**No. 02-4582 (Linda Smart, Appellant);**
**No. 03-2033 (Clara Clark, George M. Fleming, Fleming & Associates, L.L.P., Mike O'Brien and Michael C. Abbott, Appellants)**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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**IN RE DIET DRUGS (Phentermine/Fenfluramine/Dexfenfluramine)**
**PRODUCTS LIABILITY LITIGATION**

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**On Appeal from the United States District Court**
**for the Eastern District of Pennsylvania**
**MDL DOCKET NO. 1203**
***Sheila Brown, et al. v. American Home Products Corporation***
**Civil Action No. 99-20593**
**Hon. Harvey Bartle, III**
**PTOs 2680, 2828**

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# APPELLANTS' CONSOLIDATED BRIEF

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**FLEMING & ASSOCIATES, L.L.P.**
George M. Fleming (TX BN 07123000)
Sylvia Davidow (TX BN 05430551)
Rand P. Nolen (TX BN 00788126)
Scott A. Love (TX BN 24002495)
1330 Post Oak Boulevard, Suite 3030
Houston, Texas 77056
Telephone No. (713) 621-7944
Fax No. (713) 621-9638

**MIKE O'BRIEN, P.C.**
Mike O'Brien (TX BN 15170200)
1330 Post Oak Blvd., Suite 2960
Houston, Texas 77056
Telephone No. (713) 222-0088
Fax No. (713) 222-0888

**HARKINS CUNNINGHAM**
John G. Harkins, Jr. (PA BN 04441)
Steven A. Reed (PA BN 60145)
2800 One Commerce Square
2005 Market Street
Philadelphia, PA 19103-7042
Telephone No. (215) 851-6700
Fax No. (215) 851-6710

**JONATHAN MASSEY, P.C.**
Jonathan Massey (D.C. BN 457593)
3920 Northampton Street, N.W.
Washington, D.C. 20015
Telephone No. (202) 686-0457
Fax No. (202) 686-0497

**ATTORNEYS FOR APPELLANTS**

## CERTIFICATE OF INTERESTED PERSONS

1. No. 02-4582 (Linda Smart, Appellant); No. 03-2033 (Clara Clark, George M. Fleming, Fleming & Associates, L.L.P., Mike O'Brien and Michael C. Abbott, Appellants) (consolidated)

*In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*; MDL Docket No. 1203 and Civil Action No. 99-20593; in the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division.

2. The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants: Linda Smart
Clara Clark
George M. Fleming
Fleming & Associates, L.L.P.
Mike O'Brien
Michael C. Abbott

Counsel for Appellants:

**FLEMING & ASSOCIATES, L.L.P.**
George M. Fleming (TX BN 07123000)
Sylvia Davidow (TX BN 05430551)
Rand P. Nolen (TX BN 00788126)
Scott A. Love (TX BN 24002495)
1330 Post Oak Blvd., Suite 3030
Houston, Texas 77056
Telephone No. (713) 621-7944
Fax No. (713) 621-9638

**HARKINS CUNNINGHAM**
John G. Harkins, Jr. (PA BN 04441)
Steven A. Reed (PA BN 60145)
2800 One Commerce Square
2005 Market Street
Philadelphia, Pennsylvania 19103-7042
Telephone No. (215) 851-6700
Fax No. (215) 851-6710

**MIKE O'BRIEN, P.C.**
Mike O'Brien (TX BN 15170200)
1330 Post Oak Blvd., Suite 2960
Houston, Texas 77056
Telephone No. (713) 222-0088
Fax No. (713) 222-0888

**JONATHAN MASSEY, P.C.**
Jonathan Massey (D.C. BN 457593)
3920 Northampton Street N.W.
Washington, D.C. 20015
Telephone No. (202) 686-0457
Fax No. (202) 686-0497

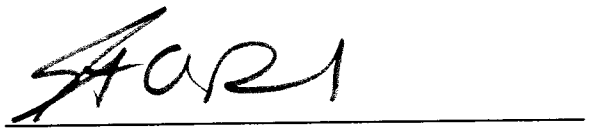
Appellee: Wyeth, f/k/a American Home Products Corporation

Counsel for Wyeth:

**ARNOLD & PORTER**
Robert D. Rosenbaum
Sarah Brackney
Jerome I. Chapman
555 Twelfth Street
Washington, D.C. 20004
Telephone No. (202) 942-5862
Fax No. (202) 942-5999

Peter L. Zimroth
399 Park Avenue
New York, NY 10022

**REED SMITH, LLP**
Michael T. Scott
Paul B. Kerrigan
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103



Steven A. Reed

## STATEMENT OF RELATED CASES

Pursuant to Third Circuit LAR 28.1(a)(ii), Appellants state that appeals arising out of the two orders at issue here (PTOs 2680 and 2828 in MDL 1203) are Nos. 02-4582 and 03-2033, which have been consolidated.[1] Nos. 02-4172 and 03-1339, which had been consolidated with No. 02-4582, have been dismissed.

Additional appeals have been taken from other of the district court's orders in the MDL 1203 diet drug litigation and are pending before this Court. Appellants are aware of the following such appeals:

02-2345
02-3529
02-3941
02-4020, 02-4021 and 02-4074 (consolidated; individual briefing)
02-4022
02-4073
02-4089
02-4173
02-4174
02-4175
02-4176
02-4378
02-4500
02-4501
02-4502, 02-4614, 02-4615, 02-4617 and 03-1007 (consolidated)
02-4581
02-4613, 02-4616 and 03-1006 (consolidated)
03-1008
03-1113

[1] Another appeal from PTO 2828, No. 03-2252, was filed by Susan Snydor on April 30, 2003. Snydor is not a party to either PTO 2680 (No. 02-4582) or PTO 2828 (No. 03-2033). Appellants have been informed that Susan Snydor will file a motion to dismiss Appeal No. 03-2252.

03-1601
03-2025
03-2063
03-2064
03-2065
03-2072
03-2234
03-2251

This Court's previous decisions with respect to MDL 1203 are reported at: 30 Fed. Appx. 27, 2002 WL 272351 (3d Cir. Feb. 26, 2002); 282 F.3d 220 (3d Cir. 2002); 275 F.3d 34 (3d Cir. 2001) (table); and 263 F.3d 157 (3d Cir. 2001) (table).

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## FEDERAL CASES

## STATE CASES



## FEDERAL STATUTES AND RULES

## JURISDICTIONAL STATEMENT

The district court (Bechtle, J.), assigned to preside over the MDL 1203 diet drug litigation, asserted jurisdiction over the underlying litigation under 28 U.S.C. §§ 1332 and 1407, and approved a class action settlement. *In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 1222042, *33 (E.D. Pa. Aug. 28, 2000).

Subsequently, the court (Bartle, J.) issued two identical injunctions concerning state court actions brought by individuals who opted out of the settlement: PTO 2625 on October 16, 2002 (as to Appellant Clara Clark), and PTO 2680 on December 11, 2002 (as to Appellant Linda Smart). On January 30, 2003, the district court issued PTO 2717, further enjoining Appellant Clark and holding her counsel, Appellant George M. Fleming, in civil contempt. On April 8, 2003, the district court issued PTO 2828, which contained a further injunction against Clark and her counsel and which vacated PTOs 2625 and 2717 as superseded. On May 21, 2003, the court issued PTO 2865, amending PTO 2828 to correct several minor inconsistencies.

Appeals from the two superseded orders (Appeal Nos. 02-4172 and 03-1339) have been dismissed. The appeal from PTO 2828 (Appeal No. 03-2033) has been consolidated with the appeal from PTO 2680 (Appeal No. 02-4582).

This Court has jurisdiction over these consolidated appeals under 28 U.S.C. § 1292(a)(1). Each appeal is timely: the notice of appeal from PTO 2680 was

filed on December 20, 2002, and the notice of appeal from PTO 2828 was filed on April 10, 2003.

## STATEMENT OF THE ISSUES

1. Whether the district court erred by construing the fen-phen Settlement Agreement's term prohibiting opt-out plaintiffs from seeking punitive damages as granting it authority to determine what evidence may be presented in state court trials where punitive damages are not sought.

2. Whether, in construing the Settlement Agreement to bar opt-out plaintiffs' use of evidence relevant to their permissible state law claims for compensatory damages, the district court improperly added terms to the Agreement that conflicted with Appellants' express rights under the Agreement.

3. Whether the district court's injunctions restricting the evidence to be offered in state court trials by opt-out plaintiffs are improper under the All Writs Act, the Anti-Injunction Act, the abstention doctrine, and principles of federalism and comity.[2]

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[2] Each of these issues was presented in Appellants' motion to modify or vacate the injunctions. (JA4:1490-1512). The issues also were presented in Appellants' memoranda in opposition to Wyeth's motions (JA1:336 (Docket No. 203234); 340 (Docket No. 203279); 342 (Docket No. 203306); 352 (Docket Nos. 203425, 203433); 362 (Docket No. 203562); 370 (Docket No. 203676)), and in the hearings on Wyeth's motions (JA6:2219-44 (transcript, 10/09/02); JA6:2468-2529 (transcript, 12/05/02); JA7:2621-64 (transcript, 01/28/03); JA7:2665-83 (transcript, 02/27/03); JA7:2684-93 (transcript, 03/19/03)).

## STATEMENT OF THE CASE

This appeal arises from the MDL 1203 diet drug (fen-phen) litigation. It raises fundamental issues about the limits on a federal district court's authority to interfere with pending state court litigation. It also raises important questions about the proper interpretation of a settlement agreement that the district court read to bar evidence relevant to the valid claims of those who exercised their right to opt out of the class settlement.

Specifically, the appeal addresses the propriety of injunctions prohibiting Appellants Clara Clark and Linda Smart — both of whom had opted out of the fen-phen settlement — from introducing evidence in their state court trials related "directly or indirectly" "in any way" to punitive damages. The district court applied those terms to preclude the use at trial of broad categories of evidence.

Wyeth sought the injunctions from the district court as the MDL-transferee court presiding over the nationwide settlement of the fen-phen litigation. The district court justified its intervention in ongoing state court proceedings as necessary to enforce the fen-phen Settlement Agreement provision barring opt-out plaintiffs from seeking punitive damages against Wyeth.

Clark's trial had been scheduled to begin in late October 2002. On October 4, 2002, during the course of *Clark* pretrial proceedings in a Texas state court, Wyeth moved to enjoin Clark and her counsel from introducing evidence of

Wyeth's conduct, alleging that Clark had violated the Settlement Agreement by seeking punitive damages. (JA1:339 (Civil Docket for Case #: 2:12-md-01203-HB; No. 203269)). The district court held an expedited hearing on October 9, 2002 (JA6:2219-44), and on October 16 issued PTO 2625, enjoining Clark and her attorneys from:

> introducing any evidence or making any statement before or argument to the [state] court or jury related directly or indirectly to (a) punitive, exemplary or multiple damages, however described; and (b) malicious, wanton or other similar conduct of Wyeth, however described.

(JA1:67).

Following the injunction, the state court reset the *Clark* trial for February 3, 2003. In mid-January 2003 — again during state pretrial proceedings — Wyeth filed another motion in the district court seeking a further injunction and sanctions. (JA1:361 (Docket No. 203545)). Wyeth claimed that Clark, through counsel, had violated PTO 2625 by intending to introduce evidence of its bad conduct in her case. (*Id.*).

The district court conducted a hearing on January 28, 2003. (JA6:2621-64). One day later the court signed PTO 2717, repeating the broad terms of the first injunction. (JA1:76-85). Additionally, the court held Appellant Fleming in civil contempt for failing to comply with PTO 2625. (*Id.* at 76-77). It also enjoined Clark and her attorneys from commencing the state court trial, scheduled to begin

within days, until counsel met with certain court-ordered conditions. (*Id.*). Those conditions included a requirement that counsel submit Clark's proposed trial exhibits, witness list, and points for charge for the district court's review and approval. (*Id.* at 77).

After an in-chambers conference held March 25, 2003, on April 8 the district court issued PTO 2828, in which it enjoined Clark and her attorneys for a third time. The court also determined, as to each proposed exhibit and deposition designation, the specific evidence Clark would be permitted to offer in her state court trial. (JA1:16-58). Finally, in PTO 2828, the court vacated as superseded the two earlier orders, PTOs 2625 and 2717, that had enjoined Clara Clark and had held Appellant Fleming in contempt. (*Id.* at 58). On May 21, 2003, the district court issued PTO 2865, which corrected several minor inconsistencies in PTO 2828. (JA1:65-66).

Wyeth's pattern of requesting emergency injunctive relief from the district court in *Clark* was mirrored in *Smart*. During the *Smart* pretrial phase in November 2002, Wyeth sought an injunction against Appellant Linda Smart to prevent her from offering evidence of its bad conduct in her state court trial, then set for mid-December 2002. (JA1:351 (Docket No. 203416)). The district court

granted Wyeth's motion on December 11, 2002 in PTO 2680. The *Smart* injunction is identical to that granted against Clark in PTO 2625. (JA1:1-2, 3-9).[3]

The latest *Clark* order, PTO 2828, vacated the two earlier *Clark* injunctions, but not the *Smart* injunction (PTO 2680). Therefore, on April 11, 2003, Appellants moved for dismissal of Appeal Nos. 02-4172 and 03-1339, the appeals arising from the two vacated *Clark* orders. The appeals were dismissed on April 29. After requesting a stay of Appeal No. 02-4582 (*Smart*) pending the docketing of the appeal from PTO 2828 (*Clark* Appeal No. 03-2033), Appellants moved to consolidate the two appeals. The Court ordered consolidation on April 25, 2003.

## STATEMENT OF FACTS

### A. THE DIET DRUG LITIGATION

This Court has previously discussed the general factual background of the fen-phen litigation and settlement. *See In re Diet Drugs (Phentermine/ Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002). Therefore, the facts are addressed only briefly here, to put the present issues in context.

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[3] During state court proceedings in *Smart*, Wyeth added to their trial team the state judge's daughter, a newly elected Texas state legislator. That provided Wyeth the basis to ask the judge to recuse himself, and to obtain from his replacement a "legislative continuance." Trial has not been reset.

### 1. Origin of the Diet Drug Litigation

The fen-phen litigation concerns two related prescription appetite suppressants, fenfluramine and dexfenfluramine (the "fens"), which AHP[4] manufactured and marketed in the U.S. from 1989 through 1997 under the trade names "Pondimin" and "Redux." A third appetite suppressant, phentermine ("phen"), is not at issue in this appeal.

From the early 1990s until the drug was taken off the U.S. market in late 1997, physicians had prescribed Pondimin to be used in combination with phentermine for obesity. Until Redux was also removed from the U.S. market in 1997, it was prescribed either to be taken alone or in combination with phentermine. Approximately six million persons in the U.S. took Pondimin or Redux from 1995 to 1997. (JA2:404-06 (PTO 1415)).

Before the drugs' withdrawal, research data had suggested an association between the use of Pondimin and Redux and valvular heart disease (VHD). Subsequently, three epidemiologic studies confirmed the causal relationship between the drugs and VHD. Epidemiologic studies also confirmed an association

[4] American Home Products Corporation, or AHP, changed its name to Wyeth on March 11, 2002. The two corporate names are used synonymously herein.

between the use of Pondimin or Redux and primary pulmonary hypertension (PPH). (*Id.* at 406-08).[5]

### 2. The Diet Drugs MDL

Following the drugs' withdrawal from the market, some 18,000 individual lawsuits and more than 100 class actions were filed in state and federal courts. (*Id.* at 408-09). Because of the large number of similar cases, on December 10, 1997, the Judicial Panel on Multidistrict Litigation transferred all pending federal actions to the U.S. District Court for the Eastern District of Pennsylvania for coordinated and/or consolidated pretrial proceedings. *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.,* MDL Docket No. 1203, 990 F. Supp. 834 (J.P.M.L. 1998).

Hon. Louis C. Bechtle was the MDL transferee judge until his retirement. Hon. Harvey Bartle, III, took Judge Bechtle's place in July 2001, after the settlement had been approved, and presently presides over MDL 1203.

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[5] VHD is a condition causing valvular regurgitation in which blood leaks backward through diseased heart valves, or "regurgitates." PPH is a progressive and fatal disease affecting pulmonary circulation. The elevation in pulmonary arterial pressure that PPH causes leads inevitably to heart failure and death. At present, there is no known cure for PPH; treatment is palliative only. (*Id.* at 421-40).

### 3. The Settlement Agreement

#### a. History of the Settlement Agreement

In spring 1999, Wyeth and representatives of various plaintiffs began negotiations toward a possible settlement. In mid-October 1999 class counsel filed a lawsuit styled *Brown v. American Home Prods. Corp.*, No. 99-20593, to create a settlement class. (JA2:411-14, 442 (PTO 1415)).

On November 18, 1999, Wyeth and representatives of the class executed a document entitled the "Nationwide Class Action Settlement Agreement with American Home Products Corporation" (Settlement Agreement). (JA2:554-711 (Agreement); JA2:414 (PTO 1415)). Shortly thereafter, Judge Bechtle signed PTO 997 (*id.* at 381-90), granting preliminary approval of the Settlement Agreement and its first three amendments, and conditionally certifying the *Brown* settlement class under Rule 23(b)(3). (*Id.* at 381). The court held a hearing on the fairness, adequacy and reasonableness of the settlement in May 2000, and a second hearing one month later. After a third hearing the court approved a fourth amendment to the Settlement Agreement. (JA2:396 (PTO 1415)). On August 28, 2000, Judge Bechtle approved the Settlement Agreement, as amended, and certified the class in PTO 1415. (*Id.* at 391-553). This Court affirmed in August 2001. 275 F.3d 34 (3d Cir. 2001). Since then, the Agreement has been amended twice. (JA2:554).

### b. Opt-Out Rights and Restrictions in the Settlement Agreement

The settlement class comprises all persons who ingested either Pondimin or Redux, or both. (JA2:442-43 (PTO 1415)). The Settlement Agreement entitles class members to opt out of the settlement at various stages, under various conditions. (*Id.* at 614-23). Those who did not opt out of the class initially, but did so later, are classified as either "intermediate opt-outs" or "back-end opt-outs." All class members who fall within certain ingestion and date-of-diagnosis parameters, and who were diagnosed by January 3, 2003 as having VHD of sufficient severity (*i.e.,* diagnosed as "FDA positive"[6]), have intermediate opt-out rights. (*Id.* at 615-17). Class members who timely and properly exercised those rights may, subject to certain exceptions, pursue all claims against Wyeth and certain other defendants based on their FDA Positive valvular injuries.[7] No legal theory for such claims is foreclosed by the Agreement.

Under the Agreement, intermediate opt-outs are barred from seeking punitive, exemplary or multiple damages:

> A Class Member timely and properly exercising an Intermediate Opt-Out right may not seek punitive,

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[6] "FDA Positive," as defined in the Agreement, means "mild" or greater regurgitation regarding the aortic valve; and "moderate" or greater regurgitation regarding the mitral valve. (JA2:564-65).

[7] Those class members with FDA positive levels who progress to serious VHD levels by December 31, 2015 may exercise back-end opt-out rights. (*Id.* at 617-20).

> exemplary, or any multiple damages against the AHP Released Parties or the Non-AHP Released Parties . . . .

(*Id.* at 616). Wyeth and other Released Parties may not assert any defense based on limitations, "claim-splitting," or any other defense based on the existence of the Agreement. (*Id.*) With one specific exception not applicable here (*i.e.*, the use of prior verdicts, judgments and findings), the Settlement Agreement does not by its express terms impose any limits on the introduction of evidence in actions by opt-outs.

## B. THE *CLARK* AND *SMART* STATE LAWSUITS

### 1. The *Clark* Lawsuit

Appellant Clara Clark used Redux for weight control, as prescribed by her physician, from late 1996 through the spring of 1997. After undergoing a series of echocardiograms from May 2001 through December 2002, she was diagnosed as having moderate to severe mitral valvular regurgitation and pulmonary hypertension. (JA3:743, 767-70 (7th amended petition)). She will eventually require surgery.

After exercising her intermediate opt-out rights, Clark sued Wyeth and her physician in Texas state court in the spring of 2002. (*Id.* at 743). She advanced a number of claims against Wyeth and her doctor, including negligence, products liability, improper warnings and fraud. (*Id.* at 755-71).

Clark filed her eighth amended petition on January 2, 2003. (JA3:969-95). Clark's petition seeks compensatory damages from Wyeth and its co-defendant, her physician, including damages for pain, disfigurement, mental anguish, and medical expenses. (*Id.* at 992-93). The petition does not request punitive damages, nor does Clark's proposed jury charge include a question on punitive damages. (JA1:70 (PTO 2625)).

### 2. The *Smart* Lawsuit

Appellant Linda Smart also exercised her intermediate opt-out rights and is pursuing claims in Texas state court. Like Clark, Smart had been prescribed a Wyeth weight control drug. She took Pondimin for a period of 17 months, as prescribed by her physician. (JA5:1807-09 (6th amended petition)). After undergoing an echocardiogram in late January 2002, Smart was diagnosed as having severe mitral valve regurgitation. (*Id.* at 1808-09).

On April 12, 2002, Smart filed suit against Wyeth and her physician. She brought several claims against them, including claims of negligence, failure to warn, and design defect. (*Id.* at 1809).

Smart's sixth amended petition was filed on October 15, 2002. As in *Clark*, the *Smart* pleading seeks only actual damages from Wyeth and its physician co-defendant, including compensation for pain, disfigurement, mental anguish, and medical expenses. (*Id.* at 1812). The petition neither requests punitive damages

nor does Smart's proposed jury charge include a question on punitive damages. (JA1:5 (PTO 2680)).

## C. THE DISTRICT COURT'S ORDERS AND RELEVANT PROCEEDINGS IN STATE AND FEDERAL COURT

### 1. Two Injunctions in *Clark* and One Injunction in *Smart*

On October 16, 2002, the district court issued PTO 2625. Holding that Clark intended to seek punitive damages in her state court case, in violation of the Settlement Agreement, the court enjoined Clark and her counsel from:

> introducing any evidence or making any statement before or argument to the [state] court or jury related directly or indirectly to (a) punitive, exemplary or multiple damages, however described; and (b) malicious, wanton or other similar conduct of Wyeth, however described.

(JA1:67).

On December 11, 2002, the district court issued an identical injunction against Smart and her counsel. (JA1:1-2 (PTO 2680)). As in *Clark,* the court held that Smart intended to violate the Settlement Agreement's prohibition against seeking punitive damages. (*Id.* at 5).

The *Clark* trial did not take place in October as scheduled, but was continued on Wyeth's motion and reset for February 3, 2003. In the midst of pretrial proceedings in which the state court was considering the parties' proposed evidence and jury charges, Wyeth returned to the federal district court, again seeking an injunction and asking for sanctions. (JA1:361 (Docket No. 203545)).

Wyeth claimed that Clark was violating PTO 2625 by intending to introduce evidence of Wyeth's bad conduct in her case. (*Id.*).

After Wyeth filed its motion in federal court, the *Clark* state court conducted a previously-scheduled pretrial conference on January 23, 2003. (JA7:2530-2620). The trial court explained that it would not permit the jury to hear "inflammatory evidence that's not relevant, or the relevant value is outweighed by the prejudicial effect." (*Id.* at 2590-91). The state court stressed that it was "very interested in a [jury] returning a fair verdict that is an approximation of the damages and not a result of [the jury] being incensed" (*Id.* at 2545). Significantly, the court went on to explain that it would not force Clark to "try the case in a vacuum" by excluding all evidence of Wyeth's bad conduct: "[A]s we . . . all know, just as inflammatory evidence can make a jury wrongfully escalate the numbers, the complete absence of explanation may make them minimize the numbers." (*Id.* at 2590). The *Clark* state court set another pretrial conference for several days later, to further address evidentiary issues and the parties' proposed charges.

Despite these ongoing proceedings in Texas — and before the state court could conduct the pretrial conference it had set — the federal district court held an expedited hearing on January 28 to consider Wyeth's motion. (JA7:2621-64). On January 30, 2003, the court issued PTO 2717, holding that Clark and her counsel had violated PTO 2625. (JA1:76-77). The court reaffirmed its broad limitation on

the evidence Clark is permitted to offer in state court, and enjoined Clark and her attorney from commencing the state trial. (*Id.* at 76-77, 84-85). It barred not only evidence relating to punitive damages but "any evidence, statement, or argument, directly or indirectly, that connotes more than simple negligence or defective design without fault." (*Id.* at 84).

The district court went on in PTO 2717 to hold George Fleming in civil contempt for failing to comply with PTO 2625. (*Id.* at 82-83). It enjoined the commencement of the *Clark* state trial until Wyeth and the court were satisfied with Clark's proposed trial exhibits, deposition excerpts, witness list and points for charge. (*Id.* at 83-85).

On February 27, 2003, the district court held a status conference devoted in part to the question of compliance with the injunction it had granted in late January. (JA7:2665-83). Despite Appellants' good faith efforts to winnow the trial exhibits, Wyeth continued to object to evidence relevant to Clark's permitted state law claims, arguing that the evidence violated PTOs 2625 and 2717. (*Id.* at 2678-79). The district court denied Appellants' request to lift the injunction and permit the *Clark* trial to proceed. The court also required Appellants to further narrow the evidence and seek to reach an agreement with Wyeth before returning to the court. (*Id.* at 2668-74, 2676-77).

### 2. The District Court's Most Recent Injunction and Evidentiary Rulings

On March 14, 2003, Clark moved to modify or vacate PTOs 2625 and 2717, based in part on the state court's demonstrated intention and ability to enforce the punitive damages bar in the Settlement Agreement. Clark also moved, in the alternative, for a finding that her revised evidentiary submissions complied with the injunctions. (JA4:1483-89).

The district court neither ruled on Clark's request nor made a finding regarding the state court's expressed intent to enforce the Agreement. Instead, the court announced at a March 19 status conference that it would conduct an in-chambers conference to rule upon each piece of evidence that Clark intended to introduce at trial. (JA7:2685-93).

As directed by the district court, Clark submitted exhibits and deposition designations to Wyeth and to the court before the conference. (JA1:370 (Docket No. 203668)). During the conference, held on March 25, the court reviewed Clark's trial evidence and Wyeth's objections, and heard argument on every proposed exhibit. (JA1:23 (PTO 2828)).

Following the conference, on April 8, 2003 the court issued PTO 2828, which the court termed "an outgrowth of injunctions entered" in *Clark*. (*Id.* at 19). PTO 2828 continued the injunction against Clark and counsel. The order also

vacated and superseded the earlier injunctions in PTOs 2625 and 2717, and the contempt order in PTO 2717. (JA1:16).

PTO 2828 repeated verbatim the previous injunctions concerning punitive damages. Thus, Clark and her attorneys continue to be prohibited from "introducing any evidence, making any statement before or argument to the court or jury, related directly or indirectly to . . . punitive, exemplary, or multiple damages however described" and "malicious, wanton or other similar conduct of Wyeth, however described." And, as it had done before, the district court limited trial evidence of Clark's medical condition to "left-sided mitral valve regurgitation or pulmonary hypertension secondary to mitral valve regurgitation." (JA1:16-17).

In addition, in PTO 2828, the court reviewed and ruled upon every specific piece of evidence Clark intended to offer at her state court trial. The district court's evidentiary rulings prohibit evidence, statement, or argument related in any way to the following:

> (a) Wyeth's profits, size or financial condition;
>
> (b) the amount or size of Wyeth's sales of diet drugs or other products;
>
> (c) Wyeth's marketing or promotion of diet drugs to the extent that Wyeth placed marketing or promotion ahead of health or safety concerns;
>
> (d) any deception or any destruction, hiding, overwriting, or deliberate miscoding of documents or information by Wyeth;

> (e) any involvement by Wyeth in the ghostwriting of articles about drugs;
>
> (f) primary pulmonary hypertension;
>
> (g) neurotoxicity; and
>
> (h) any other disease, illness or condition or persons suffering from any other disease, illness or condition caused by Redux or Pondimin except for left-sided valvular heart disease or pulmonary hypertension secondary to left-sided valvular heart disease.

(*Id.* at 17-18).

Moreover, in the memorandum portion of PTO 2828, the district court made specific evidentiary rulings as to each proposed exhibit and deposition designation. (*Id.* at 28-57). The court's specific evidentiary rulings as to Wyeth's objections were made "without limitation as to the scope of the injunction" described above. (*Id.* at 17).

### 3. The *Clark* State Court's Intent to Enforce the Settlement Agreement

Well before the district court made its evidentiary rulings in PTO 2828, the state court had issued a lengthy pretrial order. The order, entered on February 5, 2003, establishes the state court's keen awareness of the Settlement Agreement's prohibitions, its sensible approach to conducting the *Clark* trial, and its intent to conform its evidentiary rulings to the Agreement's punitive damages bar. (JA4:1280-1305).

Emphasizing that trial would proceed "within the bounds of Texas law, and under the restrictions of the Settlement Agreement," the state court held that evidence relevant only to punitive damages, or which presents the danger of undue prejudice, would not be permitted:

> Due to the prohibition against seeking punitive or exemplary damages, the Court rules that plaintiff may not plead nor submit punitive or exemplary damages. Furthermore evidence relevant only to punitive or exemplary damages (e.g. net worth of defendant) will not be admissible. Evidence that is relevant to other issues, but for which the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, will not be admitted. Conversely, however, the Court will not require the plaintiff to "try the case in a vacuum of the defendant's design," which could result in the jury improperly speculating about liability issues and evidence (or the lack thereof) and factoring such speculations into causation issues or damage evaluations.

(*Id.* at 1282).

## SUMMARY OF THE ARGUMENT

The plain text of the Settlement Agreement provides no authority for the district court's injunctions. The Agreement bars plaintiffs from seeking punitive damages, but it does not regulate evidentiary matters in state court trials in which punitive damages are not sought. Indeed, the Agreement explicitly protects the right of opt-out plaintiffs to pursue state law causes of action. The Agreement was painstakingly negotiated and reviewed in detail by the federal court before approval. If the parties had wished to adopt evidentiary restrictions, they had ample opportunity to do so. They did not.

Settlement terms that impair fundamental rights to present relevant and otherwise admissible evidence in support of an expressly preserved cause of action, and that authorize a federal court to rule on the admission of evidence in indisputedly proper state court proceedings, should not be implied. It is impermissible for the district court now to add what is a de facto amendment to the Settlement Agreement.

Independently, the district court's injunctions violate fundamental principles of federalism and comity, and both the statutory limitations on federal jurisdiction and the judicial doctrine of abstention that enforces those principles. For a federal court to override the rules of evidence otherwise applicable in Texas state court in *Clark* and *Smart*, or in any other state in which opt-out cases are pending, is an

affront to states and their judiciaries. Even if the Settlement Agreement *did* regulate the admissibility of evidence in state court (which it does not), state courts are obligated and competent to apply any such regulation in the course of their conduct of proceedings before them.

The state courts in *Smart* and *Clark* were engaged in orderly pretrial procedures in which the plaintiffs and the courts were winnowing the plaintiffs' evidence in accordance with applicable legal standards and the Settlement Agreement. By preempting that process, the district court ran roughshod over a central pillar of federalism — the rule that a state court should be trusted and allowed to proceed with the case before it, and to resolve federal issues that may arise, subject if it errs to correction in the ordinary course of the state appellate process.

The district court's orders substituted for that orderly process an unprecedented and utterly unworkable system in which a single federal judge attempts to resolve by remote control evidentiary disputes regarding numerous diet drug lawsuits nationwide. The orders should be vacated.

## ARGUMENT

### A. STANDARD OF REVIEW

This Court's overall review of the lower court's grant of an injunction is for abuse of discretion. *See, e.g., Frank Russell Co. v. Wellington Mgmt. Co.,* 154 F.3d 97, 101 (3d Cir. 1998). Factual determinations are reviewed for clear error, but underlying questions of law must be reviewed de novo. *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 363 (3d Cir. 2001) ("*Prudential I*").

At issue in this appeal are (1) the district court's interpretation of the Settlement Agreement; and (2) the district court's authority to enter the injunctions with respect to Clark's and Smart's state court proceedings. The district court found no ambiguity in the Settlement Agreement, and thus its interpretation of the Agreement is a matter of law subject to de novo review. *See, e.g., W.B. v. Matula,* 67 F.3d 484, 497 (3d Cir. 1995). Similarly, whether the district court had authority to issue the injunctions is a legal question, also subject to de novo review. *Prudential I,* 261 F.3d at 363.

Finally, because the injunctions govern the conduct of state court proceedings they must satisfy a particularly exacting standard. "Any 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 R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970) ("*ACL*").

## B. THE INJUNCTIONS ARE FOUNDED ON THE DISTRICT COURT'S ERRONEOUS READING OF THE SETTLEMENT AGREEMENT

The district court justified its injunctions as necessary to enforce the Settlement Agreement. However, in construing the Agreement to preclude the use of evidence relevant to opt-out plaintiffs' permitted claims, the court impermissibly altered the balance struck in the settlement.

### 1. The District Court Improperly Construed the Settlement Agreement

Settlement agreements are subject to the same rules of construction as other contracts. *See, e.g., Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999) ("[s]ettlement agreements are contracts and must therefore be construed according to general principles of contract law."). Under those rules, a contract must be construed as a whole, with effect given to every portion of the instrument, if possible, so that the intention of the parties may be realized. *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130, 140 (3d Cir. 2001); *see also Garden State Tanning, Inc. v. Mitchell Mfg. Group, Inc.*, 273 F.3d 332, 335 (3d Cir. 2001). "[W]here the terms of a contract are unambiguous . . . their construction is a question of law," *W.B.*, 67 F.3d at 497, and the intent of the

contracting parties must be determined from the four corners of the agreement, *Glenn Distribs. Corp. v. Carlisle Plastics, Inc.*, 297 F.3d 294, 300 (3d Cir. 2002).

Courts are not permitted to rewrite a contract so as to impose terms not included in the agreement. *See, e.g., Imperial Fire Ins. Co. v. Coos Cty.*, 151 U.S. 452, 462 (1894) ("The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made."); *New Orleans v. New Orleans Water Works Co.,* 142 U.S. 79, 91 (1891) ("Courts have no power to make new contracts or to impose new terms upon parties to contracts without their consent. Their powers are exhausted in fixing the rights of parties to contracts already existing.").

This Court has long followed that canon of construction. *See, e.g., Int'l Derrick & Equip. Co. v. Buxbaum,* 240 F.2d 536, 539 (3d Cir. 1957) (not the function of court "to re-write [parties' contract] or to give it a construction in conflict with the accepted and plain meaning of the language used'") (quoting *Topkis v. Rosenzweig*, 5 A.2d 100, 101 (Pa. 1939)); *Boase v. Lee Rubber & Tire Corp.,* 437 F.2d 527, 532 (3d Cir. 1971) ("'court may not, in the guise of construing a contract, in effect rewrite it to supply an omission in its provisions'") (quoting *Conner v. Phoenix Steel Corp.,* 249 A.2d 866, 868 (Del. 1969)); *State Farm Mut. Auto Ins. Co. v. Coviello,* 233 F.2d 710, 717 (3d Cir. 2000) (courts

cannot "construe clear and unambiguous language to mean something other than what it says.") (citation omitted.).[8]

In imposing broad limitations on the evidence that opt-out plaintiffs may present in their state court trials, the district court violated those fundamental principles. The Settlement Agreement is a comprehensive, lengthy and detailed document that was not adopted casually. Section IV.D.3 of the Agreement imposes a host of restrictions on intermediate opt-outs. (JA2:615-17). Notably, however, it imposes no restriction on opt-out plaintiffs' use of evidence (other than an express prohibition against the use of prior adjudications against Wyeth), much less on opt-out plaintiffs' use of evidence that is relevant to their permissible state law claims for compensatory damages. Rather, the Agreement expressly preserves rights that the district court's interpretation would eliminate.

Section IV.D.3 specifically acknowledges that opt-out class members have the right to pursue their claims against Wyeth:

> A Class Member who timely and properly exercises an Intermediate Opt-Out right may pursue all of his or her Settled Claims (except for those claims set forth in subparagraphs (e) and (g) of Section I.53), against the

[8] Although local law (here, Pennsylvania) may be deemed governing in the absence of specification by the parties (*e.g., Pohl v. United Airlines, Inc.*, 213 F.3d 336, 338 (7th Cir. 2000); *Cavallini v. State Farm Mut. Auto. Ins. Co.*, 44 F.3d 256, 266 (5th Cir. 1995)), general contract principles may also be applied if there is no issue about the governing law. *In re Columbia Gas Sys., Inc.*, 50 F.3d 233, 239 (3d Cir. 1995). Here, the governing principles are so basic that there can be no serious dispute about their content.

> AHP Released Parties and/or the Non-AHP Released Parties . . . .

(*Id.* at 615-16).

Significantly, the term "Settled Claims" is defined broadly in Section I.53 of the Agreement to include all claims "regardless of the legal theory" and "all claims for damages or remedies of whatever kind or character." The list of claims opt-out plaintiffs are entitled to pursue (defined in terms of the claims class members settled) is specific:

> "Settled Claims" shall mean any and all claims, including assigned claims, whether known or unknown, asserted or unasserted, **regardless of the legal theory**, existing now or arising in the future by any or all members of the Settlement Class arising out of or relating to the purchase, use, manufacture, sale, dispensing, distribution, promotion, marketing, clinical investigation, administration, regulatory approval, prescription, ingestion and labeling of Pondimin and/or Redux, along or in combination with any other substance, including, without limitation, any other drug, dietary supplement, herb, or botanical. These "Settled Claims" include, without limitation and by way of example, **all claims for damages or remedies of whatever kind or character**, known or unknown, that are now recognized by law or that may be created or recognized in the future by statute, regulation, judicial decision, or any other manner, for:
>
> a. personal injury and/or bodily injury, damage, death, fear of disease or injury, mental or physical pain or suffering, emotional or mental harm, or loss of enjoyment of life;
>
> b. compensatory damages . . .;

> c. loss of wages, income, earnings, and earning capacity, medical expenses, doctor, hospital, nursing, and drug bills;
>
> d. loss of support, services, consortium, companionship, society or affection, or damage to familial relations, by spouses, parents, children, other relatives or "significant others" of Settlement Class Members;
>
> * * *
>
> f. wrongful death and survival actions;
>
> * * *
>
> h. economic or business losses or disgorgement of profits arising out of personal injury; and
>
> i. prejudgment or post-judgment interest. . . .

(*Id.* at 572-73, 615-20) (emphasis added).

Judge Bechtle recognized opt-out plaintiffs' rights to pursue "all claims" in his order approving the settlement:

> A class member who timely and properly exercises an intermediate opt-out right may pursue all claims against AHP based on injury to the valve or valves which were diagnosed as having FDA Positive regurgitation except claims for punitive, multiple or exemplary damages, consumer fraud damages and medical monitoring.

(JA2:457 (PTO 1415)).

Hence, the Settlement Agreement expressly guarantees the right of opt-outs to pursue claims against Wyeth based on negligence, failure to warn, and product defect, as Clark and Smart have done in their individual actions. Yet the district

court's construction — resulting in the court's long list of "off-limits areas of inquiry" in PTO 2828 (JA1:26, 28-57) — prevents the use of evidence necessary to support those claims. *See* Argument Section B.2., *infra.* Similarly, the Agreement's broad guarantee of the right to bring any claim for compensatory damages "regardless of legal theory" also would permit allegations of recklessness and gross negligence. But, as Wyeth has argued (JA4:1539), and the district court appears to have agreed, the injunctions bar any evidence that would "cast Wyeth in a bad light and . . . show that Wyeth's conduct under the circumstances was a gross departure from acceptable standards."

As discussed above, Section IV.D.3 of the Settlement Agreement does bar intermediate opt-outs from seeking punitive damages:

> A Class Member timely and properly exercising an Intermediate Opt-Out Right may not seek punitive, exemplary, or any multiple damages against the AHP Released Parties or the Non-AHP Released Parties . . . .

(JA2:616). But nowhere does that prohibition refer to evidentiary matters or suggest that this damages limitation was intended to eliminate or significantly curtail opt-out plaintiffs' rights to pursue individual claims or to assert legal theories placing Wyeth's conduct at issue. Indeed, evidence of Wyeth's conduct is central to expressly preserved claims "arising out of or relating to" the "purchase, use, manufacture, sale, dispensing, distribution, promotion, marketing, clinical

investigation, administration, regulatory approval, prescription, ingestion and labeling" of the drugs. (*Id.* at 72-73). The district court's conclusion that any argument or proof that "Wyeth put marketing or promotion of those drugs ahead of the consumer's health or safety" is "off-limits" (JA1:26), is plainly inconsistent with those expressly preserved claims.

The Settlement Agreement's omission of an evidentiary restriction tied to the damages limitation is telling because the very same paragraph imposes a specific evidentiary restriction upon intermediate opt-outs: they are barred from introducing into evidence prior verdicts or judgments, and the factual findings necessary to such verdicts or judgments, against Wyeth. (JA2:616-17). Obviously, when the parties wished to impose a limitation on the evidence to be used by intermediate opt-outs they knew how to do so, and did so expressly.

The Settlement Agreement provides that Wyeth may not assert any defense based on the Agreement unless the defense is enumerated in the Agreement itself:

> With respect to each Class Member who timely and properly exercises the Intermediate Opt-Out right and who initiates a lawsuit against any of the Released Parties within one year from the date on which the Intermediate Opt-Out right is exercised, the AHP Released Parties shall not assert any defense . . . based on the existence of the Settlement Agreement, except to the extent provided herein.

(*Id.* at 616). In the end, therefore, the injunctions permit Wyeth to do exactly what the Settlement Agreement specifically forbids, namely, to use the Agreement to

defend against claims for compensatory damages properly brought by intermediate opt-out plaintiffs.

Accordingly, the district court erred in interpreting the Settlement Agreement as authorizing injunctions against the offering or admission of evidence by intermediate opt-out plaintiffs in state court suits.

This does not mean, of course, that intermediate opt-outs are free to introduce whatever evidence they wish; and it has never been Appellants' position that "state evidentiary rules, or procedural or substantive law . . . override the punitive damage exclusion of the Settlement Agreement." (JA1:23 (PTO 2828)). Evidence that relates solely to punitive damages is barred under state law as a matter of simple relevance, given that opt-out plaintiffs are not permitted to recover punitive damages. Also barred is unduly prejudicial evidence under state law rules of evidence applied by the state court, as the trial court in *Clark* recognized. *See* Statement of Facts Section C.3., *supra*. Importantly, the rules of evidence are supplied by state law, not the Settlement Agreement. The Agreement cannot properly be read to bar the use of evidence that is probative of claims the Agreement expressly preserved, or to substitute the federal court's remote judgment for the contextual judgment of the trial judge as to relevance and admissibility.

### 2. The District Court Barred Evidence Relevant to Appellants' Permissible State Law Claims

The district court's broad injunctions bar evidence relevant to Clark's and Smart's permissible state law claims. Clark, for example, asserts claims under Texas law for negligence, improper warnings and design defect. But, as Wyeth argued below, the injunctions prevent Clark from offering evidence that supports those claims:

> The Court's PTO 2717 holds that the plaintiff may not present evidence that "connotes more than" simple negligence or defective design without fault. . . . **even if that evidence might be *relevant* to a simple negligence or design defect claim.**

(JA4:1541) (italics in original, emphasis supplied).

The district court's latest order, PTO 2828, confirms that the injunctions bar broad categories of relevant evidence, including:

- "Wyeth's marketing or promotion of diet drugs to the extent that Wyeth placed marketing or promotion ahead of health or safety concerns" (JA1:24);
- "[A]ny deception or any destruction, hiding, overwriting, or deliberate miscoding of documents or information by Wyeth" (*Id.*);
- "[A]ny involvement by Wyeth in the ghostwriting of articles" (*Id.*);
- Wyeth's knowledge that "**the public [was] increasingly concerned and afraid of**" Redux (*Id.* at 30) (emphasis in original);

- Evidence "suggest[ing] that [Wyeth] withheld or concealed certain information about the dangers of fen-phen." (*Id.* at 39);

- Evidence that "suggests misfeasance on the part of the company that goes beyond mere negligence." (*Id.* at 45);

- Testimony that "connotes more than negligence" (*Id.* at 50); and

- "Wyeth's alleged illegal promotion of Pondimin and Redux" or its violations of governing FDA regulations. (*Id.* at 37, 42).

This evidence is relevant to plaintiff's claims for compensatory damages. For example, under Texas law violations of federal and state regulations can establish negligence per se. *See, e.g., El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987); *see also Murray v. O & A Exp., Inc.*, 639 S.W.2d 633, 636 (Tex. 1982); *Bevers v. Gaylord Broad. Co.*, 2002 WL 1582286, *4-*5 (Tex. App. — Dallas July 18, 2002, pet. denied) (not designated for publication). And, even when regulations do not establish negligence per se, they may nonetheless be relevant evidence. *See Wal-Mart Stores, Inc. v. Seale*, 904 S.W. 2d 718 (Tex. App. — San Antonio 1995, no pet.). Yet the district court has forbidden Clark's use of that evidence to support her negligence claim.

Similarly, evidence in many of the "off-limits" categories above goes directly to Clark's product defect claim. Under Texas law, "a marketing defect

occurs when a defendant *knows* or *should know* of a potential risk of harm presented by a product but markets it without adequately warning of the danger or providing instructions for safe use." *Sims v. Washex Mach. Corp.*, 932 S.W.2d 559, 562 (Tex. App. — Houston [1st Dist.] 1995, no pet.) (emphasis supplied; citation omitted). Thus, again, the court has barred evidence relevant to Appellants' claims.

The district court's approach presents the same problems for opt-out plaintiffs in other states. For example, under Oregon law, as in Texas, compliance with FDA regulations is viewed as a minimum measure of a pharmaceutical company's standard of care, and evidence of FDA violations is clearly relevant to a claim of negligence. *Axen v. Am. Home Prods. Corp.*, 974 P.2d 224, 234-35 (Or. Ct. App. 1998). And, in Washington state courts, where punitive damages are prohibited except where expressly authorized by legislation, *see Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996), evidence of bad conduct — including evidence of intentional departures from the standard of care — is routinely admitted to prove negligence.

Because they face the same problems, over 125 attorneys in thirty states representing intermediate and back-end opt-out plaintiffs filed a memorandum in the district court expressing their opposition to its rulings. They explained that the broad limitations on evidence were not contemplated in the Settlement Agreement,

and urged the district court not to encroach on the role of the state courts presiding over those cases. (JA4:1553-77).

The district court went so far as to bar use of the evidence in question against Dr. Hamid R. Jalali, Ms. Clark's treating physician, who is a co-defendant in *Clark*. (JA1:57-58 (PTO 2828)). The evidence is barred even though the Settlement Agreement does not prohibit plaintiffs from seeking punitive damages against doctors and certain other non-released parties. (JA2:615-17, 561, 569-71). Indeed, the district court had itself indicated in December 2002 that evidence relating to punitive damages would be admissible against treating physicians: "The settlement agreement does not address that issue [claims against physician defendants] and you are free to do with that as you like in the Texas court." (JA6:2515). The district court's change of mind in PTO 2828 leaves Appellants in the untenable position of having an expressly preserved claim for punitive damages against Dr. Jalali, but being prohibited from introducing any evidence to support it.

The point with respect to both Wyeth and Dr. Jalali, of course, is not that state law somehow "overrides" the Settlement Agreement, an argument the district court incorrectly attributed to Appellants (JA1:23), but that the court's exclusion of evidence rests on an improper interpretation of the Settlement Agreement. The Agreement expressly guarantees the rights of opt-out plaintiffs to bring their claims

in state court under state law. That right is incompatible with the district court's broad exclusion of evidence.[9]

Just as troubling as the district court's exclusion of broad categories of relevant evidence is its requirement that Appellants use only weak evidence where strong exists. In barring Clark and Smart from offering any evidence that "suggests misfeasance on the part of the company that goes beyond mere negligence" (JA1:45 (PTO 2828)), or that "connotes more than negligence" (*id.* at 50), the district court has effectively tied Appellants' hands behind their backs. Thus, for example, even though evidence that Wyeth intentionally concealed critical safety information from Clark's doctor, the FDA, and the public would plainly support her claims, the court has ruled that Clark "may not prove or argue that any such failure [to disclose] was deliberate or intentional or an act of deception because such conduct connotes more than negligence and is unnecessary to establish strict liability." (*Id.* at 27).

The district court's injunction is akin to telling a prosecutor that she must prove her case using only circumstantial evidence when she has three eye-witnesses, a videotape of the crime, and DNA evidence establishing the defendant's guilt. One effect of the court's limitation here is to require the jury to

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[9] The district court's evidentiary rulings have not ceased with PTO 2828. On May 22, 2003, the court issued an order prohibiting the introduction of evidence in another state court trial. (JA9:3443-47).

consider the question of Wyeth's failure to warn in a vacuum. Under the injunctions, the jury will not be permitted to hear direct evidence of Wyeth's "deliberate or intentional" withholding of critical safety information, nor will it be told a likely reason for Wyeth's failure to warn — that Wyeth "put marketing or promotion of these drugs ahead of the consumer's health or safety." (*Id.* at 26).

Similarly, the district court ruled that Appellants may introduce evidence that Wyeth funded certain studies relating to diet drug safety, on the ground that such funding "goes directly to the reliability or credibility of the articles." (*Id.* at 31). Yet the court ruled that evidence regarding Wyeth's ghostwriting of those articles is excluded (*id.*) — even though the fact of ghostwriting is arguably an even more powerful way to impeach the credibility and reliability of the articles. Because the court offered no alternative explanation, it must be presumed that the court accepted Wyeth's argument that the ghost-writing evidence would "only serve to inflame the jury." (*Id.* at 30). The guiding principle appears to be that opt-out plaintiffs may present evidence to support their claims so long as it doesn't make Wyeth look too bad.

### 3. The District Court's Long-Arm Evidentiary Rulings in State Court Trials Are Unworkable

The district court's approach of making evidentiary rulings in a vacuum raises institutional concerns of paramount importance. The lengthy and detailed

PTO 2828 exemplifies how the court has impermissibly usurped the role of the state trial judge. The court created a thoroughly impractical system by ruling on the evidence exhibit-by-exhibit and deposition excerpts line-by-line. Although the district court repeatedly paid lip service to the fact that the state "trial judge [is] in a better position to make a ruling on proffered exhibits and testimony" (JA1:26, 29, 35, 41-43, 48-56), its actions establish that it has violated this principle.

The federal court in Philadelphia cannot supervise state court fen-phen trials nationwide. The limitations on the district court's practical power are compounded by the dynamic nature of trials. While many evidentiary matters can be resolved in limine, the need for and relevance of evidence often changes as a trial unfolds. For example, a Wyeth witness may claim at trial that he had no knowledge of the drugs' harmful side effects, when Appellants have direct evidence that he did — evidence they are prohibited from using because the district court excluded it. The district court's approach offers no flexibility in this regard.

Conceivably, Appellants could apply to the district court to modify its injunctions, but that is no solution. Requiring Appellants to halt (potentially numerous times) their state court trials while the parties litigate evidentiary disputes in the federal MDL court would be a cumbersome and disruptive procedure. Indeed, given the number of diet drug plaintiffs across the country, the

district court's orders could well spawn massive evidentiary litigation that would overwhelm the court's ability to adjudicate these disputes in a timely manner.

Perhaps recognizing the impracticality of modifying its orders mid-trial, the district court opted for a broad, prophylactic approach. It reasoned that "once the trial is underway it will be too late for this court to prevent any breach of the Settlement Agreement," so that the injunctions must be drafted "to eliminate as much chance for evasion as possible." (JA1:23 (PTO 2828)).[10] But it is no solution to err on the side of handicapping opt-out plaintiffs with broadly-defined "off-limits areas" (*id.*) and catch-all prohibitions forbidding the use of evidence relating "directly or indirectly" to punitive damages or malicious conduct "however described" (*id.* at 26, 16-17).[11] That approach simply illustrates the

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[10] Below, Wyeth went so far as to argue that relevant evidence of its conduct should be barred out of concern about the "innuendo and body language" Clark's counsel and witnesses might employ when presenting it (JA4:1546), conduct that Wyeth contended "cannot effectively be policed by [the district court] in the midst of trial" (*id.*). This argument underscores the degree to which Wyeth would have the district court usurp the role of the state trial judge, and demonstrates the impracticalities of the court's assertion of jurisdiction to micromanage from afar the evidentiary issues that arise in the course of state court proceedings.

[11] Those broad prohibitions also fail to meet the specificity requirements of FED. R. CIV. P. 65(d). *See, e.g., Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam); *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 83 (3d Cir. 1982). The lack of specificity is not cured by the specific evidentiary rulings in PTO 2828 and its accompanying memorandum since those rulings are made "without limitation as to the scope of the injunction" (JA1:17) — leaving Appellants to guess what other evidence or argument might be covered.

extent to which the district court's injunctions violate the Settlement Agreement and usurp the role of the better-positioned state trial judge.

## C. THE INJUNCTIONS RUN AFOUL OF FUNDAMENTAL PRINCIPLES OF FEDERALISM AND COMITY, ARE NOT AUTHORIZED BY THE ALL WRITS ACT, ARE BARRED BY THE ANTI-INJUNCTION ACT, AND CONFLICT WITH THE ABSTENTION DOCTRINE

As shown above, the district court's injunctions are premised upon an improper interpretation of the Settlement Agreement. It follows logically that they were not necessary to enforce the Agreement. Both for that substantive reason, and because institutionally the state courts are fully competent, and indeed in the best position, to enforce the punitive damages bar in state court trials, the injunctions are improper. They run afoul of fundamental principles of federalism and comity, settled interpretations of the All Writs Act and the Anti-Injunction Act, and the abstention doctrine.

### 1. Principles of Federalism Require that State Courts Be Permitted to Govern the Conduct of Trials Before Them

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint. . . . States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (citations omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). "By

guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty," the Supreme Court "[s]trives to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.'" *Fed. Mar. Comm'n*, 535 U.S. at 769 (quoting *Gregory*, 501 U.S. at 458).

Dual sovereignty extends to the judiciary, making "federal and state courts . . . complementary systems for administering justice in our Nation." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). Because the independence of state courts is essential, "state judicial systems [must be maintained] for the decision of legal controversies." *ACL,* 398 U.S. at 285. Therefore, "[e]ach system proceeds independently of the other with ultimate review in [the U.S. Supreme Court] of the federal questions raised in either system." *Id.* at 286. "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]." *Id.* at 287. To safeguard the system, this principle applies even when a "duty of 'hands off' by the federal courts" seems inefficient. *See Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 132 (1941).

In this case, the federal district court, in the guise of its authority to enforce the punitive damages bar, made evidentiary rulings governing state court actions brought by opt-out plaintiffs seeking compensatory damages. The district court

took this improper preemptive action despite every indication that the state court in *Clark* was properly addressing Wyeth's evidentiary objections and with no basis to conclude that the *Smart* court would have acted differently.

The beginning and end of the federalism analysis should have been the district court's stated conclusion that the state court will enforce the Settlement Agreement: "We are confident that the state trial judge will see to it that the terms of the Nationwide Class Action Settlement Agreement will be upheld . . . ." (JA1:57 (PTO 2828)). But the court did not stop there.

The district court's expressed confidence notwithstanding, the injunctions demonstrate a profound distrust of state courts, antithetical to a federal system. The district court made the impermissible assumption that the state courts cannot be trusted to exclude evidence that relates only to punitive damages or as to which the prejudicial impact outweighs the probative value under applicable state law. The injunctions are also based on the impermissible assumptions that state courts would not properly charge juries with respect to available damages; that juries could not follow such instructions; and that state courts would not modify excessive awards if made.

The Supreme Court has repeatedly made clear that such distrust is an improper starting point for procedural and jurisdictional rulings: "Universal distrust creates universal incompetence. In the courts of the United States the

judge and jury are assumed to be competent to play the parts that always have belonged to them in the country in which the modern jury trial had its birth." *Graham v. United States,* 231 U.S. 474, 480 (1913); *accord Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.,* 342 U.S. 180, 185 (1952). Basic principles of federalism require that the same assumption of competence be accorded to state courts.

Further, the specifics of this case make clear that the district court's distrust of the Texas state court is unfounded. The *Clark* trial court demonstrated that it was prepared to rule on the evidence, and shape the charge, in a manner entirely consistent with the prohibition against punitive damages in the Settlement Agreement. Indeed, the state court's pretrial order (discussed at pp. 19-20, *supra.*) outlines a far more sensible approach to the evidence than that imposed by the district court. Likewise, there is no basis to conclude that the *Smart* trial court would have failed to recognize and enforce the punitive damages bar.

Moreover, it is well settled that "[j]uries are presumed to follow the instructions of the court." *Russell v. Plano Bank & Trust,* 130 F.3d 715, 721 (5th Cir. 1998); *see also Kelly v. Crown Equip. Co.,* 970 F.2d 1273, 1279 (3d Cir. 1992). And, the fact that evidence is not allowed for one purpose does not prohibit the evidence from going to a jury for another purpose with the proper instruction. *See Parsons v. E.I. du Pont de Nemours & Co.*, 91 F.3d 139 (5th Cir. 1996)

(unpublished opinion) (court instructed jury to "not let any finding on 'gross' negligence affect [its] damages answer"); *see also Hollis v. Provident Life & Accident Ins. Co.*, 259 F.3d 410, 417 (5th Cir. 2001) (court instructed jury to ignore evidence of bad faith in application process). Although Wyeth acknowledged below that evidence can be offered for multiple purposes (JA4:1541), it then argued from that proposition that if one possible use of the evidence is to support a claim for punitive damages the evidence may not be used at all.

Finally, Texas state court judges, like judges in other jurisdictions, have the power to set aside or reduce excessive verdicts and judgments. *See, e.g., Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

The district court did not permit the state courts (and juries) to do what they do every day, and are in the best position to do. Rather, the court entered exceedingly broad injunctions and then proceeded, in *Clark*, to make evidentiary rulings as to each of Appellants' proposed exhibits and deposition designations.

### 2. The Injunctions Are Not Permitted Under the All Writs Act

It is to guard against just this type of federal encroachment on state sovereignty that Congress placed strict limits on the power of federal courts to enter orders affecting state court proceedings. Thus, the All Writs Act, the only possible source of positive authority for the district court's injunctions (which it

neither cited nor discussed), provides that the court's writs must be (1) "necessary or appropriate in aid of their respective jurisdiction" and (2) "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

As is readily apparent from its terms, the Act does not provide district courts with unfettered authority. *See ITT Cmty. Dev. Corp. v. Barton,* 569 F.2d 1351, 1358-59 (5th Cir. 1978); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1203 (7th Cir. 1996) (vacating an injunction because "[t]he mere fact that [the district court] had the authority to take action . . . does not end our inquiry, since power alone is insufficient to sustain the entry of an injunction").

The Supreme Court has held that injunctions under the Act are "extraordinary writs" that may be issued only "in aid of" a court's "existing statutory jurisdiction," *Clinton v. Goldsmith,* 526 U.S. 529, 534-35 (1999), and that "injunctive relief under the All Writs Act is to be used sparingly and only in the most critical and exigent legal circumstances," *Brown v. Gilmore,* 533 U.S. 1301, 1303 (2001) (internal quotations and citation omitted). Further, such injunctions should function only to "fill[] the interstices of federal judicial power" in circumstances where no "statute specifically addresses the particular issue at hand," *Syngenta Crop Protection, Inc. v. Henson,* 123 S. Ct. 366, 369 (2002) (internal quotations omitted), and are "appropriate only if the legal rights at issue are indisputably clear," *Brown,* 533 U.S. at 1303 (internal quotations and citation

omitted), and there exists no alternative remedy. *See, e.g., In re Montes,* 677 F.2d 415, 415 (5th Cir. 1982); *accord In re School Asbestos Litig.,* 921 F.2d 1310, 1314 (3d Cir. 1990).

The district court's injunctions do not meet these stringent requirements. The basis for the evidentiary limitations they impose is not "indisputably clear"; and there is a viable alternative far more desirable under principles of federalism: permitting the state courts to make the evidentiary rulings themselves, "with relief from error, if any, through the state appellate courts and ultimately [the U.S. Supreme] Court." *ACL,* 398 U.S. at 287. Accordingly, the injunctions are not authorized by the All Writs Act.

### 3. The Anti-Injunction Act Bars the Injunctions

District courts' authority under the All Writs Act is further limited by the Anti-Injunction Act. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 314 F.3d 99, 103 (3d Cir. 2002) ("*Prudential II*"). Under the Anti-Injunction Act, federal court injunctive interference with state court proceedings is permitted in only three exceptional circumstances:

> A court of the United States may not grant an injunction to stay proceedings in a State court except [1] as expressly authorized by Act of Congress, or [2] where necessary in aid of its jurisdiction, or [3] to protect or effectuate its judgments.

28 U.S.C. § 2283. The Anti-Injunction Act "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of [its] recognized exceptions." *Mitchum v. Foster*, 407 U.S. 225, 228-29 (1972); *see also Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515-16 (1955) ("This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion); *ACL*, 398 U.S. at 286. The Act's prohibition applies even where, as here, the injunction is entered against a party, rather than the state court directly. *ACL*, 398 U.S. at 287 ("It is settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding").[12]

[12] *Accord Bennett v. Medtronic, Inc.*, 285 F.3d 801, 805 (9th Cir. 2002); *Int'l Ass'n of Machinists v. Nix*, 512 F.2d 125, 129 (5th Cir. 1975). The Act also is not limited to injunctions staying the entire proceeding (as PTO 2717 did) but applies to interference with state court discovery matters as well. *See Winkler*, 101 F.3d at 1201; *see also In re Gen'l Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 137-38 (3d Cir. 1998) ("*GM Trucks*") (Act prohibited an injunction directed solely at state court settlement); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir. 1982) (same).

### a. The exceptions to the Act are to be read narrowly

The Anti-Injunction Act's three exceptions — express statutory authorization, in aid of a court's jurisdiction, or protection of a court's judgments (commonly known as the "relitigation" exception) — must be strictly and narrowly construed. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146, 149 (1988); *In re Diet Drugs*, 282 F.3d at 233. Because the statutory prohibition against enjoining state proceedings is based "in part . . . on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." *ACL*, 398 U.S. at 287 (reversing federal injunction that countermanded state injunction); *Prudential I*, 261 F.3d at 364; *GM Trucks,* 134 F.3d at 144. Thus, the Supreme Court has cautioned:

> Any 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. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

*ACL,* 398 U.S. at 297; *accord Prudential I*, 261 F.3d at 364-65. If these standards were to be relaxed, the result would be the "whittl[ing] away by judicial improvisation" of the prohibitions against federal intervention in state court proceedings. *See Vendo*, 433 U.S. at 631 (plurality opinion) (citation omitted).

In its first three injunction opinions, the district court appeared to rely on the relitigation exception; in its latest order, the court invoked the "in aid of jurisdiction" exception. None of the exceptions applies here.

### b. The relitigation exception, upon which the district court relied in its first three opinions, does not apply here

Although the district court did not address the Anti-Injunction Act directly in any of its first three opinions, it invoked the language of the relitigation exception. The court concluded in its third opinion (PTO 2717, now vacated) that it had the power "to issue orders to protect or effectuate our judgments in overseeing this Nationwide Class Action Settlement." (JA1:82). The lone authority cited by the court in each of its first three opinions was *Prudential I*, in which this Court upheld an injunction under the relitigation exception. The district court's reliance on *Prudential I* was misplaced. This case and *Prudential I* differ in key respects, and the relitigation exception does not apply here.

The existence of a prior "preclusive judgment" by the federal court is an indispensable predicate for application of the relitigation exception. *In re Diet Drugs*, 282 F.3d at 233 n.11. "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to, and decided by, the federal court." *Prudential I*, 261 F.3d at 364 (quoting *Chick Kam Choo*, 486 U.S. at 147). As the Court observed in *Prudential I*:

> The exception "is founded in the well-recognized concepts of res judicata and collateral estoppel. . . . [A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in the state proceedings [must] actually have been decided by the federal court."

*Id.* (quoting *Chick Kam Choo*, 486 U.S. at 147-48 (alterations in original)).

Thus, in *Prudential I*, the Court found that the appellants were barred from relitigating claims in state court that they had clearly released in a federal court settlement. Specifically, *Prudential I* involved plaintiffs (the Lowes) who accepted the benefits of a class action settlement. They thereby granted Prudential a broad release of any claims they had against it concerning allegations that Prudential had engaged in deceptive and fraudulent practices in connection with their purchases of insurance policies. The Lowes excluded from the settlement two of the four policies they purchased during the class period. They then filed suit in a Florida state court seeking to litigate as to their excluded policies the same claims, based upon the same facts and theories advanced in the settled class action. They did so despite the fact that those claims were covered by the release and the injunction in the district court's certification order enjoining class members, including the Lowes, from bringing any suit in any jurisdiction "based on or related to the facts and circumstances underlying the claims and causes of action in this lawsuit . . ." *Prudential I*, 261 F.3d at 361. On that basis, the district court held that permitting

the Lowes to prosecute their claims through the use of evidence of the sales practices and patterns that were the subject of the class settlement release would impair the settlement and would permit relitigation of released claims. *Id.* at 363.

This Court affirmed, citing the policy interest in preventing relitigation of "settled questions at the core of a class action." *Id.* at 366 (quoting *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)). The Court held that the Lowes had released Prudential from any claims "based on," "connected with," "arising out of," or "related to, in whole or part" their two class policies. *Id.* at 367. Hence, as class members, they were "precluded from using the sales practices and factual predicates pertaining to their Class Policies in their state court action on the Excluded Policies." *Id.* In reviewing the Release and the Class Notice, the Court concluded that the Lowes "surely must have realized that, even though they could exclude certain policies from the settlement while including others, doing so would jeopardize their ability to prove claims relating to the Excluded Policies. The district court was not willing to release them from their bargain; neither are we." *Id.* at 369.

Here, Appellants, unlike the Lowes, have not received any award with respect to any claim in the settlement. And, there is no release encompassing any of Appellants' non-punitive claims in state court. Indeed, Wyeth has not argued that the Settlement Agreement bars Appellants' compensatory claims of

negligence, product defect, and failure to warn, nor did the district court so hold. Nor, for the reasons discussed above, can it be argued that the district court's evidentiary limitations were previously "presented to, and decided by" the court as part of the settlement. Similarly, it cannot be said that an implied term restricting opt-out plaintiffs' use of relevant evidence to pursue claims expressly permitted by the Settlement Agreement is a "settled question at the core" of the settlement.

Moreover, in *Prudential I*, there was no way that the state court could permit the plaintiffs to proceed with their action based upon the facts underlying the settled claims consistent with the clear terms of the release. Thus, a federal injunction was necessary "to protect or effectuate" the release, with little or no legitimate countervailing concerns about federal encroachment on state proceedings:

> As part of the settlement agreement class members such as the Lowes agreed to release certain claims against Prudential. The agreement could not have been enforced without the injunction that the Lowes now challenge. The district court's order did nothing more than enforce that agreement.

*Prudential I*, 261 F.3d at 370. Here, by contrast, it is undisputed that Appellants' state law claims are preserved under the Settlement Agreement; the litigation is properly and necessarily before the state court; and there is no basis to conclude that the state court is unable or unwilling to conduct the trial consistent with the terms of the Agreement.

In short, this is not a case where Appellants seek to undo in state court what has already been done by a federal court, or to obtain a second recovery on the same claim. Appellants simply seek to have the state courts, whose jurisdiction to adjudicate their claims was expressly preserved in the settlement, apply their otherwise applicable evidentiary and procedural rules to adjudicate cases in a way that surely was foreseeable to the parties at the time they drafted the Settlement Agreement and was not precluded by it. Thus, the relitigation exception on which the district court relied does not apply.

### c. The "in aid of jurisdiction" exception, upon which the district court relied in its fourth opinion, also does not apply here

In its fourth opinion, the district court cited the "in aid of jurisdiction" exception as the basis for its injunction. (JA1:21). Quoting this Court's decision in *Prudential II*, the district court explained that "'permitting this kind of action would open up the possibility of a large, or even an overwhelming, number of collateral attacks on the settlement itself . . . .'" (*Id.* at 22) (quoting 314 F.3d at 104).

The district court was mistaken. This case does not resemble *Prudential II* for the simple reason that it is not in any way a "collateral attack" on the settlement. *Prudential II* involved class members' state-court challenge to the allegedly negligent and bad faith handling of their claim under the ADR process

created by a settlement agreement. This Court held that the plaintiffs' lawsuit constituted an impermissible "collateral attack" on the "system of remedies specified in the class action settlement" that the district court was administering. *Prudential II*, 314 F.3d at 104-05. The Court explained that the plaintiffs' "claims cannot be separated from challenges to the ADR procedures." *Id.* at 104. After all, their complaint did not arise until their claims were submitted to the ADR process.

By contrast, Appellants do not challenge the manner in which their claims have been processed under the Settlement Agreement. Indeed, Appellants do not challenge anything about the Settlement Agreement. Instead, Appellants merely seek to pursue state-law compensatory damages claims that predate the Settlement Agreement, are expressly permitted by the Agreement, and do not in any way arise from it.

Accordingly, this case is governed by the longstanding principle, which *Prudential II* did not disturb (and could not have disturbed), that parallel state-court damages suits do not trigger the "in aid of jurisdiction" exception. In *Vendo,* 433 U.S. at 623, the Supreme Court reversed an injunction against state court proceedings and held that a simultaneous state court suit does not interfere with the jurisdiction of a federal court to entertain a damages action: "We have never viewed parallel in personam actions as interfering with the jurisdiction of either court." *Id.* at 642 (plurality opinion). In *Kline v. Burke Constr. Co.*, 260 U.S. 226,

230 (1922), the Supreme Court declined to uphold a federal court injunction against state court proceedings, explaining:

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principle of res adjudicata by the court in which the action is still pending.

*Id.* In short, "[t]he Supreme Court has narrowly interpreted the 'in aid of jurisdiction' exception." *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 535 (6th Cir. 1978). "[A] simultaneous in personam state action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter." *Id.*[13]

This Court has made clear that the mere fact that the federal proceeding involves the actual or potential settlement of multidistrict litigation does not displace this rule. In *GM Trucks*, 134 F.3d at 144-45, for example, the Court held

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[13] *See also Alton Box Bd. Co. v. Espirit de Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1982) ("this case falls within the general rule that an injunction cannot issue to restrain a state court action in personam involving the same subject matter at issue before the federal court."); *In re Temple*, 851 F.2d 1269, 1272 & n.4 (11th Cir. 1988) (rejecting "in aid of jurisdiction" exception as basis for enjoining state lawsuits to protect federal class action: "Not only does the district court's order implicate federal/state relations, it clearly violates the individual constitutional rights of the petitioners."); *In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001) (absent statutory exception specific to securities law, Anti-Injunction Act would prohibit injunction against overlapping state court securities class action); *In re Fed. Skywalk Cases*, 680 F.2d at 1182-83 (holding that Anti-Injunction Act precluded injunction to protect federal class action, despite supposed "limited fund").

that a federal MDL court could not enjoin a state case on the ground that it threatened to interfere with the federal proceeding. And in *In re Glenn W. Turner Enter. Litig.*, 521 F.2d 775 (3d Cir. 1975), the Court held that a district court presiding over multiple consolidated class actions lacked the authority to enjoin an ongoing state court proceeding even where the state lawsuit, if successful, might have rendered the defendants unable to pay any judgment subsequently entered in the pending federal class actions. *Id.* at 780-81. Despite potential interference with the federal cases, the Court reversed an injunction entered by the district court, holding that "the inability of the federal defendants to pay a judgment, assuming it exists, still would not be sufficient justification to issue the federal injunction." *Id.* at 780. This case is even easier: there is no conceivable basis for entering an injunction where the opt-out fen-phen litigants cannot recover any punitive damages whatsoever.

For similar reasons, this Court's decision in *Diet Drugs* is also inapposite. There, the Court upheld an order enjoining a mass-opt out of the consolidated diet drug litigation by the Texas sub-class. 282 F.3d at 220. But in doing so the Court stressed that the order had been narrowly crafted:

> It did not prevent the Gonzalez plaintiffs from individually opting out. Furthermore, the injunction was not directed at a proceeding in which plaintiffs had merely requested relief that threatened to interfere with the federal action, it was directed at a proceeding in

> which the state court had actually granted such a request, making the interference substantially more manifest.

*Id.* at 238-39. Further, while finding the exception applicable, the Court reaffirmed the general rule:

> Without more, it may not be sufficient that prior resolution of a state court action will deprive a federal court of the opportunity to resolve the merits of a parallel action in federal court. "The traditional notion is that in personam actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance."

*Id.* at 234 (citation omitted). "Therefore, it may not be sufficient that state actions risk some measure of inconvenience or duplicative litigation. . . . In other words, the state action must not simply threaten to reach judgment first, it must interfere with the federal court's own path to judgment." *Id.*

The contrast with the present case is stark. In *Diet Drugs*, the very purpose of the enjoined state court proceedings was to interfere with the orderly resolution of the federal litigation, by wresting class members from the federal court's jurisdiction through a mass opt-out. Here, by contrast, Appellants do not seek to interfere with the district court's own "path to judgment." Indeed, the federal court has already entered its judgment, which does not attempt to resolve — but rather, preserves for the state courts to resolve — Appellants' state-law compensatory claims. In the terms used by this Court, it is not the state suit here that threatens to

interfere with the "path to judgment" of the federal court; rather, it is the district court's collateral and preemptive attack on the state court's ability to govern its own proceedings that is interfering with the "orderly resolution" of Appellants' claims.

**d. The "express authorization" exception does not apply**

Finally, no Act of Congress expressly authorizes district courts to interfere with state courts' application of state rules of evidence to state law claims; and none has been cited by Wyeth or the district court. Therefore, the "express authorization" exception is inapplicable. Plainly, the statute under which the district court exercised jurisdiction, the multidistrict litigation statute, 28 U.S.C. § 1407, confers no such authority since it is limited to federal proceedings. *See Vendo*, 433 U.S. at 640-41 (plurality opinion) (for exception to apply, "the Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding."). Indeed, the irony of a federal court exercising jurisdiction that is expressly limited to *pretrial* proceedings in *federal* cases asserting authority to supervise *trial* proceedings in a *state* case is palpable.

Because none of its three exceptions applies, the Anti-Injunction Act bars the district court injunctions in this case.

### 4. The Injunctions Should Be Vacated Under the Abstention Doctrine

Quite apart from the question of whether the district court had the authority to enter the injunctions as a matter of law, it should not have encroached on the state courts' jurisdiction under the circumstances. Its decision not to abstain was an abuse of discretion.

The doctrine of "Our Federalism" teaches that federal courts must refrain from enjoining state judicial proceedings "under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its own laws in its own courts." *Chiropractic Am. v. LaVecchia*, 180 F.3d 99, 103 (3d Cir. 1999). In particular, the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), prevents a federal court from interfering in ongoing state court proceedings. *Younger* abstention applies when (1) there is an ongoing state judicial proceeding, (2) the state proceeding implicates an important state interest, and (3) the state proceeding provides an adequate opportunity to raise the federal issue. *See FOCUS v. Allegheny County Ct. of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996). Although *Younger* itself was a criminal case, its abstention doctrine applies to civil proceedings as well. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

In *Pennzoil*, for example, the Supreme Court held that *Younger* forbade a federal court from enjoining parties from applying state rules for the bonding and enforcement of judgments in civil cases, even though Texaco claimed that the state bonding rule effectively prevented it from appealing an allegedly unlawful judgment of $11 billion. The Court observed: "The lower courts should have deferred on principles of comity to the pending state proceedings. They erred in accepting Texaco's assertions as to the inadequacies of Texas procedure to provide effective relief." *Pennzoil*, 481 U.S. at 17.

Here, if an opt-out plaintiff attempts to introduce evidence that Wyeth believes is precluded, the proper course would be for Wyeth to raise that issue under state law in the state courts. Even if the resolution of that evidentiary issue entailed an interpretation of the Settlement Agreement, a federal court injunction or decision is unnecessary and unwarranted. The fact that a state court must decide a federal question "does not alter the respect due the state tribunal." *Total Plan Servs., Inc. v. Tex. Retailers Ass'n, Inc.*, 925 F.2d 142, 145 (5th Cir. 1991) (internal quotation omitted). "The proper course is to seek resolution of that issue by the state court." *Chick Kam Choo,* 486 U.S. at 150.

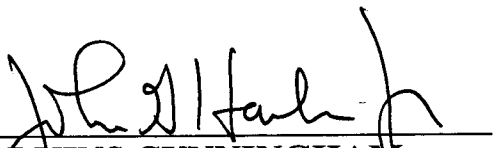
The abstention doctrine thus compels the same conclusion as the Anti-Injunction Act: unless the purpose of the state court litigation is to collaterally

challenge the federal judgment or to interfere with the federal court's path to judgment, comity is due to the state courts.

## CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the district court's grant of Wyeth's motions for injunctive relief and vacate PTOs 2680 and 2828.

Respectfully submitted,



**HARKINS CUNNINGHAM**
John G. Harkins, Jr. (PA BN 04441)
Steven A. Reed (PA BN 60145)
2800 One Commerce Square
2005 Market Street
Philadelphia, PA 19103-7042
Telephone No. (215) 851-6700
Fax No. (215) 851-6710

**FLEMING & ASSOCIATES, L.L.P.**
George M. Fleming (TX BN 07123000)
Sylvia Davidow (TX BN 05430551)
Rand P. Nolen (TX BN 00788126)
Scott A. Love (TX BN 24002495)
1330 Post Oak Boulevard, Suite 3030
Houston, Texas 77056
Telephone No. (713) 621-7944
Fax No. (713) 621-9638

**MIKE O'BRIEN, P.C.**
Mike O'Brien (TX BN 15170200
1330 Post Oak Blvd., Suite 2960
Houston, Texas 77056
Telephone No. (713) 222-0088
Fax No. (713) 222-0888

**JONATHAN MASSEY, P.C.**
Jonathan Massey (D.C. BN 457593)
3920 Northampton Street N.W.
Washington, D.C. 20015
Telephone No. (202) 686-3920
Fax No. (202) 686-0497

**ATTORNEYS FOR APPELLANTS**

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because the brief contains 13,941 words, exclusive of the exempted portions in FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and typestyle requirements FED. R. APP. P. 32(a)(5) and 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2000 in Times New Roman 14-point type for text and footnotes.

Steven A. Reed
Attorney for Appellants

## CERTIFICATE OF ADMISSION

Pursuant to 3D. CIR. LOC. R. 28(3)(d), the undersigned certifies that at least one of the attorneys whose names appear on the brief is a member of the bar of this Court.

Steven A. Reed
Attorney for Appellants

## CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above and foregoing Appellants' Consolidated Brief and one complete set of the Joint Appendix have been provided to all parties in the manner set forth below on this 3rd day of June, 2003.

Peter L. Zimroth
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
***(via Federal Express)***

Robert D. Rosenbaum
Sarah Brackney
Jerome I. Chapman
ARNOLD & PORTER
555 Twelfth Street
Washington, DC 20004
***(via Federal Express)***

Michael T. Scott
Paul B. Kerrigan
REED SMITH, LLP
2500 One Liberty Place
Philadelphia, PA 19103
***(via Hand Delivery – two copies of brief)***
**Counsel for Appellee Wyeth Corporation**

Arnold Levin
Michael D. Fishbein
Fred S. Longer
LEVIN FISHBEIN SEDRAN & BERMAN
510 Walnut Street, Suite 500
Philadelphia, PA 19106
***(via Hand Delivery – two copies of brief)***
**Counsel for Class and the Plaintiffs' Management Committee**

Steven A. Reed