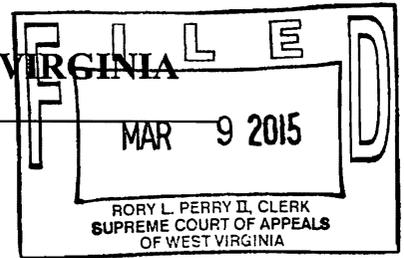


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel. AIRSQUID VENTURES,
INC. (D/B/A AMPHIBIOUS MEDICS); and TRAVIS PITTMAN;
Petitioners,

v.

No. 15-0098

HONORABLE DAVID W. HUMMEL, JR., Judge of the Circuit
Court of Marshall County; MITA SENGUPTA, as Personal
Representative of the Estate of AVISHEK SENGUPTA; TOUGH
MUDDER, LLC; PEACEMAKER NATIONAL TRAINING CENTER,
LLC; GENERAL MILLS, INC., and GENERAL MILLS SALES, INC.,
Respondents.

STATE OF WEST VIRGINIA ex rel. TOUGH MUDDER, LLC;
PEACEMAKER NATIONAL TRAINING CENTER, LLC;
GENERAL MILLS, INC.; and GENERAL MILLS SALES, INC.;
Petitioners,

v.

No. 15-0102

HONORABLE DAVID W. HUMMEL, JR., Judge of the Circuit
Court of Marshall County; and MITA SENGUPTA, as Personal
Representative of the Estate of AVISHEK SENGUPTA;
Respondents.

**RESPONDENT MITA SENGUPTA'S CONSOLIDATED OPPOSITION TO
PETITIONERS' APPLICATIONS FOR A WRIT OF PROHIBITION**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

Now comes Respondent Mita Sengupta, as Personal Representative of the Estate of Avishek Sengupta, by and through her counsel, Robert P. Fitzsimmons and Clayton J. Fitzsimmons of the Fitzsimmons Law Firm PLLC, and Robert J. Gilbert and Edward J. Denn of Gilbert & Renton LLC, who hereby request that this Honorable Court deny Petitioners' applications for a Writ of Prohibition.

I. QUESTIONS PRESENTED

1. Whether the Circuit Court properly found Marshall County to be a proper venue?
 - a. Whether the Circuit Court properly held that the Venue and Jurisdiction clause authorizes statewide venue, including venue in Marshall County?
 - b. If not, whether Petitioners' request for a writ of prohibition is premature, since the venue analysis under W.Va. Code § 56-1-1 has yet to be reached or resolved by the Circuit Court?
 - c. If not, whether this Court, on the existing record, should find that the purposeful business activities in Marshall County of General Mills and other Petitioners constitutes 'minimum contacts' sufficient to meet W.Va. Code § 56-1-1(b)'s 'wherein it does business' test for venue?

2. Whether the Circuit Court properly denied Petitioners' motions under the *forum non conveniens* statute, W.Va. Code § 56-1-1a, to transfer this case to an out-of-state arbitrator even though (a) Petitioners rely upon a contract requiring the suit to be heard in West Virginia and (b) Petitioners' motions to compel arbitration have been denied?

3. Whether the Circuit Court properly denied Petitioners' motions under W.Va. Code § 56-9-1, to remove the case where Petitioners adduced no evidence (a) that a Marshall County forum is prejudicial or (b) that another county would be materially more convenient?

II. STATEMENT OF THE CASE

A. Introduction

This matter involves the fair and reasonable enforcement of a venue-selection clause in an adhesive contract. The twist: It is the drafter of that contract – Petitioner Tough Mudder – who now seeks to avoid the plain meaning and reasonable interpretation of its own words.

Venue in this wrongful death action is controlled by the “Venue and Jurisdiction” clause in Petitioners’ agreement with Respondent’s deceased son, Avishek Sengupta. This clause (in a form release drafted by Tough Mudder) authorizes suit to be filed in the “state in which the TM event is held.” The clause protects its broad venue selection by prohibiting application of the procedural venue rules now cited by Petitioners in applying for a writ of prohibition. It provides:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal court for the state in which the TM Event is held has the sole and exclusive jurisdiction and that only the substantive laws of the State in which the TM Event is held shall apply.

[AS:184; TM:45].¹ As its title connotes, the Clause addresses two major issues for suits arising out of the Tough Mudder Event at which Avi Sengupta drowned in April 2013:

- (1) First, the Clause liberally addresses “Venue” (*i.e.*, the *place* for the legal action to be brought), by expressly allowing suits to be filed in the “state in which the TM event is held,” such that the *place* to sue is anywhere in the state of West Virginia. No further geographic restriction is placed on venue. The broad venue clause in this Agreement contrasts sharply with the restrictive venue clauses in other contracts in which Tough Mudder desired to limit venue to a particular place. For example, in its contract with Airsquid, Tough Mudder used language specifying the venue solely in Kings County, NY. [AS:642]. Similarly, in its contract applicable to an earlier event, Tough Mudder specified venue only in Frederick County, MD. [MS:41]. But in its putative contract with Avi Sengupta, Tough Mudder permitted venue on a statewide basis, with no further limitations.

¹ The notations “AS:_____,” “TM:_____,” and “MS:_____” refer, respectively, to the appendices submitted by Airsquid, Tough Mudder, and Mita Sengupta.

- (2) Next, the Clause addresses “Jurisdiction” (*i.e.*, the *type* of court able to consider the action) by authorizing suit in the state or federal court having subject matter jurisdiction (*e.g.*, the Circuit Court).

In Marshall County and again in this Court, Petitioners argued against this plain reading, asserting that the Clause should be interpreted not just as authorizing venue on a statewide basis but also as incorporating the state’s procedural venue rules to further restrict a party’s choice of the place to file suit to particular counties. Petitioners’ argument, however, ignores the Venue and Jurisdiction Clause’s plain language, which bars invocation of West Virginia’s *procedural* venue rules (*e.g.*, W.Va. Code §§ 56-1-1, 56-1-1a, and 56-9-1) by stating that “*only the substantive laws*” of the state shall apply. [AS:184, TM:45]. The Clause thus protects statewide venue by preventing parties from using the state’s procedural venue rules to narrow its scope.

But even if the Clause permitted a procedural venue analysis, it is evident that Marshall County would still be an appropriate venue. Petitioners’ purposeful and systematic commercial activities in Marshall County – particularly (but not exclusively) those of General Mills – would support venue there under W.Va. Code § 56-1-1(b)’s minimum contacts test.² Further, and as will be discussed, Marshall County is as convenient and appropriate as other forums.

The Circuit Court thus correctly denied Petitioners’ various motions to transfer this case anywhere but Marshall County. West Virginia law accords “great deference” to a plaintiff’s choice of venue where (as here) the cause of action arose in West Virginia. Yet Petitioners – relying on a contract expressly requiring suit in West Virginia – would transfer the case to Maryland pursuant to the *forum non conveniens* statute, W.Va. Code § 56-1-1a. Alternatively,

² Because the Circuit Court was able to determine venue from the Venue and Jurisdiction clause alone, it did not analyze venue under W.Va. Code § 56-1-1. Thus, it would be premature for this Court to entertain a writ on that issue; instead, remand to the Circuit Court would be appropriate.

Petitioners requested a transfer to Berkeley County, pursuant to the removal statute, W.Va. Code § 56-9-1, without adducing any evidence of prejudice from a Marshall County forum or any evidence that another county would be materially more convenient. The Circuit Court properly denied both a change of forum to Maryland and a transfer to a different West Virginia county.

In sum, whether measured by clear contract language or traditional issues of minimum contacts, convenience and lack of prejudice, the petitions should be denied.

B. Factual Background³

1. The Incident, and the Complaint

Tough Mudder is the largest company in the Obstacle Course Racing (“OCR”) industry. [AS:8; TM:257.] Avishek Sengupta participated in Tough Mudder’s Mid-Atlantic event in West Virginia on April 20, 2013 (the “Event”). [AS:3; TM:252]. At the Event, Avi purportedly signed a “Tough Mudder LLC Assumption of Risk, Waiver of Liability, and Indemnity Agreement Mid-Atlantic Spring 2013” (the “Agreement”). [AS:183-85; TM:44-46].⁴ The key Venue and Jurisdiction clause is contained in that Agreement.

The case underlying this dispute arises from Avi’s drowning while attempting to complete the Walk-the-Plank obstacle (the “Obstacle”). [AS:2-32; TM:252-82]. This obstacle required participants to jump from a 15-foot platform into a manmade body of cold muddy water, before swimming to its end and using a cargo net to climb out. [AS:9, TM:257].

³ These facts derive from Petitioners’ initial answers to venue-related written discovery, without follow-up depositions. If the Court upholds the Circuit Court based on the contract, the point is moot. Otherwise, remand is appropriate to develop a full factual record.

⁴ For venue purposes, Mrs. Sengupta assumes the authenticity of the Agreement proffered by Tough Mudder. However, she has not yet had an opportunity to conduct full discovery of the facts and circumstances of Avi’s alleged execution of the Agreement and thus reserves all rights.

Avi's drowning resulted from Petitioners' grossly negligent and reckless failure to follow basic safety precautions or to effectuate a minimally competent rescue effort. Mita Sengupta (Avi's mother and personal representative) filed this action on April 18, 2014. Her claims include Count I (Wrongful Death), Count II (Declaratory Relief – Unenforceability of Arbitration Clause), and Count III (Declaratory Relief – Unenforceability of Waiver). Mrs. Sengupta asserts claims against all six Petitioners for their contributions to Avi's death: (1) Tough Mudder, which had primary responsibility for participant safety; (2) Airsquid Ventures, which provided safety personnel and services; (3) Travis Pittman, the rescue diver; (4) Peacemaker National Training Center, which participated in advertising, construction and permitting of the Obstacle and Event; and (5-6) General Mills, which partnered with Tough Mudder to promote and sponsor the Obstacle and the Event. As stated in the Complaint, each defendant caused or contributed in myriad ways. [AS:3-32; TM:252-82].

2. Petitioners' Contacts With Marshall County

a) Tough Mudder and Its Contacts with Marshall County

Petitioner Tough Mudder is registered to do business in West Virginia. [AS:205-06]. A self-described marketing company that puts on events, Tough Mudder's primary marketing tools are free media and Facebook campaigns intended to publicize its events:

Facebook has been Tough Mudder's primary channel since our founders promoted the first event with \$8,000 in Facebook Ads, driving more than 5,000 total participants. Facebook continues to help us grow our business.

[AS:234, 295]. Tough Mudder's Facebook page includes instructions to "sign up here" with a link to an interactive webpage to "find an event." [AS:302-317]. Tough Mudder's events page, in turn, includes links to various sub-pages at which visitors can contract and pay prices up to

\$200 to participate in events, including a “Capital Region” event that was scheduled to take place in the fall of 2014 in the same West Virginia location where Avi was drowned. [AS:318-333].

In its media and marketing, Tough Mudder represents to the public, including potential participants in Marshall County, that its courses are controlled and safe, and that its safety measures and systems are “world-class” and “exceed safety standards,” citing its “world-class systems” and “best safety practices” as reason to choose its events over those of its competitors:

It’s about building **world-class systems** . . . [¶] Tough Mudder is . . . a somewhat controlled environment. And in some ways **it’s like a high ropes course. You can say that if you fall it doesn’t matter because the harness is going to catch you after three feet.** . . . One of the concerns we have is that there are hundreds of smaller events popping up. . . [T]here’s always the danger of putting a lot of new players into the market. You have people who might not be aware of **best safety practices.** Tough Mudder has spent a lot of money working with the relevant safety people here and oversees to see that **we meet and exceed safety standards. We have a \$50 million general liability policy with Lloyd’s of London and have to meet standards.**”

[AS:215-16]. Tough Mudder’s media and marketing – which borrow credibility from a host of corporate partners, including General Mills – are calculated both to stimulate interest in Tough Mudder’s challenging events and to reassure prospective customers that events are expertly designed and controlled to ensure safe participation. [AS:336] (“We wouldn’t be where we are as a brand without the partners we have.”). In this way, Tough Mudder’s events are marketed “like a high ropes course,” akin to those used by corporate executives on team building retreats. [AS:215]. The connotation is that Tough Mudder’s courses are a safe place to confront and overcome all fears, because Tough Mudder has everything under control. Only it does not. As detailed in Mrs. Sengupta’s Complaint, Tough Mudder has made dangerous cost-saving decisions on staffing, training, equipment, course design and procedures that maximized profits while creating an inevitability of death at the Walk-the-Plank obstacle. [AS:2-32; TM:252-82].

Tough Mudder’s media and marketing efforts have penetrated Marshall County at a pace consistent with the company’s explosive growth in recent years.

Year	Marshall County Participants	Marshall County Spectators	Marshall County Volunteers	Resulting T.M. Revenue
2011	3	0	0	\$415.00
2012	5	5	0	\$700.00
2013	64	14	4	\$9,890.00
2014 (through summer 2014)	39 (through summer 2014)	0 (through summer 2014)	3 (through summer 2014)	\$5,602.61 (to date)
	111	19	7	\$16,607.61 ⁵

[AS:228-237; TM:178-87]. At least two Marshall County residents participated in Avi’s Event and were targeted by the same marketing that induced Avi and his teammates to join in. *See id.*

Tough Mudder also maintains an interactive website to market branded clothing and gear. [AS:349-422]. This website is directed into Marshall County and accessible to Marshall County residents, who have paid to purchase branded products via the site. [AS:925-926]. In sum, Tough Mudder’s marketing has had the intended effect of reaching into Marshall County, whose residents (via the Internet) have made contracts with, and made payments to, Tough Mudder.

b) General Mills and Its Contacts With Marshall County

Petitioners General Mills, Inc. and General Mills Sales, Inc. (“General Mills”) ⁶ do substantial business in Marshall County, including business directly relevant to this case.

General Mills engages in the manufacture, marketing, distribution and sale of packaged foods. [AS:423-38]. General Mills, Inc. sits atop the conglomerate and delegates to General

⁵ Tough Mudder’s revenue figures do not include the value of services rendered by Marshall County residents who volunteered their services at Tough Mudder events.

⁶ General Mills, Inc. uses “General Mills” to describe the corporate conglomerate consisting of itself and its dozens of subsidiaries, including General Mills Sales, Inc. [AS:423-38].

Mills Sales, Inc. (which is registered to do business in West Virginia) substantial responsibility for the marketing, distribution, and sale of their food products. [AS:423-42].

General Mills' numerous and ubiquitous brands include (without limitation) Betty Crocker, Bisquick, Gold Medal, Pillsbury, Big G, Cheerios, Chex, Cinnamon Toast Crunch, Fiber One, Hershey's Cookies-n-Cream, Kix, Lucky Charms, Reese's Puffs, Total, Trix, Wheaties, Green Giant, Helper, Old El Paso, Bugles, Nature Valley, Progresso, Go-Gurt and Yoplait. [AS:443-70]. General Mills does retail "business with a wide variety of grocery stores, mass merchandisers, membership stores, natural food chains, and drug, dollar and discount chains operating throughout the United States." [AS:423-38]. General Mills has yet to be deposed but already concedes that it is a "global food company that sells and markets its products in all 50 states," that it "distributes its products . . . to its customers through a national sales team," and that there are members of its sales team whose "territory includes West Virginia." [AS:251-73]. Despite being asked, General Mills has not identified the team members and other employees with responsibility for Marshall County and has not provided their addresses or job descriptions. *See id.*

General Mills' sales team has been hugely successful, as its household penetration rate is an astonishing 97%. [AS:479] ("At least one of [General Mills'] brands can be found in 97 percent of U.S. homes."). This pervasive reach extends into Marshall County. In the spring of 2014, investigators visited Marshall County grocery stores, including Dollar General, Family Dollar, Greg's Market, Kroger, and Walmart. [AS:480-581]. Each was stocked with large quantities of General Mills products (*i.e.*, Bisquick, Green Giant, Honey Nut Cheerios, Lucky Charms, and Reese's Puffs), many featured in preferred floor or end-cap displays. *See id.*

Throughout the month of April 2014, these investigators also surveyed advertisements in the Sunday News-Register and the Green Tab newspapers circulated in Marshall County, and found numerous paid advertisements and promotions for General Mills products. [AS:480-581]. Local television broadcasts were also rife with General Mills commercials. [AS:582-84].

In addition to retail sales, General Mills “sell[s] to distributors and operators in many [other] customer channels including foodservice, convenience stores, vending, and supermarket bakeries.” [AS:423-38]. Through a distributor (Sysco), General Mills supplies 19 products to the Marshall County schools for consumption by nearly 4,000 students. [AS:585-603].

Moreover, General Mills directly markets branded clothing, costumes, kitchen utensils, toys and novelties (e.g., personalized Wheaties boxes) on its interactive website (“General Mills Shop”), and uses the “Coupons and Promotions” portal on that website to promote its products with a variety of coupons, promotions, contests, recipes, and tips. [AS:604-31]. This website is directed at and accessible to all General Mills customers, including residents of Marshall County.

In sum, General Mills does substantial business in Marshall County.

c) Tough Mudder’s Partnership With General Mills

In its own words, “[Tough Mudder] wouldn’t be where [we are] as a brand without the partners we have.” [AS:336]. In February 2013, Tough Mudder and General Mills announced that they had partnered in a co-promotional deal, an event reported in the media as “the latest sign that obstacle racing is becoming recognized in the mainstream.” [AS:267-69, 632-37].

Pursuant to the partnership, General Mills agreed to manufacture and distribute 2 million boxes of Wheaties bearing Tough Mudder images and logos. [AS:267-69, 632-37]. ***General Mills distributed these Tough Mudder boxes across the country, including Marshall County.***

See id. In turn, Tough Mudder branded its Walk-the-Plank obstacles (including the one at which Avi drowned) with the Wheaties logo. [AS:267-69, 632-37]. Each of these co-promotional announcements and activities was directed without exception into Marshall County.

* * * * *

In sum, the activities of Tough Mudder and General Mills easily satisfy the ‘minimum contacts’ test and are more than sufficient to support venue in Marshall County.

C. Procedural History

State Court Proceedings: Mrs. Sengupta (Avi’s personal representative) filed this action in Marshall County Circuit Court on April 18, 2014.⁷ [AS:1-32; TM:252-82].⁸

That same day, Tough Mudder filed for AAA arbitration in Maryland. *See* TM Petition No. 15-0102 at 6. Mrs. Sengupta requested that AAA stay the arbitration pending a Circuit Court ruling on arbitrability. *Id.* When AAA refused, Mrs. Sengupta obtained a temporary injunction and, after hearing, a temporary restraining order staying the arbitration. *Id.*

Petitioners then filed motions in this court to compel arbitration and to dismiss, remove or transfer this action on venue-related grounds. *Id.* at 7. The Circuit Court heard oral argument on August 22, 2104. *Id.* at 8. On September 15, 2014, the Circuit Court issued a letter notice denying the motions. *Id.* Denying Petitioners’ venue-related motions, the Circuit Court held: “As succinctly put in [Respondent’s] written submission, ‘In sum, based on the Venue and Jurisdiction clause alone, venue is valid on a statewide basis, including in the Marshall County

⁷ Consistent with West Virginia’s wrongful death statute (W.Va. Code § 55-7-5), Mrs. Sengupta, as representative, is the sole plaintiff in the Circuit Court case underlying the instant petitions.

⁸ Respondent disputes Petitioners’ unsupported suggestion that her Complaint was filed after and in response to Petitioners’ arbitration demand.

Circuit Court, without need for any venue analysis.’ This Court agrees.” *Id.* On January 9, 2015, after receipt of proposed orders and objections thereto, the Circuit Court entered formal orders denying Petitioners’ motions. *Id.* at 9.

Petitioners then filed notices of appeal concerning the denial of their motions to compel arbitration, and also filed the instant applications for writs of prohibition concerning the denial of their venue-related motions. *Id.*

Parallel Federal Proceedings: On June 2, 2014, Petitioners Tough Mudder, Peacemaker and General Mills filed a parallel petition to compel arbitration in the Federal District Court for the Northern District of West Virginia (Martinsburg). *Id.* at 8. Respondent not only opposed the petition but also moved to dismiss it for failure to join an indispensable party (Travis Pittman) who would destroy diversity and thereby deprive the Federal District Court of jurisdiction. *Id.* at 8. On October 2, 2014, Judge Groh granted Mrs. Sengupta’s motion and dismissed the federal action without prejudice. *Id.* Petitioners have appealed this dismissal to the Fourth Circuit. *Id.*

D. Standard of Review

“[W]rits of prohibition provide a drastic remedy [that] should be invoked only in extraordinary situations.” *Health Mgmt., Inc. v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999). The petitioner has the burden of showing that the trial court either (a) has no jurisdiction or (b) has jurisdiction but exceeds its legitimate powers. *State ex rel. Nelson v. Frye*, 221 W.Va. 391, 394, 655 S.E.2d 137, 140 (2007); *see also*, W.Va. Code § 53-1-1; *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994). “The right to prohibition must clearly appear . . .” *State ex rel. Maynard v. Bronson*, 167 W.Va. 35, 41, 277 S.E.2d 718, 722 (1981).

A writ of prohibition may be appropriate “to resolve the issue of where venue for a civil action lies.” *State ex rel. Mylan, Inc. v. Zakaib*, 227 W.Va. 641, 645, 713 S.E.2d 346, 360 (2011). The general rule is that review of a trial court’s decision on a motion to dismiss, remove or transfer on venue-related grounds is for abuse of discretion. *See, e.g., State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 124, 464 S.E.2d 763, 766 (1995) (“review of a trial court’s decision on a motion to dismiss for improper venue is for abuse of discretion”); *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005) (same); *Hatfield v. Hatfield*, 113 W.Va. 135, 167 S.E.89, 90 (1932) (review of trial court’s decision on removal is for abuse of discretion); *Naum v. Halbritter*, 172 W.Va. 610, 612, 309 S.E.2d 109, 112 (1983) (review of trial court’s decision on transfer is for abuse of discretion); *Nezan v. Aries Technologies, Inc.*, 226 W.Va. 631, 644, 704 S.E.2d 631, 644 (2010) (review of trial court’s determination of *forum non conveniens* is for abuse of discretion). However, where review of the “applicability and enforceability” of a forum selection clause is involved, such review is *de novo*. *See Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128,139, 690 S.E.2d 322, 333 (2009).

III. SUMMARY OF ARGUMENT

West Virginia law does not permit the drafter of a forum selection clause to avoid reasonable application of the clause’s plain meaning. But Petitioners seek to do exactly that.

The “Venue and Jurisdiction” clause in Petitioners’ agreement with Avishek Sengupta authorizes statewide venue (including Marshall County), by providing as follows:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal court for the state in which the TM Event is held has the sole and exclusive jurisdiction and that only the substantive laws of the State in which the TM Event is held shall apply.

[AS:184; TM:45]. As its title makes clear and its author concedes, the Clause addressed two key issues concerning suits arising out of the Tough Mudder event in West Virginia where Avishek Sengupta was drowned: (1) venue (*i.e.*, the *place* for the legal action to be brought and (2) subject matter jurisdiction (*i.e.*, the *type* of court eligible to hear the action).⁹ These issues are addressed very straightforwardly: the *place* for a lawsuit to be filed is defined as the “state in which the TM event is held.” The *type* of court eligible to hear lawsuits is defined as the “appropriate state or federal court.” That is, the place to sue is anywhere in West Virginia (no further geographic restriction being placed upon it), and the type of court in which suit may be brought is the state or federal court having subject matter jurisdiction (*e.g.*, the Circuit Court).

Notably, Petitioners Tough Mudder, General Mills, and Peacemaker conceded this point of statewide venue in a different court, stating to the Federal Court in Martinsburg that “West Virginia, as the state in which this particular Tough Mudder event took place, is the appropriate venue for this controversy.” [AS:188]. Petitioners now take a different position in state court, arguing that the Venue and Jurisdiction clause should be read not as authorizing statewide venue in West Virginia (while barring venue in other states) but as incorporating West Virginia’s procedural venue rules to restrict a party’s choice of the place to file suit to particular counties.

There are numerous problems with this argument. Most importantly, that is not what the Venue and Jurisdiction clause says. By addressing place-of-suit with its reference to “Venue” in the title and then using words whose only geographic requirement is for suit to be filed in “the state in which the TM Event is held,” Petitioners reinforced that venue shall be available on a statewide basis, without any need to conduct a procedural venue analysis. Far from narrowing

⁹ *Accord* Tough Mudder Petition No. 15-0102 at p, 20, ¶ 4 (“The appropriate court is one having subject matter jurisdiction over the dispute and in which venue is proper.”) (emphasis in original).

the choice of venue to a particular county by incorporating West Virginia’s *procedural* venue rules (e.g., W.Va. Code §§ 56-1-1, 56-1-1a, and 56-9-1), the Venue and Jurisdiction clause expressly rejects them, by stating that “*only the substantive laws*” of the state shall apply. [AS:184; TM:45]. If Petitioners wished to further restrict venue, they should and easily could have used different words, e.g., by incorporating state procedural rules generally, or the venue statute specifically. Rather, they decided that “only the substantive laws” of the state shall apply.

Or Petitioners could have expressly stated the county in which suit would be brought, just as they did for Tough Mudder’s earlier event in nearby Frederick, Maryland, in which its release provided specifically for all suits to be filed in Frederick County, [MS:41]; or as they did in Tough Mudder’s Confidentiality Agreement with the rescue diver, Travis Pittman:

. . . Proceedings to resolve disputes arising in connection with this Agreement shall be resolved solely in the state or federal court(s) of competent subject matter jurisdiction located in the State of New York, Kings County and I irrevocably submit to the personal jurisdiction and venue of such courts and waive any objection on any grounds to the same.

[AS:642]. Because Petitioners did not include any such restriction here, there is none.

Even if Petitioners’ interpretation of the Venue and Jurisdiction clause was plausible (it is not), that interpretation would simply create an ambiguity which, under West Virginia law, is resolved against Petitioners, since Tough Mudder drafted the language. *See Henson v. Lamb*, 120 W.Va. 552, 199 S.E. 459, 461-62 (1938) (“In case of doubt, the construction of a written instrument is to be taken most strongly against the party preparing it.”).

* * * * *

Because the Circuit Court enforced the forum selection language in the Agreement’s Venue and Jurisdiction clause, it had no cause to conduct an analysis under the venue statute,

W.Va. Code § 56-1-1. Accordingly, even if the Venue and Jurisdiction Clause was deemed by this Court not to confer statewide venue (including Marshall County), it would be premature for this Court to entertain a writ on the statutory venue analysis issue. *See, e.g., State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W.Va. 37, 45, 658 S.E.2d 728, 736 (2008) (“It would be premature . . . to prohibit the circuit court from doing that which it has yet to rule upon.”); *State ex rel. Smith v. Maynard*, 193 W.Va. 1, 9, 454 S.E.2d 46, 54 (1994) (limiting writ to venue issues reached and decided by circuit court, remanding venue issues undecided by that court).

But even if the issue was ripe for consideration in this Court, the record evidence of Petitioners’ purposeful and extensive commercial activity in Marshall County – ***including activity directly connected to Tough Mudder events*** – establishes venue under W.Va. Code § 56-1-1(b)’s ‘minimum contacts’ test. *See Kidwell v. Westinghouse Elec. Co.*, 178 W.Va. 161, 163, 358 S.E.2d 420, 422 (1986) (“[W]hether a corporation is subject to venue in a given county in this State under the phrase in W.Va. Code § 56-1-1(b) ‘wherein it does business’ depends on the sufficiency of the corporation’s minimum contacts in such county that demonstrate it is doing business, as that concept is used in W.Va. Code, 31-1-15.”).

* * * * *

The Circuit Court also correctly denied Petitioners’ motions to move this case anywhere but Marshall County. West Virginia law accords “great deference” to a plaintiff’s choice of venue where, as here, the cause of action arose in West Virginia. Nevertheless, Petitioners moved either to transfer the case outside West Virginia pursuant to the *forum non conveniens* statute, W.Va. Code § 56-1-1a (even though they rely upon a contract whose Venue and Jurisdiction clause requires suit to be heard in West Virginia), or to transfer the case within West

Virginia pursuant to the removal statute, W.Va. Code § 56-9-1 (even though they adduced no evidence of prejudice from a Marshall County forum and no evidence that another county would be materially more convenient). Petitioners failed to carry their burdens of production and proof.

For these reasons, the Circuit Court properly denied Petitioners' motions to dismiss, transfer, or remove this action. Their petitions for a writ of prohibition should be denied too.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary pursuant to W.Va. Rule of App. Proc. 18(a), because the petitions are without substantial merit; the dispositive issues have been authoritatively decided; the facts and legal arguments are adequately presented in the briefs and record on appeal; and the decisional process would not be significantly aided by oral argument. Indeed, the matter is appropriate for memorandum decision pursuant to W.Va. Rule of App. Proc. 21, because there is no substantial question of law and the trial court's decision was correct; there is no prejudicial error; and other just cause exists for summary affirmance.

If oral argument is held then, pursuant to W.Va. Rule of App. Proc. 18(c), Petition No. 15-0098 and Petition No. 15-0102 involve the same assignments of error in the same matter. Accordingly, they should be argued together on such terms as the Court may prescribe.

V. LEGAL ARGUMENT

“In analyzing whether the plaintiff has made the requisite *prima facie* showing that venue is proper, we view all the facts in a light most favorable to the plaintiff.” *Caperton v. A.T. Massey Coal Co., Inc.*, 223 W.Va. 624, 693, 679 S.E.2d 223, 291 (2008) (internal quotation omitted), *rev'd on other grounds*, 556 U.S.868 (2009). “[T]he court accepts the plaintiff's well-pled factual allegations regarding venue as true, draws all reasonable inferences from those

allegations in the plaintiff's favor, and resolves any factual conflicts in the plaintiff's favor.”
Darby v. U.S. Dep't of Energy, 231 F. Supp. 2d 274, 276 (D.D.C. 2002).

West Virginia “follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants . . .” *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 231, 366 S.E.2d 738, 739 (1988) (venue valid for all defendants because single “venue-giving defendant” waived venue). As further explained below, there are multiple venue-giving defendants in this case, who bestow venue in multiple ways. In this case, personal jurisdiction is not disputed and, thus, federal questions of constitutional due process in the exercise of personal jurisdiction are not raised. For each of these reasons and the many that follow, Petitioners’ motions to dismiss or remove this case on venue-related grounds were properly denied.

A. The Circuit Court Properly Held the “Venue and Jurisdiction” Clause in the Agreement Drafted by Tough Mudder Authorizes Venue in Marshall County

The Venue and Jurisdiction clause authorizes statewide venue, including venue in Marshall County Circuit Court. The Agreement between Tough Mudder and Avi Sengupta contains an express Venue and Jurisdiction clause providing as follows:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal court for the state in which the TM Event is held has the sole and exclusive jurisdiction and that only the substantive laws of the State in which the TM Event is held shall apply.

[AS:184, TM:45]. Interpretation of the Agreement, including the Venue and Jurisdiction clause, is a question of state law for decision by the court. *See, e.g., Benwood-McMechen Water Co. v. City of Wheeling*, 121 W.Va. 373, 4 S.E.2d 300 (1939). Under West Virginia law, forum selection clauses of this nature are presumptively enforceable. *See Caperton v. A.T. Massey Coal*

Co., Inc., 225 W.Va. 128, 142, 690 S.E.2d 322, 336 (2009). West Virginia follows the rule of *contra proferentem*, requiring ambiguities to be interpreted against the drafter. *See, e.g., Henson v. Lamb*, 120 W.Va. 552, 199 S.E. 459, 461-62 (1938) (“In case of doubt, the construction of a written instrument is to be taken most strongly against the party preparing it.”).

As its title makes clear and its author concedes, the Venue and Jurisdiction clause addresses two important practical issues concerning legal actions arising out of Tough Mudder events: (1) venue (*i.e.*, the *place* for the legal action to be brought) and (2) subject matter jurisdiction (*i.e.*, the *type* of court eligible to hear the action). *Accord* Tough Mudder’s Petition No. 15-0102 at p. 20, ¶ 4. These concerns are addressed very straightforwardly: the *place* for a lawsuit to be filed is defined solely as the “state in which the TM event is held.” The *type* of court eligible to hear lawsuits is defined to be the “appropriate state or federal court.” In other words, if somebody wishes to bring a legal action involving the April 2013 Tough Mudder event in West Virginia, the place to bring that suit is anywhere in West Virginia (no further geographic restriction being placed upon it), and the type of court in which it may be brought is the state or federal court that has appropriate jurisdiction (*e.g.*, the Circuit Court).¹⁰ Notably, Petitioners Tough Mudder, Peacemaker and General Mills have admitted in a different court that the Venue and Jurisdiction clause authorizes venue on a statewide basis, stating to the Federal Court in Martinsburg that “West Virginia, as the state in which this particular Tough Mudder event took place, is the appropriate venue for this controversy.” [AS:188].

¹⁰ As the Circuit Court observed during hearings below, the words “the appropriate state or federal court” connote that the legal action must be brought in a court having subject matter jurisdiction (*e.g.*, the Circuit Court) as opposed to a court lacking subject matter jurisdiction (*e.g.*, the City Court or Family Court). [TM:518].

Petitioners now take a different position, arguing that the Venue and Jurisdiction clause should be interpreted not just as authorizing venue on a statewide basis in West Virginia but also as incorporating West Virginia's *procedural* venue rules to further restrict a party's choice of the place to file suit to particular counties. But that is not what the clause says.

Far from incorporating West Virginia's *procedural* venue rules (e.g., W.Va. Code §§ 56-1-1, 56-1-1a, and 56-9-1), the Venue and Jurisdiction clause expressly rejects them, by stating that "*only the substantive laws*" of the state shall apply. [AS:184; TM:45]. This proviso, which plainly tries to prevent procedural end runs around the venue and jurisdiction bestowed by the clause, is inconsistent with Petitioners' argument. By ignoring this language, they violate a fundamental principle of contract interpretation in West Virginia. *See Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W.Va. 97, 103, 468 S.E.2d 712, 718 (1996), quoting *Restatement (Second) of Contracts* § 202 cmt. d at 88 (1981) ("[w]here the whole can be read to give significance to each part, that reading is preferred").

By addressing place-of-suit with its reference to "Venue" in the title and then using words whose only geographic requirement is for suit to be filed in "the state in which the TM Event is held," Petitioners reinforced that venue shall be available on a statewide basis, without any need to conduct a procedural venue analysis. Given Petitioners' choice of language, any reasonable participant would have read the clause as such.

Conversely, if (as they now argue) Petitioners intended to further restrict venue, they should have (and easily could have) used different words. For example, Petitioners could have incorporated the state's procedural rules generally, or the venue statute specifically, rather than stating that "only the substantive laws" of the state shall apply in interpreting the Venue and

Jurisdiction Clause. Alternatively, Petitioners could have used language similar to what Tough Mudder placed in prior agreements. For instance, Tough Mudder expressly specified the county for suit in a prior on-line release, purportedly accepted by Avishek Sengupta, which was later modified to become the Agreement at issue here:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal trial court for the county of Frederick in the State of Maryland has the sole and exclusive jurisdiction and that only the substantive laws of the State of Maryland shall apply.

[MS:41]. Similarly, Tough Mudder expressly stated the county for suit in its Confidentiality Agreement with Travis Pittman (the “rescue diver” assigned to the “Walk-the-Plank” obstacle at which Avi drowned):

. . . Proceedings to resolve disputes arising in connection with this Agreement shall be resolved solely in the state or federal court(s) of competent subject matter jurisdiction located in the State of New York, Kings County and I irrevocably submit to the personal jurisdiction and venue of such courts and waive any objection on any grounds to the same.

[AS:642].

In other words, if Tough Mudder had intended either to incorporate the State’s procedural venue analysis into its Venue and Jurisdiction Clause or, alternatively, to limit venue to a specific county, it not only knew how to do so but had a history of doing exactly that. But in this case, the Agreement drafted by Tough Mudder for this Event expressly repudiated procedural statutes in the consideration of venue and jurisdiction, and plainly eschewed the specification of a particular county in which suit must be brought.¹¹ The legal implication is clear: The Venue

¹¹ When a forum selection clause is meant to restrict venue to a particular county (as opposed to any county in the selected state), it says so. *See, e.g., Weiss v. Columbia Pictures Television, Inc.*, 801 F.Supp. 1276, 1277 (S.D.N.Y. 1992) (“all actions . . . shall be initiated and maintained only in a state or federal court located in the city and county of Los Angeles . . .”); *Harris v. Comscore*,

and Jurisdiction Clause authorizes statewide venue, and prohibits either party from invoking procedural venue statutes to narrow the choice of venue any further.¹²

Finally, even if Petitioners' interpretation of the Venue and Jurisdiction clause was plausible (it is not), that interpretation would simply create an ambiguity which, under West Virginia law, would need to be resolved against Tough Mudder (*i.e.*, the drafter of the language) and those claiming through Tough Mudder. *See Henson*, 120 W.Va. 552, 199 S.E. at 461-62 (“In case of doubt, the construction of a written instrument is to be taken most strongly against the party preparing it.”). *Contra proferentem* applies fully to ambiguities found in a forum selection clause. *See, e.g., Alliance Health Grp., LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 402 (5th Cir. 2008) (“forum-selection clauses are interpreted *contra proferentem*: when presented with two reasonable, but conflicting, interpretations of a contract provision, we adopt the interpretation less favorable to the drafter”).¹³

Inc., 825 F.Supp.2d 924, 926 (N.D.Ill. 2011) (“sole and exclusive jurisdiction shall reside with the appropriate state court located in Fairfax County, Virginia or federal court located in Alexandria, Virginia”); *Camsoft Data Systems, Inc. v. Southern Electronics Supply, Inc.*, 2010 WL 3199949, *1 (M.D.La. Aug. 12, 2010) (“The state and federal courts of San Mateo County shall have sole and exclusive jurisdiction . . .”), *vacated on other grounds*, 2014 WL 2782227 (5th Cir. June 19, 2014); *Karmaloop, Inc. v. ODW Logistics, Inc.*, 931 F.Supp.2d 288, 290 n.8 (D. Mass. 2013) (“the parties hereby consent to personal jurisdiction of the state and federal courts residing in Franklin County, Ohio as the sole and exclusive jurisdiction and venue . . .”); *ASDC Holdings v. Malouf*, 2011 WL 4552508, *5 (Del. Ch. Sept. 14, 2011) (unpublished) (“Each party hereby agrees to the exclusive jurisdiction of any state court within New Castle County, Delaware . . .”).

¹² In addition to addressing the *place* for suit by authorizing venue on a statewide basis, the Venue and Jurisdiction clause also addresses the *type* of court eligible to hear the suit (*i.e.*, subject matter jurisdiction), by permitting and requiring that suit be filed in the “appropriate state or federal court” within the state. Petitioners conceded both personal and subject matter jurisdiction during oral argument below. [TM:492].

¹³ *See also Tockstein v. Spoeneman*, 2007 WL 3352362, *4 (E.D. Mo. Nov. 7, 2007) (“Here, the forum selection clause is ambiguous and must be construed against the drafter . . .”); *K & V*

Petitioners nevertheless contend that if the Venue and Jurisdiction clause is deemed ambiguous, the doctrine of *contra proferentem* would not apply in this case. See Tough Mudder’s Petition No. 15-0102 at 18-20. They begin by suggesting that the doctrine has not been adopted in this state, though this Court has clearly stated and oft repeated that “in case of doubt, the construction of a written instrument is to be taken strongly against the party preparing it.” *Lawyer Disciplinary Bd. v. White*, 234 W.Va. 167, Syl. Pt. 5, 764 S.E.2d 327, 333 (2014).

Petitioners go on to suggest that the doctrine of *contra proferentem* applies solely to adhesive, unilaterally drawn, and unsigned contracts like the letter agreements in *White* and *Henson*, though the cases contain no such limitation and it is undisputed that the Agreement at issue is adhesive and unilaterally drawn. In *Lee v. Lee*, 228 W.Va. 483, 721 S.E.2d 53 (2011), this Court addressed a divorcing couple’s dispute over the meaning of a spousal support provision in a “prenuptial agreement which the parties signed shortly before they were married.” *Id.* at 485. Prior to signing, “the parties spent approximately seventeen hours negotiating the terms of the agreement,” though the husband “ultimately drafted the ambiguous spousal support provision.” *Id.* at 485, 487. On these facts (which include a negotiated and signed agreement), this Court construed the ambiguous spousal provision against the husband, reasoning that “in

Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft (“BMW”), 314 F.3d 494, 500 (10th Cir. 2002) (“Even if the clause were deemed to be ambiguous . . . the rule in this circuit and others is that the clause must be construed against the drafter, in this case defendant.”); *Harvard Eye Associates v. Clinitec Int’l, Inc.*, 1998 WL 248916 (E.D. Pa. May 5, 1998) (“to the extent that any ambiguity lurks in the forum selection clause, it should be construed against the drafter”); *Majer v. Schmidt*, 169 A.D.2d 501, 505, 564 N.Y.S.2d 722, 726 (N.Y. App. Div. 1991) (“court did not abuse its discretion in denying the motion . . . to dismiss the complaint on the grounds of improper venue and *forum non conveniens*. . . [where clause] did not designate Zurich, Switzerland, as the sole proper venue of the underlying action, but, rather, contained ambiguous language, which must be construed against the drafter”); *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985) (construing ambiguous forum selection clause against drafter).

case of doubt, the construction of a written instrument is to be taken most strongly against the party preparing it.” *Id.* at 487, quoting *Henson*, W.Va. at 558, 199 S.E. at 461-462. The grounds for applying the doctrine are even stronger here, since it is undisputed that Tough Mudder’s agreement was adhesive and unilaterally drawn. [TM:535] (Tough Mudder concedes “this is a contract of adhesion”).

Finally, Petitioners suggest that *contra proferentem* should not trump any extrinsic evidence consistent with their position. There are multiple problems with this argument. First, *Lee* makes clear that the doctrine of *contra proferentem* **does** trump extrinsic evidence.

Upon review, this Court finds that the family court clearly erred by construing the spousal support provision in the prenuptial agreement in Mr. Lee’s favor and adopting his interpretation of the phrase “another relationship.” The family court made no finding with regard to whether that agreement was or was not ambiguous, although it clearly seems to fit within the definition of that term as set forth above. Syllabus Point 6, *Frazier*, *supra*. Although the circuit court found the agreement to be “patently ambiguous,” it concluded that the family court did not abuse its discretion by declining to construe the ambiguity against Mr. Lee. Relying upon cases from other jurisdictions, the circuit court based this conclusion on a rule of construction whereby an ambiguity is construed against the party preparing the agreement only after the finder of fact has tried and failed to ascertain the parties’ intent in an ambiguous agreement. As set forth above, our case law provides that “in case of doubt, the construction of a written instrument is to be taken strongly against the party preparing it”. . . For the reasons set forth above, the final order of the Circuit Court of Upshur County is reversed . . .

Lee, 228 W.Va. at 487-88, 721 S.E.2d 57-58. The rationale is simple: the drafter of an ambiguous agreement should be denied the benefit of the doubt created by the ambiguity. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

But even if the Circuit Court should have considered extrinsic evidence in preference to the doctrine of *contra proferentem*, Petitioners provide no extrinsic evidence of the parties’

mutual intent or understanding, let alone any extrinsic evidence that might support Petitioners' position. This is this case even though Petitioners, as the authors of the Venue and Jurisdiction Clause, presumably had unfettered access to (at minimum) evidence of their unilateral intent.

Finally, to the extent evidence of Petitioners' unilateral intent exists, it points in only one direction. The trial court had before it (in addition to the Agreement purportedly signed by Avi Sengupta) only two other documents even arguably bearing on this question. The first document was Tough Mudder's Confidentiality Agreement with Travis Pittman (the "rescue diver" assigned to the Walk-the-Plank obstacle at which Avishek Sengupta drowned), which expressly restricted venue to Kings County, NY. [AS:642]. The second document was a prior on-line agreement that was purportedly accepted by Avishek Sengupta months prior to the Event, only to be superseded by the Agreement at issue here; this on-line agreement expressly restricted venue to Frederick County, MD. [MS:41]. These two prior agreements clearly demonstrate that when Tough Mudder desired to restrict venue to a specific county, it knew exactly how to do so. *Id.* Thus, the extrinsic evidence, even if admissible, establishes Tough Mudder made a deliberate choice to provide for statewide venue.

In sum, based on the Venue and Jurisdiction clause alone, venue is valid on a statewide basis, including in the Marshall County Circuit Court, without need for any venue analysis.¹⁴

B. If an Analysis Is Required Under W. Va. Code § 56-1-1(b), Then a Remand to the Circuit Court for Fact-Finding is Appropriate.

¹⁴ See, e.g., *Rescuecom Corp. v. Chumley*, 522 F.Supp.2d 429, 442-443 (N.D.NY Nov. 21, 2007) (agreement providing for "exclusive jurisdiction . . . [in] appropriate state or federal court sitting in Onondaga County, New York" functioned as consent to jurisdiction and venue, so jurisdiction and venue were appropriate regardless of minimum contacts).

Because the Circuit Court was able to determine venue from the clause alone, it did not reach the alternate issue of whether venue analysis under W.Va. Code § 56-1-1 would also support venue. It had no need to do so. Accordingly, it would be premature for this Court to entertain a writ on that issue. *See, e.g., State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W.Va. 37, 45, 658 S.E.2d 728, 736 (2008) (“It would be premature . . . to prohibit the circuit court from doing that which it has yet to rule upon.”); *State ex rel. Smith v. Maynard*, 193 W.Va. 1, 9, 454 S.E.2d 46, 54 (1994) (limiting writ to venue issues reached and decided by circuit court, remanding venue issues undecided by that court). Thus, to the extent the Court determines that the Venue and Jurisdiction Clause does not create statewide venue, this Court should, in its discretion, remand the issue for the development of facts and the making of findings.

C. Alternatively, the Current Factual Record Establishes as a Matter of Law That Tough Mudder and General Mills Have ‘Minimum Contacts’ With Marshall County Sufficient to Meet the ‘Doing Business’ Test for Venue.

Even if the Venue and Jurisdiction clause did not bestow venue on the Circuit Court (it does), venue would still be proper because Tough Mudder and General Mills do business in Marshall County. In actions against foreign corporations, venue is allowed where the company “does business.” *See* W.Va. Code § 56-1-1(a)(2). “[W]hether a corporation is subject to venue in a given county in this State under the phrase in W.Va. Code, 56-1-1(b) ‘wherein it does business’ depends on the sufficiency of the corporation’s minimum contacts in such county that demonstrate it is doing business, as that concept is used in [West Virginia’s long-arm statute].” *Kidwell v. Westinghouse Elec. Co.*, 178 W.Va. 161, 163, 358 S.E.2d 420, 422 (1986).¹⁵ Thus, in

¹⁵ Although W.Va. Code § 31-1-15 was replaced by W.Va. Code § 31D-15-1501 in 2008, pertinent minimum contacts tests were retained. In pertinent part, W.Va. Code § 31-1-15 provided that an unauthorized foreign corporation shall be deemed to be doing business in this state “if such

determining venue, it is proper to substitute the word “county” for “state” in pertinent decisions applying concepts of minimum contacts.

Accordingly, it is not necessary that the business activity or minimum contacts be directly related to the cause of action in which venue is questioned. *See id.*, overruling *Brent v. Board of Trustees*, 163 W.Va. 390, 256 S.E.2d 432 (1979). “The standard . . . is that a foreign corporation must have such minimum contacts with the . . . forum that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice.” *Id.* at 163 n.5, quoting *Hodge v. Sands Manufacturing Co.*, 151 W.Va. 133, 150 S.E.2d 793 (1966). “To what extent a nonresident defendant has minimum contacts with the forum . . . depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum” *Easterling v. American Optical Corp.*, 207 W.Va. 123, 130, 529 S.E.2d 588, 595 (2000), quoting *Pries v. Watt*, 186 W.Va. 49, 410 S.E.2d 285 (1991). “The critical element for determining minimum contacts is not the volume of activity but rather ‘the quality and nature of the activity in relation to the fair and orderly administration of the laws.’” *Easterling*, 207 W.Va. at 130, quoting *Norfolk Southern Ry. Co. v. Maynard*, 190 W.Va. 113, 116, 437 S.E.2d 277, 280 (1993) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L.Ed. 95, 104 (1945)). “Finally, . . . foreseeability is a necessary element in determining whether a defendant’s contacts satisfy due process. In this regard, . . . ‘the foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum [] are such that he

corporation makes a contract to be performed, in whole or in part, by any party thereto, in this State” Similarly, W.Va. Code 31D-15-1501 provides: “A foreign corporation is deemed to be transacting business in this state if: (1) The corporation makes a contract to be performed, in whole or in part, in this state” Thus, *Kidwell* remains good law.

should reasonably anticipate being haled into court there.” *Easterling*, 207 W.Va. at 130, quoting *Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 657, 425 S.E.2d 609, 612 (1992), *cert. denied*, 508 U.S. 908, 113 S.Ct. 2338, 124 L.Ed.2d 249 (1993).

Principles involving minimum contacts have evolved with the proliferation of electronic communications and e-commerce. The minimum contacts requirement may be met by physical presence, telephonic communication, electronic communication, maintenance of an interactive website, or a combination of these contacts. One federal district court found sufficient minimum contacts based on a combination of traditional and website contacts:

“The Court need not decide today whether standing alone the Web Site maintained by the [furniture-selling] defendant is sufficient to satisfy a finding of general jurisdiction. Nor must it look only to the traditional business contacts that that defendant has with the State of Texas. Rather, it is the combination of the two that leads the Court to the conclusion that the defendant maintains substantial, continuous and systematic contacts with Texas sufficient to subject it to personal jurisdiction. ... Simply stated, the contacts the defendant maintains with the State of Texas are such that it should reasonably expect to be haled into court here.”

Mieczkowski v. Masco Corp., 997 F.Supp. 782 (E.D. Texas 1998). Another federal district court found sufficient minimum contacts based maintenance of an interactive website alone:

“[T]he court finds that Vitacost’s website falls within the category of ‘clearly doing business over the Internet.’ Vitacost’s website allows an internet user to purchase Vitacost’s products online. ... Consumers can search for specific products; place items in virtual shopping carts; view product descriptions, price and pictures; sign up for EZShip ...; and purchase products through [Check-Out’ by providing credit card and shipping information. The court concludes that Vitacost purposefully and deliberately set up and operated a website with a high level of interactivity, which encourages customers accessing its website to order its products from which Vitacost receives economic benefits from the product sales. As such, Vitacost’s website falls within the sliding scale category of websites that allow a defendant to ‘do business’ and ‘enter into contracts with residents of foreign jurisdictions over the Internet.’ ... As Nutraceutical has established that Vitacost’s website constitutes a commercial web site, Nutraceutical has purposefully availed itself of the privilege of doing business in this jurisdiction.”

Neutraceutical Corp. v. Vitacost.com, Inc., 2006 WL 1493224, *5 (D. Utah May 25, 2006).

In this case, Petitioners' business contacts with Marshall County (including both traditional contacts and electronic contacts via interactive websites) are more than sufficient to meet the minimum contacts requirement for venue. By its marketing and media, which were clearly intended to attract participants, spectators, and volunteers from places including Marshall County, Tough Mudder succeeded in attracting 111 participants, 19 spectators, 7 volunteers, and \$16,607.61 in revenue from residents of Marshall County. [AS:228-41; TM:178-87]. Given Tough Mudder's business model (participants, spectators, and volunteers are encouraged to register, contract, and pay online), it is clear that many if not all of these residents entered their contracts (whether as participants, spectators, or volunteers) from Marshall County, and that they partially performed their contracts (*i.e.*, they made payments to Tough Mudder) from Marshall County. [AS:302-33]. Two Marshall County residents were participants in the very same event at which Avi Sengupta was drowned. [AS:228-241; TM:178-87, 193-99]. All Marshall County residents were subjected to the same marketing and media and the same dangers that resulted in Avi's drowning. In addition, Tough Mudder operates an interactive website, directed as much toward Marshall County as anywhere else, on which it direct markets and sells its branded clothing and gear to Marshall County residents. [AS: 925-926; TM:196-99]. At bottom, Tough Mudder not only has engaged in ongoing, substantial commerce with Marshall County residents but also has directed its allegedly fraudulent internet marketing into Marshall County, with substantial commercial success in attracting participants from this area.

The General Mills entities similarly satisfy minimum contacts for purposes of establishing venue in Marshall County. By their active and aggressive promotion of their

ubiquitous food products, which was clearly intended to result in the distribution and sale of products in Marshall County, General Mills succeeded in penetrating the retail and institutional markets in Marshall County. [AS:479, 480-603]. General Mills causes its products to be advertised in major publications in Marshall County (including the News Register and the Green Tab) and on television in Marshall County. [AS:480-584]. General Mills causes its products to be displayed, shelved and sold in large varieties and quantities at all (or nearly all) of the grocery stores in Marshall County. [AS:480-581]. General Mills also causes its products to be sold in large varieties and quantities to the Marshall County School system, where its products are consumed by approximately 4,000 students on a given school day. [AS:585-603]. In addition, General Mills operates an interactive website, directed as much to Marshall County as anywhere else, on which it direct promotes its products and direct markets and sells branded baking goods, clothing, and novelties. [AS:604-31].

Finally, by their self-described partnership, Tough Mudder and General Mills each co-promoted the events and products of the other, including in press releases and promotional materials and by co-branded obstacles and cereal boxes. [AS:632-37]. These promotions were directed as much toward Marshall County as anywhere else.

Alone and in combination, both Tough Mudder and General Mills have purposefully acted to obtain the benefits and privileges of doing business in Marshall County. Further, the quality, nature and quantity of their contacts with Marshall County are such that it is fair to hale them into court in Marshall County. Finally, under all the circumstances, it was eminently foreseeable to each that they might be haled into court here. Accordingly, alone and in

combination, both Tough Mudder and General Mills have sufficient minimum contacts with Marshall County to support venue here.

D. The Circuit Court Properly Denied Petitioners' Motions Under the *Forum Non Conveniens* Statute, W.Va. Code § 56-1-1a, to Transfer This Case to an Out-of-State Arbitrator.

Petitioners' motion to stay or dismiss this action in favor of an out-of-state arbitration, pursuant to West Virginia's *forum non conveniens* statute, W.Va. Code § 56-1-1a (the "Forum Statute"), was properly denied for numerous reasons.

As an initial matter, it must be stressed that the Forum Statute requires that "the plaintiff's choice of forum is entitled to great deference." *Id.* Because the cause of action for her son's death arose in West Virginia, statutory deference applies with full force to Mrs. Sengupta's selection. *See State ex rel. Mylan, Inc. v. Zakaib*, 227 W.Va. 641, 648, 713 S.E.2d 356, 363 (2011) ("[T]he statute plainly states that, in cases in which the plaintiff is not a resident of West Virginia *and the cause of action did not arise in West Virginia*, the 'great deference' typically afforded to a plaintiff's choice of forum 'may be diminished.'") (emphasis added).

Intertwined with statutory "great deference" to a plaintiff's choice of forum is the concomitant principle that "the doctrine of *forum non conveniens* is a drastic remedy that should be used with caution and restraint." *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W.Va. 198, 205, 444 S.E.2d 285, 292 (1994). "Mere allegations that a case can be tried more conveniently in another forum are not sufficient to dismiss a case on grounds of *forum non conveniens*." *Id.* "[F]or courts to determine whether the doctrine of *forum non conveniens* should be applied, the court's analysis must be supported by a record." *Id.* at 290.

Given the preference afforded to Mrs. Sengupta's choice of forum and the burden imposed on Petitioners, a court determining a motion to stay or dismiss pursuant to the Forum Statute generally should make findings on eight factors. *Mylan*, 227 W.Va. at 649. The following analysis of these factors demonstrates that Petitioners' motions to stay or dismiss this action were properly denied.

1. Petitioners Have Not Identified an Alternate Forum in Which the Claim or Action May be Tried.

For at least two reasons, Petitioners' suggested alternative forum – arbitration in Maryland – is not one where this action may be tried. First, where (as here) the parties dispute whether the claims at issue are subject to a valid arbitration agreement, the procedure is clear: Before arbitration can proceed, a court must determine the threshold question of arbitrability. *See, e.g., AT & T Technologies, Inc. v. Communications Workers of Amer.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418-19, 89 L. Ed. 2d 648 (1986) (“a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty”).

In this case, Petitioners brought motions to compel arbitration which the Circuit Court denied, based on its finding that the arbitration clause underlying Petitioners' motions to transfer this case to an arbitrator is unenforceable. [MS:1-26]. To stay or dismiss this action in favor of arbitration in Maryland would violate the *AT& T* rule against compulsory submission to arbitration without a judicial ruling of arbitrability. Accordingly, there is no alternative forum in which this case may be tried.

Second, the Agreement contains a Venue and Jurisdiction clause vesting courts in West Virginia with “sole and exclusive jurisdiction” over legal actions. *See Caperton*, 225 W.Va. at 142, 690 S.E.2d at 336 (forum selection clauses are enforceable); *State ex rel. Kenamond*, 179

W.Va. at 232, 366 S.E.2d at 740 (“venue may be conferred by consent or waiver”). Tough Mudder (as drafter) and other Petitioners (as proponents of the Agreement claiming rights equivalent to Tough Mudder’s) have consented to its terms (including forum selection) and are estopped from claiming a different or more convenient forum. *See Guffey Oil & Gas Royalties v. Marshall*, 109 W.Va. 180, 153 S.E. 291, 292 (1930) (parties to agreement “and those claiming under them are estopped to assert any other construction than that stated in said agreement”).

The alternate forum suggested by Petitioners – arbitration in Maryland – is neither a court nor in this state. Thus, to stay or dismiss this action in favor of arbitration in Maryland would violate the Venue and Jurisdiction clause. The Circuit Court’s denial of Petitioners’ motions to transfer would be appropriate even if it were for these reasons alone.

At bottom, Petitioners fail to propose an alternate forum where this action may be tried. Because the demonstrated availability of an alternative forum is, by definition, a prerequisite to a dismissal or a stay under the *forum non conveniens* statute, the transfer analysis should end here.

2. Maintenance of the Claim or Action in the Courts of This State Would Not Work a Substantial Injustice to the Moving Party.

As detailed in the Complaint, Petitioners committed the acts giving rise to this wrongful death action in West Virginia, including the grossly negligent design, construction, operation, staffing and promotion of the Obstacle and Event where Avi Sengupta’s drowned. [AS:2-32; TM:252-82]. Thereafter, Petitioners operated the same Obstacle and Event in West Virginia on at least three (and perhaps as many as five) other occasions. [AS:786-87]. Petitioners also agreed to “sole and exclusive jurisdiction” in West Virginia. [AS:184, 188; TM:45]. Thus, maintenance of this action in West Virginia will not work a substantial injustice on Petitioners.

3. Petitioners Have Not Demonstrated That the Alternate Forum, As a Result of the Submission of the Parties or Otherwise, Can Exercise Jurisdiction Over All of the Defendants Properly Joined to the Plaintiff's Claim.

Petitioners neither argue nor prove that jurisdiction over all defendants properly joined in this action can be exercised in the proposed alternative forum (Maryland arbitration). Petitioners Airsquid and Travis Pittman are properly joined as defendants in this case, but neither is joined in the Maryland arbitration. [AS:66-67, TM:49, 61]. Moreover, it does not appear that they can be joined in the arbitration, since (i) neither Airsquid nor Pittman signed the arbitration agreement, and (ii) the arbitration agreement is unilateral (*i.e.*, it purports to require Avi to arbitrate but not the defendants in this case). [AS:183-85; TM:44-46; MS:20-22].

Airsquid and Mr. Pittman are important and indispensable parties to the underlying action.¹⁶ Tough Mudder hired Airsquid's Amphibious Medics to provide water safety personnel and services at the Event. [AS:2-32; TM:252-82]. In turn, Airsquid hired Mr. Pittman as the rescue diver at the Walk-the-Plank obstacle. [AS:2-32; TM:252-82]. Alone and in combination, Airsquid and Mr. Pittman acted with gross negligence and incompetence in the performance of their duties on April 20, 2013. These failings included the following:

- a. Airsquid Ventures assigned only one rescue diver to Walk-the-Plank. As a result, the diver (Mr. Pittman) was unable to take regular rest breaks and was left without a dive buddy or a dive tender to assist in emergency rescues, all in violation of applicable standards. [AS:2-32; TM:252-82].
- b. The only diver assigned to Walk-the-Plank (Mr. Pittman) was not dressed and ready to make a rescue at the time of the incident, lacked current certification to

¹⁶ Indeed, the Federal District Court for the Northern District of West Virginia dismissed Tough Mudder's parallel Petition to Compel Arbitration filed in that court for failure to join indispensable parties (Airsquid and Mr. Pittman), including one (Mr. Pittman) whose presence would destroy diversity and thereby deprive that court of subject matter jurisdiction. *See Tough Mudder, LLC v. Sengupta*, 2014 WL 4954657 (N.D. W.Va. Oct. 2, 2014) (Groh, D.J.).

serve as a rescue diver, and seemingly lacked substantial training or experience as a rescue diver, all in violation of applicable standards. [AS:2-32; TM:252-82].

- c. The lifeguards assigned to Walk-the-Plank lacked certification as such (let alone special training to serve as lifeguards at recreational water facilities or attractions), and wore life vests that prevented them from making quick surface dives, all in violation of applicable standards. [AS:2-32; TM:252-82].
- d. The paramedics assigned to Walk-the-Plank, including paramedics who attempted to revive Mr. Sengupta, lacked certifications and licenses to work as such in the state of West Virginia. [AS:2-32; TM:252-82].

Because each contributed to Avi's death, Airsquid and Mr. Pittman are properly joined here as indispensable parties. But neither is joined (nor can be made to join) in the Maryland arbitration.

In sum, it has not been argued, let alone established, that the alternative forum can exercise jurisdiction over all defendants properly joined in the underlying action.

4. Although the Alternative Forum Is the State in Which Plaintiff Resides, That Factor Is Accorded Little Weight Under these Circumstances.

Although Mrs. Sengupta resides in Maryland, she has a right to judicial determination of the arbitrability of her claims. The forum clause provides for "sole and exclusive" jurisdiction in West Virginia. [AS:184; TM:45]. Thus, Mrs. Sengupta's claims cannot be stayed or dismissed in favor of arbitration in Maryland without a finding of arbitrability by a West Virginia court.

5. The State in Which the Cause of Action Accrued Is West Virginia, Not the Alternative Forum.

The cause of action accrued in this state, because Petitioners operated the Event and Obstacle here and caused Avi Sengupta to drown here. [AS:2-32; TM:252-82].

6. The Balance of the Private Interests of the Parties and the Public Interest of the State Does Not Predominate in Favor of the Claim or Action Being Brought in Any Alternative Forum, Particularly Where Avi Sengupta's Death Resulted From Acts or Omissions That Occurred in West Virginia.

The balance of public and private interests weighs heavily in favor of West Virginia retaining this case in preference to Maryland. In this action, Mrs. Sengupta will present evidence that Petitioners' construction and operation of the Event and the Obstacle violated both private and public safety standards, statutes, and rules, including (without limitation) the following:

- Recreational Water Facilities Rule (WV C.S.R. 64-16-1, et seq.): As a “body of water” that was “constructed or installed for the purpose of public swimming,” Petitioners’ Obstacle fell squarely within the definition of a “recreational water facility.” Accordingly, Petitioners were required to obtain construction and operating permits and inspections. They were also required to maintain water clarity, an emergency action plan, and overall safety. Because Petitioners charged admission, they were also required to provide certified lifeguards on duty at all times. Petitioners failed to do any of these things. [AS:2-32; TM:252-82].
- Amusement Rides and Amusement Attractions Safety Act (WV Code § 21-10-1, et seq.): As a “structure around, over or through which people may move or walk without the aid of any moving device integral to the building or structure that provides amusement, pleasure, thrills or excitement, including those of a temporary or portable nature,” Petitioners’ Obstacle fell squarely within the definition of an “Amusement Attraction.” Accordingly, Petitioners were required to obtain a permit and inspection. They were also required to maintain safety. They were also required to have a “Qualified Person” with documented training and experience in charge and at the controls of the Obstacle. Petitioners failed to do any of these things. [AS:2-32; TM:252-82].
- Emergency Medical Services Rule (WV C.S.R. § 64-48-1, et seq.): As an entity engaged in the provision of emergency medical services operating in this state, Petitioner Airsquid Ventures (which operated in the name of its unincorporated Amphibious Medics division) was required to be certified and licensed as a “emergency medical services agency” in this state, and the contractors and employees through which Airsquid Ventures functioned were required to be certified and licensed as “emergency medical services providers” in this state. Petitioner failed to do any of these things. [AS:2-32; TM:252-82].

Where (as here), Petitioners would invoke arbitration to shield violations of West Virginia’s public safety standards from scrutiny, the public has a significant interest in a state court making threshold rulings on arbitrability and subsequent rulings on the merits. Any burden that this

action might place on the courts or citizens of this state or the parties is slight, justified, and inherent in our justice system.

Petitioners, for their part, state no countervailing public or private interest in a Maryland forum resolving this case. Regarding private interest, the Forum Statute requires the Court to consider (i) the relative ease of access to sources of proof; (ii) availability of compulsory process for attendance of unwilling witnesses; (iii) cost of obtaining attendance of willing witnesses; (iv) a possible view of the premises (if appropriate) and (v) all other practical problems that make trial of a case easy, expeditious and inexpensive. None favor Maryland over West Virginia.

First, Maryland will not improve ease of access to proof. This case is among parties located in 5 different states (West Virginia, Maryland, New York, Minnesota and California). [AS:786-87]. Witnesses are expected to come from innumerable states, including those just mentioned as well as Pennsylvania, Virginia, Florida and other locations to be determined. ¹⁷

¹⁷ By way of illustration, Tough Mudder, its management, and its documents are in New York, but its contractors and volunteers are spread across North America and beyond. Airsquid Ventures, its management, and its documents are in California, but its employees and contractors are spread across North America. At least one Airsquid employee in a key supervisory position who witnessed the incident (Jeff Milges) is in Florida. Other Airsquid contractors (*e.g.*, Travis Pittman, the rescue diver present during the incident) are in Maryland. Still others (*e.g.*, Robert Lippman, the rescue diver seen on video leaving the scene moments before the incident) are in Pennsylvania. Peacemaker, its management, and its documents are in West Virginia. Presumably, Peacemaker's employees and contractors are in West Virginia too. General Mills does business across North America, including throughout West Virginia. Third-party witnesses to prior near-drowning incidents at the Obstacle – incidents which should have elicited safety measures prior to the day of Mr. Sengupta's participation and death – are in Canada (Courtney Huth, a lifeguard at a prior event), Texas (Robert Mann, a participant at a prior event) and Virginia (Whitney Pipkin, a participant at the Event who has since written an article about it). Third-party witnesses to Mr. Sengupta's drowning are in Pennsylvania (*e.g.*, Michael Cardile, who complained in the media), Virginia (*e.g.*, Brett Brocki, who videotaped the incident), and, of course, West Virginia (*e.g.*, Samantha Gerwig, who wrote a scathing complaint about the incident to Tough Mudder). While it is true that Mr. Sengupta's family and teammates are in Maryland, they are willing witnesses who do not consider attendance at a trial in this court inconvenient. [AS: 652-69, 786-87].

Regardless of the state where trial occurs, it will be necessary to secure third-party testimony through the usual methods of foreign depositions. Because of the availability of several videos of the incident and the impermanent nature of the course, a view may be neither necessary nor possible, rendering that a neutral factor. As Maryland is neither more convenient than West Virginia, nor would result in lower costs or greater access to witnesses or evidence, the balance of public and private interests weighs against stay or dismissal.

7. A Stay or Dismissal Would Cause Duplication/Proliferation of Litigation.

Plaintiff is entitled to a judicial determination of arbitrability. A stay or dismissal would only delay the determination, spawn an interlocutory appeal, and revive Petitioners' now dormant arbitration, thus proliferating and duplicating litigation and costs. Accordingly, continuation of this action will prevent unreasonable duplication or proliferation of litigation.

8. The Alternative Forum Provides No Remedy.

By this action, Plaintiff seeks a judicial determination of arbitrability and, ultimately, a determination of liability and an award of damages. Plaintiff will be deprived of a judicial determination of arbitrability if this action is stayed or dismissed in favor of a Maryland arbitration. In other words, the proposed forum – a Maryland arbitration – would not provide Plaintiff with her remedy of a judicial determination of arbitrability.

In sum, Petitioners do not meet their burden to overcome the strong deference favoring Plaintiff's choice of forum. Their motions based on *forum non conveniens* were properly denied.

E. The Circuit Court Properly Denied Petitioners' Motions Under the Removal Statute, W.Va. Code § 56-9-1, to Transfer the Case to Another County.

Petitioners' motion to remove under W.Va. Code § 56-9-1 should be denied too. In *Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995), this Court stated the standard for removal:

In West Virginia, there are two statutes authorizing intercircuit transfers. They are W.Va. Code, 56-1-1, and W.Va. Code, 56-9-1. Only the former is concerned with *forum non conveniens*. On the other hand, the provisions of W.Va. Code, 56-9-1, are triggered only when the moving party can demonstrate *good cause* justifying the transfer. This distinction is made clearer by reference to Rule 21 of the Federal Rules of Criminal Procedure:

Transfer from the District for Trial.

(a) *For Prejudice in the District.* The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) *Transfer in Other Cases.* For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

Rule 21(a) is similar to W.Va. Code, 56-9-1. It may be invoked successfully only when the circuit court is persuaded that the prejudice is such that unless abated will deprive the parties of a fair trial. Historically, *good cause* in the context of this statute means the moving party must demonstrate prejudice. See *Pittsburgh, Wheeling & Ky. R. Co. v. Applegate & Son*, 21 W.Va. 172 (1882). The *good cause* referred to in this section applies to situations where the judge is disqualified, see *Forest Coal Co. v. Doolittle*, 54 W.Va. 210, 46 S.E. 238 (1903); where an uninterested and unbiased jury cannot be found in the circuit where the suit was originally filed, see *Ingersoll v. Wilson*, 2 W.Va. 59 (1867); or where the clerk of the court is a party litigant. See *Hunter v. Beckley Newspapers Corp.*, 129 W.Va. 302, 40 S.E.2d 332 (1946). [¶] Although some of our cases inartfully refer to W.Va. Code, 56-9-1, as a *forum non conveniens* statute, see *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 236, 400 S.E.2d 239, 244 (1990) (“[w]e also recognize that W.Va. Code, 56-9-1 (1939), which provides a mechanism for transfer of cases within the circuit courts of this State, operates as an intercircuit *forum non conveniens* ”), our recent interpretation of W.Va. Code, 56-1-1, *sub silentio* overruled those cases.

Riffle, 195 W.Va. at 125 n.4. Petitioners do not rely on § 56-1-1, so only § 56-9-1 is at issue.

As the Supreme Court has held, § 56-9-1 “may be invoked successfully only when the circuit court is persuaded that the prejudice is such that unless abated it will deprive the parties of a fair trial.” *Riffle* at 125 n.4. Examples include disqualification of the judge, inability to find an

unbiased jury, or the clerk as a party. *Id.* *Forum non conveniens* grounds like convenience or location of parties and witnesses are irrelevant, as those are addressed by other statutes (*i.e.*, § 56-1-1(b) and § 56-1-1(a)). *See Riffle* at 125 n.4. As Petitioners do not argue that they cannot get a fair trial in Marshall County, their motion to remove this case to Berkeley County lacks merit.

But even if the Court were to entertain removal, Berkeley County would not be a proper destination. The purpose of the removal statute is to ensure a fair trial. Petitioners have adduced no evidence that they would not receive a fair trial in Marshall County. By contrast, Mrs. Sengupta reasonably desires a venue other than Berkeley County. Petitioner Peacemaker (a popular gun club and rifle range) and its owner (Cole McCulloch, a likely witness) are well known in their home county of Berkeley. [AS:671-76]. Many potential jurors (or their friends or relatives) may be members and thus likely to have strong favorable feelings for Peacemaker.¹⁸

Second, Tough Mudder brings substantial economic benefits to Berkeley County. Twice a year, its events draw thousands of visitors to the area, employing police, firefighters, paramedics and county workers and generating substantial revenue for hotels, restaurants, gas stations, stores and other businesses in the area. [AS:677-85]. Mrs. Sengupta has legitimate concerns that the jury pool may be influenced by the large number of Berkeley County residents who directly or indirectly benefit from the economic impact of Tough Mudder's events.

¹⁸ Mrs. Sengupta believes this case should stay in Marshall County. However, if removal occurs, Kanawha County is the fair choice. Four of the Petitioners have conceded venue in Kanawha County:

The final option for venue applicable in this instance is where a corporate defendant may be served. W.Va. Code § 56-1-1(a)(4). In this action, Plaintiff relied on service through the Secretary of State for service on all corporate defendants. The Secretary of State is located in Charleston, West Virginia, which is within Kanawha County.

[AS:47; TM:29]. While removal to Kanawha County would still deprive Plaintiff of her chosen forum, at least it would avoid the concerns about local favoritism in Berkeley County.

Because these factors create real and significant risks of prejudice against Mrs. Sengupta, Petitioners' motions to remove this case to Berkeley or Kanawha County were properly denied.

CONCLUSION

For the foregoing reasons, Petitioners' venue- and forum-related motions were properly denied and, thus, their Petitions for a Writ of Prohibition should be denied too.

Respectfully submitted,

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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF OHIO, to-wit:

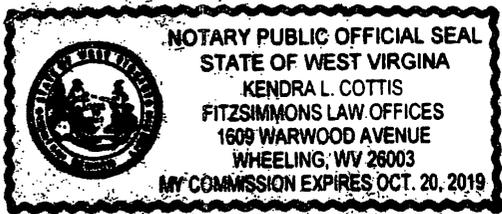
I, Robert P. Fitzsimons, being duly sworn, states that he has read the foregoing RESPONDENT MITA SENGUPTA'S CONSOLIDATED OPPOSITION TO PETITIONER'S APPLICATIONS FOR A WRIT OF PROHIBITION and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and as to such allegations he believes them to be true.

Dated: March 4, 2015.

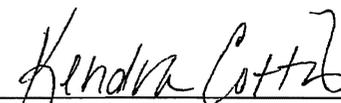


ROBERT P. FITZSIMMONS
Counsel for Respondent

Taken, sworn to and subscribed before me, this 4th day of March, 2015.



[SEAL]



Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. AIRSQUID VENTURES,
INC. (D/B/A AMPHIBIOUS MEDICS); and TRAVIS PITTMAN;
Petitioners,

v.

No. 15-0098

HONORABLE DAVID W. HUMMEL, JR., Judge of the Circuit
Court of Marshall County; MITA SENGUPTA, as Personal
Representative of the Estate of AVISHEK SENGUPTA; TOUGH
MUDDER, LLC; PEACEMAKER NATIONAL TRAINING CENTER,
LLC; GENERAL MILLS, INC., and GENERAL MILLS SALES, INC.,
Respondents.

STATE OF WEST VIRGINIA ex rel. TOUGH MUDDER, LLC;
PEACEMAKER NATIONAL TRAINING CENTER, LLC;
GENERAL MILLS, INC.; and GENERAL MILLS SALES, INC.;
Petitioners,

v.

No. 15-0102

HONORABLE DAVID W. HUMMEL, JR., Judge of the Circuit
Court of Marshall County; and MITA SENGUPTA, as Personal
Representative of the Estate of AVISHEK SENGUPTA;
Respondents.

CERTIFICATE OF SERVICE

I, Clayton J. Fitzsimmons, counsel for Respondent, do hereby certify that service of the foregoing **RESPONDENT MITA SENGUPTA'S CONSOLIDATED OPPOSITION TO PETITIONERS' APPLICATIONS FOR A WRIT OF PROHIBITION** was had upon the following by sending a true copy thereof by regular, United States mail, postage prepaid, to their last known addresses this 4th day of March, 2015, as follows:

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d.b.a. Amphibious Medics and Travis Pittman***

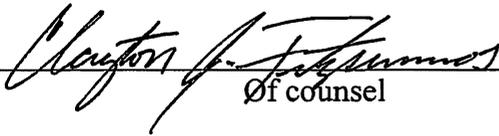
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Counsel for Defendant, Travis Pittman

Respectfully Submitted,

**MITA SENGUPTA, as Personal Representative
of the Estate of Avishek Sengupta, Respondent,**

By:



Of counsel

Robert P. Fitzsimmons (1212)
Clayton J. Fitzsimmons (10823)
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