

15-0102

CJF/kic: 09/22/14

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

No. 14-C-66-H

TOUGH MUDDER LLC, AIRSQUID VENTURES,
INC. (d.b.a. AMPHIBIOUS MEDICS), TRAVIS
PITTMAN, PEACEMAKER NATIONAL TRAINING
CENTER, LLC, GENERAL MILLS, INC. and
GENERAL MILLS SALES, INC.,

Defendants.

**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS BASED ON
VENUE AND FORUM NON CONVENIENS**

On the 22nd day of August, 2014, came Plaintiff Mita Sengupta, as Personal Representative of the Estate of Avishek Sengupta, by her attorneys, Robert P. Fitzsimmons and Clayton J. Fitzsimmons of Fitzsimmons Law Firm PLLC and Robert J. Gilbert and Edward J. Denn of Gilbert & Renton LLC, and, as well, came Defendants, Tough Mudder, LLC; Peacemaker National Training Center, LLC; General Mills, Inc.; and General Mills Sales, Inc.; by their attorneys, Samuel D. Madia of Flaherty Sensabaugh & Bonasso PLLC, Robert N. Kelly of Jackson & Campbell, P.C., and Robert O'Brien of Niles, Barton & Wilmer, LLP; and also came Defendant Airsquid Ventures, Inc. (d.b.a. Amphibious Medics) by its attorneys, David L. Shuman and David L. Shuman, Jr., of Shuman, McCuskey & Slicer P.L.L.C; as well as Defendant Travis Pittman, by his attorney, Karen E. Kahle of Steptoe & Johnson, PLLC, for a hearing on *Defendants' Airsquid Ventures, Inc. d.b.a. Amphibious Medics and Travis Pittman, Motion to Stay and Compel Arbitration, Motion to Dismiss for Improper Venue*, and

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Defendants' Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc. and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or Forum Non Conveniens, or in the Alternative, Motion to Remove; and Motion to Stay this Action and Compel Arbitration. Having fully considered the pleadings, the parties' arguments and authorities, other materials filed by the parties, and the entire record herein, the Court makes the following findings of fact with respect to all motions, and the following conclusions of law and order with respect to Defendants' motions to dismiss based on venue and forum *non conveniens*:

FINDINGS OF FACT

1. This case arises from the death of Avishek Sengupta, who was a participant in the Tough Mudder Mid-Atlantic event in Gerrardstown, Berkley County, West Virginia on April 20, 2013 (hereinafter the "Event"). Mr. Sengupta was a 28-year old man who drowned while attempting to complete an obstacle that was part of the event and known as "Walk-the Plank." Avishek Sengupta was on life support until April 21, 2013, his official date of death.

2. Plaintiff Mita Sengupta is Avi's mother and personal representative of the Estate of Avishek Sengupta. Mrs. Sengupta instituted the instant civil action on April 18, 2014 asserting that Avi's death resulted from Defendants' grossly negligent and reckless failure to follow basic safety precautions or effectuate a minimally competent rescue.

3. Mrs. Sengupta makes claims against six parties whose alleged negligence caused and/or contributed to Avi's death: (1) Tough Mudder, who she alleges to have had primary responsibility for participant safety; (2) Airsquad Ventures, who she alleges to have provided safety personnel and services; (3) Travis Pittman, the rescue diver; (4) Peacemaker National Training Center, who she alleges to have participated in advertising, construction and permitting

of the Obstacle and Event; and (5-6) the two General Mills entities, who she alleges to have partnered with Tough Mudder to promote and sponsor the Obstacle and the Event. As pled in the Complaint, each Defendant caused or contributed in some way to Avi's death.

4. Specifically, her claims include Count I (Wrongful Death), Count II (Declaratory Relief – Unenforceability of Arbitration Clause), and Count III (Declaratory Relief – Unenforceability of Waiver). *See* Complaint, *passim*.

5. Plaintiff's request for a declaratory judgment relates to a provision styled "**Mediation and Arbitration**" found on page 2 of a document styled "Assumption of Risk, Waiver of Liability, and Indemnity Agreement Mid-Atlantic Spring – 2013" (hereinafter the "Agreement").

6. The parties have stipulated for purposes of these motions that the Agreement is a true, accurate and authentic copy of a document purportedly signed and initialed by Avishek Sengupta on April 20, 2013.

7. On the same date that Mrs. Sengupta filed the instant civil action (April 18, 2014), Defendant Tough Mudder LLC filed a competing demand for arbitration before the American Arbitration Association ("AAA"). The demand for arbitration identifies the Respondents as Mrs. Sengupta, her husband (and Avi's father) Bijon Sengupta, and their daughter (and Avi's sister) Priyanka Sengupta. Tough Mudder's original AAA filing was brought only on behalf of itself. Tough Mudder subsequently amended its filing to include Peacemaker and the two General Mills entities as Claimants. Mr. Pittman and Airsquid Ventures are not involved as parties in the AAA matter.

8. Tough Mudder asserts in its arbitration demand that it is not liable for Avi's death or, in the alternative; it is immunized from liability by the doctrine of assumption of risk, by the

contributory negligence of Avishek Sengupta, or by the intervening and superseding acts and omissions of Airsquid Ventures, LLC (dba Amphibious Medics). See Ex. 2 to Plaintiff's Cross Motion and Brief at ¶ 24 ("Claimants are also immunized from any potential liability to the Senguptas by virtue of ... the intervening, superseding cause arising from the acts and omissions of Amphibious Medics."). However, Tough Mudder did not join Airsquid as a party to the arbitration, nor did Airsquid attempt to join the Maryland arbitration before it was stayed per the prior order of the Court.

9. By letter dated May 9, 2014 to AAA, a copy of which was sent to counsel for Defendant Tough Mudder, Mrs. Sengupta's counsel requested that AAA stay any further arbitration proceedings until this Court or another Court of competent jurisdiction could rule upon the validity of the arbitration clause and the arbitrability of this case.

10. Tough Mudder, by and through their attorneys from Jackson & Campbell, P.C., objected to Mrs. Sengupta's request for a stay, contending that the arbitration provision is valid and, if there is an issue as to arbitrability, it should be decided by the arbitrator.

11. The AAA denied Mrs. Sengupta's request to stay the arbitration proceedings and indicated that "in the absence of an agreement by the parties or a court order staying this matter, the AAA will proceed with the administration of the arbitration."

12. Before arbitration can proceed where (as here) arbitrability is disputed, a court of law must determine the threshold question of arbitrability. See, e.g., *AT&T Technologies, Inc. v. Communications Workers of Amer.*, 475 U.S. 643, 649 (1986) ("a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty") (internal citations and quotations omitted); *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329-331 (4th Cir. 1999) ("determination of the arbitration provision's scope and meaning is for the

court to resolve”) (internal citation and quotation omitted); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 556, 567 S.E.2d 265, 272 (2002) (“it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties”).

13. The arbitration provision at issue contains no "delegation provision" which might delegate to the arbitrator the authority to resolve any dispute about the enforceability of the arbitration provision.

14. In response to the denial of her request for a stay of the AAA arbitration, Mrs. Sengupta filed in this court a Motion for Temporary Restraining Order seeking to enjoin all parties from proceeding with arbitration and to stay the arbitration proceedings with AAA. By Order dated May 23, 2014, this Court granted the Motion for a Temporary Restraining Order pending a hearing on Mrs. Sengupta's accompanying Motion for a Preliminary Injunction.

15. On June 2, 2014, Tough Mudder and others filed an action in the United States District Court for the Northern District of West Virginia, Martinsburg Division, seeking to stay the proceedings in this Court and to compel arbitration.

16. On June 3, 2014, a hearing on Mrs. Sengupta's Motion for Preliminary Injunction was held and on June 23, 2014, this Honorable Court entered an Order Granting a Preliminary Injunction in favor of Mrs. Sengupta pursuant to W.Va. R. Civ. P. 65, prohibiting Defendants from proceeding with arbitration and staying the AAA proceedings until such further Order of this Court or other court of law of competent jurisdiction or until May 23, 2015.

17. Rather than filing an Answer, Defendants joined issue on Count II of Mrs. Sengupta's Complaint (Declaratory Relief – Unenforceability of Arbitration Clause) by filing motions to enforce the Arbitration Clause based on the four corners of the Agreement.

Defendants also filed a motion to dismiss on various grounds as discussed below. Accordingly, at the hearing on June 3, 2014, Mrs. Sengupta's motion for preliminary injunction, the Court authorized briefing on the issue of arbitrability, based on the four corners of the Agreement without the benefit of formal discovery, to determine if enforceability of the Arbitration Clause can be determined on an expedited basis. At that time, Mrs. Sengupta reserved the right to take discovery relating to enforceability of the Arbitration Clause if the Court could not resolve arbitrability in her favor on the present record.

18. Also at the June 3, 2014 hearing, the Court authorized expedited discovery by all parties on the venue-related motions brought by the Defendants. The Court set a briefing schedule on these motions as well a hearing date of August 22, 2014.

19. On August 22, 2014, the Court heard argument on the pending motions and cross-motion concerning arbitrability as well as the pending motions concerning venue-related issues.

CONCLUSIONS OF LAW CONCERNING VENUE AND FORUM MOTIONS

Venue

20. Whether Marshall County is a proper venue for this case is a procedural question determined by West Virginia state law.

21. With regard to venue, the West Virginia Supreme Court "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).

22. Here, in the "Venue and Jurisdiction" clause of its agreement with Avishek Sengupta, Defendant Tough Mudder consented to venue in any West Virginia court having

subject matter jurisdiction over this case. Thus, Defendants are bound by the terms of their own contract to honor Mrs. Sengupta's selection of Marshall County.

23. 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.

24. 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).

25. 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).

26. West Virginia also follows the rule of *contra proferentem*, requiring that ambiguous language must be interpreted against the drafter. *See, e.g., Lawyer Disciplinary Board v. White*, --- S.E.2d ----, 2014 WL 5032586 (W.Va. Sept. 30, 2014) (citing *Lee v. Lee*, 228 W.Va. 483, 487, 721 S.E.2d 53, 57 (2011) (“[I]n case of doubt, the construction of a written instrument is to be taken strongly against the party preparing it.”)) (quoting *Henson v. Lamb*, 120 W.Va. 552, 558, 199 S.E. 459, 461–62 (1938)).

27. As its title makes clear, the Venue and Jurisdiction clause addresses two important practical issues concerning legal actions arising out of Tough Mudder events: (1) the *place* for the legal action to be brought (*i.e.*, venue) and (2) the *type* of court eligible to consider the action. The first concern is 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 also defined to be any "appropriate state or federal court."

28. 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 any state court or any federal court that has appropriate jurisdiction.

29. If Defendant Tough Mudder wanted to limit venue to a specific county, as opposed to statewide, it could have easily done so. Significantly, Tough Mudder did so in a prior on-line agreement purportedly accepted by Avishek Sengupta which was later modified to become the Agreement at issue here. The prior agreement stated as follows:

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.

See Affidavit of Lucas Barclay, Exhibit A (emphasis added).

30. In addition, Tough Mudder also utilized similar language in its Confidentiality Agreement with Travis Pittman (the "rescue diver" assigned to the "Walk-the-Plank" obstacle at which Avi drowned), in which it expressly stated the county for suit:

". . . 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."

See Tough Mudder Medical Staff Confidentiality Agrmt. at ¶ 12, Ex. 27 (attached to Pittman Discovery Response) (emphasis added).

31. The previous agreements clearly demonstrate that Tough Mudder had the knowledge and ability to restrict venue to a specific county if that was its intent. However,

Tough Mudder chose not to restrict venue to any certain county here and instead agreed to statewide venue.

32. No venue restriction can be implied in the agreement. *See Bischoff v. Francesa*, 133 W.Va. 474, 488, 56 S.E.2d 865, 873 (1949) (“well recognized and long established principle of interpretation of written instruments that the express mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius* . . .”). 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, 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.”).

33. Furthermore, Tough Mudder, the General Mills defendants, and Peacemaker have admitted in a different court that the Venue and Jurisdiction clause authorizes venue on a state-wide basis, stating to the Federal Court that “West Virginia, as the state in which this particular

Tough Mudder event took place, is the appropriate venue for this controversy.” See Def.’s Federal Petition at 3, ¶ 9, Ex. 2.

34. Defendants take a different position here, now arguing that the Venue and Jurisdiction clause should be interpreted not just as authorizing venue on a state-wide 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. The Court does not accept that argument, for the following reasons.

35. First, 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," Tough Mudder used language that any reasonable participant would read as authorizing state-wide venue.

36. If Tough Mudder intended to restrict venue, it should have (and easily could have) used different words. For example, rather than stating that "*only the substantive laws*" of the state shall apply, Tough Mudder could have stated that "procedural law (including venue rules) and substantive laws" of the state shall apply. But by expressly stating that "only the substantive laws" of West Virginia shall apply, Tough Mudder reinforced the plain intent that venue shall be available on a state-wide basis, without any need to conduct a procedural venue analysis.

37. Finally, it should be noted that even if Defendants’ interpretation of the Venue and Jurisdiction clause was plausible, 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 *Lawyer Disciplinary Board, supra*, 2014 WL 5032586 (citing *Lee*, 228 W.Va. at 487, 721 S.E.2d at 57 (“[I]n case of doubt, the

construction of a written instrument is to be taken 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”).¹

38. Mrs. Sengupta also argues that venue is proper in Marshall County due to the in-county commercial activities of Tough Mudder and General Mills. *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.”). For the reasons discussed previously herein, the “Venue and Jurisdiction” clause is dispositive of venue and, therefore, the Court need not and does not reach the alternative ground that Defendants’ contacts with Marshall County also support venue.

¹ *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 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).

Forum Non Conveniens

39. Under West Virginia statute, a plaintiff's choice of venue is accorded "great deference" where, as here, the cause of action arises in West Virginia. *See* W.Va. Code § 56-1-1a.

40. Against this backdrop of great deference to Mrs. Sengupta's decision, Defendants ask this Court first to transfer the case outside West Virginia – even though they rely upon a contract whose Venue and Jurisdiction clause requires the suit to be heard in West Virginia, and even though they have told 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." *See* Def.'s Federal Petition at 3, ¶ 9, Ex. 2.

41. Defendants never explain how Maryland would be more convenient than West Virginia for the various West Virginia witnesses and the multitude of foreign defendants and witnesses from states such as New York, Pennsylvania, Michigan and California.

42. Finally, as the case arises from actions that occurred in West Virginia, a Maryland venue would invite objections to personal jurisdiction by additional non-Maryland defendants who have not yet been identified.

43. Accordingly, Defendants' motion to remove this case to Maryland under the interstate *forum non conveniens* statute, W.Va. Code § 56-1-1a, is hereby denied.

44. The Court also is not persuaded by Defendants' final ground to change venue, premised on the intrastate removal statute, W.Va. Code § 56-9-1.

45. Defendants provide no evidence of prejudice from a Marshall County forum. Further, there is no evidence that Kanawha County or Berkley County would be more convenient, let alone materially so.

46. Plaintiff, all but one Defendant and most witnesses are from out of state, so travel is required no matter the choice of county. Marshall County is convenient to Pittsburgh's airport and is easily reached by parties from New York (Tough Mudder), Michigan (General Mills), and California (Airsquid). Mrs. Sengupta and her family will willingly come to Marshall County, as will other key witnesses, e.g., Avi's teammates. Other out-of-state witnesses are beyond the subpoena power of West Virginia courts and thus are immaterial to this analysis.

47. At bottom, Defendants fail to establish inconvenience, let alone prejudice. Mrs. Sengupta's choice of forum is entitled to legal deference, and there is no cause to reject her choice. Accordingly, Defendants' motions to dismiss or remove this case are denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is accordingly

ORDERED that *Defendants' Airsquid Ventures, Inc. d.b.a. Amphibious Medics and Travis Pittman Motion to Dismiss for Improper Venue* is denied as set forth herein. It is further

ORDERED that *Defendants' Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc. and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or Forum Non Conveniens, or in the Alternative, Motion to Remove; and Motion to Stay this Action and Compel Arbitration* is denied insofar as the venue and forum issues are concerned, as set forth herein. It is further

ORDERED that all exceptions and objections are noted and preserved. It is further

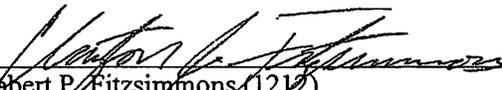
ORDERED Defendants' agreement as to the form of this Order shall not affect the Defendants' right to appeal the substance of this Order. It is further

ORDERED that an attested copy of this Order shall be sent to all counsel of record.

ENTERED THIS _____ day of _____, 2014.

DAVID W. HUMMEL, JR.
Judge of the Circuit Court of
Marshall County, West Virginia

PREPARED BY:



Robert P. Fitzsimmons (1212)
Clayton J. Fitzsimmons (10823)
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Ave
Wheeling WV 26003
Ph. (304) 277-1700
Fax: (304) 277-1705
Email: bob@fitzsimmonsfirm.com
Email: clayton@fitzsimmons.com

Robert J. Gilbert (Mass. BBO# 565466)
Edward J. Denn (Mass. BBO# 565466)
Admitted Pro Hac Vice
GILBERT & RENTON LLC
344 North Main Street
Andover, MA 01810
Phone: 978-475-7580
Fax: (978) 475-1881
Email: rgilbert@gilbertandrenton.com
edenn@gilbertandrenton.com

IN THE CIRCUIT COURT FOR MARSHALL COUNTY, WEST VIRGINIA

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

Plaintiff, *

v. * Case No. 14-C-66-H
Judge David W. Hummel, Jr.

TOUGH MUDDER LLC;
AIRSQUID VENTURES, INC.; (d.b.a. AMPHIBIOUS MEDICS);
TRAVIS PITTMAN;
PEACEMAKER NATIONAL TRAINING CENTER, LLC;
GENERAL MILLS, INC.;
and GENERAL MILLS SALES, INC.,

*
Defendants. *

* * * * *

DEFENDANTS TOUGH MUDDER, LLC, PEACEMAKER NATIONAL TRAINING CENTER LLC, GENERAL MILLS, INC., AND GENERAL MILLS SALES, INC.’S MOTION TO DISMISS FOR IMPROPER VENUE AND/OR FOR FORUM NON CONVENIENS, OR IN THE ALTERNATIVE, MOTION TO REMOVE; AND MOTION TO STAY THIS ACTION AND COMPEL ARBITRATION

Defendants Tough Mudder, LLC (“Tough Mudder”), Peacemaker National Training Center, LLC (“Peacemaker”) General Mills, Inc., and General Mills Sales, Inc. (collectively, “General Mills”), by and through undersigned counsel, hereby file this Motion to Dismiss for Improper Venue and/or for *Forum Non Conveniens*, or in the alternative, Motion to Remove; and Motion to Stay and Compel Arbitration and states as follows:

A. Introduction

1. This matter stems from Decedent’s, Avishek Sengupta’s, participation on April 20, 2013, in a Tough Mudder event in Berkeley County, West Virginia.

2. While participating in the Tough Mudder event, Avishek Sengupta entered an obstacle called “Walk the Plank,” which involves climbing a twelve-to-fifteen-foot platform and then jumping into a pool of muddy water that was fifteen-feet deep and forty-feet wide.

3. Decedent did not immediately emerge from the pool of water after jumping from the platform.

4. Decedent was pulled from the water by Co-Defendant Travis Pittman, employed by Co-Defendant Airsquid Ventures d/b/a Amphibious Medics, a company that had been retained by Tough Mudder to provide emergency rescue and medical services for the event.

5. Co-Defendant Pittman performed CPR on Decedent, but Decedent did not regain consciousness.

6. Decedent died on April 21, 2013, after life support was withdrawn.

7. Prior to participating in this event, Decedent initialed and executed the Assumption of Risk, Waiver of Liability, and Indemnity Agreement (“the Agreement”) that included a provision requiring the parties to submit to mediation and, if mediation does not resolve the dispute, to arbitration.

8. On April 18, 2014, Defendant Tough Mudder, filed an Arbitration Demand with the American Arbitration Association to determine the applicability of the provisions of the Agreement signed by Decedent.

9. General Mills and Peacemaker have joined in this Arbitration Demand.

10. The Decedent’s mother and personal representative, Mita Sengupta (“Plaintiff”), filed the instant wrongful death action in which she also seeks declarations regarding the Agreement signed by Decedent on April 18, 2014, the same day Tough Mudder filed the arbitration action before the American Arbitration Association.

B. Motion to Dismiss for Improper Venue

11. Defendants Tough Mudder, Peacemaker, and General Mills incorporate all previous paragraphs.

12. Plaintiff has filed her Complaint in Marshall County, but venue for this matter does not lie in Marshall County.

13. Plaintiff has failed to assert any facts to support that Marshall County is a proper venue under W. Va. Code § 56-1-1.

14. The events that give rise to this action occurred in Berkeley County.

15. The only party that is a resident of West Virginia, Peacemaker National Training Center LLC, resides in Berkeley County.

16. Despite the residency of the Peacemaker National Training Center LLC in Berkeley County, Plaintiff chose to bring suit in Marshall County.

17. To support her choice of venue, Plaintiff states that General Mills (although as worded, it is unclear whether General Mills refers to General Mills, Inc., or General Mills Sales, Inc.), Tough Mudder, LLC, and Airsquid Ventures, Inc. engage in purposeful commercial activities within Marshall County, including solicitations via the internet, social media and direct mailings.

18. However, while a corporation may transact some business in a county, it is not “found” therein for the purposes of venue if its officers or agents are absent from such county and the corporation is not conducting a substantial portion of its business therein, with reasonable continuity. *See Crawford v. Carson*, 138 W. Va. 852, 78 S.E.2d 268 (1953).

19. Plaintiff has failed to allege facts to support its contention that substantial portions of any of these corporations’ businesses are derived from Marshall County.

20. As such, Marshall County is an improper venue for this action, and this action should be dismissed pursuant to W.Va. R. Civ. Proc. 12(b)(3). *See* W. Va. Code § 56-1-1.

C. Motion to Dismiss for *Forum Non Conveniens* pursuant to W. Va Code § 56-1-1a.

21. Defendants Tough Mudder, Peacemaker, and General Mills incorporate all previous paragraphs.

22. This matter should be dismissed or stayed for *forum non conveniens* pursuant to W. Va. Code § 56-1-1a.

23. On the same day that Plaintiff filed this action in Marshall County, Defendant Tough Mudder filed an Arbitration Demand before the American Arbitration Association (“AAA”) pursuant to the Agreement signed by Decedent prior to participating in the Tough Mudder event.

24. This Arbitration Demand was submitted to the AAA in Maryland, the state where Plaintiff resided.

25. Many of the witnesses whom the Defendants anticipate calling and whom the Defendants anticipate the Plaintiff will call also reside in Maryland.

26. Those witnesses include the members of Decedent’s family, Bijon Sengupta, Priyanka Sengupta, and Plaintiff, Mita Sengupta, who upon information and belief reside in Maryland.

27. The anticipated witnesses also include Decedent’s co-workers who entered the April 20, 2013, Tough Mudder event with Decedent, many of whom witnessed Decedent’s entrance into the “Walk the Plank” obstacle and his emergence from the water.

28. The only individual Defendant named in this matter, Travis Pittman, who pulled Decedent from the water and performed CPR on Decedent, is a resident of Maryland.

29. Consequently, Marshall County, West Virginia is an inconvenient forum for many of the witnesses and for the parties.

30. For the interests of justice and convenience, this matter should be dismissed for *forum non conveniens* or stayed pending the resolution of the arbitration action that was filed concurrently with this matter pursuant to W. Va. Code § 56-1-1a.

D. Motion to Remove to Berkeley County pursuant to W. Va. Code § 56-9-1

31. Defendants Tough Mudder, Peacemaker, and General Mills incorporate all previous paragraphs.

32. This matter should be removed to Berkeley County pursuant to W. Va. Code § 56-9-1 for good cause shown because this matter has no connection to Marshall County.

33. The controversy is based upon actions that took place at a Tough Mudder obstacle event held in Berkeley County on April 20, 2013.

34. Plaintiff has alleged that only one Defendant, Peacemaker National Training Center, LLC is a resident of West Virginia and the county of Peacemaker National Training Center LLC's residence is Berkeley County.

35. All other Defendants are alleged to reside out of state and, in the case of the other corporate defendants, to maintain their principal places of business out of state.

36. All Defendants, however, are alleged to have participated in some capacity in the Tough Mudder event of April 20, 2013 which took place at the Peacemaker National Training Center located in Berkeley County.

37. The choice to file suit in Marshall County rather than Berkeley County prejudices the sole West Virginia Defendant in this matter.

38. Because Berkeley County is the county of residence of the only party that resides in West Virginia and Berkeley County is the county in which the events giving rise to this action took place, there is good cause to transfer this matter to the Circuit Court of Berkeley County.

39. Furthermore, in an action that so hinges on a particular event that took place in a certain county, it is appropriate that citizens of that county determine the disputed facts of the matter if this matter is to be litigated rather than arbitrated.

40. Plaintiff has alleged that she is a resident of Maryland and that Decedent was a resident of Maryland, so her selection of Marshall County as a forum should be given only limited deference.

41. With no connection to the parties in this matter or the event that gave rise to the action, the citizens of Marshall County should not be burdened with the litigation costs of this matter or the possibility of extended jury service that will likely be required in a trial of this matter.

42. Conversely, Berkeley County, the location of the event that gave rise to this action and the location of the only West Virginia defendant, has great interest in the outcome of this proceeding, and it is only appropriate that the citizens of Berkeley County be involved in the resolution of this matter.

43. Consequently, this action should be removed to the Circuit Court for Berkeley County pursuant to W. Va. Code § 56-9-1.

E. Motion to Stay Proceeding and Compel Arbitration

44. Defendants Tough Mudder, Peacemaker, and General Mills incorporate all previous paragraphs.

45. The arbitration action that Tough Mudder filed on April 18, 2014, has the potential to resolve this matter, obviating the need to expend judicial resources on a matter that is so wholly disconnected from Marshall County. See *Hamilton Watch Co. v. Atlas Container*, 156 W. Va. 52, 58, 190 S.E.2d 779, 783 (1972).

46. West Virginia has recognized the advantages of arbitration as a method of resolution of disputes when those parties have agreed to such a manner of resolution.

47. The Agreement amounts to a contract into which Decedent entered with Tough Mudder and to which General Mills and Peacemaker were third-party beneficiaries. The Agreement requires the parties to attend mediation in the event of a legal dispute; and, in the event that mediation is unsuccessful, the parties are to submit their disputes to binding arbitration.

48. This is an enforceable arbitration clause contained in an interstate commerce agreement and controls the Plaintiff's instant wrongful death action. See Federal Arbitration Act (FAA) 9 U.S.C. § 2 (2012).

49. Courts in West Virginia have held that similar arbitration provisions in contracts are enforceable.

50. Consequently, the Plaintiff, as the personal representative of Decedent who entered into this Agreement, should be compelled to participate in arbitration and this matter should be stayed pending the resolution of the arbitration action that has already commenced in Maryland, the forum where Plaintiff resides and where Decedent resided.

WHEREFORE for the reasons stated above and discussed more fully in the attendant Memorandum in Support of Defendants Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc., and General Mills Sales, Inc.'s Motion to Dismiss for

Improper Venue and/or Forum Non Conveniens, or in the alternative, Motion to Remove and/or Motion to Stay and Compel Arbitration, Defendants Tough Mudder, Peacemaker, and General Mills respectfully request that this Honorable Court:

- A) Dismiss this action for Improper Venue or *Forum Non Conveniens*; or
- B) Remove the matter to Berkeley County; and
- C) Stay the Action and Compel Arbitration.

Respectfully submitted,



ALONZO D. WASHINGTON (W.Va. Bar No. 8019)
SAMUEL D. MADIA (W.Va. Bar No. 10819)
Flaherty Sensabaugh Bonasso PLLC
48 Donley Street
Suite 501
Morgantown, WV 26501
(304) 598-0788
awashington@fsblaw.com
smadia@fsblaw.com
*Attorneys for Defendants,
Tough Mudder, LLC
Peacemaker Nation Training Center, LLC
General Mills, Inc.
General Mills Sales, Inc.*

IN THE CIRCUIT COURT FOR MARSHALL COUNTY, WEST VIRGINIA

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

Plaintiff, *

v. * Case No. 14-C-66-H
Judge David W. Hummel, Jr.

TOUGH MUDDER LLC;
AIRSQUID VENTURES, INC.; (d.b.a. AMPHIBIOUS MEDICS);
TRAVIS PITTMAN;
PEACEMAKER NATIONAL TRAINING CENTER, LLC;
GENERAL MILLS, INC.;
and GENERAL MILLS SALES, INC.,

*
Defendants. *

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2014, a copy of the foregoing Defendants Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc., and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or for *Forum Non Conveniens*, or in the alternative, Motion to Remove; and Motion to Stay and Compel Arbitration, was mailed, postage prepaid to:

Robert P. Fitzsimmons, Esq.
Clayton J. Fitzsimmons, Esq.
Fitzsimmons Law Firm PLLC
1609 Warwood Ave
Wheeling, WV 26003
Counsel for Plaintiff

Robert J. Gilbert, Esq.
Edward J. Denn, Esq.
Gilbert & Renton, LLC
344 North Main Street
Andover, MA 01810
Counsel for Plaintiff

A handwritten signature in black ink, appearing to read 'S. Madia', written over a horizontal line.

SAMUEL D. MADIA (W.Va. Bar No. 10819)

IN THE CIRCUIT COURT FOR MARSHALL COUNTY, WEST VIRGINIA

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

Plaintiff, *

v. * Case No. 14-C-66-H
Judge David W. Hummel, Jr.

TOUGH MUDDER LLC;
AIRSQUID VENTURES, INC.; (d.b.a. AMPHIBIOUS MEDICS);
TRAVIS PITTMAN;
PEACEMAKER NATIONAL TRAINING CENTER, LLC;
GENERAL MILLS, INC.;
and GENERAL MILLS SALES, INC.,

*
Defendants. *

* * * * *

**MEMORANDUM IN SUPPORT OF DEFENDANTS TOUGH MUDDER, LLC,
PEACEMAKER NATIONAL TRAINING CENTER LLC, GENERAL MILLS, INC.,
AND GENERAL MILLS SALES, INC.'S
MOTION TO DISMISS FOR IMPROPER VENUE AND/OR
FOR FORUM NON CONVENIENS, OR IN THE ALTERNATIVE, MOTION TO
REMOVE; AND MOTION TO STAY THIS ACTION AND COMPEL ARBITRATION**

Defendants Tough Mudder, LLC (“Tough Mudder”), Peacemaker National Training Center, LLC (“Peacemaker”) General Mills, Inc., and General Mills Sales, Inc. (collectively, “General Mills”), by and through undersigned counsel, hereby submit this Memorandum in Support of its Motion to Dismiss for Improper Venue and/or for *Forum Non Conveniens*, or in the alternative, Motion to Remove; and Motion to Stay and Compel Arbitration and state as follows:

I. Introduction

This matter arises from an accidental drowning at an extreme obstacle course event organized by Tough Mudder in April 2013. The accident, described in more detail below, occurred in Berkeley County, West Virginia, the location of the Tough Mudder event. The parties explicitly agreed to resolve this dispute by arbitration. Further, none of the parties resides in Marshall County. The only party that resides in West Virginia at all--Peacemaker—is based in Berkeley County, not Marshall County. Lacking any plausible connection to Marshall County, Plaintiff instead relies on the theory that one or more Defendants “deliberately and regularly engages in commerce in Marshall County” to support its choice of venue in Marshall County. The pleadings make clear, however, that Plaintiff has failed to allege facts that adequately place this matter before the Court and the people of Marshall County, who have no connection to this incident or the parties, and have no genuine interest in the resolution of this matter. As such, Defendants respectfully submit this Motion asking the Court to dismiss the action for improper venue and/or *forum non conveniens*; to remove the matter to Berkeley County, the county where the incident occurred and where the only West Virginia party resides; and/or to stay the matter pending arbitration pursuant to an agreement signed by Decedent prior to the accident.

II. Background

Avishek Sengupta, Decedent, took part in a Tough Mudder event on April 20, 2013, an event in which participants complete a course of ten to twelve miles while tackling a variety of physically strenuous obstacles, which was held in Gerrardstown, Berkeley County in West Virginia. While participating in the Tough Mudder event, Avishek Sengupta entered an obstacle called “Walk the Plank,” which involves climbing a twelve-to-fifteen-foot platform and then

jumping into a pool of water measuring approximately fifteen-feet deep and forty-feet wide. Decedent did not immediately emerge from the water after jumping from the platform.

Decedent was pulled from the water by Co-Defendant Travis Pittman, who was employed by Co-Defendant Airsquid Ventures d/b/a Amphibious Medics, the company that had been retained by Tough Mudder to provide emergency rescue and medical services for various obstacles in the event, including the Walk the Plank obstacle. Co-Defendant Pittman performed CPR on Decedent, but Decedent did not regain consciousness. Decedent died on April 21, 2013, after life support was withdrawn.

Prior to participating in this event, Decedent initialed and executed the Assumption of Risk, Waiver of Liability, and Indemnity Agreement (“the Agreement”) that included a provision requiring the parties to submit to mediation and, if mediation does not resolve the dispute, to arbitration. *See* Exhibit A, Assumption of Risk, Waiver of Liability, and Indemnity Agreement executed by Avishek Sengupta (“Agreement”). Pursuant to that agreement, the Senguptas, Tough Mudder, and Airsquid attempted to mediate this dispute, but the Senguptas discontinued mediation.

On April 18, 2014, Defendant Tough Mudder filed an Arbitration Demand with the American Arbitration Association (“AAA”) to determine the applicability of the provisions of the Agreement signed by Decedent. Decedent’s mother and personal representative, Mita Sengupta (“Plaintiff”), filed this instant wrongful death action and a declaratory judgment action in the Circuit Court for Marshall County on the same day, April 18, 2014. In this action, Plaintiff seeks declarations regarding the Agreement signed by Decedent.

Plaintiff is a resident of Maryland and is serving as the personal representative of her deceased son who was also a Maryland resident. Defendant Travis Pittman, the only individual

defendant, is also a resident of Maryland. Of the entities named in this lawsuit, Peacemaker National Training Center LLC is the only West Virginia resident, and its principal place of business is located in Berkeley County. Defendant Tough Mudder is a Delaware limited liability corporation with a principal place of business in New York; Airsquid Ventures is a California corporation with a principal place of business in California; Defendants General Mills, Inc., and General Mills Sales, Inc., are Delaware corporations with their principal places of business in Minnesota.

III. Argument

A. This Action Should be Dismissed Due to Plaintiff's Choice of an Improper Venue.

By filing in Marshall County, a county in which no defendant resides, rather than in Berkeley County, the county where the action arose and where the sole in-state party resides, Plaintiff has filed in an improper venue pursuant to W. Va. Code § 56-1-1. West Virginia Code Article 56-1-1 controls the venue in which actions in West Virginia are filed. The venue statute reads in relevant part:

- (a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
 - (1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is;
 - (2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this State, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this State which has its principal office located outside of this State and which has no office or place of business within the State, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of

action arose in this State or grew out of the rights of stockholders with respect to corporate management;

* * * *

- (4) If it be against one or more nonresidents of the state, where any one of them may be found and served with process or may have estate or debts due him or them[.]

W. Va. Code § 56-1-1.

Section 56-1-1(a) allows for a plaintiff to file an action where the action arose, which in this instance would be Berkeley County. W. Va. Code § 56-1-1(a)(1). If a defendant is a corporation, however, a plaintiff may file the action where the corporation's principal place of business is found or where its chief officers are found, which in this instance would be Berkeley County because it is the location of the principal place of business of the sole West Virginia Defendant. W. Va. Code § 56-1-1(a)(2).

If the corporate defendant is an out-of-state corporation, a plaintiff may file suit where the corporation does business or where the plaintiff resides. *Id.* In this instance, because the Plaintiff is a resident of Maryland as the personal representative of a Decedent who resided in Maryland, the venue option of where the plaintiff resides is not relevant to this inquiry.

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.

It appears from the pleadings that Plaintiff relies on the general provision regarding the ability to sue a corporate defendant where it transacts business. Plaintiff asserts that General Mills, Tough Mudder, and Airsquid Ventures transact business within Marshall County and such transactions serve as the venue predicate for this action. However, Plaintiff fails to allege that a

substantial amount of that business is transacted within Marshall County, a county with less than 35,000 residents according to the last census. Without alleging and providing a basis for determining that a substantial portion of any of these businesses is conducted within Marshall County, Plaintiff has failed to show that any Defendant is found for the purposes of venue within Marshall County. See W. Va. Code § 56-1-1(a); *Crawford v. Carson*, 138 W. Va. 852, 860, 78 S.E.2d 268, 273 (1953) (“Though a corporation may transact some business in a county, it is not ‘found’ therein, if its officers or agents are absent from such county and the corporation is not conducting a substantial portion of its business therein, with reasonable continuity.”).

“In determining the sufficiency of a corporation's minimum contacts in a county to demonstrate that it is doing business, [the Supreme Court of Appeals for West Virginia] recognized that ‘the maintenance of an action in the forum [should] not offend traditional notions of fair play and substantial justice.’” *Westmoreland Coal Co. v. Kaufman*, 184 W. Va. 195, 197, 399 S.E.2d 906, 908 (1990) (quoting *Hodge v. Sands Mfg. Co.*, 151 W. Va. 133, 141, 150 S.E.2d 793, 797 (1966)). Further, those notions of fair play and substantial justice in terms of the venue inquiry require a substantial connection between a defendant and the forum to establish minimum contacts that result from an action of the defendant purposefully directed toward the forum. *Id.* (citing *Asahi Metal Industry Co., Ltd. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 112 (1987); *King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Additionally, “[w]here properly questioned by motion to dismiss under Rule 12(b)(3), W. Va. R.C.P., venue must be legally demonstrated independent of *in personam* jurisdiction of the defendant.” *State ex rel. Galloway Group v. McGraw*, 227 W. Va. 435, 437, 711 S.E.2d 257, 259 (2011) (quoting Syl.pt. 1, *Wetzel Co. Sav. & L. Co. v. Stern Bros.*, 156 W. Va. 693, 195 S.E.2d 732 (1973)).

The Plaintiff has failed to put forth any allegations that indicate any actions by any Defendant were purposefully directed toward Marshall County. Further, the venue allegations fail to provide any connection to Marshall County beyond the alleged minimal requirements for *in personam* jurisdiction that the Circuit Court for Marshall County may have over these corporate defendants due to their minimum contacts with West Virginia in general.

Because Plaintiff's Complaint fails to comport with any of the venue provisions provided in W. Va. § 56-1-1(a), Marshall County is an improper venue for this action, and this action should be dismissed pursuant to W.Va. R. Civ. Proc. 12(b)(3). *See* W. Va. Code § 56-1-1.

B. This Matter Should be Dismissed or Stayed under W. Va. Code § 56-1-1a.

Under West Virginia law, a trial court may, in its discretion, dismiss or stay a proceeding based on the doctrine of *forum non conveniens*. Section § 56-1-1a of the West Virginia Code has codified *forum non conveniens* and states in relevant part:

- (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 not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and
 - (8) Whether the alternate forum provides a remedy.

W. Va. § 56-1-1a. The statute sets forth the factors a court should consider when exercising its discretion based on *forum non conveniens*. *W. Va. ex rel. N. River Ins. Co. v. Chafin*, No. 13-0897, 2014 W. Va. LEXIS 286, at 8-9, 16 (Mar. 27, 2014). Courts favor the invocation of the doctrine of *forum non conveniens* if the alternate forum provides the possibility that the parties' "action may be brought more conveniently, but still justly, in another forum." *N. River Ins.*, 2014 W. Va. LEXIS 286, at 12 (quoting W.Va. Code § 56-1-1a; *see generally Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994) (discussing that under the federal doctrine of *forum non conveniens*, a court may dismiss the case when trial in the chosen forum would establish oppressiveness to a defendant out of all proportion to plaintiff's convenience, or because of the court's own administrative concerns). Courts disfavor the invocation of the doctrine of *forum non conveniens* if the alternate forum does not provide the possibility of a swift, clear remedy to the Plaintiff. *See N. River Ins.*, 2014 W. Va. LEXIS 286, at 17-18 (noting that the actions pending in other states involved declaratory judgments regarding insurance coverage and that the court hears those actions did not have personal jurisdiction over the plaintiffs).

As previously stated, Defendant Tough Mudder filed an arbitration demand before the AAA in Maryland on the same day that Plaintiff filed this action; Defendants Peacemaker and

General Mills have also joined in this arbitration demand. *See* Exhibit B, Arbitration Demand; Exhibit C, Amended Arbitration Demand. Defendants instituted this AAA action pursuant to the Agreement that Decedent signed and initialed before taking part in the Tough Mudder event. *See* Exhibit A, Agreement. Because the Plaintiff resides in Maryland, the state in which the Arbitration Demand was submitted, this arbitration action is presumably convenient for her. Additionally, many of the witnesses anticipated to be called regarding this dispute are residents of Maryland. Specifically, Decedent's family members reside in Maryland. Many of Decedent's Tough Mudder teammates were co-workers of Decedent who reside in Maryland, and most of these teammates were at the Walk the Plank obstacle when Decedent entered the water. *See* Complaint at ¶¶ 34-39, 50. The Complaint specifically lists DeYonte Wilkinson, Arsham Mirshah, Josh Muskin, Kim Keen, and Samad Rahimi, all of whom are, upon information and belief, residents of Maryland. *See* Complaint at ¶¶ 34-39, 50. Further, the one individual Defendant listed in this matter, Travis Pittman, is a resident of Maryland.

In light of the eight factors to be considered, the doctrine of *forum non conveniens* should be invoked. First, there is a separate forum in which this matter should be tried—the AAA is the appropriate forum for this dispute pursuant to the Agreement signed by Decedent prior to his participation in the event. Second, the alternative forum of the arbitration action has jurisdiction over Tough Mudder, the true party in interest in this matter. Tough Mudder and Decedent submitted to arbitration pursuant to the Agreement signed by Decedent prior to his participation in the event. Additionally, Defendants General Mills and Peacemaker are third-party beneficiaries to the contract that is at the center of Plaintiff's declaratory judgment claims. Peacemaker was specifically identified in the introduction as one of the released parties, and General Mills, a Tough Mudder sponsor, was also specifically included among the released

parties in the Agreement. See Exhibit A, Agreement. Third, the Plaintiff does not reside in West Virginia, and only one Defendant is found in West Virginia, but not in Marshall County. Fourth, with arbitration of this matter pending, it is a waste of the judicial resources of the State of West Virginia to allow for the litigation of this matter to proceed. The arbitration of this matter will fully and finally resolve the controversy and provide all parties with justice. Fifth, with an arbitration pending, there is a real possibility of conflicting outcomes regarding the enforceability of the waiver of negligence. Sixth, the alternate forum of the AAA arbitration does provide for a remedy for Plaintiff for the alleged wrongful death of Decedent, and that forum has jurisdiction over the real parties in interest.

The statute also permits the matter to be stayed pending a separate action. West Virginia courts are only to grant stays if such a stay would “be essential to justice, and it must be that the judgment or decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it.” *N. River Ins.*, 2014 W. Va. LEXIS 286 at 9 (quoting Syl. pt. 4, *Dunfee v. Childs*, 59 W.Va. 225, 53 S.E. 209 (1906)). Further, “a stay is appropriate when the earlier-filed action ‘will settle the matter in controversy in the cause in which a stay is asked[.]’” *N. River Ins. Co.*, 2014 W. Va. LEXIS 286 at 19 (quoting *State ex rel. Piper v. Sanders*, 228 W.Va. 792, 796, 724 S.E.2d 763, 767 (2012)).

This arbitration action will resolve the issues presented in this Complaint. The arbitration will address the applicability of the Agreement and the validity of any of Plaintiff’s claims relating to the death of Decedent.

Consequently, Defendants Tough Mudder, Peacemaker, and General Mills respectfully request that this Honorable Court exercise its discretion and dismiss this action for *forum non*

conveniens or, as an alternative, stay the matter pending the resolution of the simultaneously filed arbitration action.

C. This Case Should be Removed to Berkeley County Under W. Va. Code § 56-9-1.

If the Court finds that Plaintiff's choice of venue is proper and determines that the doctrine of *forum non conveniens* does not apply to this matter, this action should be removed to Berkeley County pursuant to W. Va. Code § 56-9-1 for good cause shown because this matter has no connection to Marshall County. As previously stated, the controversy is based upon actions that took place at a Tough Mudder obstacle event held in Berkeley County on April 20, 2013. Section 56-9-1 of the West Virginia Code provides for the removal of actions:

A circuit court, or any court of limited jurisdiction established pursuant to the provisions of section 1, article VIII of the constitution of this state, wherein an action, suit, motion or other civil proceeding is pending, or the judge thereof in vacation, may on the motion of any party, after ten days' notice to the adverse party or his attorney, and for good cause shown, order such action, suit, motion or other civil proceeding to be removed, if pending in a circuit court, to any other circuit court, and if pending in any court of limited jurisdiction hereinbefore mentioned to the circuit court of that county: *Provided*, That the judge of such other circuit court in a case of removal from one circuit to another may decline to hear said cause, if, in his opinion, the demands and requirements of his office render it improper or inconvenient for him to do so.

W. Va. Code § 56-9-1. This situation presents the very "good cause" showing required as a predicate for a transfer of the matter to a different circuit court. There is virtually no connection between the Plaintiff's chosen forum and this action.

In this matter, the Plaintiff, a Maryland resident serving as personal representative for her son, who was also a Maryland resident, has alleged that only one Defendant, Peacemaker, is a resident of West Virginia and Peacemaker's residence is Berkeley County. All other Defendants are alleged to reside out of state and, in the case of the other corporate defendants, to maintain their principal places of business out of state. All Defendants, however, are alleged to have

participated in some capacity in the Tough Mudder event of April 20, 2013 which took place at the Peacemaker National Training Center located in Berkeley County. The choice to file suit in Marshall County rather than Berkeley County prejudices the sole West Virginia Defendant in this matter.

Additionally, several of the witnesses anticipated to be called, namely the first responders to the scene, likely reside in or around Berkeley County. Consequently, litigating this matter in Marshall County would also be inconvenient for those witnesses.

The citizens of Marshall County have little if any connection to this event. The actions giving rise to this matter occurred in a county far from their own, and Plaintiff has failed to claim that any resident of Marshall County was involved in this incident. The citizens of Marshall County have no cause to expend their judicial resources on litigating this matter, and their resources should not be expended on a matter that occurred out of the county involving an out-of-state Plaintiff and Defendants with no plausible connection to Marshall County. Instead, the citizens of Berkeley County, who reside in the same county where this event occurred and where one of the Defendant's resides, have a keen interest in the outcome of this matter.

Because Berkeley County is the county of residence of the only Defendant that resides in West Virginia and Berkeley County is the county in which the events giving rise to this action took place and the likely location of several of the potential witnesses, there is good cause to remove this matter to the Circuit Court of Berkeley County.

Consequently, if the Court finds that venue is proper in Marshall County, this action should be removed to the Circuit Court for Berkeley County pursuant to W. Va. Code § 56-9-1.

D. This Action Should be Stayed, Allowing for Arbitration to Resolve the Matter.

In addition to removing the matter to Berkeley County, the Defendants also respectfully ask the Court to stay the matter so that the arbitration currently pending before the AAA can serve to resolve the dispute pursuant to the Agreement signed by Decedent prior to his participation in the Tough Mudder event. Under the Agreement, arbitration of the Plaintiff's claims is mandatory. However, rather than participate in arbitration as required by the agreement, Plaintiff has responded to Tough Mudder's arbitration Demand by refusing to participate. *See* Exhibit D, Sengupta Response to Arbitration Demand; *see also* Exhibit E, May 21, 2014 Letter from AAA.

The arbitration action that Tough Mudder filed on April 18, 2014, has the potential to resolve this matter, obviating the need to expend judicial resources on a matter that is so wholly disconnected from Marshall County. *See* Exhibit B, Arbitration Demand; Exhibit C, Amended Arbitration Demand; *see also Hamilton Watch Co. v. Atlas Container*, 156 W. Va. 52, 58, 190 S.E.2d 779, 783 (1972). West Virginia has recognized the advantages of arbitration as a method of resolution of disputes when those parties have agreed to such a manner of resolution. *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 563 (W. Va. 2013) (citing *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 190 (4th Cir. 2010) (commenting that “the purpose of having arbitration at all [is] the quick resolution of disputes and the avoidance of the expense and delay associated with litigation”) (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193 (4th Cir. 1998)); *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91, ___, 736 S.E.2d 91, 101 (2012) (identifying one purpose of arbitration as “providing a suitable alternative forum for plaintiff's claims”); *Board of Ed. of Berkeley County v. W. Harley*

Miller, Inc., 160 W. Va. 473, 479, 236 S.E.2d 439, 443 (1977) (describing the purpose of arbitration as “just, speedy, economical conflict resolution”).

The Agreement signed by Decedent amounts to a contract governing interstate commerce into which Decedent entered with Tough Mudder requiring parties to attend mediation in the event of a legal dispute; and, in the event that mediation is unsuccessful, “[Decedent] agree[s] that all disputes, controversies or claims arising out of [his] participation in the TM event shall be submitted to binding arbitration in accordance with the applicable rules of the American Arbitration Association then in effect.” See Exhibit A, Agreement. This is the very type of provision contemplated in Section 2 of the Federal Arbitration Act (FAA), which reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

West Virginia’s Supreme Court of Appeals comprehensively discussed arbitration clauses and their enforceability in light of the FAA and West Virginia law in *Brown v. Genesis Healthcare Corp. (Brown I)*, 228 W. Va. 646, 724 S.E.2d 250 (2011) and then in *Brown v. Genesis Healthcare Corp. (Brown II)*, 229 W. Va. 382, 729 S.E.2d 217 (2012). The *Brown* cases reaffirmed that traditional contract law concepts of unconscionability apply to the analysis of the enforceability of arbitration clauses. *Brown II*, 229 W. Va. at 389, 729 S.E.2d at 224. If the contract is both procedurally and substantively unconscionable, the agreement is not to be enforced. *Credit Acceptance Corp.*, 745 S.E.2d at 563.

In *Brown I* and *Brown II*, the arbitration clause at issue was contained in a nursing home contract that required residents to participate in arbitration for all disputes. The Supreme Court overruled a portion of *Brown I* to the extent that West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes was a categorical rule prohibiting arbitration of a particular type of claim, and that rule was contrary to the terms and coverage of the FAA. *Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201, 1203-1204, (2012). Regardless, these two cases serve as the basis for West Virginia courts' analysis of arbitration clauses.

In discussing arbitration agreements and different situations in which arbitration agreements exist, the Court specifically addressed arbitration agreements as they relate to hazardous recreational activities. The Court stated, "agreements absolving participants and proprietors from liability during hazardous recreational activities with no general public utility — such as skiing, parachuting, paintball, or horseback trail rides — will tend to be enforceable (but subject to willful misconduct or statutory limitations)." *Brown I*, 228 W. Va. at 687, 724 S.E.2d at 291. The Court further specified that, "[p]rivate recreational businesses generally do not qualify as services demanding a special duty to the public, nor are their services of a highly special, highly necessary nature." *Id.* at 687 n.156, 724 S.E.2d at 291 n.156 (quoting *Schutkowski v. Carey*, 725 P.2d 1057, 1060 (Wyo. 1986)).

The arbitration clause contained in the Agreement signed by Avishek Sengupta is the very type of arbitration clause that the Court in *Brown I* contemplated as an enforceable arbitration clause relating to a "hazardous recreational activity" without public utility that would tend to be enforceable. Much like the activities listed by the Court, such as paintballing and parachuting, Tough Mudder events are hazardous by their very nature and serve only as

recreational activities. Further, the Agreement signed by Decedent prior to his participation in the Tough Mudder event is the very sort of interstate contract contemplated in Section 2 of the FAA in which arbitration clauses will be enforced unless they are they are found to be unenforceable under general principles of contract law.

The hallmarks of procedural and substantive unconscionability that would render an agreement unenforceable are absent in this instance. *See Credit Acceptance Corp.*, 745 S.E.2d at 565 (holding that arbitration agreements in lender and debtors' contracts were enforceable under 9 U.S.C.S. § 2 of the Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 *et seq.*, even though they deprived the debtors of their rights to jury trials, because W. Va. Code § 46A-1-107, which prohibited consumers from waiving their rights, was preempted by the FAA). Both parties are equally bound by this Agreement, which mutually requires Tough Mudder and Decedent to resolve disputes through arbitration. Further, there is no requirement that the arbitration occur in a certain forum that could prove to be burdensome for the other party.¹ Rather, this agreement stems from the very type of hazardous recreational activity in which an arbitration clause should be enforceable according to the Supreme Court of Appeals in West Virginia. *See Brown I*, 228 W. Va. at 687, 724 S.E.2d at 291.

Consequently, the Plaintiff, as the personal representative of Decedent who entered into this agreement, should be compelled to participate in arbitration, and this matter should be stayed pending the resolution of the arbitration action that has already commenced in Maryland, the forum where Plaintiff resides and where Decedent resided.

¹Tough Mudder submitted this arbitration action on April 18, 2014, in Maryland, the home state of Decedent and of the Plaintiff, thereby potentially minimizing the inconvenience and cost of arbitration to the parties.

IV. Conclusion

For the reasons stated above, Defendants Tough Mudder, Peacemaker, and General Mills respectfully request that this Honorable Court grant Defendants' Motion and dismiss this action due to Plaintiff's choice of an improper venue or for *forum non conveniens*. If the Court determines that venue is proper in Marshall County, Defendants request that this Honorable Court remove the action to Berkeley County, the more convenient venue where the action arose and where the sole West Virginia defendant, Peacemaker, is located. Additionally, Defendants request that this Honorable Court stay this action and compel arbitration so that the parties may resolve this dispute through the contractually mandated arbitration action currently pending before the American Arbitration Association.

Respectfully submitted,



ALONZO D. WASHINGTON (W.Va. Bar No. 8019)

SAMUEL D. MADIA (W.Va. Bar No. 10819)

Flaherty Sensabaugh Bonasso PLLC

48 Donley Street

Suite 501

Morgantown, WV 26501

(304) 598-0788

awashington@fsblaw.com

smadia@fsblaw.com

Attorneys for Defendants,

Tough Mudder, LLC

Peacemaker Nation Training Center, LLC

General Mills, Inc.

General Mills Sales, Inc.

IN THE CIRCUIT COURT FOR MARSHALL COUNTY, WEST VIRGINIA

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

Plaintiff, *

v. * Case No. 14-C-66-H
Judge David W. Hummel, Jr.

TOUGH MUDDER LLC;
AIRSQUID VENTURES, INC.; (d.b.a. AMPHIBIOUS MEDICS);
TRAVIS PITTMAN;
PEACEMAKER NATIONAL TRAINING CENTER, LLC;
GENERAL MILLS, INC.;
and GENERAL MILLS SALES, INC.,

*
Defendants. *

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2014, a copy of the foregoing Memorandum in Support of Defendants Tough Mudder, LLC, Peacemaker National Training Center, LLC, General Mills, Inc., and General Mills Sales, Inc.'s Motion to Dismiss for Improper Venue and/or for *Forum Non Conveniens*, or in the alternative, Motion to Remove; and Motion to Stay and Compel Arbitration was mailed, postage prepaid to:

Robert P. Fitzsimmons, Esq.
Clayton J. Fitzsimmons, Esq.
Fitzsimmons Law Firm PLLC
1609 Warwood Ave
Wheeling, WV 26003
Counsel for Plaintiff

Robert J. Gilbert, Esq.
Edward J. Denn, Esq.