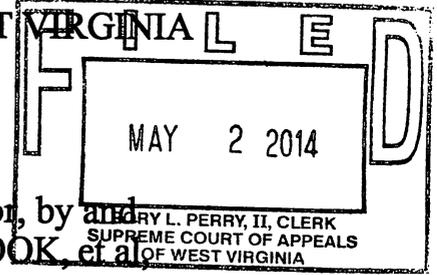


ARGUMENT  
DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0207

STATE OF WEST VIRGINIA, ex rel. J. C., a minor, by and through his mother and next friend, MICHELLE COOK, et al.



*Petitioners,*

v.

THE HONORABLE JAMES P. MAZZONE, Lead Presiding Judge,  
Zoloft Litigation, Mass Litigation Panel;  
PFIZER, INC., ROERIG, a division of Pfizer, Inc.,  
and GREENSTONE, LLC f/k/a Greenstone, LTD.

*Respondents*

PETITIONERS' REPLY BRIEF IN  
SUPPORT OF EMERGENCY PETITION FOR PROHIBITION

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## I. STATEMENT OF THE CASE

This reply brief is submitted in support of an Emergency Petition for Writ of Prohibition from a ruling by the Mass Litigation Hearing Panel [“Panel”] that it will separate one civil action with twenty-five plaintiff families [“Petitioners”] against defendants, Pfizer, Inc.; Roerig, a division of Pfizer, Inc.; and Greenstone, LLC f/k/a Greenstone, Ltd. [“Respondent Drug Companies”] into twenty-five separate civil actions based on its erroneous interpretation of Rule 3(a) and Rule 20(a) of the Rules of Civil Procedure [“Rule 3(a)” and “Rule 20(a)”].

## II. SUMMARY OF ARGUMENT

After extensive briefing by the Respondent Drug Companies and the Panel, it is clear that Rule 3(a) is, and must be interpreted as, an administrative rule designed for the specific purpose of ensuring that each plaintiff in a multi-plaintiff case pays a separate filing fee and that the action is “docketed” in a way that makes it simple for the Circuit Courts and Circuit Clerks to administratively track each plaintiff.

Extending Rule 3(a) beyond its administrative function to effectuate an automatic, substantive severance of properly-joined claims is contrary to the plain language of Rule 20(a) permitting such joinder. If allowed to stand, the Respondent Drug Companies’ and Panel’s interpretation will prevent West Virginia citizens from joining with citizens of other states to sue in West Virginia state court; and will therefore impede West Virginia citizens from prosecuting their claims in their chosen West Virginia state court forum. Respectfully, Petitioners submit that stripping West Virginia citizens of their rights under Rule 20(a) was not the intention of Rule 3(a). Nor was it the intention of Rule 3(a) to limit the scope, purpose, and importance of the Mass Litigation Panel.

The responses filed by the Respondent Drug Companies and the Panel, which argue to the contrary, are inconsistent with:

- (1) This Court's opinion in *Cable v. Hatfield*, 202 W. Va. 638, 505 S.E.2d 701 (1998), which precipitated the amendments to Rule 3(a);
- (2) The detailed rulings of Judge Chambers and Judge Berger in *J.C. v. Pfizer, Inc.*, Civil Action No. 3:12-cv-04103 at \*7 (S.D. W. Va. September 15, 2012) and *Almond v. Pfizer, Inc.*, 2013 WL 6729438 at \*4 (S.D. W. Va. December 19, 2013), respectively, who evaluated the scope and effect of Rule 3(a) as it applies to these cases and rejected the interpretation of Rule 3(a) advanced by the Respondent Drug Companies and the Panel;
- (3) The decisions of Judge Young who denied the Respondent Drug Companies' improper attempt to use Rule 3(a) as a mechanism to evaluate each plaintiff individually for purpose of *forum non conveniens*;
- (4) The decision of this Court in *State ex rel. Pfizer, Inc. v. Young*, No. 12-1370 (W. Va. Jan. 9, 2013), to reject the Respondent Drug Companies' petition for writ of prohibition challenging Judge Young's rulings; and,
- (5) Chief Justice Benjamin's interpretation of Rule 3(a) when he denied the Respondent Drug Companies' initial motion to the Panel which rested on the incorrect premise that there was more than one civil

action pursuant to Rule 3(a) simply because multiple plaintiffs joined in a single complaint under Rule 20(a).<sup>1</sup>

The Rules of Civil Procedure, including Rule 20(a), have been in effect since July 1, 1960. F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 1 (4<sup>th</sup> ed. 2012). The Mass Litigation Panel rules have been in effect since June 9, 1999. Id. at § 42[3] n. 279.

Essentially the same criteria for the joinder of claims in a single complaint by multiple plaintiffs contained in Rule 20(a) – “arising out of the same transaction, occurrence, or series of transactions and occurrences” and “if any question of law or fact common to all these persons will arise in the action” – apply to cases within the jurisdiction of the Mass Litigation Panel:

Rule 26.04(a) defines mass litigation as two or more civil actions pending in one or more circuit courts: (1) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (2) involving common questions of law or fact in “personal injury mass torts” implicating numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (3) involving common questions of law or fact in “property damage mass torts” implicating numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (4) involving common questions of law or fact in “economic loss” cases implicating numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury;

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<sup>1</sup> The Respondent Drug Companies’ interpretation of Rule 3(a) also directly contradicts the practice of the Circuit Court of Wayne County.

or (5) involving common questions of law or fact regarding harm or injury allegedly caused to numerous claimants by multiple defendants as a result of alleged nuisances or similar property damage causes of action.

LITIGATION HANDBOOK at § 42[3][a] (Footnote omitted).

The existence of Rule 20(a) since 1960 and Rule 26.04 since 1999 has not opened the floodgates of litigation by non-residents. In the instant case, only twenty-five families are involved, which is not an unreasonable or unmanageable number. If the interpretation of this Court's rules advanced by Petitioners will have the immediate deleterious effects advanced by the Panel and the Respondent Drug Companies, then the logical question is why in the over fifty years since adoption of Rule 20(a) and almost fifteen years since adoption of the Mass Litigation Panel rules has the flood of litigation not occurred?

Moreover, the practical effect of improperly ignoring the plain language of Rule 20(a) and the long history of its liberal construction for the benefit of parties joining their claims in a single complaint will be to deprive West Virginia citizens of their state court forum. With complete diversity between West Virginia plaintiffs and non-West Virginia defendants, the claims of West Virginia plaintiffs will be removed to federal court and those West Virginia plaintiffs deprived of their choice of a West Virginia state court forum.

Consequently, Petitioners respectfully request that this Court apply Rule 20(a) as written and as applied since its adoption and allow both residents and non-residents who satisfy its requirements to join their claims in a single complaint.

### III. ARGUMENT

#### A. THE PANEL'S FAILURE TO MAKE A SINGLE REFERENCE TO RULE 20(A) UNDERScores THE DEFICIENCIES IN ITS REASONING REGARDING APPLICATION OF RULE 3(A) TO THIS CASE.

In its ten-page response, the Panel essentially makes two arguments.

First, it argues that because Trial Court Rule 26.04(a)(2) ["Rule 26.04"] and Rule 3(a) both reference "civil action[s]," it is required to process complaints with multiple, unrelated plaintiffs as separate cases. Panel's Response at 2-4.

Second, it argues that "the Panel will be overrun with endless civil actions having absolutely no nexus to West Virginia." Panel's Response at 8.

Noticeably absent from the Panel's response, however, is any reference whatsoever to Rule 20(a) which unequivocally permits multiple, unrelated plaintiffs, including non-residents, to join their claims in a single complaint if the requirements of that rule are satisfied.

The Panel's silence on Rule 20(a) is telling because there can be no legitimate debate that if Rule 3(a) is interpreted as a substantive rule that automatically severs the claims of properly joined plaintiffs, then for all practical purposes, Rule 20(a) disappears, which is a result prohibited by the rules of statutory construction applicable to this Court's rules.

1. **Nothing in Either Rule 26.04(a)(2) or Rule 3(a) Requires that a Single Complaint Filed by Multiple, Unrelated Plaintiffs Be Separated Into Independent Cases for Processing by the Mass Litigation Panel.**

The Panel correctly notes that Rule 26.04(a)(2) defines "Mass Litigation" as "Two (2) or more civil actions pending in one or more circuit courts . . . involving common questions of law or fact in 'personal injury mass torts' implicating numerous claimants in

connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure.” (Emphasis supplied)

Likewise, the Panel correctly notes that Rule 3(a) provides, “For a complaint naming more than one individual plaintiff not related by marriage, a derivative or fiduciary relationship, each plaintiff shall be assigned a separate civil action number and be docketed as a **separate civil action** and be charged a separate fee by the clerk of a circuit court.” (Emphasis supplied).

The Panel’s argument is logically flawed, however, that because both rules reference the term “civil action” and the legal dictionary definition of “civil action” is “[a]n action brought to enforce, redress, or protect a private or civil right,” Panel’s Response at 3 (internal citation omitted), “While there may be one, multi-plaintiff complaint . . . there are numerous civil actions . . . ,” id.

Even a single plaintiff may join multiple claims against multiple defendants, for example, in a single complaint, but no one would suggest that because each of those claims constituted a separate “private or civil right,” the complaint constituted “numerous civil actions” to be processed separately.

Similarly, the Panel’s statement that “defendants have a due process right to defend against each individual civil action in a multi-plaintiff complaint,” id., is equally flawed.

Again, merely because a single plaintiff joins multiple defendants in a single complaint affords no “due process right” in those multiple defendants to defend each claim as to each defendant as a “separate civil action.”

Moreover, if related plaintiffs may join related claims against multiple defendants in a single complaint, is the Panel suggesting that each of those defendants “have a due process right to defend each individual civil action in a multi-plaintiff complaint” as a “separate civil action?” Or, is the Panel suggesting its argument only applies when multiple plaintiffs are unrelated or non-residents?

Petitioners respectfully submit that there is a reason no legal authority is offered for the argument advanced by the Panel that some due process right exists in one or more defendants to defend claims properly joined in a single complaint under R. Civ. P. 20 as separate civil actions.

Obviously, reading Rule 26.04(a)(2), Rule 3(a), and Rule 20(a) *in pari materia*, nothing prevents the Panel from processing Petitioners’ claims joined in a single complaint, as they have been numbered and docketed, as separate civil actions for administrative purposes, but as a single complaint for all other purposes.

As the Panel notes, Rule 3(a) “facilitates management and tracking of each civil action the Panel is charged with resolving, whether such resolution is by dismissal, summary judgment, trial or settlement.” Panel’s Brief at 4. Of course, this was precisely the reason for amendment to Rule 3(a) and nothing Petitioners are arguing in this case will prevent accomplishment of that objective.

Likewise, answering the question “Who is suing whom for what?,” Panel’s Brief at 5, will be made no more difficult by treating Petitioners’ claims as being made pursuant to a single complaint under Rule 20(a). Nor will it be any different than in any case in which multiple plaintiffs, related or unrelated, join their claims in a single complaint under Rule 20(a).

The case of *Abbott v. Earth Support Services*, Wyoming County Civil Action No. 08-C-138, relied upon by the Panel, similarly provides no impediment to Petitioners' argument. There, as noted by the Panel, the issue was whether newly-amended Rule 3(a) would apply retroactively to a complaint filed prior to its amendment. Panel's Response at 6. Even though the Panel determined that the newly-amended rule did not apply, it nevertheless accepted jurisdiction and processed the claims separately. *Id.*

Nothing done in *Abbott* is inconsistent with Petitioners' position in this case. Each individual plaintiff's claim has received a separate case number; has been docketed separately; and where appropriate in circumstances that are truly unique to each individual plaintiff can be considered separately. On the other hand, as each individual plaintiff's claim has been permissibly joined in a single complaint under Rule 20(a), those claims can be jointly considered as one for all other purposes. The Panel's concern is simply unfounded that by merely considering plaintiffs' complaint jointly, as filed, where joint consideration makes sense under Rule 20(a), will prevent "the independent, substantive analysis of their separate civil actions that is critical to the Panel's process." Panel's Response at 8.

If multiple, related plaintiffs file a single complaint under Rule 20(a), a Circuit Court is just as able to give each plaintiff's claims individual evaluation as will the Panel if multiple, unrelated plaintiffs file a similar complaint. When the case is processed as a single complaint in either situation presents no impediment to undertaking "the independent substantive analysis" of separate claims presented in a single complaint in either scenario.

2. **Either Petitioners Were Permitted to Join Their Claims in a Single Complaint Under Rule 20(a), in Which Case They Are Entitled to Have that Single Complaint Processed Under Rule 20(a), or They Were Not.**

As the Panel's response makes clear, its decision was less predicated upon the history and language of Rule 3(a) than it was motivated by concerns of docket control:

Petitioners' interpretation of Rule 3(a) would permit a non-West Virginia plaintiff who suffered personal injury outside the State of West Virginia to sue a non-resident West Virginia defendant in West Virginia state court, so long as the non-West Virginia plaintiff filed a multi-plaintiff complaint with at least one West Virginia plaintiff unrelated by marriage, or a derivative or fiduciary relationship. If such a suit cannot survive in West Virginia state court as a single complaint, it should not be permitted under the guise of a multi-plaintiff complaint.

Panel's Response at 8. The Panel further argues, "West Virginia must expend its limited judicial resources on cases involving West Virginia residents and torts that have a nexus to West Virginia." *Id.* at 10. Again, however, nowhere in the Panel's response is Rule 20 mentioned or referenced.

Rule 20(a) provides:

All persons may join **in one action** as plaintiffs if they assert **any right to relief** jointly, severally, or in the alternative in respect of or **arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.** . . . A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for **one or more of the plaintiffs according to their respective rights to relief**, and against one or more defendants according to their respective liabilities.

(Emphasis supplied).<sup>2</sup>

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<sup>2</sup> Similarly, Fed. R. Civ. P. 20(a) provides: "Persons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or

Plainly, on its face, multiple “persons” like the Petitioners “may join in one action as plaintiffs” their claims against the Zoloft defendants where Petitioners’ “right to relief” is alleged to arise “out of the same transaction, occurrence, or series of transactions or occurrences” presenting “question[s] of law and fact common to all these persons.”

Rule 20(a) nowhere differentiates between West Virginia “persons” and non-West Virginia “persons.” Rather, at least with respect to joining their claims “in one action,” Rule 20(a) permits all “persons,” both West Virginian and non-West Virginia to join their claims “in one action” if the other criteria in the rule are satisfied.

Again, “The Supreme Court has been adamant in holding that the rules should be construed liberally to promote justice. Rule 1 echoes the policy of liberal construction in holding that the rules of civil procedure are to be construed to secure a just, speedy, and inexpensive determination of every action.” F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 1[2][c] (4th ed. 2012)(Footnotes omitted).

Indeed, specifically with respect to Rule 20, it has been noted, “Justice McHugh noted in *Anderson v. McDonald* that Rule 20 is to be liberally construed. **A liberal construction of the rule is consistent with the rule’s purpose in providing for an efficient and complete resolution of legal disputes.**” LITIGATION HANDBOOK at § 20[2](Emphasis supplied).

“Rule 20(a) permits joinder,” it has been noted with respect to the corresponding federal rule, “in a single action of all persons asserting . . . a joint, several, or alternative right to relief that arises out of the same transaction or occurrence and presents a common

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arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.”

question of law or fact.” 7 FED. PRAC. & PROC. CIV. § 1652 (3d ed. 2014)(Footnotes omitted). “

In the federal courts, “[t]he joinder of multiple, alternative defendants,” it was noted in *Koch v. I-Flow Corp.*, 715 F. Supp. 2d 297, 302 (D. R.I. 2010), “is standard practice in products liability cases.” (Citations omitted). Likewise, “[j]oinder of plaintiffs has been permitted in a wide variety of cases.” 7 FED. PRAC. & PROC. CIV. § 1656 (3d ed. 2014).

In awarding a writ of mandamus compelling a circuit clerk to file a complaint with multiple, unrelated plaintiffs in *Cable*, supra at 644-645, 505 S.E.2d at 707-708, for example, one of the reasons for this Court’s ruling was that, “Our rules of civil procedure permit multiple plaintiffs to join in a single action, under the appropriate circumstances. See W. Va. R. Civ. P., Rule 20(a). . . . Increasingly, numerous parties will join in an action as authorized by Rule 20.” This includes the joinder of multiple, unrelated plaintiffs in product liability cases.

In *Alexis v. GlaxoSmithKline PLC*, 2002 WL 1022261 at \*2-3 (E.D. La.), for example, a federal court remanded a multiple plaintiff suit instituted against several defendants arising from the manufacturer, marketing, and distribution of LOTRONEX®, stating as follows:

Fed. R. Civ. P. 20(a) (permissive joinder) provides in pertinent part:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all these persons will arise in the action. . . . A

plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, . . .

“[T]he transaction/occurrence requirements prescribed by Rule 20(a) are ‘not rigid tests’ and ‘are to be read as broadly as possible whenever doing so is likely to promote judicial economy.’” *Terrebonne Parish School Board*, at \*3 (citing Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, 2<sup>nd</sup> ed., § 1653. The common transaction/occurrence in this matter is Lotronex<sup>®</sup>. The drug was manufactured, marketed and distributed by GlaxoSmithKline; prescribed by a physician for all plaintiffs; and, dispensed and sold to one or more plaintiffs by one or more defendant pharmacy. It is not necessary that each plaintiff obtain relief from each and every defendant, or that each defendant be found liable to each and every plaintiff.

Ultimately, absent fraudulent joinder, “the plaintiff has the right to select the forum; to elect whether to sue joint tort-feasors jointly or separately; and to prosecute his own suit in his own way to a final determination.” *Bently v. Halliburton Oil Well Cementing Co.*, 174 F.2d 788, 791 (5<sup>th</sup> Cir. 1949). In the interest of judicial economy, and finding no fraudulent joinder, the court declines to sever the claims of the two plaintiffs who have not stated malpractice claims against the non-diverse doctors. While this alone is enough to justify remand of this case, the court will nevertheless address defendants argument that plaintiffs cannot establish a cause of action under Louisiana law against any of the defendant pharmacies, including of course the non-diverse pharmacy.

Similarly, in *In re Prempro Products Liability Litigation*, 591 F.3d 613, 623-624 (8<sup>th</sup> Cir. 2010), where fifty-seven plaintiffs brought three suits against the manufacturers of hormone replacement therapy drugs, the Eighth Circuit held that remand to state court was warranted it could not conclude that plaintiffs’ claims had been misjoined in the three suits, stating as follows:

Rule 20(a)(1), Federal Rules of Civil Procedure, allows multiple plaintiffs to join in a single action if (i) they assert

claims “with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences;” and (ii) “any question of law or fact common to all plaintiffs will arise in the action.” In construing Rule 20, the Eighth Circuit has provided a very broad definition for the term “transaction.” As stated in *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974):

“Transaction” is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

Accordingly, all “logically related” events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.

*Id.* at 1333 (citations omitted); see also 7 Charles A. Wright et al., *FEDERAL PRACTICE AND PROCEDURE*, § 1653, at 415 (3d ed.2001) (explaining that the transaction/occurrence requirement prescribed by Rule 20(a) is not a rigid test and is meant to be “read as broadly as possible whenever doing so is likely to promote judicial economy.”).

After considering the Rule 20 joinder standards, we conclude that the manufacturers have not met their burden of establishing that plaintiffs’ claims are egregiously misjoined. Plaintiffs’ claims arise from a series of transactions between HRT pharmaceutical manufacturers and individuals that have used HRT drugs. Plaintiffs allege the manufacturers conducted a national sales and marketing campaign to falsely promote the safety and benefits of HRT drugs and understated the risks of HRT drugs. Plaintiffs contend their claims are logically related because they each developed breast cancer as a result of the manufacturers’ negligence in designing, manufacturing, testing, advertising, warning, marketing, and

selling HRT drugs. Some of the plaintiffs allege to have taken several HRT drugs made by different manufacturers.

Furthermore, given the nature of the plaintiffs' claims, this litigation is likely to contain common questions of law and fact. See Hines & Gensler, *supra*, at 822 ("When plaintiffs join together to sue a defendant based on the purchase of a common product or having engaged in a common transaction, it seems rather clear that their claims will involve some common question of law or fact."). One such common question might be the causal link between HRT drugs and breast cancer. Causation for all of the plaintiffs' claims will likely focus on the 2002 WHI study suggesting a link between HRT drugs and breast cancer and whether the manufacturers knew of the dangers of HRT drugs before the publication of that study.

Based on the plaintiffs' complaints, we cannot say that their claims have "no real connection" to each other such that they are egregiously misjoined. See *Tapscott*, 77 F.3d at 1371. This is unlike *Tapscott* where the alleged transactions concerning the automobile class were wholly distinct from the transactions involving the merchant class and there was "no real connection" between the two sets of transactions. *Id.* Here, there may be a palpable connection between the plaintiffs' claims against the manufacturers as they all relate to similar drugs and injuries and the manufacturers' knowledge of the risks of HRT drugs.

Furthermore, the manufacturers have presented no evidence that the plaintiffs joined their claims to avoid diversity jurisdiction. "[T]he majority of courts demand more than simply the presence of nondiverse, misjoined parties, but rather a showing that the misjoinder reflects an egregious or bad faith intent on the part of the plaintiffs to thwart removal." Hines & Gensler, *supra*, at 803. Without any evidence that the plaintiffs acted with bad faith, we decline to conclude they egregiously misjoined their claims.

(Footnote omitted).<sup>3</sup>

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<sup>3</sup> See also *Jones v. Nastech Pharmaceutical*, 319 F. Supp. 2d 720, 727 (S.D. Miss. 2004) ("Without question all Plaintiffs have alleged a claim against the pharmaceutical Defendants arising out of the same series of transactions or occurrences, i.e., the manufacture and marketing of Stadol. Obviously there are common questions of fact and law that apply to the claims of all Plaintiffs against the pharmaceutical Defendants. Consequently, the Plaintiffs are not misjoined in their claims against the pharmaceutical Defendants."); *Catalogna v. Copley*

In *In re Pradaxa (Dabigatran Etxilate) Products Liability Litigation*, 2014 WL

257831 at \*1 (S.D. Ill.), the court described the litigation as follows:

This is a multi-plaintiff action originally brought in Missouri State Court against Boehringer Ingelheim Pharmaceuticals, Inc. (“BIPI”) (a citizen of Delaware and Connecticut) and Boehringer Ingelheim International GMBH (“BII”) (a citizen of the foreign state of Germany) (Doc. 1 ¶¶ 12–13). The plaintiffs are citizens of Missouri, Indiana, New York, Connecticut, Illinois, Ohio, California, and Colorado (Doc. 1–1 ¶¶ 9–20). The plaintiffs have no connection with one another—each received medication prescribed by different doctors, dispensed by different pharmacies, at different times, and in different locations. Further, the plaintiffs who are citizens of states other than Missouri do not appear to have any connection with the forum.

In other words, the circumstances were much like in the instant case. Rejecting the defendant’s argument in that case, the court stated as follows:

This Court has extensively discussed its reasoning in respectfully declining to recognize the doctrine of procedural misjoinder. See *Sabo*, 2007 WL 1958591 at \*6–8; *In re Yasmin*, 779 F. Supp. 2d at 853–857. To summarize, this Court feels that recognition of such a doctrine acts as an improper expansion of subject matter jurisdiction, as misjoinder under the applicable permissive joinder rules is a matter to be resolved first at the state level. Joinder of non-fraudulent claims does not appear to this Court to implicate subject matter jurisdiction. Additionally, the need for clear and precise jurisdictional rules weighs against this Court’s recognition of procedural misjoinder. See *id.*

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*Pharmaceutical, Inc.*, 4 Mass. L. Rptr. 152 (Mass. Super. Ct. 1995)(“The plaintiffs in this action live in Massachusetts, Pennsylvania, New Jersey, New York, Wisconsin, and Minnesota. Copley is organized under the laws of Delaware with a principal place of business in Massachusetts. . . . I hold that the plaintiffs here may join together in one suit under Mass. R. Civ. P. 20(a) because they allege injury arising out of Copley’s negligence in the manufacture of Albuterol, and such negligence constitutes a single transaction or occurrence or series of transactions or occurrences.”).

Id. at \*2. Because Missouri’s state law permits residents and non-residents to join their claims in a single complaint, the court remanded the case back to Missouri state court.<sup>4</sup>

Not only do other states permit both residents and non-residents to join their claims in a single complaint, it is permissible under the federal counterpart to W. Va. R. Civ. P. 20(a) for resident plaintiffs to join their claims against common defendants “arising out of the same transaction, occurrence, or series of transactions or occurrences” and presenting “question[s] of law or fact common to all these persons” with non-resident plaintiffs. See, e.g., *Ahmed v. United States*, 1997 WL 151974 at \*1 (D. Minn.) (“Thirty-two of the Plaintiffs are Minnesota residents; the remaining non-resident Plaintiffs are joined pursuant to Fed. R. Civ. P. 20(a).”).

Consequently, the Circuit Court of Wayne County and the United States District Court for the Southern District of West Virginia correctly determined that Petitioners were permitted to join their claims in a single action.<sup>5</sup>

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<sup>4</sup> Similarly, in *In re Paulsboro Derailment Cases*, 2014 WL 197818 at \*5 (D. N.J.), where defendants had removed a case filed by multiple plaintiffs with different citizenships alleging that they had been misjoined in order to defeat diversity, the court granted plaintiffs’ motion to remand, stating as follows:

[A] finding of fraudulent misjoinder is ultimately a finding that the requirements of the applicable permissive joinder rule are not satisfied. See *Tapscott*, 77 F.3d at 1360.3 In their zeal to advance a fraudulent misjoinder theory, Defendants have overlooked the plain language of Rule 20. If parties are properly joined under Rule 20, fraudulent misjoinder cannot exist. See 7 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *FEDERAL PRACTICE & PROCEDURE* § 3723 (4th ed. 2009). Rule 20 requires that the plaintiffs’ damages arose out of the same “transaction, occurrence, or series of transactions or occurrences,” and that there is some “question of law or fact common to all plaintiffs.” Both requirements are met in this case.

<sup>5</sup> *J.C. v. Pfizer, Inc.*, Civil Action No. 3:12-cv-04103 at \*7 (S.D. W. Va. September 15, 2012) (“administrative separation of claims in state court [under Rule 3(a)] does not determine the propriety of joinder in federal court. Defendants have not met their burden of demonstrating that Plaintiffs’ claims were not properly joined because of case processing practices in Wayne County Circuit Court.”), App. 9; *J.C. v. Pfizer, Inc.*, Civil Action No. 3:12-cv-04103 at \*7 and 10

**B. THE RESPONDENT DRUG COMPANIES' ARGUMENT STANDS RULE 20(A) ON ITS HEAD**

Unlike the Panel's response, which does not reference Rule 20(a) at all, the Respondent Drug Companies' response does address Rule 20(a), but their attempt to reconcile Rule 3(a) and Rule 20(a) stands the latter on its head: "[B]oth rules work together very simply: The claims of unrelated plaintiffs must *begin* as separate cases, and a court can *then* consolidate those cases if the standard for joinder is satisfied. In other words, Rule 3(a) simply changes the starting point." Response at 10-11. (Emphasis in original)

There is no language in Rule 20(a) differentiating between related and unrelated plaintiffs or between resident and non-resident plaintiffs. Rather, Rule 20(a) plainly states, "All persons may join in one action as plaintiffs . . . ." (Emphasis supplied)

Under Rule 20(a), "one action" filed by "all persons" who "join" in a single complaint is "one action," not "separate cases" and there is nothing in Rule 3(a) that dictates that result.

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(S.D. W. Va. February 5, 2014)("In both instances, the statute is clear: an entire civil action—not a subpart thereof—is removable. . . . This Court cannot and will not convert the clear consolidation of multiple cases into one civil action by a state court into something that it is not."), App. 128 and 131; see also *Almond v. Pfizer, Inc.*, 2013 WL 6729438 at \*4 (S.D. W. Va.)("The Plaintiffs in the present action properly joined their claims in a single case, regardless of the administrative filing requirements of the state court. This Court finds Judge Chambers' reasoning persuasive with respect to the application of West Virginia Rule of Civil Procedure 3(a), and further finds that the rule does not mandate that federal courts treat all plaintiffs in a joined case, whether under a single civil action number or not, independently for the purposes of remand analysis."); *Grennell v. Western Southern Life Ins. Co.*, 298 F. Supp. 2d 390, 395 (S.D. W. Va. 2004)("Furthermore, this Court's treatment of the lawsuits (including assigning multiple case numbers and requiring Defendants to pay multiple filing fees) has no bearing on the nature of the case as it existed in Circuit Court. The Court therefore finds that Defendants have not met their burden of demonstrating that the Mason County Circuit Court litigation involved non-joined plaintiffs.")(emphasis in original). The Fourth Circuit dismissed an appeal from Judge Chambers' 2012 remand order in *E.D. ex rel. Darcy v. Pfizer, Inc.*, 722 F.3d 574 (4<sup>th</sup> Cir. 2013), and this Court refused a petition for writ of prohibition from Judge Young's 2012 ruling in *State ex rel. Pfizer, Inc. v. Young*, No. 12-1370 (W. Va. Jan. 9, 2013), App. 70.

There is no need, as advocated by the Respondent Drug Companies, to break apart “one action” in which “all persons” may “join” under Rule 20(a) and then “rejoin” those cases later if it is deemed appropriate. A suit filed under Rule 20(a) starts as “one action” even if under Rule 3(a) it is assigned separate case numbers, docketed separately by case number, and assessed a separate fee by unrelated plaintiffs, and there is no need to break it apart only to put it back together again.

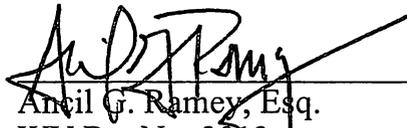
R. Civ. P. 21 [“Rule 21”], governing “misjoinder,” is the only method under the Rules of Civil Procedure for severing parties joined in a single complaint under Rule 20(a). LITIGATION HANDBOOK at § 21[2](“If a trial court finds that a plaintiff has misjoined parties, the court should sever those parties or claims, allowing those grievances to continue in spin-off actions, rather than dismiss them.”). Not only did this Court never intend Rule 3(a) to emasculate Rule 20(a), it never intended it to supplant Rule 21.

The Respondent Drug Companies’ circular argument of joinder, severance, and rejoinder has never been adopted by any court. Rather, all of the federal and state courts that have addressed Rule 3(a) and Rule 20(a) have held that the former does not negate the latter. Rule 3(a) properly permits assignment of separate case numbers and the charging of separate fees to unrelated plaintiffs in a complaint filed under Rule 20(a) for administrative purposes, but it was simply never intended to substantively supplant Rule 20(a).

#### IV. CONCLUSION

WHEREFORE, Petitioners respectfully request that this Court issue a writ of prohibition overruling the ruling of the Mass Litigation Panel treating their single complaint filed under R. Civ. P. 20 as multiple complaints for purposes of processing.

Respectfully submitted,



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VERIFICATION

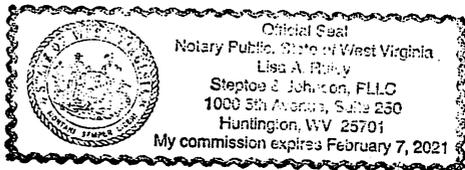
STATE OF WEST VIRGINIA,  
COUNTY OF CABELL, TO-WIT:

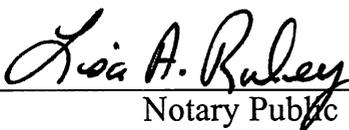
I, Ancil G. Ramey, being first duly sworn, state that I have read the foregoing PETITIONERS' REPLY BRIEF IN SUPPORT OF EMERGENCY PETITION FOR PROHIBITION; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

  
Ancil G. Ramey

Taken, subscribed and sworn to before me this 2<sup>nd</sup> day of May, 2014.

My commission expires: February 7, 2021



  
Notary Public

**CERIFICATE OF SERVICE**

The undersigned hereby certifies that on **May 2, 2014**, he served a true and correct copy of the foregoing **PETITIONERS' REPLY BRIEF IN SUPPORT OF EMERGENCY PETITION FOR PROHIBITION** by sending the same in the U.S. Mail, first class, postage prepaid, upon the following:

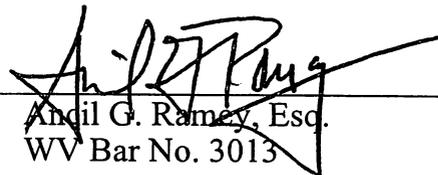
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