



Because Defendants are likely to prevail on the merits of their appeal, and because both the balance of harms and the public interest favor a stay, Defendants' motion should be granted.

**I. Defendants Are Likely To Prevail On The Merits Of Their Appeal.**

The July 12 Order is an injunction appealable under 28 U.S.C. 1292(a). See Avery v. Sec'y of Health and Human Servs., 762 F.2d 158, 160-61 (1st Cir. 1985); see also Great Rivers Coop. v. Farmland Indus., Inc., 59 F.3d 764, 766 (8th Cir. 1995). The Order "compel[s] affirmative agency conduct," imposes a significant "burden on the Secretary," and is "enforceable by contempt sanctions." Avery, 762 F.2d at 160 (citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure: Jurisdiction § 3922 (1977)). On its face, it is "not purely 'a matter of [litigation] procedure'" but reflects a substantive determination and orders substantive relief. Id. at 160-61. Harm resulting from the Order could not be undone on appeal from final judgment. See id. at 161. The July 12 Order is also a final order subject to immediate review under the collateral order doctrine. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-77 (1974) (holding that an order allocating 90% of the costs of a class notice to the defendants was appealable under the collateral order doctrine and proceeding to review the notice requirement on the merits); In re School Asbestos Litig., 842 F.2d 671, 677-79 (3d Cir. 1988) (order requiring an association of asbestos manufacturers to disclose in communications with class members its relationship to the defendants was reviewable under the collateral order doctrine).

Federal Rule of Civil Procedure 23(d) authorizes a district court in class action litigation to require a notice advising the class "of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." Fed. R. Civ. P. 23(d)(2). The notice required by the July 12 Order is not limited to such procedural matters, and therefore is not authorized by Rule 23(d). Communications with class members may be regulated to protect against the types of abuses associated with class actions, such as barratry-like solicitation of nonparty class members, though only in a "carefully drawn

order that limits speech as little as possible” and that is based on a “clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 & n.12, 101, 102 (1981). No precedent exists for an order requiring a defendant to give class members notice of the district court’s preliminary unfavorable assessment of the evidence introduced in the case, with the stated purpose of influencing the decisions of class members.

Moreover, the July 12 Order is linked to the now-reissued structural injunction that is the subject of a pending appeal and has been stayed. Among the issues on appeal are whether Interior’s accounting obligations under the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (“1994 Act”), extend beyond an accounting for the balance of funds in IIM accounts, and whether those obligations extend to former account holders whose accounts were closed before enactment of the 1994 Act. The July 12 Order requires the Court’s notice to be included with all communications, without regard to subject matter, Mem. Op. at 22, to all present and former IIM account holders. In the memorandum opinion accompanying the July 12 Order, the Court determined that all such communications “threaten class members’ right to make fully informed decisions about their trust assets.” Mem. Op. at 21. The Court explained that “[t]he court-ordered accounting is designed to promote class members’ rights to make fully informed choices about their trust assets” and that “[i]f there are no more informed decisions to be made, or if all the trust assets are gone, then the court-ordered accounting will be useless to the Indians.” Mem. Op. at 20. Indeed, the Court described the July 12 Order as the practical alternative to an order “suspend[ing] all trust-related decision-making until this case concludes and Interior actually provides the required accounting,” which the Court stated would be “the only way to fully safeguard” the right to the court-ordered accounting. Id. at 20 n.8; see also id. at 18 (“the trust beneficiaries should retain all or most of their trust assets in as unaltered a state as is practicable, until Interior completes the required accounting”) (quotation marks omitted). Inasmuch as the scope of the court-ordered accounting is currently on appeal,

the July 12 Order should, at a minimum, be stayed until Defendants' appeal from the structural injunction is resolved.

## **II. The Balance Of Harms And The Public Interest Favor Entry Of A Stay Pending Appeal.**

Both the balance of harms and the public interest favor entry of a stay pending appeal. A stay that preserves the status quo will not harm the class. Indeed, Plaintiffs' principal argument in the pending appeal of this Court's structural injunction is that the case should be remanded because the injunction is "impossible" to implement. As Plaintiffs do not suggest that the accounting ordered by the district court will ever be implemented, they could not plausibly contend that the class should be warned to avoid trust-related transactions pending the completion of that accounting.

Nor could Plaintiffs identify any other pressing need for a class-wide notice. Plaintiffs' motion for a class-wide notice was filed in October 2004, eight years into the litigation. Their motion did not cite any specific development in the litigation as its impetus. Nor did this Court identify any specific impetus for the July 12 Order other than Plaintiffs' motion.

Harm to the class is more likely to result from implementation of the July 12 Order than from a stay of the Order. A notice declaring that "any" trust-related information "may be unreliable" is certain to cause confusion, and is not likely to facilitate informed decision-making even if its distribution is narrowly targeted. The July 12 Order is not narrowly targeted; it requires the notice to be included with every written communication to every current and former IIM account holder without regard to subject matter.

The risk of irreparable harm to Defendants absent a stay is great. If Defendants are correct that the notice is improper and confusing, dissemination of the notice to hundreds of thousands of beneficiaries will irreparably damage the relationship between the agency and those it is responsible to serve. That the Order does not limit distribution of the notice to communications related to the IIM trust further exacerbates the potential harm. The Court expressly indicates that the notice is to be attached to communications regarding health care,

education, and other topics unrelated to the subject matter of this case. Mem. Op. at 22-23 & n.10. The harm that dissemination of the notice would cause could not be undone if Defendants prevail in their appeal.

Finally, because implementation of the July 12 Order would directly undermine the relationship between an executive branch agency and the beneficiaries it serves, the public interest favors a stay.

**III. Expedited Consideration Of This Motion Is Needed Because The July 12 Order Requires Compliance By August 2, 2005.**

The July 12 Order requires Interior to “complete all preparations and distribute all instructions necessary to ensure the implementation” of the Order within twenty days, or by August 1, 2005. Beginning twenty-one days from the date of the Order, or August 2, 2005, Interior, its agents, representatives, employees, officials, and counsel are required to include the prescribed notice with all communications to current and former IIM account holders.

Defendants recognize the Court’s demanding schedule during the current proceeding on Plaintiffs’ motion for a preliminary injunction. Nonetheless, Defendants believe a stay of the July 12 Order is warranted for the reasons set forth above and must be obtained no later than August 1, 2005 to provide meaningful relief. Accordingly, Defendants respectfully request expedited consideration of this motion so that Defendants may seek emergency relief from the Court of Appeals in the event this Court does not agree that a stay is warranted.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request that this Court stay its July 12, 2005 Order pending Defendants' appeal to the United States Court of Appeals for the District of Columbia Circuit. Because compliance with the Order is required by August 2, 2005, Defendants respectfully request expedited consideration of this motion.

Date: July 25, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 25, 2005 the foregoing *Defendants' Emergency Motion for Stay of July 12, 2005 Order Pending Appeal and for Expedited Consideration* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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