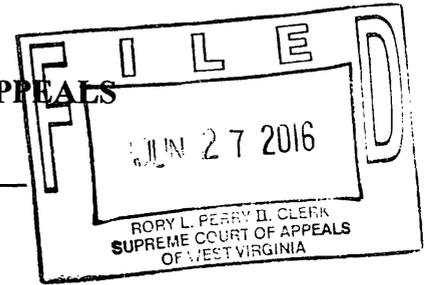


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 16-0607



**STATE OF WEST VIRGINIA ex rel.
BETTY J. ALMOND
and THEODORE H. ALMOND, et al.,**
Petiitioners, (Plaintiffs, below)

v.

Civ. Action No. (Below) 13-C-159
McDowell County Circuit Court

**THE HONORABLE RUDOLPH
MURENSKY, McDowell County
Circuit Court Judge, and
PFIZER INC.,**
Respondents. (Defendant below)

VERIFIED PETITION FOR WRIT OF PROHIBITION

J. Jeaneen Legato WVSB 6978
Legato Law, PLLC
405 Capitol Street, Suite 701
Charleston, WV 25301
(304)340-9910 Cell: (304) 549-8488

H. Blair Hahn (*Pro Hac Vice*)
Christiaan A. Marcum (*Pro Hac Vice*)
Aaron R. Dias (*Pro Hac Vice*)
Richardson, Patrick, Westbrook & Brickman
1037 Chuck Dawley, Blvd., Bldg. A
Mount Pleasant, SC 29464
(843) 727-6500

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VERIFIED PETITION FOR WRIT OF PROHIBITION

Comes now Plaintiffs, by counsel, J. Jeaneen Legato and H. Blair Hahn, and hereby submit the instant Petition for Writ of Prohibition pursuant to Rule 16 of the Appellate Rules of Procedure for the reasons that follow: (The circuit court Order is on page 35 of the Appendix.)

I. QUESTIONS PRESENTED

1. Whether the lower tribunal exceeded its legitimate authority by granting Defendant Pfizer's *Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens* pursuant to West Virginia Code §56-1-1a(b) despite Defendant having missed the statutory deadline by nearly two years and without a showing of "good cause" for the extension.

More specifically, the lower tribunal committed the following errors in this regard:

a. The lower tribunal erred in holding that Defendant Pfizer's motion was timely filed because the Circuit Court has the authority to amend the statute by extending the statutory deadline contained in West Virginia Code §56-1-1a(b) through the issuance of a Scheduling Order. The Circuit Court lacks the authority to amend a statute;

b. The lower tribunal erred in holding that Defendant Pfizer's motion was timely filed because Defendant Pfizer preserved *inconvenient forum* as an affirmative defense in their *Answer*. West Virginia Code §56-1-1a(a) requires a separate *motion* to be filed and does not allow for preservation of a motion as an *affirmative defense* in an *Answer*;

c. The lower tribunal erred in holding that Defendant Pfizer acted in "good faith" in causing the delay and that it would be unfair to penalize them for advancing a "good faith" jurisdictional motion. Defendant Pfizer did not act in good faith during the first year of this litigation in causing the delay, and failed to file the motion for more than a year after the delay that they caused to occur. The lower tribunal erred in granting Pfizer's motion without a showing of "good cause" as required by West Virginia Code §56-1-1a(a) because no "good cause" exists; and,

d. The lower tribunal erred in holding that Plaintiffs were required to show prejudice, and further erred in finding that the Plaintiffs will not suffer any prejudice due to the dismissal.

2. Whether the lower tribunal exceeded its legitimate authority by granting Defendant Pfizer's *Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens* pursuant to West Virginia Code §56-1-1a(8) when the alternate forum does not provide an adequate

or sufficient remedy for the Texas Plaintiffs.

3. Whether the lower tribunal exceeded its legitimate authority by granting Defendant Pfizer's *Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens* pursuant to West Virginia Code §56-1-1a by not considering the West Virginia Plaintiffs. Plaintiffs who have been properly joined pursuant to Rule 20(a) of the WV Rules of Civil Procedure cannot be severed by a Circuit Court for purposes of jurisdiction and venue.

II. STATEMENT OF THE CASE

The present case involves forty (40) Plaintiffs and eighteen (18) spouses of Plaintiffs, for a total of fifty-eight (58). Of the primary Plaintiffs, ten (10) are from West Virginia, four (4) are from New York, and twenty-six (26) are from Texas. Plaintiffs allege that they developed diabetes after taking Defendant Pfizer's drug Lipitor. On September 4, 2013, fourteen (14) Plaintiffs filed their initial complaint in the Circuit Court of McDowell County, West Virginia. Subsequently, on October 3, 2013, Plaintiffs filed an amended complaint wherein twenty-six (26) Texas Plaintiffs were joined to the original Complaint.

Eight days later, on October 11, 2013, Defendant Pfizer made its first attempt to take this case out of the Circuit Court of McDowell County when Defendant Pfizer filed thirty-six (36) separate removal actions in the United States District Court for the Southern District of West Virginia. On October 16, 2013, Defendant Pfizer filed four (4) separate Answers in the Circuit Court of McDowell County for each of the New York Plaintiffs. On October 16 and 17, 2013, Defendant Pfizer filed thirty six (36) separate Answers in the United States District Court for the Southern District of West Virginia.

After the district court granted Plaintiffs' motion to remand in December of 2013, Pfizer made a second attempt to remove the case from the Circuit Court of McDowell County when it

moved for referral to the Mass Litigation Panel (“MLP”) in March of 2014. However, in June 2014, Pfizer withdrew its request for referral to the MLP after Chief Justice Davis requested supplemental briefing in light of the Court’s recent ruling in *Mazzone I* that a single complaint with multiple plaintiffs does not meet the definition of “mass litigation” and therefore does not qualify for referral to the Mass Litigation Panel.

During a telephonic status conference on November 21, 2014, the lower court ordered the parties to negotiate a proposed scheduling order detailing discovery matters leading up to a May 2016 trial date. There was no discussion by either side or the judge regarding a motion for forum non conveniens.

Despite several months of back-and-forth negotiations, the parties could not agree on a proposal and eventually submitted opposing schedules. Pfizer’s proposal provided for the filing of Rule 12 motions, including motions to dismiss for forum non conveniens; Plaintiffs, recognizing that the time for such filings had long since passed, did not include such an allowance.

On August 11, 2015, the lower tribunal held a status conference. At that time, Defendant Pfizer asked that the Court permit Defendant to file a motion to dismiss for forum non conveniens. The Plaintiffs objected on the grounds that said motion would be untimely. (A.R. 558).

On August 14, 2015, the lower court entered a scheduling and case management order, wherein paragraph 5 stated as follows:

“5. Defendant may file dispositive motions by September 1, 2015. Plaintiffs are not precluded from asserting the untimeliness of any such motion.” (A.R. 627).

The Order is ambiguous and can be read in a manner which authorizes the Court to extend filing deadlines or can be read in a manner more consistent with *Mazzone II* in that the Court will

permit Defendant Pfizer to file the untimely motion and argue that “good cause” exists to allow them to file nearly two years past the statutory deadline. At the time, Defendant Pfizer and Plaintiffs both interpreted the paragraph to mean that the Court was permitting Defendant Pfizer to argue “good cause” and was not extending the statutory deadline through the issuance of the Scheduling Order. In fact, when they eventually filed their motion, Defendant Pfizer did not attempt to argue that the motion was timely filed. However, prior to Defendant filing their motion and out of an abundance of caution, Plaintiffs sought clarification from the Court.

On August 17, 2015, Plaintiffs filed a *Motion for Clarification* as to whether the Court was extending statutory and rule deadlines. Plaintiffs’ counsel stated the following:

Plaintiffs seek clarification as to whether this Court’s Scheduling Order is intended to extend the filing deadlines as established by rule and statute from October 16, 2013, the date Defendant’s Answer was filed, to September 1, 2015, the date specified in paragraph 5, or as to whether the Court intends to hold the deadline extension in abeyance until the parties have more fully presented their positions.

(A.R. 624).

On August 18, 2015, Defendant Pfizer filed a Response to Clarification essentially stating that clarification was not necessary. (A.R. 621). On August 19, 2015, Plaintiffs filed a Reply seeking clarification and again noting Plaintiffs’ objection to the extension of any statutory or rule deadlines for filing motions, and further citing *State ex. rel J.C. Michelle C. V. Mazzone*, 772 S.E.2d 336 (2015), (*Mazzone II*) as the need for clarification. (A.R. 617) On August 21, 2015, the Court denied the Plaintiffs’ Motion for Clarification. (A.R. 615).

Thereafter, on September 1, 2015, nearly two years after Plaintiffs filed their initial complaint, Defendant Pfizer filed two motions - *Defendant Pfizer’s Motion to Dismiss the Non-*

West Virginia Plaintiffs on the Grounds of Forum Non Conveniens pursuant to West Virginia Code §56-1-1a and *Defendant's Motion to Dismiss Texas Plaintiffs under Texas Law*. (A.R. 391 & 342). On September 30, 2015, Plaintiffs filed responses to these two motions - *Plaintiffs' Response to Dismiss the Texas Plaintiffs under Texas Law* and *Plaintiffs' Opposition to Pfizer's Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens*. (A.R. 297 & 341). On October 29, 2015, the Court heard oral argument. On May 13, 2016, Plaintiffs filed *Plaintiffs' Supplement to their Opposition to Pfizer's Motion to Dismiss for Forum Non Conveniens*. (A.R. 57). On May 27, 2016, Pfizer filed a *Response to Plaintiffs' Supplement*. (A.R. 51).

On June 16, 2016, the Court entered an *Order Granting Defendant Pfizer's Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens*, which is the subject of this Writ. (A.R. 35). On June 21, 2016, pursuant to Rule 28 of the Revised Rules of Appellate Procedure, Plaintiffs filed with the lower court a *Motion for Stay Pending Review in the Supreme Court of Appeals of West Virginia*. (A.R. 9). As of the date of this filing, the lower court has not issued a ruling on the motion.

III. SUMMARY OF ARGUMENT

On June 16, 2016, the Circuit Court entered an Order granting Defendant Pfizer's motion to dismiss Plaintiffs on the grounds of forum non conveniens pursuant to West Virginia Code §56-1-1a despite Defendant's motion being filed nearly two years after the statutory deadline, and over Plaintiffs' continual objections regarding the extension of any such deadlines.¹ (A.R. 35).

West Virginia Code § 56-1-1a governs motions to dismiss on forum non conveniens grounds.

¹ The Circuit Court Order contains a typographical error on the last page which incorrectly indicates that it was entered on June 16, 2015 instead of 2016.

Under § 56-1-1a(b), such a motion to dismiss is “timely if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule 12 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.”

In *State ex. rel J.C. Michelle C. V. Mazzone*, 772 S.E.2d 336 (2015), commonly and hereinafter referred to as *Mazzone II*, the Court found, citing West Virginia Trial Court Rule 26.12 which only applies to the mass litigation panel, that the panel has great discretion to implement case management orders even if “these rules conflict with other rules or statutes.” The Court further found that even if the panel’s Order extending the Rule 12 and statutory (§56-1-1a) deadline was erroneous that the Plaintiffs had failed to object at the time the order was entered. The majority of the Court never addressed the issue of “good cause” because they found that the motion was timely pursuant to the Scheduling Order, and that the Plaintiffs had waived any objection by failing to object to the Rule 12 extension in the Scheduling Order. The dissenting justices found that the motion was untimely filed, and that Defendant Pfizer had failed to show “good cause” for an extension of the statutory deadline.

With respect to some significant factual issues, this case differs significantly from *Mazzone II*. This case does not meet the definition of “mass litigation”. It is a single Complaint with multiple Plaintiffs. It has always been pending before the Circuit Court rather than the mass litigation panel. The panel is governed by separate and distinct procedural rules which grant the panel greater discretion than the rules governing a circuit court. Additionally, the Plaintiffs have always objected to the extension of the statutory deadline, prior to and after entry of the Scheduling Order.

In this case, the lower court erred in finding that it had the discretion, over the Plaintiffs’ objection, to extend the statutory deadline through a Scheduling Order. The lower court further

erred in finding that an inconvenient forum motion pursuant to West Virginia Code §56-1-1a could be preserved in an Answer and could be filed any time thereafter. Additionally, the lower court erred in finding that Defendant Pfizer acted in “good faith” in causing the delay. Furthermore, Defendant Pfizer did not act in “good faith” in causing the delay, and no “good cause” exists to extend the statutory deadline.

Plaintiffs’ Complaint in this case was filed on September 4, 2013. (A.R. 1216). The lower court’s Scheduling Order was entered on August 14, 2015. (A.R. 626). Plaintiffs’ counsel vehemently objected to any statutory or rule extensions prior to entry of the Scheduling Order. On August 11, 2015, three days before the Scheduling Order was entered, Plaintiffs’ counsel informed the judge that it was Plaintiffs position that they had missed the deadline to file a forum non conveniens motion and stated “they had 20 days to file and they didn’t do so.” (A.,R. 550). As discussed above, Plaintiffs sought clarification immediately after entry of the Scheduling Order. Also, as discussed above, after receiving no clarification, Plaintiffs, citing *Mazzone II*, again objected if it were the Court’s intent that the Scheduling Order would operate to extend statutory or rule deadlines. Defendant Pfizer filed its motion on September 1, 2015, having missed the statutory deadline by nearly two years without any showing of “good cause”.

It simply strains credulity for the lower court or for Defendant Pfizer to assert that Plaintiffs were in any manner agreeable to or that they acquiesced to the untimely filing of an inconvenient forum motion nearly two years after the statutory deadline had passed; after Plaintiffs had fought removal of this case to federal court; after Plaintiffs fought referral to the mass litigation panel; after Plaintiffs vehemently objected prior to and after the entry of the ambiguous Scheduling Order; and, especially after this honorable Court’s ruling in *Mazzone II*.

A statutory inconvenient forum motion cannot be preserved by including it in a litany of

affirmative defenses buried in an Answer. West Virginia Code §56-1-1a requires that a separate motion be filed with the Court prior to filing an Answer or concurrently with a Rule 12 motion so that the lower court, this honorable Court, the Plaintiffs and counsel do not have to spend the next three years addressing venue and jurisdictional issues; and, more importantly, Plaintiffs do not have to start litigation all over again three years later in a new forum which Defendant Pfizer claims does not recognize their cause of action. If the timely filed motion has merit, then there is no need for a Scheduling Order. A Circuit Court does not have the authority by rule or common law to amend statutory deadlines that have long passed through the issuance of a Scheduling Order.

Furthermore, Defendant Pfizer cannot show “good cause” for extending the period for the filing of such motion because no “good cause” exists. The facts and issues have not changed since the filing of this Complaint in September of 2013, and the removal/referral motions were resolved by June 2014. Defendant Pfizer filed the motion on September 1, 2015, fourteen months later, four months after this honorable Court’s decision in *Mazzone II*, and only after the lower court’s issuance of a non-appealable ambiguous Scheduling Order. An inconvenient forum motion pursuant to W.Va, Code §56-1-1a is due prior to or concurrently with an Answer or Rule 12 motion, and should have been filed (and resolved) by the lower court in October of 2013, not filed in September of 2015. Such motions should be filed before the entry of a Rule 16 Scheduling Order. For the reasons stated above and discussed more fully below, the Plaintiffs respectfully request that this honorable Court grant a writ of prohibition to prevent the lower court from enforcing its Order entered on June 16, 2016, dismissing the non-West Virginia plaintiffs on the basis of forum non conveniens.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this petition involves a clear error of law with respect to a Circuit Court

amending a statute and a clear abuse of discretion in finding “good cause” after nearly a two year delay, Plaintiffs request an oral argument pursuant to Rules 19 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. Prohibition is the Only Remedy to Correct a Clear Legal Error

Pursuant to W.Va. Code §53-1-1, a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the matter in controversy or having such jurisdiction exceeds its legitimate powers.” In that regard a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court, although having jurisdiction, exceeds its legitimate powers. See *State ex el. Abraham Linc. Corp. v. Bedell*, 216 W.Va. 99, 602 S.E.2d 542 (2004). “Prohibition will lie to prohibit a judge from exceeding his legitimate powers.” Syl.Pt. 2, *State ex rel. Winter v. MacQueen*, 161 W.Va. 30, 239 S.E.2d 660 (1977).

In determining whether to issue a writ, the Court examines five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Prohibition is necessary in this case because of factors one through four listed above and will

result in the Plaintiffs having an opportunity to have their claim heard.

B. The lower tribunal exceeded its legitimate authority by granting Defendant Pfizer's *Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens* pursuant to West Virginia Code §56-1-1a(b) despite Defendant having missed the statutory deadline by nearly two years and without a showing of "good cause" for extending the deadline.

Plaintiffs' Complaint in this case was filed on September 4, 2013. (A.R. 1216). The lower court's Scheduling Order was entered on August 14, 2015. (A,R. 626). Plaintiffs' counsel vehemently objected to any statutory or rule extensions prior to entry of the Scheduling Order. Plaintiffs sought clarification after entry of the Scheduling Order, and after receiving no clarification Plaintiffs again objected if it were the Court's intent that the Scheduling Order would operate to extend statutory or rule deadlines. Defendant Pfizer filed its motion on September 1, 2015, having missed the statutory deadline by nearly two years without any showing of "good cause".

West Virginia Code § 56-1-1a governs motions to dismiss on forum non conveniens grounds. Under § 56-1-1a(b), such a motion to dismiss is "timely if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule 12 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." Rule 12(b) motions "shall be made before pleading." *W.V. Rules of Civil Procedure, Rule 12(b)*.

On June 16, 2016, the lower court entered an Order granting Defendant Pfizer Inc.'s Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens. (A.R. 35). The lower court found that the motion was timely filed because the Court had the authority to extend the statutory deadline with the issuance of its Scheduling Order, and that even if the motion were untimely, then the Court would still find "good cause shown" because the Court neglected to enter a Scheduling Order, Defendant Pfizer had listed inconvenient forum as an affirmative defense in

its Answer, Defendant has been diligent in defending the case, and that the Plaintiffs could not show prejudice.

Plaintiffs respectfully request that this honorable Court issue a writ of prohibition with respect to the Order because the ruling is erroneous for the following reasons:

1. Pursuant to W.V. Code §56-1-1a(b) Defendant Pfizer's motion was untimely, and the Circuit Court lacks the authority to amend the statute through the issuance of a Scheduling Order; and,
2. No "good cause" exists which would warrant an extension of the statutory deadline.

Each point is addressed more fully below.

a. The Circuit Court lacks the authority to amend a statute.

The lower court erred in finding that "When this Court entered its Scheduling Order dated August 14, 2015, with dates for case management, the Court in effect, extended a 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." (A.R. 40). Furthermore, the time to file the motion had long since passed by the time the Scheduling Order was even issued as the Answers had been filed nearly two years earlier.

At the outset, it is important to note that the lower tribunal's Scheduling Order did NOT extend a deadline contained within the Rules of Civil Procedure; but, rather, the Order changed a deadline contained within a statute. The lower court can only interpret a statute, it cannot modify or amend a statute.

The lower court relies upon this Court's opinion in *Mazzone II* as authority for a Circuit Court to amend a statutory deadline through the issuance of a Scheduling Order. *State ex. rel J.C. Michelle C. V. Mazzone* , 772 S.E.2d 336 (2015). That reliance is misplaced. The *Mazone II* opinion involved a mass litigation case pending before the Mass Litigation Panel. In *Mazzone II*, the Court held that West Virginia Trial Court Rule 26.08(d) provides the Panel's lead presiding

judge the authority to enter case management orders which extend the Rule 12 deadline. The Court further held that “Indeed, the Panel has great discretion under our mass litigation rules to implement case management plans and orders even when they may conflict with another rule or statute.” West Virginia Trial Court Rule 26.12 states that “if these rules conflict with other rules or statutes, these rules shall apply.” The *Mazzone II* Court did NOT hold that a Circuit Court could amend a statute through the issuance of a Scheduling Order; and, there is no analogous rule under the Rules of Civil Procedure remotely comparable to W.V.T.C. Rule 26.12 that would grant a Circuit Court the authority to amend a statutory deadline.

The facts and applicable legal authority in *Mazzone II* are considerably different from the facts and issues in this case. West Virginia Trial Court Rule 26.01 established the Mass Litigation Panel, and Rules 26.01 through 26.12 pertain only to mass litigation pending before the Mass Litigation Panel. Unlike this case, in *Mazzone II*, civil actions were transferred to the Mass Litigation Panel pursuant to West Virginia Trial Court Rule 26.04 which defines “mass litigation” as ‘one or more civil actions pending in one or more circuit courts.’

Shortly after all of the actions were transferred to the Panel, the presiding judge, Judge Mazzone, entered a Case Management Order which specifically contained a “Rule 12 Deadline.” The Plaintiffs in that case did not object to the extension of the Rule 12 deadline being in the case management order. Prior to the deadline in the case management order, Defendant Pfizer filed a motion to dismiss for forum non conveniens. The Plaintiffs in that case filed a response brief objecting to the timeliness of the motion. The Mass Litigation Panel ruled that the motion was timely because it was filed prior to the Rule 12 deadline contained in its Case Management Order and never addressed the issue of “good cause”.

Whereas, this case is a *single* civil action with properly joined Plaintiffs as previously

determined by federal Judge Irene Berger and Justice Davis. West Virginia Trial Court Rule 26, *Mass Litigation*, and Rules 26.01-26.12 only apply to mass litigation pending before the Mass Litigation Panel. Defendant was unsuccessful in having this case referred to the Mass Litigation Panel because this case does not meet the definition of “mass litigation.” Unlike the mass litigation in *Mazzone II* in which the panel was a relatively new forum for the litigation at the time the case management order was entered, this case has remained in the same forum in which it was filed, the Circuit Court of McDowell County. Additionally, Plaintiffs in this case have strenuously objected to the extension of any Rule 12 deadline both prior to the lower court’s entry of the Scheduling Order and after the entry of the lower court’s Scheduling Order.

The most significant factor that renders *Mazzone II* unique and inapplicable to the instant cases lies in the fact that a Circuit Court does not have the authority to extend a West Virginia Rule of Civil Procedure Rule 12 deadline or the statutory deadline contained in West Virginia Code §56-1-1a(b) without a showing of good cause; whereas, West Virginia Trial Court Rule 26.12 (applicable only to the MLP) grants the Mass Litigation Panel great discretion even when they may conflict with another rule or statute.

Defendant Pfizer’s motion should have been filed in October of 2013 at the time a Rule 12 motion and/or an Answer was required to be filed. West Virginia Code §56-1-1a and Rule 12 motions relating to venue are required to be filed early in litigation so that the lower court, this honorable Court, the Plaintiffs and counsel do not have to spend the next three years addressing venue and jurisdictional issues; and, more importantly, so Plaintiffs do not have to start litigation all over again in a new forum three years later. If the timely filed motion has merit, then there is no need for a Scheduling Order. A Circuit Court does not have the authority by rule or common law to amend statutory deadlines that have long passed through the issuance of a Scheduling

Order. Such motions when timely filed *always* precede the issuance of a Scheduling Order.

Also, just as a matter of common sense, the Rules of Civil Procedure are in sequential order for a reason. The Rules set forth the manner in which to file a civil action and proceed in sequential order to trial and judgment. Rule 16 (Scheduling Order) of the West Virginia Rules of Civil Procedure is subsequent to Rule 12 motions because if any of the venue/jurisdictional issues have merit, then you never get to Rule 16.

Defendant Pfizer filed an Answer over two years ago on October 16, 2013. The law does not support the filing of motions to dismiss for forum non conveniens nearly two years after the filing of an answer. See Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(3)[4], at p. 374, n.1077 (4th ed. 2015) (“Under the statute a motion is timely if filed either concurrently or prior to the filing of either a motion pursuant to Rule 12 of the West Virginia Rules of Civil Procedure or a responsive pleading to the first complaint that gives rise for such a motion.”).

This Court in *Mazzone II* noted that “[t]ypically, we would not expect to see a Rule 12 motion deadline in litigation that has been pending, in part, for nearly two years at the time the Case Management Order was entered.” *Mazzone*, 772 S.E.2d at 342, n. 20. Later, the Court stated that the Panel properly heard the motions to dismiss for forum non conveniens only “under the unique circumstances of this particular litigation.” *Id.* at 345. One of those unique circumstances includes the fact that the case was a mass litigation that was newly before the Panel as opposed to a single civil action which has always been pending before the Circuit Court of McDowell County.

Finally, counsel for Defendant Pfizer during oral argument and briefing below conceded that the motion was not timely filed, and instead relied upon arguing that Defendant had “good cause” for missing the statutory deadline by almost two years.

Pursuant to W.V. Code §56-1-1a(b) Defendant Pfizer's motion was untimely, and the Circuit Court committed error in holding that it had the authority to amend the statutory deadline contained in West Virginia Code §56-1-1a(b) by issuance of a Scheduling Order.

b. No "good cause" exists that would warrant the extension of the statutory deadline.

The lower court further erred in holding that even if the motion were untimely filed, then the court would still find "good cause shown" because Defendant Pfizer had listed inconvenient forum as an affirmative defense in its Answer, Defendant has been diligent in defending the case, and that the Plaintiffs could not show prejudice. The lower court appears to have adopted Defendant Pfizer's argument below that even though Defendant caused the delay, it should not be held against them; that Plaintiffs' counsel never informed them that they had to timely file the motion; that having Plaintiffs start over three years later in a new forum that Defendant Pfizer asserts does not recognize their cause of action is not prejudicial; and, that with the recent changes in the Legislature, Plaintiffs could not prevail had they filed their Complaint today.

Citing *Caruso* and *Mazzone II*, the lower tribunal erroneously found that the procedural history and circumstances of this case establish good cause for extending the statutory deadline. *Caruso v. Pearce*, 678 S.E.2d 50 (2009). As previously discussed, this case differs procedurally from *Mazzone II* because unlike the plaintiffs in that case, this case has always remained in the circuit court, and any issues involving transfer to the mass litigation panel and remand from federal court were decided in June of 2014, fourteen months prior to Defendant Pfizer filing its motion on September 1, 2015, and nearly two years after the initial Complaint had been filed in this case.

Relying upon the holding in *Caruso*, the lower court found that the Defendant's untimeliness was the Court's fault for not issuing a Scheduling Order. (A.R. 39-40). The lower court misconstrued the ultimate holding in *Caruso* that a dismissal on procedural grounds should

only be granted in egregious cases to support its position that Defendant Pfizer's inactivity should be rewarded with dismissal of the Plaintiffs' case.

The Court in *Caruso* reversed the lower court's dismissal of an action due to inactivity pursuant to Rule 41(b) of the Rules of Civil Procedure, and found that part of the plaintiff's neglect was due to the Court's failure to enter a Scheduling Order. *Id.* at 55-56. It is somewhat ironic that the lower tribunal in this case would use *Caruso* as legal authority for dismissal of this action when the Court in *Caruso* went to great lengths to conclude that the harsh sanction of dismissal should only be used in egregious cases. The majority opinion further noted that Rule 16 does not specify when a scheduling order should be entered, but that it should be entered within one to two months after defendant has filed an Answer². The deadline to file a motion for inconvenient forum pursuant to §56-1-1a(b) is either concurrent with or prior to the filing of an Answer which occurs one to two months before the majority in *Caruso* found that a scheduling order should be entered.

In her concurring opinion in *Caruso*, Justice Workman agrees that the inactivity was not egregious enough to warrant dismissal; however, she did not believe the lower court was partly responsible for the delay because it had not yet entered a Scheduling Order, and that the majority had unfairly transferred part of the responsibility for the delay from the lawyer to the Court. Justice Davis in her dissent also points out that the parties are not prohibited from moving forward because there is no Scheduling Order, and that when attorneys do not attend to their interests in Court that they must suffer the consequences.

After the lower court in this case erroneously found that Defendant Pfizer's neglect in timely filing the motion was the Court's fault for not entering a Scheduling Order, the lower court then contradicts that finding with the next finding that "good cause" exists to extend the statutory deadline

² Citing Franklin D. Cleckley, et al., *Litigation Handbook on WV Rules of Civil Procedure*, Rule 16(b)(2) (3rd Edition 2008).

because Defendant Pfizer had been so diligent in defending this action.(A,R. 40).

The lower tribunal clearly erred because the facts it relied upon to find a showing of “good cause” actually illustrate that no good cause exists to warrant the extension of the statutory deadline by nearly two years.

The procedural history of this case reflects that Defendant Pfizer caused the delay in this case moving forward to trial. The lower court’s finding that “good cause” exists because this litigation has taken a long route ignores the fact that the motion should have been filed at the beginning of this litigation, that Defendant Pfizer did not act in good faith in causing the delay, that Defendant Pfizer waited for more than a year after its initial venue and jurisdictional motions had been denied to file the forum non conveniens motion; and, that Defendant Pfizer waited more than four months after the opinion in *Mazzone II* was issued, a case in which Defendant had the same counsel.

With the exception of the transfer of the litigation to the mass litigation panel, this litigation has followed essentially the same route with the same Defendant and counsel for the Defendant as the Zolofit litigation. Based upon that litigation, Pfizer knew or should have known that the U.S. Southern District Court for West Virginia was going to remand this case, and that the West Virginia Supreme Court of Appeals would find that this case did not meet the definition of “mass litigation” for referral to the panel. Pfizer cannot benefit from a delay in litigation that they caused for filing motions they knew or should have known would not be granted. Furthermore, Pfizer withdrew its motion for referral with the Supreme Court of Appeals in June of 2014 and then waited more than a year later to file the inconvenient forum motion.

Defendant Pfizer’s lack of good faith in causing the initial delay in this litigation becomes more apparent when the time line in this litigation (Lipitor) is compared against the background of the Zolofit litigation:

9-4-13 - Lipitor Complaint filed (A.R. 1169)

10-3-13 - Amended Lipitor Complaint filed

10-11&15 -13 - Lipitor - Pfizer filed 36 separate removal actions with the U.S. Southern Dist. Court

{{Pfizer filed this removal motion after federal district Judge Chambers had remanded the Zolofit litigation back to Wayne Circuit Court a year earlier on 9-25-12 on the identical Rule 3(a) issue, and after the Fourth Circuit had refused the appeal on 7-12-13}}³

10-16-13 – Pfizer files 4 separate Answers in Circuit Court for NY Plaintiffs (A.R. 985)

12 -19- 13 - Federal Dist. Judge Berger Remands Lipitor action for the same reason Judge Chambers did in the Zolofit litigation (A.R. 973)

3-4-14 - Pfizer moves for Referral of Lipitor litigation to the mass litigation panel (A.R. 780)

{{Pfizer filed this motion after Justice Benjamin had denied referral in the Zolofit litigation on 9-24-13 on the identical Rule 3(a) issue}}

7-11-14 - Pfizer withdraws motion for referral following the *Mazzone I* opinion and additional inquiry by Justice Davis regarding the identical Rule 3(a) issue (A.R. 759)

4-10-15 - *Mazzone II* opinion is issued by the Court regarding the Zolofit litigation

8-14-15 - Scheduling Order is entered in the Lipitor litigation by the lower court (A.R. 626)

9-1-15 - Defendant Pfizer files §56-1-1a motion to dismiss for forum non conveniens in the Lipitor litigation (A.R. 442).

The above timeline illustrates that Defendant Pfizer should have known its jurisdictional and venue challenges would be unsuccessful; however, even if the lower court was correct in its finding that Defendant Pfizer acted in “good faith”, West Virginia Code §56-1-1a(b) requires a finding of “good cause” shown for extending the statutory deadline for filing a forum non conveniens motion. “Good faith” does not equate to “good cause shown”.

³ *J.C. ex rel. Cook v. Pfizer, Inc.*, Nos. 3:12-cv-04103 (S.D. W.Va. Sept. 25, 2012).

It's even more difficult for Defendant Pfizer to show "good cause" for missing a statutory deadline by nearly two years because they are represented by over twenty highly skilled zealous attorneys. In this case, no good cause can be shown, because no good cause exists. The facts and legal issues in this case remain the same as they were on the date the initial Complaint was filed. The inconvenient forum motion should have been filed in October of 2013 not September of 2015.

Since filing its Answer in federal Court on October 16, 2013, Pfizer only mentioned this motion for the first time during a phone call after the *Mazzone II* opinion was issued (May 2014), at which time Plaintiffs' counsel said to Defendant's counsel that the time had passed for them to file the motion. The parties did not begin to negotiate a scheduling order until after the November 21, 2014 status conference. By that time Pfizer's time to file the motion was more than a year late. Pfizer's allegation that Plaintiffs' counsel ever *agreed* to the inclusion of a time line in which to file forum non conveniens motions is grossly false and offensive. It is nonsensical for Defendant Pfizer to assert that Plaintiffs were in any manner agreeable or acquiesced to the untimely filing of an inconvenient forum motion nearly two years after the statutory deadline had passed; after Plaintiffs had fought removal of this case to federal court; after Plaintiffs fought referral to the mass litigation panel; after Plaintiffs vehemently objected prior to and after the entry of the ambiguous Scheduling Order; and, especially after this honorable Court's ruling in *Mazzone II*.

Additionally, the lower court erred in finding that notice of intent to make a motion to dismiss for forum non conveniens within an Answer supports a showing of good cause. (A.R. 339). Setting aside the fact that forum non conveniens is not an affirmative defense, the inclusion of forum non conveniens as an affirmative defense in the Answer in no way constitutes a motion and cannot be construed as creating good cause for filing such a motion almost two years after it is statutorily

required to have been filed.⁴ West Virginia Code §56-1-1a does authorize preservation of a forum non conveniens motion by including it in an Answer. Such a theory is inconsistent with the deadline established by the statute, and is inconsistent with the policy reasons for having the deadline to resolve venue issues early in the litigation.

Furthermore, the lower court erroneously shifted the burden to Plaintiffs to show prejudice. It is Pfizer's burden to show good cause for an extension of the statutory deadline. However, Plaintiffs will be prejudiced by dismissal. Setting aside the exorbitant amount of time, expense and resources that have been utilized to keep this action in the original forum in which it was filed, dismissal would severely handicap the Plaintiffs' ability to successfully present their claim. Dismissal will result in Plaintiffs having to start litigation all over again three years later in a new forum, one which Pfizer asserts does not recognize their cause of action.

Plaintiffs are women who have deteriorating health due to diabetes which they allege was caused by the Defendant's drug Lipitor; their action has been pending in the Circuit Court of McDowell County for almost three years. If they are required to start over again and Defendant files all of their procedural motions in the new forum, then it could be close to seven or eight years before they have an opportunity to have their claim heard, which highlights the importance of venue and jurisdiction issues being resolved early in the litigation.

C. The lower tribunal exceeded its legitimate authority by granting Defendant Pfizer's *Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens* pursuant to West Virginia Code §56-1-1a(8) when the alternate forum does not provide an adequate or sufficient remedy for the Texas Plaintiffs.

⁴ After Defendant Pfizer included in its *Motion to Dismiss for Forum non conveniens* that one of the reasons their untimely motion should be granted is because they included it in their *Answer*, Plaintiffs filed a *Motion for Default* arguing that Pfizer had only filed 4 separate Answers in the Circuit Court relating to the New York Plaintiffs, and that because the federal court lacked subject matter jurisdiction, the Answers filed with that Court were void and could therefore not be transferred to the Circuit Court, Plaintiffs then argued that Pfizer should ask the Court for leave to file an untimely Answer (A.R. 105). Although counsel for both sides argued this motion as a case of first impression in West Virginia as to whether the filing of a federal court Answer suffices as a state court answer, the judge did not address the issue, but rather upon his own initiative, ruled that Pfizer's 4 circuit court Answers were sufficient to cover all Plaintiffs (A.R. 75).

The lower tribunal exceeded its legitimate authority by granting Defendant Pfizer's *Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens* pursuant to West Virginia Code §56-1-1a(8) when the alternate forum does not provide as adequate or sufficient remedy for the Texas Plaintiffs. "When the remedy provided in the alternate forum is so "clearly inadequate or unsatisfactory that it is no remedy at all", then the alternate forum ceases to exist for purposes of forum non conveniens." Syl. Pt. 9, *Mace*, 227 W.Va. 666, 668, 714 S.E.2d 223, 225.

During a hearing in the lower court on August 11, 2015, the following exchange took place between Plaintiffs' counsel and Judge Murensky:

Mr. Hahn: Well, based upon the *Mazzone* opinion, Judge, I read that that the Supreme Court was suggesting that the Texas Plaintiffs were orphans, if you will, and needed a forum, and that's why West Virginia was open to granting them a forum. (A.R. 577).

The Court: Well, I'll probably talk to Judge Mazzone and find out how much of an orphan Texas is. (A.R. 578).

By Order entered on October 21, 2014, by James Mazzone, Lead Presiding Judge, Zoloff Litigation, the mass litigation panel unanimously denied Defendant's motion to dismiss for forum non conveniens for a Texas and a Michigan plaintiff because the panel found that the remedy in those states was so clearly inadequate that it was no remedy at all, and therefore no alternate forum existed for Texas or Michigan. (A.R.375-77). The panel found that although the Texas claim for failure to warn was not subject to a public policy analysis by virtue of W.Va. Code §55-8-16, their other claims can still be reviewed under the common law of West Virginia. (A.R. 376). The panel came to this conclusion after counsel for the Defendant admitted during the hearing that every claim that they had in the complaint is precluded under Texas law. The causes of action in the Zoloff litigation are the same as the ones in this litigation.

During a hearing that lead to that ruling, the following exchange occurred:

Judge Swope: What I'm trying to find out, all these claims they filed – I use to be a plaintiff's lawyer, you file strict liability, simple negligence, you got a breach of warranty, et cetera, so you go through these. I don't know. I want to know what claims they have alleged that you say are per se excluded in Texas and Michigan. So, I'll go back to the beginning, and that is on Page 25. Is strict liability excluded in Texas and Michigan?

Ms. Armstrong: Yes.

Judge Swope: Is failure to warn precluded in Texas and Michigan?

Ms. Armstrong: Yes.

Judge Swope: Is design defect precluded in Texas and Michigan?

Ms. Armstrong: Yes.

Judge Swope: Count 7. Gross negligence.

Ms. Armstrong: Yes.

Judge Swope: Count 8. Loss of consortium and pecuniary loss.

Ms. Armstrong: It's a derivative claim so it would be excluded.

Judge Swope: So every ground that they have alleged in this complaint – is this complaint the same as the other complaint?

Mr. Itkin: Yes, your honor, substantially.

Judge Swope: Every claim that they have raised in this complaint is precluded under Texas and Michigan laws?

Ms. Armstrong: Yes.

(A.R. 376-77, Paragraph 63 of the MLP Order)

Counsel for Defendant conceded in virtually identical litigation to the case at bar and counsel admitted in this specific litigation that Texas does not provide an adequate alternate forum, and that the Texas plaintiffs should not be dismissed pursuant to West Virginia Code §56-1-1a(8). Although Plaintiffs' counsel informed the lower court of Plaintiffs' belief that the Texas cases were orphan cases, Plaintiffs' counsel regrettably failed to include this specific argument in their forum non conveniens brief to the lower court as an additional ground to support Plaintiffs' position. However, September 1, 2015, Defendant Pfizer simultaneously filed with their motion to dismiss for forum non conveniens, a motion to *Dismiss the Claims of Texas Plaintiffs under Texas Law and Notice of Hearing*, noticing the motion for the same day the forum non conveniens motion was to be heard. On September 30, 2015, Plaintiffs' counsel also filed two separate motions - *Plaintiffs Memorandum of Law in Response to Defendant's Motion to Dismiss the Claims of Texas Plaintiffs under Texas law*

and *Plaintiffs' Opposition to Pfizer's Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens*. On October 29, 2015, the Court heard oral argument with respect to the forum non conveniens motion, but did not hear argument regarding the dismissal of Texas Plaintiffs under Texas law.

Additionally, in their motion to dismiss for forum non conveniens, Defendant Pfizer admits that the mass litigation panel concluded that any remedy under Texas law was “so clearly inadequate or unsatisfactory that it is no remedy at all.” (Quoting *Mace v. Mylan Pharm., Inc.*, 227 W.Va. 666, 668, 714S.E.2d 223,225 (2011) (A.R. 464). However, they argue that the panel did not have the opportunity to apply H.B. 2276 (Feb. 13, 2015) in their analysis in *Zolofit*. This argument fails, because this amendment cannot be retroactively applied to these Plaintiffs who filed their Complaint in September of 2013. Defendant Pfizer filed a completely separate motion to dismiss the Texas Plaintiffs under Texas Law, which is more suitable as a summary judgment motion when it becomes ripe, arguing that any case filed in Texas will be dismissed, citing numerous Texas cases some of which are Rule 12(b) dismissals and further stating “Texas law bars all of the Texas Plaintiffs’ claims in this action.” (A.R. 402).

Courts in West Virginia have historically ruled that Plaintiffs should have an opportunity to have their case decided on the merits of their claim, and that dismissal is a harsh remedy that should be granted with extreme caution and scrutiny. Opposing counsel cannot plausibly argue that Texas provides those Plaintiffs with an adequate and fair opportunity to be heard after filing their motion to *Dismiss the Claims of Texas Plaintiffs under Texas Law* in which they vehemently argue that these claims will not survive if filed in Texas.

D. The lower tribunal exceeded its legitimate authority by granting Defendant Pfizer’s Motion to Dismiss the Non-West Virginia Plaintiffs on the Grounds of Forum Non Conveniens pursuant to West Virginia Code §56-1-1a(b) by not considering the West Virginia Plaintiffs. Plaintiffs who have been properly joined pursuant to Rule 20(a) of the WV Rules of Civil Procedure cannot be severed by a Circuit Court for purposes of

jurisdiction and venue.

This case is far more analogous to the Zoloft civil action prior to its referral to the Mass Litigation Panel. When Zoloft was a single civil action with multiple plaintiffs pending before the Circuit Court of Wayne County, Pfizer filed a motion to dismiss for forum non conveniens as to the non-resident Plaintiffs. Circuit Court Judge Young denied Pfizer's motion. (A.R. 380-386). Judge Young included the West Virginia Plaintiffs in his analysis because it was a single civil action with multiple plaintiffs. Pfizer appealed this decision to the West Virginia Supreme Court of Appeals who issued an Order summarily dismissing the appeal, and sending it back to the Circuit Court. (A.R. 389). Pfizer also filed a motion for fraudulent joinder in the federal district court which was denied and appealed to the Fourth Circuit where it was once again denied and remanded back to the Circuit Court of Wayne County. *State ex rel. E.D. Pfizer*, 722 F.3d 574 (4th Cir. 2013).

Like that civil action case, the case pending before this court is a single civil action with multiple plaintiffs as the Supreme Court and the Fourth Circuit Court have previously ruled regarding a civil action pending before a Circuit Court. In *Mazzone II*, the Zoloft litigation got transferred to a new forum, the mass litigation panel, that is governed by a set of different rules that give the panel broader discretion to resolve "mass litigation issues; whereas, the case at bar has always been in the Circuit Court.

Because jurisdiction and venue issues are addressed shortly after litigation has been filed in a Circuit Court pursuant to Rule 12(b) and WV Code 56-1-1(b), plaintiffs who have been properly joined pursuant to Rule 20(a) should be treated as one case with multiple plaintiffs for purposes of jurisdiction and venue, as Judge Chambers and Judge Berger previously ruled regarding jurisdiction (diversity/subject matter jurisdiction), and Justice Benjamin and Justice Davis ruled regarding venue (transfer to mass litigation panel).

Therefore, the lower tribunal erred in not including the West Virginia Plaintiffs in his

consideration of Defendant Pfizer's motion for forum non conveniens, and the impact that dismissal would have on the West Virginia Plaintiffs. When this case is analyzed as it should be for venue and jurisdictional issues, a single action with multiple Plaintiffs, then all eight factors considered pursuant to WV §56-1-1a weigh in favor of the Plaintiffs. To do otherwise, could mean dismissal of all Plaintiffs. West Virginia Plaintiffs at a minimum will have to fight Defendant on yet another removal action; Texas Plaintiffs do not have a forum to be heard in Texas; and, New York Plaintiffs would have to battle Pfizer, one of the world's largest and wealthiest pharmaceutical companies, in Pfizer's backyard.

VI. SUMMARY

The Complaint in this case was filed almost three years ago in September 2013. West Virginia Code § 56-1-1a governs motions to dismiss on forum non conveniens grounds. Under § 56-1-1a(b), such a motion to dismiss is "timely if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule 12 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 filing of such a motion."

On September 1, 2015, Defendant Pfizer filed their motion almost two years past the statutory deadline. The Circuit Court erred in ruling that it had the authority to amend the statute through the issuance of a Scheduling Order. The Circuit Court cannot modify or amend a statute. The Circuit Court further erred in finding that "good cause" exists to extend the statutory deadline by nearly two years despite Plaintiffs repeated objections. Additionally, no good cause exists that would warrant nearly a two year extension of the statutory deadline. The facts and issues are the same now as they were when the Complaint was filed. Furthermore, Defendant Pfizer concedes that Texas does not provide an adequate or sufficient forum for Plaintiffs.

Wherefore, for the foregoing reasons, Plaintiffs request a writ prohibiting enforcement of

the Circuit Court's June 16, 2016 Order, and, under West Virginia Rule of Appellate Procedure 16(j), a stay of all proceedings in the underlying action.

Respectfully Submitted,
Counsel for Petitioners (Plaintiffs),



J. Jeaneen Legato WVSB 6978
Legato Law, PLLC
405 Capitol Street, Suite 701
Charleston, WV 25301
(304)340-9910 Cell: (304) 549-8488

H. Blair Hahn (*Pro Hac Vice*)
Christiaan A. Marcum (*Pro Hac Vice*)
Aaron R. Dias (*Pro Hac Vice*)
Richardson, Patrick, Westbrook & Brickman
1037 Chuck Dawley, Blvd., Bldg. A
Mount Pleasant, SC 29464
(843) 727-6500

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. _____

STATE OF WEST VIRGINIA ex rel.
BETTY J. ALMOND
and THEODORE H. ALMOND, et al.,
Petiitioners, (Plaintiffs, below)

v.

Civ. Action No. (Below) 13-C-159
McDowell County Circuit Court

THE HONORABLE RUDOLPH
MURENSKY, McDowell County
Circuit Court Judge, and
PFIZER INC.,
Respondents. (Defendant below)

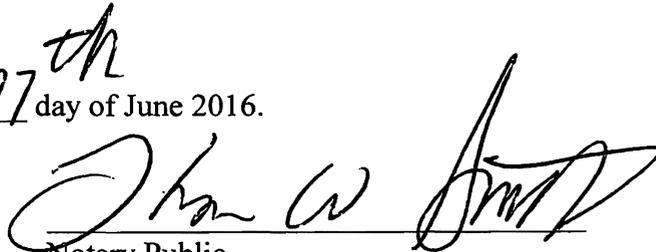
VERIFICATION

In accordance with the requirements of W. Va. Code §53-1-3, the undersigned hereby verifies that the foregoing Petition constitutes a fair and correct statement of the proceedings in the civil action identified in this Petition, based upon my information and belief.

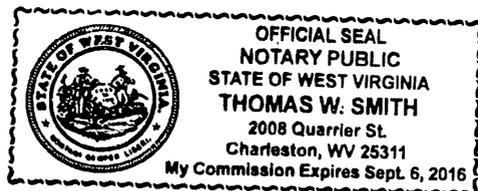


J. Jeanen Legato, Esquire
Counsel for Petitioners

Taken, subscribed and sworn to on this 27th day of June 2016.



Notary Public



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MURENSKY, McDowell County
Circuit Court Judge, and
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CERTIFICATE OF SERVICE

I, J. Jeaneen Legato, counsel for the Plaintiffs do hereby certify that a copy of the foregoing *Appendix Volumes 1- 3 of Verified Petition for Writ of Prohibition* was served upon the honorable Rudolph Murensky, Circuit Judge, and counsel for Respondent on the 27th day of June, 2016, by regular mail, postage prepaid, addressed as follows:

Erik W. Legg
Michael Farrell
Farrell, White & Legg PLLC
P.O. Box 6457
Huntington, WV 25772-6457

Mark S. Cheffo
Quinn Emanuel Urquhart
& Sullivan, LLP
51 Madison Avenue
New York, NY 10010

Honorable Rudolph J. Murensky, II
McDowell County Circuit Judge
P.O. Box 768
Court & Wyoming Streets

Welch, WV 24801

A handwritten signature in cursive script that reads "J. Jeaneen Legato". The signature is written in black ink and is positioned above a horizontal line.

Counsel for Plaintiffs

J. Jeaneen Legato (WVSB #6978)

Legato Law, PLLC

405 Capitol Street, Suite 701

Charleston, West Virginia 25301

Telephone: (304) 340-9910

Facsimile: (304) 340-9915