

16-0607

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

BETTY J. ALMOND and THEODORE H. ALMOND, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 13-C-159
	)	Honorable Rudolph J. Murensky, II
<hr/>		
v.	)	
	)	
PFIZER INC.,	)	
	)	
Defendant.	)	
	)	
	)	

**ORDER GRANTING DEFENDANT PFIZER INC.'S MOTION TO DISMISS THE NON-WEST VIRGINIA PLAINTIFFS ON THE GROUNDS OF FORUM NON CONVENIENS**

On the 29<sup>th</sup> day of October, 2015, came the Plaintiffs' by H. Blair Hahn, Esq., and Jeaneen Legato, Esq., their attorneys, and came the Defendant by Mark Cheffo, Esq., Michael J. Farrell, Esq., and Erik W. Legg, Esq., for a hearing on defendant's *Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens*. Having considered the briefs and evidence submitted by the parties, and the arguments presented by counsel, the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

Plaintiffs are forty (40) women and certain spouses who are suing Pfizer Inc. ("Pfizer"). Pfizer is a Delaware corporation with its headquarters in New York. Plaintiffs allege that they developed diabetes as a result of taking Lipitor, Pfizer's cholesterol-lowering prescription medication, and that Pfizer failed to adequately warn that Lipitor could cause diabetes.

Fourteen (14) plaintiffs filed the original complaint in McDowell County, West Virginia, on September 4, 2013. Ten (10) of these Plaintiffs are residents of West Virginia and the remaining four (4) Plaintiffs reside in New York. On October 3, 2013, Plaintiffs filed an Amended Complaint joining twenty-six (26) additional Plaintiffs, all from Texas, and spouses of eighteen (18) Plaintiffs.

The Plaintiffs from New York are Alicia Blair, Barbara Finnerty, Brenda Gay, and Alice Heath. The Plaintiffs from Texas are Paula M. Anderson, Nanette V. Avitts, Brenda L. Black, Violet J.

Brown, Catalina Castro, Connie Cervantes, Barbara A. Cheeves, Diana M. Edwards, Rosie J. Ferguson, Joyce Foreman, Joanne K. Gamini, Marilyn Garretson, Beverly Hamilton, Jeanetta Harris-Mitchell, Denise Hicks, Ruby Hicks, Alexie R. Johnson, Jeanne C. Rosenbohm, Margarita Sepulveda, Mary Shofner, Deborah Sierra, Melba J. Thibodeaux, Wanda Trotter, Rose L. Williams, Carol S. Willis-Roberson, and Maude L. Womack. The following two New York Plaintiffs and eight Texas Plaintiffs are joined by their husbands, who assert derivative claims for loss of consortium: Nanette V. Avitts (Robert S. Avitts, Jr.); Catalina Castro (Eduardo R. Castro); Diana M. Edwards (Kerry K. Edwards); Joanne K. Gamini (Kianoush Gamini); Brenda Gay (James E. Gay); Jeanetta Harris-Mitchell (James O. Mitchell); Alice Heath (Karl E. Heath); Ruby Hicks (Donald L. Hicks); Melba J. Thibodeaux (Junior F. Thibodeaux); and Rose L. Williams (Jerry W. Williams).

None of the foregoing Plaintiffs alleges that she was prescribed Lipitor or developed diabetes in West Virginia.

Important non-party witnesses presumptively reside outside of West Virginia given that neither of the Plaintiffs' respective home states, Texas and New York, border West Virginia. To determine issues of liability, including causation, and damages, the parties may have to depose and potentially call at trial: healthcare providers who treated each Plaintiff and prescribed Lipitor to her; healthcare providers who counseled each Plaintiff on the risks and benefits of taking Lipitor; healthcare providers who treated each Plaintiff's diabetes; and other fact witnesses who may have knowledge of each Plaintiff's other risk factors for diabetes, including family members and friends. Most of these witnesses are likely to be located in each Plaintiff's home state.

The parties agreed that general discovery taken in the federal Lipitor multidistrict litigation pending in the District of South Carolina, *In re Lipitor (Atorvastatin Calcium) Products Liability Litigation*, MDL No. 2502 (the "Lipitor MDL"), will be applicable in this case. In addition to other coordination, the parties made arrangements for cross-noticing in this litigation the common depositions taken in the Lipitor MDL. General discovery of Pfizer is now complete in the Lipitor

MDL. No case-specific discovery has been conducted in this litigation with regard to the non-West Virginia Plaintiffs.

On October 14, 2013, Pfizer removed this litigation to federal court on diversity grounds as to the 36 non-New York Plaintiffs. In federal court, it filed an answer that included inconvenient venue as an affirmative defense. Pfizer also timely filed answers in this Court and similarly included inconvenient venue as an affirmative defense. On December 19, 2013, the federal court granted a motion by Plaintiffs to remand this action to the Circuit Court of McDowell County, stating case was a single action.

On March 4, 2014, Pfizer moved for referral of this litigation to West Virginia's Mass Litigation Panel ("MLP"). In May 2014, while that motion was pending, the West Virginia Supreme Court of Appeals issued a decision in litigation involving Zolofit that addressed legal questions that impacted Pfizer's pending motion to refer this litigation to the MLP. *See State ex rel. J.C. v. Mazzone*, 233 W. Va. 457, 759 S.E.2d 200 (2014) ("*Mazzone I*"). In *Mazzone I*, the Supreme Court of Appeals held that West Virginia Rule of Civil Procedure 3(a) "is an administrative fee and record keeping provision," and that its requirement that courts assign separate docket numbers to each plaintiff in multi-plaintiff matters like this one "does not provide authority for severing a complaint substantively into two or more separate civil cases." Because this case constitutes a single action rather than multiple actions under *Mazzone I*, Pfizer withdrew its request for referral to the MLP without prejudice to renew if additional cases are filed.

On November 21, 2014, the parties appeared for a telephonic status conference with this Court, during which the Court and the parties discussed scheduling and case management. After agreeing upon a trial date and pretrial date, the Court requested that the parties agree upon the remaining portions of the scheduling order and provide the Court with an Order with agreed upon case management dates. Normally, these are dates for dispositive motions, discovery dates as to fact and expert witness disclosure, pre-trial forms and any other case management matters that may need to come before the court.

Following the scheduling conference, the parties could not agree upon case management matters. On July 20, 2015, Defendant filed a Notice of Status Conference scheduling a hearing for August 11, 2015, at 2:30 p.m. An Amended Notice of Status Conference was filed changing the time to 1:30 p.m.

On August 11, 2015, this Court held a status conference to address scheduling and case management. During that status conference, counsel for Pfizer discussed Pfizer's intentions to file motions for dismissal on forum non conveniens grounds and asked the Court to include in its scheduling order a deadline for those motions.

On August 14, 2015, the Court entered a Scheduling Order. The Order included a deadline for Pfizer to file dispositive motions and provided that "Plaintiffs are not precluded from asserting the untimeliness of any such motion."

Pfizer filed its motion to dismiss the non-West Virginia Plaintiffs on the grounds of forum non conveniens in accordance with the Scheduling Order. Plaintiffs have opposed the motion on the ground that it is untimely. The Court heard arguments on October 29, 2015.

In response to a motion filed by plaintiffs for default judgment, which was also heard on October 29, 2015, this Court denied Plaintiffs' motion for entry of default judgment by an order entered November 23, 2015.

The matter relating to Defendant's motion relating to forum non conveniens is now ripe for disposition by the Court, which makes the following conclusions of law:

### CONCLUSIONS OF LAW

#### Pfizer's Motion is Timely

The first issue raised by Plaintiffs is whether Pfizer's motion to dismiss for forum non conveniens is timely. The Court concludes that it is.

This case was originally filed on September 4, 2013, and is a highly complex products liability case involving a cholesterol-lowering prescription medication, Lipitor. As originally filed, there were ten West Virginia plaintiffs and four New York plaintiffs. On October 3, 2013, plaintiffs filed an

amended complaint joining twenty-six plaintiffs. Also, included were eighteen spouses for loss of consortium claims.

---

In its answer to the amended complaint, Pfizer preserved the defense of forum non conveniens by asserting it in paragraph Thirty-Second in its Affirmative and other Defenses. As of the date of the filing of the amended answer, Plaintiffs were on notice of this defense.

Rule 12(b) of the West Virginia Rules of Civil Procedure requires that “[e]very defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto,” here, Pfizer’s answer. The defense of forum non conveniens is not listed among the defenses that “shall be made before pleading,”<sup>1</sup> and Rule 12(b) expressly states that “[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.”

West Virginia Code Section 56-1-1a(b) provides that a motion to dismiss on grounds of forum non conveniens “is timely if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule twelve of the West Virginia Rules of Civil Procedure or a responsive pleading to the first complaint that gives rise to the grounds for such a motion: *Provided*, That a court may, for good cause shown, extend the period for the filing of such a motion.”

Although this case was originally filed on September 4, 2013, matters concerning same didn’t come before this Court on a regular basis until the telephonic conference on November 21, 2014. It wasn’t until the request for a date for another scheduling conference that the Court was aware of the problems concerning the scheduling order.

---

<sup>1</sup> The defense of improper venue that is listed under Rule 12(b) involves the defense that an action has been filed in an improper venue within the State, *see State, ex rel. Galloway Grp. v. McGraw*, 227 W. Va. 435, 437, 711 S.E.2d 257, 259 (2011) (observing that improper venue turns on plaintiffs’ compliance with the State’s venue statute, W. Va. Code § 56-1-1(a)(1)), and is distinct from forum non conveniens, which asserts that claims should not be pending in West Virginia at all and should be dismissed in favor of another, more convenient, alternative forum. *See State, ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 649, 713 S.E.2d 356, 364 (2011).

When this Court entered its Scheduling Order dated August 14, 2015, with dates for case management, the Court in effect, extended the time period for filing a motion to dismiss for forum non conveniens. Pfizer's Motion to Dismiss for Forum Non Conveniens was filed within the time frame set forth in the August 14, 2015, Scheduling Order.

Even if the motion was not timely filed, this Court would still find that Pfizer's motion is timely because there is "good cause shown" to "extend the period for the filing of such a motion." W. Va. Code § 56-1-1a(b). A party may establish good cause for extending a statutory deadline in the interest of justice and based on the procedural history and circumstances in a given case. *See Caruso v. Pearce*, 223 W. Va. 544, 550, 678 S.E.2d 50, 56 (2009). In *State ex rel. J.C. ex rel. Michelle C. v. Mazzone*, 235 W. Va. 151, 772 S.E.2d 336 (2015) ("*Mazzone IP*"), the Supreme Court of Appeals expressly recognized that timeframes can be adjusted for a forum non conveniens motion based on the needs of the case before them.

Under Rule 16 of the West Virginia Rules of Civil Procedure, this Court can and should "design[] case-specific plans," *Caruso*, 223 W. Va. at 549, 678 S.E.2d at 55 (quotation omitted), including with respect to deadlines "[t]o file and hear motions." W. Va. R. Civ. P. 16(b). Such case-specific determinations may include a finding of good cause to modify a deadline that may otherwise apply. *See Caruso*, 223 W. Va. at 549, 678 S.E.2d at 56; W. Va. Code § 56-1-1a(b). In *Caruso*, for example, the Supreme Court of Appeals reversed the dismissal of an action under Rule 41(b) where the record demonstrated good cause for a more than one-year delay in prosecuting the case, including a misunderstanding of the status of discovery and the absence of a mandatory scheduling order. 223 W. Va. at 549-50, 678 S.E.2d at 55-56. By contrast, in *Raab v. Marshall*, No. 13-0249, 2013 WL 5966972 (W. Va. Nov. 8, 2013), cited by Plaintiffs, the plaintiffs seeking relief from a dismissal under Rule 41(b) failed to timely produce experts under a scheduling order, requiring the court to continue the trial date, and then allowed more than a year to lapse without remedying that failure.

The Court concludes that Pfizer's record of preservation of its forum non conveniens defense, its diligence in defending this case, and the absence of any prejudice to Plaintiffs warrant extension of

the time to file this motion under section 56-1-1a(b). Pfizer included the defense of inconvenient forum in its answers filed in both state and federal court. Following remand of this litigation to state court, Pfizer sought transfer to the MLP, and there was a period of several months during which that issue was being addressed by the parties and the Supreme Court of Appeals. Although Pfizer ultimately withdrew that motion following the decision in *Mazzone I*, the Court finds that it would be unfair to penalize Pfizer for advancing a good faith jurisdictional motion and then engaging in good faith scheduling negotiations that included a schedule for filing this motion. The Motion to Dismiss for Forum Non Conveniens is not a surprise to anyone.

The Court also concludes that Plaintiffs have not rebutted Pfizer's showing of good cause by demonstrating that they will suffer any prejudice if the deadline for Pfizer's motion is extended. Plaintiffs cannot show prejudice because no case-specific discovery or dispositive rulings have occurred with respect to the non-West Virginia Plaintiffs and common discovery from the MDL will be readily transferrable to these cases upon any refiling. Indeed, Plaintiffs' only claim of prejudice is that they "have spent a significant amount of time and resources fighting Pfizer to stay in this forum." But those efforts apply equally to the ten West Virginia Plaintiffs in this action to whom Pfizer's motion does not apply.

Accordingly, the Court concludes that Pfizer's motion was timely. To the extent that an extension of time for good cause shown was necessary, the Court concludes that Pfizer has demonstrated good cause based on the history of this litigation, the record of the communications between the parties, and the absence of any prejudice to Plaintiffs.

#### **The Statutory Forum Non Conveniens Factors Support Dismissal**

The Court now turns to the merits of the question of whether the statutory factors support dismissal on the grounds of forum non conveniens and finds that section 56-1-1a supports dismissal of the non-West Virginia Plaintiffs. The Court finds guidance in the decision of the Supreme Court of Appeals in *Mazzone II*, which, like this litigation, involved a pharmaceutical products liability litigation against Pfizer in which Pfizer sought dismissal of claims by out-of-state Plaintiffs. The

Supreme Court of Appeals denied a writ of prohibition and affirmed orders by the MLP granting Pfizer's motions, explaining that, "West Virginia has no real interest in trying non-resident plaintiffs' claims against non-resident defendants involving causes of action that accrued in states other than West Virginia." *Mazzone II*, 772 S.E.2d at 349.

There is no evidence that any of the non-resident Plaintiffs have any contact with the State of West Virginia. There is no evidence that any of the Plaintiffs saw any health care providers in West Virginia. There is no evidence that any of the Plaintiffs purchased any of their medication (Lipitor) in West Virginia. There is no evidence that any of these non-resident Plaintiffs have any contact with the State of West Virginia in any manner.

For the same reasons that the Court in *Mazzone II* affirmed the dismissal of the claims of the non-resident plaintiff families there on forum non conveniens grounds, this Court finds that dismissal of the non-West Virginia Plaintiffs' claims is appropriate here.

Section 56-1-1a(a) provides that "the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state." W. Va. Code § 56-1-1a(a); accord *Mazzone II*, 772 S.E.2d at 345; *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of Am.*, 194 W. Va. 186, 191, 460 S.E.2d 1, 6 (1994); *Norfolk & W. Ry. Co. v. Tsapis*, 184 W. Va. 231, 235, 400 S.E.2d 239, 243 (1990). In *Mazzone II*, the Supreme Court of Appeals affirmed a determination that the plaintiffs' "choice of forum is entitled to less deference" where it was "indisputable that all of the petitioners reside—and their causes of action arose—in states other than West Virginia." 772 S.E.2d at 347. Here also, the same essential and undisputed facts concerning the out-of-state origin of these claims show that Plaintiffs' choice of forum is entitled to less deference, weighing in favor of dismissal based on forum non conveniens.

As set forth more fully below, the Court concludes that the multi-factor analysis required by section 56-1-1a supports the forum non conveniens dismissal of the non-West Virginia Plaintiffs' claims.

A. Availability of an Adequate, Alternative Forum

The first factor directs the Court to consider “[w]hether an alternate forum exists in which the claim or action may be tried.” W. Va. Code § 56-1-1a(b)(1). The Court finds that alternative forums exist for each of the 30 non-West Virginia Plaintiff units.

“In considering ‘whether an alternate forum exists in which the claim or action may be tried’ pursuant to [§ 56-1-1a(a)(1)], an alternate forum is presumed to ‘exist’ where the defendant is amenable to process.” Syl. Pt. 9, *Mace v. Mylan Pharms., Inc.*, 227 W. Va. 666, 668, 714 S.E.2d 223, 225 (2011). “Such presumption may be defeated, however, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” *Id.* While, “considering possible changes in substantive law is generally not appropriate when deciding motions to dismiss based on forum non conveniens,” there are rare instances in which a “change in substantive law in an alternate forum may be so significant that it would, in effect, eliminate the plaintiff’s chance of recovery in the case.” *State, ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 647 n.5, 713 S.E.2d 356, 362 n.5 (2011).

An alternate forum exists for their claims. Pfizer has consented to personal jurisdiction in each of the Plaintiffs’ home states and to toll the applicable statutes of limitations to the extent they were not already expired at the time Plaintiffs’ claims were filed. Accordingly, the Court finds that “alternative forum[s] [are] presumed to exist.” Syl. Pt. 9, *Mace*, 227 W. Va. 666, 668, 714 S.E.2d 223, 225.

The Court need not evaluate the effect of a potential change in law, as no change in governing law would result from dismissal. As of the time this action was filed, West Virginia law provided that “[i]t is *public policy* of this state that, in determining the law applicable to a product liability claim brought by a nonresident of this state against the manufacturer or distributor of a prescription drug for failure to warn, the duty to warn shall be governed *solely* by the product liability law of the place of injury (‘lex loci delicti’).” W. Va. Code § 55-8-16(a) (emphasis added). In addition, a post-filing amendment to that statute clarifies this State’s public policy to apply the lex loci delicti for *all* product

liability claims by a nonresident, not just failure-to-warn claims. *See* W. Va. Code § 55-8-16(a).<sup>2</sup> Moreover, the Plaintiffs' home states recognize products liability causes of action. *See, e.g., Martin v. Hacker*, 628 N.E.2d 1308, 1311 (N. Y. 1993); *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 153-54 (Tex. 2012).

Accordingly, the Court concludes that Plaintiffs' home states provide an alternate forum for these claims.

**B. Substantial Injustice to Pfizer**

The second factor directs the Court to consider “[w]hether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party.” W. Va. Code § 56-1-1a(a)(2). The Court concludes that maintenance of these claims in West Virginia would work a substantial injustice to Pfizer.

West Virginia has no connection to the 30 Plaintiffs at issue, their claims, or Pfizer. All of the evidence, witnesses, and locations relevant to the Plaintiffs' claims will be located in other states. West Virginia is located at a considerable distance from the various states in which the Plaintiffs reside, which will render it difficult and costly to secure the voluntary attendance of non-party witnesses.

The Court also lacks subpoena power to compel the deposition or trial attendance of non-party witnesses or the production of documents in the possession of non-parties. While there is a process for engaging in interstate discovery, it can be complicated, expensive, and unsuccessful. The inability to achieve subpoena power over essential witnesses weighs heavily in favor of dismissal of the claims. As in *Muzzone II*, the “lack of subpoena power to compel the attendance of non-party witnesses at deposition or trial or to compel the production of documents in the possession of non-parties” weighs

---

<sup>2</sup> Although Plaintiffs filed their complaint prior to the statutory amendment's effective date, this Court finds that West Virginia's current public policy is relevant to the choice-of-law public policy analysis that the forum non conveniens statute directs it to conduct. In any event, without regard to the statutory amendment, Plaintiffs' counsel has recognized that they are presenting “nothing but a failure-to-warn case,” Hr'g Tr. 22:8-9, Aug. 11, 2015, and thus, even the prior version of section 55-8-16(a) would support the application of the Texas and New York Plaintiffs' home states' laws.

in favor of dismissal on the grounds of forum non conveniens. 772 S.E.2d at 348. “[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to [the] court, jury or most litigants.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947); accord *Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978) (the unavailability of live testimony is “a very serious handicap” that favors dismissal on forum non conveniens grounds).

The Court finds that West Virginia’s lack of connection to this litigation, coupled with the difficulty of compelling or voluntarily securing witnesses for depositions and trial, would cause substantial injustice to Pfizer and this factor therefore favors dismissal.

**C. Ability of Alternative Forum to Exercise Jurisdiction Over Pfizer**

The third factor directs the Court to consider “[w]hether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff’s claim.” W. Va. Code § 56-1-1a(a)(3). Pfizer has consented to personal jurisdiction in Plaintiffs’ home states and has agreed to toll statutes of limitations to the extent they had not already expired prior to the initiation of Plaintiffs’ claims in West Virginia. The Court thus finds that alternative forums can exercise jurisdiction over Pfizer. Accordingly, this factor favors dismissal.

**D. Plaintiffs’ States of Residence**

The fourth factor directs the Court to consider “[t]he state in which the plaintiff(s) reside.” W. Va. Code § 56-1-1a(a)(4). The Court finds, and Plaintiffs do not dispute, that each of the 30 Plaintiffs at issue resides in a state other than West Virginia. Accordingly, this factor favors dismissal.

**E. State Where the Cause of Action Accrued**

The fifth factor directs the Court to consider “[t]he state in which the cause of action accrued.” W. Va. Code § 56-1-1a(a)(5). The Court finds that each of the 30 Plaintiffs’ claims accrued in a state other than West Virginia, for the following reasons:

Plaintiffs were prescribed Lipitor outside of West Virginia.

Plaintiffs ingested Lipitor outside of West Virginia.

Plaintiffs were allegedly injured outside of West Virginia.

Plaintiffs were treated for alleged injuries outside of West Virginia.

Plaintiffs reside outside of West Virginia.

Lipitor was developed outside of West Virginia and marketed and sold to Plaintiffs outside of West Virginia.

Plaintiffs' claims thus accrued outside of West Virginia in Plaintiffs' respective home states.

Accordingly, this factor favors dismissal.

**F. Balance of Private and Public Interests**

The sixth factor directs the Court to consider:

Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

W. Va. Code § 56-1-1a(a)(6).

Public and private interests favor dismissal on the grounds of forum non conveniens. The Court concludes that the balance of private interests and public interests favor each of the 30 Plaintiffs' claims being brought in an alternative forum for the following reasons.

Each of the private interests weighs in favor of dismissal. As discussed above, because Plaintiffs' claims have no connection with West Virginia, all of the relevant evidence and witnesses will be located in states other than West Virginia. Accordingly, "access to sources of proof" favors litigation in Plaintiffs' home states where such proof is located; the "availability of compulsory process for attendance of unwilling witnesses" favors litigation in Plaintiffs' home states, as local state and

federal courts are better positioned to issue subpoenas to relevant witnesses; the “cost of obtaining attendance of willing witnesses” favors litigation in Plaintiffs’ home states because such witnesses will have to travel a much shorter distance to attend trial; and finally the “possibility of a view of the premises” favors litigation in Plaintiffs’ home states because Plaintiffs’ homes, which may have been modified to accommodate the Plaintiffs’ injuries and/or disabilities, are located therein. W. Va. Code § 56-1-1a(a)(6).

The public interests of the state of West Virginia also do not support trial of these Plaintiffs’ claims in West Virginia.

First, where, as here, the events underlying claims occurred primarily in a foreign jurisdiction, West Virginia does not have a sufficient interest to justify the burden and “administrative difficulties flowing from court congestion” that would result if this Court were forced to hear non-residents’ claims. W. Va. Code § 56-1-1a(a)(6). A fundamental purpose of the forum non conveniens doctrine is to avoid the burdens that result “when litigation is piled up in congested centers instead of being handled at its origin.” *Gulf Oil*, 330 U.S. at 508; accord *Vinson v. Allstate*, 579 N.E.2d 857, 859 (Ill. 1991); *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 247 (N.Y. 1984). As the Supreme Court of Appeals succinctly put it, “West Virginia has no real interest in trying non-resident plaintiffs’ claims against non-resident defendants involving causes of action that accrued in states other than West Virginia.” *Mazzone II*, 772 S.E.2d at 349. Rather, because Plaintiffs’ “claims arose in other states, their cases can ‘be tried substantially more inexpensively and expeditiously’ in those other states where the sources of proof will be more easily accessible.” *Id.* (quoting Syl. Pt. 3, in part, *Tsapis*, 184 W.Va. 231, 400 S.E.2d 239).

Second, the West Virginia legislature has emphasized “the interest in having localized controversies decided within the state.” W. Va. Code, § 56-1-1a(a)(6). As stated above, neither these Plaintiffs nor Pfizer are West Virginia residents, these Plaintiffs were not prescribed and did not ingest Lipitor in West Virginia, none of these Plaintiffs’ alleged injuries occurred in West Virginia, and it is unlikely that any witnesses are located in West Virginia. By contrast, these various Plaintiffs’ home

states have a substantial interest in disputes involving their residents who were allegedly injured in those states by the prescription and ingestion of a medication in those states.

Third, the West Virginia legislature also cautions that courts should “avoid[] . . . unnecessary problems in conflict of laws, or . . . the application of foreign law.” *Id.* As set forth above, the law of West Virginia does not govern the claims of these non-West Virginia Plaintiffs. *See McKinney v. Fairchild Int’l, Inc.*, 199 W. Va. 718, 729, 487 S.E.2d 913, 922 (1997); *accord* W. Va. Code § 55-8-16(a). Thus, because Plaintiffs’ alleged injuries occurred in New York or Texas, those states’ laws will apply. There are significant “advantages of conducting a trial in a forum familiar with the applicable law,” and there will be advantages here in conducting these trials in Plaintiffs’ home states. *Cannelton Indus.*, 194 W. Va. at 194, 460 S.E.2d at 9 (quoting *Tsapis*, 184 W. Va. at 234-35, 400 S.E.2d at 242-43.); *see also* W. Va. Code § 56-1-1a(a)(6). As the Supreme Court of Appeals explained in *Mazzone II*, “the applicable and governing law in those other states is more readily applied by the courts of those states,” further supporting dismissal on the ground of forum non conveniens. 772 S.E.2d at 349.

Fourth, West Virginia juries and taxpayers should not be burdened with the claims of out-of-state plaintiffs arising from out-of-state conduct that has no connection to West Virginia. *See* W. Va. Code § 56-1-1a(a)(6); *accord Cannelton*, 194 W. Va. at 193, 460 S.E.2d at 8 (agreeing with trial court that “[i]t would be unjust and unreasonable to impose jury duty on the citizens of Kanawha County, who most likely would be required to spend many days trying to determine complicated insurance and environmental issues’ for a piece of property located in [another state]”). In contrast, “the judges and jurors in the petitioners’ home states would not be impositioned by having to determine disputes involving individuals who allegedly sustained injuries while residing in those states.” *Mazzone II*, 772 S.E.2d at 349-50.

Accordingly, the Court concludes that both the private and public interest factors overwhelmingly weigh in favor of dismissal of the 30 Plaintiffs’ claims.

**G. Duplication or Proliferation of Litigation**

The seventh factor directs the Court to consider “[w]hether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation.” W. Va. Code § 56-1-1a(a)(7).

The common discovery shared in these actions from the MDL is “readily transferable to any re-filed proceeding,” *Mazzone II*, 772 S.E.2d at 349, and no case-specific discovery has yet been conducted in these cases.

The Court has not yet engaged in any adjudication of the merits of Plaintiffs’ claims. Dismissal will therefore not result in duplicative and unnecessary re-litigation of issues.

The Court therefore concludes that a dismissal will not result in the unreasonable duplication or proliferation of litigation.

**H. Availability of a Remedy in the Alternative Forum**

The eighth factor directs the Court to consider: “[w]hether the alternate forum provides a remedy.” W. Va. Code § 56-1-1a(a)(8). Plaintiffs’ home states provide a remedy. Both New York and Texas recognize product liability causes of action. *See, e.g., Martin*, 628 N.E.2d at 1311; *Centocor*, 372 S.W.3d at 153-54. To the extent Plaintiffs’ claims may ultimately fail on their merits under those states’ substantive laws, a question this Court does not now decide, it should be true regardless of whether they are heard here or in an alternative forum, and it “is not a sufficient basis to render that alternate forum nonexistent.” *Zakaib*, 227 W. Va. at 647 n.5, 713 S.E.2d at 362 n.5. Thus, the availability of a remedy in Plaintiffs’ home states favors dismissal for forum non conveniens.

Accordingly, the Court concludes that the statutory factors support forum non conveniens dismissal of the 30 non-West Virginia Plaintiffs.

**CONCLUSION**

In light of the foregoing, the Court **GRANTS** *Pfizer Inc.’s Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens*. The claims of the thirty (30) non-West Virginia Plaintiffs identified above are hereby **DISMISSED WITHOUT PREJUDICE**, subject to

refiling only in each Plaintiff's home state within 150 days and to tolling of the statutes of limitations to the extent they were not already expired at the time Plaintiffs' claims were originally filed.

The Clerk is directed to mail a attested copy of Order to the following attorneys:

H. Blair Hahn, Esquire  
Richardson, Patrick, Westbrook & Brickman, LLC  
1037 Chuck Dawley Blvd., Bldg. A  
Mount Pleasant, SC 29464

J. Jeaneen Legato, Esquire  
Legato Law, PLLC  
405 Capitol St., Suite 701  
Charleston, WV 25301

Michael J. Farrell, Esquire  
Eric W. Legg, Esquire  
Farrell, White & Legg, PLLC  
Huntington, WV 25772

Mark S. Cheffo, Esquire  
Quinn Emanuel Urquhart & Sullivan, LLP  
51 Madison Avenue, 22<sup>nd</sup> Floor  
New York, NY 10010

ENTER this the 16<sup>th</sup> day of June, 2015.

  
RUDOLPH J. MURENSKY, II, JUDGE

A TRUE COPY TESTE  
FRANCINE SPENCER CLERK  
BY 