



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ZOLOFT LITIGATION

Civil Action No. 14-C-7000

THIS DOCUMENT RELATES TO :

<i>M.W., a minor by and through her mother and next friend Angela Dropp</i>	Civil Action No. 12-C-147 WNE
<i>I.Z., a minor by and through his mother and next friend Mary Masters</i>	Civil Action No. 12-C-148 WNE
<i>M.M., a minor by and through her mother and next friend Jeanette Maskill</i>	Civil Action No. 12-C-149 WNE
<i>D.M., a minor by and through his mother and next friend Rebecca Mardorf</i>	Civil Action No. 12-C-150 WNE
<i>J.S., a minor by and through his mother and next friend Cindy Simpson-Durand</i>	Civil Action No. 12-C-151 WNE
<i>H.S., a minor by and through her mother and next friend Shannon Scalisi</i>	Civil Action No. 12-C-152 WNE
<i>E.D., a minor by and through her mother and next friend Denise Darcy</i>	Civil Action No. 12-C-153 WNE
<i>C.B., a minor by and through her mother and next friend Lala Fields</i>	Civil Action No. 12-C-154 WNE
<i>L.V., a minor by and through his mother and next friend Lorie Vinson</i>	Civil Action No. 12-C-155 WNE
<i>J.E., a minor by and through his mother and next friend Karen DeVries</i>	Civil Action No. 12-C-156 WNE
<i>A.N., a minor by and through her mother and next friend Heather Norfolk</i>	Civil Action No. 12-C-157 WNE
<i>T.S., a minor by and through his mother and next friend Dawn Skurry</i>	Civil Action No. 12-C-158 WNE
<i>A.H., a minor by and through her mother and next friend Heather Slabaugh</i>	Civil Action No. 12-C-159 WNE
<i>A.W., a minor by and through his mother and next friend Sheri Widner</i>	Civil Action No. 12-C-160 WNE
<i>K.W., a minor by and through her mother and next friend Angel Wolfertz</i>	Civil Action No. 12-C-161 WNE

<i>H.C., a minor by and through her mother and next friend Melissa Shroyer</i>	Civil Action No. 12-C-162 WNE
<i>C.S., a minor by and through his mother and next friend Kimberly Lancaster</i>	Civil Action No. 12-C-163 WNE
<i>G.S., a minor by and through his mother and next friend Jodi Winchell</i>	Civil Action No. 13-C-230 WNE
<i>L.C., a minor by and through her mother and next friend Crystal Cassada</i>	Civil Action No. 13-C-231 WNE
<i>W.E., a minor by and through his mother and next friend Jessica Eyerman</i>	Civil Action No. 13-C-232 WNE
<i>K.R., a minor by and through her mother and next friend Shonna Rightnowar</i>	Civil Action No. 13-C-233 WNE
<i>C.W., a minor by and through his mother and next friend Heidi Worrick</i>	Civil Action No. 13-C-234 WNE

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANTS’ FIRST MOTION TO DISMISS TWENTY-ONE PLAINTIFF FAMILIES ON THE GROUND OF FORUM NON CONVENIENS, AND GRANTING DEFENDANTS’ MOTION TO RECONSIDER DISMISSAL AS TO ONE PLAINTIFF FAMILY, ON THE GROUND OF FORUM NON CONVENIENS

On September 11, 2014, the Panel heard arguments on *Defendants’ First Motion to Dismiss Twenty-One Plaintiff Families, and Motion to Reconsider Dismissal as to One Plaintiff Family, on the Ground of Forum Non Conveniens* (Transaction ID 55708149). 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 11, 2012, a group of 19 plaintiffs (the “Mother Plaintiffs”) filed a complaint in the Circuit Court of Wayne County, alleging they 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.”

2. Seventeen of the Plaintiff Families have at all relevant times resided in states other than West Virginia: the Dropp Plaintiffs reside in New York; the Masters Plaintiffs reside in Pennsylvania; the Maskill Plaintiffs reside in Michigan; the Mardorf Plaintiffs reside in Connecticut; the Simpson-Durand Plaintiffs reside in Oklahoma; the Scalisi Plaintiffs reside in Louisiana; the Darcy Plaintiffs reside in Florida; the Fields Plaintiffs reside in Texas; the Vinson Plaintiffs reside in Tennessee; the Cheeks Plaintiffs reside in Pennsylvania; the Norfolk Plaintiffs reside in Maryland; the Skurry Plaintiffs reside in North Carolina; the Slabaugh Plaintiffs reside in North Carolina; the Widner Plaintiffs reside in Florida; the Wolfertz Plaintiffs reside in Louisiana; the Shroyer Plaintiffs reside in Oregon; and the Lancaster Plaintiffs reside in South Carolina. The remaining two Plaintiff families are the Cook Plaintiffs and the Brumfield Plaintiffs. The Cook Plaintiffs are West Virginia residents and the Brumfield Plaintiffs are Ohio residents, but the Brumfield Minor Plaintiff was born in West Virginia.

3. With the exception of the Brumfield Plaintiffs and the Cook Plaintiffs, the Mother Plaintiffs were prescribed and ingested Zoloft in states other than West Virginia, and the Minor Plaintiffs were injured and treated for said 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. On August 13, 2012, Defendants moved to dismiss the claims of one Plaintiff Family, the Dropp Plaintiffs, on the ground of forum non conveniens. On October 31, 2012, Judge Young of the Circuit Court of Wayne County, West Virginia, entered an Order denying Defendants' motion. The decision was based on the conclusion that the presence of the Cook and Brumfield Plaintiffs in the same case made West Virginia a convenient forum for adjudicating the Dropp Plaintiffs' claims. Defendants filed a petition for writ of prohibition against Judge Young that was denied by summary order of the West Virginia Supreme Court.

9. On October 28, 2013, a group of six Plaintiff Families filed a second, substantially identical complaint, alleging the Mother Plaintiffs ingested Defendants' prescription medication, Zoloft, or its generic form, sertraline, during their pregnancies and that, as a result, their respective children sustained birth defects. Five of the Plaintiff Families in the second complaint have resided at all relevant times in states other than West Virginia: the Smith Plaintiffs reside in New York; the Cassada Plaintiffs reside in South Carolina; the Eyerman

Plaintiffs reside in Iowa; the Rightnowar Plaintiffs reside in Indiana; and the Worrick Plaintiffs reside in Illinois. One Plaintiff Family, the Hughes Plaintiffs, resides in West Virginia.

10. As with the first complaint, with the exception of the Hughes Plaintiffs, all of the Mother Plaintiffs were prescribed and ingested Zoloft in states other than West Virginia, and all of the Minor Plaintiffs were injured and treated for their injuries in states others than West Virginia. Thus, as discussed above, important non-party witnesses likely reside outside of West Virginia and in each of the Plaintiff Families' respective home states.

11. On January 14, 2014, the West Virginia Supreme Court of Appeals entered an Order transferring these two cases to the Mass Litigation Panel ("the Panel") pursuant to Rule 26.06 of the West Virginia Trial Court Rules. Following the first status conference, the Panel issued an Order on March 11, 2014, directing that each of the 25 Plaintiff Families' claims be treated as separate civil actions pursuant to Rule 3(a) of the West Virginia Rules of Civil Procedure.

12. 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.

13. However, "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) 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)

14. On June 24, 2014, the Panel issued a Case Management Order requiring all Rule 12 Motions to be filed by July 9, 2014. (Transaction ID 55637257) On the prescribed date, Defendants filed their *First Motion to Dismiss Twenty-One Plaintiff Families and Motion to Reconsider Dismissal as to One Plaintiff Family, on the Ground of Forum Non Conveniens*. (Transaction ID 55708149).

15. Defendants’ motion invokes West Virginia Code § 56-1-1a(a), which provides:

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

16. As a threshold matter, the parties disagree as to whether Defendants’ motion is timely. 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.”

17. Because the Court’s Case Management Order established a deadline for filing Rule 12 motions, and Defendants filed the present motion by the Court’s deadline, the Panel unanimously FINDS that the motion was timely filed.

The “Law of the Case” Doctrine Does Not Bar Consideration of the Motion

18. The parties also disagree as to whether the “law of the case” bars consideration of the present motion. Plaintiffs argue that Judge Young’s October 31, 2012 Order bars reconsideration of Defendants’ motion as to the Dropp Plaintiff Family and bars consideration of Defendants’ motion as to the remaining 21 Plaintiff Families.

19. “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). “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).

20. “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).

21. The Panel unanimously FINDS that the law of the case doctrine is inapplicable for a number of reasons. First, the doctrine is inapplicable to at least five of the Plaintiff Families. The Smith, Cassada, Eyerman, Rightnowar, and Worrick Plaintiffs did not file their complaint until after Judge Young’s Order Denying Defendants’ motion and the Supreme Court of Appeals’ Order denying issuance of a writ of prohibition. These Plaintiff Families are part of a second case and, 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).

22. Second, the doctrine is inapplicable to at least 16 Plaintiff Families,¹ because Defendants did not move to dismiss the claims of those Plaintiff Families when it moved to dismiss the Dropp Plaintiff Family’s claims. In addition, Judge Young’s decision did not enter an order addressing the merits of a forum non conveniens motion as to those Plaintiff Families.

23. 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 the Dropp Plaintiff Family. There has been no ruling on the merits of Defendants’ motion as to the

¹ The Masters, Maskill, Mardorf, Simpson-Durand, Scalisi, Darcy, Fields, Vinson, Cheeks, Norfolk, Skurry, Slabaugh, Widner, Wolfertz, Shroyer, and Lancaster Plaintiffs.

remaining subject Plaintiff Families, who are unrelated, hail from different states, and allege different birth defects.

24. 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. 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.

25. 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).

26. 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.)

27. 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.

28. The Panel unanimously FINDS that procedural considerations do not bar the adjudication of Defendants' motion on the merits. 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

29. 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.

Deference to Plaintiffs' Choice of Forum

30. 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.

31. The parties do not dispute that all of the Plaintiff Families at issue 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 22 Plaintiff Families at issue are joined to the claims of the 3 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.

32. 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

33. 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.

34. "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.*

35. 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 Zolofit Multidistrict Litigation (the "Zolofit 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 Zolofit 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

36. 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.

37. 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.

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

39. 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 Alternate Forum Can Exercise Jurisdiction Over All Defendants

40. 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

41. 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 22 subject Plaintiff Families reside in states other than West Virginia. Accordingly, this factor favors dismissal.

State Where the Cause of Action Accrued

42. 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 22 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.

43. Because Plaintiffs’ claims accrued outside of West Virginia, this factor favors dismissal.

Balance of Private Interests of the Parties and the Public Interest of the State

44. 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 22 subject Plaintiff Families' claims being brought in an alternative forum.

45. Each of the private interests weighs in favor of dismissal. None of the claims in question resulted from acts or omissions that occurred in West Virginia. Because the 22 subject Plaintiff Families' claims have no connection with West Virginia, all of the relevant evidence and witnesses will be located in states other than West Virginia. 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.

46. 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.

47. The "cost of obtaining attendance of willing witnesses" favors litigation in the 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.

48. 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.

49. "[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 22 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 Zolofit 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.

50. “[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. 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.

51. 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.

52. 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

53. 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.

54. The discovery the parties have conducted, which includes extensive discovery of Defendants as well as initial discovery of Plaintiffs, is readily transferable to any re-filed proceeding in a subject Plaintiff Family’s home state.

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

56. In addition to the Zolofit MDL in federal court, there are state court proceedings involving similar cases alleging birth defects as a result of *in utero* exposure to Zolofit. 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 Zolofit litigation. Accordingly, this factor favors dismissal.

Availability of a Remedy in the Alternative Forum

57. The eighth factor directs the Panel to consider: “[w]hether the alternate forum provides a remedy.” W. Va. Code 56-1-1a(a)(8). 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). Therefore, 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.

58. Plaintiffs argue on behalf of the Maskill and Fields Plaintiff Families, that the Michigan and Texas tort statutes provide no adequate remedy for those families. As the West Virginia Supreme Court has previously held, the presumption that alternate forums exist may be defeated “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all. In such cases, the alternate forum ceases to ‘exist’ for purposes of forum non conveniens, and dismissal in favor of that forum would constitute error.” Syl. Pt. 9, *Mace*, 227 W. Va. 666, 668, 714 S.E.2d 223, 225.

59. The Maskill and Fields Plaintiff Families allege causes of action against the Defendants for strict products liability, failure to warn, design defect, negligence and negligence per se, negligent design, negligent pharmacovigilance, and gross negligence. *See*, Counts One through Seven of the July 11, 2012 Complaint.

60. However, the Maskill and the Fields Plaintiff Families' public policy argument is rendered academic insofar as it applies to their failure to warn claims. In 2011, the West Virginia Legislature enacted W. Va. Code § 55-8-16(a) which provides that, "It is **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 delicti')." (Emphasis added).

61. 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."

62. Because the Maskill and Fields Plaintiff Families filed their complaint after the effective date of § 55-8-16, the Panel is bound to apply the law of those states to the Maskill and Fields Plaintiff Families' failure to warn claims.

63. Although the Maskill and Fields Plaintiff Families' claims for failure to warn are not subject to a public policy analysis by virtue of W. Va. Code § 55-8-16(a), their other claims can still be reviewed under the common law of West Virginia. During the hearing on September 11, 2014, defense counsel admitted that each and every claim raised by the Maskill and Fields Plaintiff Families in their complaint would be precluded under Michigan and Texas Law:

JUDGE SWOPE: What I'm trying to find out, all these claims they filed -- I used to be a plaintiff's lawyer, you file strict liability, simple negligence, you got a breech (sic) of warranty, et cetera, as you go through these. I don't know. I want to know what claims that they have alleged you say are per se excluded in Texas

and Michigan. So I'll go back to the beginning, and that is on Page 25. Is strict liability precluded in Texas and Michigan?

MS. ARMSTRONG: Yes.

JUDGE SWOPE: Is failure to warn precluded in Texas and Michigan?

MS. ARMSTRONG: Yes.

JUDGE SWOPE: Is design defect precluded in Texas and Michigan. (sic)

MS. ARMSTRONG: Design defect is excluded in Michigan. We believe under Texas law the design defect that they are alleging is failure to include an adequate warning. The answer to your question is yes.

JUDGE SWOPE: Count 4 and 5, negligence per se. Is that excluded?

MS. ARMSTRONG: Yes.

JUDGE SWOPE: All right. "Count 6. Negligent pharmaco vigilance (sic)."

MS. ARMSTRONG: Yes.

JUDGE SWOPE: "Count 7. Gross negligence."

MS. ARMSTRONG: Yes.

JUDGE SWOPE: "Count 8. Loss of consortium and pecuniary loss." I don't really know that's a liability claim as well as it's an element of damage. But I'll just throw that out.

MS. ARMSTRONG: It's a derivative claim so it would be excluded.

JUDGE SWOPE: So every ground they have alleged in this complaint -- is this complaint the same as the other complaint?

MR. ITKIN: Yes, Your Honor, substantially.

JUDGE SWOPE: Every claim that they have raised in this complaint is precluded under Texas and Michigan laws; correct?

MS. ARMSTRONG: Yes.

September 11, 2014, Hearing Transcript, page 43, line 21 through page 45, line 16.

64. Accordingly, the Panel unanimously FINDS that, the remedy provided to the Maskill and Fields Plaintiff Families under Michigan and Texas law is so "clearly inadequate or unsatisfactory that it is no remedy at all." Syl. Pt. 9, *Mace*, 227 W. Va. 666, 668, 714 S.E.2d 223, 225. Therefore, "the alternate forum ceases to 'exist' for purposes of forum non conveniens, and dismissal in favor of that forum would constitute error." *Id.*

65. 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 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).

67. The Panel unanimously FINDS that although the claims of those Plaintiff Families who reside in 20 of the 22 states 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 IN PART AND DENIES IN PART** Defendants' first motion to dismiss twenty-one Plaintiff Families on the ground of forum non conveniens, and **GRANTS** Defendants' motion to reconsider dismissal as to one Plaintiff Family, on the ground of forum non conveniens. Defendants' motion to dismiss the claims of the Maskill Plaintiff Family and the Fields Plaintiff Family on the ground of forum non conveniens is **DENIED**. The claims of the 20 other Plaintiff Families that are the subject of Defendants' motion, are **DISMISSED WITHOUT PREJUDICE** on the ground of forum non conveniens.

It is so **ORDERED**.

ENTER: October 21, 2014

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