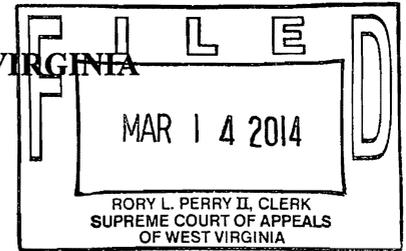


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET 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, and PFIZER, INC., )  
ROERIG, a division of Pfizer, Inc., and )  
GREENSTONE, LLC f/k/a Greenstone, LTD. )

Respondents. )

Underlying:  
IN RE: ZOLOFT LITIGATION  
Civil Action No. 14-C-7000

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**PFIZER INC. AND GREENSTONE LLC'S  
RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION**

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## QUESTIONS PRESENTED

- 1) Should this Court grant an extraordinary writ of prohibition to review a unanimous ruling of the Mass Litigation Panel that Rule 3(a) of the West Virginia Rules of Civil Procedure requires the 25 civil actions filed in this litigation to be treated as separate civil actions?
- 2) Was the Mass Litigation Panel correct in its unanimous interpretation of West Virginia Rule of Civil Procedure 3(a)?

## STATEMENT OF THE CASE

### **I. The Mass Litigation Panel's Unanimous Decision**

On March 4, 2014, the Mass Litigation Panel (the "Panel") held its first Status and Scheduling Conference in *In Re: Zoloft Litigation*, a coordinated proceeding addressing the products liability claims of 25 unrelated plaintiff families from across the country. At the outset, Judge Mazzone, the Lead Presiding Judge, addressed an issue of significant dispute between the parties: Does West Virginia Rule of Civil Procedure 3(a) transform a single complaint naming multiple unrelated plaintiffs into separate and independent civil actions? The Panel held that it does:

[W]e did have an opportunity to discuss a couple of other things . . . and in particular, the prior orders of the Circuit Court relative to whether or not these cases will be considered or reviewed as one file or separate filings. Consistent with this panel's prior orders, we have determined that they will be treated as separate files. That's how this panel has considered such cases in the past and that's how we intend to consider this case as well. . . . [T]o the extent that there were any prior orders entered of the Circuit Court inconsistent with that finding, they're hereby ordered vacated. And that would include, as I understand it there were two consolidation orders, October 18, 2012 and October 28, 2013. . . . Those orders would also be considered vacated consistent with the ruling today.<sup>1</sup>

App. 13. Judge Moats emphasized the Panel's role in bringing about the language for Rule 3(a), stating that "Rule 3(A) was changed because of this panel. The panel is the one that made the

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<sup>1</sup> The Panel was authorized to issue this order pursuant to West Virginia Trial Court Rule 26.05, which empowers the Panel to "take such action as is reasonably necessary and incidental to the powers and responsibilities conferred" to the panel, including its duty to preside over Mass Litigation or proceedings referred by the Chief Justice.

motion to the court to change Rule 3(A). We hashed this out in 2007 for a long, long time. The reason it was changed was because of this panel's request to the Supreme Court. It was changed in 2008, so there's no need to brief. It came as a result of the actions of this panel." App. 37.

On March 11, 2014, the Panel issued a unanimous order memorializing its March 4, 2014 ruling. App. 58-60. The panel held that "Rule 3(a) is, on its face, a substantive rule of civil procedure, not an 'administrative rule.' As such, the plain meaning of Rule 3(a) must be read in conjunction with the other rules of civil procedure. . . ." App. 58. In coming to this conclusion, the Panel emphasized its role in proposing the amendment to Rule 3(a) "after extensive discussions regarding Rule 3, and after reviewing numerous public comments regarding the proposed amendment of Rule 3." App. 59. According to the Panel, the purpose "in proposing the amendment was to achieve consistent treatment of multi-plaintiff complaints filed in the circuit courts of West Virginia, and in litigation assigned to [the] Panel." App. 59. Thus, based on both the plain meaning of the Rule, and the Panel's familiarity with its history and purpose, the Panel held that "[i]t is irrelevant whether separate complaints are filed, or whether a single complaint is filed. . . [;] all plaintiffs not related by marriage or a derivative or fiduciary relationship must be assigned separate civil action numbers. Each separately assigned civil action number constitutes a separate civil action for any and all substantive purposes, as opposed merely for administrative purposes. . . ." App. 59. The Panel reasoned that this construction was necessary to allow the Panel to "analyze individual civil actions for such issue as jurisdiction, venue and the statute of limitations, among other things." App. 59. On the basis of this holding, the Panel specifically ordered that:

Consistent with the Mass Litigation Panel's treatment of cases referred to it since Rule 3(a) of the West Virginia Rules of Civil Procedure was amended, effective November 10, 2008, the Panel **ORDERS** the 25 civil actions filed in the Zoloff Litigation to be treated as separate civil actions . . . .

Accordingly, the Panel **FINDS** and **ORDERS** that the October 18, 2012 order consolidating Wayne County Civil Action Numbers 12-C-146 through 12-C-164 into Wayne County Consolidated Civil Action Number 12-C-146, the October 28, 2013 order consolidating Wayne County Civil Action Numbers 13-C-229 through

13-C-234 into Wayne County Consolidated Civil Action Number 12-C-146, and any other prior orders that are inconsistent with the Panel's prior application of Rule 3(a), as plainly written, are **VACATED**. App. 58-60.

## II. Procedural History

On July 11, 2012, 19 unrelated families ("Plaintiff Families") from 14 different states attempted to file a single Complaint in the West Virginia Circuit Court for Wayne County. App. 61-103. When filing, however, each Plaintiff Family was assigned a separate civil action number, and each of their individual cases was docketed as a separate civil action pursuant to W. Va. R. Civ. P. 3(a). The Plaintiff Families consist of women ("Mother Plaintiffs") claiming that they took Zoloft or sertraline, its generic equivalent, during pregnancy and that their minor children ("Minor Plaintiffs"), who were allegedly exposed to Zoloft or sertraline *in utero*, sustained birth defects as a result. App. 63-66.

On August 7, 2012, based on the fact that the cases were docketed as separate actions, only one of which involved a non-diverse plaintiff, Respondents Pfizer Inc. and Greenstone LLC ("Defendants") removed the diverse cases to federal court in 18 separate removals. The remaining Plaintiff family, the Dropp Plaintiffs, are New York citizens and are thus not diverse from Pfizer, which has its headquarters in New York. App. 68. Plaintiffs moved for remand, arguing that Rule 3(a) was just an administrative tool to facilitate the collection of fees and supported their motion with an affidavit from the court clerk. Pfizer opposed, arguing that, under the unambiguous language of Rule 3(a), the cases were separate actions at the time of removal and, therefore, removable. The federal district court agreed with plaintiffs and, on September 25, 2012, remanded the cases to state court. *J.C. ex rel. Cook v. Pfizer, Inc.*, 2012 WL 4442518 (S.D. W. Va. Sept. 25, 2012). Defendants appealed this ruling on September 26, 2012.

Following remand, on October 18, 2012, Judge Young of the Wayne County Circuit Court issued an order consolidating the claims of the 19 Plaintiff Families into "one civil action number." App. 104-05. On October 31, 2012, Judge Young issued an order denying Defendants motion to dismiss the Dropp Plaintiffs on *forum non conveniens*. App. 106-112. While Judge Young based this decision, in part, on the presence of other Plaintiff families, Judge Young did

not address Rule 3(a), and any discussion of Rule 3(a) was mooted by his consolidation order.<sup>2</sup> When Defendants sought a Writ of Prohibition to determine whether Judge Young exceeded his authority in denying the *forum non conveniens* motion, this Court denied the writ without opinion, and without discussing whether Judge Chambers had appropriately interpreted Rule 3(a) or whether Judge Young had appropriately consolidated the actions. App. 113-14. Rule 3(a) was not before the Court, nor was it discussed or ruled upon by the Court.

While Plaintiffs assert that the “Fourth Circuit refused to cast any doubt on Judge Chamber’s or Judge Young’s interpretation of Rule 3(a),” this statement is misleading. The Fourth Circuit appeal proceeded in parallel to the state proceedings, and the court ultimately dismissed the appeal *solely* for lack of federal appellate jurisdiction on July 12, 2013. *E.D. ex rel. Darcy v. Pfizer, Inc.*, 722 F.3d 574, 577 (4th Cir. 2013). The Fourth Circuit never considered Judge Chambers’ interpretation of Rule 3(a), as it found that it lacked jurisdiction to consider an appeal from the remand order.

On July 26, 2013, Defendants filed a motion for referral to the Mass Litigation Panel (the “Panel”). Plaintiffs strenuously contested the transfer, arguing that “[t]his case, which involves nineteen plaintiffs joined together under W. Va. R. Civ. P. 20(a) in a single complaint, does not satisfy the first requirement of the definition [of mass litigation] because it is a civil action, not two or more civil actions.”<sup>3</sup> App. 115. On September 24, 2013, Justice Benjamin denied Defendants’ Motion to Refer, “without prejudice to renew the motion in the event additional

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<sup>2</sup> Indeed, that Judge Young apparently found it necessary to consolidate the cases implies a belief that Rule 3(a) *did* create separate actions.

<sup>3</sup> While Plaintiffs maintain that the Panel’s interpretation of Rule 3(a) would “take essentially every West Virginia Mass Tort case out of the panel,” and “jeopardize[] the very existence of the Mass Litigation Panel,” (Petition at 2, 7), it is notable that Plaintiffs’ interpretation of Rule 3(a)—that there was only a single action with 19 Plaintiffs—served as their basis for opposing transfer to the MLP. App. 115-24.

state actions are filed.” App. 125. The administrative order did not validate or interpret Rule 3(a) or Judge Young’s consolidation order; it simply denied transfer.<sup>4</sup>

Following issuance of the administrative order, Plaintiffs sought to add the claims of six additional Plaintiff Families to the litigation, without filing a second complaint. Plaintiffs first filed a motion to intervene, which Defendants opposed and Plaintiffs inexplicably withdrew the day before oral argument. They then filed a substantially identical motion to amend the original complaint. Finding that it would prejudice Defendants, Judge Young rejected the attempted amendment and directed the Plaintiffs to file a separate complaint, which he then consolidated with the original complaint for pre-trial purposes. App. 126-27. However, just over one month later, *Plaintiffs* filed for transfer to the Mass Litigation Panel on the basis of this second, consolidated complaint.

While Plaintiffs’ Motion to Refer was pending, Defendants learned through discovery that the single New York family in the original complaint never used Zoloft or Greenstone sertraline. Defendants removed the original 19 plaintiff families,<sup>5</sup> arguing that the New York family was fraudulently joined. However, Plaintiffs argued that there was still no diversity because the group of six plaintiffs, which had been consolidated with the original 19, also contained a New York family that destroyed diversity.

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<sup>4</sup> Contrary to Plaintiffs’ assertion that “Chief Justice Benjamin held that transfer was not appropriate because there was only one case,” the cited order contains no such statement. Plaintiffs maintain that it is implicit that “this Court agreed with [their] interpretation of Rule 3(a). . . . Otherwise, this Court would have held that there were multiple civil actions and transferred this case to the Mass Litigation Panel.” (Petition at 5.) However, Plaintiffs conflate an administrative order by the Chief Justice with a ruling of this Court, and their incorrect interpretation of that order would reduce the Chief Justice’s review of Motions to Refer to a mere rubber stamp when two or more actions exist, with no consideration of the benefits of coordination, or whether additional actions were likely to be filed.

<sup>5</sup> Plaintiffs assert that the “Defendants removed the case for a second time, cherry-picking for removal every Plaintiff except one of the non-diverse New York Plaintiff families.” (Petition at 5.) This is incorrect. In fact, Defendants removed 19 of 25 plaintiff families, on the belief that there were two separate actions—the 19 plaintiffs and the 6 plaintiffs.

On February 5, 2014, the federal district court agreed with Plaintiffs, rejected Pfizer's arguments that the cases were consolidated for pre-trial purposes only, and remanded. *J.C. ex rel. Cook v. Pfizer, Inc.*, 2014 WL 495455 (S.D.W. Va. Feb. 5, 2014). While Plaintiffs' motion to remand was pending, Chief Justice Davis transferred all 25 plaintiff families to the Mass Litigation Panel. App. 128.

### **SUMMARY OF ARGUMENT**

This Court should refuse Plaintiffs' petition for an extraordinary writ. The Panel was correct in unanimously holding that Rule 3(a) is a substantive rule of civil procedure that creates separate civil actions for any and all purposes. Its ruling is based on the plain terms of Rule 3(a) and the Panel is uniquely situated to weigh the history and the purpose of the Rule because it played a substantial role in bringing about the 2008 amendment that applies here.

Indeed, the Panel's construction of a rule it helped to amend renders unreasonable Plaintiffs' assertion that the Panel's interpretation will "jeopardize[] the very existence of the Mass Litigation Panel" by taking from it "essentially every West Virginia Mass Tort [sic] case." (Petition at 2, 6.) As the Panel explained, it has consistently treated Rule 3(a) as creating separate civil actions since the rule was amended in 2008. The Panel's reasoned interpretation fully accords with the plain language, history, and purpose of Rule 3(a) and enables the Panel to properly adjudicate core issues of mass tort cases before it, such as "jurisdiction, venue and the statute of limitations, among other things." App. 59.

### **STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Respondents waive any request for oral argument under Rules 19 or 20.

### **ARGUMENT**

#### **I. Plaintiffs Are Not Entitled to the Issuance of a Writ of Prohibition**

Plaintiffs seek a writ of prohibition under West Virginia Code § 53-1-1, which is inapplicable to the circumstances of the Panel's decision. That section provides that "[t]he writ of prohibition shall lie as a matter of right in all 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. As this Court has held, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” Syl. Pt. 1, *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997) (internal citations omitted).

In determining whether to issue a writ of prohibition, the Court examines five factors:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, although the Panel’s order is not directly appealable, these factors favor refusal of the Writ. As an initial matter, Plaintiffs will not be damaged or prejudiced by the Panel’s order. The Panel’s order is not a ruling on the merits of Plaintiffs’ claims but instead determines whether procedural rules will apply to the case on a joint or individual basis and is an order that the Panel held enables it to adjudicate issues of jurisdiction, venue, and statutes of limitations.

Additionally, the Panel’s order is not clearly erroneous as a matter of law. As set forth more fully below, the Panel’s unanimous ruling on the meaning of Rule 3(a) was based on both the plain language of the Rule and the history and purposes of the rule, with which the Panel itself had substantial involvement. Further, as the Panel made clear in its order, the Panel’s position is consistent with the position it has continually taken on Rule 3(a) since it was amended in 2008. Thus, the Panel’s interpretation of Rule 3(a), based on the plain language and history of the Rule, does not “manifest persistent disregard for either procedural or substantive law.” *Id.* Nor do two non-binding decisions from a single federal district court compel a different ruling or review by this Court. Finally, the last factor favors refusal of the Writ because the Panel’s order

does not raise a new issue of law but clarifies the meaning of a rule that the Panel has consistently applied since it was adopted.

As more fully set forth below, even if this Court determines to rule on the merits of the petition, it should not issue a writ because the Circuit Court was correct in its unanimous ruling.

## **II. The Panel Correctly Held That This Litigation Constitutes 25 Separate Actions**

The Panel correctly applied Rule 3(a) when it unanimously held that this litigation constitutes 25 separate actions. The Panel's decision was based on both the plain language of Rule 3(a) and the history and purpose of the 2008 amendment. The Panel's ruling is consistent with its treatment of Rule 3(a) since 2008, and is a correct interpretation of the Rule, notwithstanding two contrary, non-binding, decisions from the Southern District of West Virginia in 2012 (in this litigation) and 2013 (in another litigation).

The Panel reasoned that "Rule 3(a) is, on its face, a substantive rule of civil procedure, not an 'administrative rule.'" App. 58. As such, "the plain meaning of Rule 3(a) must be read in conjunction with the other rules of civil procedure." *Id.* Thus, the Rule's requirement that "each plaintiff . . . be docketed as a separate civil action" does not create a separate civil action "merely for administrative purposes, such as fee collection." App. 59. Instead, that provision creates a separate civil action in the same sense as that term is used throughout the Rules of Civil Procedure and West Virginia law. This avoids the unworkable interpretation that would redefine "civil action" differently for different rules of civil procedure and other doctrines. And as Plaintiffs correctly note, this Court has held that it has a "duty to avoid whenever possible," interpretations that "lead[] to absurd, inconsistent, unjust or unreasonable results." *Davies v. W. Va. Office of Ins. Com'r*, 227 W. Va. 330, 336, 708 S.E.2d 524, 530 (2011). The Panel's interpretation does just that.

The Panel also based its ruling on the history and purpose of the 2008 amendment to Rule 3(a), which introduced the language that governs here. Indeed, the Panel "proposed the amendment" to Rule 3(a) "after extensive discussions regarding Rule 3, and after reviewing numerous public comments regarding the proposed amendment." App. 59. The Panel explained

that the amendment was designed to “achieve consistent treatment of multi-plaintiff complaints filed in the circuit courts of West Virginia, and in litigation assigned to this panel, where the plaintiffs were not related by marriage or a derivative or fiduciary relationship.” *Id.* As the Panel reasoned:

It is irrelevant whether separate complaints are filed, or whether a single complaint is filed naming multiple plaintiffs who are not related by marriage or a derivative or fiduciary relationship. In either instance the result is the same, that is, all plaintiffs not related by marriage or a derivative or fiduciary relationship must be assigned separate civil action numbers. Each separately assigned civil action number constitutes a separate civil action for any and all substantive purposes, as opposed merely for administrative purposes, such as fee collection.

*Id.* Without this rule, the Panel explained that it would “be unable to manage individual civil actions, or conduct hearings pertaining to individual plaintiffs among the multitudes of civil actions in multi-plaintiff complaints.” *Id.* Defendants submit that the Panel’s unique role as the author of the Rule and the judicial tribunal often charged with applying it to mass tort scenarios make the Panel especially well suited to interpret the Rule’s meaning and purpose.

### **III. Plaintiffs’ Arguments are Not Supported by Settled Law**

Plaintiffs maintain that Rule 3(a) “has been consistently interpreted” and that virtually every court that has analyzed it has held that the rule is administrative in nature and does not create separate civil actions. (Petition at 7.) Plaintiffs’ view is erroneous, and Defendants will address each of the four grounds Plaintiffs identify in purported support of their interpretation:

- **Plaintiffs assert that the Panel’s decision is contrary to “16 years of West Virginia state court jurisprudence beginning with this Court’s opinion in *Cable v./ Hatfield*” (Petition at 12.)**

As an initial matter, it is peculiar to invoke “16 years” of jurisprudence about the current text of Rule 3(a) when the relevant text was adopted only five years ago in 2008. Far from conflicting with existing precedent and custom, when the Panel proposed amending Rule 3, it engaged in “extensive discussions regarding Rule 3” and studied “numerous public comments regarding the proposed amendment of Rule 3.” App. 59. Plaintiffs assert that Rule 3(a) was amended to “codify the local practices authorized by the Supreme Court in *Cable*” (Petition at

10), but they offer no support for this proposition, much less any support as persuasive as the construction by the judicial tribunal that proposed the very text of the rule at issue.

Moreover, the decisions in *Cable v. Hatfield*, 202 W. Va. 638, 505 S.E.2d 701 (1998), and subsequent cases refute Plaintiffs' view. In *Cable*, the Court stated that the West Virginia Rules of Civil Procedure "permit multiple plaintiffs to join in a single action" and that "[i]ncreasingly, numerous parties will join in an action as authorized by Rule 20." *Id.* at 645. According to the Court, "the mass litigation that can result imposes a significant burden, financial and otherwise," but that the Rules of Civil Procedure were "silent with regard to the filing fee to be charged." *Id.* To alleviate this dilemma, the Court granted circuit courts the authority to "enter an *administrative order* governing when separate filing fees are required." *Id.* (emphasis added). The decision did not address whether such actions should be docketed separately by plaintiff or otherwise shed light on Rule 3(a) as amended 10 years later.

The federal court's decision in *Grennell v. W. S. Life Ins. Co.*, 298 F. Supp. 2d 390 (S.D.W. Va. 2004), similarly does not support Plaintiffs' interpretation of Rule 3(a) as amended. In *Grennell*, the removing defendants argued that because the Mason County Circuit Court issued an administrative order charging "supplemental filing fees" that the actions were separately removable. However, Judge Chambers held that the clerk's characterization of the filing fees as "supplemental filing fees" and the administrative actions taken by the court did not separate the single case into 1,891 original actions. Nevertheless, Judge Chambers held that the actions had been misjoined and denied plaintiffs motion for remand.

The decision in *Grennell* is certainly not binding on West Virginia courts and also lacks persuasive value in construing Rule 3 here. That decision was limited to interpreting an administrative order authorized pursuant to *Cable*. Yet, the administrative authority to charge separate filing fees is not at issue here. According to the Panel, Rule 3(a) is something different: "[w]ithout this substantive rule, a circuit court, or this Panel, was unable, and but for the amendment to Rule 3(a), would still be unable to manage individual civil actions, or conduct

hearings pertaining to individual plaintiffs among the multitudes of civil actions in multi-plaintiff complaints.” App. 59. The amendments to Rule 3(a) went beyond the circumstances in *Cable*.

- **Plaintiffs assert that the Panel’s decision is contrary to “the ruling of West Virginia federal courts who have dealt with this issue 3 times – twice in this case (App. 3-15; 122-32), and once in *Almond*.” (Petition at 12.)**

Plaintiffs are incorrect in stating that federal courts have “dealt with this issue 3 times – twice in this case.” *Id.* The Southern District of West Virginia has only addressed Rule 3(a) in this case once. In its September 25, 2012 remand order, the Southern District stated that Rule 3(a) was merely an administrative order and did not create separate civil actions. *See, J.C. ex rel. Cook v. Pfizer, Inc.*, 2012 WL 4442518 (S.D.W. Va. Sept. 25, 2012). While the Defendants did ultimately remove 19 of the 25 cases a second time, they did so as *one civil action* pursuant to the Southern District’s prior decision. The Southern District ultimately remanded the case a second time, holding that Judge Young’s consolidation order merged the six new plaintiff families into the original action. *See, J.C. ex rel. Cook v. Pfizer, Inc.*, 2014 WL 495455 (S.D.W. Va. Feb. 5, 2014). However, this second remand did not address Rule 3(a), and instead rested solely on Judge Young’s October 28, 2013 consolidation order. *Id.*

The Southern District has only twice stated that Rule 3(a) does not create separate civil actions. *See, J.C. ex rel. Cook*, 2012 WL 4442518; *Almond v. Pfizer Inc.*, 2013 WL 6729438 (S.D.W. Va. Dec. 19, 2013). Neither case is binding on this Court, and neither is persuasive in light of the unanimous conclusion of all six West Virginia Judges on the Panel that Rule 3 requires that the cases be separate civil actions for all purposes.

- **Plaintiffs’ assertion that the Panel’s decision is contrary to “Judge Young’s consolidation orders in this case (App. 1-2; 61-62), his oral and written rulings on Defendants’ motion to dismiss (App. 63-69)” (Petition at 12.)**

Judge Young has not issued a decision interpreting Rule 3(a). Nor do the orders cited by Plaintiffs contain language interpreting Rule 3(a). First, Plaintiffs cite Judge Young’s consolidation order dated October 18, 2012, which issued approximately one month after the Southern District’s remand on Rule 3(a). The order simply states “[t]he Court is of the opinion

to consolidate these *matters* into one civil action number.” App. 105 (emphasis added). It is unclear why Plaintiffs believe this is an interpretation of Rule 3(a). Indeed, if the Southern District’s conclusion on Rule 3(a) were correct, it is unclear why Judge Young would deem a consolidation order necessary.

Second, Plaintiffs cite Judge Young’s consolidation order dated October 28, 2013, which states that “[t]he Court is of the opinion to consolidate the above-styled Complaint with Consolidated Civil Action Number 12-C-146.” App. 126. It is unclear why Plaintiffs believe this is an interpretation of Rule 3(a). Rule 3(a) does not govern a Circuit Court’s discretion to consolidate actions, or to vacate consolidation orders, while actions are pending.

Third, Plaintiffs cite Judge Young’s October 31, 2012 order denying Defendants’ motion to dismiss the Dropp Plaintiffs on *forum non conveniens*. It is again unclear why Plaintiffs believe this order contains an interpretation of Rule 3(a). The order mentions Rule 3(a) twice and only when describing the procedural history of the case. App. 106, 110. The order does not interpret Rule 3(a). While Judge Young’s decision to deny the Motion to Dismiss was based in part on the presence in the consolidated proceedings of Plaintiffs other than the Dropp Plaintiffs, that decision is consistent with Judge Young’s prior consolidation order.

- **Plaintiffs’ assertion that the Panel’s decision is contrary to this Court’s “rejection of such an interpretation in its denial of Defendants’ Petition for Writ of Prohibition (App. 70-71) in this case and its order denying referral to the Mass Litigation Panel (App. 72) prior to the second Complaint being filed.” (Petition at 12.)**

Plaintiffs assert that this Court previously interpreted Rule 3(a) *sub silentio* in two discretionary orders, on separate issues and, therefore, that the Panel was without authority to “revisit” the interpretation of Rule 3(a). (Petition at 12, n.7.) This is incorrect and is belied by an examination of the two orders.

Plaintiffs cite Chief Justice Benjamin’s administrative order denying referral to the Mass Litigation Panel. As an initial matter, Plaintiffs mischaracterize an administrative decision by the Chief Justice pursuant to Trial Court Rule 26.06, as an act by the Court. Moreover, the order

itself contains no statement on Rule 3(a). Plaintiffs cannot cite any support in the order or elsewhere for their contention that the order supports their view that Rule 3(a) does not actually mean what it says and does not create separate civil actions for each Plaintiff family.

Plaintiffs next cite to this Court's denial of the Defendants' Petition for a Writ of Prohibition regarding Judge Young's order on the motion to dismiss the Dropp Plaintiffs on *forum non conveniens*. As noted above, Judge Young's order was not based on an interpretation of Rule 3(a), and any such interpretation would not be relevant given the prior order consolidating the cases. Moreover, this Court's decision that "a rule should not be awarded," in response to Defendants' request for a Writ overturning Judge Young's order, was not a decision on Rule 3(a), consolidation, or even a decision that Judge Young's order was correct. App. 113-14.

#### **IV. The Panel's Decision Is Consistent With Its Jurisdiction and Rule 20.**

While Plaintiffs argue that the Panel's interpretation of Rule 3(a) will all but end the existence of the Panel by undercutting its jurisdiction in mass tort cases, those concerns are unfounded and are clearly not shared by the Panel. As the Panel noted, it has consistently treated the amended Rule 3(a) as creating separate cases. This has not stopped the Panel from hearing "all kinds" of cases including "asbestos cases, tobacco litigation, [and] huge flood cases," all cases involving West Virginia parties that are appropriately adjudicated by its court. App. 10. For example, the Panel is currently dealing with numerous cases arising out of the loss of accreditation and closure of Mountain State University in Beckley, West Virginia. These types of cases will continue to be heard by the Panel under its current interpretation of Rule 3(a). Indeed, the Panel's interpretation of Rule 3(a) will ensure that large groups of Plaintiffs cannot avoid the Panel's jurisdiction by filling a single complaint, the strategy initially adopted by Plaintiffs in this litigation.

Plaintiffs also suggest that the Panel's interpretation of Rule 3(a) diminishes the import of Rule 20 by severing claims that are joined by plaintiffs not related by marital, derivative, or fiduciary relationships. To the contrary, the Panel's construction of Rule 3 supplements Rule 20

and is not inconsistent with that rule. While Plaintiffs can initially join their claims when filing, those claims will be severed pursuant to Rule 3(a). Thereafter, courts have the discretion to join or consolidate cases pursuant to Rules 20, 21, and 42, based on the relevant factors, including whether the cases share a common core of operative facts. Ultimately, the Panel's interpretation of Rule 3(a) will ensure that mass claims are independently evaluated, up until a decision for referral to the Mass Litigation Panel, or until a circuit court orders consolidation or joinder. This is not an absurd or unjust result, but a reasonable compromise between the desire of plaintiffs to aggregate their claims and the desire of courts and defendants to ensure that claims are before the proper court and that relevant procedural rules are correctly applied.

### CONCLUSION

This Court should decline to consider Plaintiffs' petition for a Writ of prohibition because Plaintiffs have not demonstrated that the Mass Litigation Panel exceeded its legitimate powers. The Panel was correct in unanimously holding that Rule 3(a) creates separate civil actions. The Panel's decision is in accord with the plain terms of Rule 3(a) and the history of the rule's 2008 amendment. As the entity that proposed the text of the current Rule, the Panel is in a unique position to understand its meaning, purpose and import, and if this Court determines to hear the writ, it should deny it in its entirety and affirm the Panel's order. Affirmation by this Court of the unambiguous text of Rule 3(a) will eliminate any future misunderstandings by the Bench and Bar. The denial of the Writ is important to the jurisprudence of West Virginia.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET 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. )

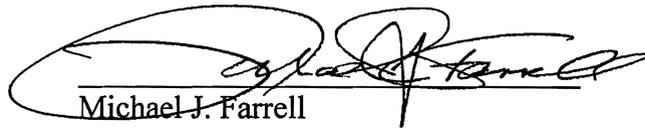
THE HONORABLE JAMES P. MAZZONE, )  
Lead Presiding Judge, Zoloft Litigation, )  
Mass Litigation Panel, and PFIZER, INC., )  
ROERIG, a division of Pfizer, Inc., and )  
GREENSTONE, LLC f/k/a Greenstone, LTD. )

Respondents. )

Underlying:  
IN RE: ZOLOFT LITIGATION  
Civil Action No. 14-C-7000

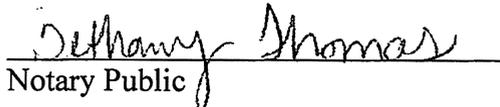
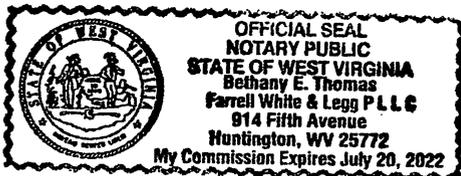
VERIFICATION

I, Michael J. Farrell, counsel for Respondents, in accordance with W. Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Response and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Response, based upon information and belief.



Michael J. Farrell  
Counsel for Respondents

Subscribed and sworn before me this 14 day of March, 2014.

  
Notary Public



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