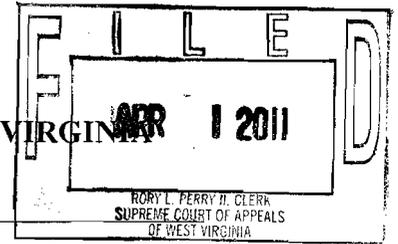


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 11-0440

STATE OF WEST VIRGINIA
ex. rel. MYLAN TECHNOLOGIES, INC., f/k/a BERTEK, INC., MYLAN, INC., MYLAN
PHARMACEUTICALS, INC.,

Petitioners,

v.

THE HON. JENNIFER BAILEY;
and WILLIAM DAVIS HALL, individually and as Next of Kin of
HARRIET ELIZABETH HALL, Deceased, and as Personal Representative
of The Estate of HARRIET ELIZABETH HALL, Deceased,

Respondents.

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF PROHIBITION

On Petition for a Writ of Prohibition to the Circuit Court of Kanawha County
(Civil Action No. 09-C-1777)

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RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Respondent William Davis Hall, Individually and as Personal Representative of the Estate of Harriet Elizabeth Hall, Deceased (“Respondent Hall”), by and through his counsel, respectfully files this response to Petitioners, State of West Virginia *ex rel.* Mylan Technologies Inc., Mylan Inc., and Mylan Pharmaceuticals, Inc.’s (“Mylan Defendants”) (collectively “Petitioners”) Petition for Writ of Prohibition.

I. QUESTIONS PRESENTED

1. Did the Circuit Court of Kanawha County properly consider Petitioners’ residence and contacts in West Virginia when deciding that Petitioners would not face substantial injustice under W.Va. Code § 56-1-1a if the case remains in West Virginia?

2. Is the Circuit Court of Kanawha County’s denial of Petitioners’ Motion to Dismiss proper given that Petitioners have brought and defended lawsuits in West Virginia?

3. Did the Circuit Court of Kanawha County provide due deference to Respondent Hall’s choice of forum pursuant to W.Va. Code § 56-1-1a?

4. Is the Circuit Court of Kanawha County’s denial of Petitioners’ Motion to Dismiss proper given that the private and public interest factors set forth in W.Va. Code § 56-1-1a favor maintaining this case in West Virginia?

5. Did Petitioners meet their burden of demonstrating that the Circuit Court of Kanawha County’s denial of Petitioners’ Motion to Dismiss amounts to a “clear cut legal error” requiring the issuance of a Writ of Prohibition by this Court?

II. STATEMENT OF THE CASE

Respondent Hall filed suit in the Circuit Court of Kanawha County, West Virginia against the Mylan Defendants seeking damages associated with the wrongful death of his sister,

Harriet Elizabeth Hall (“Mrs. Hall”), following her use of the Mylan Fentanyl Transdermal System® (“Fentanyl Patch”). The Fentanyl Patch used by Mrs. Hall was designed, manufactured, marketed, promoted, sold and distributed by the Mylan Defendants, two of which are West Virginia corporations.

The Mylan Defendants filed a Motion to Dismiss under the doctrine of *forum non conveniens* or, in the alternative, failure to state a claim upon which relief can be granted as to several of Respondent Hall’s causes of action. Following oral argument, Respondent Honorable Jennifer Bailey of the Circuit Court of Kanawha County, West Virginia (“Respondent Bailey”) denied the Motion to Dismiss based on *forum non conveniens*. Petitioners now seek a Writ of Prohibition from this Court prohibiting the Circuit Court of Kanawha County from taking any further action in the underlying case and ordering dismissal thereof pursuant to W.Va. Code § 56-1-1a.

A. STATEMENT OF JURISDICTION

This Court has original jurisdiction in prohibition pursuant to Rule 16 of the West Virginia Revised Rules of Appellate Procedure and W.Va. Code § 51-1-3. However, Petitioners’ basis for filing the Petition for Writ of Prohibition is entirely inappropriate. A Writ of Prohibition may be filed only in cases of “usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers.” W.Va. Code § 53-1-1.

It is well settled that a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. *See State ex rel. Peacher v. Sencindiver*, 233 S.E.2d 425, 426 (W. Va. 1977) (“We cannot issue prohibition when the action of the trial court could be attacked as an abuse of discretion”); *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 697 S.E.2d 139,

146 (W. Va. 2010) (“[W]e remain mindful that the threshold for issuing a writ of prohibition is greater than a finding of abuse of discretion”).

The decision whether to grant or dismiss on *forum non conveniens* grounds is within the “sound discretion of the trial court.” *Norfolk & W. Ry. v. Tsapis*, 400 S.E.2d 239, 245 (W. Va. 1990); see *Hodson v. A.H. Robins Co.*, 715 F.2d 142, 144 (4th Cir. 1983) (“Whether a motion to dismiss on the ground of *forum non conveniens* should be granted or denied is a matter entrusted to the discretion of the district judge”); *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 314 (4th Cir. 1984) (“Our only role is to determine whether or not the action of the district court was so unreasonable or so arbitrary as to be beyond the range of its discretion”).

In denying Petitioners’ Motion to Dismiss, Respondent Bailey acted within her discretion and Petitioners cannot establish an abuse of such discretion. The purported “circuit split” does not provide a basis for prohibition. It is common that circuit courts may reach different conclusions when confronted with similar issues. However, if each time such a split required the intervention of an appellate court, the courts would be overwhelmed. This is particularly true in this instance where the evidence overwhelmingly favors retaining this lawsuit in West Virginia. See *United States v. Warlick*, 742 F.2d 113, 117 (4th Cir. 1984) (holding that although “there is a split of authority on this point it is unnecessary for us to fact it at this time” because the “evidence and the law supporting conviction are overwhelming”).

B. PARTIES

Respondent agrees with Petitioners’ description of the parties as set forth in their Petition for Writ of Prohibition.¹

¹ As corporate discovery has not yet taken place in this lawsuit, Respondent cannot affirm or deny Petitioners’ representations regarding the locations of the manufacturing and distribution of the Fentanyl Patch are accurate.

C. STATEMENT OF FACTS

The Fentanyl Patch is a prescription drug indicated for the treatment of pain. *See* Plaintiff's Original Complaint and Demand for a Jury Trial, attached hereto, Appendix at 45, ¶11. Its active ingredient, fentanyl, is an extremely powerful controlled substance which is delivered to the user transdermally. *See id.* at 45, ¶11-12. If properly designed and manufactured, the Fentanyl Patch should release a certain amount of fentanyl at a certain rate producing a controlled level of fentanyl in the user's blood, thus preventing overdose. *See id.* At all relevant times, the Mylan Defendants knew or should have known that their product was defective in that the Fentanyl Patch leaked and/or delivered lethal levels of fentanyl to its users. *See id.* at 46, ¶13.

Mrs. Hall was prescribed the Fentanyl Patch by her doctor for chronic back pain. *See id.* at 46, ¶16. Mrs. Hall filled her prescription on August 20, 2007 and was found dead on September 29, 2007. *See id.* She had a lethal amount of fentanyl in her blood at the time of her death. *See id.* Subsequently, Respondent Hall brought this action to recover damages for the wrongful death of Mrs. Hall resulting from the Mylan Defendants' defective product. *See generally*, Complaint, Appendix at 43-75.

Petitioners concede that Mylan Technologies Inc ("MTI") is a West Virginia corporation and Mylan Pharmaceuticals Inc ("MPI") is a West Virginia corporation with its headquarters in Morgantown, Monongalia County, West Virginia. *See* Petitioners' Petition for Writ of Prohibition, attached hereto, Appendix at 9-10. Petitioners also concede that these West Virginia corporations manufactured and distributed the Fentanyl Patch. *Id.*

D. PROCEDURAL HISTORY

Respondent Hall filed suit in the Circuit Court of Kanawha County, West Virginia on September 23, 2009. *See* Appendix at 43. On October 22, 2009, the Mylan Defendants, two of which are West Virginia corporations, moved the trial court to dismiss Respondent Hall's Complaint on the grounds of *forum non conveniens* or, in the alternative, failure to state a claim upon which relief can be granted as to several of Respondent Hall's causes of action. *See* Defendants' Motion to Dismiss Complaint and Brief in Support of Motion to Dismiss, attached hereto, Appendix at 61. Respondent Bailey heard oral argument on the motion on October 1, 2010. *See* Motions Hearing Transcript, Appendix at 110.

Petitioners have presented no evidence that Respondent Bailey failed to considered the various *forum non conveniens* factors as set forth in W.Va. Code § 56-1-1a. Respondent Bailey denied Petitioners' motion on *forum non conveniens* grounds in part because MTI and MPI are West Virginia corporations and, as such, could not demonstrate substantial injustice in having to defend the lawsuit in West Virginia. *See* Order, *Hall, et al. v. Mylan et al.*, No. 09-C-1777, Circuit Court of Kanawha County, attached hereto, Appendix at 126. Respondent Bailey further indicated that while "there will be some testimony from persons, perhaps, who reside in other states", this can be "addressed in this day and age with not a whole lot of inconvenience or where parties can agree that discovery will take place." *See* Appendix at 118.

III. SUMMARY OF THE ARGUMENT

Petitioners have not met what is indisputably their significant burden of demonstrating the need for a writ of prohibition in this case. There is ample evidence to support Respondent Bailey's denial of the Mylan Defendants' Motion to Dismiss. First and foremost, it is undisputed that two of the Mylan Defendants responsible for the manufacturing and distribution of the

Fentanyl Patch, MPI and MTI, are West Virginia corporations. *See* Appendix at 10. Petitioners have conceded in past litigation that West Virginia is a convenient forum. *See Abbott Labs. v. Mylan Pharms., Inc.*, 2006 U.S. Dist. LEXIS 13782, at * 22-24 (N.D. Ill. 2006) (Mylan requested that the lawsuit be transferred to West Virginia because “it would be more convenient to conduct the litigation in West Virginia” and the Court observing that “this action would be more convenient for Mylan if it were pending in West Virginia - Mylan’s home district”); *In re Buspirone Patent Litig.*, 162 F. Supp. 2d 686, 687 (J.P.M.L. 2001) (“The Mylan parties support selection of the Northern District of West Virginia as transferee district for the MDL-1410 patent actions”).

Moreover, the Mylan Defendants are currently litigating numerous product liability lawsuits filed by nonresident plaintiffs in West Virginia involving injuries they sustained following their use of the generic drug Digitek in *In re Digitek Product Liability Litigation*, MDL No. 1968,. *See* Appendix at 116-117. The reason behind the consolidation of the lawsuits in West Virginia was Petitioners’ headquarters in Morgantown, West Virginia. *See id*; *In re Digitek Prods. Liab. Litig.*, 571 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008) (holding that the “Southern District of West Virginia will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation” because “Mylan’s principal place of business is in West Virginia and documents and witnesses will likely be found there.”). At no point did the Mylan Defendants object to the consolidation or ask that the nonresident plaintiffs’ lawsuits be remanded to state court. *See* Appendix at 116.

The Mylan Defendants have also filed cases in West Virginia. *See Mylan Pharms., Inc. v. Thompson*, 268 F.3d 1323, 1328 (Fed. Cir. 2001) (Mylan filed an action in the United States District Court for the District of West Virginia for a declaration of noninfringement and

invalidity); *Mylan Pharms., Inc. v. United States FDA*, 454 F.3d 270, 274 (4th Cir. 2006) (Mylan brought suit against the FDA in the district court for the Northern District of West Virginia). Yet the Mylan Defendants now disingenuously suggest that litigation in West Virginia is inconvenient.

Petitioners contend that Respondent Bailey's decision amounts to legal error because the cause of action accrued in Georgia. *See* Appendix at 13. As this Court has recognized, in a wrongful death action, the cause of action accrues in the state where the decisions leading directly to the death occurred, not merely the state in which the decedent died. *See Edith Nezan v. Aries Techs., Inc.*, 704 S.E.2d 631, 641 (W. Va. 2010) (reversing the lower court's dismissal of a wrongful death case on *forum non conveniens* grounds because defendant "made certain decisions while in West Virginia that, when considered in the light most favorable to the plaintiff, led directly to the death of [decedent]"). Fundamentally, Petitioners cannot overcome the fact that decisions regarding the design, manufacture, distribution and warnings related to the Fentanyl Patch occurred at its headquarters in Morgantown, West Virginia. *See Doran v. Mylan Inc.*, 2010 U.S. Dist. LEXIS 140095, at * 6 (E.D. Pa. 2010) ("Defendants contend that Mylan did not design, manufacture, market or distribute the fentanyl patches at issue. Rather, Mylan's two wholly-owned subsidiaries, MTI and MPI, manufactured and distributed the MFTS patches").

Assuming *arguendo* that the actual distribution and manufacturing occurred in Vermont and North Carolina as Petitioners claim, the decisions underlying the design, manufacture and distribution of the Fentanyl Patch likely occurred at their headquarters in West Virginia.² *See Forgotson v. Shea*, 491 A.2d 523, 526 (D.C. 1985) (dismissal for *forum non conveniens* affirmed where plaintiff failed to bring cause of action in jurisdiction where defendant's principal office

² Corporate discovery has not yet taken place. However, given Petitioners' corporate residence and principal office in West Virginia, Respondent believes that discovery will reveal that the decisions relating to the design and manufacture of the Fentanyl Patch took place in West Virginia.

was located and where all relevant decisions had been made); *Fantome S.A. v. Frederick*, 58 Fed. Appx. 835, slip op. (11th Cir. 2003) (unpublished) (denying dismissal on *forum non conveniens* grounds because “every decision that was not made on the ship appears to have been made at the Miami Beach headquarters.”); *Tahir v. Avis Budget Group, Inc.*, 2009 U.S. Dist. LEXIS 115879, at *16 (D.N.J. 2009) (holding that it is “conceivable, as plaintiff has argued, that witnesses such as Avis officers and employees with relevant information about the company’s FLSA classification of employees and compensation decisions will be found in New Jersey, where the company is headquartered”); *Snaza v. Howard Johnson Franchise Sys.*, 2008 U.S. Dist. LEXIS 103987, at *46 (N.D. Tex. Dec. 24, 2008) (transferring action to Massachusetts in part because “that’s where the decisions were made to the extent those decisions have to do with the plaintiff’s cause of action.”). The wrongful conduct giving rise to Respondent Hall’s causes of actions occurred in West Virginia. As a result, this Court should reject Petitioners’ disingenuous assertions that West Virginia has a minimal role in this lawsuit.

Additionally, Petitioners allege that Respondent Bailey’s decision is erroneous as a matter of law because she “placed undue weight on the Plaintiff’s choice of venue in contravention of the clear statutory language.” *See* Appendix at 13. While W.Va. Code § 56-1-1(a) suggests that Plaintiff’s choice of forum may be diminished when plaintiff is a nonresident, it certainly does not say that it is “eliminated.” *See Slight by & Through Slight v. E.I. DuPont de Nemours & Co.*, 979 F. Supp. 433, 437 (S.D. W. Va. 1997) (“this is not to say that a foreign plaintiff’s choice of forum is entitled to no deference”); *see also Galustian v. Peter*, 591 F.3d 724, 732 (4th Cir. 2010) (“This lack of deference is muted, however, when the defendant is a resident and citizen of the forum he seeks to have declared inconvenient for litigation ...”). This Court has held that a plaintiff’s choice of forum may only be disturbed if defendant has

“demonstrated that the forum has only a slight nexus to the subject matter of the suit and that another available forum exists which would enable the case to be tried substantially more inexpensively and expeditiously.” *Abbott v. Owens- Corning Fiberglas Corp.*, 444 S.E.2d 285, 289 (W.Va. 1994); *Cannelton Indus. v. Aetna Casualty & Sur. Co. of Am.*, 460 S.E.2d 1, 6 (W.Va. 1994).

Petitioners mistakenly contend that the West Virginia statute does not require them to show that litigating in the alternate forum can be done “inexpensively and expeditiously.” See Appendix at 14. Yet the statute specifically states that when balancing the factors in favor of the alternate forum, “all other practical problems that make trial of a case easy, expeditious and inexpensive.” See W.Va. Code § 56-1-1a(a)(6). Petitioners have simply not met their burden of showing that Georgia is a proper alternate forum. While Petitioners contend that they will have to subpoena third party witnesses in Georgia, they identify only Mrs. Hall’s prescriber as a potential witness. See Appendix at 35. Upon information and belief, Respondent Hall anticipates that the number of witnesses in Georgia will be very few in comparison with the significant number of former and current Mylan Defendant corporate representatives in West Virginia. Petitioners argue that discovery will be “far more costly and time consuming” if the case proceeds in West Virginia because they will have to resort to letters rogatory to obtain relevant information. See *id.* The evidence, including medical records, death certificates and the coroner’s reports that Petitioners will require to litigate their case can easily be obtained through the use of a medical authorization. Conversely, Respondent Hall will incur significant hardship compelling the thousands of corporate documents maintained in West Virginia.

As the Court has held, a writ of prohibition is a “drastic remedy to be invoked only in extraordinary situations.” *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 82 (W. Va. 1994). One

such extraordinary situation is “to correct substantial, clear-cut, legal errors.” *See Hinkle v. Black*, 262 S.E.2d 744, 749-50 (W. Va. 1979). Petitioners fervently contend that Respondent Bailey’s denial of their motion is erroneous as a matter of law because of the dismissal of several Fentanyl Patch cases on *forum non conveniens* grounds by the Honorable Russell L. Clawges in the 17th Judicial Circuit, Monongalia County and the Honorable Joseph R. Goodwin in the District Court for the Southern District of West Virginia. *See* Appendix at 18. However, the Honorable Judge Irene Berger in the Circuit Court, Kanawha County recently denied Petitioners’ motion to dismiss on *forum non conveniens* grounds in another Fentanyl Patch case, *Neidige v. Mylan*, Civil Action No. 09-C-325. *See Neidige v. Mylan*, Civil Action No. 09-C-325, Order Denying Mylan’s Motion to Dismiss and Granting Plaintiff’s Motion to Amend, attached hereto, Appendix at 129. After considering the factors delineated in W.Va. Code § 56-1-1a(a)(1)-(8), Judge Berger found that “the Mylan Defendants would not suffer substantial injustice if the case is litigated in West Virginia.” *See id* at 130. Judge Berger further held that after giving consideration to the public interests of the state, “there is no unfair burden of the citizens of West Virginia if the case is litigated here.” *See id*.

A purported “circuit split” is not a sufficiently extraordinary circumstance to invoke a writ of prohibition. Lower tribunals and circuit courts routinely arrive at different decisions when confronted with similar factual scenarios. The proposition that the West Virginia Supreme Court must intervene every time such a split occurs is plainly illogical. *See United States v. Warlick*, 742 F.2d 113, 117 (4th Cir. 1984) (holding that although “there is a split of authority on this point it is unnecessary for us to fact it at this time” because the “evidence and the law supporting conviction are overwhelming”). As demonstrated above, Respondent Bailey’s decision is not a clear-cut legal error requiring the intervention of this Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not agree with Petitioners that oral argument is necessary under Rule 18(a)(4) of the West Virginia Revised Rules of Appellate Procedure. Respondent believes that the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument.

V. ARGUMENT

A. RESPONDENT BAILEY'S CONSIDERATION OF THE MYLAN DEFENDANTS' RESIDENCE WAS NOT ONLY PROPER BUT NECESSARY AS PART OF A FORUM NON CONVENIENS ANALYSIS.

Petitioners suggest that because a defendant's residence is not *explicitly* listed as a factor to be considered in a *forum non conveniens* analysis under W.Va. Code § 56-1-1a, Respondent Bailey erred in taking into consideration that two of the Mylan Defendants are West Virginia corporations. *See* Appendix at 30-31. The statute at issue outlines several factors which requires consideration of the defendant's residence including "whether maintenance of the claim or action in the courts of the state would work a substantial injustice to the moving party," "whether 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," "the state in which the cause of action accrued," and "the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses." *See* W.Va. Code §56-1-1a(a)(2)-(6). An analysis of the above factors would be impossible without considering the residence of the Mylan Defendants involved in the action.

Providing further credence to the fact that the Defendant's residence is an important consideration in a *forum non conveniens* analysis is the fact that the Legislature repealed W.Va. Code 56-1-1(c) which held that "a nonresident of the state may not bring an action in a court of

this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state.” W.Va. Code § 56-1-1(c) (2003). As the Court explained in *Morris v. Crown Equip. Corp.*, a reading of W.Va. Code § 56-1-1(c) that would

categorically immunize a West Virginia defendant like Jeffers from suit in West Virginia by a nonresident would contravene the constitutionally permissible scope of the venue statutes in an interstate contest. There is no evidence in the cases cited by the parties or identified in this Court's research showing any trend in favor of such distinctions. Additionally, erecting such barriers would contravene established West Virginia law, including other provisions of *W.Va. Code*, 56-1-1.

633 S.E.2d 292, 300 (W.Va. 2006).

Indeed, pursuant to the above holding in *Morris*, the legislature repealed W.Va. Code 56-1-1(c) in favor of the current *forum non conveniens* statute, W.Va. Code § 56-1-1a. *See Savarese v. Allstate Ins. Co.*, 672 S.E.2d 255, 259 n. 8 (W.Va. 2008) (Subsequent to the Court's decision in *Morris v. Crown Equipment Corporation*, which found that W.Va. Code § 56-1-1(c), was “constitutionally infirm when a claim was asserted against a West Virginia Defendant, the Legislature repealed W.Va. Code § 56-1-1(c) (2003) and enacted a separate *forum non conveniens* statute at W.Va. Code § 56-1-1a (2007)”). Given that this Court has already declined to impose a restrictive interpretation of a venue statute that would prohibit nonresident Plaintiffs from bringing suit against a West Virginia Defendant, the Court should continue to follow this precedent and reject Petitioners' argument that their residence in West Virginia is irrelevant. Historically, the Mylan Defendants have argued that their West Virginia corporations are responsible for the manufacture and distribution of the Fentanyl Patch. Recently, the Mylan Defendants took the position that Mylan Inc. (“MI”), which is a Pennsylvania corporation, was fraudulently joined to defeat diversity jurisdiction in a number of wrongful death cases involving the Fentanyl Patch pending in the Philadelphia County Court of Common Pleas. *See Doran v. Mylan Inc.*, 2010 U.S. Dist. LEXIS 140095 (E.D. Pa. 2010). The Mylan Defendants argued that

MTI and MPI, both West Virginia corporations, manufactured and distributed the Fentanyl Patches, and that MI is merely a holding company whose involvement with the Fentanyl Patch was limited to providing “administrative support and regulatory assistance” to its subsidiaries. *Id.* at *6. The court granted the motions to remand, finding that the plaintiffs plead a facially viable negligence claim against Mylan Inc., which the court observed was responsible for the management of regulatory compliance for the Fentanyl Patch. *Id.* at *11, 16. Clearly, in an instance where the Mylan Defendants sought to avoid litigating Fentanyl Patch cases Pennsylvania state court, the Mylan Defendants contended that the true parties in interest were their West Virginia corporations which are solely responsible for the manufacture and distribution of the Fentanyl Patch. Consequently, this Court should reject Petitioners’ position that the West Virginia residency of two of the Mylan Defendants should be given little or no weight as part of a *forum non conveniens* analysis.

B. THE WRONGFUL CONDUCT GIVING RISE TO RESPONDENT HALL’S CAUSES OF ACTION OCCURRED IN WEST VIRGINIA.

This Court recently held that the location where wrongful conduct giving rise to an action occurred is an appropriate forum. *Edith Nezan v. Aries Techs., Inc.*, 704 S.E.2d 631 (W. Va. 2010). In *Edith Nezan*, a Canadian resident was killed in a plane crash in Virginia following a decision made by the pilot in West Virginia to descend to a lower altitude due to icing on his aircraft. *Id.* at 644. The plaintiff brought suit on behalf of the decedent in the Circuit Court of Kanawha County, West Virginia. *Id.* at 636. The trial court dismissed the action on *forum non conveniens* grounds finding that the cause of action accrued when the airplane crashed and the decedent died in Virginia. *Id.* This Court reversed finding that the defendant “made certain decisions while in West Virginia that, when considered in the light most favorable to the plaintiff, led directly to the death of [the decedent].” *Id.* at 641. Specifically, this Court held that:

When balancing our clearly deferential appellate standard with the statutory preference for the appellant's choice of forum and the fact that the cause of action being pursued by the appellant actually arose in this state, we conclude that the circuit court abused its discretion in finding that West Virginia was not the appropriate forum for this civil action.

Id. at 644.

In the present case, the decisions regarding the design, manufacture, sale and distribution of the Fentanyl Patch likely occurred in West Virginia. Respondent Hall filed suit against the Mylan Defendants alleging wrongful death as a result of defective design, manufacturing and marketing of the Fentanyl Patch. *See* Appendix at 46-48. Consequently, the wrongful conduct giving rise to Respondent Hall's causes of action took place in West Virginia. The Mylan Defendants' assertion that it is inconvenient to defend a lawsuit in the very state where the wrongful conduct giving rise to this lawsuit occurred is baseless. The Mylan Defendants have benefited from conducting business in West Virginia and have availed themselves of favorable West Virginia law. As Justice Goodwin noted in a recent Fentanyl Patch case:

Although Mr. Woodcock was not a West Virginia resident, Mylan is. As a West Virginia corporation, Mylan has taken advantage of the laws of West Virginia, and it cannot now complain that it is being held to their consequences. Presumably, Mylan has developed its business around an expectation that, as a West Virginia corporation, it will be subject to West Virginia tort law.

Woodcock v. Mylan, Inc., 661 F. Supp. 2d 602, 608-609 (S.D. W. Va. 2009). By moving the Court to dismiss this action on *forum non conveniens* grounds, it is the Mylan Defendants that are engaging in forum shopping – not Respondent Hall. As West Virginia corporations, the Mylan Defendants simply should not be permitted to avoid litigation in West Virginia under the present circumstances.

C. THE MYLAN DEFENDANTS HAVE PREVIOUSLY ACKNOWLEDGED THAT WEST VIRGINIA IS A CONVENIENT FORUM BY BRINGING AND DEFENDING NUMEROUS LAWSUITS IN WEST VIRGINIA.

The Mylan Defendants have just recently defended more than a thousand product liability lawsuits brought by non-West Virginia residents involving the generic drug Digitek in West Virginia, *In re Digitek Product Liability Litigation*, MDL No. 1968, in the United States District Court for the Southern District of West Virginia. See Appendix at 116-117, 132-161. The Mylan Defendants did not oppose the United States Judicial Panel on Multidistrict Litigation's consolidation and transfer of the Digitek products liability litigation to West Virginia. See *id* at 116-117. Additionally, the Mylan Defendants sought to have another MDL involving buspirone antitrust actions transferred to West Virginia. *In re Buspirone Patent Litig.*, 162 F. Supp. 2d at 687 (J.P.M.L. 2001) (holding that in the event the court decided to centralize buspirone antitrust actions pending in various districts, the Mylan parties support selection of the Northern District of West Virginia as transferee district for the MDL patent actions).

Indeed, the Mylan Defendants have filed and litigated lawsuits against other parties in West Virginia. *Thompson*, 268 F.3d at 1328 (action for a declaration of noninfringement and invalidity filed in the United States District Court for the District of West Virginia); *United States FDA*, 454 F.3d at 274 (action against the FDA filed in the United States District Court for the Northern District of West Virginia). Additionally, the Mylan Defendants have in the past requested transfer of litigation to West Virginia for convenience. See *Abbott Labs.*, 2006 U.S. Dist. LEXIS 13782 at * 22-24 (requesting transfer of venue to Mylan's home district of West Virginia due to convenience and existence of parallel patent suit in West Virginia).

D. RESPONDENT HALL'S CHOICE OF FORUM HAS BEEN AFFORDED PROPER WEIGHT.

Petitioners argue that as a nonresident, Respondent Hall's choice of forum is entitled to diminished deference. However, "this is not to say that a foreign plaintiff's choice of forum is entitled to no deference." *E.I. DuPont de Nemours & Co.*, 979 F. Supp. at 437 (citing *Murray v. British Broadcasting Corp.*, 81 F. 3d 287, 290 (2d Cir. 1996) (stating "some weight must still be given to a foreign plaintiff's choice of forum. Indeed, this reduced weight is not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for *forum non conveniens* is the exception rather than the rule.")); *see also Peter*, 591 F.3d at 732 ("This lack of deference is muted, however, when the defendant is a resident and citizen of the forum he seeks to have declared inconvenient for litigation ...").

This Court has held that a plaintiff's choice of forum may only be disturbed if defendant has "demonstrated that the forum has only a slight nexus to the subject matter of the suit and that another available forum exists which would enable the case to be tried substantially more inexpensively and expeditiously." *Abbott*, 444 S.E.2d at 289. The trial court may not rely on mere allegations of the party who is seeking to have the case dismissed that another forum exists in which the suit may be tried substantially more inexpensively and expeditiously. *Id.* Indeed, this Court has held that defendants must make an offer of proof with a "detailed showing of how long it will take to get a jury trial in another forum, the additional costs to the parties, and other factual aspects that would show the advantages of the alternative forum." *Id.* at 204.

Petitioners adopt a narrow interpretation of W.Va. Code § 56-1-1a to support their contention that not only has the adoption of the West Virginia statute abolished any requirement that they demonstrate that the forum selected by Respondent Hall is inconvenient but also that an alternative forum is proper. *See Appendix at 26.* Petitioners fail to cite a single case that releases

them from this burden. Instead, Petitioners criticize Respondent Hall's reliance on *Abbott* because it predates the passage of W.Va. Code § 56-1-1a, while ironically citing *Riffle*, a case that not only predates the passage of the statute by over a decade but also addresses an entirely different section of the statute. 464 S.E. 2d at 763. Specifically, *Riffle* addressed the adoption of W.Va. Code § 56-1-1(b) as the exclusive authority for any discretionary intercircuit transfer or change of venue **within** West Virginia. *Id.* at 771 (emphasis added).

More importantly, while Petitioners contend that they are not obligated to show that the case can be tried "inexpensively and expeditiously" in another forum as this Court dictated in *Abbott*, this is precisely one of the factors that must be considered by the Court under W.Va. Code § 56-1-1a(a)(6), which states that when balancing the private interest factors of the parties in favor of a claim being brought in an alternate forum the Court must consider "all other practical problems that make trial of a case easy, expeditious and inexpensive." *See* W.Va. Code § 56-1-1a(a)(6).

Petitioners have failed to demonstrate that an alternative forum is proper. Petitioners' assertions that discovery will be more expensive and many of the relevant witnesses simply cannot be compelled to appear in West Virginia are simply unsupported. *See* Appendix at 35-36. Conversely, if Petitioners' argument concerning the ability to compel the appearance of witnesses is to be given credence the same may be said for Respondent's inability to compel the appearance of corporate witnesses in West Virginia if Respondent is forced to litigate his case in another state. Indeed, in the Digitek MDL, many of the Mylan Defendants' corporate representatives were deposed in West Virginia and upon information and belief, thousands of pages of corporate documents were produced out of MPI's headquarters in Morgantown, West Virginia. *See* Appendix at 117 (Petitioners' counsel conceding that Digitek was assigned to West

Virginia for “discovery purposes.”). Consequently, Petitioners have not met their burden of demonstrating that this lawsuit can be tried more inexpensively and expeditiously in Georgia than in West Virginia. As such, this Court should provide deference to Respondent’s choice of forum.

E. ANALYSIS OF THE FORUM NON CONVENIENS FACTORS IN W.VA. CODE § 56-1-1A

(1) *Maintenance of this claim will not work a substantial injustice on Mylan Defendants*

As this Court is well aware, in the world of pharmaceutical litigation it is exceedingly common to have pharmaceutical manufacturer defendants with corporate offices and plants all over the country. *See* Appendix at 114. It is a common practice for product liability cases involving pharmaceutical products to be brought in the state of the pharmaceutical manufacturer’s domicile, residence and/or primary place of business. The Mylan Defendants argue that conducting discovery in West Virginia will be burdensome. *See id.* at 34-35. Specifically, Petitioners claim that they will encounter difficulty compelling nonresident third parties to attend trial and will be forced to “try the case by videotape.” *See id.* However, the same can be said for Respondent’s ability to compel former Mylan Defendant corporate representatives who were intricately involved in the manufacturing and distribution of Fentanyl Patches to attend trial in Georgia. Petitioners further allege that “discovery will be far more costly and time consuming” because they will have to resort to letters rogatory to obtain relevant information. *See id.* at 30. This argument is thwarted by the fact that obtaining medical records, the certificate of death and other evidence is just as easy for Petitioners as it is for Respondent through the use of medical authorizations provided to them. In fact, discovery will be far more burdensome and time consuming in Georgia because Respondent will have to compel thousands

of corporate documents from former and current Mylan Defendant corporate representatives at their corporate headquarters in West Virginia.

Petitioners also claim that litigation in West Virginia would preclude the possibility of joining Mrs. Hall's prescribing physician as a third-party defendant due to lack of personal jurisdiction. *Id.* at 30. This lawsuit was filed in 2009 and has been pending in West Virginia for almost two years. At no point has Mylan made any attempt to cross-claim or claim indemnity against any of Mrs. Hall's physicians nor have they provided any indication of intent to do so until now. Further, the Mylan Defendants have failed to articulate how maintaining this action in West Virginia would preclude them from joining Mrs. Hall's prescribing physician as a third-party defendant. In light of the foregoing, Petitioners cannot argue that they will suffer substantial injustice if this case is tried in West Virginia.

(2) *The private interest factors favor retaining this lawsuit in West Virginia*

The "private interest" factors in a *forum non conveniens* analysis include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses; (3) the enforceability of a judgment if one is obtained; (4) the possibility of viewing the premises if that would be appropriate to the action; and (5) all other practical problems that make trial of a case easy, expeditious, and inexpensive. W.Va. Code § 56-1-1a(a)(6); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

Petitioners erroneously claim that all the evidence relevant to this case is located in Georgia. *See* Appendix at 36. However, Petitioners fail to provide a proper factual basis for this conclusion. They simply allege that it "will be difficult to obtain depositions without the aid of a subpoena." *Id.* Respondent anticipates that the number of witnesses in the State of Georgia will

be very few.³ In fact, the vast majority of depositions will likely be taken in West Virginia where two of the Mylan Defendants' corporate headquarters are located and their corporate representatives/witnesses reside. As Respondent Bailey stated during the hearing, "no doubt that there will have to be some testimony from persons, perhaps who reside in other states, and I think that can be addressed in this day and age with not a whole lot of inconvenience or where parties can agree that discovery will take place." *See* Appendix at 118.

(3) *The public interest factors favor retaining this lawsuit in West Virginia*

The relevant "public interest" factors in a *forum non conveniens* analysis include: (1) the administrative difficulties flowing from court congestion; (2) the interest in having localized controversies decided within the State; (3) the avoidance of unnecessary problems in conflicts of laws; or in the application of foreign law; (4) the unfairness of burdening citizens in an unrelated forum with jury duty. W.Va. Code § 56-1-1a(a)(6).

Petitioners allege that litigating this suit in West Virginia burdens this Court and that Georgia has a distinct interest in protecting its own citizens. However, the residents of West Virginia have a significant interest in ensuring that a large pharmaceutical corporation such as Mylan follows proper safety and manufacturing practices. *See E.I. DuPont de Nemours & Co.*, 979 F. Supp. at 441 ("While it is true England has an interest in the safety of the products its citizens consume, it is also true that West Virginia has an interest in the safety of products manufactured here. This local interest favors retention of jurisdiction."); *Woodcock*, 661 F. Supp. 2d at 609 (holding that while "Mylan cites cautionary language from the Supreme Court of Appeals expressing concern for forum shopping, that language addresses a circumstance not present by these facts..." "West Virginia's interest in this case extends beyond service of process

³ In any event, Respondent Hall represents to the Court and to Petitioners that Respondent Hall intends to fully cooperate in the discovery of this case. As in all cases, Respondent's counsel will see to it that Petitioners have the opportunity to conduct necessary discovery.

within the state. Mylan is a West Virginia corporation subject to general personal jurisdiction here. West Virginia thus has an interest in this litigation beyond the attenuated circumstance addressed in *Paul*.”). As Judge Irene Berger held in her order denying Petitioners’ Motion to Dismiss in *Neidige v. Mylan*, “the Court has given consideration to the public interest of the state, and given that Defendant Mylan Pharmaceuticals, Inc. resides in this State and Mylan Technologies, Inc. is incorporated in this State, finds that there is no unfair burden on the citizens of West Virginia if this case is litigated here.” *See* Appendix at 130.

Petitioners contend that Georgia substantive law governs Respondent’s causes of actions. *See* Appendix at 38. Contrary to Petitioners’ contentions, Respondent does not concede that Georgia law applies. In fact, West Virginia law will apply to several of Respondent’s causes of actions, including marketing defect and failure to warn. *See Woodcock*, 661 F. Supp. 2d at 609 (“Because West Virginia has rejected the learned-intermediary doctrine on public-policy grounds and applying Alabama law to the marketing defect claim would violate that public policy, West Virginia law applies to that claim.”); *see also Vitatoe v. Mylan Pharms., Inc.*, 696 F. Supp. 2d 599, 609 (N.D. W. Va. 2010) (holding that the “the public policy of West Virginia bars the application of Louisiana’s learned intermediary doctrine as a defense in this case. Mylan therefore may not raise the defense as a bar to Vitatoe’s inadequate warning claim. Moreover, as the duty to warn under Louisiana law runs to a learned intermediary, such as a physician, rather than the consumer, West Virginia law governs Vitatoe’s inadequate warning claim.”)

Additionally, there is no difficulty in applying the law of another jurisdiction since this is a routine practice performed by most courts. As the court held in *Abbott*, “the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the Court.” 444 S.E.2d

at 292. (quoting *Hoffman v. Goberman* 420 F.2d 423, 427 (3d Cir. 1970)); see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (U.S. 1968) (“The need to apply foreign law . . . alone is not sufficient to warrant dismissal.”); *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 492 (2d Cir. 1998) (holding that “while reluctance to apply foreign law is a valid factor favoring dismissal under *Gilbert*, standing alone it does not justify dismissal.”); *Olympic Corporation v. Societe Generale*, 462 F.2d 376, 379 (2d Cir. 1972) (holding that “the need to apply foreign law is not in itself a reason to apply the doctrine of forum non conveniens”).

F. ISSUANCE OF THE WRIT OF PROHIBITION IS IMPROPER ABSENT EXTRAORDINARY CIRCUMSTANCES.

As an initial matter, when determining whether to issue a writ of prohibition in cases where it is claimed that the lower tribunal exceeded its legitimate powers, the Court will examine 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. Syl. pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W.Va. 1996). Petitioners appear to take issue the second and third factors, contending (1) that a post-trial appeal is an inadequate remedy due to the alleged costs and challenges associated with trying a case outside its factual epicenter, and (2) that Respondent Bailey’s denial of their motion is erroneous as a matter of law because other courts have decided similar motions differently.

This Court has repeatedly held that writs of prohibition provide a “drastic remedy to be invoked only in extraordinary situations.” *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 82 (W. Va. 1994); see *State ex rel. Jeanette H. v. Pancake*, 529 S.E.2d 865, 871 (W. Va. 2000) (“[W]e have repeatedly declared that mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . reserved for really extraordinary causes”); *Health Mgmt., Inc. v. Lindell*, 528 S.E.2d 762, 766 (W. Va. 1999) (“We have previously cautioned that writs of prohibition provide a drastic remedy, and should be invoked only in extraordinary situations”). Additionally, “only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.” *Bedell*, 454 S.E.2d at 77. Specifically, prohibition should be used only “to correct substantial, clear-cut, legal errors where there is a high probability that the trial court will be completely reversed if the error is not corrected in advance.” *Hinkle*, 262 S.E.2d at 749-50.

In order to justify the issuance of a writ of prohibition, a petitioner has “the burden of showing that the lower court’s jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy.” *Bedell*, 454 S.E.2d. at 82; see *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 196- 97 (U.S. 1980) (holding that a party seeking a writ of mandamus or writ of prohibition carries a “heavy burden” of showing that his right to such relief is “clear and indisputable”); *Maynard*, 437 S.E.2d at 284 n. 6 (“the right to a writ of prohibition must be shown by a petitioner...”). As demonstrated below, Petitioners have failed to establish that Respondent Bailey exceeded her legitimate powers thus warranting a writ of prohibition.

G. PETITIONERS HAVE NOT MET THEIR BURDEN OF SHOWING THAT THIS CASE REQUIRES THE ISSUANCE OF A WRIT OF PROHIBITION.

Petitioners have not met their burden of demonstrating that this factual scenario necessitates the issuance of the writ of prohibition. Petitioners argue that a post-trial appeal is an inadequate remedy given Respondent Bailey's denial of their Motion to Dismiss. *See* Appendix at 17. In support, Petitioners cite *State ex rel. Riffle v. Ranson*, in which this Court granted a writ of prohibition to address discretionary venue transfers not explicitly authorized by West Virginia's venue statute, W.Va. Code § 56-1-1(b). 464 S.E. 2d at 765. The venue statute is not at issue in the present action making *Riffle* easily distinguishable. Specifically, the decision in *Riffle* "simply deferred to legislatively-prescribed principles governing intra-state venue. However, in *Riffle* this Court explicitly disavowed applying its decision to interstate situations." *Morris*, 633 S.E.2d at 300. As such, *Riffle* has no bearing on this lawsuit.

The true linchpin of Petitioners' argument is that Respondent Bailey's denial of their motion is erroneous as a matter of law in that it runs contrary to a growing body of case law dismissing similar actions on *forum non conveniens* grounds. *See* Appendix at 18. The case law referenced by Petitioners stems from the dismissal of a number of cases on *forum non conveniens* grounds by the Honorable Russell L. Clawges in the 17th Judicial Circuit, Monongalia County and the Honorable Joseph R. Goodwin in the District Court for the Southern District of West Virginia. The mere fact that Respondent Bailey's decision runs contrary to that of Judges Clawges and Goodwin does not constitute an error as a matter of law. *Warlick*, 742 F.2d at 117 (holding that although "there is a split of authority on this point it is unnecessary for us to fact it at this time" because the "evidence and the law supporting conviction are overwhelming").

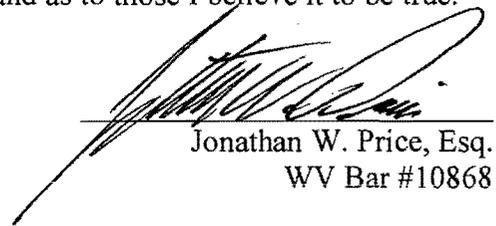
The Court should not be misled by Petitioners' representations that Fentanyl Patch cases have been dismissed on *forum non conveniens* grounds by every West Virginia judge with the exception of Respondent Bailey. As discussed above, the Honorable Judge Irene Berger in the Circuit Court, Kanawha County denied Petitioners' motion to dismiss on *forum non conveniens* grounds in another Fentanyl Patch case, *Neidige v. Mylan*, Civil Action No. 09-C-325. See Appendix at 129. Specifically, after considering the factors outlined in W.Va. Code § 56-1-1a(a)(1)-(8), Judge Berger found that "the Mylan Defendants would not suffer substantial injustice if the case is litigated in West Virginia." *Id.* at 130. Judge Berger further held that after giving consideration to the public interests of the state, "there is no unfair burden of the citizens of West Virginia if the case is litigated here." *Id.* Accordingly, the Court should decline to issue Petitioners' Petition for Writ of Prohibition.

VI. CONCLUSION

Respondent Hall respectfully requests that this Court decline to issue Petitioners' Petition for Writ of Prohibition.

VII. VERIFICATION

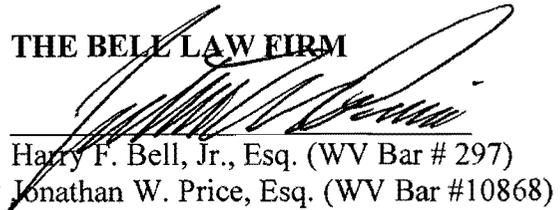
I, Jonathan Price, hereby declare, under penalty of perjury under the laws of the State of West Virginia, that I have read the above Petition it is true to the best of my own knowledge, except to those things stated upon information and belief, and as to those I believe it to be true.


Jonathan W. Price, Esq.
WV Bar #10868

Respectfully submitted,

THE BELL LAW FIRM

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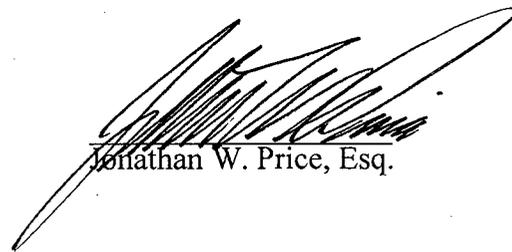
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Response to Petition for Writ of Prohibition and Appendix were served via U.S. Mail, upon the following:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE