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Transaction ID 56264365

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ZOLOFT LITIGATION	**Civil Action No. 14-C-7000**
THIS DOCUMENT APPLIES TO:	
G.B., a minor, by and through her mother and next friend, Patience B	Civil Action No. 14-C-139 WNE
M.A., a minor by and through his mother and next friend, Melissa S	Civil Action No. 14-C-140 WNE
J.F., a minor, by and through his mother and next friend, Susan M	Civil Action No. 14-C-141 WNE
D.M., a minor, by and through her mother and next friend, Jacola C	Civil Action No. 14-C-142 WNE
E.B., a minor, by and through her other and next friend, Tonya B	Civil Action No. 14-C-143 WNE
A.R., a minor, by and through her mother and next friend, Jaime R	Civil Action No. 14-C-145 WNE
S.T., a minor, by and through his mother and next friend, Tramechia A	Civil Action No. 14-C-146 WNE
L.M., a minor, by and through her mother and next friend, Crystal K	Civil Action No. 14-C-148 WNE
H.J., a minor, by and through her mother and next friend, Misty J	Civil Action No. 14-C-149 WNE

Plaintiffs,

v.

Pfizer Inc., et al.,

Defendants

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS NINE PLAINTIFF FAMILIES ON THE GROUND OF FORUM NON CONVENIENS

On September 11, 2014, the Panel heard arguments on *Defendants' Motion to Dismiss Eleven Plaintiff Families on the Ground of Forum Non Conveniens* (Transaction ID 55952029).[1] Having fully considered the briefs and evidence submitted by the parties, and the arguments presented by counsel, and having conferred with one another to ensure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges make the following unanimous Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On July 7, 2014, thirteen Plaintiff Families filed a single complaint in the Circuit Court of Wayne County, West Virginia alleging various tort claims against Defendants ("*Hill* Complaint"). The *Hill* Complaint is substantively identical to two prior complaints filed in the Circuit Court of Wayne County, West Virginia, that were transferred to the Mass Litigation Panel ("Panel") by Administrative Order of the Supreme Court of Appeals of West Virginia on January 14, 2014.[2]

2. On July 24, 2014, Defendants filed a *Notice of Special Appearance and Motion to Join in Existing Mass Litigation*, pursuant to West Virginia Trial Court Rule 26.09, seeking an order joining the *Hill* Complaint with the existing Mass Litigation styled *In Re: Zoloft Litigation,*

[1] Defendants originally moved to dismiss eleven of the thirteen Plaintiff Families in the complaint on the ground of forum non conveniens. On August 13, 2014, Plaintiffs voluntarily dismissed the claims of Plaintiffs, *M.P., a minor, by and through her mother and next friend, Amanda F* and *L.C. a minor, by and through her mother and next friend, Misty C* when counsel learned that these Plaintiff currently have identical claims against the same Defendants currently pending in the Eastern District of Pennsylvania. (*See* Transaction ID 55899857). Nine Plaintiff Families remain the subject of Defendants' motion to dismiss.

[2] The January 14, 2014 Administrative Order was superseded by an Amended Administrative Order entered on March 5, 2014, which authorized the Panel "to transfer and join with the existing Mass Litigation any similar or related actions subsequently file in any circuit court."

Civil Action No. 14-C-7000, pending in the Circuit Court of Kanawha County, West Virginia. (Transaction ID 55779906) Plaintiffs filed a Response on July 25, 2014, concurring with Defendants' motion and moving for an order joining all actions set forth within the *Hill* Complaint with *In Re: Zoloft Litigation*. (Transaction ID 55785586)

3. On August 21, 2014, the Panel granted the motion and ordered the *Hill* Complaint joined with the existing Mass Litigation styled *In Re: Zoloft Litigation* Civil Action No. 14-C-7000, pending in the Circuit Court of Kanawha County, West Virginia. (Transaction ID 55920311)

4. Defendants' motion to dismiss on the ground of forum non conveniens was filed on August 7, 2014, in the Circuit Court of Wayne County, West Virginia. After the Panel granted Defendants' motion to join the *Hill* Complaint with the Zoloft Litigation, Defendants' previously filed motion was filed in the Zoloft Litigation on August 28, 2014, for the convenience of the Court and the parties. (Transaction ID 55952029)

5. The *Hill* Complaint alleges that the Mother Plaintiffs ingested Defendants' prescription medication, Zoloft, or its generic form, sertraline, during their pregnancies and, as a result, their respective children (the "Minor Plaintiffs") sustained birth defects. The Mother Plaintiffs and their respective Minor Plaintiffs are collectively referred to as the "Plaintiff Families."

6. None of nine Plaintiff Families that are the subject of Defendants' motion to dismiss reside in West Virginia: the B Plaintiff Family resides in New York (Compl. ¶ 10); the S Plaintiff Family resides in Massachusetts (Compl. ¶ 11); the M Plaintiff Family resides in Kentucky (Compl. ¶ 12); the M Plaintiff Family resides in Illinois (Compl. ¶ 13); the B Plaintiff Family resides in Montana (Compl. ¶ 14); the R Plaintiff Family

resides in South Carolina (Compl. ¶ 16); the A Plaintiff Family resides in Virginia (Compl. ¶ 17); the K Plaintiff Family resides in Tennessee (Compl. ¶ 19); and the J Plaintiff Family resides in Minnesota (Compl. ¶ 20).

7. The remaining two Plaintiff Families in the *Hill* Complaint are the Hill Plaintiff Family and the Crites Plaintiff Family. Both of these Plaintiff Families reside in West Virginia. (Compl. ¶¶ 8 and 9).

8. With the exception of the Hill Plaintiff Family and the Crites Plaintiff Family, all of the Mother Plaintiffs in the *Hill* Complaint were prescribed and ingested Zoloft in states other than West Virginia, and all of the Minor Plaintiffs in the *Hill* Complaint were injured and treated for their injuries in states others than West Virginia. As a result, important non-party witnesses likely reside outside of West Virginia and in each of the Plaintiff Families' respective home states.

9. To determine liability, the parties may have to depose and potentially call at trial: the providers who evaluated the Mother Plaintiffs' psychiatric conditions and prescribed Zoloft to them; the providers who counseled the Mother Plaintiffs on the risks and benefits of taking Zoloft, including during pregnancy; the obstetricians who provided prenatal care; the technicians who performed radiography or ultrasound examinations; and the providers (potentially including an obstetrician, nurse, midwife, or anesthesiologist) who delivered the Minor Plaintiffs. Most of these witnesses are likely to be located in each of the Plaintiff Families' respective home states.

10. To determine possible issues of alternate causation, the parties may have to depose and potentially call at trial: the providers who treated the Mother Plaintiffs for any other medical conditions; the providers who performed genetic testing or counseling; and fact

witnesses who may be aware of the Mother Plaintiffs' environmental toxic exposures. Most of these witnesses are likely to be located in each of the Plaintiff Families' respective home states.

11. To determine damages, the parties may wish to examine: the Minor Plaintiffs' diagnosing and treating providers (such as surgeons, cardiologists, and technicians who perform echocardiogram or other testing); and witnesses who can evaluate each Minor Plaintiff's status and prognosis (such as pediatricians, teachers, and counselors). Most of these witnesses are likely to be located in each of the Plaintiff Families' respective home states.

12. Critical non-party witnesses may also include Plaintiffs' family members and friends, and the Mother Plaintiffs' or Father Plaintiffs' supervisors or colleagues in instances where the mother or father plaintiffs pursue a lost wages claim. Most of these witnesses are likely to be located in each of the Plaintiff Families' respective home states.

13. Prior to Plaintiffs filing the *Hill* Complaint, the West Virginia Supreme Court granted a writ prohibiting enforcement of the Panel's March 11, 2014 Order separating the two cases referred by the Chief Justice into twenty-five civil cases. *State ex rel. J.C. v. Mazzone*, 233 W. Va. 457, 759 S.E.2d 200, 218 (2014). The Court held that, "Rule 3(a) is an administrative fee and record keeping provision. The use of multiple case docket numbers is for the purpose of assessing and tracking filing fees, and for tracking documents that may apply to individual plaintiffs. Rule 3(a) does not provide authority for severing a complaint substantively into two or more separate civil cases." *Id.*, Syl. Pt. 3.

14. The Supreme Court found that the allegations set out in the two multi-plaintiff complaints were sufficient to permit joinder under Rule 20(a). *Id.* at 207-208. However, the Court also found that, "to the extent that some plaintiffs may be subject to dispositive motions based upon such issues as statutes of limitation or summary judgment, the Panel . . . is free to

devise a scheme that permits the defendants to raise those issues and have them addressed ***separately***." *Id.* at 217. (Emphasis added)

15. As further stated in Justice Loughry's concurring opinion, "[c]hallenges, ***such as a motion to dismiss on the ground of forum non conveniens*** under West Virginia Code § 56-1-1a (2012), or a motion to dismiss fraudulently or improperly joined parties, are available to litigants. In short, misjoined claims and parties may still be addressed through appropriate procedural and substantive challenges." *Id.* at 219. (Emphasis added)

16. Defendants' motion relies upon West Virginia Code § 56-1-1a(a), which provides that:

> In any civil action if a court of this state, upon a timely written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action, or dismiss any plaintiff . . . .

CONCLUSIONS OF LAW

Defendants' Motion is Timely

17. West Virginia Code § 56-1-1a(b) provides that a motion to dismiss upon grounds of forum non conveniens is timely "if it is filed either concurrently or prior to the filing of either a motion pursuant to Rule twelve of the West Virginia Rules of Civil Procedure or a responsive pleading to the first complaint that gives rise to the grounds for such a motion: *Provided*, That a court may, for good cause shown, extend the period for the filing of such a motion."

18. Because Defendants filed their motion "either concurrently or prior to the filing of either a motion pursuant to Rule twelve of the West Virginia Rules of Civil Procedure or a responsive pleading to the first complaint that gives rise to the grounds for such a motion" the Panel unanimously FINDS that the motion was timely filed.

The "Law of the Case" Doctrine Does Not Bar Consideration of the Motion

19. The parties also disagree as to whether the "law of the case" bars consideration of the present motion. Plaintiffs argue that the motion "before this Court is nearly identical to the motion denied by Judge Young in *J.C. a minor by and through his mother and next friend Michelle C , et al. v. Pfizer, et al.* on October 18, 2012, a ruling ultimately upheld by the West Virginia Supreme Court." Plaintiffs' Resp., p. 6.

20. "The general rule is that when a question has been definitely determined by this Court [the West Virginia Supreme Court], its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal or writ of error and it is regarded as the law of the case." Syl. Pt. 3, *Bass v. Rose*, 216 W. Va. 587, 609 S.E.2d 848 (2004), quoting Syl. Pt. 1, *Mullins v. Green*, 145 W. Va. 469, 115 S.E.2d 320 (1960).

21. "The law of the case doctrine 'generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there has been no material changes (sic) in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal.'" *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2003), quoting 5 Am.Jur.2d *Appellate Review* § 605 at 300 (1995). (Footnotes omitted).

22. "However, the law of the case doctrine is not all-encompassing. 'Law of the case principles do not bar a trial court from acting unless an appellate decision was issued on the merits of the claim sought to be precluded.'" *Hatfield v. Painter*, 222 W. Va. 622, 632, 671 S.E.2d 453, 463 (2008) (internal quotes omitted). As the West Virginia Supreme Court has recognized, "there are narrowly configured exceptions" to this doctrine which would allow a lower court to depart from a Supreme Court mandate: "(1) The evidence at a subsequent trial is

substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice." *Bass v. Rose*, 216 W. Va. at 587, 590, 609 S.E.2d 848, 851, n. 6 (2004) (internal quotes omitted).

23. The Panel unanimously FINDS that the law of the case doctrine is inapplicable for a number of reasons. First, the doctrine is inapplicable to the nine subject Plaintiff Families, who filed a separate case. Therefore, there can be no contention that the issue was "decided in a prior appeal in the same case." *State ex rel. Frazier & Oxley, L.C.*, 214 W. Va. at 808, 591 S.E.2d at 734 (quotes omitted).

24. Second, Judge Young's order did not address the merits of a forum non conveniens motion as to these nine Plaintiff Families. The Supreme Court has held that "[i]n all decisions on motions made pursuant to West Virginia Code § 56-1-1a (Supp. 2010), courts must state findings of fact and conclusions of law as to each of the eight factors listed for consideration under subsection (a) of that statute." Syl. Pt. 6, *State, ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 643, 713 S.E.2d 356, 358 (2011). However, Judge Young's order only considered the eight factors as they applied to one Plaintiff Family in another case.

25. Third, the law of the case is not applicable to any of the subject Plaintiff Families because there has been no "appellate decision . . . issued on the merits of the claim sought to be precluded." *Hatfield*, 222 W. Va. at 632, 671 S.E.2d at 463 (internal quotes omitted). The Supreme Court of Appeals denied issuance of a writ of prohibition to Judge Young's October 31, 2012 order without explanation.

26. Because a writ of prohibition shall issue only when a lower court has no jurisdiction or "having such jurisdiction, exceeds its legitimate powers," W. Va. Code § 53-1-1, the denial of issuance of a writ shows only that the Court did not feel that Judge Young

exceeded his discretionary authority, not that he was required to enter a specific ruling. Therefore, there has been no appellate decision issued on the merits of Defendants' claims. *See, e.g., State ex rel. N. River Ins. Co. v. Chafin*, 758 S.E.2d 109, 113-114 (W. Va. 2014)("Because a writ of prohibition is not available to correct discretionary rulings, we deny the extraordinary relief requested.")

27. Fourth, the law of the case is not applicable to any of the subject Plaintiff Families because there have been intervening "material changes in the facts." *State ex rel. Frazier & Oxley, L.C.*, 214 W. Va. at 808, 591 S.E.2d at 734 (internal quotes omitted). Following Judge Young's order, this litigation has grown from 19 Plaintiff Families and one case to 36 Plaintiff Families and three cases. Moreover, at the first status conference before the Panel, Plaintiffs' counsel stated they intend to file additional cases. Finally, all three cases have been transferred to this Panel for consideration and treatment as Mass Litigation. Each of these facts changes the overall character of this litigation and also impacts the factors enumerated in W. Va. Code § 56-1-1(a).

28. Finally, the law of the case is not applicable to any of the Plaintiff Families because there has been an "intervening change of law by a controlling authority." *Bass*, 216 W. Va. at 590, 609 S.E.2d at 851, n.6 (internal quotes omitted). At the time Judge Young's opinion issued, Plaintiffs maintained that the claims constituted one case and must be considered in unison, while Defendants maintained that the claims constituted 19 separate cases and should be considered separately. Judge Young's decision adopted Plaintiffs' position, and held that the presence of West Virginia Plaintiffs defeated Defendants' motion to dismiss. However, Judge Young noted in oral argument that "[l]ooking at the *Dropp* case by itself . . . I would find that . . . the more appropriate place is New York." (Oct. 18, 2012 Oral Arg. Tr. At 7:17-19.)

29. The West Virginia Supreme Court resolved the dispute regarding the proper treatment of the claims by "prohibit[ing] enforcement of the Panel's order of March 11, 2014, that separated the two cases referred by the Chief Justice into twenty-five civil cases." *State ex rel. J.C.*, 759 S.E. 2d. at 218. However, the Court also noted that "to the extent that some plaintiffs may be subject to dispositive motions based upon such issues as statutes of limitation or summary judgment, the Panel is . . . free to devise a scheme that permits the defendants to raise those issues and have them addressed separately." This decision evidences a change in controlling authority, authorizing the consideration of each of the Plaintiff Families' claims independently, even where they are joined together in one case.

30. The Panel unanimously FINDS that the "law of the case" does not bar consideration of the present motion.

Each of the Claims of the Nine Plaintiff Families Should be Evaluated Independently

31. Defendants have moved for dismissal of nine of the Plaintiff Families named in the Complaint on the grounds of forum non conveniens because their claims are not connected to West Virginia and would be more appropriately litigated in the Plaintiff Families' respective home states.

32. While *State ex rel. J.C.* established that Rule 3(a) does not provide authority for severing a complaint substantively into two or more separate civil cases it also provided that the Panel "has the authority to implement procedural mechanisms to address the numerous individual and collective unique issues that are inherent in mass litigation." 759 S.E.2d at 217. "Moreover, to the extent that some plaintiffs may be subject to dispositive motions based upon such issues as statutes of limitation or summary judgment, the Panel . . . is free to devise a

scheme that permits the defendants to raise those issues and have them addressed ***separately***." *Id*. (Emphasis added)

33. As stated in Justice Loughry's concurrence, "[c]hallenges, ***such as a motion to dismiss on the ground of forum non conveniens*** under West Virginia Code § 56-1-1a (2012), or a motion to dismiss fraudulently or improperly joined parties, are available to litigants. In short, misjoined claims and parties may still be addressed through appropriate procedural and substantive challenges." *Id.* at 219. (Emphasis added)

34. Forum non conveniens "is applied when, 'in the interest of justice and for the convenience of the parties' an action may be brought more conveniently, but still justly, in another forum." *State ex rel. N. River Ins. Co.*, 758 S.E.2d at 114 (internal citations omitted). "Forum non conveniens is ***not a substantive right of the parties, but a procedural rule of the forum***." *Id*. (Emphasis added)

35. By their very nature, motions to dismiss on the ground of forum non conveniens are fact specific and unique to each set of parties. *Id.* at 115 ("The weight assigned to each factor varies because each case turns on its own unique facts.")

36. Moreover, Rule 20(a) of the West Virginia Rules of Civil Procedure provides that, "[j]udgment 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."

37. For the foregoing reasons, the Panel unanimously FINDS that the nine Plaintiff Families' claims may be independently evaluated for purposes of a Defendants motion to dismiss on the grounds of forum non conveniens. Accordingly, the Panel next considers the eight statutory factors enumerated in W. Va. Code § 56-1-1a. *See* Syl. Pt. 6, *Zakaib*, 227 W. Va. at 643, 713 S.E.2d at 358.

Dismissal of Actions Under The West Virginia Forum Non Conveniens Statute

38. Dismissal of actions based on forum non conveniens is addressed in W. Va. Code § 56-1-1a, which provides that:

> (a) In any civil action if a court of this state, upon a timely written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action, or dismiss any plaintiff: *Provided*, That the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state. In determining whether to grant a motion to stay or dismiss an action, or dismiss any plaintiff under the doctrine of forum non conveniens, the court shall consider:
>
> (1) Whether an alternate forum exists in which the claim or action may be tried;
>
> (2) Whether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
>
> (3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
>
> (4) The state in which the plaintiff(s) reside;
>
> (5) The state in which the cause of action accrued;
>
> (6) Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;

(7) Whether or not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and

(8) Whether the alternate forum provides a remedy.

38. "In all decisions on motions made pursuant to West Virginia Code § 56-1-1a (Supp. 2010), courts must state findings of fact and conclusions of law as to each of the eight factors listed for consideration under subsection (a) of that statute." Syl. Pt. 6, *State, ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 643, 713 S.E.2d 356, 358 (2011).

Deference to Plaintiffs' Choice of Forum

39. The Panel recognizes a party seeking dismissal on grounds of forum non conveniens "ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Chafin*, 758 S.E.2d at 114. However, in evaluating the eight statutory factors, W. Va. Code § 56-1-1a(a) provides that. "the plaintiff's choice of a forum is entitled to great deference, ***but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state.*"** (Emphasis added) Because the Plaintiff Families at issue are not residents of West Virginia and their causes of action did not arise in the state of West Virginia, the Panel unanimously FINDS that Plaintiffs' choice of forum is entitled to less deference.

40. The parties do not dispute that the nine Plaintiff Families at issue in this complaint reside in states other than West Virginia, nor do they dispute that all of their causes of action accrued in states other than West Virginia. However, Plaintiffs argue that because the claims of the nine Plaintiff Families at issue are joined to the claims of the two Plaintiff Families residing in West Virginia, they are entitled to deference in their choice of forum. In support of their argument, Plaintiffs cite *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 713 S.E.2d 356.

41. The Court unanimously FINDS that *Zakaib* does not control on this point. Rule 20(a) of the Rules of Civil Procedure, and *State ex rel. J.C.* are dispositive of this issue. As set forth in Rule 20(a), "[j]udgment 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." Furthermore, "to the extent that some plaintiffs may be subject to dispositive motions based upon such issues as statutes of limitation or summary judgment, the Panel is . . . free to devise a scheme that permits the defendants to raise those issues and have them addressed ***separately***." *State ex rel. J.C.*, 759 S.E. 2d. at 217. (Emphasis added) This includes motions to dismiss on the ground of forum non conveniens, as noted by Justice Loughry in his concurring opinion. *Id.* at 219. Accordingly, the claims of each Plaintiff Family can be separately analyzed.

Whether an alternate forum exists in which the claim or action may be tried

42. The first factor directs the Panel to consider "[w]hether an alternate forum exists in which the claim or action may be tried." W. Va. Code § 56-1-1a(a)(1). The Panel unanimously FINDS that alternate forums exist for the subject Plaintiff Families' separate claims.

43. "In considering 'whether an alternate forum exists in which the claim or action may be tried' pursuant to West Virginia Code § 56–1–1a(a)(1) (Supp. 2010), an alternate forum is presumed to 'exist' where the defendant is amenable to process." Syl. Pt. 9, *Mace v. Mylan Pharm., Inc.*, 227 W. Va. 666, 668, 714 S.E.2d 223, 225 (2011). Defendants have consented to jurisdiction in each of the Plaintiff Families' home states and to a tolling of statutes of limitations to the extent they were not already expired at the time Plaintiffs' claims were filed. Accordingly, the Panel unanimously FINDS that alternate forums are "presumed to exist." *Id.*

44. Plaintiffs argue that if they re-file their claims in their home states, Defendants will remove their claims to federal courts and have them transferred to the Zoloft Multidistrict Litigation (the "Zoloft MDL") pending in the Eastern District of Pennsylvania, which will deprive Plaintiffs of a remedy. However, Plaintiffs provide no authority or evidence for the proposition that the Zoloft MDL, or multidistrict litigations in general, are ineffective or unfair or would constitute a complete lack of remedy for their claims. Thus, the presumption is not defeated on that basis. Accordingly, this factor favors dismissal.

Substantial Injustice to the Moving Party

45. The second factor directs the Panel to consider "[w]hether maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party." W. Va. Code § 56-1-1a(a)(2). The Panel unanimously FINDS that maintenance of the subject Plaintiff Families' claims in West Virginia would work a substantial injustice to Defendants for a number of reasons.

46. First, West Virginia has no connection to the subject Plaintiff Families, their claims, or the Defendants. All of the evidence, witnesses, and locations relevant to the subject Plaintiff Families' claims will all be located in other states.

47. Second, West Virginia is located at a considerable distance from the various states in which the subject Plaintiff Families reside, which will render it difficult and costly to secure the voluntary attendance of non-party witnesses.

48. The Panel also lacks subpoena power to compel the deposition or trial attendance of non-party witnesses or the production of documents in the possession of non-parties. While there is a process for engaging in interstate discovery, it can be complicated and expensive. West Virginia's lack of connection to this litigation coupled with the difficulty of compelling or

voluntarily securing witnesses for depositions and trial would work a substantial injustice to both Plaintiffs and Defendants, therefore, this factor favors dismissal.

Whether the Alternate Forum Can Exercise Jurisdiction Over All Defendants

49. The third factor directs the Panel to consider "[w]hether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim." W. Va. Code § 56-1-1a(a)(3). Defendants have consented to jurisdiction in the subject Plaintiff Families' home states, and have agreed to waive statutes of limitations, to the extent they had not already expired prior to initiation of the subject Plaintiff Families' claims in West Virginia. The Panel unanimously FINDS that alternative forums can exercise jurisdiction over all the Defendants and, therefore, this factor favors dismissal.

Plaintiffs' State of Residence

50. The fourth factor directs the Panel to consider "[t]he state in which the plaintiff(s) reside." W. Va. Code 56-1-1a(a)(4). The Panel unanimously FINDS, and the parties do not dispute, that the nine subject Plaintiff Families reside in states other than West Virginia. Accordingly, this factor favors dismissal.

State Where the Cause of Action Accrued

51. The fifth factor directs the Panel to consider "[t]he state in which the cause of action accrued." W. Va. Code 56-1-1a(a)(5). The Panel unanimously FINDS that the claims of the nine Plaintiff Families at issue accrued in states other than West Virginia:

A. The Mother Plaintiffs were prescribed Zoloft outside of West Virginia;

B. The Mother Plaintiffs ingested Zoloft outside of West Virginia;

C. The Minor Plaintiffs were injured outside of West Virginia;

D. The Minor Plaintiffs were treated for their injuries outside of West Virginia;

E. The Plaintiff Families reside outside of West Virginia; and

F. Zoloft was developed, marketed, and sold to Plaintiffs outside of West Virginia.

52. Because the nine subject Plaintiff Families' claims accrued outside of West Virginia, this factor favors dismissal.

Balance Of Private Interests Of The Parties And The Public Interest Of The State

53. The sixth factor directs the Panel to consider:

> Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

W. Va. Code § 56-1-1a(a)(6).

For the foregoing reasons, the Panel unanimously FINDS that the balance of private and public interests favor each of the nine subject Plaintiff Families' claims being brought in an alternative forum.

54. Each of the private interests weighs in favor of dismissal. None of the claims of the nine subject Plaintiff Families resulted from acts or omissions that occurred in West Virginia. Relevant evidence and witnesses regarding the subject Plaintiff Families' claims will be located in states other than West Virginia and, therefore, "relative ease of access to sources of proof"

favors litigation in the subject Plaintiff Families' home states where a significant amount of such proof is located.

55. The "availability of compulsory process for attendance of unwilling witnesses" also favors litigation in the subject Plaintiff Families' home states where local state and federal courts are better positioned to issue subpoenas to relevant witnesses.

56. The "cost of obtaining attendance of willing witnesses" favors litigation in the subject Plaintiff Families' home states because the witnesses will have to travel a shorter distance to attend trial. In addition, the "possibility of a view of the premises" favors litigation in the subject Plaintiff Families' home states if the homes of the Minor Plaintiffs have been modified to accommodate their alleged injuries.

57. The public interest of the state of West Virginia also weighs in favor of trying the subject Plaintiff Families' claims in their respective home states. The "administrative difficulties flowing from court congestion" favors litigation of non-residents' claims in their home states.

58. "[T]he interest in having localized controversies decided within the state," also favors litigation of non-residents' claims in their home states. As stated above, none of the nine subject Plaintiff Families is a resident of West Virginia. By the same token, none of the Defendants is a resident of West Virginia. The Mother Plaintiffs were not prescribed and did not ingest Zoloft in West Virginia, none of Plaintiffs' alleged injuries occurred in West Virginia, and it is unlikely any witnesses are located in West Virginia. In contrast, the subject Plaintiff Families' respective home states have a substantial interest in resolving disputes involving their residents who were allegedly injured in those states by the prescription and ingestion of a medication therein. West Virginia has no interest in adjudicating claims of the nine subject

Plaintiff Families with no connection to West Virginia just because their claims are joined together with two Plaintiff Families who do have a connection to West Virginia.

59. "[A]voidance of unnecessary problems in conflict of laws, or in the application of foreign law," also favors dismissal. West Virginia law cannot govern the claims of the subject Plaintiff Families injured outside of West Virginia. Because the subject Plaintiffs' alleged injuries occurred in various other states, the law of those states will apply under the choice-of-law rule of lex loci delicti, unless the Court determines such law is against the public policy of the state of West Virginia. Consequently, the Court may be faced with applying the product liability laws of different states, a difficult prospect at best.

60. Defendants assert that differences in state law between the nine subject Plaintiff Families' claims will be significant on issues such as: adoption of the learned intermediary doctrine; requiring warnings to physicians to be accurate and unambiguous; adoption of the presumption that an adequate warning, if it had been given, would have been heeded; punitive damages; and statutes of limitations. Defendants' Mot., p. 15, n. 5. (Citations omitted) Thus, there are advantages to conducting trial in the subject Plaintiff Families' respective home states where the alternate forums are familiar with the applicable law.

61. Finally, "the unfairness of burdening citizens in an unrelated forum with jury duty" favors dismissal of the claims of out-of-state plaintiffs arising from out-of-state conduct that has no connection to West Virginia. It would be unreasonable to impose jury duty on the citizens of West Virginia, who would be required to spend days trying to determine complicated issues involving the subject non-resident Mother Plaintiffs' alleged ingestion of Zoloft, or its generic form, sertraline, and the resulting birth defects allegedly sustained by the subject non-resident Minor Plaintiffs.

62. The Panel unanimously FINDS that the balance of the private interests of the parties and the public interest of the state of West Virginia predominate in favor of the claims of the subject Plaintiff Families being brought in their respective home states. Accordingly, this factor favors dismissal.

Duplication or Proliferation of Litigation

63. The seventh factor directs the Panel to consider: "[w]hether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation." W. Va. Code § 56-1-1a(a)(7). The Panel unanimously FINDS that dismissal will not result in the unreasonable duplication or proliferation of litigation.

64. The discovery the parties have conducted, which has primarily been discovery of Pfizer, rather than the Plaintiff Families, is readily transferable to any re-filed proceeding in a subject Plaintiff Family's home state.

65. The Panel has not adjudicated the merits of Plaintiffs' claims, so dismissal will not result in duplicative and unnecessary re-litigation of issues.

66. In addition to the Zoloft MDL in federal court, there are state court proceedings involving similar cases alleging birth defects as a result of *in utero* exposure to Zoloft. Defendants have represented to the Court that the courts and parties in these various actions have been coordinating with respect to discovery and other pretrial matters. Thus, dismissal of the subject Plaintiff Families' claims will not significantly expand the scope or geographical breadth of the Zoloft litigation. Accordingly, this factor favors dismissal.

Availability of a Remedy in the Alternative Forum

67. The eighth factor directs the Panel to consider: "[w]hether the alternate forum provides a remedy." W. Va. Code 56-1-1a(a)(8). Defendants assert, and Plaintiffs do not dispute, that the courts of the subject Plaintiff Families' home states provide an adequate remedy.

68. Furthermore, the West Virginia Legislature has determined that, "[i]t is a public policy of this state that, in determining the law applicable to a product liability claim brought by a nonresident of this state against the manufacturer or distributor of a prescription drug for failure to warn, ***the duty to warn shall be governed solely by the product liability law of the place of injury ('lex loci delecti')***." (Emphasis added) W. Va. Code § 55-8-16(a)(2011). Accordingly, the Panel is required by statute to apply the law of the location of injury to each of the subject Plaintiff Families' failure to warn claims. If the subject Plaintiff Families' claims fail upon the merits, that would hold true regardless of whether they are heard in West Virginia or an alternate forum.

69. Although the West Virginia Supreme Court previously held that "the doctrine of lex loci delicti will not be invoked where 'the application of the substantive law of a foreign state . . . contravenes the public policy of this State", *Mills v. Quality Supplier Trucking*, Inc., 203 W. Va. 621, 624, 510 S.E.2d 280, 283 (1998), that ruling predates W. Va. Code § 55-8-16(a), which applies to "all civil actions commenced on or after July 1, 2011." Because the subject Plaintiff Families filed their complaint after the effective date of W. Va. Code § 55-8-16, the Panel is bound to apply the law of their respective home states to the subject Plaintiff Families' failure to warn claims.

70. Although the West Virginia Legislature has declared this state's public policy for product liability claims brought by a nonresident against the manufacturer or distributor of a

prescription drug for failure to warn, the subject Plaintiff Families' other claims can still be reviewed under the common law of West Virginia.

71. The West Virginia Supreme Court has held that:

> The mere fact that the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law under recognized conflict of laws principles is contrary to the public policy of the forum state.

Nadler v. Liberty Mutual Fire Ins. Co., Syl. Pt. 3, 188 W. Va. 329, 424 S.E.2d 256 (1992).

72. The Panel unanimously FINDS that although the claims of the nine subject Plaintiff Families may be more difficult to prove than they would be under West Virginia law that, by itself, does not satisfy the test of absence of a remedy. Therefore, West Virginia's public policy exception does not work in favor of maintaining their actions in West Virginia, but favors dismissal on the ground of forum non conveniens.

CONCLUSION

For the foregoing reasons, after careful consideration of the eight factors set forth in W. Va. Code § 56-1-1a, and with further consideration of the degree of deference to be given to the Plaintiffs' choice of forum, the Panel **GRANTS** Defendants' motion to dismiss the claims of the nine subject Plaintiff Families on the ground of forum non conveniens. Accordingly, the claims of the nine Plaintiff Families that are the subject of Defendants' motion are **DISMISSED WITHOUT PREJUDICE**.

It is so **ORDERED.**

ENTER: October 29, 2014

/s/ James P. Mazzone
Lead Presiding Judge
Zoloft Litigation