UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION	:	**MDL NO. 1355**
	:	**SECTION: L**
	:	**JUDGE FALLON**
	:	**MAG. JUDGE AFRICK**
THIS DOCUMENT RELATES TO ALL CASES	:	

MOTION FOR INJUNCTION

NOW INTO COURT, through undersigned counsel, come defendants, Johnson & Johnson and Janssen Pharmaceutica Inc., who, pursuant to the All Writs Act, 28 U.S.C. §1651, and as permitted by the Anti-Injunction Act, 28 U.S.C. §2283, together with the Court's "inherent powers," respectfully move the Court to enter an injunction in the form attached and entitled, "Order Granting Injunctive Relief."

Respectfully submitted:

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MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION

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MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION

MAY IT PLEASE THE COURT:

The following memorandum is submitted on behalf of Janssen Pharmaceutica Inc. and Johnson & Johnson in support of the Motion for Injunction.

> Because both state and federal courts frequently have concurrent jurisdiction in mass tort cases, this area of the law poses a particular problem for our judicial system. We run the risk that lawyers, oriented by tradition to single-minded pursuit of the interests of their clients, will seek to pursue duplicative and exhaustive litigation, and that some courts, operating under a parochial view of the situation, will allow them to do so. The result is expense, delay, resulting crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued. No thoughtful persons can deny the need for coordinating state and federal efforts to adjudicate mass tort claims.

Chief Justice William H. Rehnquist, *Welcoming Remarks, National Mass Tort Conference*, 73 Tex. L. Rev. 1523 (June 1995).

During the seven years that Propulsid® was available by prescription in the United States, several hundred reports of alleged cardiac events were received by Defendant Janssen Pharmaceutica, with the vast majority of the reports noting the concomitant use of contraindicated

medications or underlying medical conditions. Virtually none of these reports resulted in litigation. By contrast, since Janssen announced on March 23, 2000 that the sale of Propulsid® in the United States would be discontinued voluntarily, over 700 lawsuits representing the claims of more than 2700 individual plaintiffs have been filed against Janssen and Johnson & Johnson nationwide, 232 of which are consolidated for pretrial proceedings in this Court pursuant to 28 U.S.C. §1407, and 474 of which are scattered through 37 state courts and Puerto Rico. These lawsuits seek compensation for injuries alleged to have resulted from the use of Propulsid® (ranging from virtually every known cardiac problem to complaints of self mutilation disorder), or for the plaintiffs' alleged fear of developing some unidentified future injury. Over thirty of these lawsuits have been filed as class actions on behalf of variously described classes of former Propulsid® users, their personal representatives and families. A few of these putative class actions seek compensation for personal injuries or death allegedly suffered by the putative class members during their use of Propulsid®; the vast majority, however, seek compensation, generally in the form of "refunds" and/or medical monitoring, for persons who have not been diagnosed with any Propulsid®-related injury.

There is no overall authority providing management or coordination among the 37 states in which these actions are pending. Defendants seek an order compelling coordination of pretrial discovery and class certification proceedings in the state court cases with the proceedings in this Court. The purpose of this Memorandum is twofold: first, to assure the Court that it has the power to issue such an injunction; and second, to persuade the Court that it should exercise its discretion to invoke that power.

I. THIS COURT HAS THE AUTHORITY TO COMPEL COORDINATION OF PRETRIAL PROCEEDINGS IN STATE AND FEDERAL PROPULSID® CASES.

The Court's Power Under the All Writs Act

Congress has granted federal courts broad authority to take such action as they deem necessary for the adjudication of the matters entrusted to them: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (the "All Writs Act"). The All Writs Act authorizes a federal court to "issue such commands ... as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *U.S. v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). "Indeed, '[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.'" *New York Telephone*, 434 U.S. at 172-73 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 273 (1942)).[1]

The scope of appropriate action under the All Writs Act depends upon the "nature of the case and the legitimacy of the ends to be achieved." *ITT Community Development Corp. v. Barton*, 569

[1] An injunction "in aid of jurisdiction" does not require security. *See Magidson v. Duggan*, 180 F.2d 473, 479 (8th Cir. 1950) ("The temporary and permanent injunctions issued by the trial court in the instant case were to aid and preserve the court's jurisdiction over the subject matter involved and as such were not limited by Rule 56(c) [now Rule 65(c)]."); *Doyne v. Saettele*, 112 F2d 155, 162 (8th Cir. 1940) (same); *Powelton Civil Home Owners Assoc. v. Department of Housing and Urban Development*, 284 F. Supp. 809, 839 (E.D. Pa. 1968) ("F.R. Civ. P. 65(c) is not applicable when the preliminary injunction has been issued in order to preserve the court's subject matter jurisdiction."); *Bivens v. Board of Public Education*, 284 F. Supp. 888, 899 (M.D. Ga. 1967) (same). *See also In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litigation)*, 770 F.2d 328, 338 (2d Cir. 1985) ("Injunctions issued under the authority of the All Writs Act stem from very different concerns than those motivating preliminary injunctions governed by Fed. R. Civ. P. 65.")

F.2d 1351, 1358-59 (5th Cir. 1978). The All Writs Act empowers the Court to enjoin any "conduct that, if left unchecked, would have the practical effect of diminishing the court's power to bring the litigation before it to its natural conclusion." *Id.* at 1359. In most cases, the business before the court is simply the management and trial of a single action; in such a case, the proper scope of the court's power under the All Writs Act is those orders that are necessary to bring the matter to final judgment. *Id.* ("The business to be disposed of by the court below was the trial of the main suit and the trial of the ancillary garnishment proceeding.").

The "business to be disposed of" by this Court, however, is not the management of a single action to final judgment, but the pretrial management of hundreds of individual lawsuits and the oversight of dozens of putative class actions:

> [T]he animating purpose of [28 U.S.C. § 1407] is to provide a statutory basis for the coordination of pretrial proceedings of cases which, by their sheer number, would "engulf the courts" and threaten to "disrupt the functions of the Federal courts."... This coordination, *inter alia*, is intended to eliminate the possibility of inconsistent judicial treatment during pre-trial proceedings..... One needs little imagination to envision the enormous costs and lengthy delays that would be inflicted on the parties were they subject to different discovery schedules, motion deadlines and trial dates.

In re Taxable Municipal Bonds Litigation, MDL No. 863, 1993 U.S. Dist. LEXIS 5538, *5-6 (E.D. La. Apr. 16, 1993) (Sear, j.). In ordering consolidation of federal Propulsid® actions, the Judicial Panel on Multidistrict Litigation, referring to the complexity of the factual issues raised by the plaintiffs (and therefore necessarily to be explored in discovery), held that, "Centralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to the question of class certification), and conserve the resources of the parties, their counsel and the judiciary." *In Re Propulsid® Products Liability Litigation,* No. 1355 (JPML Aug. 7, 2000) (Order transferring cases for consolidation). As stated previously by this

Court, the "very basis for the jurisdiction of the Court in this matter" is "to avoid duplicity, avoid harassment [and] provide consistency in rulings." *In Re Propulsid® Product Liability Litigation,* No. 1355, Transcript of Proceedings at 19 (E.D. La. Sept. 28, 2001) (Hon. Eldon E. Fallon).

The "business to be disposed of" by this Court also includes the supervision of putative class actions. As explained by the Supreme Court,

> Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.

Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981);[2] *see also Oppenheimer Fund, Inc. v. Sanders et al.*, 437 U.S. 340 (1978). As noted by the Third Circuit Court of Appeals, the district court's supervisory power "furthers the Federal Rules' dual policy of protecting the interests of absent class members while fostering the fair and efficient resolution of numerous claims involving common issues." *In re School Asbestos Litigation*, 842 F.2d 671, 680 (3d Cir. 1988). The Fifth Circuit has also recognized the "broad discretion" of a district court to issue orders in class actions "to enable efficacious administration of the course of the proceedings before it." *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1096 (5th Cir. 1977). *See also Bing v. Roadway Express, Inc.*, 485 F.2d 441, 448 (5th Cir. 1973) ("In authorizing … notice the trial court was exercising its discretion to fashion equitable relief. . . [T]he power of the district court to fashion an equitable remedy is broad."); *Robinson v. Union Carbide Corp.*, 544 F.2d 1258 (5th Cir. 1977) (Wisdom, J., concurring specially).

[2] *Gulf Oil* concerned the scope of the district court's power under Fed. R. Civ. P. 23(d). While Rule 23(d) is instructive with respect to the scope of this Court's power and responsibility to supervise class actions, Defendants do not contend that Rule 23(d) provides independent authority for the issuance of the injunction they request. *See Baldwin-United Corp.*, 770 F.2d at 335.

A district court's authority and mandate to manage class action litigation exists at all phases of class action litigation, including prior to class certification. *See Simer v. Rios*, 661 F.2d 655, 665 (7th Cir. 1981) (stating that the district court has broad authority and discretion under Rule 23(d) and its general equity power prior to certification to provide notice to putative class members even when there is no prejudice or abuse); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1306 (4th Cir. 1978) (the district court has an "ample arsenal to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result, irrespective of the time when the abuse arises" and is obligated to protect the rights of absent class members even at the pre-certification stage); *Bantolina v. Aloha Motors, Inc.*, 75 F.R.D. 26, 30-31 (D. Haw. 1977) (interpreting Rule 23(d) to give courts broad authority when there is potential prejudice to the putative class). This Court has concurred, holding that a district court may act pursuant to Rule 23(d) at "any step in the action." *Hoston v. U.S. Gypsum Co.*, 67 F.R.D. 650 (E.D. La. 1975). The Court may even impose burdens upon putative class members and their counsel before class certification, particularly to deter them from engaging in abusive conduct. *See, e.g., Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999 (7th Cir. 1971) (affirming order requiring absent class members with notice of the class to answer discovery requests; also affirming dismissal of the claims of class members with notice who did not respond to the discovery requests).

In short, the "business" of this Court extends far beyond the simple resolution of a claim. Indeed, because Multidistrict consolidation is ordered strictly for pretrial purposes, this Court has far more interest in the execution of its responsibilities with respect to the coordination of pretrial discovery and class certification than it does in the final adjudication of the Propulsid® claims before it (apart from those originally and properly filed in this District). The All Writs Act provides this

Court with broad authority to issue such orders as it deems necessary in carrying out its mission.[3] Because the contemplated injunction would affect pending state court cases, however, this Court must also be mindful of the requirements of the Anti-Injunction Act.

The Anti-Injunction Act and its Exceptions

As the Supreme Court has observed, "we have … in this country two essentially separate legal systems. Each system proceeds independently of the other…." *Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). Given the independence and concurrent jurisdiction of the two courts systems, occasional conflicts between the systems are inevitable: "Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of which ever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Id.*

Under the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court's ability to enjoin proceedings in state court is strictly limited. That Act sets forth an "absolute prohibition against

[3]Some courts have considered whether the doctrine of inherent powers provides independent authority for the issuance of injunctions against state court proceedings. The doctrine of inherent powers "provides a federal court with appropriate instruments *required for* the performance of [its] duties and *essential to* the administration of justice. *ITT Community Development,* 569 F.2d at 1360 (citations omitted – emphasis in original). As the italicized terms in the proceeding quote illustrate, however, the Fifth Circuit has held that the inherent powers doctrine provides no broader equitable authority than the All Writs Act; both turn upon the circumstances and needs of the particular situation before the court:

> The limitation that inherent powers be used only *as required* for the performance of duties suggest, however, that the exigencies of the pending litigation dictate the breadth of a court's discretion to invoke these powers just as they operate to bridle a court's discretion under the All Writs Act.

ITT Community Development 569 F.2d at 1360.

enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coastline*, 398 U.S. at 286. The Act provides:

> 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.

28 U.S.C. § 2283. The Act's requirements must be met before a federal court may enjoin any part of a state court "proceeding," *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1201 (7th Cir. 1996), and apply whether the injunction is directed to the state court itself or to the parties proceeding in that court. *Atlantic Coastline*, 398 U.S. at 287. Thus, the Anti-Injunction Act and its exceptions govern this Court's power to order coordination of pretrial discovery and class certification proceedings in all pending Propulsid® cases.

Of the three exceptions contained in the Anti-Injunction Act, only the exception for injunctions that are "necessary in aid of [the court's] jurisdiction" is relevant to the motion now before the Court. Once subject matter jurisdiction is established, a federal court may issue such injunctions as are "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coastline,* 398 U.S. at 294.

There can be no question that this Court has subject matter jurisdiction over the individual and class litigation before it.[4] The individually filed actions seek compensation for serious injuries

[4] As plaintiffs will no doubt point out, in some of the cases that have been removed from state courts and transferred to this one, the plaintiffs contend that the federal courts lack subject matter jurisdiction over their claims and seek remand to state court. The Court need not resolve these jurisdictional issues before acting pursuant to its power under the All Writs Act, for "[w]hen potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." *ITT Community Development*, 569 F.2d at 1359 n.19 (citing *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-05

and death alleged to result from the use of Propulsid®. The Master Class Action Complaint is brought on behalf of all persons in the United States who purchased or used Propulsid® – thus purporting to subsume all possible Propulsid® claimants in the nation. The Master Class Action Complaint , which seeks, *inter alia*, compensation for personal injuries and wrongful death, alleges that each and every plaintiff has a claim in excess of $75,000, as well as an undivided interest in injunctive relief alleged to be worth more than $75,000, thus giving this Court jurisdiction over the claims of all Propulsid® plaintiffs in the country.[5] Master Class Action Complaint at ¶ 2, Ex. J. to Affidavit of Quentin F. Urquhart, Jr. ("Urquhart Aff.").

This Court's authority under the "in aid of jurisdiction" exception of the Anti-Injunction Act mirrors the equitable powers of the federal courts under the All Writs Act. *Winkler v. Eli Lilly & Co.,* 101 F.3d 1196, 1203 (7th Cir. 1996). Furthermore, a federal court's authority under the All Writs Act is not limited to enjoining parties before the federal court, but may, in appropriate circumstances, extend to injunctions against non-parties. *New York Telephone,* 434 U.S. at 174; *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 654 (5th Cir. 1985); *U.S. v. Hall*, 472 F.2d 261, 264-66 (5th Cir.1972). The Anti-Injunction Act does not create any different limitation. *Baldwin-United Corp.*, 770 F.2d at 338.[6]

(1966)).

[5]Under the law of this Circuit, of course, only one plaintiff in a case pleaded as a class action need have a claim for more than the jurisdictional amount: the Court may exercise supplemental jurisdiction over the claims of the other putative class members under 28 U.S.C. § 1367. *Free v. Abbott Laboratories (In re Abbott Lab.)*, 51 F.3d 524, 529 29 (5th Cir. 1995), *aff'd by equally divided Court*, 529 U.S. 333 (2000).

[6]In two recent decisions, *In re General Motors Pick-Up Truck Fuel Tank Prod. Liab. Lit.*, 134 F.3d 133 (3d. Cir. 1998), and *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d. Cir. 1993), the Third Circuit Court of Appeals engaged in a "minimum contacts" analysis to determine

***In Personam* v. *In Rem* Jurisdiction**

In light of the unique circumstances and growing importance and scale of multidistrict litigation, a number of federal Courts of Appeals have held that a district court's supervision over protracted, complex litigation forms a matter that is the equivalent of a *res,* thus establishing *in rem* jurisdiction and triggering the greatest level of protection under the All Writs Act and the Anti-Injunction Act. *See, e.g., Winkler*, 101 F.3d at 1202; *Battle v. Liberty National Life Ins. Co.*, 877 F.2d 877, 881-82 (11th Cir. 1989) ("lengthy, complicated litigation is the 'virtual equivalent of a res'"). The leading treatise on federal civil procedure, in discussing these cases, has suggested that this approach is especially appropriate in the context of federal class action proceedings. 17 Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d,* § 4225 at 531-33 (2d ed. 1996) ("A good argument can be made that on similar grounds it should be permissible for a federal court to enjoin state proceedings that would interfere with an efficient disposition of a federal class action."). Many district courts – including courts within this Circuit – have held that consolidated multidistrict proceedings may be treated as a *res* for the purpose of

whether to enjoin absent class members who have not yet had an opportunity to opt out. No other Court of Appeals has adopted this approach, and there is no Supreme Court authority requiring that type of jurisdictional analysis. Traditional interpretation of the Anti-Injunction Act and All Writs Act has embraced the power of a federal court to enjoin any proceedings that rise to the level of interfering with the court's jurisdiction, even those involving non-parties who have not taken any affirmative action to hinder justice. *See In re Corrugated Container Antitrust Litig.,* 659 F.2d 1332 (5th Cir. 1981) (affirming injunction against absent class members without "minimum contacts" analysis); *see also New York Tel. Co.*, 434 U.S. at 174 (same, as to non-party). In this case, the Master Class Action Complaint seeks, *inter alia*, certification of a mandatory class under Fed. R. Civ. P. 23(b)(2) comprised of all persons who have taken Propulsid®. No opt out is required for the Court to have jurisdiction over the members of such a class. Moreover, the Third Circuit's "minimum contacts" analysis would appear to be unnecessary if complex multidistrict litigation suffices as a *res* for Anti-Injunction Act purposes, as discussed below.

defining the court's equitable powers under the All Writs Act and the Anti-Injunction Act. *See, e.g., In re Taxable Municipal Bonds Litigation*, MDL No. 863, 1992 U.S. Dist. LEXIS 12207, *6-7 (E.D. La. August 12, 1992).

The Fifth Circuit has also recognized the potential validity of this argument in *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1298-99 (5th Cir. 1992) (observing that "our opinion in *Texas v. United States* does not specifically preclude such interpretation [of the 'in aid of jurisdiction' exception to the Anti-Injunction Act]", but declining to find that the litigation in that action was of such length and complexity that it could be considered the "equivalent of a *res*"). Moreover, the Fifth Circuit has long held that the "in aid of jurisdiction" language of the Anti-Injunction Act permits an injunction "where the state proceeding threatens the continuing superintendence by a federal court." *Royal Ins. Co*, 960 F.2d at 1299 (citing *Texas v. United States*, 837 F.2d 184, 186 n.4 (5th Cir. 1988)). In *Royal Ins. Co.*, which involved neither a class action nor multidistrict proceedings, the Fifth Circuit recognized that "[t]he 'in aid of jurisdiction' exception is designed to 'prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case,'" but vacated a portion of the district court's injunction against parallel state court proceedings upon finding that the state court action posed no practical impediment to the management of the federal litigation. *Id.* (quoting *Atlantic Coastline,* 398 U.S. at 295).

The multidistrict proceeding before this Court incorporates hundreds of individual actions and a consolidated class action proceeding that purports to subsume the claims of "all persons in the United States who purchased and/or used Cisapride (Propulsid®)." Master Class Action Complaint at ¶ 41. This Court has invested a significant amount of time and resources to the

management of this action since its inception. Urquhart Aff. at ¶¶ 4-11. If any proceeding can be said to be the equivalent of a *res*, surely this one so qualifies.

Even were this Court to reject the characterization of such a massive and complex litigation as a *res* as to which the Court has the equivalent of *in rem* jurisdiction, it cannot be denied that this litigation has and will invoke the "continuing superintendence" of this Court. That, after all, is the entire purpose of consolidation under 28 U.S.C. § 1407. *Cf. FBT Bancshares, Inc. v. Mutual Fire, Marine and Inland Ins. Co.*, No. 95-1702, 1995 U.S. Dist. LEXIS 11490, *6 (E.D. La. August 10, 1995) (Fallon, J.) (declining to enjoin proceeding by Pennsylvania Commissioner of Insurance because "[t]his Court's jurisdiction is not in rem, nor is there any implication that this case will necessitate superintendence by this Court over the Pennsylvania proceeding").

The breadth of this Court's authority under the All Writs Act and the Anti-Injunction Act – *i.e.*, whether an injunction is necessary "in aid of the court's jurisdiction" – is determined by the "nature of the case before the court and the legitimacy of the ends to be achieved." *ITT Community Development*, 569 F.2d at 1358-59. As discussed below, federal courts have found a number of different types of injunctive relief to be necessary in aid of their jurisdiction. While the circumstances of each case are unique and must be considered as such, there is ample precedent for the order that Defendants seek, compelling coordination of pretrial discovery and class certification proceedings in all Propulsid® actions.

Injunctions in Aid of Discovery

Several courts have issued injunctions limiting or entirely enjoining discovery proceedings in concurrent state court litigation. The leading case is *Winkler v. Eli Lilly Co.*, 101 F.3d 1196 (7th Cir. 1996), in which the Seventh Circuit Court of Appeals approved the use of the district court's

power under the All Writs Act and Anti-Injunction Act "to protect the integrity" of a single discovery order. *Winkler*, 101 F.3d at 1202. In *Winkler*, a lawyer representing plaintiffs suing for injuries allegedly sustained as a result of the use of Prozac made a confidential settlement agreement with the defendants in a state court proceeding and thereafter sought to withdraw from his position as lead counsel for plaintiffs in the Prozac MDL. Other plaintiffs' attorneys sought to compel disclosure of the confidential settlement as a condition of his withdrawal, but the MDL judge denied their requests. The same lawyers then commenced a state court action against the attorney for the purpose of obtaining the information denied to them by the MDL judge. Upon motion, the MDL judge enjoined further prosecution of the state court suit.

On appeal, the Seventh Circuit noted that "[a] court's power to guide discovery is concomitant with its duty to provide effective management of complex litigation," and held that the district court had the authority to enter an injunction against state court discovery proceedings when supported by an adequate record:[7]

> In the case at bar, the district court quite reasonably believed that the plaintiffs were resorting to the state courts for the specific purpose of evading its ruling denying discovery of the Fentress agreement. The principles of federalism and comity which the Anti-Injunction Act is meant to protect include a strong and long established policy against forum-shopping. The districts courts' power to control multidistrict litigation is established by statute, 28 U.S.C. § 1407, and as we have already noted, with that power comes the duty to exercise it as efficiently as possible. An important aspect of that control is to prevent predatory discovery, especially of sensitive documents, ensuring that litigants use discovery properly as an evidence gathering tool, and not as a weapon. Indeed, an express purpose of consolidating multidistrict litigation for discovery is to conserve judicial resources by avoiding duplicative

[7] Although it held that the district court had the authority to enjoin state court proceedings in order to prevent an "end run" around its discovery ruling, the Seventh Circuit nonetheless vacated the injunction because the district court did not conduct a thorough enough investigation of the facts to warrant the issuance of the discovery ruling in the first place. *Winkler*, 101 F.3d at 1204.

> rulings. Where a litigant's success in a parallel state court action would make a nullity of the district court's ruling, and render ineffective its efforts effectively to manage the complex litigation at hand, injunctive relief is proper....
>
> Litigants who engage in forum-shopping, or otherwise take advantage of our dual court system for the specific purpose of evading the authority of a federal court, have the potential "to seriously impair the federal court's flexibility and authority to decide that case." Indeed, although an injunction is extraordinary relief, where such abuses exist, failure to issue an injunction may create the very "needless friction between state and federal courts" which the Anti-Injunction Act was designed to prevent. For these reasons, we hold that the Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of their rulings, including pre-trial rulings like discovery orders, as long as the injunctions are narrowly crafted to prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly.

Winkler, 101 F.3d at 1202-03 (citations omitted).

Not surprisingly, a number of the cases in which district courts have enjoined parallel state court discovery proceedings in aid of jurisdiction have, like *Winkler*, involved multidistrict litigation or other consolidated proceedings. A prime example is *In re Taxable Municipal Bonds*, MDL No. 863, 1992 U.S. Dist. LEXIS 12207 (E.D. La Aug. 12, 1992), in which Judge Sear, after futile attempts to obtain voluntary coordination, issued a broad injunction requiring coordination of discovery in related state court proceedings and staying arbitration of related claims. Judge Sear held that the multidistrict proceeding before him – which at that time consisted of sixteen actions seeking certification of eight classes, plus sixteen tag-along actions involving a variety of claims and parties – was such lengthy, complicated litigation that it was entitled to *in rem* protection under the Anti-Injunction Act. *Id.* at *7. In a later proceeding in the same action, Judge Sear expressed his conviction that the enforced coordination had benefited all litigants. *In re Taxable Municipal Bonds Litigation*, MDL No. 863, 1993 U.S. Dist. LEXIS 5538 (E.D. La. April 16, 1993) (denying motion

to permit arbitration to move forward before completion of core discovery). He noted, as well, that the same results could never have been achieved in a litigation of that magnitude through mere persuasion:

> In a litigation of national scope such as this one, any attempt to informally coordinate pre-trial proceedings among a number of different forums eventually would result in an administrative quagmire, not to mention a waste of judicial resources, wholly separate from the merits of the issues involved.

In re Taxable Municipal Bonds Litigation, 1993 U.S. Dist. LEXIS 5538, at *6.[8]

More recently, Judge Higgins of the Middle District of Tennessee enjoined a state court's consideration of a duplicative discovery motion in a case in which he had previously ordered the creation of a central document repository for all related litigation and directed the parties to use their "best efforts" to coordinate state and federal discovery. *In re Columbia/HCA Healthcare Corp.*, 93 F. Supp. 2d 876 (M.D. Tenn. 2000). Citing the *Winkler* court's concerns about the potential for forum shopping, Judge Higgins held that he had the authority to enjoin state court discovery proceedings under the All Writs Act event though the multidistrict litigation before him was not an *in rem* proceeding in the traditional sense. He rejected the plaintiffs' argument that he could not enjoin parties who were not before him, and noted that several courts had permitted MDL courts particularly wide latitude under the All Writs Act. *Id.* Similarly, Judge Eginton of the District of Connecticut enjoined the threatened filing of a state court action designed to circumvent discovery limitations in the consolidated litigation before him. *Harris v. Wells*, 764 F. Supp. 743, 746 (D.

[8]In a different multidistrict proceeding, Judge Sear denied a request to enjoin parallel state court proceedings because he found, under the circumstances of that case, no potential for interference with his management of the multidistrict litigation. *See In re Ford Motor Co., Bronco II Prod. Liability Litig.*, MDL 991, 1995 U.S. Dist. LEXIS 12394 (E.D La. Aug. 15, 1995).

Conn. 1991) ("This Court has carefully monitored the discovery in this complex litigation. It has issued carefully crafted rulings on countless discovery motions…. This Court is persuaded that a Delaware proceeding could interfere with this Court's prior discovery orders, and could 'frustrate proceedings in a federal action of substantial scope, which has already consumed vast amounts of judicial time'." (citing *Baldwin-United Corp.*)).

Even outside the context of multidistrict and other consolidated proceedings, however, this Court has recognized that an injunction of state court proceedings is justified where needed to safeguard the interests of federal court litigants. In *Cinel v. Connick*, 792 F. Supp. 492 (E.D. La. 1992), Judge Feldman enjoined a state court order requiring the surrender of all copies of documents relevant to the action before him. In holding that the Anti-Injunction Act and All Writs Act authorized the injunction, Judge Feldman noted the importance of the power provided by these statutes:

> Both federal statutes direct similar and parallel grants of authority to federal courts. Without it, our judicial system could deteriorate to a mere pretext about the ability of litigants to get a fair, an unquestionably fair, trial. Justice would be diminished to little more than a confused jumble of pretenders to the court's jurisdictional prerogative, with few courts willing, or able, to ensure the promise of fairness and impartiality.

Cinel, 792 F. Supp. at 496. In addition to enjoining the state court's order compelling surrender of the relevant documents, Judge Feldman also directed all persons with notice of the order to provide him with an inventory of the documents held by them, so as to protect against the potential for destruction of evidence. *Id.* at 498.

The recurring theme in the majority of these cases is the prevention of forum shopping. As is demonstrated below, this case presents a compelling case for the use of injunctive relief to protect

the integrity of this Court's case management decisions and prevent their circumvention through duplicative proceedings in state court.

Injunctions to Protect Federal Supervision Over Class Action Cases

Several federal courts have enjoined state class actions proceedings that threatened the integrity of federal class certification proceedings, most often in the context of actions nearing settlement. The Fifth Circuit affirmed such an injunction in *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. 1981). The Fifth Circuit affirmed the district court's injunction against state court proceedings that threatened to disrupt a pending federal court class action settlement, holding that the federal court's substantial investment of time into the construction of the settlement and the imminence of settlement justified enjoining the efforts of certain dissident plaintiffs' counsel to derail the agreement. *Id.* at 1334-35. Thus, in *Corrugated Container*, the Fifth Circuit recognized an exception to the general rule that *in personam* actions may proceed simultaneously in state and federal court without mutual interference. *Id.* at 1335.

Other Circuits have approved injunctions against state court class proceedings under similar circumstances. *See, e.g. Baldwin-United Corp.*, 770 F.2d at 337-340 (affirming, under All Writs Act, the district court's issuance of a broad injunction against duplicative actions in state or federal courts for the purpose of protecting potential settlement, including actions against defendants who had not yet joined in the settlement). *See also Carlough*, 10 F.3d at 204 (affirming injunction against prosecution of state court action that would threaten tentative federal class action settlement); *Battle*, 877 F.2d at 880-82 (affirming injunction against prosecution of state court class actions challenging settlement of the same claims in federal class action); *cf. Peters v. Brants Grocery*, 990 F. Supp. 1337, 1342 (M.D. Ala. 1997) (in class action procedurally "in its infancy," court found no basis for

enjoining state court actions and compelling centralization of discovery and class certification). The Second and Eleventh Circuits expressly held that the federal court litigation had taken on the status of a *res* for the purposes of the All Writs Act and the Anti-Injunction Act. *Baldwin*, 770 F.2d at 337; *Battle*, 877 F.2d at 881-82.

While most of the cases in which federal courts have enjoined parallel state court class action proceedings concern settlements that are in the process of approval, that is not the only circumstance under which a federal court has enjoined state class action proceedings. In the recent case of *In re BankAmerica Corp. Securities Litig.*, 95 F. Supp. 2d 1044 (E.D. Mo. 2000), the district court enjoined the continued prosecution of a California state court class action on the grounds that it was being used to undermine the federal court's authority over substantially similar claims. *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d at 1050. That court held that its injunction was expressly authorized by the Private Securities Litigation Reform Act ("PSLRA") because the state court action was being used to undermine the substantive and procedural strictures of the PSLRA. *Id.* at 1051.

What these cases do not authorize – and Defendants do not seek – is an injunction against trials or other proceedings on the merits of pending state cases. Neither the All Writs Act nor the Anti-Injunction Act permits a federal court to enjoin a state court for the sole purpose of being the first court to reach final judgment. *Royal Insurance*, 960 F.2d at 1299. It is only where the evidence supports a finding that continued prosecution of the state court litigation is designed to or will have the effect of interfering with the district court's "flexibility and authority" to dispose of the matters assigned to it that an injunction of state court proceedings is appropriate. As the record demonstrates, this is such a circumstance.

II. UNDER THE FACTS AND CIRCUMSTANCES PRESENTED HERE, AN INJUNCTION COMPELLING COORDINATION OF PRETRIAL PROCEEDINGS IN STATE AND FEDERAL PROPULSID® CASES WOULD BE AN APPROPRIATE EXERCISE OF THIS COURT'S DISCRETION AND POWER.

"[F]orum shopping and litigation fragmentation are anathema to sound judicial administration." *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387, 402 (5th Cir. 1969). Pursuant to the All Writs Act and the Anti-Injunction Act, this Court has the authority to issue such orders as are "calculated in its sound judgment to achieve the ends of justice entrusted to it." *New York Tel. Co.*, 434 U.S. at 173. The Court's power extends to enjoining state court proceedings where such action is necessary to halt "conduct that, if left unchecked, would have the *practical* effect of diminishing the court's power to bring the litigation before it to its natural conclusion." *ITT Community Development*, 569 F.2d at 1359 (emphasis supplied). While the scope of the Court's authority is beyond dispute, only the facts and circumstances of each case can dictate whether the Court has sufficient reason to invoke its power under the All Writs Act. *See Winkler*, 101 F.2d at 1204; *Castano v. The American Tobacco Co.*, 879 F. Supp. 594 (E.D. La. 1995) (declining to enjoin deposition in state court proceeding because of lack of particularized allegations and evidence of interference with conduct of action before the federal court).

In this case, the "nature of the case and the legitimacy of the ends to be achieved" provide ample support for the requested injunction, as does the factual record . *See ITT Community Development,* 569 F.2d at 1358-59. There are currently 232 Propulsid® actions involving nearly 1500 named plaintiffs pending before this Court. Urquhart Aff. at ¶ 4. These actions have been sent to this Court in order to "avoid duplicity, avoid harassment [and] provide consistency in rulings." *In Re Propulsid® Product Liability Litigation,* No. 1355, Transcript of Proceedings at 19 (E.D. La.

Sept. 28, 2001) (Hon. Eldon E. Fallon); *see also In Re Propulsid® Products Liability Litigation,* No. 1355 (JPML Aug. 7, 2000) (Transfer Order) (consolidation is needed to "eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to the question of class certification) and conserve the resources of the parties, their counsel and the judiciary").

As of September 29, 2001, there were an additional 474 Propulsid® lawsuits, representing 1195 individual litigants, pending against these Defendants in state courts. Urquhart Aff. at ¶ 2. All of these actions – state and federal – contain substantially similar allegations. *See* Affidavit of Ethan D. Stein. In the absence of compulsory coordination, the sheer breadth of factual discovery in this litigation and the parallel state proceedings will inevitably generate conflicts that will interfere with this Court's supervision and management of pretrial proceedings, as well as multiply unnecessarily the costs and burdens upon the Defendants. The history of Propulsid®'s marketing and development spans over a decade and involves present and former employees of Janssen on two continents, in addition to many independent researchers. Urquhart Aff. at ¶ 12-13. After thirteen months and the investment of millions of dollars and thousands of employee hours, Defendants have completed the domestic paper production, having turned over more than 3.5 million pages of studies, government submissions, internal memoranda and marketing material. Urquhart Aff. at ¶ 11. Defendants are working diligently to complete the production of databases, and the Belgian document production has already commenced. *Id.* Even with the enormous commitment of company time, resources and money given over to the endeavor, Defendants expect that it will be another seven months before the process is complete. *Id.*

And that is just the beginning. There are many present and former Janssen employees in the United States and Belgium who have worked on Propulsid® development, marketing or safety over

the years. Several depositions have taken place to date and – as explained more fully below – every one of those is subject to repetition. Janssen has answered several sets of duplicative written interrogatories, but anticipates far more. Affidavit of Michelle M. Bufano ("Bufano Aff.") at ¶ 41. Several state courts have issued discovery orders that are inconsistent with the schedule in this Court. Urquhart Aff. at ¶ 16.

Because of its sheer magnitude and the number of plaintiffs' counsel involved, this discovery process requires central coordination if it is to move forward with any degree of efficiency. Ad hoc voluntary cooperation among scores of lawyers, all with their own agendas, will not achieve that end. While most plaintiffs have been happy to accept the benefits of coordinating document discovery with the MDL, Janssen has, so far, achieved relatively little success with respect to coordination of depositions despite going to great lengths to achieve that coordination. As detailed in the Affidavit of Michelle Bufano, several Company employees have been deposed – with most depositions being cross-noticed in most other active cases – yet in each instance various plaintiffs' groups have purported to reserve the right to call the witness for subsequent testimony. Bufano Aff. at ¶¶ 2-36. Ironically, the many hours that Defendants have devoted to attempting to coordinate these proceedings has produced less consistency, not more, as each plaintiff's counsel has felt free to participate in some depositions and not others, and many have purported to reserve the right to recall the witness. *Id.* In a number of instances, counsel who had declined to "participate" in the depositions, preferring to wait until document discovery is complete, have nonetheless attended the depositions. Those attorneys have made clear that they expect to be able to recall the witnesses whose depositions they attended for further questioning. *Id.*

Most recently, the New Jersey plaintiffs have demanded the depositions, in a span of sixty days, of thirty-eight present and former Janssen employees on two continents, requesting that all witnesses appear in New Jersey. Bufano Aff. at ¶¶ 37-38. Although the proposed schedule contemplates depositions of various witnesses proceeding on successive days, the lawyers have reserved the right to have each deposition continue from day to day until completed. *Id.* With such a schedule, there is no question that the depositions will overlap. If Defendants attempt to accommodate MDL counsel and all other state court counsel who may wish to participate, there could easily be three depositions proceeding simultaneously. Nevertheless, plaintiffs' counsel have stated, "Plaintiffs have the manpower to complete these depositions as scheduled and with all respect we must insist that defendants do likewise." Bufano Aff. at ¶ 37.

And, of course, while a number of plaintiffs' counsel and state courts have agreed to coordinate some aspects of discovery with the MDL, that could change at any time. Absent an order from this Court, any state court plaintiff that has entered into a coordination agreement could have a change of mind and petition its home court for an accelerated discovery schedule, arguing that the needs of local plaintiffs require a faster or different process. For instance, although counsel for the plaintiffs in *Sprouse v. Johnson & Johnson*, a putative class action pending in the Circuit Court of Marshall County, West Virginia, agreed to adopt the MDL document production schedule, the same lawyers have recently requested briefing and consideration of a motion for class certification before the end of November. Urquhart Aff. at ¶ 11(e). Counsel for the Sprouses also represents parties in the putative class actions before this Court, as well as serving on the State Liaison Committee.

Defendants are not the only ones that will suffer unnecessary expense and disruption in the absence of total coordination of Propulsid® related discovery. There are a number of third parties

who will be subject to the same fate. Plaintiffs in various jurisdictions have served third party discovery requests upon the FDA and outside vendors and consultants used by Janssen. These entities have no protection against being subpoenaed in jurisdiction after jurisdiction, unless they wish to incur the cost of hiring counsel to defend each subpoena.

Given the number of jurisdictions and lawyers involved, it is not realistic to expect that the Defendants could obtain any significant degree of coordination of depositions voluntarily. *See In re Taxable Municipal Bonds*, 1993 U.S. Dist. LEXIS 5538, at *6 ("In a litigation of national scope such as this one, any attempt to informally coordinate pre-trial proceedings among a number of different forums eventually would result in an administrative quagmire, not to mention a waste of judicial resources, wholly separate from the merits of the issues involved."). If depositions are permitted to proceed on multiple and probably overlapping tracks, the Defendants' resources – both internal and legal – will be stretched thin. The cost of permitting unregulated and ad hoc discovery in the state court actions will be to decrease the Defendants' ability to proceed with alacrity in this Court. It is simply not possible for Defendants' employees or their counsel to be in two or more jurisdiction simultaneously.

In addition, a lack of national coordination of discovery will "seriously impair" this Court's flexibility and power to effectively manage discovery in the federal cases. Many of the attorneys who have appeared before this Court also represent one or more state court claimants. Urquhart Aff. at ¶ 3 and Ex. C. With dozens of other jurisdictions to choose from, it is a foregone conclusion that attorneys who are unsatisfied with this Court's discovery rulings will look for a second bite at the apple from state courts. Nor can the Court prevent forum shopping simply by enjoining the lawyers before it from relitigating this Court's decisions elsewhere, for most of these lawyers work with

others who do not appear before this Court, who will certainly seek relitigation of unfavorable rulings, with or without the approval of the lawyers who have appeared here. Those lawyers have nothing to lose by doing so, since their association with the MDL attorneys ensures that they will have access to all discovery produced in the MDL and they owe no allegiance to this Court. Whether this "second bite" discovery litigation is motivated by a belief that the interests of their state court clients require them to seek discovery at home that they cannot obtain in the MDL, or by a perception that there is some leverage to be gained – either with Defendants or within the plaintiffs' coalition – the process will destroy the uniformity, conservation of resources and control that is the goal of multidistrict consolidation.

This Court is about to enter a comprehensive class certification scheduling order, providing for discovery and briefing that will culminate in a hearing on March 22, 2002. The proposed class in this Court subsumes all of the other class actions filed in the country, for the plaintiffs in this court seek to represent all former users of Propulsid®, as well as their personal representatives and spouses. Master Class Action Complaint, Ex. J. to Urquhart Aff. The only other Propulsid® class action even scheduled for briefing is the New Jersey action, which is brought on behalf of a nationwide class of former Propulsid® users who do not claim present physical injury as a result of their use of the medication, but seek refunds and "public health remedies" under theories of consumer fraud and strict products liability.

However, the fact that no other class action is currently even to the briefing stage does not preclude the possibility that one or more of the state court actions could be expedited. If the recent actions of counsel for the West Virginia *Sprouse* plaintiffs were not sufficient evidence of this, the Court could consider the "class certification" proceedings before the Circuit Court of Shelby County,

Tennessee, in the matter of *Jackson v. Johnson & Johnson*, which has since been removed and transferred to this Court. In that action, the plaintiffs filed a motion for class certification, which the Tennessee court scheduled for hearing on two dates: February 9 and March 9, 2001. Affidavit of J. Kimbrough Johnson ("Johnson Aff."). At a hearing held February 5, 2001, the court held that it would not decide class certification at the February 9 hearing, but would give the Defendants the opportunity to conduct discovery before preparing their response. Johnson Aff. The court ordered the plaintiffs to present their proof at the February 9 hearing. *Id.* At the February 9, 2001 hearing, however, the court reversed course and announced that it would "conditionally" certify a class of Tennessee residents, despite the fact that the Defendants, at its direction, had conducted no discovery and filed no opposition papers. Johnson Aff. and Ex. "A" at pp. 14-15, 71, 81, 96-99. The court explained its change of position by reference to a radio advertisement about lawyers from Texas coming to Memphis to sign up Propulsid® plaintiffs, and stated clearly that its purpose in certifying the class was to preclude out of state lawyers from gaining control over Tennessee resident plaintiffs. *Id.*[9] The same sort of whiplash certification activity could happen in other state courts.

Defendants seek an injunction against further state court class action proceedings until after this Court has concluded its consideration of class certification. If this Court certifies the proposed class, that will dispose of the need for piecemeal class certifications. If this Court declines to certify the requested class, the state courts may then consider the certification of the more limited classes

[9]At the same hearing, the court dismissed the claims against the sole remaining non-diverse defendant. Johnson Aff. The following business day, in the morning, Defendants removed the case to federal court. Nevertheless, the Tennessee court, later that afternoon, entered a *nunc pro tunc* order memorializing its oral "conditional" class certification decision. Johnson Aff. At the appropriate time Defendants will move this Court for an order either decertifying or declining to recognize the "conditional" certification of the Tennessee class.

before them. If this Court does not suspend state class certification proceedings, this Court could find its own class certification inquiry has become a moving target. If one state court certifies a limited class, perhaps this Court could "carve out" the claimants and claims pleaded in that action without too much trouble. *See In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, MDL No. 991, 1995 U.S. Dist. LEXIS 12394, at *10 (E.D. La. Aug. 15, 1995). But if a second, or third class is certified, the "carving out" will become increasingly more difficult, both as to claims and as to persons.[10] Indeed, it is uncertain how the Court could "carve out" such a class as that proposed to be considered by the West Virginia court in November, which includes the claims of all West Virginia residents who took Propulsid®, their personal representatives and spouses, *as well as* all residents of other states who purchased, were prescribed, were administered, or were treated for injuries alleged to result from Propulsid® while in the state of West Virginia.

The class proposed in this Court is clearly – if expansively – defined. If state court classes are certified while the issue remains pending here, that will no longer be true. Indeed, the resulting reductions and redefinition of the class before this Court could require supplemental briefing or even discovery by the parties in this litigation. If this Court does not suspend class certification proceedings, it could easily find its class certification inquiry impeded and complicated by state court action.

CONCLUSION

In its consideration of any request for an injunction, the Court must consider the relative equities. The costs imposed upon the Defendants – and the consequences of ad hoc state court action – will deprive this Court of the ability to manage this action efficiently and decisively. Lack of

[10]Currently, there are four state court class actions pending. Of course, more could be filed.

coordination also threatens the Defendants and third parties with unnecessary expense, duplication of effort, inefficiency, and, above all, uncertainty. But what would coordination cost the plaintiffs?

Enforced coordination will cost the state court plaintiffs and the lawyers who represent them the opportunity to serve duplicative, inefficient discovery demands and seek class certification on whatever schedule suits their convenience. It will also cost the plaintiffs the opportunity to pick and choose which proceedings in this Court they will join in and which they will ignore. Currently, the plaintiffs can choose, as to each issue, whether to coordinate with the MDL proceedings and thereby save themselves time and effort, or whether to act independently in the pursuit of some perceived advantage, whether substantive or strategic. What the state court plaintiffs will not lose is the forum of their choice, for this Court will not enjoin trials or proceedings on the merits.

On balance, all parties – and all courts – will benefit from coordination. As observed by Judge Sear:

> [A] particular plaintiff ... may have an interest in evidence not discovered during the "core" discovery taking place. However, I believe the best route is to allow core discovery to be completed first, with supplemental discovery, whether in this forum or otherwise, taking place at a time and in a manner that will not disrupt these proceedings and defeat the purposes of 28 U.S.C. § 1407.
>
> I recognize that coordinated pretrial proceedings can appear unwieldy and inefficient. However, I have no doubt that in a case such as this, the collective benefit to the parties and the judicial system more than outweighs any apparent delay and additional burden. To allow the [previously enjoined] arbitration proceedings to go forward would threaten these gains.

In re Taxable Municipal Bonds, 1993 U.S. Dist. LEXIS 5538, at *9.

For all of the foregoing reasons, Defendants respectfully request that the Court issue an Order in the form proposed, requiring the coordination of pretrial discovery in all Propulsid® litigation and

enjoining state court class action proceedings in Propulsid® cases until the completion of this Court's consideration of the issue.

Respectfully submitted:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION	:	**MDL NO. 1355**
	:	**SECTION: L**
	:	**JUDGE FALLON**
	:	**MAG. JUDGE AFRICK**
THIS DOCUMENT RELATES TO ALL CASES	:	

ORDER GRANTING INJUNCTIVE RELIEF

The Court heard Johnson & Johnson Company and Janssen Pharmaceutica, Inc.'s Motion for Injunction on October 25, 2001. After reviewing the briefs and supporting evidence submitted by the parties and interested persons, and after considering the arguments advanced in the briefs and at the hearing, the Court finds as follows:

There is pending before the Court in this multidistrict litigation ("MDL") some 232 consolidated federal lawsuits involving almost 1,500 plaintiffs. Thirty of the federal lawsuits before this Court are putative class actions. The Plaintiffs' Steering Committee has prepared and filed a Master Complaint on class certification issues on October 5, 2001.

That Master Complaint seeks certification of a nationwide class of all users or purchasers of Propulsid.

At the same time, there are approximately 474 lawsuits pending in state court. Those suits involve almost 1,200 individual plaintiffs. Of the state court suits, four are putative class actions. There are also consolidated mass tort proceedings pending in Philadelphia, Texas and New Jersey.

There has been considerable discovery conducted in this MDL. Defendants have produced, at great cost, millions of pages of documents generated in the United States. They have begun producing documents generated overseas, and they expect to complete that document production by April, 2002. Defendants have also worked with plaintiffs to set up a schedule for the depositions of their past and present employees both in North America and Europe.

Under the All Writs Act, 28 U.S.C. § 1651, this Court has the authority to issue injunctive relief necessary and appropriate to aid its jurisdiction. The Court finds that the pendency of the parallel state proceedings interferes with the jurisdiction of this Court. Specifically, the parallel state court discovery and potential for further conflicts in the state courts interferes with this Court's ability to complete the discovery plan in this matter, which is already well advanced. The Court further finds that the pending state court litigations may interfere with this Court's ability to dispose of the pending class certification issues. Moreover, the Court finds that the provisions making the MDL discovery available the state court litigants adequately advances their interest in pursuing

discovery at this time and that any delay in prosecuting the state court actions does not cause or threaten to cause irreparable harm. The Court also finds that, since the requested injunctive relief is necessary to protect the Court's jurisdiction, no bond is necessary. *Magidson v. Duggan,* 180 F.2d 473, 479 (8th Cir. 1950); *Bivins v. Board of Public Education and Orphanage for Bibb County*, 284 F.Supp. 888, 898-99 (M.D. Ga. 1967).

Thus, to facilitate the completion of discovery in this MDL and the resolution of the pending class certification issues, the Court finds it is necessary and appropriate to issue the following injunctive relief:

1. IT IS ORDERED by the Court that the parties shall present to the Court, before the next monthly Status Conference, the following:

   a) An agreed upon Pre-Trial Order establishing a schedule for the presentation, hearing and determination of a motion for class certification;

   b) A Supplement to Pre-Trial Order No. 2 establishing a schedule for the conclusion of the defendants' document production;

   c) A Supplement to Pre-Trial Order No. 7 establishing a schedule for the taking of the depositions of the defendants' past and present employees. The Supplements to Pre-Trial Nos. 2 and 7 shall apply to all issues, including both class action issues and issues relating to liability, damages and defenses in individual plaintiffs' cases;

2. IT IS FURTHER ORDERED that if the parties have not agreed to a proposed Pre-Trial Order establishing the schedule for the hearing of a motion to determine class

certification, a Supplement to Pre-Trial Order No. 2, and/or a proposed Supplement to Pre-Trial Order No. 7 before the time of the November Monthly Status Conference, then the parties shall separately submit proposed Orders to this Court for its consideration ten days in advance of the November Status Conference so that this Court may resolve the issues;

3. IT IS FURTHER ORDERED that the following persons, and all those acting on their behalf and in concert with them, are subject to the prohibitions set forth in Paragraph 4 below:

a) All attorneys and law firms listed on Exhibit "A;"

b) All attorneys and law firms who hereafter make an appearance in both MDL 1355 and in litigation involving Propulsid other than MDL 1355; and

c) All putative members of the class sought to be certified in MDL 1355, defined in the Master Complaint as "all persons nationwide who purchased and/or used Propulsid."

4. IT IS FURTHER ORDERED that the persons identified in Paragraph 3 are restrained and enjoined from taking any of the following actions in any litigation involving Propulsid other than in cases pending in MDL 1355:

a) Seeking a determination of class certification before the Court has ruled on the class certification issues;

b) Seeking or compelling document production by defendants, other than in accordance with the Supplement to Pre-Trial Order No. 2; and

c) Noticing or conducting a deposition of defendants' past or present employees, other than in accordance with the Supplement to Pre-Trial Order No. 7.

5. IT IS FURTHER ORDERED that the defendants are restrained and enjoined:

a) From taking action to seek a determination of class certification before this Court has ruled on the class certification issues;

b) From producing documents other than as set forth in this Court's Supplement to Pre-Trial Order No. 2; and

c) From presenting their past or present employees for deposition other than as set forth in this Court's Supplement to Pre-Trial Order No. 7.

6. IT IS FURTHER ORDERED that the defendants will continue to produce documents in the MDL, and they will make available to the attorneys for the plaintiffs in any lawsuits involving Propulsid other than MDL 1355 documents which defendants have already produced and which hereafter they will produce pursuant to this Court's Supplement to Pre-Trial Order No. 2 and any amendments thereto;

7. IT IS FURTHER ORDERED that the defendants shall notify the attorneys for the plaintiffs in any litigation involving Propulsid other than MDL 1355 of the pendency of any depositions to be taken of defendants' past or present employees so that the notified attorneys may decide whether to attend to participate in them. In the event those attorneys do not participate in those depositions, defendants shall make

available to the attorneys, at no expense to them, copies of the transcripts of those depositions;

8. IT IS FURTHER ORDERED that if the conduct of the depositions presents problems in the management of the depositions, this Court will appoint a Master pursuant to Federal Rule of Civil Procedure 53 to preside over future depositions, with the expense of the Master to be borne by defendants.

9. IT IS FURTHER ORDERED that since this relief is designed to protect the Court's jurisdiction, the above relief shall issue without the necessity of a bond.

NEW ORLEANS, LOUISIANA, this ____ day of OCTOBER, 2001.

UNITED STATES DISTRICT JUDGE

F \PROPULSID\MDL 1355\Order Granting Injunctive Relief wpd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

	:	**MDL NO. 1355**
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION	:	**SECTION: L**
	:	
	:	**JUDGE FALLON**
	:	**MAG. JUDGE AFRICK**
THIS DOCUMENT RELATES TO ALL CASES	:	
	:	

NOTICE OF HEARING

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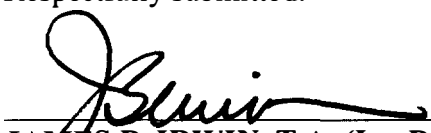
PLAINTIFFS' STEERING COMMITTEE

PLEASE TAKE NOTICE that counsel for defendants Johnson & Johnson and Janssen Pharmaceutica Inc. will bring on for hearing their Motion for Injunction on the 25th day of October, 2001 at 9:00 a.m. before the Honorable Eldon E. Fallon, United States District Judge for the Eastern District of Louisiana.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing **Notice of Hearing** together with the below itemized materials, have been served on Liaison Counsel, Russ M. Herman, by U.S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by uploading the same to Verilaw in accordance with Pre-trial Order No. 4, on this 9th day of October, 2001.

In addition to the foregoing Notice of Hearing, the following materials are included:

1. Motion for Injunction;

2. Order Granting Injunctive Relief;

3. Memorandum in Support of Motion for Injunction;

4. Affidavit of Quentin F. Urquhart, Jr., with exhibits;

5. Affidavit of Michelle M. Bufano, with exhibits;

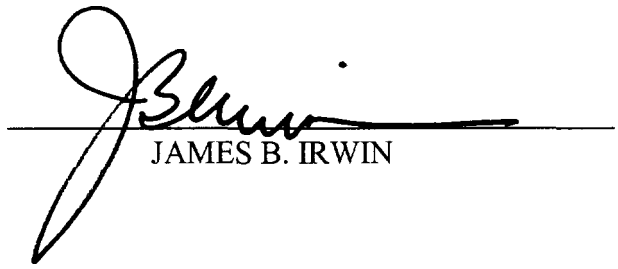
6. Affidavit of Ethan D. Stein, with exhibit;

7. Affidavit of J. Kimbrough Johnson, with exhibit;

8. Motion and Order for Leave to File Memorandum in Excess of Twenty Pages;

9. Service List.

In addition to the Uniform Certificate of Service as set forth above in accordance with Pretrial Order No. 12, undersigned counsel further certifies that a copy of the above and foregoing has been served on all counsel identified on the Service List, Item 9 above, by Federal Express. The exhibits referenced in Items 4 and 5 are contained on CD-Rom.



JAMES B. IRWIN

SEE RECORD FOR EXHIBITS OR ATTACHMENTS NOT SCANNED