was filed by Lani Rothstein, an appellant herein.² *Appendix* at 16, 18, 111, 130, 178. Ms. Rothstein’s federal lawsuit was filed on her behalf, and on behalf of the classes the district court ultimately certified, by the law firm of Milberg Weiss Hynes &

¹ Citations to *Appendix* are to the Appendix to Appellants’ Opening Brief.

² The California group inaccurately states that “they never appeared as parties before the federal district court in this case...” *Appellants’ Brief* at 3.

Lerach and co-counsel. *Id.* at 27. In December, 1998, competing motions for appointment as lead plaintiff and lead counsel were filed, and the district court appointed lead plaintiffs and lead counsel April 20, 1999. *Id.* at 15-17, 22. Ms. Rothstein moved to withdraw as a plaintiff in the consolidated proceedings, and Milberg Weiss and its co-counsel moved to withdraw as co-counsel for plaintiffs. The district court granted the withdrawal motions July 1, 1999. *Id.* at 27.

Simultaneously with its filing of the federal *Rothstein* case, Milberg Weiss filed five parallel cases in California state court, including the case of *Allison Desmond vs. BankAmerica Corporation* (the “*Desmond* case”) and a separate case for Ms. Rothstein. The five California state court cases filed by Milberg Weiss were ultimately consolidated in the *Desmond* case. *Appendix* at 111, 181-95. *Exhibit 87 to the Declaration of Christopher P. Sefer* (“*Sefer Decl.*”).³

The district court certified the consolidated federal cases as a class action, certifying four separate classes July 6, 1999. As part of this order,

³ The Sefer Declaration is not properly a part of the record on appeal in this case. Nevertheless, for convenience appellees will occasionally refer to documents attached to the declaration.

the district court directed the federal court plaintiffs (the “Lead Plaintiffs”) and the Bank to prepare an initial notice to class members and to submit their agreed-upon notice to the court for approval prior to mailing. *Appendix* at 29. Following denial of the Bank’s motion to dismiss December 15, 1999,⁴ and after consultation and agreement with the Bank, Lead Plaintiffs filed for approval of class notice April 6, 2000. *Id.* at 34, 38. The class notice was approved April 18, 2000. *Id.* at 39.

Lead Plaintiffs moved to stay prosecution of *Desmond* as a class action November 22, 1999. *Appendix* at 32. The California group opposed the motion. *Id.* at 32-33.

While the injunction motion was pending, a number of events occurred in *Desmond*. A hearing on the California group’s motion for class certification was scheduled in San Francisco Superior Court. The Bank removed *Desmond* to federal court. *Exhibit 87 to Seefer Decl.* The case was remanded by United States District Judge Vaughn R. Walker, Northern District of California, February 23, 2000. *Exhibit 88 to Seefer Decl.* The

⁴ The order denying the motion to dismiss is reported. *In re BankAmerica Corp. Securities Litigation*, 78 F.Supp.2d 976 (E.D. Mo. 1999) (“*BankAmerica I*”).

remand order noted, however, that if the California group obtained class certification in state court under its then-pending class certification motion, removal would be proper. *Id.* at 7.

The day after the remand, counsel for the California group wrote the state court judge and requested that he *not* proceed with class certification so that the California group could devise a new class structure to avoid removal. The California group requested two weeks in which to submit a new class certification motion. *Exhibit 89 to Seefer Decl.* The California group and the Bank then jointly requested the class certification motion be removed from the calendar and that they be ordered to immediately participate in mediation. The state court granted the joint request and ordered the California group and the Bank to mediate. *Appendix* at 115, 200.

At the time mediation was ordered, no depositions had been taken of the Bank or of non-party witnesses in either the federal or the state case, and the Bank had not answered any interrogatories and had produced only ten boxes of documents, a fraction of the documents subsequently produced to Lead Plaintiffs. *Appendix* at 119.

The district court, the Hon. John F. Nangle presiding, granted the Lead Plaintiffs' motion to enjoin *Desmond* April 25, 2000 .⁵ *Appendix* at 40, 110-28. The injunction did not bar the California group from pursuing individual claims; it did, however, bar it from engaging in mediation or otherwise attempting to represent the interests of the classes. *Id.* at 126-28; *BankAmerica II*, 95 F.Supp.2d at 1053.

The California group filed its notice of appeal from the April 25 injunction May 1, 2000. *Appendix* at 41.

The Lead Plaintiffs moved May 9, 2000, to amend the previously approved initial class notice to reflect entry of the injunction and this appeal, which motion was granted the same day. *Appendix* at 41.⁶

The California group moved May 22, 2000, to stay, suspend or modify both the April 25 injunction order and the May 9 class notice order. *Appendix* at 42. In support of this May 22 motion, the California group

⁵ The order granting the injunction is reported. *In re BankAmerica Corp. Securities Litigation*, 95 F.Supp.2d 1044 (E.D. Mo. 2000) ("*BankAmerica I*").

⁶ The notice was then mailed to the class members. The deadline for class members to opt out is September 5, 2000.

filed declarations by Christopher P. Seefer and Bjorn I. Steinholt. *Id.* The district court denied the motion May 31, 2000. *Id.*

The California group filed an amended notice of appeal June 2, 2000. *Appendix* at 43, 177-78. This added an appeal from the May 9 class notice order. *Id.* The California group has never appealed, however, from the denial of its May 22 motion to stay, suspend or modify the April 25 and May 9 orders. *Id.*

STATEMENT OF FACTS

The statement of facts in the California group's brief is seriously flawed. It misstates facts. It states as fact contentions which are merely opinions or conclusions. It relies on "declarations" not filed in district court until after the orders appealed from were entered. It states as fact contentions immaterial to the issues on appeal. Finally, the California group's statement of facts is incomplete in that it fails to state the facts relied on by the district court in issuing the injunction.

I. The factual statements contained in the California group's brief are inaccurate, are not factual in nature, rely on declarations not part of the record on appeal, or are immaterial to the issues before the Court.

The California group asserts, as though it were a fact, that damages available to the classes in a state-court proceeding greatly exceed damages available in federal court. *Appellants' Brief* at 5-6. The California group states that "expert declarations" were filed in both state and federal court stating that there is a disparity in the damages available because of the bounce-back provision contained in 15 U.S.C. § 78u-4. *Id.* at 6.

This assertion is misleading.⁷

⁷ Interestingly, despite the importance the California group places on the damage contentions in its brief, it seriously misstates the dollar amounts involved. The California group states that the amount of the "loan" made by the Bank to D.E. Shaw was \$372 million. *Appellants' Brief* at 4. The "loan" actually consisted of a \$1.6 billion line of credit, of which \$1.3 billion had been drawn down, plus a \$100 million loan to D.E. Shaw's parent, used as the parent's "equity" in D.E. Shaw. The \$372 million was the loss recognized by the Bank on the "loan" during the third quarter of 1998 according to the Bank's disclosures October 14, 1998. In addition to the \$372 million loss, the Bank reversed \$70 million in profits previously recognized on its investment in D.E. Shaw. Soon after the merger, the Bank assumed a \$20 billion D.E. Shaw portfolio to avoid substantial additional losses the Bank would have otherwise incurred. *Appendix 48-49, 67, 71, 79; BankAmerica I*, 78 F.Supp.2d at 983, 985.

The only “expert” to whom the California group refers is its own expert, Bjorn I. Steinholt, whose declaration was filed in district court *after* the injunction was issued and *after* the class notice was approved. *Appendix* at 141-71. Mr. Steinholt’s opinions in his declaration are based upon the assumption that the bounce-back provision limits the damages claimed by the classes in federal case. *Appendix* at 143. The assumption is incorrect for several reasons discussed in the argument below.

It is important to note that the assertions about the difference in damages supposedly available in state court versus federal court are immaterial to whether the district court had the power to enjoin the state court from proceeding with a class action. Moreover, because Mr. Steinholt’s declaration was not filed until *after* the orders being appealed were entered, and because the California group has not appealed the order denying the motion to stay, suspend or modify, the declaration is not part of the record on appeal. *See* Rule 10(a), Fed. R. App. P.

The California group’s statement of facts is also defective to the extent it relies on the declaration of Christopher P. Seefer. *See Appellants’ Brief* at 7-9. Mr. Seefer’s declaration, like that of Mr. Steinholt, was not

filed by the California group in the district court until *after* the district court entered the orders on appeal. Mr. Seefer's declaration is therefore also not part of the record on appeal.

Mr. Seefer's declaration has the added defect of being utterly inadmissible in evidence, and thus could not be part of the record on appeal even if timely filed. Mr. Seefer is "an associate with the law firm of Milberg Weiss..." *Seefer Decl.* at 1. Although he asserts in his declaration that he has "personal knowledge" and could competently testify about the "facts" stated, the declaration is simply an advocate's argument. Mr. Seefer makes a variety of assertions, some factual, some legal; quotes from and interprets a number of documents, including correspondence and court orders; and opines as to the intent of various parties and judges involved in the litigation.

The one thing Mr. Seefer does *not* do is state facts admissible in evidence.

Finally, the statement of facts is defective in that it includes, under the rubric of "fact," extensive legal argument. *See Appellants' Brief* at 9-13. These pages of the brief should be stricken or disregarded.

II. The California group in its brief failed to include the factual bases for the injunction.

The factual bases for the injunction are stated in the injunction itself. They include the following:

Milberg Weiss filed the federal *Rothstein* case simultaneously with the five California actions consolidated as *Desmond*. When it became clear that Milberg Weiss's clients lacked the financial stake to become lead plaintiffs in the federal case, and thereby select Milberg Weiss as lead counsel, it dismissed the federal case to focus on the California cases where no financial stake rules govern the selection of lead plaintiff and lead counsel. *Appendix* at 111; *BankAmerica II*, 95 F.Supp.2d at 1046.

No class has been certified in *Desmond*. Initially, Milberg Weiss sought certification of a single class. Milberg Weiss proposed three individuals as class representatives, but one was withdrawn after it was discovered by the Bank that he was a convicted felon with a history of fraudulent conduct. Although the class purported to include both purchasers and holders of stock, none of the proposed representatives were purchasers. Thus, the proposed class representatives were not representative of all members of the class. This first class certification motion

was denied by the California state court because of irreconcilable conflicts of interest between former NationsBank and BankAmerica shareholders. *Appendix* at 113; *BankAmerica II*, 95 F.Supp.2d at 1047.

Milberg Weiss filed a second class certification motion. This motion broke the class into five sub-classes modeled after the classes certified in federal court, and proposed Milberg Weiss as counsel for three of the classes while adding another law firm, Gold Bennett & Cera, as counsel for the other two. To remedy the lack of purchaser representatives, Milberg Weiss proposed that five persons not named as plaintiffs represent the purchaser classes. *Appendix* at 114; *BankAmerica II*, 95 F.Supp.2d at 1047.

Because Milberg Weiss proposed to add as class representatives persons not named as plaintiffs, the Bank removed the action to federal court. The Bank contended that claims asserted by the proposed new class representatives were new claims for purposes of the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), thus making the entire case removable. 15 U.S.C. §§ 77p(b)(c), 78bb(f)(1)-(2). The case was remanded on the ground that removal was premature because the newly identified

persons had only been *proposed* as representatives but had not yet been appointed by the state court. In the remand order, the California district court stated:

In the event that parties or claims not stated in the original complaint are brought into this litigation by some mechanism other than amendment of the complaint, such as a class certification order, defendants would have 30 days in which to file a notice of removal under section 1446(b).

Appendix at 114-15.

In response to the remand order, Reed Kathrein, a Milberg Weiss partner, wrote to the California state court judge, expressing the California group's intent to restructure the proposed classes to avoid future removal to federal court, stating:

Plaintiffs would like to resubmit a proposed order of class certification to this Court which would avoid adding new parties, yet resolve this Court's concerns with potential conflicts amongst the classes...

Appendix at 115.

The California group was in a difficult bind. Only seven persons had been named as plaintiffs in the original state court complaints. These persons were not adequate to represent the interests of the five proposed

classes so as to avoid conflicts of interests among the classes, but Milberg Weiss could not add new persons as class representatives on peril of removal to federal court and joinder with the present case as a tag-along. Recognizing this difficulty, Milberg Weiss obtained the Bank's agreement to remove the *Desmond* class certification motion from the docket and to begin mediation to settle all class claims prior to class certification, notwithstanding that Milberg Weiss had previously been advised by the state court that irreconcilable conflicts prevented the law firm from representing all of the classes. *Appendix* at 115, 119-21; *BankAmerica II*, 95 F.Supp.2d at 1048.

The district court carefully considered the entire record and concluded:

Milberg Weiss's behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent. Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to control that case, the firm simply took its marbles and went to play in the state court. In that forum, they have filed numerous inadequate motions for class certification, overlooking potential conflicts of interest among classes and failing

to propose class representatives which truly represent the entire class. Furthermore, one proposed class representative was highly inadequate due to his criminal record and history of participation in fraud. They have attempted to circumvent the prohibitions of the SLUSA by adding non-party plaintiffs as class representatives, which would effectively create a new state securities law suit after the effective date of the SLUSA. When faced with the possibility that such an action would result in removal of the case to federal court, they indicated their intent to structure the classes, not in the best interests of the class members, but to avoid federal court at all costs. When that task proved difficult, they requested the state court to order mediation for settlement purposes, despite the fact that they do not represent the class and despite the fact that minimal discovery has been done either on the substantive issues or the damages available to class members. Clearly, the *Desmond* case is nothing more than a thinly-veiled attempt to circumvent federal law. The *Desmond* plaintiffs, and the law firm behind them, do not have the best interests of the class at heart and have proven themselves wholly inadequate to control the conduct of this suit. The Court finds their attempts to do so outrageous. Accordingly, under the facts of this case, the Court finds that an injunction is necessary to preserve the federal plaintiffs' rights under the PSLRA.

Appendix at 119-21; *BankAmerica II*, 95 F.Supp.2d at 1050.

The factual findings made by the district court in its injunction have not been challenged by the California group on appeal.

SUMMARY OF THE ARGUMENT

The district court had jurisdiction over the California group notwithstanding the fact that it was not a party to the federal case. *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977).

If a district court has jurisdiction to issue an injunction, issuance is reviewed under an abuse of discretion standard. *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000).

Federal courts have the power to enjoin state court proceedings when a federal statute expressly authorizes an injunction. 28 U.S.C. § 2283. A federal statute expressly authorizes enjoining state court proceedings where the statute creates a federal right or remedy which can only be given its intended scope by such an injunction. *Mitchum v. Foster*, 407 U.S. 225, 237-38 (1972). If permitting a state court proceeding to continue would completely frustrate Congress' intent in passing a statute intended to resolve a national problem, then the federal courts have the power to stay the interfering proceeding. *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949, 952-53 (8th Cir. 1976).

The lead plaintiff provisions of the PSLRA were enacted to resolve a national problem in which control of securities class actions vested in the first plaintiff to file suit. This resulted in control vesting in plaintiffs assertedly captive to their counsel, and excluded individuals with a substantial stake in the litigation from any meaningful role. The PSLRA was enacted to correct this national problem by placing control of securities cases in the persons with the largest financial interest in the litigation. *H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 32-35 (1995)*.

The control given to the lead plaintiff under the PSLRA is effectively no control at all, however, if the same old captive plaintiffs can seize control of the litigation, and even settle a case out from under the lead plaintiff, by the simple expediency of filing suit in state court. The lead plaintiff provisions of the PSLRA therefore expressly authorize enjoining state court class actions.

Here, the district court found the California group's conduct outrageous and crafted to advance the interests of the lawyers rather than the classes. The district court therefore properly decided to enjoin the California group from taking any action on behalf of the classes. The

injunction permits the members of the California group to continue to prosecute their individual claims in state court.

The decision of the district court can be affirmed on any basis supported by the record. *Smith v. Arkansas Dept. of Correction*, 103 F.3d 637, 649 (8th Cir. 1996). Although the district court never reached the applicability of the remaining exceptions under the Anti-Injunction Act, the third exception, relating to the protection of judgments, is applicable here. The order appointing lead plaintiff is an appealable collateral order, and therefore a “judgment” supporting a stay of state court proceedings under the Anti-Injunction Act. *Cohen v. Beneficial Industrial Loan*, 337 U.S. 541, 545-547 (1949); *Baker v. Gotz*, 415 F.Supp. 1243, 1250 (D. Del. 1976).

There is no jurisdiction to consider the interlocutory appeal from the May 9 class notice order. *Fogie v. Thorn Americas, Inc.*, 95 F.3d 645, 648 (8th Cir. 1996). Even if the order were appealable, the California group lacks standing to do so. *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992).

The class notice complies with the requirements of Rule 23(c)(2). The rule does not require excessive detail in class notices, and does not require notices to recite speculative and unsubstantiated contentions such as the claim that there is a potential for greater damages in state court. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999). The evidence on which the California group would rely for its damage contentions was not filed at the time of the May 9 order and is not part of the record on appeal. *Shea v. Esensten*, 208 F.3d 712, 720 (8th Cir. 2000).

ARGUMENT

I. The district court did not err in exercising jurisdiction over the California group in issuing its injunction in that the All-Writs Act authorizes the injunction of persons not party to an action if those persons are in a position to frustrate the implementation of a court order or the proper administration of justice, because the California group was asserting control over the litigation contrary to the right of the Lead Plaintiffs to control the litigation.

Although the California group does not assert lack of personal jurisdiction as a basis for reversal in the argument portion of its brief, it does contend in its jurisdictional statement and statement of facts that the district court lacked jurisdiction over members of the group, as non-

parties, so as to permit the district court to enjoin it from prosecuting a class action in state court. *Appellants' Brief* at 2, 9-10.

Contrary to this contention, the district court could enjoin the California group under the All-Writs Act, 28 U.S.C. § 1651, notwithstanding that it is not a party to the federal action.

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

United States v. New York Telephone Co., 434 U.S. 159, 174 (1977) (broad scope of courts' power under the All-Writs Act extends to enjoining non-parties); *see also United States v. International Brotherhood of Teamsters*, 907 F.2d 277, 281 (2nd Cir. 1990) ("Injunctions may be issued against non-parties under the All-Writs Act").

II. The district court did not err in enjoining the California group from prosecuting class claims in state court in that the PSLRA expressly authorizes the enjoining of state court proceedings under the first exception in the Anti-Injunction Act because the federal statutory rights granted the lead plaintiff under the PSLRA can only be given their intended scope if a federal court has the power to prevent other class members from seizing control of the litigation from the federal lead plaintiffs through a competing state court class action.

The district court enjoined the California group from prosecuting its state-court securities actions as class actions, holding that the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) created federal rights which can only be given their intended scope if other class members could be enjoined from prosecuting competing state court class actions.

A federal court’s power to enjoin pending state court proceedings lies at the junction of two of the oldest and most fundamental statutes addressing federal judicial power: the All-Writs Act and the Anti-Injunction Act. The first act gives federal courts authority to enjoin state court actions, while the second limits that authority.

The All-Writs Act, 28 U.S.C. § 1651, states:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

While the All-Writs Act presents an affirmative grant of power to the federal courts, the Anti-Injunction Act, 28 U.S.C. § 2283, imposes restrictions on that power. The Anti-Injunction Act states:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Courts harmonize the All-Writs Act and the Anti-Injunction Act by holding that if a proposed injunction of a state court proceeding comes within any of the three exceptions stated in the Anti-Injunction Act, then it is authorized under the All-Writs Act. *In re General Motors Corp. Pickup Truck Fuel Tank Products Liab. Litig.*, 134 F.3d 133, 143 (3rd Cir. 1998). The exceptions contained in the Anti-Injunction Act always parallel the Courts' powers under the All-Writs Act. *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1201 (7th Cir. 1996).

The Supreme Court has held that a federal court may enjoin state court proceedings if necessary to prevent the state court from interfering with the federal court's consideration or disposition of a case so as to seriously impair the federal court's flexibility and authority to decide its case. *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 US 281, 295 (1970).

If jurisdiction to issue an injunction exists, the decision to enjoin a state court proceeding is one directed to the discretion of the district court. *See Wesch v. Folsom*, 6 F.3d 1465, 1469 (11th Cir. 1993). The standard of review is abuse of discretion. *See Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000).

A. Federal courts can enjoin state court proceedings whenever expressly authorized by Congress.

The Anti-Injunction Act authorizes federal courts to enjoin state court proceedings under three separate circumstances. The first is when an injunction is expressly authorized by an Act of Congress. The established test for determining whether a statute expressly authorizes such an injunction was stated by the Supreme Court in *Mitchum v. Foster*, 407 U.S. 225 (1972), where the Court held:

[I]n order to qualify as an “expressly authorized” exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. *The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.*

Mitchum, 407 U.S. at 237-38 (emphasis added); *see also Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132-134 (1941); *Zajac v. Federal Land Bank*, 909 F.2d 1181, 1183, 1195 (8th Cir. *en banc* 1990) (Arnold, J., concurring) (Heaney, S.J., dissenting).

In *Mitchum*, the Supreme Court held that the Civil Rights Act, 42 U.S.C. § 1983, qualified as an expressly authorized exception to the Anti-Injunction Act. Section 1983 states in its entirety:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Although Section 1983 never mentions either the Anti-Injunction Act or the enjoining of state courts proceedings, the Supreme Court held that the provision for suits in equity viewed in the context of the legislative history and the wrong sought to be remedied together were sufficient to compel the conclusion that Section 1983 expressly authorized federal courts to enjoin state court proceedings. *Mitchum*, 407 U.S. at 242-43.

From *Mitchum*, it is clear that a federal statute can expressly authorize the enjoining of state court proceedings even if the statute never mentions the Anti-Injunction Act or the issuance of injunctions directed at state courts. *Mitchum*, 407 U.S. at 237; *see also, e.g., Amalgamated Clothing Workers of America v. Richmond Brothers Co.*, 348 U.S. 511, 516 (1955).

Thus the Supreme Court and the Courts of Appeal have held several different federal statutes, including the Fair Labor Standards Act, the

Public Utility Holding Act, the 1934 Securities and Exchange Act, the Employee Retirement Income Security Act, and the National Environmental Policy Act, all provide express authorization for a federal court to enjoin state court proceedings notwithstanding that these statutes never state in so many words that they are exceptions to the Anti-Injunction Act or that enjoining state court proceedings is authorized. *See* discussion in *Mitchum*, 407 U.S. at 237 n.25; *see also* cases cited in Wright, Miller & Cooper, *Federal Practice & Procedure* § 4224 at n. 20.

This Court has followed *Mitchum*, holding, for example, that the National Environmental Policy Act, 42 U.S.C. § 4332 (“NEPA”), is an “expressly authorized” exception to the Anti-Injunction Act notwithstanding that NEPA makes no mention of injunctions. *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949 (8th Cir. 1976).

In *Stockslager*, landowners sought to enjoin construction of electric high-voltage lines being built with federal funds but without the detailed environmental impact statement required by NEPA. The district court granted plaintiffs a preliminary injunction barring construction of power lines being built on land controlled by the utility, but refused to enjoin

construction of lines being built on land that was the subject of pending, state-court condemnation proceedings. The district court held that enjoining state court condemnation proceedings would violate the Anti-Injunction Act. *Id.* at 950-51. This Court reversed the decision denying an injunction, holding that the condemnation proceedings could be enjoined under the first exception to the Anti-Injunction Act:

If an environmental impact statement is required ... this entire process would be frustrated if Carroll Electric is allowed to proceed with condemnation of lands and construction of the power line...

It is evident that the NEPA was enacted in response to deep concern about the deterioration of the national environment, and that it was felt that the best method of insuring environmental protection was by implementing a coordinated national policy....

Surely, if and when state court proceedings are in derogation of the requirements placed on the federal government by Congress to carry out the national environmental policy, we would not be according the statutory language its full sweep if we did not find authority to enjoin the offending state proceedings.... [W]e hold that the trial court erred in determining that 28 U.S.C. § 2283 forbids interference with the state court condemnation proceedings, and that to the extent such interference is determined to be necessary to effectuate the purposes of 42 U.S.C. § 4332, 28 U.S.C. § 2283 is no bar.

Stockslager, 528 F.2d at 952, 952-53 (emphasis added).

B. The PSLRA gives specific rights to the lead plaintiffs; because the lead plaintiff provisions of the PSLRA cannot be given full effect if other class members can seize control of the litigation through competing state-court class actions, Congress in enacting the PSLRA “expressly authorized” federal courts to enjoin such competing state court proceedings.

The PSLRA’s lead plaintiff provisions fit the criteria stated in *Mitchum* and its progeny, including *Stockslager*, of a statute which expressly authorizes enjoining state court proceedings.

In 1995, the Congress passed the PSLRA to correct what it perceived as unsatisfactory and abusive practices in the prosecution of securities class actions. One of Congress’ chief concerns was the method by which class representatives and class counsel were selected. *H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 32-35 (1995)*. It was Congress’ view that there were individuals who acted as “professional plaintiffs” in securities class actions. These individuals would purchase a small number of shares in many public companies not for investment but to be available as plaintiffs in class actions filed by attorneys with whom they had ongoing relationships. *Id.* at 32-33 (“Floor debate in the Senate highlighted that many of

the ‘world’s unluckiest investors’ repeatedly appear as lead plaintiffs in securities class action lawsuits”).

Under the law and practice in effect prior to the PSLRA, the first plaintiff to file a purported class action was typically selected to serve as class representative once a class was certified, and his attorney was selected as class counsel. *Conf. Rep. No. 369, id.* at 33 (describing selection process as being on a “first come, first serve” basis). Control of securities class actions typically went to the plaintiff and attorney who won the “race to the courthouse.” In Congress’ view, the combination of professional plaintiffs and a race to the courthouse meant that securities class actions were typically controlled not by “real” plaintiffs with a substantial interest in the case, but by attorneys primarily interested in the fees they could generate. *Id.* at 32-33, cited in *Appendix* at 117-18; *BankAmerica II*, 95 F.Supp.2d at 1049.

The pre-PSLRA law and practice thus presented to Congress an odd and undesirable procedure for the management and control of securities class actions which were national in scope and which could involve, as does the present case, claims in the billions of dollars.

Congress sought to correct these problems and eliminate the “race to the courthouse” by vesting control of securities class actions in lead plaintiffs selected on the basis of their financial interest in the outcome of the litigation rather than on the basis of their sprinting ability. *Conf. Rep. No. 369, id.* at 33-34. Under the PSLRA, control of the case does not vest in the first plaintiff to file suit. Instead, the fact that a class action lawsuit has been filed is widely published and all potential class members are given the right to apply to be lead plaintiff, whether or not they have filed a lawsuit of their own, so that control of the case can vest in the most adequate plaintiff, as defined by Congress.

Specifically, the PSLRA provides that when a securities class action is filed in federal court, the first plaintiffs to file shall, within 20 days of filing, “cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class” that the case has been filed, the claims being asserted in the action, the purported class period, and the right of class members to move to serve as lead plaintiff. 15 U.S.C. § 77z-1(a)(3)(A); 15 U.S.C. § 78u-4(a)(3)(A). Class members can move to be appointed lead

plaintiff any time within 60 days of publishing of the first notice; the moving class members need not be named plaintiffs in any case. Within 90 days of the publishing of the notice, the district court “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members...” 15 U.S.C. § 77z-1(a)(3)(B)(i); 15 U.S.C. § 78u-4(a)(3)(B)(i). The “most adequate plaintiff” shall be the person, otherwise qualified, who “in the determination of the court, has the largest financial interest in the relief sought by the class.” 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(bb); 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

“Professional plaintiffs” are expressly prohibited under the PSLRA from serving as lead plaintiffs in securities class actions. Any person seeking to be lead plaintiff must certify that he or she “did not purchase the security that is the subject of the complaint at the direction of plaintiff’s counsel or in order to participate in any private action arising under this subchapter.” 15 U.S.C. § 77z-1(a)(2)(A)(ii); 15 U.S.C. § 78u-4(a)(2)(A)(ii). Furthermore, no person may serve as a lead plaintiff in more than five securities class actions in any three-year period except as the court may

otherwise permit. 15 U.S.C. § 77z-1(a)(3)(B)(vi); 15 U.S.C. § 78u-4(a)(3)(B)(vi).

To complete the effort to wrest control of securities class actions from the asserted control of the attorneys rather than the plaintiffs, the PSLRA provides that the attorneys who file a securities class action will not necessarily serve as class counsel. Instead, the lead plaintiff — that is, the plaintiff selected by the court as the most adequate plaintiff — selects the class counsel: “The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.” 15 U.S.C. §§ 77z-1(a)(3)(B)(v); 15 U.S.C. § 77u-4(a)(3)(B)(v).

Under the rule established by *Mitchum*, *Stockslager*, and other cases, the PSLRA comes within the “expressly authorized” exception of the Anti-Injunction Act because the rights granted to the “most adequate plaintiff” cannot be given their intended scope unless the federal court has the power to stay competing state court class actions.

It is obvious that none of the provisions in the PSLRA concerning the lead plaintiff can be given its intended scope if, contemporaneously with a federal district court’s appointment of a lead plaintiff pursuant to the

PSLRA, a state court can vest control of the litigation in another class member whose sole qualification is that his lawyer won the race to the state courthouse. Indeed, the entire statutory framework is a complete sham if state courts are free to empower class members with relatively insignificant financial interests to act on behalf of the class to direct discovery, assert legal theories, retain consultants and expert witnesses, make admissions, negotiate binding settlement agreements, and ultimately try cases to judgments that are *res judicata* as to the lead plaintiff and the class he or she represents. The district court below so found, holding:

Clearly, the PSLRA creates rights in plaintiffs possessing the greatest financial stake in the litigation. They have the right to be appointed lead plaintiffs, to control the course of the class action litigation, and to select class counsel of their choice. This federal right cannot be given its intended scope if competing state court plaintiffs, representing a significantly smaller number of shares, can institute premature settlement negotiations which threaten the orderly conduct of the federal case and which could result in the release of the federal claims.

Appendix at 118; *BankAmerica II*, 95 F.Supp.2d at 1049.⁸

In short, the lead plaintiff system established by the PSLRA simply cannot co-exist with the race-to-the-courthouse system it replaced — and which is still in use in California. A ship cannot have two captains, and the control over securities class litigation vested by the PSLRA in the lead plaintiff is really no control at all if the lead plaintiff is subject to the speedy plaintiff hijacking the rudder.

The conclusion that the PSLRA provides express authority to enjoin state court proceedings is supported by *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 693-694 (2nd Cir. 1966). *Studebaker* presented the question of whether a federal court had authority to stay state court proceedings under the 1934 Securities and Exchange Act, and found that the Exchange Act granted that authority. This is of particular significance because the PSLRA is an amendment to the Exchange Act intended to grant the federal courts greater power in securities class actions relative to state

⁸ The district court's analysis and holding in this case has already received praise from a highly-regarded commentator: "The *Bank-America* decision presents a sound framework within which abuses in securities litigation beyond the ambit of the SLUSA may be addressed and remedied." E. Brodsky, *Federal Court Enjoins State Court Securities Class Action*, New York Law Journal, Aug. 16, 2000, § 2, at 3, 6, col. 4.

courts, and is therefore part of — and an extension of — an Act of Congress previously held to expressly authorize federal courts to enjoin state court proceedings.

In *Studebaker*, a shareholder from Michigan filed suit in New York state court to obtain the corporation's current shareholder list for use in a takeover attempt. The Michigan shareholder had obtained written authorization from several New York shareholders authorizing him to get the shareholders list on their behalf. *Studebaker*, 360 F.2d at 693-694. The shareholder did not, however, obtain proxies from the New York shareholders as required by Section 14(a) of the Exchange Act. Because New York state law required only a written authorization and not a proxy to establish entitlement to a shareholder list, the New York state trial court ordered Studebaker to turn over the list.

Studebaker sought relief in federal district court, obtaining an injunction staying the state court proceedings. While the Exchange Act included a provision empowering the SEC to obtain an injunction, there was no provision authorizing private party injunctions. *See* 15 U.S.C. § 78u(d)(1) (1997). The *Studebaker* court nonetheless held that the Exchange

Act expressly authorized federal courts to enjoin state court proceedings at the behest of a private party because the state court case, by its very nature, furthered a violation of the Exchange Act and undermined the policy of investor protection at the heart of the federal act's proxy provision. *Studebaker*, 360 F.2d at 697-698; *see also In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 781 (3rd Cir. 1975). The same analysis is applicable here.

This Court's decision in *Zajac v. Federal Land Bank*, 909 F.2d 1181 (8th Cir. *en banc* 1990), is also instructive. *Zajac* concerned enforcement of the "borrower's rights" provisions of the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2202-2202a. This was enacted to assist farmer-borrowers during the farm credit crisis of the 1980s. The Federal Land Bank brought a state foreclosure action against a farmer; the farmer brought a federal action to enjoin the foreclosure. A panel of this Court held that the act provided a private right of action and expressly authorized an injunction of state court proceedings. The Court *en banc* reversed the panel, holding that the act did not provide a private right of action; the majority opinion

in the *en banc* decision did not, however, reach the injunction issue. *Zajac*, 909 F.2d at 1182-83.

The dissenting and concurring opinions in *Zajac* filed by Judges Heaney and Arnold, respectively, however, did reach the injunction issue. Judge Heaney, joined by Judge Lay, would have held, relying on *Mitchum*, that Congress in enacting the borrower's rights provisions of the act expressly authorized the enjoining of state court proceedings. Judge Arnold, joined by Judge McMillian, would have held to the contrary that injunctions were not authorized because an injunction was not the *only* way to enforce the act because the farmers "were completely free to set up, by way of defense to the state-court foreclosure proceeding, their rights to an independent appraisal" under the act. *Zajac*, 909 F.2d at 1183 (Arnold, J., concurring). In other words, because the farmers were parties in the foreclosure proceeding, they could assert their federal rights in that proceeding.⁹ In the present case, in contrast with *Zajac*, the Lead Plain-

⁹ *But see Studebaker Corp. v. Gittlin*, 360 F.2d 692, 693-694 (2nd Cir. 1966), where an injunction of a state court proceeding was permitted under the "expressly authorized" exception even though the party seeking the injunction was also a party to the state court proceeding sought to be enjoined.

tiffs are not parties in *Desmond* and thus have no way to assert their rights to control the litigation in California state court. An injunction of state court proceedings is therefore the *only* way to enforce the Lead Plaintiffs' federal rights.

It is important to note that here, as in *Mitchum* and *Studebaker*, the state court proceedings are the device being used to violate federal statutory rights. Unlike other provisions of the Exchange Act, the lead plaintiff provisions cannot be violated by a private party except by prosecution of a competing class action. Simply put, because the lead plaintiff provisions have no meaning outside of litigation — it is senseless to select a “lead plaintiff” other than in a lawsuit — prosecution of a competing state court class action is the only conduct by which the California group could actually violate the Lead Plaintiff's rights under the PSLRA. The present case is thus quite similar to *Mitchum*, where the prosecution of state court proceedings itself violated the plaintiffs' rights under the Civil Rights Act.

C. The arguments made by the California group are without merit.

The California group makes three arguments criticizing the injunction entered by the district court.

First, the California group argues that there is an important general policy, embodied in the Anti-Injunction Act, generally prohibiting federal courts from enjoining state court proceedings. The California group contends that this general policy and the principles of comity are particularly applicable here because of the long history of concurrent state and federal jurisdiction in securities cases.

Second, the California group argues that the injunction is inconsistent with *Matsushita Elec. Industries Co. v. Epstein*, 516 U.S. 367 (1996), where the Supreme Court held that a judgment in a state court action would be *res judicata* as to Exchange Act claims pending in federal court even though federal courts have exclusive jurisdiction over such claims.

Third, the California group argues that the enactment of SLUSA in 1998, with its specific authorization of a limited injunction of state court discovery, demonstrates that Congress did not intend authorizing broader injunctive powers in the PSLRA, which preceded the SLUSA.

Each of these arguments is flawed, and none contradicts the analysis under *Mitchum* and *Stockslager* discussed above. For these reasons, none of the arguments presents a sound basis for reversal.

First, general policy arguments do not control over the specific analysis of whether the PSLRA expressly authorized the injunction. Each federal statute stands alone and must be individually analyzed, both textually and in the context of the reasons for its enactment, to determine what rights, if any, are created by the statute and whether the power to enjoin state proceedings is necessary to give the statute effect. The general policy arguments present a framework for analysis already incorporated in the *Mitchum* standards, and thus are not determinative.

Second, the holding in *Matsushita* is in no way inconsistent with the holding of the district court here. The fact that a state court judgment would be *res judicata* to the federal claims asserted by the Lead Plaintiffs gives no guidance on whether the Lead Plaintiffs have the right to enjoin the state court proceedings *before* any judgment is entered. These are two separate issues, and the holding in *Matsushita* is entirely compatible with

the holding that the lead plaintiff provisions of the PSLRA expressly authorize enjoining certain state court proceedings.

Indeed, it is the fact that, absent the injunction, the California group could enter into a quick (and cheap) settlement with the Bank which, pursuant to *Matsushita*, may be binding on the Lead Plaintiffs and the rest of the federal class members, that largely causes the prosecution of a competing class action to be so destructive of the rights of the Lead Plaintiffs.

It is also important to note that *Matsushita* is a pre-PSLRA case.

The California group's third argument, based on the subsequent enactment of SLUSA, is also unpersuasive. Congress enacted SLUSA because of the kind of shenanigans that the California group engaged in here to avoid the requirements of the PSLRA. Congress became frustrated with the state courts, and in particular the California state courts, and their willingness to accommodate efforts to avoid the requirements of the PSLRA. "[P]laintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none

of the Reform Act’s procedural protections against abusive suits are available. In California, State securities class action filings ... went up roughly five-fold...” *H.R. Conf. Rep. No. 803, 105th Cong., 2d Sess.* 14-15 (1998).

Contrary to the California group’s contention that SLUSA grants only a minimal authority to federal courts to enjoin state court proceedings, SLUSA in fact *prohibits* the bringing of essentially all private securities class actions, including those based on state law, in state court, and provides that all securities class actions, broadly defined, filed in state court *must be removed* to federal court. 15 U.S.C. § 77p(b) & (c); 15 U.S.C. § 78bb(f)(1) & (2). *See generally Conf. Rep. No. 803* at 15. These new powers can be described fairly as ‘injunction-plus.’

The limited injunction power to which the California group refers in its brief is the power to enjoin discovery in individual, *i.e.*, non-class, state court securities actions where such discovery is being used to circumvent the stay of discovery imposed in federal securities class actions. 15 U.S.C. §§ 77z-1(b)(4), 78 u-4(b)(3)(D). The holding of the district court in the present case does not render this injunction provision of SLUSA “mere

surplusage,” as contended by the California group. *Appellants’ Brief* at 17. The SLUSA injunction power solves a very different perceived abuse than does the injunction entered here — the SLUSA injunction prevents plaintiffs in a federal securities class action from bypassing the federal automatic discovery stay provision pending resolution of a motion to dismiss *regardless* of whether lead plaintiffs have been selected.

That SLUSA provides federal courts with authority to stay discovery in state court actions does not mean that the lead plaintiffs provisions of the PSLRA do not expressly authorize the enjoining of state class action proceedings when necessary to protect the rights of the lead plaintiffs. “[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *United States v. Vig*, 167 F.3d 443, 448-49 (8th Cir. 1999), quoting *United States v. Price*, 361 U.S. 304, 313 (1960). Subsequent legislative enactments may change existing law *or* clarify it. *Johnson v. United States Dept. of Housing and Urban Development*, 911 F.2d 1302, 1310-11 (8th Cir. 1990). The fact that SLUSA was enacted does not in itself require any particular conclusion concerning the meaning of the PSLRA. *Id.*

Vig is instructive. *Vig* was a criminal prosecution arising from the possession of child pornography in the form of computer files. Subsequent to defendants' conviction, Congress passed a new act explicitly criminalizing possession of pornographic computer files. The legislative history accompanying the new act stated that Congress believed that it was expanding the law to close a loophole. Notwithstanding the subsequent Congress' views and its enactment of a "broader" statute, this Court held that the conduct had already been criminalized by the earlier, "narrower" statute. *Vig*, 167 F.3d at 448-49.

III. The district court did not err in enjoining the state court proceedings because the injunction was also authorized by the third exception to the Anti-Injunction Act to protect the district court's order appointing Lead Plaintiffs.

The California group states that the district court "acknowledged that two of the three exceptions [to the Anti-Injunction Act] do not apply." *Appellants' Brief* at 16. This misstates the district court's opinion. In fact, the district court held that "[b]ecause the applicability of one exception is all that is needed to authorize an injunction under the [Anti-Injunction] Act," it was not necessary to analyze the propriety of the injunction under

the second or third exceptions. *Appendix* at 123; *BankAmerica II*, 95 F.Supp.2d at 1051.

Here the district court's injunction was also proper under the third exception to the Anti-Injunction Act. Even if the Court should disagree with Judge Nangle's analysis under the first exception, the injunction should nevertheless be affirmed. A court of appeals may affirm the district court on any basis supported by the record. *Smith v. Arkansas Dept. of Correction*, 103 F.3d 637, 649 (8th Cir. 1996), citing *Dicken v. Ashcroft*, 972 F.2d 231, 233 (8th Cir. 1992).

The third exception to the Anti-Injunction Act authorizes federal courts to enjoin state court proceedings when necessary to "protect or effectuate its judgments." Although no final judgment has been entered in this case, the district court's order appointing lead plaintiffs is a "judgment" for the purpose of the third exception because it is a final and appealable order under the collateral order doctrine.

Under the collateral order doctrine, an otherwise interlocutory order is a final judgment for purposes of appeal if: (1) the order conclusively determines a disputed issue; (2) the issue resolved is an important issue

completely independent from the merits of the action; and (3) the order is effectively not reviewable on an appeal from the final judgment. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985); *Cohen v. Beneficial Industrial Loan*, 337 U.S. 541, 545-547 (1949).

A. An order appointing lead plaintiff conclusively determines the issue of lead plaintiff.

The question of whether an order appointing lead plaintiff under the PSLRA is immediately appealable under the collateral order doctrine is a fairly novel issue which has not been decided in any published appellate opinion. The issue was examined, however, by the Second Circuit in *Metro Services, Inc. v. Wiggins*, 158 F.3d 162 (2nd Cir. 1998), and by the Tenth Circuit in *Pindus v. Fleming Companies, Inc.*, 146 F.3d 1224 (10th Cir. 1998).

In *Metro Services*, the Court of Appeals considered but declined to decide whether an order appointing lead plaintiff was appealable under the collateral order doctrine because the order expressly retained jurisdiction over the appointment by providing for the court to reassess the lead plaintiff's performance from time to time. The Court of Appeals held that in light of this express retention of jurisdiction, the order did not

conclusively determine the lead plaintiff issue, and thus did not satisfy the first element of the collateral order doctrine. *Metro Services*, 158 F.3d at 165.

Here, in contrast to *Metro Services*, the district court has not expressly reserved jurisdiction to reconsider its order appointing lead plaintiffs.¹⁰ Furthermore, there is no basis in the statute for reconsideration. Each Lead Plaintiff owns a large number of shares in the Bank, representing in total 2,583,505 shares in the Bank or its predecessors. The California group represents only 98,678 shares. The California group's financial stake in this case is less than four percent of the financial stake of the Lead Plaintiffs.¹¹ *Appendix* at 119; *BankAmerica II*, 95 F.Supp.2d at 1049.

In *Pindus*, a group of plaintiffs who were unsuccessful in their application to be lead plaintiffs appealed the lead plaintiff order. The grounds of the appeal were quite narrow. Appellants contended that under the lead

¹⁰ A copy of the order is attached as an addendum to this brief.

¹¹ The California group initially misrepresented to the district court the number of shares it represented, inflating the number of shares by 67,000, or by approximately 67%. *Appendix* at 119; *BankAmerica II*, 95 F.Supp.2d at 1049 n.6.

plaintiff order they were forbidden from filing or receiving service of any papers in the case, and that therefore, “not only can they not be heard, they cannot hear.” *Pindus*, 146 F.3d at 1226. The appellants did not offer the Court of Appeals any other reason for holding the lead plaintiff order appealable under the collateral order doctrine. The Court of Appeals found, however, that the order only restricted the filing of pleadings, not motions, and that appellants had successfully moved the district court to stay proceedings pending appeal. “Under these circumstances, we cannot adopt the appellants’ interpretation of the March 26 order. Because the appellants’ jurisdictional claims cannot stand without this interpretation, we reject them.” *Id.*

It appears from the opinion in *Pindus* that the collateral order doctrine arguments were not presented in detail. *Pindus* thus does not appear to address the issues relevant here. Furthermore, to the extent that *Pindus* is deemed relevant, it is distinguishable. Here, in contrast with *Pindus*, the lead plaintiff order imposes the restriction on other plaintiffs that the Tenth Circuit found lacking. The order in the present case states: “No motion, request for discovery, or other pre-trial matter

shall be initiated or filed by any plaintiff except through lead counsel.” *Addendum* at 6. Thus the order here contains the very restrictions which the court found critically lacking in *Pindus*.

Thus, given that the lead plaintiff order did not expressly reserve jurisdiction over the issue and that it completely barred all other plaintiffs from exercising any control of the litigation, and given that the Lead Plaintiffs are far more qualified under the PSLRA than the California group to serve as lead plaintiff, the order appointing lead plaintiff in this case has conclusively determined the lead plaintiff issue and thus satisfies the first requirement of the collateral order doctrine.¹²

The California group may argue that the order is not final for purposes of the collateral order doctrine because the district court assertedly has the inherent ability to modify its orders at any time. *Cf. J.R. Clearwater, Inc. v. Ashland Chemical Co.*, 93 F.3d 176, 179 n.2 (5th Cir.

¹² The district court, in its injunction order, specifically found that “the federal plaintiffs ... are without doubt the most adequate plaintiffs under the PSLRA...” *Appendix* at 122; *BankAmerica II*, 95 F.Supp.2d at 1051. In contrast, as to the California group, the district court held: “The *Desmond* plaintiffs, and the law firm behind them, do not have the best interests of the class at heart and have proven themselves wholly inadequate to control the conduct of this suit.” *Appendix* at 120; *BankAmerica II*, 95 F.Supp.2d at 1050.

1996) (denial of class certification in federal action not a basis for enjoining class certification in state court proceeding since denial of class certification is not a final, appealable order).

This argument should fail. A lead plaintiff order is completely distinguishable from a class certification order on this issue. The PSLRA requires the first plaintiffs filing a purported securities class action to publish a notice of the action within 20 days of filing, and that within 90 days of the publishing of this notice, the district court “*shall* appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members...” 15 U.S.C. § 77z-1(a)(3); 15 U.S.C. § 78u-4(a)(3) (emphasis added). There is no provision in the statute for the district court to subsequently reconsider its lead plaintiff appointment. *Id.* The lead plaintiff statute is therefore quite different from the class certification rule at issue in *J.R. Clearwater*. That rule provides:

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Rule 23(c)(1), Fed. R. Civ. P. Thus, under the class action rule, in contrast with the lead plaintiff statute, there is no fixed time limit within which a class certification order must be determined and all orders concerning certification are expressly made alterable any time prior to decision on the merits.

Furthermore, even if the district court retains the inherent power to reconsider its appointment of a lead plaintiff absent any express retention either in the order or the statute, this fact would not render the lead plaintiff order non-final for purposes of the collateral order doctrine. To hold otherwise would eliminate the collateral order doctrine entirely. All interlocutory orders entered by a district court prior to final judgment are subject to reconsideration by the district court. “The district court has the inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment.” *Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995). If the district court’s inherent power to reconsider all interlocutory orders would render all such orders non-final for purposes of the collateral order doctrine, then no interlocutory order could ever be “final” and appealable under the

doctrine. This clearly is not the case, however, as otherwise there would be no interlocutory orders appealable under the collateral order doctrine. Consequently, “the inherent power to reconsider and modify” a lead plaintiff order cannot in itself make such an order non-final under the collateral order doctrine.

In a similar context, involving the “full faith and credit” clause of the Constitution, this Court held that a judgment was entitled to full faith and credit even if modifiable by the issuing court. “The full faith and credit clause is not so weak that it can be evaded by mere mention of the word modification.” *Baker v. General Motors Corp.*, 86 F.3d 811, 820 (8th Cir. 1996), citing *Howlett v. Rose*, 496 U.S. 356 (1990). Similarly, the lead plaintiff provision of the PSLRA is not so weak that it cannot be protected simply because lead plaintiff orders, like other interlocutory orders, may be modified by the district court. *Cf. Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 248-49 (2nd Cir. 1961) (third exception is not limited to final judgments but applies as well to interlocutory decrees).

The California group’s counsel on appeal, Professor Arthur R. Miller, agrees with this analysis. In his treatise on federal court jurisdiction, Prof. Miller writes:

The statute speaks of “judgments” and in Civil Rule 54(a) “judgment” is defined as including “a decree and any order from which an appeal lies.” ... If that meaning is read into the statute, it would permit protection of truly final judgments but would also encompass interlocutory rulings, such as a preliminary injunction, that are appealable as of right ... and, *perhaps most important, it would include those orders that are appealable under the “collateral order” doctrine.* There is enough flexibility in this to permit protection of those federal determinations that have in fact been “fully adjudicated,” as the Reviser’s Note contemplated.

Wright, Miller & Cooper, *Federal Practice & Procedure* § 4226, text at notes 22-25 (emphasis added); *see also Baker v. Gotz*, 415 F.Supp. 1243, 1250 (D. Del. 1976) (“Since the order ... was an appealable ‘final decision’ under 28 U.S.C. § 1291 and a ‘judgment’ under Rule 54(a), it should also constitute a ‘judgment’ for purposes of the relitigation exception in 28 U.S.C. § 2283”).

Consequently, the lead plaintiff order is a judgment for purposes of the collateral order doctrine.

B. The selection of lead plaintiff is an important issue unrelated to the merits of the case.

An order appointing lead plaintiffs also satisfies the second prong of the collateral order doctrine because it decides an important issue independent of the merits of the case. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985); *Cohen v. Beneficial Industrial Loan*, 337 U.S. 541, 545-547 (1949).

The selection of lead plaintiffs is of critical importance to the direction and the management of any securities class action. Congress certainly viewed it as such. The vesting of the control of securities class actions in lead plaintiffs and the standards to be applied in their selection were central to the entire legislative program adopted by Congress in enacting the PSLRA. The Committee Report accompanying the bill that became the PSLRA specifically highlighted the lead plaintiff provisions, stating:

The Committee believes that the selection of the lead plaintiff should rest on considerations other than a speedy filing of the complaint.... The Committee intends to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring the court to presume that the members of the purported class with the largest financial stake in the relief sought is the “most adequate plaintiff.”... The current system often works to

prevent institutional investors from selecting counsel or serving as lead plaintiff in class actions.... The Committee believes that increasing the role of institutional investors in class actions will ultimately benefit the class and assist the court....

H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 32-35 (1995).

Despite its importance, however, selection of the lead plaintiff is not related to the merits of the case. A lead plaintiff must be selected regardless of whether the action has merit. No element of any claim, or of any affirmative defense, is determined by the selection of the lead plaintiff. Lead plaintiff orders are thus completely distinguishable from orders relating to class certification, which are ordinarily not immediately appealable under the collateral order doctrine, “because whether or not the class should have been certified involve[s] a consideration of the merits of the entire action.” *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 844 (8th Cir. 1977).

C. The selection of lead plaintiff is effectively not reviewable on appeal from the final judgment.

A lead plaintiff order satisfies the third prong of the collateral order doctrine as it is effectively not reviewable on appeal from final judgment.

If on an appeal from final judgment an appellate court holds that the district court erred in its selection of the lead plaintiffs, what relief, if any, can the appellate court grant to the class member who should have been but was not selected?

Will the appellate court vacate the judgment and send the parties back to ground zero? Can the defendant be compelled to retry the case in its entirety against new opponents even though the defendant is not a participant in the lead plaintiff selection process? On remand, can the “proper” lead plaintiff pursue new legal theories or promulgate new discovery requests? Would an appellate court order any of these things to happen because a district court erred in ruling on a preliminary matter entirely independent of the merits of the case?

Yet, unless the appellate court is willing to send the parties back to the district court at ground zero, the class member who was erroneously denied the opportunity to serve as lead plaintiff is effectively denied relief on appeal.

Because there is no practical relief available after final judgment should the district court err in its selection of lead plaintiffs, an order

appointing lead plaintiffs is essentially not reviewable on an appeal from final judgment.

D. Because the lead plaintiff order is appealable under the collateral order doctrine, it is a judgment for purposes of the third exception to the Anti-Injunction Act.

Because the order appointing lead plaintiff is an appealable judgment under the collateral order doctrine, the order can be protected by the district court through, if necessary, enjoining state court proceedings under the third exception to the Anti-Injunction Act.

Here, the injunction was necessary to protect or effectuate the district court's judgment selecting the lead plaintiffs. The California state court proceedings were an undisguised attack upon the judgment in that the California group was using them to divest control of the litigation from the Lead Plaintiffs. Numerous courts have upheld injunctions of state court proceedings under analogous circumstances. *See In re Corrugated Container Anti-Trust Litigation*, 659 F.2d 1332, 1335 (5th Cir. 1981); *Battle v. Liberty Nat. Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989); *NBA v. Minnesota Professional Basketball, Ltd. Partnership*, 56 F.3d 856, 871-872 (8th Cir. 1995); *Daewoo Electronics Corp. of America v. Western*

Auto Supply Co., 975 F.2d 474, 477-478 (8th Cir. 1992); *In re SDDS, Inc.*, 97 F.3d 1030, 1037-1039 (8th Cir. 1996); also see generally discussion in Wright, Miller & Cooper, *Federal Practice & Procedure* § 4226.

IV. The district court did not err in enjoining the state court from proceeding with class claims because it properly exercised its discretion in determining that an injunction was needed to protect the rights of the Lead Plaintiffs and the interests of the classes certified by the district court.

As established above, the injunction was authorized under the exceptions to the Anti-Injunction Act. Thus, the only remaining inquiry is whether the district court properly exercised its discretion in entering the injunction. The California group does not appear to address this issue in its brief. Even if the issue were disputed, however, the record establishes no abuse of discretion by the district court.

The district court found, and the record supports the finding, that the California group, under the control of its counsel, Milberg Weiss, was attempting to “negotiate” a quick settlement of the claims of the federally-certified classes notwithstanding that the classes are represented only by the Lead Plaintiffs and the class representatives duly appointed by the district court. By engaging in settlement discussions before any class has

been certified in state court and after only minimal discovery, the California group was clearly attempting to circumvent the ordinary and orderly prosecution of the litigation.

The significance of the California group's conduct is obvious from the record. The California group cannot have its proposed classes certified *and remain in state court* without the cooperation of the Bank. The Bank, of course, has no reason to cooperate with the California group unless such cooperation gains the Bank an advantage, to-wit: a cheap settlement. The Bank is not required, however, to remove the California group's case once it becomes removable through the class certification process. The Bank can waive removal. The Bank has no motive to waive removal, however, unless the California group delivers it a cheap settlement in this multi-billion dollar case.

In short, the only way the California group's counsel, led by Milberg Weiss, is going to earn a fee is to first settle the case and then get a settlement class certified in the state court with the consent of the Bank. The value of such a settlement will undoubtedly be far less than the true value of the case. This situation should be avoided at any cost.

As Judge Nangle found, the California group's counsel, led by Milberg Weiss, is in a conflict of interest situation in which counsel's own financial interests, which can only be satisfied if it controls the litigation, are in direct competition with the interests of the classes, whom it purports to represent, in obtaining the greatest possible recovery. Judge Nangle properly found the California group's handling of this conflict "outrageous." *Appendix* at 120-21; *BankAmerica II*, 95 F.Supp.2d at 1050.

The approach taken by the California group is not surprising given that the lead Milberg Weiss partner in *Desmond*, William S. Lerach, is renowned for his claim that, "I have the greatest practice in the world because I have no clients. I bring the case, I hire the plaintiff. I do not have some client telling me what to do. I decide what to do." *In re Lucent Technologies, Inc., Securities Litigation*, 194 F.R.D. 137, 156 n. 24 (D. N.J. 2000), citing *In re Network Assoc., Inc.*, 76 F.Supp.2d 1017, 1032 (N.D. Cal. 1999); *Fortune*, "The King of Pain is Hurting," Sept. 4, 2000, p. 190. Here, Milberg Weiss is conducting itself consistent with Mr. Lerach's belief that the firm has no clients, just its own self-interest.

The district court properly exercised its discretion in determining that an injunction was needed here.

V. The California Group’s appeal from the May 9 class notice order should be dismissed for lack of appellate jurisdiction.

The California group has appealed the May 9 order directing publication of the initial class notice. That portion of the appeal should be dismissed for lack of appellate jurisdiction because the class notice is not “inextricably bound up” with the injunction which forms the sole basis for an interlocutory appeal. This Court has held:

Our jurisdiction under section 1292(a)(1) also extends to the remainder of the appealed order to the extent the injunction is “interdependent with” the remainder of the appealed order. Under this standard, we have jurisdiction to review all portions of the order that are dependent on the resolution of the issues necessarily resolved in reviewing the injunction order. In other words, in addition to the injunction order, we may review other issues only if they are “inextricably bound up” with the injunction.

Fogie v. Thorn Americas, Inc., 95 F.3d 645, 648 (8th Cir. 1996) (citations omitted).

The California group offers no reason why the class notice order can be reviewed as part of the appeal of the injunction. Resolution of a class

notice order is not dependent in any way upon any of the issues which must be resolved in reviewing the injunction. Far from being “inextricably bound up” with each other, the injunction and the class notice order are entirely independent. As in *Surgidev Corp. v. Eye Technology, Inc.*, 828 F.2d 452, 457-58 (8th Cir. 1987), the class notice issues have “absolutely no bearing on any other issue in this appeal, let alone any interlocutory orders of serious, perhaps irreparable, consequence.” Consequently, there is no jurisdiction to consider the class notice appeal at this time, and that portion of the appeal should be dismissed.

The present case is completely distinguishable from *Emerson Electric Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234 (8th Cir. 1979), cited by the California group in support of appellate jurisdiction. In *Emerson Electric*, the district court granted defendant’s motion to transfer the case to another district and denied plaintiff’s request for a preliminary injunction as moot in light of the transfer. This Court held that the transfer order was appealable because, “Emerson, in contesting the transfer, in effect contests the underlying basis for denial of the injunction.” *Id.*, 606 F.2d at 237.

This case is also distinguishable from *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), also cited by the California group. In *Skywalk*, this Court held that a mandatory class certification order was effectively an injunction of pending state court actions and therefore immediately appealable. *Id.*, 680 F.2d at 1179-80. The Court then held that, “because the injunction is interdependent with the remainder of the appealed [class certification] order, we may review the entire order...” *Id.* at 1180. Here, in contrast, the California group is seeking to bootstrap review of a separate order, not the balance of the same order, where the two orders are in no way “interdependent.”

It also appears that the California group lacks standing to appeal the class notice. In *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), this Court held that an unnamed class member must intervene before appealing approval of a class settlement in which the member will participate. If a class member must intervene before appealing a settlement, then it follows *a fortiori* that he or she must intervene before appealing a notice which is only a preliminary step to a settlement.

VI. The district court did not err in entering its May 9 class notice order because the notice satisfied all legal requirements; there is no requirement that the notice recite the California group's contentions about purported differences in the damages potentially available in the different forums.

Assuming for purposes of argument that the class notice issue is properly before the Court, which it is not, the district court did not err in entering its May 9 order directing publication and mailing of the initial class notice. The standard of review is abuse of discretion.¹³

The heart of the California group's contention is their repeated assertion that there is an "indisputable disparity in potential damages between the state and federal cases" because of possible application of the PSLRA bounce-back provision, 15 U.S.C. § 78u-4(e), in the federal case.

See, e.g., Appellants' Brief at 28.

¹³ The California group unfairly ties together the injunction and the class notice, suggesting that "Judge Nangle was not content simply to enjoin the state-court proceeding," but that he purposefully authorized an allegedly inadequate class notice to force class members to make "an immediate election while silencing one candidate." *Appellants' Brief at 27.* This statement is unfair for a number of reasons, not least of which is that the district court had approved a substantially similar class notice prior to entering the injunction. The notice was amended May 9 after the injunction issued solely to reflect that the injunction had been entered and was being appealed. The class notice and the injunction are unrelated, and the California group's efforts to suggest some kind of unsavory conduct on the part of Judge Nangle is disgraceful.

Unfortunately for the California group, just because it say so, does not make it true.

The applicability of the bounce-back provision to the federal classes' claims is an open question. The classes do not seek "to establish damages by reference to the market price of a security," as required by the statute; moreover, the security which the classes purchased is not "*that* security" which bounced-back, as that phrase is used in the statute.¹⁴ That is because the merger created a corporation materially different in scope, assets, liabilities, and market price from its two predecessors, and thus eliminated the expectation of continuity inherent in the bounce-back provision. Furthermore, the federal plaintiffs can amend their complaint to add the California statutory claims, and such an amendment is presently pending. The amendment should be granted. *See* Rule 15(a), *Fed. R. Civ. P.; Popp Telcom, Inc. v. American Sharecom Inc.*, 210 F.3d 928, 943-44 (8th Cir. 2000) (reversing as an abuse of discretion district court's denial of motion to amend complaint to add state statutory law

¹⁴ Only those members of the BankAmerica Purchaser Class who purchased their shares in the Bank after the merger are establishing damages with reference to the market price of a security that bounced back.

claims where “[t]he state law claims are based on the same set of facts” as the pending federal claim). Once the amendment is granted, all of the “additional” damages supposedly recoverable under the California statutes will be available to the federal classes in the action below.¹⁵

Consequently, the alleged disparity in damages does not, or will not, exist.

It is important to note, moreover, that the record on appeal shows that *no evidence* concerning the alleged disparity in damages had been submitted to the district court prior to its May 9 order. The two declarations on which the California group relies were not filed until May 22. *Appendix* at 42. They were not part of the record at the time the district court issued its order, and the district court could not have erred by disregarding the declarations. The declarations are not part of the record on appeal. *See, e.g., Shea v. Esensten*, 208 F.3d 712, 720 (8th Cir. 2000) (“we will not consider materials that became part of the district court file subsequent to [the appealed] ruling”); *Rivers-Frison v. Southeast Missouri*

¹⁵ The California group’s ability to recover any damages on behalf of the purchaser classes is questionable given that the groups’ members are all members of the holder classes. *Appendix* at 113; *BankAmerica II*, 95 F.Supp.2d at 1047.

Community Treatment Center, 133 F.3d 616, 619 n.2 (8th Cir. 1998) (refusing to consider any evidence not presented to the district court).

Finally, even if alleged disparity in available damages actually existed, and even if the California group had submitted their evidence of the alleged disparity prior to the complained-of order, there still would not be any requirement that the alleged disparity be discussed in the initial class notice. The notice requirements are stated in Rule 23(c)(2), Fed. R. Civ. P. In discussing the related, but more stringent requirements of Rule 23(e), this Court has held that,

the district court directs the form of the notice of settlement, and the notice need only satisfy the broad reasonableness standards imposed by due process. The Supreme Court has found that the notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.... It is well settled that the notice is not required to provide a complete source of information.

Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1153 (8th Cir. 1999) (citations and internal quotations omitted). The class notice need not be unduly specific. *See* 2 Newberg on Class Actions § 11.53, at 11-130, citing *In re*

“Agent Orange” Prod. Liab. Litig., 818 F.2d 145, 170 (2nd Cir. 1987). As

the district court noted in its May 31, 2000 order:

Due process merely requires the class notice to “describe the action and the plaintiff’s rights in it.” Only “minimal procedural due process protection” is necessary. The present notice clearly provides this minimal protection. The existence of the competing actions was acknowledged. Due process does not require a full exposition of every difference between the two cases.

Appendix at 175, citing *Hilton v. Braunskill*, 481 U.S. 770, 811-12 (1987).

Significantly, although the California group says that the notice could be better, it does not provide this Court or the district court with any suggested modifications. Thus it gives the Court nothing to measure the notice against. If the district court had determined in its discretion to require the notice to state that the California group contends that *Desmond* could yield greater damages, should the notice also state that the Lead Plaintiffs contend that this is not so? Should the notice state that the California group does not include any purchasers, and therefore may not be able to represent the purchasers’ claims? Should the notice state that the California group included a felon with a history of fraudulent conduct, or that, in the opinion of the district court, the California group

and its counsel have proved themselves wholly inadequate to represent the classes?

Once one starts down the slippery slope of adding excessive details or contested details to the class notice, it is difficult to know where to draw the line. The Lead Plaintiffs respectfully suggest that Judge Nangle drew the line properly here, and that the California group's appeal from the May 9 order should be denied.

CONCLUSION

The order of the district court enjoining the California group and the state court should be affirmed.

The appeal from the decision of the district court directing publication of the initial class notice should be dismissed; alternatively, the order of the district court should be affirmed.

Respectfully submitted,

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