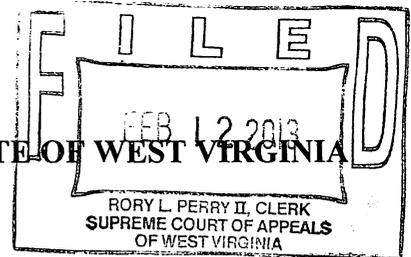


IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Docket Number: 13-0102



STATE OF WEST VIRGINIA EX REL. GLAXOSMITHKLINE, LLC, FORMERLY  
SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE,

Petitioner/Defendant,

- v. -

THE HONORABLE JAMES H. YOUNG, JR., JUDGE OF THE CIRCUIT COURT OF  
WAYNE COUNTY, WEST VIRGINIA; AND ALL PLAINTIFFS IN *STATE EX REL.*  
*MCGRAW V. GLAXOSMITHKLINE, LLC*, Civil Action No. 12-C-085,

Respondents/Plaintiffs.

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**VERIFIED PETITION FOR A WRIT OF PROHIBITION**

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## QUESTION PRESENTED

Did the Wayne County Circuit Court exceed its legitimate authority when it denied GlaxoSmithKline's ("GSK") Motion to disqualify private counsel retained by the Attorney General to bring claims for damages and penalties pursuant to the West Virginia Consumer Credit and Protection Act ("WVCCPA"), in violation of the express command of the West Virginia Legislature that the State must be represented by qualified personnel in the Attorney General's office when the State brings claims pursuant to the WVCCPA?

## STATEMENT OF THE CASE

The State of West Virginia filed the present complaint on March 30, 2012. The State asserts claims under the WVCCPA, West Virginia Code § 46A-1-101, *et seq.*, the West Virginia Fraud and Abuse in the Medicaid Program statute, West Virginia Code § 9-7-1, *et seq.*, the West Virginia Public Employees Insurance Act, West Virginia Code § 5-16-1, *et seq.*, the Insurance Fraud Prevention Act, West Virginia Code § 33-41-1, *et seq.*, and various common law claims, including strict liability, breach of warranty and unjust enrichment. The claims are based on reimbursements by West Virginia Medicaid and the Public Employee Insurance Agency ("PEIA") of prescriptions of Avandia, an oral anti-diabetic medication, manufactured by GlaxoSmithKline ("GSK").<sup>1</sup>

The State seeks disgorgement of funds GSK received as a result of West Virginia Medicaid and PEIA reimbursements for prescriptions of Avandia to program enrollees, an injunction against further alleged violations under West Virginia Code § 46A-7-108, and civil penalties of up to \$5,000 per alleged violation pursuant to West Virginia Code § 46A-7-111.<sup>2</sup>

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<sup>1</sup> See Complaint (A.R. 6-65).

<sup>2</sup> See Complaint ¶¶ 86-96 (A.R. 39-43).

Under the WVCCPA, these penalties and injunctions are exclusive to the State, and cannot be sought by ordinary consumers. *Compare* W. Va. Code § 46A-7-108 (authorizing the “attorney general [to] bring a civil action” for injunctions); § 46A-7-111(2) (authorizing the “attorney general” to “bring a civil action . . . to recover a civil penalty”) *with* W. Va. Code § 46A-6-106(a) (authorizing “actions by consumers” for the greater of actual damages or two hundred dollars).

In order to “initiat[e] and maintain[.]” this action, the Attorney General has appointed several “Special Assistant” Attorneys General to represent the State in this action. These “Special Assistants” are Laura Baughman and Burton LeBlanc of Baron & Budd, PC, a plaintiffs’ law firm with offices in Texas and Louisiana; Bill Robins, III, of Heard Robins Cloud & Black, a plaintiffs’ law firm with offices in Texas and New Mexico; and Paul Farrell, Jr., of Greene Ketchum Bailey Walker Farrell & Tweel, a West Virginia plaintiffs’ law firm.<sup>3</sup> These private plaintiffs’ lawyers have agreed to “advance all expenses associated with the maintenance of this action,” and will be compensated out of attorneys’ fees “paid by the defendant.” (A.R. 88-93).

Petitioner moved to disqualify the private counsel on August 10, 2012.<sup>4</sup> Respondents opposed the motion on August 24, 2012.<sup>5</sup> At the hearing held on August 28, 2012,

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<sup>3</sup> See Appointment Letters: Appointment Letters re: Paul T. Farrell, Jr., Esq. (Nov. 22, 2011; July 17, 2012), Burton LeBlanc, Esq. (Nov. 22, 2011; July 17, 2012), Bill Robins, III, Esq. (Mar. 23, 2012; July 17, 2012), Laura Baughman, Esq. (March 23, 2012; July 17, 2012) (A.R. 88-93).

<sup>4</sup> See Mot. to Disqualify Private Counsel on Behalf of Defendant, GlaxoSmithKline LLC (A.R. 66-69) and Memorandum of Law in Support of Mot. to Disqualify Private Counsel (A.R. 70-93).

<sup>5</sup> See Pl.’s Opposition to Def.’s Mot. to Disqualify Private Counsel (A.R. 102-402).

counsel for GSK requested oral argument on the issue.<sup>6</sup> The Circuit Court stated that oral argument was unnecessary, and on September 4, 2012, GSK replied to the State's Opposition.<sup>7</sup>

On September 28, 2012, the Circuit Court denied GSK's Motion.<sup>8</sup> The Court held that the plain language of the WVCCPA did not limit the Attorney General's authority to hire private counsel because of the "broad powers given to the Attorney General" and the "overall purpose of the Act to protect [West Virginia] citizens . . . ." (A.R. 1-5). The court also appeared to hold that GSK lacked standing because the "manner in which the Attorney General operates his office is not the subject of the case at bar."<sup>9</sup>

### SUMMARY OF ARGUMENT

The Attorney General's actions must comport with the directives of the State Constitution and the governing statutes at all times. Attempts by the Attorney General in the past to expand the law and/or his authority have been repeatedly and consistently rejected. *See Manchin v. Browning*, 170 W. Va. 779, 785, 296 S.E.2d 909, 915 (1982) ("[t]he phrases 'prescribed by law' and 'provided by law' mean prescribed or provided by statute"); *see also* Syl. pt. 2, *McGraw v. Bear Stearns & Co., Inc., et al.*, 217 W. Va. 573, 618 S.E.2d 582 (2005) ("The Attorney General of West Virginia does not have the authority pursuant to W. Va. Code § 46A-6-104 (1974) of the Consumer Credit and Protection Act to bring an action based upon conduct that is ancillary to the general business of buying and selling securities."); *McGraw v. Caperton*, 191 W.Va. 528, 533, 446 S.E.2d 921, 926 (1994) ("The Attorney General, acting in

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<sup>6</sup> See Tr. of 8/28/2012 Motions/Status Conference (A.R. 629-630).

<sup>7</sup> See Def. GSK's Reply in Support of Mot. to Disqualify Private Counsel (A.R. 403-448).

<sup>8</sup> See Order (A.R. 1-5).

<sup>9</sup> Compare Pl.'s Opposition to Def.'s Mot. to Disqualify Private Counsel (A.R. 102 – 402) with the Order (A.R. 1-5).

his official capacity, does not come within the parameters of the definition of ‘person’ set forth in W. Va. Code § 55-13-13 and is not entitled to bring a declaratory judgment action pursuant to W. Va. Code § 55-13-2 (1993).”); Syl. pt. 3, *State ex rel. Fahlgren Martin v. McGraw*, 190 W. Va. 306, 438 S.E.2d 338 (1993) (“The Attorney General cannot hold a contract in his office awaiting the outcome of a trial, investigation, or other proceedings. The Attorney General has no investigative powers in connection with the contract. He cannot sue on the contract on behalf of the Attorney General unless otherwise authorized by statute.”); and *Better Gov’t Bureau v. McGraw*, 106 F.3d 582, 597 (4th Cir. 1997) (“Thus, we must agree with the district court that formation of a ‘government agency’ corporation clearly exceeds the power § 46A-7-102(1) provides to the Attorney General.”).

The Legislature has expressly prohibited the Attorney General’s use of private counsel to prosecute its WVCCPA claim. W. Va. Code § 46A-7-102(1)(f). By denying GSK’s motion to disqualify counsel, the trial court has contravened the express command and clear intent of the Legislature that the Attorney General use his own staff, not private counsel, to bring claims pursuant to the WVCCPA. GSK’s challenge to the involvement of private counsel does not seek to stop the Attorney General from bringing this case; nor does it seek to dictate how the Attorney General runs his office. It asks the Court only to ensure, as it has traditionally done, that the Attorney General’s authority is limited to powers and duties “prescribed or provided by statutes.” *Manchin v. Browning*, 170 W. Va. 779, 785, 296 S.E.2d 909, 915 (1982).

The consequence of the trial court’s clear legal error is that GSK will be subjected to the pursuit of civil penalties and other damages by attorneys motivated by completely different incentives -- particularly financial incentives -- than those of the lawyers in the Attorney General’s office that are supposed to be handling this case. Because the error satisfies all five

requirements for a Writ of Prohibition, this Court should grant this Petition, and issue a Writ disqualifying private counsel.

This Court has consistently held that a Writ of Prohibition is an appropriate method to challenge a Circuit Court's decision on a Motion to Disqualify. *See State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 153, 697 S.E.2d 740, 745 (2010) (quoting *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W. Va. 587, 589, 482 S.E.2d 204, 206 (1996)) (granting writ after the trial court denied the motion to disqualify and noting that "a party aggrieved by a trial court's decision on a motion to disqualify may properly challenge the trial court's decision by way of a petition for a writ of prohibition"); *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 412, 624 S.E.2d 844, 849 (2005) ("When considering the issuance of a writ of prohibition arising from a circuit court's ruling on a motion for disqualification, this Court has consistently found the same to be an appropriate method of challenge."). In determining whether to entertain a Writ of Prohibition, the Court looks to five (5) 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.

*State ex rel. Hoover v. Berger*, 199 W. Va. 12, 21, 483 S.E.2d 12, 21 (1996). "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." *Id.*

In this case, all five factors weigh in favor of issuing a Writ. Most importantly, there has been a clear error of law because the trial court's Order ignores the plain language of West Virginia Code § 46A-7-102(1)(f), which provides that the Attorney General must use

“qualified personnel in his office” to litigate WVCCPA claims, not outside counsel. Second, a direct appeal of the Court’s Order will not remedy the error because the Circuit Court’s Order regarding GSK’s Motion to Disqualify was interlocutory. Moreover, GSK will be prejudiced because a direct appeal after judgment against Defendant, should it occur, requires GSK to go to the time and expense of defending itself against an Attorney General action that goes beyond the Attorney General’s constitutional and statutory authority. Third, as this Court has previously recognized, allowing an action to proceed when counsel should be disqualified “would effectively emasculate any other remedy.” *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. at 154, 697 S.E.2d at 746. Fourth, the trial court’s failure to address the specific statutory text regarding attorney representation violates traditional maxims of interpretation and the WVCCPA itself. Finally, this petition raises an issue of first impression and constitutional significance. This Court has traditionally intervened when necessary to ensure that the Attorney General’s conduct of state business is consistent with West Virginia’s Constitution and its statutes.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Under the West Virginia Rules of Appellate Procedure 18(a), Petitioner respectfully requests Rule 20 oral argument. This Petition is appropriate for oral argument pursuant to Rule of Appellate Procedure 20(a)(1), (2), (3) and (4). Specifically, this Petition addresses an issue of first impression: whether the Attorney General’s use of private counsel violates the plain language of the WVCCPA. This is an issue of fundamental public importance because the privatization of actions expressly delegated to the Attorney General dramatically alters the relationship between the State and its citizens, including West Virginia corporate citizens. It also raises constitutional questions regarding the Attorney General’s authority, and the appropriate limits on those powers. Finally, this issue has arisen repeatedly before West

Virginia trial courts and should be resolved by this Court. Because this Petition addresses all the factors listed under Rule of Appellate Procedure 20(a), oral argument is both necessary and appropriate.

## ARGUMENT

### **I. A WRIT OF PROHIBITION SHOULD BE ISSUED BECAUSE THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER AND ABUSED ITS DISCRETION IN DENYING PETITIONER'S DISQUALIFICATION MOTION**

#### **A. The Lower Tribunal's Decision is Clearly Erroneous as a Matter of Law**

The most important factor in evaluating a petition for a Writ of Prohibition is “whether the lower tribunal’s order is clearly erroneous as a matter of law.” *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. The Circuit Court’s refusal to enforce the statutory prohibition on the use of outside counsel to litigate WVCCPA claims brought by the State is clear error that demands correction.

The West Virginia Constitution provides that the Attorney General “shall perform such duties as may be *prescribed by law*.” W. Va. Const. art. VII, § 1 (emphasis added). This Court has insisted that “the plain effect of [this] provision is to limit the powers of the Attorney General to those conferred by law laid down pursuant to the constitution,” not from common law. *Manchin*, 170 W. Va. at 785, 296 S.E.2d at 915. Thus, the Attorney General’s authority is limited to those powers “prescribed or provided by statutes.” *Id.* Here, the West Virginia Legislature has specified in the WVCCPA that the Attorney General may only “[d]elegate his power and duties under this chapter to qualified personnel *in his office*, who shall act under the direction and supervision of the Attorney General and for whose acts he shall be liable.” W. Va. Code § 46A-7-102(1)(f) (emphasis added). The Attorney General’s use of attorneys outside his office exceeds his statutorily-granted authority in contravention of the West Virginia Constitution and this Court’s holding in *Manchin*.

The use of the phrase “personnel in his office” is a deliberate limitation on whom the Attorney General can utilize to litigate claims under the WVCCPA. It is a departure from the language of the Uniform Consumer Credit Code upon which the WVCCPA is based, which allowed the use of “*any necessary attorneys . . . to appear for and represent the [state officer] in court.*” See *White v. Wyeth*, 227 W. Va. 131, 136, 705 S.E.2d 828, 833 (2010); *Orlando v. Fin. One of W. Va., Inc.*, 179 W. Va. 447, 449-50, 369 S.E.2d 882, 884-85 (1988); 1974 UCCC § 6.104(g); 1968 UCCC § 6.104(g). That model language was not adopted by the West Virginia Legislature when it enacted the WVCCPA. Indeed, the WVCCPA is the only consumer protection legislation in the country that employs the “in his office” language.<sup>10</sup>

The restriction to personnel “in his office” also departs from other West Virginia statutes that authorize the Attorney General and other officials to employ counsel outside their offices. See, e.g., W. Va. Code § 47-18-6 (allowing the Attorney General to direct county prosecutors to aid in prosecuting anti-trust actions); § 11-10-5h (allowing the Tax Commissioner to be represented by a county prosecutor or his own counsel as a special assistant attorney general); § 5-3-2a (allowing for an independent special assistant attorney general for review of

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<sup>10</sup> See Ala. Code § 8-19-4 (2012); Alaska Stat. § 45.50.495 (2012); Ariz. Rev. Stat. § 44-1524 (2012); Ark. Code Ann. § 4-88-105 *et seq.* (2012); Cal. Bus. & Prof. Code § 310 *et seq.* (2012); Colo. Rev. Stat. § 6-1-103 (2012); Colo. Rev. Stat. § 6-1-107 (2012); Conn. Gen. Stat. § 21a-11 (2012); Del. Code Ann. tit. 6, § 2514 *et seq.* (2012); Fla. Stat. Ann. § 501.206 (2012); Ga. Code Ann. § 10-1-403 (2012); Haw. Rev. Stat. § 487-2 *et seq.* (2012); Idaho Code Ann. § 48-606 (2012); Ill. Comp. Stat. Ann. § 505/3 *et seq.* (2012); Ind. Code Ann. § 4-6-9-4 (2012); Iowa Code § 537.6104 (2012); Kan. Stat. Ann. § 50-628 (2011); Ky. Rev. Stat. Ann. § 367.150 (2012); La. Rev. Stat. Ann. § 51:1404 (2012); Me. Rev. Stat. Ann. tit. 9-A, § 6-104 (2011); Md. Code Ann., Com. Law § 13-201 (2012); Mass. Gen. Laws ch. 93A, § 4 (2012); Mich. Comp. Laws Serv. § 445.905 (2012); Minn. Stat. § 8.02 *et seq.* (2012); Miss. Code Ann. § 75-24-1 *et seq.* (2011); Mo. Rev. Stat. § 407.040 (2012); Mont. Code Ann. § 30-14-113 (2011); Neb. Rev. Stat. Ann. § 87-303.02 (2012); Nev. Rev. Stat. § 598.096 (LexisNexis 2012); N.H. Rev. Stat. Ann. § 358-A:4 (2012); N.J. Rev. Stat. §§ 56:8-3-4 (2012); N.M. Stat. Ann § 57-12-12 (2012); N.Y. Gen. Bus. Law § 349 (Consol. 2012); N.C. Gen. Stats. § 75-9 *et seq.* (2012); N.D. Cent. Code § 51-15-04 (2012); Ohio Rev. Code Ann. § 1345.05 (2012); Okla. Stat. Ann. tit. 15, § 756.1 *et seq.* (2012); Or. Rev. Stat. § 646.618 (2011); 73 Pa. Cons. Stat. § 201-4 (2012); R.I. Gen. Laws § 6-13.1-5 (2012); S.C. Code Ann. § 37-6-104 *et seq.* (2011); S.D. Codified Laws § 37-24-23 (2012); Tenn. Code Ann. § 47-18-106 (2012); Tex. Bus. & Com. Code Ann. § 17.48 (2012); Utah Code Ann. § 13-2-5 (2012); Vt. Stat. Ann. tit. 9, § 2460 (2012); Va. Code Ann. § 59.1-201 (2012); Wash. Rev. Code Ann. §§ 19.86.080-110 (2012); Wis. Stat. § 426.104 (2012) and § 426.106 (2012); Wyo. Stat. Ann. § 40-12-102 (2012) and § 40-12-112 (2012).

consent judgments against state agencies, officers or employees); § 22B-1-7 (allowing for outside counsel in appeals to state environmental boards). If the Legislature intended to permit the Attorney General to use attorneys from outside his office to pursue actions under the WVCCPA, it knew how to do so. Instead, it very deliberately specified the exact opposite. While there is no legislative history explaining why this limitation on the Attorney General was imposed, it is consistent with the well-established principle that government actions to impose penalties should not be motivated by financial gain for counsel representing the government. *See* Section I.C, *infra*.

In this case, the trial court approved the arrangement between the State and private counsel because of “[t]he broad powers given to the Attorney General under the Act and the overall purpose of the Act to protect the citizens of the State of West Virginia” without explaining how this general proposition vitiated the plain and specific language in the statute relating to representation. (A.R. 88-93). “[C]ourts are not to eliminate through judicial interpretation words that were purposely included . . . .” *Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. 52, 57, 622 S.E.2d 289, 294 (2005).

For its part, the State does not ignore the edict that the Attorney General’s representation in WVCCPA cases is limited to “qualified personnel in his office” -- it pretends that private counsel *are* such personnel by virtue of their retention as “Special Assistants.” (A.R. 122).<sup>11</sup> This interpretation of “in his office” to apply to private attorneys, including several

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<sup>11</sup> The State provides no authority for hiring outside counsel to represent the PEIA.

whose actual offices are in other states, is so loose and strained as to deprive it of any meaning.<sup>12</sup>

Moreover, if this interpretation were accepted, the arrangement in this case would directly contradict other West Virginia law directing how the Attorney General and his staff are compensated. West Virginia Code § 5-3-3 provides that compensation for “Assistant Attorneys General” “shall be within the limits of the amounts appropriated by the Legislature for personal services.” But the compensation for the “Special Assistants” in this case does not come from any legislative appropriation, but instead from any award of fees by the Court if the State prevails in this litigation. The State has not identified any authority that permits payment of personnel in the Attorney General’s office in this manner.

The arrangement also runs afoul of the West Virginia Ethics Act, which prohibits any public employee from “knowingly and intentionally us[ing] his or her office . . . for his or her own private gain.” W. Va. Code § 6B-2-5(b)(1). Unlike salaried attorneys in the Attorney General’s Office, who would litigate this case without any influence of personal gain depending on the outcome, the “Special Assistants” have a direct financial stake in the outcome of this case.

Finally, the West Virginia Constitution “restricts the compensation of the Attorney General and of the other named executive department officers to a strict salary basis and bars the officers from supplementing or increasing their legislatively provided compensation by their receipt of fees or any other form of compensation.” *Hechler v. Casey*, 175 W. Va. 434, 450, 333 S.E.2d 799, 815 (1985); W. Va. Const. art. VII, § 19 (enumerated officers “shall receive for their services a salary to be established by law,” and are not permitted to “receive to

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<sup>12</sup> See, e.g., Appointment Letters (A.R. 88-93), which list counsel’s offices as follows:

Laura Baughman, Esq.  
Baron & Budd, PC  
3012 Oak Lawn Avenue Suite 1100  
Dallas, TX 75219-4281

Burton LeBlanc, Esq.  
Baron & Budd, P.C.  
9015 Bluebonnet Boulevard  
Baton Rouge, LA 70810

Bill Robins, III, Esq.  
Heard Robins Cloud & Lubel, LLP  
300 Paseo De Peralta, Suite 200  
Santa Fe, NM 87501

their own use any fees, costs, perquisites of office or other compensation”). Consequently, to the extent the “Special Assistant” Attorneys General are treated by this Court as “personnel in the [AG’s] office,” they would have to be compensated with payment by the State with the salary of an Assistant Attorney General employed in the office of the Attorney General not some open ended award that turns on the amount of the recovery.

The State argued that these prohibitions do not specifically refer to “special assistants,” but only to public employees of the executive branch. (A.R. 126). The State cannot credibly claim that private counsel are personnel in the office of the Attorney General for the purpose of complying with the statutory language of the WVCCPA, but then treat them differently than the Attorney General’s staff for other purposes, including compensation. Such a position is contrary to the law, and offensive to fair administration of justice against GSK, and the fair treatment of the public servants that actually do serve in the Attorney General’s office.

In addition to inflicting an ongoing harm on GSK, this arrangement harms West Virginia. The Attorney General asserted in State’s Opposition to the Disqualification Motion that any attorney’s fees recovered in this matter would be the property of the “Special Assistant” Attorneys General and not the State. (A.R. 126-127). The West Virginia Constitution provides, however, that “all fees . . . for any service performed by any officer . . . shall be paid in advance into the state treasury.” W. Va. Const., art. VII § 19. *See also Hechler*, 175 W. Va. at 450, 333 S.E.2d at 815 (citing *Manchin*, 170 W. Va. at 785, 296 S.E.2d at 915); W. Va. Code § 5-3-5 (fee award to Attorney General to be deposited in State Treasury). Thus, the award of fees that the State has promised private counsel properly belongs to the State, and the promise to pay these fees to out-of-state plaintiffs’ attorneys would be a misappropriation of State funds.

West Virginia statutes that expressly provide for attorneys' fees consistently adhere to the rule that the fees are the property of the litigant, not its lawyers. *See* W. Va. Code § 21-5-12(b) ("Such attorney fees in the case of actions brought under this section by the commissioner shall be remitted by the commissioner to the Treasurer of the State."); *see also* W. Va. Code § 5-11-3(c) ("In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.") and *Hollen v. Hathaway Electric*, 213 W. Va. 667, 584 S.E.2d 523 (2003) ("Working people should not have to resort to lawsuits to collect wages they have earned. When however, resort to such action is necessary, the Legislature has said that they are entitled to be made whole by the payment of wages, liquidated damages, and costs, including attorney fees."). In this case, the WVCCPA does not permit an award of attorneys' fees *at all*. *See*, Syl. pt. 2, *Sally-Mike Props v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986) ("as a general rule, each litigant bears his or her own attorneys' fees absent a contrary rule of court or expressed statutory or contractual authority for reimbursement."). There is certainly no authority for the State to assign away any part of its recovery, including any fee award, to the private counsel prosecuting these causes of action, in violation of the West Virginia Constitution.

In this case, the claimant is the State, not the Attorney General. The Attorney General is the State's attorney. *See Manchin*, 170 W. Va. at 790, 296 S.E.2d at 920 ("His primary responsibility is to provide proper representation and competent counsel to the officer or agency on whose behalf he appears. The Attorney General's role in this capacity is not to make public policy in his own right on behalf of the Attorney General."). Consequently, the State's counsel, the Attorney General and Special Attorneys General, have no claim to any part of the State's recovery including any award of attorneys' fees.

**B. GSK Has No Adequate Means to Address the Trial Court’s Failure to Disqualify the Illegally Retained Private Counsel**

A Writ should be issued because GSK “has no other adequate means, such as direct appeal, to obtain the desired relief.” *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. Outside of this Petition, GSK has no avenue to ameliorate the ongoing harm caused by the State’s illegal use of private counsel. First, direct interlocutory appeal is not available.<sup>13</sup> Second, as this Court has recognized, a direct appeal at the conclusion of the case would be “emasculate[d]” by the ongoing harm caused by an erroneous disqualification decision. *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. at 154, 697 S.E.2d at 746. Rather, this Court has found that a Writ of Prohibition is the appropriate mechanism to prevent such harm:

The reason that a writ of prohibition is available in this Court to review a motion to disqualify a lawyer is manifest. . . . [I]f a party who is unsuccessful in its motion to disqualify is forced to wait until after the trial to appeal, and then is successful on appeal, [that party is] exposed to undue costs and delay . . . .

*State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. at 154, 697 S.E.2d at 746.

Furthermore, there is a substantial chance that the improper representation by private counsel will never be resolved on appeal. If the case proceeds, and the Attorney General prevails, any direct appeal taken from an adverse ruling would likely center on the underlying liability, making it unlikely that the representation issue would be viewed as anything but an ancillary consideration. On the other hand, the injustice of a biased prosecution is perhaps at its zenith if GSK prevails: a defeat for the State would doubly reinforce that the suit should not and

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<sup>13</sup> Outside of very limited circumstances not applicable here, interlocutory orders are not subject to appeal. See Syl. pt. 3, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995) (“Under W. Va. Code, 58-5-1 [1998], appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.”). See also *Hinkle v. Black*, 164 W. Va. 112, 116, 262 S.E.2d 744, 747 (1979) (noting that this Court is “adamantly opposed to being in the interlocutory appeals business”).

would not have been brought but for the improper financial incentives of private counsel, but the issue will never be presented on appeal.

**C. GSK Will Be Incurably Harmed Due to the Lack of Prosecutorial Independence If the Trial Court's Ruling Stands**

The next factor in analyzing a petition for a writ of prohibition is “whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal.” *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. In this case, the harm -- subjecting GSK to an improper prosecution -- is particularly unsuited for post-judgment appellate correction because, no matter the outcome of the case, the harm will already have occurred.

Private counsel is “advance[ing] all expenses” for the suit, and will receive a fee only if “paid by the defendant.” (A.R. 88-93). Unless private counsel commits or is limited to compensation commensurate with the salaries of the personnel in the Attorney General’s office that they purport to be, it is anticipated that counsel will base their fee request in large part on the extent of the State’s recovery, and prosecute this case with those financial incentives in mind. This arrangement presents a structural risk that the “Special Assistants” will make decisions and pursue a strategy to obtain penalties and other potential damages and remedies in order to maximize their fee. While maximizing recoveries in ordinary civil litigation is desirable for clients, public attorneys must have a different goal. In *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935), the United States Supreme Court explained that a public lawyer “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . .” The client’s interest is “not that it shall win a case, but that justice shall be done.” *Id.* This principle applies in West Virginia. See *State ex rel. Bailey v. Facemire*, 186 W. Va. 528, 533, 413 S.E.2d 183, 188 (1991); cf. *Farber v. Douglas*, 178 W. Va. 491, 494, 361 S.E.2d 456,

459 (1985); *Nicholas v. Sammons*, 178 W. Va. 631, 632, 363 S.E.2d 516, 518 (1987); *State ex rel. Moran v. Ziegler*, 161 W. Va. 609, 613, 244 S.E.2d 550, 552 (1978).

The Attorney General has argued that *Berger*'s strictures are inapplicable because "*Berger* is neither a conflict of interest case nor a civil case." (A.R. 130). However, the quasi-criminal nature of the civil penalties sought in this case firmly plants the "Special Assistants" within the prosecutorial sphere. *See, e.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355, 118 S. Ct. 1279, 1288, 140 L. Ed. 2d 438, 450 (1998) ("[T]he awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding.") (citation omitted); *United States v. La Franca*, 282 U.S. 568, 575, 51 S. Ct. 278, 281, 75 L. Ed. 551, 557 (1931) ("[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action."); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) ("civil penalties are 'quasicriminal' in nature"); *First Am. Bank of Va. v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985) ("Civil penalties may be considered 'quasi-criminal' in nature."). The Attorney General's "Special Assistants" are seeking statutory penalties and injunctions as *parens patriae*,<sup>14</sup> on behalf of the State, and these

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<sup>14</sup> The office of the Attorney General in West Virginia wields only limited powers, and "does not possess the common law powers attendant to that office in England and in British North America during the colonial period." *Manchin*, 170 W. Va. at 785, 296 S.E.3d at 915. The *parens patriae* power, being "derived from the English constitutional system," is just such a common-law power. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257, 92 S.Ct. 885, 888, 31 L. Ed. 2d 184, 189 (1972). The West Virginia Constitution "abrogated any common law executive powers the [Attorney General] may have had. The executive function formerly exercised by the Attorney General at common law was extinguished...". *Manchin* at 785, 296 S.E.2d at 915. This abrogation includes the *parens patriae* power. For example, the *Manchin* court looked to *In re Estate of Sharp*, 63 Wis. 2d 254, 260-61, 217 N.W.2d 258, 262 (1974), where the Wisconsin Supreme Court interpreted a similar constitutional provision. As the *Manchin* court noted:

Wisconsin, unlike numerous states, has specifically circumscribed the powers and duties of the office of Attorney General. Art. VI, Sec. 3 of the Wisconsin Constitution limits those powers and duties to those "prescribed by law." This constitutional principle has been interpreted by the courts in numerous decisions

penalties far exceed any compensatory damages, but rather are punitive in nature.<sup>15</sup> Unlike civil cases, the “Special Assistants” must make judgments and tradeoffs virtually identical to those a prosecutor would have to make. Specifically, the State must balance the costs and benefits of the Petitioner’s business practices; the propriety and extent of state versus federal regulation in this area; the balance among compensatory, injunctive and punitive goals; and protection of the Petitioner’s constitutional rights. The ethical limits on criminal prosecutors are appropriate

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as removing from the office of the Attorney General any powers and duties which were found in that office under common law.

*Manchin* at 785, 296 S.E.2d at 915 (quoting *Sharp*, 63 Wis. 2d at 260-61, 217 N.W.2d at 262). In the very next sentence, the Wisconsin Supreme Court spelled out the logical conclusion of this principle. “The attorney general is devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens *and cannot act for the state as parens patriae.*” *Sharp*, 63 Wis. 2d at 261, 217 N.W.2d at 262 (emphasis added.)

<sup>15</sup> In *State ex rel. Palumbo v. Graley’s Body Shop, Inc.*, 188 W. Va. 501, 425 S.E.2d 177 (1992), this Court outlined the test for determining whether a penalty is criminal or civil:

[I]f the legislature indicates an intention to establish a civil remedy, courts must consider whether the legislature, irrespective of its intent to create a civil remedy, provided for sanctions so punitive as to transform the civil remedy into a criminal penalty. . . . [C]ourts should be guided by the following factors identified by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L. Ed. 2d 644, 661 (1963): ‘Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]’

*Id.* at Syl. pt. 1. The penalties sought here are based on purported misrepresentations allegedly made by GSK. The State does not intend to prove that any particular physician was impacted by any particular statements or that any particular patient suffered harm as a result. See Complaint (A.R. 6-65). In similar circumstances, comparable penalty provisions have been held to be penal in nature. See *Merck Sharp & Dohme Corp. v. Jack Conway*, No. 3:11-51, 2012 U.S. Dist. LEXIS 38390, at \*10-11 (E.D. Ky. Mar. 21, 2012) (where penalties sought under Kentucky’s Consumer Protection Act did not require proof of actual damages, were not based on the loss suffered, and were intended to punish and deter, they were penal in nature and the prosecution to impose those penalties was required to be undertaken in accordance with the requirement of neutrality). In addition, at the August 28, 2012 hearing, Special Assistant Attorney General Robins indicated that the Attorney General will be seeking “quite a large” award of penalties in relation to the claims made under these statutes. It is GSK’s experience from other similar litigations that the Attorney General may seek an award of penalties in the hundreds of millions if not billions of dollars. An award of penalties this large (and completely independent of provable harm) is, if not criminal under *Palumbo*, at the very least quasi-criminal.

guideposts in evaluating the “Special Assistants,” and their compensation agreements -- which make it impossible to balance these factors solely in the public’s interest -- fail the test.

In addition, allowing private counsel with financial incentives to maximize penalties alters the relationship between government and the corporate citizen. As mentioned *supra* in Section I.A, the Legislature has already taken a firm position on this issue: the Attorney General may “[d]elegate his powers and duties under [the WVCCPA] to *qualified personnel in his office . . .*” W. Va. Code § 46A-7-102(1)(f) (emphasis added). By prohibiting outside counsel from pursuing WVCCPA claims, the Legislature defined the appropriate prosecutorial financial incentive: “[t]he total compensation of all such assistants shall be within the limits of the amounts appropriated by the Legislature for personal services.” W. Va. Code § 5-3-3. The trial court’s disregard for this express legislative balance will subject GSK to the ongoing harm of an improper prosecution.

While this Court can resolve this dispute on statutory, rather than constitutional grounds, the arrangement between the Attorney General and private counsel violates GSK’s due process rights under the Fourteenth Amendment of the United States Constitution and under the West Virginia Constitution, art. III, § 10. The Due Process Clause of the United States Constitution guarantees that a prosecutor or government enforcement attorney be free from improper financial interests. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-50, 100 S. Ct. 1610, 1616-17, 64 L. Ed. 2d 182, 192-93 (1980). The standard of neutrality for prosecutors applies to private counsel retained by the government. *Young v. United States, ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987); *see State ex rel. Koppers Co., Inc. v. International Union of Oil, Chemical and Atomic Workers*, 171 W. Va. 290, 293-94, 298 S.E.2d 827, 829-30 (1982) (noting that a public prosecutor’s primary duty is to do justice and “a private

prosecutor is held to the same high standards as a public one”). Due process forbids prosecution of this action by “Special Assistants” who have a financial stake in the outcome with no effective means of oversight by an impartial Attorney General. *Young*, 481 U.S. at 810, 107 S. Ct. at 2139, 95 L.Ed. 2d at 760; *Marshall*, 446 U.S. at 249-50, 100 S.Ct. at 1616-17, 64 L.Ed.2d at 192-93.

In sum, GSK is faced with a biased prosecution impermissibly tainted by a personal stake in the outcome of the litigation. This ongoing harm will occur regardless of the outcome of the case, and cannot be corrected by a direct appeal after judgment is entered. For the foregoing reasons, this Court should grant GSK’s Petition and issue a Writ of Prohibition.

**D. The Trial Court Has Failed to Apply The Plain Language of the WVCCPA**

The fourth factor to be considered in granting a petition for a Writ of Prohibition is “whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law.” *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. As discussed in Section I.A, *supra*, the Court decision to ignore the plain language of West Virginia Code § 46A-7-102(1)(f) was clear legal error. To the extent that the trial court’s order ignores relevant statutory text, it manifests a disregard for both procedural maxims of interpretation (*see, e.g., Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. at 57, 622 S.E.2d at 294) and the substantive law (*i.e., W. Va. Code § 46A-7-102(1)(f)*).

This is not the only West Virginia court in which this is occurring. The State listed six separate decisions in which the WVCCPA has been violated in like manner, through prosecution by private counsel rather than the personnel in the Attorney General’s Office.<sup>16</sup> The

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<sup>16</sup> See *State ex rel. McGraw v. Capital One Bank*, Nos. 05-C-71 and 05-C-72 (W. Va. Cir. Ct. Lincoln Cty., Sept. 22, 2005) (A.R. 140-147); *State ex rel. McGraw v. Johnson & Johnson*, No. 04-C-156 (W. Va. Cir. Ct. Brooke Cty., March 15, 2006) (A.R. 148-162); *State of West Virginia v. Steptoe & Johnson, PLLC*, No. 02-C-47M (W. Va. Cir. Ct. Marshall Cty., April 3, 2003) (A.R. 163-180); *State ex rel. McGraw v. Bear, Stearns & Co.*, No. 03-C-

frequency of this practice demonstrates the need for this Court's immediate intervention, to enforce the plain language of the statute. As this Court held in *Manchin*, "The issues raised by the petition concern the powers and duties of the Attorney General," a "substantial public policy issue which can constantly reoccur." *Manchin*, 170 W. Va. at 782 n.1, 296 S.E.2d at 912 n.1.

**E. This Petition Raises an Important Issue of First Impression**

The final factor this Court must consider in evaluating this Petition for a Writ of Prohibition is "whether the lower tribunal's order raises new and important problems or issues of law of first impression." *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. This factor weighs heavily in favor of a writ being issued, as this case raises an important issue of first impression: whether the WVCCPA allows the Attorney General to hire private counsel on a contingency fee basis.<sup>17</sup> As noted above in Section I.D, multiple Circuit Courts have permitted these illegal arrangements; one has prohibited it. *See* n. 16, *supra*. This Court must resolve this disagreement.

In the proceedings before the Circuit Court, the State argued that *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002), "supports appointments under the facts here." (A.R. 110). In fact, this Court did not decide *anything* about the use of private counsel by the State in that case, making only "brief mention of the issue" because "the scope and propriety of such practice was not fully developed or addressed in the instant case." *Id.* at 40

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133M (W. Va. Cir. Ct. Marshall Cty., May 6, 2004) (A.R. 181-185); *State of West Virginia ex rel. McGraw v. Minnesota Mining & Mfg. Co.*, 354 F. Supp.2d 660, 666 n. 6 (S.D. W. Va. 2005); *State of West Virginia ex rel. McGraw v. Visa U.S.A., Inc.*, No. 03-C551 (W.Va. Cir. Ct. Ohio Cty., Dec. 29, 2008) (A.R. 186-195); *but see McGraw ex rel. State of West Virginia v. American Tobacco Co.*, No. 94-C-1707 (W. Va. Cir. Ct. Kanawha Cnty. Nov. 29, 1995) (A.R. 439-445).

<sup>17</sup> This issue was raised but not taken up in the Petition filed in *Capital One*. *See* Writ of Prohibition, *West Virginia ex. rel. Capital One Bank (USA), N.A., et al. v. Nibert*, No. 10-C-7-N (Oct. 12, 2011) (A.R. 449-491). However, in *Capital One* the petitioners did not seek a Writ until a year-and-a-half into the litigation. Here, one of Petitioner's central arguments is that the harm of a biased prosecution can be avoided only through early intervention.

n.25, 569 S.E.2d at 116 n.25. It certainly did not address the very precise language in the WVCCPA. A decision in this case would be the first time this Court has directly addressed this issue on the merits.

*Burton* established that the Attorney General's office had certain core functions that could not be transferred by legislation creating rights in other agencies to retain their own separate legal staff. *Id.* at 38, 569 S.E.2d at 114. In doing so, however, it confirmed the core principle of *Manchin*: that the operation of the Attorney General's office is subject to statutes passed pursuant to the Constitution. *Id.* at 30, 569 S.E.2d at 106. Here, the Legislature spoke clearly in designating which attorneys can prosecute WVCCPA claims on behalf of the State, and there is no suggestion by the State that the Legislature crossed any constitutional boundaries in doing so. This Court should grant this Petition and issue a Writ of Prohibition to correct the clear legal error in the trial court's decision to ignore the plain language of the WVCCPA precluding the use of private counsel.

Because this is an issue of first impression and fulfills the fifth and final element, this Court should grant the Petition and issue a Writ of Prohibition.

## **II. THE CIRCUIT COURT'S STANDING ANALYSIS IS UNCLEAR, UNNECESSARY AND ERRONEOUS**

The trial court concluded its opinion with a discussion of the issue of standing. The trial court stated, "Divesting the Attorney General of his authority to direct the State's legal representation could not possible [sic] redress any concrete, particularized, actual, and non-conjectural injury of GSK because the manner in which the Attorney General operates his office is not the subject of the case at bar." (A.R. 1-5). Of course, GSK did not seek to divest the Attorney General of its authority to direct the State's legal representation in this case -- *it sought an Order that reestablishes that authority in place of improperly incentivized private counsel.*

If the trial court's statement is intended to conclude that GSK lacked standing, such an analysis is unwarranted in the disqualification context. Standing has nothing to do with Petitioner's Motion to Disqualify private counsel. "Typically, . . . the standing inquiry requires careful judicial examination . . . to ascertain whether the particular plaintiff is entitled to an adjudication of *the particular claims asserted*." *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 95, 576 S.E.2d 807, 822 (2002) (alterations in original) (citations omitted). In other words, a standing analysis determines whether a party has suffered an injury-in-fact entitling it to adjudication of a cause of action. When a defendant, haled into court, argues for disqualification, it is not asserting a cause of action requiring standing, but invokes the court's "inherent power to do what is reasonably necessary for the administration of justice." *Garlow v. Zakaib*, 186 W. Va. 457, 461, 413 S.E.2d 112, 116 (1991).

Further, even if standing were required (and it is not), Petitioner has satisfied the standing requirements under *Findley*, and the trial court's holding is clearly erroneous as a matter of law.<sup>18</sup> First, Petitioner has suffered an injury-in-fact: improper prosecution in violation of the State and federal Constitutions and the WVCCPA. "Merely being forced to defend oneself in a proceeding before a biased administrative agency is enough to constitute an ongoing injury." *Esso Std. Oil Co. (P.R.) v. Lopez Freytes*, 467 F. Supp. 2d 156, 162 (D.P.R. 2006), *aff'd*, 522 F.3d 126 (1st Cir. 2008); *see also*, *Merck Sharp & Dohme Corp. v. Conway*, No. 3:11-51-DCR, 2012 U.S. Dist. LEXIS 38390, at \*13 (E.D. Ky. Mar. 21, 2012) (citations and quotation marks omitted) ("Merck has suffered an injury in fact; namely, that it is being forced to defend itself in

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<sup>18</sup> "Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact'-- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

an inherently biased quasi-criminal enforcement proceeding. This is sufficient to constitute a concrete and ongoing injury in fact.”). Second, there is a causal connection between the injury and the conduct because the improper use of private counsel with improper financial incentives to advance the State’s cause is in direct violation of express language of the WVCCPA. Finally, the relief GSK seeks -- the disqualification of private counsel -- would redress the injury. GSK clearly has standing.

This Court has previously recognized that a criminal defendant’s “special interest as a person subject to a criminal charge or criminal investigation by an allegedly improperly appointed special prosecutor would give him standing . . . .” *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 166, 248 S.E.2d 602 (1978). Similarly here, GSK is being subjected to a quasi-criminal proceeding by improperly incentivized “Special Assistant” prosecutors. The “special interest” GSK has in the proceedings similarly gives rise to standing.

In sum, the trial court’s order that GSK lacks standing is both inapposite and clearly erroneous. Therefore, this Court should grant this Petition and issue a writ of prohibition.

**CONCLUSION**

For the foregoing reasons, the Petitioner respectfully moves this Honorable Court to grant its Verified Petition for a Writ of Prohibition and issue a writ finding that the Circuit Court of Wayne County exceeded its legitimate power in denying petitioner’s Disqualification Motion and ordering the court to reverse the order and grant the Disqualification Motion.

**GlaxoSmithKline, LLC**

**By Counsel**

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VERIFICATION

STATE OF West Virginia

COUNTY OF Cabell, TO-WIT:

I, Tamela J. White being first duly sworn upon my oath, depose and say that I have read the foregoing *Verified Petition for Writ of Prohibition* and *Appendix* thereto and the procedural facts contained therein are true and correct to the best of my knowledge.

Tamela J. White  
Tamela J. White, Esq.

Taken, subscribed and sworn to before me this 12<sup>th</sup> day of February,  
2013.

My commission expires July 20, 2022.



**CERTIFICATE OF SERVICE**

I, the undersigned, do here by certify that I have timely transmitted true and correct copies of *Verified Petition for Writ of Prohibition* on February 12, 2013 to all persons upon whom a rule to show cause should be served, if granted, via hand delivery, U.S. Mail and electronic mail, as follows:

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