

Case No. 14-3520

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS  
CONCUSSION INJURY LITIGATION,

ROY GREEN, *et alia*,  
Appellants.

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Appeal from the U.S. District Court for the Eastern District of Pennsylvania  
Honorable Anita B. Brody, District Judge  
Case Nos. 2:12-md-02323 and 2:14-cv-00029

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BRIEF OF THE APPELLANTS

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### **Jurisdictional Statement**

This is an appeal from an order of the U.S. District Court for the Eastern District of Pennsylvania in a class action enjoining Appellants Roy Green, John Thomas Smith, Edward Scott, Jade Scott and Monica Smith (“the Missouri Plaintiffs”) from, *inter alia*, participating in, continuing to prosecute, or maintaining as plaintiffs any other lawsuit “against Released Parties based on, relating to, or arising out of the claims and causes of action, or the facts and circumstances at issue, in the class Action Complaint, Related Lawsuits and/or the Released Claims” (Appellants’ Appendix (“Aplt.Appx.”) 4).

The case below consists of numerous civil actions consolidated as multi-district litigation under 28 U.S.C. § 1407 (Aplt.Appx. 608). The district court had diversity jurisdiction under 28 U.S.C. § 1332(a) and (d), as, in at least one consolidated action, the opposing parties are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interests and costs. Moreover, among the actions consolidated is at least one putative class action consisting of more than 100 class members in which at least one member of the putative class is a citizen of a state different from a defendant and the aggregate amount in controversy exceeds \$5,000,000 (Aplt.Appx. 822).

The district court entered its injunction against the Missouri Plaintiffs on July 7, 2014 (Aplt.Appx. 4). The Missouri Plaintiffs filed their notice of appeal on August 5, 2014 (Aplt.Appx. 1).

Under Fed. R. App. P. 4(a)(1)(A), the notice of appeal was timely, as it was filed within thirty days of the district court's injunction. Therefore, this Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's "[i]nterlocutory orde[r] ... granting ... [an] injunctio[n]."

### **Statement of the Issue**

The district court erred in enjoining the Missouri Plaintiffs from proceeding in their Missouri state court action, *Green*, because the injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. The Act's allowance of injunctions "necessary in aid of a" district court's jurisdiction does not apply to *in personam* actions like *Green*. This Court's limited *Carlough* exception for state court proceedings that pose an actual threat to the district court's proceedings does not apply because *Green* does not pose an actual threat to the provisional class-action settlement before the district court.

*(Issue raised at Aplt.Appx. 759-71; no action taken)*

### **Statement of Related Cases**

Objecting class members in the litigation below previously filed a petition for leave to appeal from the district court's order granting provisional settlement class certification. *See In re: National Football League Players Concussion Injury Litig.*, No. 14-8103. On September 11, 2014, after briefing and argument, the Court entered an order denying the petition, in which it stated it would issue an opinion at a later time.

## Statement of the Case

### **A. Formation of MDL 2323**

On July 19, 2011, 73 former National Football League (“NFL”) players and some of those players’ wives filed a complaint in the Superior Court of California against the NFL, alleging the NFL breached a duty to protect the players’ health and safety by failing to warn and protect them against the long-term risks associated with concussions (Aplt.Appx. 326) (referencing *Maxwell v. Nat’l Football League*, No. BC465842 (Cal. Super. July 19, 2011)). Thereafter, two additional suits were filed in California state court and a fourth was filed in the Eastern District of Pennsylvania. (Aplt.Appx. 326) (referencing *Pear v. Nat’l Football League*, No. LC094453 (Cal. Super. Aug. 3, 2011); *Easterling v. Nat’l Football League*, No. 2:11-cv-05209 (E.D.Pa. Aug. 17, 2011); and *Barnes v. Nat’l Football League*, No. BC468483 (Cal. Super. Aug. 26, 2011)). The NFL removed the three California State cases to federal court on the basis of federal preemption under the Labor Management Relations Act (“LMRA”) (Aplt.Appx. 326).

On January 31, 2012, on the NFL’s motion, the U.S Judicial Panel on Multidistrict Litigation (“JPML”) ordered these four separate actions consolidated for pretrial proceedings under 28 U.S.C. § 1407 (Aplt.Appx. 324) (reported at *In re: Nat’l Football League Players Concussion Injury Litig.*, 842 F.Supp.2d 1378 (J.P.M.L. 2012)). The multidistrict litigation, referred to in this brief as “MDL

2323,” was assigned to the Honorable Anita B. Brody in the U.S. District Court for the Eastern District of Pennsylvania (Aplt.Appx. 324).

On August 30, 2012, the NFL moved to dismiss the various claims against it on the grounds that all of them were subject to the dispute resolution procedures agreed to in applicable collective bargaining agreements (“CBAs”) (Aplt.Appx. 557, 560). The crux of the NFL’s argument was the duties it owed to former players necessarily arose under or were inextricably intertwined with an applicable CBA (Aplt.Appx. 557, 560). The district court heard oral argument on the NFL’s motions on April 9, 2013 (Aplt.Appx. 248), but, as of the filing of this brief, has not issued a ruling on them.

**B. The *Turner* Class Action**

On January 6, 2014, former NFL players Kevin Turner and Shawn Wooden filed a class action complaint against the NFL in the Eastern District of Pennsylvania on behalf of themselves and others similarly situated (Aplt.Appx. 812, 822). This brief refers to their case, *Turner v. Nat’l Football League*, as “the Class Action.” It is being heard below along with MDL 2323 (Aplt.Appx. 289, 819).

The Class Action alleges generally that the NFL breached its duties to the plaintiffs by failing to take reasonable actions to protect players from the chronic risks created by concussive and sub-concussive head injuries and that the NFL

concealed those risks (Aplt.Appx. 840-41, 853-54, 875). The Class Action complaint stated:

The NFL is not, and has not been, the employer of the [plaintiffs], who were employed during their respective careers in professional football by the independent clubs .... The United States Supreme Court held in *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2212-13 (2010), that each team that is a member of the NFL is a legally distinct and separate entity from both the other teams and the NFL itself.

(Aplt.Appx. 824).

As a result, the Class Action alleges the NFL breached duties *not* arising out of an employer-employee relationship (Aplt.Appx. 824).

### **C. The *Green* Case**

On December 31, 2013, six days before the Class Action was filed, the Missouri Plaintiffs filed an original petition in the Circuit Court of the City of St. Louis, Missouri, 22nd Judicial Circuit, alleging individual causes of action for negligence, negligent misrepresentation, fraudulent concealment, and loss of consortium against their former employer, the Arizona Cardinals Football Club, LLC (“the Cardinals”) (Aplt.Appx. 565). *See Green v. Arizona Cardinals Football Club, LLC*, No. 4:14-cv-461, 2014 WL 1920468 (E.D.Mo. May 14, 2014).

This brief refers to the Missouri Plaintiffs’ action as *Green*. In Missouri, unlike in various other jurisdictions, the exclusivity provision of the state’s workers compensation law does not apply to the claims the Missouri Plaintiffs

asserted in *Green*. See *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293 (Mo. App. 2013); *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14 (Mo. App. 2011).

Three of the Missouri Plaintiffs are former employees of the Cardinals: Roy Green, employed from 1979 through 1987, John Thomas “J.T.” Smith, employed from 1985 through 1987, and Edward Scott, employed in 1987 (collectively “the Players”). *Green*, 2014 WL 1920468 at \*1. The other two are Jade Scott, wife of Edward Scott, and Monica Smith, wife of J.T. Smith (collectively “the Wives”). *Id.*

The Players alleged they suffered multiple concussive and sub-concussive blows to the head between September 1, 1987 and December 1987. *Id.* They alleged the Cardinals, as their employer, owed them duties including to maintain a safe working environment, not to expose them to unreasonable risks of harm, and to warn them about the existence of concealed dangers. *Id.*

The Players alleged that, although these risks were outside of their own reasonable knowledge, the Cardinals knew or should have known that the sort of brain trauma to which they were exposed can lead to neurological impairments, including Chronic Traumatic Encephalopathy, and studies demonstrating this link were published as early as the 1920s. *Id.* The Players alleged that, despite this knowledge, the Cardinals represented to them that concussions are not “serious”

and lack long term effects. *Id.* Finally, the Players alleged the Cardinals increased their risk of exposure to brain trauma by forcing them to return to work after they were concussed and by installing AstroTurf, a playing surface that yields faster, more dangerous play and increases the risk of concussion. *Id.* The Wives alleged loss of consortium. *Id.*

Unlike the claims against the NFL in the Class Action complaint, Appellants' claims each are "premised upon the common law duties" owed by employers in Missouri "to maintain a safe working environment, not to expose employees to unreasonable risks of harm, and to warn employees about the existence of dangers of which they could not reasonably be expected to be aware." *Id.* at \*5 (referring to an employer's non-delegable duties as including "1) to provide a safe workplace; 2) to provide safe equipment in the workplace; 3) to warn employees of the existence of dangers of which the employees could not reasonably be expected to be aware; 4) to provide a sufficient number of competent fellow employees; and 5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety") (citations omitted).

The Cardinals removed *Green* to the U.S. District Court for the Eastern District of Missouri, arguing the LMRA completely preempted the Missouri Plaintiffs' claims. *Id.* at \*1. This was exactly what the NFL had asserted in its motions to dismiss in MDL 2323 (Aplt.Appx. 557, 560).

The Missouri Plaintiffs moved to remand *Green* back to state court. *Green*, 2014 WL 1920468 at \*1. On May 14, 2014, the Eastern District of Missouri agreed, granted the Missouri Plaintiffs' motion, and ordered *Green* remanded to the Missouri state trial court from which it was removed. *Id.* at \*1 and \*3-8. The court held there was no federal subject-matter jurisdiction over *Green*, as the Missouri Plaintiffs' claims arose under Missouri common law, were based on the Players' employer-employee relationship with the Cardinals, and can be adjudicated without reference to a CBA. *Id.*

**D. The District Court “Preliminarily Approves” the *Turner* Class Action and Enjoins *Green***

On June 25, 2014, proposed class counsel for Kevin Turner and Shawn Wooden moved for, among other things, an order granting preliminary approval of a class action settlement and for an order enjoining proposed settlement class members from pursuing “related lawsuits” (Aplt.Appx. 610-11).

On July 7, 2014, more than seven months after the Missouri Plaintiffs filed *Green*, the district court certified a settlement class, granted preliminary approval of the settlement, and enjoined all proposed settlement class members, including the Missouri Plaintiffs, “from filing, commencing, prosecuting, intervening in, participating in, continuing to prosecute and/or maintaining” any other lawsuit, including *Green* (Aplt.Appx. 11).

In a memorandum accompanying the order, the court speculated the injunction was necessary because, “Without the requested stay and injunction, the NFL Parties and other Released Parties remain exposed to ‘countless suits in state court despite settlement of the federal claims’ that ‘would seriously undermine the possibility for settling [this] large, multi-district class action’” (Aplt.Appx. 33) (quoting *In re: Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 367 (3d Cir. 2001)).

On July 15, 2014, the Missouri Plaintiffs moved the district court for relief from the stay and injunction as it applies to *Green* (Aplt.Appx. 777). They explained that the Anti-Injunction Act, 28 U.S.C. § 2283, only allowed the court to enjoin a state-court proceeding if doing so was a genuine threat to its jurisdiction, and *Green* could not possibly be construed as a threat to the preliminary settlement of the Class Action (Aplt.Appx. 784-87). As of the filing of this brief, the court has not ruled on that motion (Aplt.Appx. 314-23).

The Missouri Plaintiffs then timely appealed to this Court (Aplt.Appx. 1).

### **Summary of the Argument**

The district court's order enjoining the Missouri Plaintiffs from proceeding with *Green* violates the Anti-Injunction Act, 28 U.S.C. § 2283. It must be vacated.

The All Writs Act, 28 U.S.C. § 1651(a), gives federal courts authority to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” This is limited, though, by the Anti-Injunction Act, which bars a federal court from enjoining a proceeding in state court unless the injunction is either (1) expressly authorized by Act of Congress, (2) where necessary in aid of its jurisdiction, or (3) to protect or effectuate its judgments. § 2283. The Anti-Injunction Act is an absolute bar against any stay of any state-court proceedings unless it falls within one of these three specifically defined exceptions. Moreover, as the Supreme Court has directed, when interpreting the Anti-Injunction Act, any doubt as to the propriety of a stay should be resolved in favor of permitting the state court action to proceed.

In this case, the district court enjoined the Missouri Plaintiffs “from filing, commencing, prosecuting, intervening in, participating in, continuing to prosecute and/or maintaining” any other lawsuit, including *Green*. The court stated the stay was necessary in aid of its jurisdiction because it speculated that, “[w]ithout the requested stay and injunction, the NFL Parties and other Released Parties remain exposed to ‘countless suits in state court despite settlement of the federal claims’

that ‘would seriously undermine the possibility for settling [this] large, multi-district class action.’”

The district court’s interpretation of the Anti-Injunction Act and application of that statute to the facts in this case were error for two manifest reasons:

*First*, the court erred in interpreting the “necessary in aid of jurisdiction” exception as applying to state court proceedings that *do not* pose an *actual* threat to the provisional settlement. It made no effort to assess the character of the Missouri Plaintiffs’ state court action so as to determine the level of interference with the federal action. Indeed, in its order staying *Green*, the district court made no mention of *Green* or any threat actually posed by any case. Rather, it merely observed the NFL remains exposed to suit, which is a fact the injunction does not remotely resolve.

*Second*, if the court had assessed *Green*, it necessarily would have found *Green does not* pose an actual threat to its jurisdiction or the provisional settlement. It is impossible that *any* state court order issuing from *Green* could pose any threat to the federal class action, let alone a threat that would negate the federal court’s exercise of its jurisdiction. Simply put, *Green* satisfies *none* of the factors the Anti-Injunction Act requires to be considered in determining whether a state court proceeding threatens sufficient interference to justify an injunction.

As a result, this Court should vacate the order enjoining *Green*.

### Argument

ISSUE: The district court erred in enjoining the Missouri Plaintiffs from proceeding in their Missouri state court action, *Green*, because the injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. The Act's allowance of injunctions "necessary in aid of a" district court's jurisdiction does not apply to *in personam* actions like *Green*. This Court's limited *Carlough* exception for state court proceedings that pose an actual threat to the district court's proceedings does not apply because *Green* does not pose an actual threat to the provisional class-action settlement before the district court.

### Standard of Review

"The standard of review for the authority to issue an injunction under the Anti-Injunction Act and the All-Writs Act is de novo." *In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 261 F.3d 355, 363 (3d Cir. 2001). This Court "review[s] the terms of an injunction for an abuse of discretion, underlying questions of law receive de novo review, and factual determinations are reviewed for clear error." *Id.* Simply put, "When determining whether or not a district court has the authority to issue an injunction under the All Writs Act, we exercise plenary review. Once that authority has been established, a district court's decision to issue such an injunction is reviewed for abuse of discretion." *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 328 (3d Cir. 2007).

\* \* \*

The Anti-Injunction Act prohibits a federal court from enjoining a state court proceeding unless, *inter alia*, doing so is “necessary in aid of its jurisdiction.” In the Third Circuit, for an *in personam* state court action to fit this exception, the state court action must pose an actual threat to the federal court’s jurisdiction. The Missouri Plaintiffs’ pending Missouri state court proceeding in *Green* poses no threat of any kind to the district court’s provisional class action settlement below.

Did the district court have authority to enjoin *Green*?

**A. A federal court only may enjoin a state court action under the All Writs Act if, resolving all doubts in favor of denying such an injunction, doing so strictly fits one of the exceptions in the Anti-Injunction Act.**

The All Writs Act, 28 U.S.C. § 1651(a), grants federal courts authority to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” This authority is limited, however, by the Anti-Injunction Act, 28 U.S.C. § 2283, which bars any federal court from enjoining any proceeding in state court unless doing so is either: (1) expressly authorized by Act of Congress; (2) necessary in aid of its jurisdiction; or (3) to protect or effectuate its judgments. While the Anti-Injunction Act does “not preclude injunctions against the institution of state court proceedings,” it does bar “stays of suits already instituted.” *In re: Diet Drugs Prod. Liab. Litig. I*, 282 F.3d

220, 233 n.10 (3d Cir. 2002) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965)).

The Anti-Injunction Act “is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act.” *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977). The exceptions must “be rigorously construed and should not be enlarged by loose statutory construction.” *In re: Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 144 (3d Cir. 1998) (citation omitted). That is, they must “be construed narrowly.” *Diet Drugs*, 282 F.3d at 233. Indeed, it is “clear beyond cavil that the” Act’s “prohibition is not to be whittled away by judicial improvisation.” *Vendo*, 433 U.S. at 631 (quoting *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511, 514 (1955)).

Simply put, “a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear.” *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 294 (1970). The Anti-Injunction Act “is not a minor revetment to be easily overcome; it is a fortress which may only be penetrated through the portals that Congress has made

available.” *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1100 (9th Cir. 2008).

The Supreme Court has directed that, when interpreting the Anti-Injunction Act, “[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.” *Atl. Coast Line*, 398 U.S. at 297; *see also Gen. Motors*, 134 F.3d at 144. Moreover, “especially ... when principles of federalism are involved,” federal courts entering any injunction must tailor it carefully. *Diet Drugs*, 369 F.3d at 307.

These principles apply equally to a district court relying, as here, on the “necessary in aid of its jurisdiction” exception to the Anti-Injunction Act. *Gen. Motors*, 134 F.3d at 145. That exception is interpreted and applied just as narrowly as the others. *Id.*

**B. The district court erred in determining the injunction against *Green* was “necessary in aid of its jurisdiction.”**

**1. The “necessary in aid of its jurisdiction” exception to the Anti-Injunction Act applies only to competing *in rem* actions, not parallel *in personam* actions such as *Green* and the Class Action.**

Generally, an injunction against a state court proceeding is considered “necessary in aid of” a federal court’s jurisdiction only in an action involving or determining the status of a thing (an action *in rem*), where the effect of the injunction is “to draw to the federal court the possession or control, actual or

potential, of the” thing so that a later-initiated state court with jurisdiction over the same thing would not impair or defeat the jurisdiction of the federal court already attached. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922). The converse of this rule is equally true, such that where a state court’s jurisdiction attached to a thing first, “the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court’s jurisdiction.” *Id.*

A controversy over the question of personal liability, however, “is not a thing.” *Id.* at 230. Rather, it is *in personam*, not *in rem*. *Id.* It “does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending.” *Id.* As a result, each of two parallel actions *in personam* pending in both state and federal court is generally “free to proceed in its own way and in its own time, without reference to the proceedings in the other court.” *Id.*

Indeed, the Supreme Court declared it a rule that “where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.” *Id.* Under this rule, it is “settled that the pendency of a suit *in personam* is not a bar to suits brought in other jurisdictions upon the same cause of action.” *Asiatic Petroleum Corp. v. Italia Societa Anonima Di Navigazione*, 119 F.2d 610, 613 (3d Cir. 1941). This is

because the Supreme Court has “never viewed parallel in personam actions as interfering with the jurisdiction of either court.” *Vendo*, 433 U.S. at 642. The Anti-Injunction act does not merely establish principles of comity, but rather bars any injunction that “cannot be justified by any of the three exceptions.” *Atl. Coast Line*, 398 U.S. at 286-87.

Limiting the grant of an injunction to actions *in rem* fulfills the prerequisite that an order enjoining a state court proceeding be *necessary* in aid of the federal court’s jurisdiction. Plainly, it makes sense that staying “later-initiated state court proceedings *over the same res* in actions in rem” would be *necessary* to prevent “the exercise by the state court of jurisdiction over the same res,” thereby defeating the federal court’s jurisdiction that already had attached. *Diet Drugs*, 282 F.3d at 234 (internal citations omitted).

But it makes equal sense that “in personam actions in federal and state court may proceed concurrently, without interference from either court and,” as the Supreme Court observed, “there is no evidence that the [‘necessary in aid of’] exception to § 2283 was intended to alter this balance.” *Vendo*, 433 U.S. at 642. For “an order directed at a state court proceeding must be *necessary* in aid of jurisdiction – it is not enough that the requested injunction is related to that jurisdiction.” *Diet Drugs*, 282 F.3d at 234 (emphasis in the original) (internal quotation marks omitted).

And such a necessity is and should be highly unusual. “Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately” the Supreme Court. *Atl. Coast Line*, 398 U.S. at 287.

As a result, the “necessary in aid of jurisdiction” exception to the Anti-Injunction Act generally cannot apply to allow the district court’s injunction against the Missouri Plaintiffs’ pending state court action in *Green*. Both the Class Action and *Green* plainly are *in personam* actions, not *in rem*. They are controversies over the question of personal liability, which “is not a thing.” *Kline*, 260 U.S. at 230.

Therefore, *Green* “does not tend to impair or defeat the jurisdiction of the” district court in the Class Action, and each of these two parallel actions *in personam* pending in both state and federal courts is generally “free to proceed in its own way and in its own time, without reference to the proceedings in the other court.” *Id.* The Anti-Injunction Act requires that they “may proceed concurrently, without interference from either court ....” *Vendo*, 433 U.S. at 642. Enjoining *Green* is not “*necessary* in aid of jurisdiction.” *Diet Drugs*, 282 F.3d at 234 (emphasis in the original) (internal quotation marks omitted).

**2. This Court’s limited *Carlough* exception for state court actions that actually threaten a provisional settlement in a complex class action does not apply to *Green*, as *Green* in no way threatens the district court’s provisional settlement, let alone “actually” so.**

Despite the Supreme Court’s admonition that the Anti-Injunction Act’s prohibitions are “not to be whittled away by judicial improvisation,” *Vendo*, 433 U.S. at 631, in *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 194 (3d Cir. 1993), “this Court fashioned a third, and narrow, application of the ‘necessary in aid of its jurisdiction’ exception.” *Gen. Motors*, 134 F.3d at 145.

The *Carlough* exception applies only in the context of a complex class action multi-district litigation case where: (1) a settlement is imminent; (2) the federal court already has expended considerable time and resources; and (3) the pending state action *actually* threatens to derail the provisional settlement. *Gen. Motors*, 134 F.3d at 145. “This is not to say,” however, “that class actions are, by virtue of that categorization alone, exempt from the general rule that in personam cases must be permitted to proceed in parallel.” *Diet Drugs*, 282 F.3d at 236. Rather, to apply, the *Carlough* exception requires an assessment of the character of the state court action sought to be enjoined, as “the level of interference with the federal action actually threatened by the state court proceeding” must be such that an injunction is *necessary* in aid of jurisdiction. 282 F.3d at 237.

For, even in a complex multi-district litigation case, an injunction still “must be supported by [a] direct threat to the federal action.” *Id.* Even under *Carlough*,

the general rule is still that “[w]here a suit is strictly in personam ... there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined[,] ... because [the subsequent action] neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with the law.”

*Sandpiper Vill. Condo. Ass’n. v. La.-Pac. Corp.*, 428 F.3d 831, 844 (9th Cir. 2005) (quoting *Kline*, 260 U.S. at 232).

The *Carlough* exception plainly does not substantiate the district court’s injunction of the Missouri Plaintiffs’ state court action in *Green*.

In *Carlough*, the plaintiffs (referred to as the “*Gore* plaintiffs”) were absent class members in a class action brought under Fed. R. Civ. P. 23(b)(3) in connection with a multi-district litigation for asbestos-related injuries. 10 F.3d at 193. Simultaneously, the *Gore* plaintiffs also were prosecuting a West Virginia state court class action filed *after* the federal class action complaint, with both actions filed against exactly the same defendants. *Id.* at 194-95. The West Virginia class action sought a declaration that the impending *Carlough* settlement was unenforceable as to the *Gore* plaintiffs and that the *Gore* plaintiffs were authorized, on behalf of themselves and the West Virginia class, to “opt out” of the *Carlough* settlement. *Id.* at 195-96.

Understandably, the *Carlough* defendants sought an order from the federal district court enjoining the *Gore* plaintiffs, “their attorneys, agents and employees,

and the class they purport to represent, from taking any steps in the further prosecution of their state claim or from pursuing similar ‘duplicative’ litigation in any other forum.” *Id.* at 196. The district court agreed and found that the *Gore* action, which it described as a “preemptive” attack on the federal class action, posed a serious threat to its jurisdiction. *Id.* It issued a temporary restraining order which it later converted into a preliminary injunction. *Id.*

This Court affirmed. *Id.* at 203-04. As a settlement in the federal class action was imminent, and as the *Gore* plaintiffs’ attempt to effect a mass opt-out posed an actual threat to the federal class action settlement, the traditional bar against injunctions in actions *in personam* had to cede to the goal of preventing actual threats to the finalization of a complex, federal class action settlement. *Id.*

That is, the *Gore* plaintiffs in *Carlough* “were seeking not merely to litigate the same cause of action in state court, but rather to use the state action as a ‘preemptive strike’ against the federal suit, attempting to have the state court declare what the federal court should and should not do with respect to the federal settlement.” *Gen. Motors*, 134 F.3d at 145. As a result, while the Court broke with the traditional rule that *in personam* actions may proceed concurrently without interference, the facts of *Carlough* were such that this limited exception was justified. Under the “narrow circumstances” of *Carlough*, where plaintiffs

attempted “to effectuate a ‘mass opting out’” of an entire state of class members, “an injunction was appropriately within the district court’s discretion.” *Id.*

Circumstances similar to those in *Carlough* also prompted this Court to uphold an injunction against a state court proceeding in *Diet Drugs*, 282 F.3d at 220. There, after the JPML consolidated various class action cases against diet drug manufacturers in the Eastern District of Pennsylvania, the district court issued an order conditionally certifying a class action and approving a settlement agreement that had been reached. *Id.* at 225. At the same time, one of the plaintiffs whose case had been transferred in filed a separate class action in Texas state court and obtained an order opting-out all the Texas members of this new class from the federal multi-district litigation settlement class. *Id.* at 225. In response, the district court issued an order enjoining class-wide opt-outs and declaring the Texas court’s opt-out order null and void. *Id.* at 228.

As in *Carlough*, this Court affirmed, later observing:

[W]e concluded in *In re Diet Drugs* that it may not be sufficient that state actions risk some measure of inconvenience or duplicative litigation. Rather, an injunction under the All Writs Act is appropriate only when “the state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation.” That is, the state action must not simply threaten to reach judgment first, it must interfere with the federal court’s own path to judgment.

*Grider*, 500 F.3d at 329-30 (internal citations and quotation marks omitted).

In upholding the injunction as necessary to prevent a mass opt-out in *Diet Drugs*, the Court not only reiterated that *actual* interference with the district court’s path to judgment is a necessary prerequisite to the grant of an injunction staying an *in personam* state court proceeding, but also set forth relevant factors that must be considered when determining whether the state court proceeding threatens sufficient interference to justify an otherwise prohibited injunction. 282 F.3d at 234.

First, a court contemplating an injunction must “look to the nature of the federal action to determine what kinds of state court interference would sufficiently impair the federal proceeding.” *Id.* Second, it must “assess the state court’s action, in order to determine whether they present a sufficient threat to the federal action.” *Id.* Finally, it must “consider principles of federalism and comity.” *Id.*

In both *Diet Drugs* and *Carlough*, the state court proceeding attempting a mass opt-out of a whole state, a preemptive strike against the class action, plainly presented an actual threat to the impending settlement. *Id.* at 238 (“there is no doubt the motion requesting the Texas court to opt *Gonzalez* class members out ... was a preemptive strike”). That kind of state court interference easily satisfies the first factor.

Moreover, as the injunction in *Diet Drugs* allowed the Texas residents to commence individual, non-class-action lawsuits in the forum of their choice, it

“did not so much interfere with the state court proceeding as prevent state court inference with the federal proceeding.” *Id.* at 239. As well, and just as in *Carlough*, the interest in preserving federalism and comity with the state court was not significantly disturbed by the issuance of the injunction. Thus, in both *Carlough* and *Diet Drugs*, not only was there an impending class action settlement, but the nature of the state inference was acute, substantial, and definite, whereas the threat to federalism and comity was non-existent in light of the narrow scope of the injunctions and the continuing rights to prosecute state claims individually.

The same, of course, cannot be said here. Whereas the district court’s order in *Diet Drugs* enjoined only the pursuit of the attempted mass opt-out, the part of the state case “that unquestionably interfered with the management” of the federal class action, *id.* at 238-39, the district court’s injunction in this case stays *Green* in its entirety. The Missouri Plaintiffs are *not* free to continue prosecuting their individual actions against their former employer while the injunction remains in effect. Therefore, issues of federalism and comity cannot be so easily dismissed.

Moreover, unlike in *Diet Drugs* and *Carlough*, the Missouri Plaintiffs are not attempting to use *Green* as a mass opt-out. *Green* is not even a state court class action. Rather, the Missouri Plaintiffs simply seek to obtain monetary relief for their injuries that the law of Missouri provides them as individuals.

It is impossible that *any* order the Circuit Court of the City of St. Louis may issue in *Green* ever could pose a threat to the Eastern District of Pennsylvania's class action, let alone an actual one that even in a minor way could hamper the federal court's exercise of its jurisdiction. *Cf. Prudential*, 261 F.3d at 365.

Simply put, *Green* satisfies *none* of the factors that this Court requires as prerequisites when determining a pending state court proceeding threatens sufficient interference with ongoing federal litigation to justify an injunction. The district court lacked authority under the Anti-Injunction Act to enjoin *Green*. What is more, its sole rationale given in support of its injunction proves this indelibly.

**3. The district court's injunction against *Green* fails ameliorate the danger of "countless suits" the district court feared and, therefore, is not *necessary* to aid the court's jurisdiction.**

In the memorandum accompanying its order, the only reason the district court gave for enjoining *Green* was this speculation: "Without the requested the stay and injunction, the NFL Parties and other Released Parties remain exposed to 'countless suits in state court despite settlement of the federal claims' that 'would seriously undermine the possibility for settling [this] large, multi-district class action'" (Aplt.Appx. 33) (quoting *Prudential*, 261 F.3d at 367).

At the outset, the district court's speculation fails to satisfy the basic procedural requirement of Fed. R. Civ. P. 52(a)(2) that a district court ruling on a motion for a preliminary injunction must "state the [factual] findings and [legal]

conclusions that support its action.” *Patel v. Meridian Health Sys., Inc.*, 536 Fed.Appx. 197, 199 (3d Cir. 2013) (quoting Rule 52(a)(2)). It is reversible on this ground alone. *See id.* at 199-200 (reversing preliminary injunction for failure to make required specific findings and conclusions); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175, 1178-79 (3d Cir. 1990) (same as to denial of preliminary injunction).

More importantly, though, the district court’s speculation also fails to satisfy this Court’s well-established requirement that a district court ruling on a motion for an All Writs Act injunction must assess “the character of the state court action” and “the level of interference with the federal action actually threatened by the state court proceeding.” *Diet Drugs*, 282 F.3d at 237.

Putting aside the district court’s patently insufficient findings and assuming, *arguendo*, that “countless suits” against the NFL in state courts somehow could pose a serious threat to the class action settlement (which they plainly do not, *supra* at 21-31), the injunction demonstrably fails to alleviate that threat. As a result, even if the district court otherwise had the authority to issue its All Writs Act injunction, its decision to do so here was an abuse of discretion.

As the proposed settlement agreement grants class members the right to opt out (Aplt.Appx. 9-10), any class member exercising this option will retain the right to bring suit against the NFL in either state or federal court. Thus, even with the

injunction firmly in place, the NFL remains exposed to “countless suits.” As the injunction fails to alleviate the district court’s sole expressed concern, then even if the district court somehow had authority to issue it, the injunction cannot possibly be upheld as *necessary* in aid of the district court’s jurisdiction.

Moreover, in addition to the injunction being the wrong antidote, a remedy to the threat of “countless suits” already has been prescribed. Since creating MDL 2323, the JPML has transferred more than 187 actions to the Eastern District of Pennsylvania (Aplt.Appx. 608). The Missouri Plaintiffs are not aware of a *single* case against the NFL involving similar issues that has not been removed to federal court and subsequently transferred to MDL 2323. Presumably, the “countless” number of new suits the district court feared below likewise will be transferred to MDL 2323, where an order staying all action already has been entered (Aplt.Appx. 327).

As a result, even if the district court’s fear of additional suits could satisfy the prerequisite that *Green* first seriously must impair the federal court’s flexibility and authority to decide the case, an All Writs Act injunction is entirely unnecessary to alleviate the court’s concern. The injunction is both needless and ineffective, and therefore demonstrably is not *necessary* in aid of the district court’s jurisdiction. *Diet Drugs*, 282 F.3d at 234. Thus, it must be vacated.

It is worth noting that, in speculating the NFL would remain exposed to “countless suits in state court despite settlement of the federal claims” and this exposure “would seriously undermine the possibility for settling [this] large, multi-district class action,” the district court was quoting *Prudential*, 261 F.3d at 355 (Aplt.Appx. 33). In *Prudential*, this Court relied on the third exception to the Anti-Injunction Act – “the ‘relitigation exception,’ which permits injunctions ‘to protect or effectuate [a federal court’s] judgments’” – in affirming the grant of an injunction that prevented the use of certain evidence in a state action but, notably, did not bar or stay any state court proceeding. 261 F.3d at 367-68 (quoting § 2283 and *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)).

The “relitigation exception” permits an injunction of state proceedings filed after an issue has been decided by a federal court that attempt to relitigate an issue a federal court previously decided. *Id.* at 364. In *Prudential*, this Court held members of a previously settled class action’s attempt to litigate claims based on the allegations underlying the claims in the now-settled class action “would allow an end run around the Class settlement by affording them (and other class members who might later attempt the same strategy) an opportunity for relitigation of the released claims.” *Id.* at 367 (internal quotation marks omitted).

This Court observed that such an attempt “would seriously undermine the possibility for settling any large, multi district class action.” *Id.* This was because

allowing settling class members to relitigate claims in state court would leave defendants “exposed to countless suits in state court despite settlement of the federal claims.” *Id.* It was for *that* reason that the Court upheld the *Prudential* injunction.

As a result, *Prudential* is entirely inapposite to this case. The Missouri Plaintiffs are making no attempt in *Green* to relitigate previously settled claims, rendering *Prudential* inapplicable. It does not support the district court’s reasoning.

In sum, though enjoining *Green* may seem of little importance to the NFL or the district court below, it is, in fact, a substantial transgression of the express and well-established intent of Congress. The Anti-Injunction Act’s explicit prohibition against injunctions of state court proceedings rests “on the fundamental constitutional independence of the States and their courts.” *Atl. Coast Line*, 398 U.S. at 287. The Act expresses on its face “the duty of ‘hands off’ by the federal courts in the use of the injunction to stay litigation in a state court.” *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 132 (1941).

The appellees, of course, will urge that *Diet Drugs* adopted the view that, in complex cases, where a federal court has conditionally approved a settlement, *any* related litigation in other fora presents an *actual* threat to the federal court’s jurisdiction. This is plainly untrue. *Diet Drugs* did not and cannot be held to have

imbedded a doctrine in the law that so obviously would violate the express intent of Congress. *See Toucey*, 314 U.S. at 132.

Whatever justification there might be for enlarging the plain and unmistakable words of Congress by loose statutory construction or judicial improvisation, it cannot be urged here. Congress, this Court, and the Supreme Court have left intact the Anti-Injunction Act's explicit and comprehensive policy.

The Missouri Plaintiffs' state court action in *Green* does not in any way interfere with the district court's path to judgment below. The district court's order enjoining *Green* therefore violates the Anti-Injunction Act. This Court must vacate it.

**Conclusion**

This Court should vacate the district court's order enjoining the Missouri Plaintiffs from proceeding in their Missouri state court action in *Green*.

Respectfully submitted,

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**Certificate of Bar Membership**

I hereby certify that Paul Anderson, Jonathan Sternberg, and I are members of the Bar of this Court.

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**Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, Times New Roman size 14 font, using Microsoft Word 2013.

I further certify that the electronic copies of both this Brief of the Appellant and the Addendum filed via the Court's ECF system are exact, searchable PDF copies thereof, that they were scanned for viruses using Microsoft Security Essentials and, according to that program, that they are free of viruses.

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**Certificate of Service**

I hereby certify that, on October 16, 2014, I electronically filed the foregoing and all volumes of its appendix (volumes 1-5) using the Court's CM/ECF system, which will send notification of such filing to each party or their counsel of record.

I also certify that, on October 16, 2014, I mailed a true and accurate paper copy of the foregoing and all volumes of its appendix (volumes 1-5) to each of the following:

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