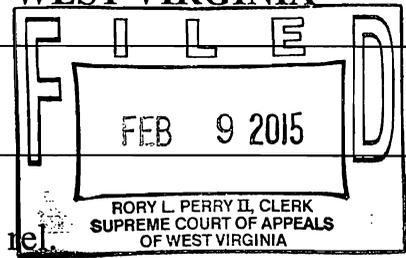


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-*0102*



Petitioners,

STATE OF WEST VIRGINIA ex rel.
TOUGH MUDDER, LLC;¹ PEACEMAKER NATIONAL TRAINING CENTER,
LLC; GENERAL MILLS, INC.; and GENERAL MILLS SALES, INC.,

v.

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

Respondents.

PETITION FOR A WRIT OF PROHIBITION

On Petition for a Writ of Prohibition to the Circuit Court of Marshall County,
West Virginia (Civil Action No. 14-C-66)

Robert P. O'Brien
(*pro hac vice* pending)
Jennifer M. Sullam
(*pro hac vice* pending)
Niles, Barton & Wilmer, LLP
11 South Calvert Street
Suite 1400
Baltimore, MD 21202
(410) 783-6300
rpobrien@nilesbarton.com
jmsullam@nilesbarton.com

Robert N. Kelly
(*pro hac vice* pending)
Michele L. Dearing
(WV Bar No. 8196)
Jackson & Campbell, P.C.
1120 20th Street, N.W.
Suite 300 South
Washington, D.C. 20036
(202) 457-1600
rkelly@jackscamp.com
mdearing@jackscamp.com

Alonzo D. Washington
(WV Bar No. 8019)
Christopher M. Jones
(WV Bar No. 11689)
Flaherty Sensabaugh Bonasso
PLLC
48 Donley Street, Suite 501
Morgantown, WV 26501
(304) 598-0788
awashington@fsblaw.com
cjones@fsblaw.com

*Counsel for Petitioners, Tough Mudder, LLC, Peacemaker National Training
Center, LLC, General Mills, Inc., and General Mills Sales.*

¹ Tough Mudder, LLC has changed its name since the instant matter was filed. The entity's new name is Tough Mudder Incorporated.

TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. QUESTIONS PRESENTED..... | 1 |
| II. STATEMENT OF THE CASE..... | 2 |
| A. Introduction | 2 |
| B. Factual Background..... | 4 |
| C. Procedural History..... | 6 |
| D. Standard of Review..... | 10 |
| III. SUMMARY OF ARGUMENT | 12 |
| IV. STATEMENT RESPECTING ORAL ARGUMENT AND DECISION..... | 16 |
| V. ARGUMENT..... | 16 |
| A. The Circuit Court Erred in Ignoring the Unambiguous, Plain Meaning of the Venue and Jurisdiction Provision to Find that Venue did Lie in Marshall County and then Misapplying Settled West Virginia Law Regarding Contract Interpretation after Finding an Ambiguity in the Agreement..... | 17 |
| B. The Circuit Court Erred in Failing to Consider West Virginia’s Statutory Venue Requirements in Holding that Venue Did Lie in Marshall County and, Had the Circuit Court Considered the State’s Venue Requirements, It Would Have Found that Venue was Improper Under West Virginia Law..... | 22 |

| | Page |
|-----|---|
| C. | The Circuit Court Erred in Failing Make a Determination Regarding the Eight Factors Needed To Rule Upon A <i>Forum Non Conveniens</i> Motion.....29 |
| 1. | An Alternative Forum Exists Where the Action May Be Tried.....31 |
| 2. | Maintenance of the Action in West Virginia Would Work a Substantial Injustice on the Tough Mudder Defendants.....31 |
| 3. | The Arbitration in Maryland Can Exert Jurisdiction Over Defendants.....31 |
| 4. | Plaintiff Resides In Maryland.....32 |
| 5. | Plaintiffs’ Cause of Action Accrued In Berkeley County.....32 |
| 6. | The Private and Public Interests Weigh In Favor of Dismissal from Marshall County to Allow for Arbitration in Maryland.....32 |
| 7. | A Stay or Dismissal of this will Limit Duplicative or Contradictory Outcomes.....32 |
| 8. | Arbitration Provides A Remedy33 |
| 9. | A Stay or Dismissal in Favor of the Pending Arbitration is Warranted.....33 |
| D. | The Circuit Court Erred in Failing to Address and Grant the Tough Mudder Defendants’ Alternative Motion to Remove the Matter Under West Virginia Code § 56-9-1.....34 |
| VI. | CONCLUSION.....35 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|------------|
| CASES | |
| <i>Asahi Metal Industry Co., Ltd. v. Superior Court of Cal., Solano Cnty.</i> , 480 U.S. 102 (1987)..... | 25 |
| <i>Bennett v. Dove</i> , 166 W. Va. 772, 277 S.E.2d 617 (1981)..... | 17 |
| <i>Berkeley County Public Service Dist. v. Vitro Corp. of America</i> , 152 W. Va. 252, 162 S.E.2d 189 (1968)..... | 18 |
| <i>Bischhoff v. Francessa</i> , 133 W. Va. 474, 56 S.E.2d 865 (1949)..... | 21 |
| <i>Brent v. Board of Trustees</i> , 163 W. Va. 390, 256 S.E.2d 432 (1979)..... | 25, 26 |
| <i>Caperton v. A.T. Massey Coal Co.</i> , 225 W. Va. 128, 690 S.E.2d 322 (2009)..... | 11 |
| <i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995)..... | 11 |
| <i>Cotiga Dev.t Co. v. United Fuel Gas Co.</i> , 147 W. Va. 484, 128 S.E.2d 626 (1962)..... | 17 |
| <i>Crawford v. Carson</i> , 138 W. Va. 852, 78 S.E.2d 268 (1953)..... | 14, 24 |
| <i>FOP, Lodge No. 69 v. City of Fairmont</i> , 196 W. Va. 97, 468 S.E.2d 712 (1996)..... | 11, 17, 21 |
| <i>Harbert v. County Court</i> , 129 W. Va. 54, 39 S.E.2d 177(1946)..... | 21 |
| <i>Harris v. Harris</i> , 212 W. Va. 705, 575 S.E.2d 315 (2002)..... | 18 |

| | Page(s) |
|--|----------------|
| <i>Henson v. Lamb</i> , 120 W. Va. 552, 199 S.E. 459 (1938)..... | 19 |
| <i>Hodge v. Sands Mfg. Co.</i> , 151 W.Va. 133, 150 S.E.2d 793 (1966)..... | 25 |
| <i>HN Corp. v. Cyprus Kanawha Corp.</i> , 195 W. Va. 289, 465 S.E.2d 391 (1995)..... | 18 |
| <i>Kidwell v. Westinghouse Elec. Co.</i> , 178 W. Va. 161, 358 S.E.2d 420 (1986)..... | 22, 25, 26, 27 |
| <i>King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)..... | 25 |
| <i>Lawyer Disciplinary Board v. White</i> , 764 S.E.2d 327, 2014 W. Va. LEXIS 978 (W. Va. 2014)..... | 19 |
| <i>Lee v. Lee</i> , 228 W. Va. 483, 721 S.E.2d 53 (2011)..... | 18, 19, 20 |
| <i>Soliva v. Shand, Morahan & Co., Inc.</i> , 176 W. Va. 430, 345 S.E.2d 33 (1986)..... | 18 |
| <i>State ex rel. Frazier & Oxley, L.C. v. Cummings</i> , 212 W. Va. 275, 569 S.E.2d 796 (2002)..... | 18 |
| <i>State ex rel. Galloway Group v. McGraw</i> , 227 W. Va. 435, 711 S.E.2d 257 (2011)..... | 14, 25 |
| <i>State ex rel. Huffman v. Stephens</i> , 206 W. Va. 501, 526 S.E.2d 23 (1999)..... | 10, 26 |
| <i>State ex rel. Mylan, Inc. v. Zakaib</i> , 227 W. Va. 641, 713 S.E.2d 356 (2011)..... | <i>passim</i> |
| <i>State ex rel. N. River Ins. Co. v. Chafin</i> , 758 S.E.2d 109, 2014 W. Va. LEXIS 252 (2014) | 30 |

| | Page(s) |
|---|----------------|
| <i>State ex rel. Riffle v. Ranson</i> , 195 W. Va. 121, 464 S.E.2d 763, 766 (1995)..... | 10, 11, 12 |
| <i>State ex rel. Thornhill Group, Inc. v. King</i> , 2014 W. Va. LEXIS 648, 2014 WL 2572874 (W. Va. June 6, 2014)..... | 27 |
| <i>State ex rel. Winter v. MacQueen</i> , 161 W. Va. 30, 239 S.E.2d 660 (1977)..... | 10 |
| <i>State v. Harden</i> , 62 W. Va. 313, 58 S.E. 715 (1907)..... | 18 |
| <i>Terra Int’l, Inc. v. Mississippi Chem. Corp.</i> , 119 F.3d 688 (8th Cir. 1997)..... | 11 |
| <i>United Bank, Inc. v. Blosser</i> , 218 W. Va. 378, 624 S.E.2d 815 (2005)..... | 10 |
| <i>Ware v. Ware</i> , 224 W. Va. 599, 687 S.E.2d 382 (2009)..... | 11 |
| <i>Westmoreland Coal Co. v. Kaufman</i> , 184 W. Va. 195, 399 S.E.2d 906 (1990)..... | 25 |
| <i>Wetzel Co. Sav. & L. Co. v. Stern Bros.</i> , 156 W. Va. 693, 195 S.E.2d 732 (1973)..... | 14, 25 |

STATUTES AND RULES

| | |
|---|---------------|
| Federal Arbitration Act (FAA) 9 U.S.C. §§ 1, <i>et seq.</i> | 8 |
| W. Va. Code § 56-1-1..... | <i>passim</i> |
| W. Va. Code § 56-1-1(a) | 23 |
| W. Va. Code § 56-1-1(a) (1)..... | 23 |

| | Page(s) |
|---------------------------------------|------------------|
| W. Va. Code § 56-1-1(a)(2)..... | 23, 25 |
| W. Va. Code § 56-1-1(a)(4)..... | 23 |
| W. Va. Code § 56-1-1(b)..... | 25 |
| W. Va. Code § 56-1-1a..... | <i>passim</i> |
| W. Va. Code § 56-1-1a(a)..... | 33 |
| W. Va. Code § 56-1-1a(a)(6)..... | 32 |
| W. Va. Code § 56-1-1a(a)(7)..... | 32 |
| W. Va. Code § 56-9-1..... | 2, 3, 15, 34, 35 |
| W. Va. Code § 31D-15-1501..... | 23, 26 |
| W. Va. Code § 31D-15-1501(d)..... | 27 |
| W. Va. Code § 31D-15-1501(b)(4)..... | 27 |
| W. Va. Code § 31D-15-1501(b)(10)..... | 27 |
| W. Va. Code § 31D-15-1501(b)(13)..... | 27 |
| W. Va. Code § 31-1-15..... | 26 |
| W. Va. R.C.P. 12(b)(3) | 1, 14, 25 |
| W. Va. R. App. P. 18(a) | 16 |
| W. Va. R. App. P. 19(a)(1)..... | 16 |
| W. Va. R. App. P. 19(a)(2)..... | 16 |
| W. Va. R. App. P. 19(a)(4) | 16 |

TO: THE HONORABLE CHIEF JUSTICE AND
THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

AND NOW, come the Petitioners, State of West Virginia *ex rel. Tough Mudder, LLC* (*n/k/a Tough Mudder Incorporated*), *Peacemaker National Training Center, LLC*, *General Mills, Inc.*, and *General Mills Sales, Inc.* (collectively, “Tough Mudder Defendants”), by and through their counsel, Robert P. O’Brien and Jennifer M. Sullam of Niles, Barton and Wilmer, LLP; Robert N. Kelly, and Michele L. Dearing of Jackson & Campbell, PC; and Alonzo D. Washington and Christopher M. Jones of Flaherty Sensabaugh Bonasso, PLLC, who hereby petition this Honorable Court to issue a Writ of Prohibition against Respondents, the Honorable David W. Hummel, Jr. in his official capacity as Judge of the Circuit Court of Marshall County, and Plaintiff Mita Sengupta, as personal representative of Avishek Sengupta, thereby prohibiting the Circuit Court of Marshall County from taking further action in the underlying case and ordering dismissal thereof due to the Plaintiff Mita Sengupta’s choice of an improper venue in Marshall County pursuant to West Virginia Rule of Civil Procedure 12(b)(3) and West Virginia Code § 56-1-1.

I. QUESTIONS PRESENTED

1. Whether the circuit court erred in concluding that the “Venue and Jurisdiction clause” in the Agreement authorizes venue in each and every county in the State of West Virginia regardless of West Virginia’s statutory requirements and regardless of Plaintiff’s challenge of the validity and enforceability of the Agreement document as a whole.

2. Whether the circuit court erred in refusing to dismiss this case for improper venue pursuant to West Virginia Code § 56-1-1 and West Virginia Rule of Civil Procedure 12(b)(3).

3. Whether the circuit court erred in refusing to dismiss or stay this case for *forum non conveniens* pursuant to West Virginia Code § 56-1-1a where the circuit court failed to heed this

Court's precedent requiring it to consider *all* the statutory *forum non conveniens* factors and making its determination based upon consideration of each of those statutory factors.

4. Whether the circuit court erred in refusing to transfer this case to Berkeley County under West Virginia Code § 56-9-1.

II. STATEMENT OF THE CASE

A. Introduction

This matter involves important issues that are central to West Virginia's laws relating to venue. Here, Plaintiff has fully disregarded West Virginia's venue requirements, and the circuit court has seemingly validated and endorsed the Plaintiff's efforts to subvert the purpose of West Virginia's venue requirements.

The case involves the accidental drowning death of a participant, Avishek Sengupta, in the April 20, 2013 Tough Mudder event in Berkeley County, West Virginia. Prior to participating in the Tough Mudder event, Mr. Sengupta signed the "Assumption of Risk, Waiver of Liability, and Indemnity Agreement" (hereinafter "the Agreement"). The Agreement included a clause that required all legal actions be brought in "the appropriate state or federal trial court for the state in which the TM Event is held[.]"

All events relevant to this action, from Mr. Sengupta's signing of the Agreement to his voluntary participation in an extreme obstacle course event at which the accident in question took place, occurred in Berkeley County. Regardless of the location of all of these events, Plaintiff has filed the instant matter in Marshall County, a county with no connection to this controversy and without sufficient connection to any Defendant to warrant venue under West Virginia law. In fact, the only West Virginia party, Peacemaker National Training Center, LLC, is located in Berkeley County, the site where the Tough Mudder event occurred. In light of these

concerns, the Tough Mudder Defendants filed a Motion to Dismiss for Improper Venue or for *Forum Non Conveniens* or in the alternative Motion to Transfer the Matter to Berkeley County (“the Motion”). See The Motion, Appendix 1-14; see also Tough Mudder Defs. Reply Mem. in Sup. Of Mot. to Dismiss (“the Reply”), Appendix 155-251.

The circuit court’s decision to deny the Tough Mudder Defendants’ Motion to Dismiss for Improper Venue or for *Forum Non Conveniens* or in the alternative Motion to Transfer the Matter to Berkeley County was based upon the circuit court’s reading of the clause in the Agreement captioned “Venue and Jurisdiction.” In rendering this decision, the circuit court misconstrued the language of the clause, which requires that a legal action be brought in “the appropriate state or federal court”, and disregarded the Complaint’s stated basis for venue. In addition to the circuit court’s erroneous reading of the Venue and Jurisdiction clause in the Agreement, there can be no finding that Marshall County is “the appropriate” venue under West Virginia law.

Further, in failing to address and consider the eight statutory *forum non conveniens* factors enumerated in West Virginia Code § 56-1-1a, the circuit court committed the identical error that led this Court to issue a writ of prohibition in *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 713 S.E.2d 356 (2011). Despite the Tough Mudder Defendants’ motion regarding the dismissal of this action for *forum non conveniens*, the circuit court made no independent findings regarding any of the statutory factors. Likewise, the circuit court failed to issue any sort of ruling or finding on the Tough Mudder Defendants’ alternative motion that the matter be transferred to Berkeley County under West Virginia Code § 56-9-1.

Rather, the circuit court signed and entered the lengthy order prepared and submitted by Plaintiff, which included findings of fact and conclusions of law far beyond those articulated by

the circuit court in its letter directing Plaintiff to write the order. In signing this proposed order, the circuit court entirely disregarded the alternative order submitted by Tough Mudder Defendants that hewed closely to the circuit court's direction. Consequently, a writ against the circuit court's disregard for West Virginia law in favor of the Plaintiff's position should be issued.

B. Factual Background

Avishek Sengupta, a 28 year-old Senior Account Executive for a website engineering and optimization firm, 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. *See* Compl. at ¶1, Appendix 252. 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. *See* Compl. at ¶¶1, 17-18, Appendix 252, 257-58. Decedent did not immediately emerge from the water after jumping from the platform. *See* Compl. at ¶¶ 52, 58, 92, Appendix 265, 266, 273.

Decedent was pulled from the water by Co-Defendant Travis Pittman, who was employed by Co-Defendant Airsquad 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. *See* Compl. at ¶¶ 30-31, 52, 58, 92, Appendix 260, 265, 266, 273. Medics performed CPR on Decedent, but Decedent did not regain consciousness. *See* Compl. at ¶¶ 98, 99, Appendix 274. Decedent died on April 21, 2013, after life support was withdrawn. *See* Compl. at ¶¶ 101, 102, Appendix 274.

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* Agreement, Ex. A of the Motion, Appendix 43-46. It also contained a clause titled “Venue and Jurisdiction” which read:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal trial 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.

Agreement at 2, Ex. A of the Motion, Appendix 45.

Although the event took place in Berkeley County, Plaintiff, Mr. Sengupta’s mother and personal representative, instituted this lawsuit, which seeks declarations regarding the Agreement and also seeks to recover monetary damages for the death of Avishek Sengupta in Marshall County. *See* Compl., Appendix 252-82. She named six defendants: Tough Mudder LLC., which organized and hosted the event; Peacemaker National Training Center, LLC, which served as the location of the event; General Mills, Inc., and General Mills Sales, Inc.; Airsquid Ventures, Inc. (d.b.a. Amphibious Medics), which provided the rescue personnel for the April 20, 2013 event; and Travis Pittman, the rescue diver stationed at the obstacle where Mr. Sengupta drowned. None of the parties, however, is located in Marshall County for the purposes of venue. Plaintiff is a resident of Maryland and her deceased son was also a Maryland resident. *See* Compl. at ¶ 3, Appendix 253. Defendant Travis Pittman, the only individual defendant, is also a resident of Maryland. *See* Compl. at ¶ 6, Appendix 254. Of the corporate entities named in this lawsuit, Peacemaker National Training Center, LLC is the only West Virginia resident, and its principal and only place of business is located in Berkeley County. *See* Compl. at ¶ 7, Appendix 254. 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. *See* Compl. at ¶¶ 4-5, 8, Appendix 253-54.

According to the Complaint, the allegations that served as predicate for venue in Marshall County stated that “one or more of the Defendants deliberately and regularly engaged in commerce in Marshall County and/or resides in Marshall County” pursuant to West Virginia Code § 56-1-1. Compl. at ¶ 13, Appendix 256-57. The Complaint goes on to state that Tough Mudder, Airsquid, General Mills, and General Mills Sales engage in purposeful and regular commercial activities in Marshall County. Compl. at ¶ 13a-c, Appendix 256-57. The Complaint also alleges that Tough Mudder events are held in locations near Marshall County, and, as a result, Marshall County residents are actively involved in these events and exposed to allegedly fraudulent advertising and physical dangers. Compl. at ¶ 13b, Appendix 256. Nowhere in the Complaint did the Plaintiff discuss the Venue and Jurisdiction clause as a basis for a finding of venue in Marshall County. *See* Compl., Appendix 252-82.

C. Procedural History

Pursuant to the Agreement, the Senguptas, Tough Mudder, and Airsquid attempted to mediate this dispute, but such efforts were unsuccessful. Transcript of August 22, 2014 Hearing at 72:2-73:3, Appendix 560-61. After participating in mediation pursuant to the Agreement, 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 on April 18, 2014.² Upon receiving email notification of the arbitration demand, Plaintiff filed this instant wrongful death action and a declaratory judgment action in the Circuit Court of Marshall County on the same day, April 18, 2014. *See* Compl., Appendix 252-82.

Plaintiff sought a stay of the arbitration by requesting that the AAA stay the matter. After the AAA denied her request, on May 23, 2014, Plaintiff, on an *ex parte*, basis requested that the circuit court halt the arbitration through a temporary restraining order (“TRO”) and a preliminary injunction. After issuing an *ex parte* TRO, the court conducted a hearing on June 3, 2014 and entered an order on June 23, 2014, staying the matter until May 23, 2015. *See* May 23, 2014 Order, Appendix 283-91; Transcript of June 3, 2014 Hearing, Appendix 423-86; June 23, 2014 Order, Appendix 292-303. The circuit court’s lengthy June 23, 2014 order was identical to the proposed order presented by Plaintiff, including the document identifiers in the top and bottom left corners of the pages. *See* May 23, 2014 Order, Appendix 283-91; Pltf. Proposed Injunction Order, Appendix 304-15. The signed order contained findings of fact wholly irrelevant to the preliminary injunction and wholly unaddressed in the hearing regarding the injunction. *See* Pltf. Proposed Injunction Order, Appendix 304-15; *but see* Tough Mudder Defs. Proposed Injunction Order, Appendix 316-24.

In responding to Plaintiff’s Complaint, the Tough Mudder Defendants timely filed a 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. *See* the Motion, Appendix 15-120; the Reply, Appendix 155-251. Defendants Airsquid and Travis Pittman likewise timely filed a Motion to Dismiss for Improper Venue that contained an alternative

² Tough Mudder subsequently amended its filing before the AAA to include Peacemaker and the two General Mills entities as Claimants on May 22, 2014. *See* AAA Demand, Ex. B. of the Motion, Appendix 47-59; Amended AAA Demand, Ex. C. of the Motion, Appendix 60-67.

request that the action be moved to Berkeley County for the convenience of the parties. Defendants Airsquid and Pittman also filed a separate Motion to Stay and Compel Arbitration.

On August 22, 2014, a hearing was held on the various motions relating to venue and also Defendants' Motions to Stay and Compel Arbitration. On September 15, 2014, the circuit court sent brief letters to all parties stating that it was denying the Defendants' motions. The stated basis for the denial of the motions relating to venue consisted only of "[t]he Court's instant 'venue' ruling and analysis begins and necessarily ends with the '*Venue and Jurisdiction*' clause of the putative agreement." Sept 15, 2015 Venue Letter, Appendix 325-26. The letter continued "[a]s succinctly put in Plaintiff's written submission, '*In sum, based on the Venue and Jurisdiction clause alone, venue is valid on a state-wide basis, including in the Marshall County Circuit Court, without need for any venue analysis.*' This Court agrees." *Id.* (emphasis in the original). The court then asked that the Plaintiff draft an order "reflective of the Court's foregoing determinations." *Id.*

Tough Mudder Defendants also filed a Petition with the United States District Court for the Northern District of West Virginia to Compel Arbitration under the Federal Arbitration Act, (FAA), 9 U.S.C. §§ 1, *et seq.*, on June 2, 2014 based upon the provisions of the Agreement against the Decedent's three immediate family members, including Plaintiff. The Respondents filed a motion to dismiss the petition on August 8, 2014. The district court dismissed the petition without prejudice for lack of subject matter jurisdiction on October 2, 2014 because Tough Mudder did not include Travis Pittman, who had relied upon the arbitration provision as a defense before the circuit court.³

³ Tough Mudder Defendants are appealing the district court's decision.

Despite the circuit court's insistence that no venue analysis was needed to address the question of whether venue was proper, and giving no indication of the circuit court's findings regarding any of the statutory factors enumerated in 56-1-1a, Plaintiff drafted an extensive 14-page order containing multiple findings of fact and conclusions of law relating to the issue of venue and convenience, which Plaintiff submitted to the circuit court on November 5, 2014. *See* Plf. Proposed Venue Order, Appendix 327-342. On January 9, 2015, the circuit court entered the orders denying the Defendants' various motions, signing an order nearly identical to the order proposed by Plaintiff, which included identical document identifier codes in the upper and lower left hand corners. *See* Plf. Proposed Venue Order at 1, Appendix 327-342; Jan. 9, 2015 Venue Order at 1, Appendix 1-14. In so doing, the circuit court failed to consider Defendants' proposed venue order, which hewed more closely to the circuit court's instruction. *See* Tough Mudder Defs. Proposed Venue Order, Appendix 343-68. The sole difference between the order submitted and the order signed was the excision of the penultimate sentence, which had read: "**ORDERED** Defendants' agreement to the form of this Order shall not affect the Defendants' right to appeal the substance of this Order. It is further . . ." *See* Plf. Proposed Venue Order at 13, Appendix 341; Jan. 9, 2015 Venue Order at 13, Appendix 13.

The Tough Mudder Defendants are seeking redress of the circuit court's determination as to the Motion to Stay and Compel Arbitration through an appeal of the order under the collateral order doctrine. In light of the differing avenues for the review of these two rulings, the Tough Mudder Defendants request this Court to undertake the extraordinary remedy of issuing a writ of prohibition based upon the circuit court's venue ruling.

D. Standard of Review

“Prohibition will lie to prohibit a judge from exceeding his legitimate powers.” *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 645, 713 S.E.2d 346, 360 (2011) (quoting Syl. Pt. 2 *State ex rel. Winter v. MacQueen*, 161 W. Va. 30, 239 S.E.2d 660 (1977)). In the context of disputes over venue, this Court has previously held that a writ of prohibition is an appropriate remedy “to resolve the issue of where venue for a civil action lies,” because “the issue of venue [has] the potential of placing a litigant at an unwarranted disadvantage in a pending action and [] relief by appeal would be inadequate.” *Id.* (alterations in original) (quoting *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 503, 526 S.E.2d 23, 25 (1999)). Further, “in every case that has had a substantial legal issue regarding venue, [this Court] ha[s] recognized the importance of resolving the issue in an original action.” *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 124, 464 S.E.2d 763, 766 (1995).

Although “this Court’s review of a trial court’s decision on a motion to dismiss for improper venue is for abuse of discretion[,]” this case involves questions regarding the circuit court’s interpretation and application of a forum-selection clause. *See United Bank, Inc. v. Blosser*, 218 W. Va. 378, 383, 624 S.E.2d 815, 820 (2005) (applying an abuse of discretion standard when reviewing a circuit court’s decision to deny a motion to dismiss for improper venue). According to the circuit court’s September 15, 2014 letter to the parties announcing the court’s decision to deny all of the Defendants’ venue-related motions, the circuit court pointed only to the Venue and Jurisdiction clause as justification for the court’s ruling. *See* Sept. 15, 2014 Venue Letter, Appendix 325-26. Additionally, the circuit court’s January 9, 2015 Order makes clear that the circuit court’s ruling was based only upon its interpretation of the Venue and Jurisdiction clause. *See* Jan. 9, 2015 Venue Order at ¶ 38, Appendix 11. Consequently, the

circuit court's interpretation and enforcement of this clause is at the crux of this Court's review of the circuit court's actions, and such questions of the interpretation, applicability, and enforceability of forum-selection clauses should be reviewed *de novo*. See *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 139, 690 S.E.2d 322, 333 (2009); see also *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691-92 (8th Cir. 1997) (concluding "that *de novo* review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in a forum selection clause"). See also *Ware v. Ware*, 224 W. Va. 599, 603-604, 687 S.E.2d 382, 386-387 (2009) ("[Q]uestions about the meaning of contractual provisions are questions of law, and we review a trial court's answers to them *de novo*." (quoting *FOP, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 100, 468 S.E.2d 712, 715 (1996))).

Additionally, by failing to address the Tough Mudder Defendants' motions relating to the propriety of venue in Marshall County in light of the general statute or the *forum non conveniens* statute and also failing to address the Tough Mudder Defendants' alternative motion requesting that the matter be removed to Berkeley County, this case implicates the circuit court's misinterpretation and misapplication (really the non-application) of the general venue statute, the *forum non conveniens* statute, and the statute relating to the transfer of matters to a competent court with jurisdiction over the matter in a different county. See Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."); see also *Zakaib*, 227 W. Va. at 646, 713 S.E.2d at 361.

As previously determined by this Court, "[t]he normal deference accorded to a circuit court's decision . . . does not apply where the law is misapplied or where the decision [not] to transfer hinges on an interpretation of a controlling statute." *State ex rel. Riffle v. Ranson*, 195

W. Va. 121, 124, 464 S.E.2d 763, 766 (1995); *see also Zakaib*, 227 W. Va. at 645-46, 713 S.E.2d at 360-61 (agreeing that *de novo* review applies to the allegation that circuit court “misapplied and/or misinterpreted the [*forum non conveniens*] statute”).

Nevertheless, for the reasons explained below, a writ of prohibition would be proper in this instance even under an abuse of discretion standard.

III. SUMMARY OF ARGUMENT

In filing this lawsuit in Marshall County, a county with no connection whatsoever to this controversy, Plaintiff has engaged in forum shopping. She has chosen a venue that is not authorized under the laws of West Virginia for the apparent tactical advantage derived from litigating in her local counsel’s back yard.⁴ In an attempt to justify this otherwise unauthorized choice of venue, Plaintiff has belatedly relied upon a provision in a document the very enforceability of which she contests as she refers to the document as the “putative agreement” throughout her Complaint.

The circuit court erred in allowing this matter to proceed in Marshall County. The Tough Mudder Defendants, along with Airsquid and the one individual defendant, Travis Pittman, filed motions to dismiss for improper venue,⁵ disputing the Plaintiff’s allegation that venue was appropriate in Marshall County under West Virginia Code § 56-1-1 due to the commercial activities of Tough Mudder, Airsquid, and General Mills. In rejecting all of the Defendants’

⁴ The Tough Mudder Defendants note and request that this Court take judicial notice of the proximity of local plaintiff’s counsel’s office, which is located at 1609 Warwood Avenue, Wheeling, WV 26003, and the Marshall County Courthouse, which is located at 511 6th Street, Moundsville, WV 26041. The distance between the two locations is less than 20 miles, and travel time by car ranges from 25 minutes to 40 minutes depending on the route taken and the travel conditions.

⁵ The Defendants also asked the circuit court to stay the instant action and to compel arbitration. The circuit court also denied these motions in a separate order. The Tough Mudder Defendants are appealing the order relating to arbitration in a separate appeal.

various motions to dismiss this matter for improper venue, the circuit court erred by failing to consider West Virginia's statutory venue requirements and adopting a strained reading of a contractual provision.

With respect to the circuit court's decision regarding the motions to dismiss for improper venue, the circuit court erred in interpreting the Venue and Jurisdiction clause as conferring venue on a state-wide basis. The circuit court further erred in relying on this clause as a basis for venue as the Plaintiff has plainly disputed the validity and enforceability of the Agreement as a whole by referring to it as the "putative agreement" throughout the Complaint, a characterization of the Agreement that the circuit court adopted in its September 15, 2014 letter to the parties. Despite the plain language of the provision, which requires that a matter be brought in "*the* appropriate state or federal court" within the state where the Tough Mudder event is held, the circuit court determined that this provision authorized venue throughout the state of West Virginia rather than in *the* appropriate court. By disregarding this definite article, the circuit court abused its discretion.

In addition to abusing its discretion through its erroneous interpretation of and reliance on the Venue and Jurisdiction clause, the circuit court abused its discretion in refusing to address the basis for venue as stated in the Complaint and under the venue laws of West Virginia. The stated basis for venue in the Complaint was the allegation that several of the Defendants "deliberately and regularly engag[e] in commerce in Marshall County" and attempted to claim that venue was appropriate under the laws of West Virginia. In fact, the Plaintiff's claims in the Complaint regarding the allegedly deliberate and regular engagement of commerce in Marshall County, served as a basis for extensive venue-based discovery aimed at developing facts relating to the extent of commercial and business activities in Marshall County. Despite this extensive venue-

based discovery, there was no factual finding upon which the circuit court could base a finding that venue was proper under West Virginia Code §56-1-1. *See Crawford v. Carson*, 138 W. Va. 852, 78 S.E.2d 268 (1953); *see also State ex rel. Galloway Group v. McGraw*, 227 W. Va. 435, 437, 711 S.E.2d 257, 259 (2011) (“Where 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.”) (quoting Syl. Pt. 1, *Wetzel Co. Sav. & L. Co. v. Stern Bros.*, 156 W. Va. 693, 195 S.E.2d 732 (1973)).

The Tough Mudder Defendants also requested that the circuit court consider dismissing the matter due to *forum non conveniens* under West Virginia Code § 56-1-1a. The circuit court failed to indicate that it had considered the eight statutory factors laid out in West Virginia Code § 56-1-1a, instead stating only that “[t]he Court’s instant ‘venue’ ruling and analysis begins and necessarily ends with the ‘*Venue and Jurisdiction*’ clause of the putative agreement.” Sept. 15, 2014 Venue Letter, Appendix 325. Likewise, the order signed by the circuit court fails to address all of the statutory factors. *See* Jan. 9, 2014 Venue Order at ¶¶ 40-43, Appendix 12.

In failing to address the Tough Mudder Defendants’ motion to dismiss for *forum non conveniens*, the circuit court committed an error of law for which this Court already has determined that a writ of prohibition is appropriate. Because the circuit court’s decision conflicts with the decisions of this Court and the plain language of the *forum non conveniens* statute in numerous respects, a writ of prohibition should be granted. The circuit court’s failure to consider and make findings with respect to all eight statutory *forum non conveniens* factors is incompatible with this Court’s express holding in *Zakaib*. This Court made clear in *Zakaib* that “in all decisions on motions made pursuant to West Virginia Code § 56-1-1a (Supp. 2010), courts *must state findings of fact and conclusions of law as to each of the eight factors listed for*

consideration under subsection (a) of that statute.” 227 W. Va. at 650, 713 S.E.2d at 365 (emphasis added). The circuit court indisputably failed to comply with that requirement here. And just as in *Zakaib*, the circuit court’s failure to make the requisite findings alone requires issuance of a writ of prohibition.

Additionally, in light of the inconvenience and resultant prejudice that Defendants will likely suffer if the matter proceeds in Marshall County, the Tough Mudder Defendants also made an alternative motion requesting that the circuit court transfer the matter under West Virginia Code § 56-9-1 to Berkeley County, the county in which venue is clearly appropriate under West Virginia Code § 56-1-1. While this case has no connection to Marshall County, it is convenient to Plaintiff’s local counsel, whose office is located less than 20 miles away from the Marshall County courthouse. Defendants will be at a severe logistic and tactical disadvantage if the matter proceeds in Marshall County. The only county in the State of West Virginia with any connection to this lawsuit is Berkeley County. The sole West Virginia entity involved in this lawsuit, Peacemaker, is located hours away from Marshall County in Berkeley County. The events that are at the heart of this matter, the April 20, 2013 Tough Mudder event, took place in Berkeley County. The people of Berkeley County should have a hand in deciding the issues that are at the heart of this matter as they have a vested interest in the outcome of litigation involving events that occurred within their county involving a business located in their county. Further, many of the fact witnesses who were the first responders are public employees of Berkeley County, and allowing the matter to proceed in Marshall County would be especially burdensome to such witnesses. The circuit court, however, failed to consider or address this alternative motion and the grounds for the possible finding that good cause existed under West Virginia Code § 56-9-1.

By allowing this action to remain in Marshall County, the circuit court ignored the grave tactical prejudice that Defendants will suffer if the matter remains in Marshall County.

In sum, allowing this matter to proceed in Marshall County would subvert the purpose of West Virginia's entire statutory and legal framework regarding venue. Specifically, allowing this matter to proceed in Marshall County would condone the Plaintiff's forum shopping. Consequently, a writ of prohibition should be granted.

IV. STATEMENT RESPECTING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court's consideration of this case. Argument is proper pursuant to Rule 19 because this case involves, *inter alia*, assignments of error in the application of settled law; an exercise of discretion that is unsustainable; and this case involves a narrow issue of law. *See* W. Va. R. App. P. 19(a)(1), (2), (4).

V. ARGUMENT

At its core, the Plaintiff's choice to bring this suit in Marshall County, is a choice based upon the Plaintiff's efforts to ensure that the Defendants are severely inconvenienced and potentially prejudiced. Marshall County is on roughly the other side of the State from the one county with any connection to this matter, Berkeley County. Marshall County's only connection to this lawsuit is the Marshall County courthouse's proximity to the law offices of Plaintiff's counsel in Wheeling.

A. The Circuit Court Erred in Ignoring the Unambiguous, Plain Meaning of the Venue and Jurisdiction Provision to Find that Venue did Lie in Marshall County and then Misapplying Settled West Virginia Law Regarding Contract Interpretation after Finding an Ambiguity in the Agreement.

The circuit court erred in finding that venue was appropriate in Marshall County based upon the provisions in the Venue and Jurisdiction clause. The circuit court disregarded the plain meaning of the clause. The word “appropriate” clearly refers to the unambiguously stated subject matter of the clause, to wit, “Venue and Jurisdiction.” Thus, “the appropriate trial court” is one in which both venue and subject matter jurisdiction exist. If the parties had intended venue to lie in any county in the State having personal and subject matter jurisdiction, the provision would have clearly stated as much. Instead, the circuit court substituted the word “any” for “the” into the clause to justify the finding that venue is authorized through the terms of the Agreement on a state-wide basis. Moreover, the circuit court failed to consider West Virginia’s laws relating to contract interpretation and erroneously adopted the principle of *contra proferentem*, contrary to West Virginia’s laws relating to contract interpretation.

When presented with an integrated agreement, it is up to the trial court to determine when the terms of the agreement are unambiguous and, if the terms are unambiguous, the court is to construe the contract according to its plain meaning. *FOP, Lodge No. 69*, 196 W. Va. at 100, 468 S.E.2d at 715. As this Court has made clear, “[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.” Syl. Pt. 1 *FOP, Lodge No. 69*, 196 W. Va. at 99, 468 S.E.2d at 714 (quoting Syl. Pt. 2, *Bennett v. Dove*, 166 W. Va. 772, 277 S.E.2d 617 (1981)); see also Syl. Pt. 3, *Cotiga Dev.t Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

In cases where the plain language of the contract is ambiguous, however, a court must go beyond the plain language of the contract. This Court gave a clear definition of ambiguity in Syl. Pt. 13, *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907), stating:

Ambiguity in a statute or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.

See HN Corp. v. Cyprus Kanawha Corp., 195 W. Va. 289, 294, 465 S.E.2d 391, 396 (1995); *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 432, 345 S.E.2d 33, 35 (1986). “The mere fact that parties do not agree to the construction of a contract does not render it ambiguous.” *Lee v. Lee*, 228 W. Va. 483, 486, 721 S.E.2d 53, 56 (2011) (quoting Syl. Pt. 1, *Berkeley County Public Service Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968)). “Contract language is considered ambiguous where an agreement’s terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.” Syl. Pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002).

If a court, however, determines that a provision of a contract is ambiguous, “the intent of the parties must be ascertained.” *Harris v. Harris*, 212 W. Va. 705, 709, 575 S.E.2d 315, 319 (2002). “[T]he ambiguous terms should be construed in such a manner as to effectuate the intention of the parties, but only where the evidence pertaining to the parties’ intent conflicts, the ambiguous terms should be construed against the party who drafted the document.” *Lee*, 228 W. Va. at 487, 721 S.E.2d at 57. Despite the well-settled law relating to the manner in which a court is to interpret an ambiguous contract, the circuit court created new law by asserting that “West Virginia also follows the rule of *contra proferentem*,” despite the fact that no published West Virginia court opinion has employed this Latin phrase to date. *See* Jan. 9, 2015 Venue Order at

¶ 26, Appendix 7. Further, the cases the circuit court cites to support its statement that West Virginia adheres to the doctrine of *contra proferentem* do not stand for such. For example, *Henson v. Lamb*, 120 W. Va. 552, 199 S.E. 459 (1938), addressed a letter, not a contract, which had been prepared by a bank's vice president. This letter stated that the sum deposited by a property owner to pay off a deed of trust had been received by the bank and that the deed of trust would be considered paid without further action by the depositor. *Henson*, 120 W. Va. at 555, 199 S.E. at 460-461. The Court determined that this letter should be construed against the bank as the drafter of the document; there was no signature from the property owner. *Id.* at 557-558, 199 S.E. at 461-462. Likewise, *Lawyer Disciplinary Board v. White*, 764 S.E.2d 327, 2014 W. Va. LEXIS 978 (W. Va. 2014), involves a unilateral letter, not a contract, which this Court determined should be construed against the drafter. Again, this case is not applicable to the situation here where the Decedent signed and accepted the Agreement containing this Venue and Jurisdiction clause after having ample opportunity to review it.

The other case cited in the circuit court's order as a basis for the circuit court's adaptation of the doctrine of *contra proferentem*, *Lee v. Lee*, 228 W. Va. 483, 721 S.E.2d 53 (2011), actually serves as an example of the application of West Virginia's laws surrounding ambiguous contract terms—an examination of parol evidence. In *Lee*, a prenuptial agreement contained the ambiguous phrase “another relationship.” Through testimony in an evidentiary hearing, it became clear that the reasonable interpretation and intention of the husband was that “another relationship” was to mean any sort of dating and sexual relationship while the wife reasonably understood and intended “another relationship” to mean an exclusive, serious romantic relationship similar to that of a married couple. *Id.* at 486, 721 S.E.2d at 56. Due to the ambiguity, the parties in the trial court introduced extrinsic evidence regarding their

understandings of the meaning of “another relationship.” *Id.* at 487, 721 S.E.2d at 57. Only after determining that the parol evidence introduced by the parties failed to resolve the ambiguity did the Court consider that the agreement was to be construed against the drafter. *See id.* at 487-488, 721 S.E.2d at 57-58. Such an effort to resolve an ambiguity through extrinsic evidence is hardly the strict adherence to the doctrine of *contra proferentem* contemplated in the circuit court’s order.

In this case, there is no ambiguity in the language of the Venue and Jurisdiction clause.

This clause reads:

Venue and Jurisdiction: I understand that if legal action is brought, the appropriate state or federal trial 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.

Agreement, Ex. A of the Motion, Appendix 45.

As the Venue and Jurisdiction clause makes clear, any legal actions are to be brought in the place where the Tough Mudder event occurred, and that the laws of the state where the event occurs would apply to the legal action—not the laws of the state where the potential party may reside or may have signed the Agreement.

The unambiguous language of the Venue and Jurisdiction clause states that legal action arising from the Tough Mudder event should be brought in the appropriate trial court of the State of West Virginia or the appropriate federal trial court in West Virginia. The appropriate court is one having subject matter jurisdiction over the dispute and in which venue is proper. Had the parties intended to authorize venue in every county of the State in which a particular Tough Mudder Event occurs, the clause would have included language that clearly authorized venue in every county. Further, in light of Tough Mudder’s use of “the” before the word appropriate, a reading of the clause authorizing legal action in every or any trial court in West Virginia with

subject matter jurisdiction entirely disregards the plain meaning of the clause. *See* Jan. 9, 2015 Venue Order at ¶¶ 27-31, Appendix 7-9. As both the Plaintiff in her brief and the circuit court in its Order note, there is a “well-recognized and long established principle of interpretation of written instruments that the express mention of one thing implies the exclusion of another, expression *unius est exclusion alterius*.” *Bischhoff v. Francessa*, 133 W. Va. 474, 488, 56 S.E.2d 865, 873 (1949) (quoting *Harbert v. County Court*, 129 W. Va. 54, 64, 39 S.E.2d 177, 186 (1946)). All of the venue clauses from other jurisdictions that are noted in the circuit court’s order clearly restrict the venue to a specific, named forum. Jan. 9, 2015 Venue Order at ¶ 32, Appendix 9. Likewise, in using a definite article, Tough Mudder sought to bind the parties to the venue where the Tough Mudder event was held. The circuit court’s reading of the Venue and Jurisdiction clause as an authorization of state-wide venue is erroneous, and, due to the reciprocal nature of the Agreement, would allow Tough Mudder to potentially bring suit against any participant in the April 2013 in a court anywhere in the State of West Virginia. The circuit court’s interpretation of the Venue and Jurisdiction clause is unconscionable under such a scenario.

Further, in holding that the provision authorizes venue in any state or federal court in West Virginia that has the appropriate subject matter jurisdiction, the circuit court has seen fit to alter the Agreement by inserting language into the clause as the word “any” is not contained in the clause. *See* Jan. 9, 2015 Venue Order at ¶ 27, Appendix 7-8. The circuit court’s adoption of such a reading of the clause is a misapplication of West Virginia’s laws relating to contract interpretation. The circuit court’s actions run contrary to Syllabus Point 1 in *FOP, Lodge No. 69 v. City of Fairmont*, in which this Court prohibited courts from “alter[ing], pervert[ing] or destroy[ing] the clear meaning and intent of the parties as expressed in unambiguous language in

their written contract to make a new or different contract for them.” 196 W. Va. at 99, 468 S.E.2d at 714 (1996),

Finally, in finding that there was no venue restriction in the clause so long as the court was in West Virginia, despite the plain meaning of the Venue and Jurisdiction clause’s language, the circuit court should have looked to West Virginia’s venue provisions to determine if venue was proper. However, the circuit court failed to even consider West Virginia’s venue requirements. Jan. 9, 2015 Venue Order at ¶ 38, Appendix 11. Such a failure constitutes further error by the circuit court.

B. The Circuit Court Erred in Failing to Consider West Virginia’s Statutory Venue Requirements in Holding that Venue did Lie in Marshall County and, Had the Circuit Court Considered the State’s Venue Requirements, It Would Have Found that Venue was Improper in Marshall County Under West Virginia Law.

In erroneously basing its ruling solely upon the Venue and Jurisdiction clause as stated above, the circuit court failed to address any of the grounds for venue in the Complaint. Rather, the circuit court reiterated the law as stated in *Kidwell v. Westinghouse Elec. Co.*, 178 W. Va. 161, 163, 358 S.E.2d 420, 422 (1986). Jan. 15, 2015 Venue Order at ¶ 38, Appendix 11. Had the circuit court considered and applied settled West Virginia law to Plaintiff’s choice of venue, it would have concluded that venue for this matter does not lie in Marshall County. By failing and refusing to make any sort of findings relating to the propriety of Plaintiff’s choice of venue in light of West Virginia law and the extensive venue-related discovery in which the parties participated to provide the factual information necessary for the circuit court to make a ruling relating to venue, the circuit court abused its discretion.

Plaintiff has filed in an improper venue according to the requirements set forth in W. Va. Code § 56-1-1 and W. Va. Code § 31D-15-1501. Under West Virginia's general venue statute, W. Va. Code § 56-1-1:

- (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.

According to the Complaint, Plaintiff alleges 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, the venue-based discovery that took place prior to the circuit court's ruling revealed that none of the corporate defendants has contact sufficient to serve as a basis for venue with Marshall County.⁶ *See* General Mills, Inc.'s Answers to Venue-Related Interrogatories, Ex. 3 of the Reply, Appendix 228-51; General Mills Sales, Inc.'s Answers to Venue-Related Interrogatories, Ex. 2 of the Reply, Appendix 204-27; Tough Mudder's Answers to Venue-Related Interrogatories, Ex. 1 of the Reply, Appendix 177-91; Tough Mudder's Supplemental Answers to Venue-Related Interrogatories, Ex. 1A of the Reply, Appendix 192-203; Airsquid's Answers to Venue-Related Interrogatories, Appendix 369-409. *See also* 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

⁶ Plaintiff waived her argument that Airsquid's contacts and commercial activity are sufficient to allow venue to properly lie by relying on only Tough Mudder and General Mills contacts with Marshall County as a basis for venue in her Consolidated Opposition. *See* Pltf.'s Consolidated Opp. To Defs. Venue Related Motions to Dismiss, at 5-10, Appendix 127-32; *see also* Transcript of August 22, 2014 Hearing 35:20-24, Appendix 523 (Plaintiff's counsel arguing only that Tough Mudder's and General Mills' contacts with Marshall County are a sufficient basis for a finding of proper venue, waiving his argument that Airsquid's contacts are a sufficient basis for venue as was alleged in the Complaint).

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)). In terms of the venue inquiry, those notions of fair play and substantial justice 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.” *McGraw*, 227 W. Va. at 437, 711 S.E.2d at 259 (quoting Syl. Pt. 1, *Wetzel Co. Sav. & L. Co. v. Stern Bros.*, 156 W. Va. 693, 195 S.E.2d 732 (1973)).

In light of the requirement that venue comport with traditional notions of fair play and substantial justice, West Virginia courts have looked to West Virginia’s long-arm statute to determine if venue is proper based upon W. Va. Code § 56-1-1(a)(2). *See Kidwell v. Westinghouse Elec. Co.*, 178 W. Va. 161, 163, 358 S.E.2d 420, 422 (1986).⁷ In *Kidwell v. Westinghouse Electric Co.*, this Court narrowed its previous ruling in *Brent v. Board of Trustees*, 163 W. Va. 390, 256 S.E.2d 432 (1979), in which this Court had determined that “foreign corporations do business in a particular county under Code, 56-1-1(b) when they do any of those

⁷ The circuit court acknowledges in its Order the legal standard set forth in *Kidwell* regarding venue, but the circuit court fails to broach how such a standard would be applied in light of the alleged commercial activities by General Mills and Tough Mudder in Marshall County despite having information relating to such activities based upon the venue-based discovery that the parties were ordered to undertake for that very purpose. *See* Jan. 9, 2015 Venue Order at ¶ 38, Appendix 11. *See* Transcript of June 3, 2014 Hearing at 56:3-57:7, Appendix 478-79.

acts specified in Code, 31-1-15 in a particular county and, consequently, they may be sued in that particular county on any cause of action arising from those acts.” *Id.* at 394, 256 S.E.2d at 435.⁸ The *Kidwell* Court held that while W. Va. Code § 31-1-15 was the benchmark for determining whether a foreign corporation was conducting business within a county for the purposes of W. Va. Code § 56-1-1, it was not necessary that the sort of business conducted within the chosen forum county be the same business out of which the dispute at issue arose. Consequently, under both *Kidwell* and *Brent* a court is still to look to West Virginia’s long arm statute, now W. Va. Code § 31D-15-1501, to determine the sufficiency of the entity’s contacts to the county for the purposes of venue. The present long-arm statute, W. Va. Code § 31D-15-1501,⁹ reads in part:

A foreign corporation is deemed to be transacting business in the State if:

- (1) The corporation makes a contract to be performed, in whole or in part, by any party thereto in this State;
- (2) The corporation commits a tort, in whole or in part, in this State; or
- (3) The corporation manufactures, sells, offers for sale or supplies any product in a defective condition and that product causes injury to any person or property

⁸ *Kidwell* did not fully overrule *Brent*, but only overruled it to the extent that it suggested a more restrictive test for determining whether a foreign corporation was conducting business in a certain county. See *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 503-504, 526 S.E.2d 23, 25-26 (1999) (quoting *Kidwell*, 178 W. Va. at 163, 358 S.E.2d at 422).

⁹ In the prior statute W. Va. Code §31-1-15, the statute under which both *Brent* and *Kidwell* were decided, the provision read slightly differently and stated that a corporation is deemed to be “conducting affairs or doing business” in the State:

- (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto in this State;
- (b) if such corporation commits a tort, in whole or in part, in this State; or
- (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and that product causes injury to any person or property within this State notwithstanding the fact that the corporation had no agents, servants or employees or contacts within this State at the time of the injury.

W. Va. Code § 31-1-15.

within this State notwithstanding the fact that the corporation had no agents, servants or employees or contacts within this State at the time of the injury.

W. Va. Code § 31D-15-1501(d). Additionally, W. Va. Code § 31D-15-1501 contains a list of examples of activities that specifically do not constitute “conducting affairs” within the State. Although the list is not exhaustive, the listed activities include: selling through independent contractors; conducting affairs in interstate commerce; and effecting sales through independent contractors. W. Va. Code § 31D-15-1501(b)(4), (10), (13).

In light of this Court’s reliance on the language of the long-arm statute to define the contacts required within a county to form the basis of proper venue, Plaintiff’s choice of forum clearly fails to comport with West Virginia’s venue requirements. *See Kidwell*, 178 W. Va. at 163, 358 S.E.2d at 422; *see also State ex rel. Thornhill Group, Inc. v. King*, 2014 W. Va. LEXIS 648, 21, 2014 WL 2572874 (W. Va. June 6, 2014) (“West Virginia Code § 56-1-1 prescribes that a civil action shall be brought where the individual defendants reside, where a corporate defendant has a principal place of business, or where the cause of action arose[.]”).

Despite the venue-based discovery available and presented to the circuit court, the circuit court refused to make any finding relating the to the propriety of venue in Marshall County in light of West Virginia’s venue requirements. This discovery made clear that Marshall County is not an appropriate venue for this action. From Tough Mudder’s founding until July 2, 2014, the date upon which Tough Mudder submitted its answers to these venue-based discovery requests, only 111 people out of the roughly 1.6 million people who had participated in Tough Mudder events or planned to do so later that year had listed Marshall County addresses. Tough Mudder’s Answers to Venue-Related Interrogatories, Number 2 at 3, Ex. 1 of the Reply, Appendix 180. Additionally, all agreements between participants and Tough Mudder involve participation in a Tough Mudder event, and no Tough Mudder event has ever been held in Marshall County. *See*

Tough Mudder's Answers to Venue-Related Interrogatories, Numbers 1-6 at 2-7, Ex. 1 of the Reply, Appendix 179-84; Tough Mudder's Supplemental Answers to Venue-Related Interrogatories, Number 3 at 3-4, Ex. 1A of the Reply, Appendix 195-96. Therefore, no contract involving Tough Mudder has been performed in whole or in part in Marshall County. *See* Tough Mudder's Answers to Venue-Related Interrogatories, Number 6 at 6-7, Ex. 1 of the Reply, Appendix 183-84.

Similarly, the venue-based discovery involving General Mills shows that neither General Mills defendant has a connection to Marshall County that is sufficient for venue to lie in Marshall County. As General Mills' discovery answers revealed, General Mills has made no contract with any entity in Marshall County or entered into a contract to be performed in whole or in part in Marshall County. Rather, General Mills' responses to the venue based discovery show that retailers and brokers based outside of Marshall County, which are the entities that contract directly with General Mills, are responsible for the placement of General Mills' products within Marshall County through other various contracts. *See* General Mills Inc.'s Answers to Venue-Related Interrogatories, Numbers 4, 5, and 7 at 6-10, 12-14, Ex. 3 of the Reply, Appendix 234-38, 240-42; General Mills Sales, Inc.'s Answers to Venue-Related Interrogatories, Numbers 4, 5, and 7 at 6-10, 12-14, Ex. 2 of the Reply, Appendix 210-214, 216-18.

Additionally, although Tough Mudder merchandise and General Mills products may be available in Marshall County, there is no allegation that any such product or merchandise that entered Marshall County was defective. Instead, this lawsuit involves the service that was provided in Berkeley County, allegations that the Tough Mudder event itself was inadequately staffed and negligently constructed and organized. Therefore, Plaintiff has failed to show that either of the two alleged venue-providing defendants has sufficient contacts with Marshall

County to warrant the filing of this present lawsuit in Marshall County. Therefore, the circuit court erred in failing to find that venue was improper in Marshall County.

Finally, Peacemaker's and Airsquid's responses to the propounded venue-based discovery show that neither entity conducts any sort of business in Marshall County. *See* Airsquid's Answers to Venue-Related Interrogatories, Appendix; Peacemaker's Answers to Venue-Related Interrogatories, Appendix 410-422. Plaintiff even waives her claim that either Peacemaker or Airsquid's contacts and commercial activity are sufficient to allow venue to properly lie by relying on only Tough Mudder and General Mills contacts with Marshall County as a basis for venue in her Consolidated Opposition. *See* Pltf.'s Consolidated Opp. To Defs. Venue Related Motions to Dismiss at 5-10, Appendix ; *see also* Transcript of August 22, 2014 Hearing 35:20-24, Appendix 523 (Plaintiff's Counsel arguing only that Tough Mudder's and General Mills' contacts with Marshall County are a sufficient basis for a finding of proper venue).

As stated previously, this matter has no connection to Marshall County.

C. The Circuit Court Erred in Failing Make a Determination Regarding the Eight Factors Needed to Rule Upon a *Forum Non Conveniens* Motion

The legislature has enumerated eight factors "to aid a court in making the ultimate determination of whether the interest of justice and convenience of the parties would, in fact, be served by staying or dismissing the action in favor of an alternate forum." *Zakaib*, 227 W. Va. at 649 n.6, 713 S.E.2d at 364 n.6. They are:

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

W. Va. Code § 56-1-1a. A movant need not establish that every factor weighs in favor of dismissal for *forum non conveniens*. Rather, “[t]he weight assigned to each factor varies because each case turns on its own unique facts.” *State ex rel. N. River Ins. Co. v. Chafin*, 758 S.E.2d 109, 115, 2014 W. Va. LEXIS 252 (W. Va. 2014). In this case, however, the circuit court erred in failing to even consider all of the necessary factors.

Instead, the circuit court addressed only four factors: the convenience of the parties; the residence of the plaintiff; the state in which the cause of action arose; and issue of personal jurisdiction of the arbitration action pending in Maryland over any potential non-Maryland defendants, defendants who have still not been identified. *See* Jan. 9, 2015 Venue Order at ¶¶ 40-42. In addition to failing to consider any other factors, the factors the circuit court did consider, were misapplied to the situation. Most egregiously, the circuit court considered potential parties to the suit in determining that the matter should remain in Marshall County. *See* Jan. 9, 2015 Venue Order at ¶ 42. Additionally, the circuit court wholly disregarded the myriad of Defendants’ witnesses who are located far from Marshall County and failed to appreciate the

distance between their location and Marshall County. Transcript of August 22, 2014 Hearing at 14:10-15:11, Appendix 502-03.

1. An Alternative Forum Exists Where the Action May Be Tried

As has been previously discussed, there is an alternative forum in the form of an arbitration, which will address and decide all of the issues relating to the enforceability of the agreement and whether Tough Mudder or any other party to the Agreement was in fact negligent or grossly negligent. Additionally, pursuant to the Agreement in which Venue and Jurisdiction clause the circuit court chose to enforce the Venue and Jurisdiction clause, there is a requirement that the parties proceed to arbitration after having participated in mediation. Again, the circuit court's failure to compel arbitration is being appealed separately.

2. Maintenance of the Action in West Virginia Would Work a Substantial Injustice on the Tough Mudder Defendants

Maintaining this action in Marshall County, West Virginia works a substantial injustice on the Tough Mudder Defendants. As previously stated, many of the witnesses expected to be called are public servants, first responders who arrived at the scene in an effort to resuscitate Mr. Sengupta, or provided assistance and support for the Tough Mudder event itself. Additionally, as the Complaint makes clear, many of the individuals who were on the same team as Mr. Sengupta worked with him in Maryland. They will be able to speak to Mr. Sengupta's training in preparation for the Tough Mudder event and also their accounts of his drowning. These individuals are being asked to travel to Marshall County, roughly 300 miles from Maryland. *See* Transcript of August 22, 2014 Hearing at 14:15-15:11, Appendix 502-03.

3. The Arbitration in Maryland Can Exert Jurisdiction Over Defendants

In light of all Defendants' various Motions to stay and compel arbitration, it can be inferred that all will submit to the arbitration proceeding currently in Maryland.

4. Plaintiff Resides in Maryland

As stated previously, Plaintiff resides in Maryland as did the Decedent. Without a more substantial connection to Marshall County, Plaintiff should not be allowed to take advantage of the judicial resources in Marshall County, West Virginia.

5. Plaintiffs' Cause of Action Accrued in Berkeley County

Although the death of Avishek Sengupta actually took place in Fairfax County, Virginia when he was removed from life support, his death was the result of events that occurred in Berkeley County, West Virginia. There is, however, no doubt that there was no action in Marshall County that was in anyway related to Avishek Sengupta's death.

6. The Private and Public Interests Weigh in Favor of Dismissal from Marshall County to Allow for Arbitration in Maryland

The West Virginia legislature directed courts to consider factors such as “the interest in having localized controversies decided within the State” and “the unfairness of burdening citizens in an unrelated forum with jury duty.” W. Va. Code § 56-1-1a(a)(6). Here, the controversy can hardly be considered local as all events took place over 250 miles away in Berkeley County. The public interests of justice necessitate that the matter be moved out of Marshall County so that the jury pool is not burdened by the responsibility of deciding a controversy wholly unconnected to their interests.

7. A Stay or Dismissal of this Action will Limit Duplicative or Contradictory Outcomes

Dismissing or staying this litigation to allow for arbitration to proceed offers the best hope to avoid “unreasonable duplication or proliferation of litigation.” W. Va. Code § 56-1-1a(a)(7). The arbitration demand offers the opportunity to determine issues central to this dispute in the manner contemplated by the parties. Specifically, the arbitration allows for a

declaration relating to the rights of the parties under the Agreement, which would streamline any litigation that the parties may deem necessary if the matter is not fully resolved through arbitration.

8. Arbitration Provides a Remedy

Arbitration does offer the opportunity to address all of the issues pled in Plaintiff's Complaint. While the arbitration demand submitted by the Tough Mudder Defendants does not address any potential damages for Plaintiff, Plaintiff can certainly join in the arbitration and add her own claims to the demand in the form of cross claims.

9. A Stay or Dismissal in Favor of the Pending Arbitration is Warranted

Because the circuit court substantially misapplied the statute, and failed to consider numerous factors identified by the legislature, “[t]he normal deference accorded to a circuit court’s decision to transfer [or not transfer] a case ... does not apply.” *Zakaib*, 227 W. Va. at 645, 713 S.E.2d at 360. Because the factors identified by the legislature weigh in favor of staying or dismissing this matter to allow the arbitration to proceed, the circuit court erred, not only in failing to address all of the factors enumerated by the legislature, but in failing to recognize that the weight of those factors indicate that the matter in Marshall County should be dismissed or stayed for *forum non conveniens*.

The text of W. Va. Code § 56-1-1a(a), which self-evidently seeks to make *forum non conveniens* available within this state and specifically directs that when “a claim or action would be more properly heard in [another forum], the court *shall* decline to exercise jurisdiction under the doctrine of *forum non conveniens*.” See *Zakaib*, 227 W. Va. at 649, 713 S.E.2d at 364 (“[T]he Legislature’s use of the word ‘shall’ [in the *forum non conveniens* statute] [was] clearly

intentional, given that it used the permissive word ‘may’ in other contexts within this statute. Thus, the term must be afforded a mandatory connotation in this context.”).

D. The Circuit Court Erred in Failing to Address and Grant the Tough Mudder Defendants’ Alternative Motion to Remove the Matter Under West Virginia Code § 56-9-1.

The circuit court erred in failing to remove and transfer this matter to Berkeley County pursuant to W. Va. Code § 56-9-1. 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 the removal of a matter to a different circuit court. The Plaintiff’s decision to file in Marshall County is a clear instance of forum shopping, the very phenomenon that West Virginia’s venue statutes are designed to prevent.

As discussed previously, the sole West Virginia party, Peacemaker, is located in Berkeley County; the actions giving rise to this matter all occurred in Berkeley County; and many of the witnesses are located in Berkeley County. Consequently, the people of Marshall County have no connection or interest in the outcome of this matter as it is wholly disconnected from Marshall County, but the people of Berkeley County have an interest in the outcome of this matter. The

potential jurors and courts of Marshall County should not be burdened with having to hear this matter, but the potential jurors and courts of Berkeley County should not be denied the ability to decide the fate of matters important to their lives.

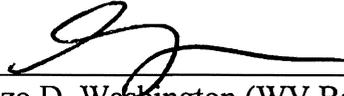
Despite this alternative motion being properly before the circuit court, the circuit court failed to issue any sort of ruling or finding relating to the removal of this matter to Berkeley County under West Virginia Code § 56-9-1. As was the case with the circuit court's *forum non conveniens* findings, the circuit court made no independent findings of fact or conclusions of law relating to the motion to remove the case to Berkeley County in its letters to counsel and simply adopted the Plaintiff's suggested findings in signing the Plaintiff's proposed order.

In signing the Plaintiff's proposed order, the circuit court entirely disregarded the Tough Defendants' competing order, which had hewed more closely to the circuit court's brief direction in its September 15, 2014 letter.

VI. CONCLUSION

For the foregoing reasons, the Court should grant the writ of prohibition to prevent the Circuit Court of Marshall County from presiding over this matter based upon Marshall County being the improper venue or *forum non conveniens* or the necessity of removal of this matter to Berkeley County in light of good cause.

Respectfully Submitted,



Alonzo D. Washington (WV Bar No. 8019)
Christopher M. Jones (WV Bar No. 11689)
Flaherty Sensabaugh Bonasso PLLC
48 Donley Street, Suite 501
Morgantown, WV 26501
(304) 598-0788
awashington@fsblaw.com
cjones@fsblaw.com

Robert P. O'Brien (*pro hac vice* pending)
Jennifer M. Sullam (*pro hac vice* pending)
Niles, Barton & Wilmer, LLP
11 South Calvert Street, Suite 1400
Baltimore, MD 21202
(410) 783-6300
rpobrien@nilesbarton.com
jmsullam@nilesbarton.com

Robert N. Kelly (*pro hac vice* pending)
Michele L. Dearing (WV Bar No. 8196)
Jackson & Campbell, P.C.
1120 20th Street, N.W., Suite 300 South
Washington, D.C. 20036
(202) 457-1600
rkelly@jackscamp.com
mdearing@jackscamp.com

4838-7659-5233, v. 1

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

v.

Appeal No.: 15-_____

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

VERIFICATION

STATE OF WEST VIRGINIA.

COUNTY OF MONONGALIA, to wit:

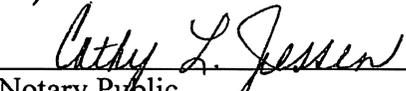
The undersigned, after being first duly sworn, states that the information contained in the foregoing Petition for Writ of Prohibition is true, except insofar as it is stated to be based upon information and belief. To the extent that any information is based upon information provided to me or on my behalf, it is believed to be true.



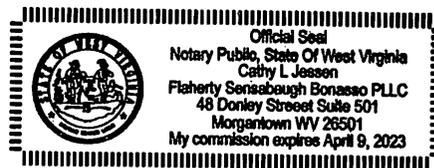
Alonzo D. Washington

Taken, subscribed, and sworn to before the undersigned authority, this 6th day of February, 2015.

My commission expires: April 9, 2023



Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

v.

Appeal No.: 15-_____

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

CERTIFICATE OF SERVICE

I, Alonzo D. Washington, counsel for Petitioners, do hereby certify that **PETITIONERS' PETITION FOR WRIT OF PROHIBITION** was served on the 9th day of February, 2015 via first class U.S. mail, postage prepaid, to the following counsel of record:

Judge David W. Hummel, Jr.
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

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

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

David L. Shuman, Esq.
David L. Shuman, Jr., Esq.
SHUMAN, McCUSKEY & SLICER, P.L.L.C
1411 Virginia Street, East, Suite 200 (25301)
P.O. Box 3953
Charleston, WV 25339

Counsel for Airsquid Ventures, Inc. d/b/a Amphibious Medics and Travis Pittman

Robert C. Morgan, Esq.
MORGAN, CARLO, DOWNS & EVERTON, P.A.
Executive Plaza III, Suite 400
11350 McCormick Road
Hunt Valley, MD 21031

Counsel for Airsquid Ventures, Inc. d/b/a Amphibious Medics and Travis Pittman

Charles F. Johns, Esq.
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
Counsel for Defendant, Travis Pittman

Karen E. Kahle, Esq.
Steptoe & Johnson PLLC
1233 Main Street, Suite 3000
Wheeling, WV 26003
Counsel for Defendant, Travis Pittman


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