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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20- 0206

STATE EX REL. THIRD-PARTY DEFENDANT HEALTH PLANS, *et al.*,

Petitioners,

v.

THE HONORABLE SHAWN NINES, PRESIDING, WEST VIRGINIA BUSINESS COURT
DIVISION, CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA, AND MEDTEST
LABORATORIES, LLC,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

On Petition for a Writ of Prohibition to the West Virginia Business Court Division, Circuit Court
of Wood County, West Virginia (Civil Action No. 18-C-271)

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I. QUESTION PRESENTED

A state's exercise of specific jurisdiction over an out-of-state defendant depends entirely on the defendant's affirmative contacts with the forum and the litigation at issue. The United States Supreme Court has made clear that absent general jurisdiction — which does not exist here — the claims in a lawsuit must arise directly from *the defendant's own* substantial forum-related activities in order for a state to exercise jurisdiction over it. Otherwise, the extension of personal jurisdiction violates the defendant's due process rights embodied in the United States Constitution's Fourteenth Amendment. The question presented here is: Are the out-of-state Health Plans¹ subject to specific personal jurisdiction in West Virginia when they have not

¹ The "Health Plans" who are the petitioning Third-Party Defendants are Blue Cross and Blue Shield of Alabama; Anthem, Inc.; Health Care Service Corporation, A Mutual Legal Reserve Company; Cambia Health Solutions, Inc.; CareFirst, Inc.; Premera Blue Cross; Blue Cross and Blue Shield of Arizona, Inc.; USABLE Mutual Insurance Company d/b/a Arkansas Blue Cross and Blue Shield; Blue Cross of California d/b/a Anthem Blue Cross; California Physicians' Service, Inc. d/b/a Blue Shield of California; Rocky Mountain Hospital and Medical Service, Inc. d/b/a Anthem Blue Cross and Blue Shield; Anthem Blue Cross and Blue Shield; Anthem Health Plans, Inc. d/b/a Anthem Blue Cross and Blue Shield of Connecticut; Highmark Inc.; Highmark BCBSD Inc. d/b/a Highmark Blue Cross Blue Shield Delaware; Group Hospitalization and Medical Services, Inc. d/b/a CareFirst BlueCross BlueShield; Blue Cross and Blue Shield of Florida, Inc.; Blue Cross and Blue Shield of Georgia, Inc.; Blue Cross of Idaho Health Service, Inc.; Regence BlueShield of Idaho, Inc.; Blue Cross and Blue Shield of Illinois, Inc.; Anthem Insurance Companies, Inc. d/b/a Anthem Blue Cross and Blue Shield of Indiana; Wellmark, Inc. d/b/a Wellmark Blue Cross And Blue Shield of Iowa; Anthem Health Plans of Kentucky, Inc. d/b/a Anthem Blue Cross and Blue Shield of Kentucky; Louisiana Health Service and Indemnity Company, PAC d/b/a Blue Cross and Blue Shield of Louisiana; Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield of Maine; CareFirst of Maryland, Inc. d/b/a CareFirst BlueCross BlueShield; Blue Cross and Blue Shield of Massachusetts, Inc.; Blue Cross Blue Shield of Michigan; BCBSM, Inc. d/b/a Blue Cross and Blue Shield of Minnesota; Blue Cross & Blue Shield of Mississippi, A Mutual Insurance Company; HMO Missouri, Inc. d/b/a Anthem Blue Cross and Blue Shield of Missouri; Blue Cross and Blue Shield of Kansas City; Caring for Montanans, Inc. f/k/a Blue Cross Blue Shield of Montana, Inc.; Blue Cross and Blue Shield of Nebraska, Inc.; Anthem Blue Cross and Blue Shield of Nevada; Anthem Health Plans of New Hampshire, Inc., d/b/a Anthem Blue Cross and Blue Shield of New Hampshire; Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey; Blue Cross and Blue Shield of New Mexico Insurance Company; Empire HealthChoice Assurance, Inc. d/b/a Empire BlueCross BlueShield; Excellus Health Plan, Inc. d/b/a Excellus BlueCross BlueShield; Blue Cross and Blue Shield of North Carolina; Noridian Mutual Insurance Company d/b/a Blue Cross Blue Shield of North Dakota; Community Insurance Company d/b/a Anthem Blue Cross and Blue Shield of Ohio; Blue Cross and Blue Shield of Oklahoma; Regence BlueCross BlueShield of Oregon; Capital Blue Cross; Independence Hospital Indemnity Plan, Inc.; Triple-S Salud, Inc.; Blue Cross & Blue Shield of Rhode Island; Blue Cross Blue Shield of South Carolina; Wellmark of South Dakota, Inc. d/b/a Wellmark, Blue Cross and Blue Shield of South Dakota; BlueCross BlueShield of Tennessee, Inc.; Blue Cross and Blue Shield of Texas; Regence BlueCross BlueShield of Utah; Blue Cross and Blue Shield of Vermont; Anthem Health Plans of Virginia, Inc. d/b/a Anthem Blue Cross and Blue Shield of Virginia, Inc.; Regence BlueShield; Blue Cross Blue Shield of Wisconsin d/b/a Anthem Blue Cross and Blue Shield of Wisconsin; and Blue Cross & Blue Shield of Wyoming.

purposefully created a substantial connection to West Virginia and have not engaged in any activity in or directed to this State giving rise to Third-Party Plaintiff MedTest's claims?

Under uniform and controlling precedent, the answer, unequivocally, is "no." This Court therefore should grant this writ of prohibition and so hold.

II. INTRODUCTORY STATEMENT AND REASONS TO GRANT THIS WRIT²

The Petitioners are 64 out-of-state Blue Cross Blue Shield Health Plans who have been dragged into a contract dispute between Highmark West Virginia Inc. ("Highmark WV"), the Blue Cross Blue Shield health plan operating in West Virginia, and MedTest, a laboratory testing company purportedly operating in Hurricane, West Virginia. None of the out-of-state Health Plans has a purposeful or direct connection to West Virginia that gives rise to MedTest's claims. As a result, the Circuit Court's assertion of specific jurisdiction contradicts relevant and controlling jurisdictional case law and violates the Health Plans' due process rights. It also extends West Virginia's long-arm statute well beyond recognized constitutional bounds.

Highmark WV and MedTest had a network provider contract, under which MedTest agreed to provide testing services to Highmark WV plan members, as well as to members of the out-of-state Blue Cross Blue Shield Health Plans. In return, Highmark WV agreed to pay MedTest for those services under the terms of its provider contract with MedTest. This proceeding commenced when Highmark WV sued MedTest for billing and receiving more than \$6 million for laboratory testing services that it claims MedTest did not perform.³ MedTest responded by counterclaiming against Highmark WV. Then, in the alternative, MedTest filed a

² Contemporaneously with filing this Petition, the Third-Party Defendants have filed a stay request for that portion of the action in the Circuit Court dealing with MedTest's claims against them. Petitioners will advise the Court of the ruling on that request upon entry. As a supplemental measure, Petitioners have also moved this Court for a stay of the proceedings against them.

³ There is a factual dispute on whether, during the relevant time periods, MedTest's testing facility in Hurricane actually was operating. There is no dispute, however, that the billings questioned by Highmark WV are for laboratory services performed outside of West Virginia.

third-party complaint against the out-of-state Health Plans, alleging that they had conspired with Highmark WV to defraud MedTest out of compensation for its services.

The out-of-state Health Plans have no contracts with MedTest. They are not alleged to have solicited business from MedTest in this State or otherwise purposefully created any substantial connection with West Virginia, much less a connection giving rise to MedTest's claims. Under controlling precedent, the jurisdictional inquiry should end there. The Health Plans' lack of forum-specific contacts related to MedTest and its claims establishes that there is no basis to assert specific jurisdiction over them.

The Circuit Court improperly found jurisdiction by focusing on factors that do not belong in the jurisdictional calculus in the first place. It put primary emphasis on *MedTest's* presence in West Virginia, *Highmark WV's* location in West Virginia, and *Highmark WV's* handling of *MedTest's* claims here. But it is the *defendant's* forum-focused activities that matter, not the *plaintiff's*. The Circuit Court further noted that all of the Blue Cross and Blue Shield Health Plans were connected to each other by a BlueCard program that enables their members to obtain services from a nationwide network of providers that included MedTest, ignoring extensive case law holding that participation in such national provider networks is not enough for specific jurisdiction. It further placed undue reliance on the fact that the out-of-state Health Plans listed MedTest as a network provider in the provider directories on their websites, again ignoring ample precedent that such passive websites do not create the kind of purposeful and substantial connection necessary for specific jurisdiction. Glaringly, the Circuit Court entirely discounted the fact that there is no allegation that any of the disputed testing services at issue were actually performed by MedTest in West Virginia, and MedTest admits that it billed for tests performed by other labs outside West Virginia. Finally, the Circuit Court credited MedTest's conclusory

allegation that the out-of-state Health Plans had conspired with Highmark WV to deprive MedTest of payments under its contract with Highmark WV, even though those bare bones allegations provided no jurisdictional connection to this State. There are no forum-directed contacts by the out-of-state Health Plans in any of this. Consequently, *none* of the purported connections to West Virginia the Circuit Court relied on is relevant to the assertion of jurisdiction under controlling law.

In a series of recent cases, the United States has made it clear that the due process protections provided to out-of-state defendants restrict “a State’s authority to bind a nonresident defendant to a judgment of its courts.” *Walden v. Fiore*, 571 U.S. 277, 283 (2014); *accord Bristol-Myers Squibb v. Superior Ct. of CA*, 137 S. Ct. 1773, 1779 (2017). To properly safeguard these due process rights, any attempted assertion of jurisdiction must focus on “the relationship among the defendant, the forum, and the litigation.” *Walden*, 571 U.S. at 284 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). This defendant-focused inquiry, in turn, gives rise to two corollary principles that govern the specific jurisdiction analysis with respect to nonresident defendants like the out-of-state Health Plans bringing this Petition.⁴

First, the critical relationship between the defendants, the forum, and the litigation “must arise out of the contacts that the ‘defendant *himself*’ creates with the forum State.” *Walden*, 571 U.S. at 284 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (emphasis in original). The “defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.*; *accord State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 329 (W. Va.

⁴ MedTest does not assert that West Virginia courts can exercise general jurisdiction over the Third-Party Health Plans, nor could it. *See generally Daimler Ag v. Bauman*, 571 U.S. 117, 139 (2014) (a defendant must be essentially “at home” in the forum to be subject to general jurisdiction).

2016) (“Specific jurisdiction, also known as case-linked jurisdiction, refers to jurisdiction which arises out of or relates to the defendant’s contacts with a forum.”).

Second, the jurisdictional analysis depends on “the defendant’s contacts *with the forum itself*, not the defendant’s contacts with the persons who reside there.” *Walden*, 571 U.S. at 284 (emphasis added). A “defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.” *Id.* at 286.

The U.S. Supreme Court has applied these principles to limit a state’s exercise of specific jurisdiction to instances where a defendant — not anyone else — purposefully acts to create substantial contacts with a forum and where those contacts give rise to the claims at issue. With the same rigor, the Supreme Court has rejected attempts to substitute a loose cobbling of purported in-state contacts for the defendant-focused inquiry the law demands. In *McGraw*, this Court recognized the force of these precedents and the due process rights they preserve. While not compelled to apply these jurisdiction-limiting principles in *McGraw*, the Court should do so now.

Consistent with controlling precedent, this Court should use this Petition to firmly declare that the specific jurisdiction analysis must focus on the *defendant’s own* contacts with this forum and whether the claims in dispute arise from those contacts. Such a declaration will provide important predictability and certainty for businesses and other litigants, ensure that West Virginia courts do not extend the exercise of specific personal jurisdiction beyond the bounds of what due process protects, and put West Virginia’s law back on its proper course.⁵

⁵ The proliferation of U.S. Supreme Court, federal court and state court cases considering and resolving jurisdictional issues underscores their recurring nature. In fact, the U.S. Supreme Court has taken up the specific jurisdiction issue again in *Ford v. Bandemer*, U.S. Sup. Ct. No. 19-369, a fully briefed case that will be argued in October. This case will provide yet another opportunity for the Supreme Court to opine on minimum contacts, jurisdictional standards, and the due process limitations that apply to both.

III. STATEMENT OF THE CASE

A. In Its Third-Party Lawsuit, MedTest Sues Out-Of-State Health Plans Who Have No Jurisdictional Contacts With West Virginia

The underlying contract dispute between Highmark WV and MedTest involves MedTest submitting reimbursement claims to Highmark WV for testing services admittedly performed by other laboratories and simply billed by MedTest to Highmark WV. First Amended Complaint (“FAC”) ¶ 1; Appendix (“App.”) 9-10; First Amended Third-Party Complaint (“FATPC”) ¶¶ 1-4, 74; App. 62-63, 96. Highmark WV says this billing was improper, a breach of MedTest’s provider contract, and fraud. FAC ¶¶ 1-2, App. 9-10. MedTest says it is not, and that it is entitled to compensation for these services provided by its “affiliate” laboratories. FATPC ¶¶ 1-4, 74; App. 62-63, 96.

As to the out-of-state Health Plans, MedTest alleges four claims: fraudulent misrepresentation and inducement, civil conspiracy, joint venture, and unjust enrichment. FATPC ¶¶ 4, 103; App. 63, 106. These claims all are alleged in the alternative; MedTest seeks relief from the out-of-state Health Plans only if it cannot recover against Highmark WV. *Id.*

Several facts critical to the dispute between Highmark WV and MedTest (and the jurisdictional analysis) were undisputed below. None of the out-of-state Health Plans is incorporated in West Virginia or has its principal place of business in this State. FATPC ¶¶ 10-72; App. 65-95. Moreover, none has a contract with MedTest. *Id.*; FATPC ¶ 1; App. 62.

MedTest alleges that the out-of-state Health Plans “conspired” to deny reimbursement to MedTest for laboratory services it performed “for one or more of each of the Defendants’ members, either directly or by referring laboratory testing services to be performed under its supervision to its affiliate Vitas Laboratory, LLC (“Vitas”) and others.” FATPC ¶ 74; App. 96. Notably, MedTest admits that these claimed laboratory services were not performed by MedTest

in West Virginia. FATPC ¶ 74; App. 96; *see also* MedTest Defendants' Answer ¶ 1; App. 31 ("The MedTest Defendants admit that they billed Highmark WV for independent laboratory services that they did not perform . . ."). Even though MedTest did not provide the services at issue, MedTest contends that the out-of-state Health Plans availed themselves of the benefits of doing business in West Virginia by participating in the national BlueCard program and listing MedTest as an in-network provider on their websites. FATPC ¶¶ 79-80; App. 97.

B. The Out-of-State Health Plans Move To Dismiss For Lack Of Jurisdiction Because Controlling Law Establishes They Have No Relevant Jurisdictional Connections To This State

The out-of-state Health Plans moved to dismiss MedTest's FATPC under W. V. R. Civ. P. 12(b)(2) for lack of personal jurisdiction because they had no relevant jurisdictional contacts with West Virginia.⁶ App. 1378. It was undisputed that they had not entered into any contracts in the State, did not have a relationship with MedTest in this State, and had done nothing to purposefully avail themselves of the privilege of doing business in this State, much less anything giving rise to the claims asserted by MedTest. App. 1396.

On this record, controlling law established that the Health Plans' participation in the BlueCard program, under which their members might choose to obtain service from MedTest in West Virginia, was not sufficient to establish a purposeful connection to this West Virginia dispute. App. 1402. Further, the mere fact that these out-of-state Health Plans had websites listing MedTest as an in-network provider was, under well-established law, insufficient to confer jurisdiction. App. 1397-98. Finally, MedTest's claims grew out of its billing dispute with Highmark WV, not with the out-of-state Health Plans. MedTest never contracted with any of these out-of-state Health Plans, did not bill them, and did not allege that any of them improperly failed to pay for services rendered in West Virginia. App. 1404, 1581. From any perspective,

⁶ The Health Plans also moved to dismiss under Rule 12(b)(6), and the Circuit Court denied that motion.

therefore, the out-of-state Health Plans were, and are, outside this State's jurisdictional reach. App. 1405.

C. The Circuit Court Denies The Health Plans' Motion And Holds That West Virginia Can Assert Specific Jurisdiction

Following oral argument, the Circuit Court denied the out-of-state Defendant Health Plans' motion.⁷ It found that, because the BlueCard program required the out-of-state Health Plans to reimburse Highmark WV for services performed in West Virginia, the relationship between the out-of-state Health Plans and Highmark WV satisfied West Virginia's long arm statutes as to claims by MedTest against the out-of-state Health Plans. Order ¶ 31; App. 1620.

With respect to the constraints of federal law, the Circuit Court also held that the Health Plans were subject to specific jurisdiction based on their websites listing MedTest as an in-network provider (which the Circuit Court compared to paper directories), the mere possibility that the out-of-state members could use MedTest's services, and the allegation that MedTest, as a West Virginia entity, suffered injury in West Virginia. App. 1621-22. It further pointed out that it was reasonable to exercise jurisdiction over the out-of-state Health Plans because West Virginia had an interest in allowing in-state companies, like MedTest, to hold out-of-state defendants, like the Health Plans, liable for actions resulting from doing business with Highmark WV, a West Virginia company. App. 1623. Finally, at the end of its decision, the Circuit Court noted, without analysis, that "because MedTest has pled a claim for conspiracy, it has undoubtedly established jurisdiction here." Order ¶ 49; App. 1624.

⁷ As certified pursuant to Rule 16(e)(8) of the West Virginia Rules of Appellate Procedure, the Appendix provided herein is sufficient to permit this Court to fairly consider the legal question presented in the Petition. Petitioners requested a transcript of the January 28, 2020 hearing on the Third Party Defendant Health Plans' Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction on January 28, 2020. While Petitioners' counsel have followed up on the transcript request several times through May 15, 2020, no transcript has yet been received, and the COVID-19 Judicial Emergency may have limited the normal production of the same. While not necessary to resolve the legal question presented herein, Petitioners intend to supplement the Appendix with the addition of the January 28, 2020 transcript, if and when it is received, and have so advised MedTest counsel and the Circuit Court.

IV. SUMMARY OF ARGUMENT

The Circuit Court's holding that the out-of-state Health Plans are subject to personal jurisdiction in West Virginia conflicts with controlling precedent. There is no allegation or evidence showing that the out-of-state Health Plans developed or maintained a substantial relationship with West Virginia or purposefully engaged in any forum-related conduct that gave rise to MedTest's claims. In these circumstances, any attempt to assert specific jurisdiction violates the limits due process imposes. To reach a contrary result, the Circuit Court erroneously relied on MedTest's and Highmark WV's forum contacts, combined with the out-of-state Health Plans' connections to Highmark WV under the BlueCard program and their plan members' hypothetical connection through passive websites. But none of this is relevant to the legally controlling jurisdictional calculus.

The Circuit Court also erroneously found that MedTest's conclusory conspiracy allegations independently could support jurisdiction, even though there are no alleged in-state acts by the out-of-state Health Plans that have anything to do with MedTest's dispute with Highmark WV. Neither this Court nor the U.S. Supreme Court has held that specific jurisdiction can be supported on a conspiracy theory, without the necessary jurisdictional allegations, and the Circuit Court's reliance on that theory here is misplaced. In fact, there are no allegations that any member of any out-of-state Health Plan actually received laboratory services from MedTest, much less laboratory services in West Virginia. The only allegation is that MedTest billed Highmark WV for laboratory services *someone* provided to the out-of-state Health Plans' members *somewhere*. Controlling precedent forecloses the extension of jurisdiction based on such a conclusory allegation, and there is no basis to even consider the conspiracy theory on this record.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As required by Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure, the Health Plans request oral argument under Rule 20, as this case involves matters of first impression before this Court regarding an issue of fundamental public importance. W. Va. R. App. P. 20(a)(1)-(2).

VI. STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia has held, “[w]here a court lacks jurisdiction over a nonresident defendant, prohibition is the appropriate remedy to prevent further prosecution of the suit.” *Pries v. Watt*, 410 S.E.2d 285, 289 (W. Va. 1991) (granting writ of prohibition in the same procedural posture as this case, to correct erroneous denial of motion to dismiss for lack of personal jurisdiction); *see also W. Virginia Secondary Sch. Activities Comm’n v. Wagner*, 102 S.E.2d 901, 909-10 (W. Va. 1958) (granting writ of prohibition upon determination that “the circuit court does not have jurisdiction of the necessary parties to the suit”).⁸ And where “a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right ‘regardless of the existence of other remedies.’” *State ex rel. Farber v. Mazzone*, 584 S.E.2d 517, 521 (W. Va. 2003) (quoting Syl. Pt. 10, *Jennings v. McDougale*, 98 S.E. 162, 166 (W. Va. 1919)); *State ex rel. Valley Distribs., Inc. v. Oakley*, 168 S.E.2d 532, 535 (W. Va. 1969) (“The writ lies as a matter of right whenever the inferior court . . . has no jurisdiction [and] it matters not if the aggrieved party has some other remedy . . .”).

MedTest bears the burden of establishing personal jurisdiction over the out-of-state Health Plans. *Ranson*, 497 S.E.2d at 767. It must make “a prima facie showing that jurisdiction

⁸ See *State ex rel. Bell Atl.-W. Va., Inc. v. Ranson*, 497 S.E.2d 755 (1997) (addressing the merits of writ of prohibition challenging denial of motion to dismiss for lack of personal jurisdiction); *Norfolk S. Ry. Co. v. Maynard*, 437 S.E.2d 277, 284 (W. Va. 1993) (suggesting, in challenge to denial of motion to dismiss for lack of personal jurisdiction, that “a writ of prohibition is the traditional remedy to challenge the actions of a trial court when that court acts without jurisdiction”).

exists.” *Lane v. Boston Sci. Corp.*, 481 S.E.2d 753, 758 (W. Va. 1996). This Court “must view the allegations in the pleadings in the light most favorable to the plaintiff,” “except insofar as controverted by the defendant’s affidavit[s].” *Id.* (quotation and emphasis omitted). Where, as here, the relevant facts are undisputed, this Court reviews *de novo* a Circuit Court’s determination that West Virginia can exercise personal jurisdiction. *See Bowers v. Wurzburg*, 501 S.E.2d 479, 483 (W. Va. 1998).⁹

VII. ARGUMENT

A. Recent And On-Point Precedent Establishes That West Virginia Cannot Constitutionally Assert Specific Jurisdiction Over The Out-Of-State Health Plans

To establish personal jurisdiction, a plaintiff must show that “the defendant’s actions satisfy [West Virginia’s] personal jurisdiction statutes” and that the exercise of jurisdiction is consistent with “federal due process.” *Nezan v. Aries Techs., Inc.*, 704 S.E.2d 631, 637 (W. Va. 2010). Here, those two inquiries collapse into one, “[b]ecause the West Virginia long arm statute is coextensive with the full reach of due process.” *In re Celotex Corp. v. Rapid Am. Corp.*, 124 F.3d 619, 627-28 (4th Cir. 1997); *see also Leslie Equip. Co. v. Wood Res. Co.*, 687 S.E.2d 109, 115 n.14 (W. Va. 2009) (noting that the West Virginia long arm statute is coextensive with due process limitations) (citing *Celotex*, 124 F.3d at 627).¹⁰

In particular, “[t]he specific jurisdiction analysis for determining whether a forum’s exercise of jurisdiction over a nonresident defendant meets due process standards is multi-pronged.” *McGraw*, 788 S.E.2d at 335. Under the first prong, a court must determine that “the

⁹ This Court at times has indicated that the absence of jurisdiction must be “clearly shown” to warrant a writ of prohibition. *Norfolk S. Ry.*, 437 S.E.2d at 284; *but see Pries*, 418 S.E.2d at 289 (granting writ for lack of personal jurisdiction without mentioning any heightened burden). The Circuit Court’s holding here, however, should be reversed under any standard of review.

¹⁰ As the out-of-state Health Plans demonstrated below, MedTest’s allegations do not confer jurisdiction under West Virginia’s statute either. App. 1394-98. In any event, application of controlling federal jurisdictional precedent is dispositive in this case. Any exercise of jurisdiction by West Virginia on this record conflicts with due process.

nonresident defendant has minimum contacts with the forum,” which requires “an examination of whether the defendant purposefully availed itself of the privilege of conducting activities within the forum.” *Id.* Under the second, a court must determine “that the plaintiff’s claims arise out of or relate to the defendant’s contacts with the forum.” *Id.* Finally, under the third prong, “it must be constitutionally reasonable to assert the jurisdiction so as to comport with fair play and justice.” *Id.*

The extension of jurisdiction over the out-of-state Health Plans is contrary to applicable case law and due process standards. There is no specific jurisdiction over these Health Plans because none of them engaged in any activity purposefully directed to West Virginia that gave rise to MedTest’s claims. The Circuit Court erred by disregarding the Health Plans’ own conduct and instead focusing on MedTest’s or Highmark WV’s connections to this State, the existence of the BlueCard program and national provider directories on passive websites, and an insufficient conspiracy allegation. None of those considerations belonged in the jurisdictional calculus.

1. The out-of-state Health Plans did not purposefully avail themselves of the privilege of doing business in West Virginia

In the specific jurisdiction analysis, the purposeful availment prong ensures that a defendant “will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.” *Burger King Corp.*, 471 U.S. at 475 (internal quotations omitted). Instead, a “substantial connection” to the forum is required, so nonresident defendants have “fair warning” that their “particular activity may subject them to the jurisdiction of a foreign sovereign.” *Id.* Application of this defendant-specific and forum-centric focus leads to only one conclusion here: the out-of-state Health Plans

have not purposefully availed themselves of the privilege of doing business in this State in the manner required by controlling law.

Purposeful availment, as the phrase portends, requires direct and affirmative conduct by *the defendant*, conduct demonstrating that *the defendant* has targeted the forum with an intent to develop business or relationships there. A defendant's contacts or activity linked to the forum in some attenuated fashion will not suffice. The record instead must reveal that the defendant has purposefully developed a substantial connection with the forum, thereby making it reasonable for it to be haled into court there. *See Burger King Corp*, 471 U.S. at 478-82 (finding purposeful availment where defendant reached into forum state and "heavily negotiated" a "carefully structured" contract that "envisioned continuing and wide-reaching contacts" with the forum state); *Pro Axess, Inc. v. Orlux Distribution, Inc.*, 428 F.3d 1270, 1278 (10th Cir. 2005) (holding that defendant was subject to jurisdiction in Utah where defendant specifically sought out relationship with Utah corporation, engaged in significant communications with Utah corporation, and entered into contract requiring continuing performance in Utah); *Corp. Inv. Bus. Brokers v. Melcher*, 824 F.2d 786, 789 (9th Cir. 1987) (finding defendants had purposefully availed themselves of jurisdiction in Arizona where defendants solicited relationship with Arizona corporation, traveled to Arizona to meet with representatives of Arizona corporation, and entered into contract governed by Arizona law that envisioned long-term relationship with Arizona corporation).

There is nothing like that here. The out-of-state Health Plans did not specifically target West Virginia in any concerted or direct way, and the Circuit Court's conclusion to the contrary is unsupported. MedTest does not allege, and the record does not reflect, that the out-of-state Health Plans made significant contacts with West Virginia to develop business, engaged in the

direct solicitation of business in West Virginia, sent employees and sales people to West Virginia for that purpose, or sought out West Virginia as a place to cultivate plan members. Nor is there any substantial connection between the out-of-state Health Plans and MedTest as related to MedTest's laboratory services as a network provider contracted with Highmark WV. MedTest does not (and cannot) allege that any out-of-state Health Plan members were sent by the Health Plans to West Virginia for testing, had tests performed by MedTest in West Virginia at the Health Plans' request, or that the Health Plans' actively cultivated a relationship with MedTest for the purpose of using MedTest's services in West Virginia.¹¹

On this record, as far as the purposeful availment prong is concerned, this is not a close case. Relevant case law compels a rejection of jurisdiction where, as here, there is no purposeful availment alleged or shown. *See Yates v. Motivation Indus. Equip. Ltd.*, 38 F. App'x 174, 178 (4th Cir. 2002) (holding that defendant had not purposefully availed itself of jurisdiction in North Carolina because there was no evidence that defendant's general solicitation activities were directed toward North Carolina residents); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946-47 (4th Cir. 1994) (finding that defendant's close relationship with corporation that had extensive contacts with Maryland did not amount to purposeful availment because the defendant's conduct was not "in any way directed toward the state of Maryland") (emphasis in original); *Ellicott Mach. Corp. v. John Holland Party Ltd.*, 995 F.2d 474, 478 (4th Cir. 1993) (finding no purposeful availment where Australian defendant executed contract with Maryland corporation requiring performance in Australia). This writ accordingly should be granted to align this case with the result the law commands.

Third-party conduct and purported "foreseeability of injury" do not show purposeful availment. In holding to the contrary, the Circuit Court initially focused on the

¹¹ In fact, the disputed testing, as noted, was not performed in West Virginia.

Health Plans having “entered into a series of contracts that require performance in West Virginia by Highmark WV and MedTest,” while noting that both Highmark WV and MedTest were West Virginia entities. App. 1620. In addition, it noted that the Health Plans “should have been aware that they could cause injury in West Virginia to the West Virginia corporation.” App. 1622. But there were no specific allegations that contracts to which the out-of-state Health Plans were parties required performance in West Virginia, and, moreover, MedTest did not perform the disputed laboratory testing in West Virginia under its contract with Highmark WV. Indeed, none of this reflects the kind of purposeful in-state activity by the Health Plans required by the case law. Concocting an attenuated link between out-of-state conduct and a possible in-state event is not enough to show “purposeful availment” as the phrase itself imparts. Not surprisingly, therefore, the U.S. Supreme Court expressly rejected that notion in *Walden*:

[The Ninth Circuit Court of Appeal’s] approach to the “minimum contacts” analysis impermissibly allows a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis. [Defendant]’s actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff’s forum connections to the defendant and makes those connections “decisive” in the jurisdictional analysis.

571 U.S. at 289. The Court then concluded that “[i]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.” *Id.* at 291.

Specifically, in *Walden*, the Court held that the conduct of a Georgia police officer, occurring entirely in Georgia, could not support Nevada’s exercise of jurisdiction, even though the officer knew his actions would have an effect on Nevada plaintiffs and the plaintiffs were injured in Nevada. *Id.* at 286. The Court found it immaterial that the plaintiffs “suffered the ‘injury’ caused by the [defendant’s] allegedly tortious conduct while they were residing in the forum,” because their injury did not “evinced a connection between [the defendant] and” the

forum. *Id.* at 289-90. The Court explained that “an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State.” *Id.* at 290.

In short, whether the out-of-state Health Plans “should have been aware that they could cause injury in West Virginia to the West Virginia corporation” is irrelevant to the specific jurisdiction analysis. *See Burger King Corp.*, 471 U.S. at 474 (noting that U.S. Supreme Court has “consistently held” that “foreseeability of causing injury in another state” is “not a sufficient benchmark for exercising personal jurisdiction”). Furthermore, whether MedTest allegedly was injured in West Virginia has no bearing on whether the out-of-state Health Plans are subject to specific jurisdiction in West Virginia. “[M]ere injury to a forum resident is not a sufficient connection to the forum.” *Walden*, 571 U.S. at 290.¹²

Under any circumstances, and in any kind of case, the exercise of specific jurisdiction always depends on “[t]he relationship among the defendant, the forum, and the litigation.” *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). That relationship must arise out of contacts that the *targeted defendant* created with the forum. The U.S. Supreme Court thus has “consistently rejected attempts to satisfy the defendant-focused ‘minimum contacts’ inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.” *Walden*, 571 U.S. at 284; *see also Bristol-Myers*, 137 S. Ct. at 1783 (rejecting argument that defendant’s decision to contract with a company in the forum state was a sufficient basis for personal jurisdiction); *Kulko v. Superior Court of Cal., City and County of San Francisco*, 436 U.S. 84, 93 (1978)

¹² Consistent with *Walden*’s reasoning and holding, courts routinely dismiss cases for lack of personal jurisdiction where the only connection between the defendant and the forum state is through the plaintiff or a third party. *See, e.g., Mar.-Westin Co., Inc. v. Swinerton Builders, Inc.*, No. 1:17CV199, 2018 WL 2471451, at *6 (N.D. W.Va. June 1, 2018) (declining to exercise jurisdiction over California corporation where only connection to West Virginia was through negotiations with West Virginia plaintiff); *see also, e.g., Anzures v. Flagship Rest. Grp.*, 819 F.3d 1277, 1281 (10th Cir. 2016) (“[T]he fact that Anzures was affected in Colorado (because he resides there) is insufficient to authorize personal jurisdiction over defendants.”); *Advice Co. v. Novak*, No. C-08-1951 JCS, 2009 WL 210503, at *2 (N.D. Cal. Jan. 23, 2009) (holding that Arizona-based online attorney directory company that entered into advertising contracts requiring performance in California was not subject to jurisdiction in California because “the activity is attributable to third-party companies and not to Defendants themselves”).

(declining to “find personal jurisdiction in a State ... merely because [the plaintiff in a child support action] was residing there”); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”). The Circuit Court erred in declining to follow these settled principles in this case.

The Circuit Court also improperly found that the Health Plans purposefully availed themselves of West Virginia in two additional ways: (1) by participating in the BlueCard program; and (2) by listing MedTest as an in-network provider on their websites, which the Circuit Court described as an “online version of the paper directory of providers.” App. 1621-22. Neither is sufficient to demonstrate that the Health Plans purposefully availed themselves of the privilege of doing business in West Virginia as defined under controlling law.

The BlueCard program does not establish purposeful availment. The Circuit Court stepped well outside the mainstream when it held that the bare existence of the BlueCard program and the Health Plans’ participation in it could be equated with purposeful availment. The availability of reimbursement for services rendered by a provider in West Virginia does not show the necessary forum-directed activity to meet this prong, and MedTest’s own allegations concede as much. Participation in the BlueCard program adds nothing to the jurisdictional analysis because it does not give rise to any purposeful in-state activity by the out-of-state Health Plans.

To start with, even if a health plan is willing to reimburse for services delivered to its members in other states, the *members’* choices in seeking that out-of-state treatment do not equate with the *health plan* directing commercial activity at the other forum. For that reason, a federal court in Florida recently dismissed Third-Party Defendant Blue Cross and Blue Shield of

Massachusetts, Inc. on personal jurisdiction grounds, finding that due process was not satisfied where a provider sued on the basis of the defendant's members choosing to receive healthcare in the forum state. As the court's decision reflects, it is just one of many reaching the same conclusion. *See Wiegering v. BCBSMA*, No. 16-23031, 2017 WL 1294907, *8 (S.D. Fla. Feb. 2, 2017) ("Courts throughout the country have addressed similar jurisdictional issues in the healthcare context and have generally held that an insurer or third-party administrator does not avail itself of the privilege of doing business in a particular state simply because the insured chose a medical provider in that particular forum and the insurer or third-party administrator pre-approved treatment or paid medical bills.").

Beyond that, the "contracts" in question are not between MedTest and any of the out-of-state Health Plans. MedTest argues that its contract with Highmark WV *plus* "a series of contracts that require performance in West Virginia by Highmark WV and MedTest" taken together are enough to establish specific jurisdiction. Opp'n at 5; App. 1467. But this unspecified "series of contracts" associated with the BlueCard program does not establish the requisite minimum contacts because the contracts were not negotiated in, or specifically aimed at, West Virginia. *See, e.g., New Venture Holdings, L.L.C. v. DeVito Verdi, Inc.*, 376 F. Supp. 3d 683, 692 (E.D. Va. 2019) (citing *Burger King Corp.*, 471 U.S. at 478)). None of the out-of-state Health Plans are alleged to have negotiated a contract in West Virginia, including any contract related to the BlueCard program. Participation in the BlueCard program alone simply does not create the necessary jurisdictional nexus envisioned by the U.S. Supreme Court.

This is not a matter of speculation or conjecture. As noted, the Circuit Court's contrary holding stands in contrast to those of the many courts that have examined the BlueCard program and other national provider networks and, after applying the constitutionally mandated analysis,

rejected the contention that mere participation in such programs is sufficient to confer jurisdiction over out-of-state health plans. *See, e.g., Choice Healthcare, Inc. v. Kaiser Foundation Health Plan of Colo.*, 615 F.3d 364, 372 (5th Cir. 2010) (out-of-state insurance provider that had contracted to participate in a national healthcare network had not “purposefully availed itself of the benefits and privileges of the forum state”); *Int’l Air Med. Servs. v. Triple-S Salud, Inc.*, No. CV-15-00149-PHX-DGC, 2015 WL 5158832, at *11-12 (D. Ariz. Sept. 3, 2015) (personal jurisdiction was not established by virtue of Triple-S Salud joining the BlueCard Program, because “merely contracting with an organization that does business in all fifty states does not thereby subject Triple-S to the jurisdiction of courts throughout the country.”); *Angel Jet Servs., L.L.C. v. Red Dot Bldg. Systems’ Employee Benefit Plan*, No. CV-09-2123-PHX-GMS, 2010 WL 481420, at *12-13 (D. Ariz. Feb. 8, 2010) (personal jurisdiction was not established by virtue of Blue Cross and Blue Shield of Texas joining the BlueCard program and corresponding with Blue Cross Blue Shield of Arizona with regard to a claim, because “[a]lthough BCBS corporations allow their beneficiaries to receive and process benefits in other states, that alone is not continuous and systematic contact[.]”); *St. Luke’s Episcopal Hosp. v. La. Health Service & Indem. Co.*, No. H-08-1870, 2009 WL 47125, at *9 (S.D. Tex. Jan. 6, 2009) (personal jurisdiction on state law claims was not established by virtue of Blue Cross and Blue Shield of Louisiana joining the BlueCard Program, because it “ha[d] not contracted directly with a Texas entity but instead joined a national organization that allows it to obtain coverage and processing in all of the Blue Card Program members’ states”). This writ should be granted to align West Virginia with this well-reasoned case law.

Passive, online provider directories do not establish purposeful availment. An unbroken line of authority also provides that the out-of-state Health Plans did not purposefully

avail themselves of the privilege of doing business simply by passively providing online information to their members.

When websites are asserted as the basis for the exercise of specific jurisdiction, their level of interactivity with residents of the forum state determines whether there is purposeful availment. See *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713-14 (4th Cir. 2002). In *ALS Scan*, the Fourth Circuit Court of Appeals, relying on *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), described the interactivity analysis as follows:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

ALS Scan, Inc., 293 F.3d at 714 (quoting *Zippo Manufacturing Co.*, 952 F. Supp. at 1124)). The record in this case does not come close to the necessary interactivity threshold. MedTest fails to allege that any West Virginia resident interacted with the Health Plans' websites (or even that any non-West Virginia resident did so), much less that MedTest's claims arose from any such interaction. The passive websites accordingly provide no jurisdictional nexus at all.

Looking first at the relevant interactivity factors, there is no suggestion here that any of the out-of-state Health Plans are actively transacting business in West Virginia via the Internet or trying to contract with anyone in West Virginia through Internet communications. The relationship to West Virginia is purely passive to the extent it can be said to exist at all. In

particular, MedTest alleges that “Highmark WV’s and the Blues’ websites listed MedTest as an in-network provider in numerous provider networks, which include Blue Card networks, but also many others” and that the “Blues’ websites describe the Blue Card program as way for members to access medical care nationwide.” FATPC ¶¶ 79, 81; App. 97. Based on MedTest’s own allegations, the out-of-state Health Plans’ websites “do[] little more than make information available to those who are interested.” *ALS Scan, Inc.*, 293 F.3d at 714 (quoting *Zippo Manufacturing Co.*, 952 F. Supp. at 1124)).

The Circuit Court characterized the websites as “an online version of the paper directory of providers that insureds can use to determine if a provider will be covered.” App. 1621.¹³ But even providing a passive directory falls far short of the level of forum-directed activity necessary to avail oneself of the privilege of doing business in a jurisdiction.

Fidrych v. Marriott Int’l, Inc. illustrates as much. There, the Fourth Circuit made the point succinctly and directly. It held that the defendant was not subject to specific jurisdiction in South Carolina, even though the defendant’s website included South Carolina as an option in the drop-down menu used by customers to select their state of residence when making reservations. 952 F.3d 124, 142 (4th Cir. 2020). A website that merely “makes itself available to anyone who seeks it out, regardless of where they live” and “is accessible in a given state” is not sufficient to demonstrate that the defendant “is targeting its activities at that state.” *Id.* at 141. Although the website facilitated transactions with South Carolina residents, it did not establish that such contacts were specifically directed at South Carolina. *Id.* at 142-43 (“To the contrary, the list of

¹³ The out-of-state Health Plans refer to the individuals with healthcare coverage under their products as “members” rather than “insureds” because, among other reasons, those products may not be fully insured, and instead may be self-insured or government-sponsored products.

options confirms that the website was accessible to all but targeted at no one in particular.”). *Fidrych* is, moreover, one of many cases providing for this result.¹⁴

The same conclusion follows with respect to the national provider network listing. That network listing is precisely what its name suggests: a *national* listing of in-network providers that in no way targets West Virginia any more than it targets any other state where in-network providers reside, even if members were to receive a “paper copy” of the directory, as analogized by the Circuit Court but not alleged by MedTest. But, as just noted, exercising specific jurisdiction requires that the defendant specifically target the particular forum and do so directly and purposefully. Participation in a national provider network, which is then disclosed to all who care to look for it on a passive website, shows no specific targeting at all. *See, e.g., Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1246 (9th Cir. 1984) (no minimum contacts between a medical insurer based in Pennsylvania with the forum state of California, rejecting the argument that personal jurisdiction “follows the claimant wherever the claimant goes” because the insurance policy covered accidents across the United States); *Kennedy Krieger Institute, Inc. v. Brundage Management Co., Inc.*, No. WDQ-14-1680, 2015 WL 926139, at *3 (D. Md. 2015) (no personal jurisdiction where plaintiff-insured chose to seek medical care in the forum state); *Berg v. Blue Cross and Blue Shield of Utica–Watertown, Inc.*, No. C-93-2752-DLJ, 1993 WL 467859, at *3 (N.D. Cal. 1993) (insufficient contacts where a New York insurer authorized medical care in

¹⁴ *See, e.g., Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 401 (4th Cir. 2003) (“In sum, when [defendant] set up its generally accessible, semi-interactive Internet website, it did not thereby direct electronic activity into Maryland with the manifest intent of engaging in business or other interactions within that state in particular.”); *Clockwork IP, LLC v. Clearview Plumbing & Heating Ltd.*, 127 F. Supp. 3d 1020, 1029 (E.D. Mo. 2015) (dismissing case for lack of personal jurisdiction where Canadian defendant’s website contained business directory of U.S. based companies); *Roblor Mktg. Grp., Inc. v. GPS Indus., Inc.*, 645 F. Supp. 2d 1130, 1155 (S.D. Fla. 2009) (“[T]he fact that the website of a company that sells products in Florida can be reached via a link on Intelligolf’s website is too narrow a thread on which to find a meaningful ‘contact’ for the purposes of due process.”) (quoting *Dynetech Corp. v. Leonard Fitness, Inc.*, 523 F. Supp. 2d 1344, 1347 (M.D. Fla. 2007)); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (“Access to an Internet Yellow Page site is akin to searching a telephone book—the consumer pays nothing to use the search tool, and any resulting business transaction is between the consumer and a business found in the Yellow Pages, not between the consumer and the provider of the Yellow Pages.”).

California and assured that it was covered, and noting that even if contact with a forum state is tortious, it does “not conclusively prove that defendant purposefully availed itself to the privileges of that state”); *Mem. Hosp. Sys. v. Blue Cross & Blue Shield of Ark.*, 830 F. Supp. 968 (S.D. Tex. 1993) (no personal jurisdiction established via approval for services in a telephone call made by a hospital to an out-of-state insurer to determine a patient’s coverage); *Elkman v. Nat’l States Ins. Co.*, 173 Cal. App. 4th 1305, 1318-21 (Cal. Ct. App. 2009) (surveying case law on specific personal jurisdiction of an out-of-state insurer and holding that an insurer did not subject itself to specific jurisdiction in California merely by processing and paying claims submitted by its insureds for services rendered in California).

As such, there is no purposeful availment with West Virginia based on the fact that MedTest can be found among the thousands of other providers across the nation listed as in-network providers on the out-of-state Health Plans’ passive websites. This Court should grant this writ to send that message for West Virginia cases, too.

2. MedTest’s claims do not arise from the out-of-state Health Plans’ contacts with West Virginia

Allegations supporting prong two — conduct by the out-of-state Health Plans directed at West Virginia giving rise to MedTest’s claims — are absent as well. In order for a court to exercise specific jurisdiction over an out-of-state defendant, the plaintiff’s claim must “aris[e] out of or relat[e] to the defendant’s contacts with the forum.” *Bristol-Myers*, 137 S. Ct. at 1780 (internal quotation marks omitted). This Court’s precedents are in accord. *See McGraw*, 788 S.E.2d at 335 (“it must be determined that the plaintiff’s claims arise out of or relate to the defendant’s contacts with the forum.”); *Grove v. Maheswaran*, 498 S.E.2d 485, 490 (W. Va. 1997) (same). Moreover, “the defendant’s *suit-related conduct* must create a substantial connection with the forum State.” *Walden*, 571 U.S. at 284 (emphasis added).

Under this second prong, “specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Goodyear Dunlap Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). If the defendant’s activities directed to the forum are not relevant to resolving the legal claims in the controversy, they cannot support the exercise of specific personal jurisdiction. See *Bristol-Myers*, 137 S. Ct. at 1781-1782 (focusing solely on the “relevant conduct” by the non-resident defendant). *Walden*, 571 U.S. at 284 (quoting *Burger King Corp.*, 471 U.S. at 475 (specific jurisdiction “must arise” out of contacts the defendant himself creates with the forum)).

Here, however, MedTest’s complaint contains no allegations that the out-of-state Health Plans engaged in any conduct in West Virginia that gave rise to MedTest’s claims. MedTest does not allege that the out-of-state Health Plans entered into or breached a contract in West Virginia, or that they took any action at all in West Virginia that gave rise to its lawsuit. On the contrary, MedTest’s “alternative” theory, and the only theory under which the out-of-state Health Plans are alleged to have liability, involves no conduct whatsoever in West Virginia.

Specifically, MedTest contends that the Health Plans “misrepresented” that MedTest was in-network (despite there being no dispute that MedTest and Highmark WV had a valid provider contract) based only on representations made on their websites. Those representations plainly did not originate in West Virginia, nor were they aimed at West Virginia either. While MedTest alleges that it “provided laboratory services to one or more of each of the [out-of-state Health Plans’] members under these national programs,” (FATPC ¶ 6), it never alleges these services were provided in West Virginia. See *id.* ¶ 73; App. 95. Furthermore, MedTest admits that some or all of these services were performed by other laboratories, such as the Arkansas-based Vitas Laboratory. *Id.* ¶ 74; Answer ¶ 1; App. 31, 96.

As the record shows, MedTest seeks to be compensated for services that were provided to members of the out-of-state Health Plans under MedTest's network provider agreement with Highmark WV. MedTest's claims thus arise from its contract with Highmark WV, not any connection between the out-of-state Health Plans and West Virginia. Again, MedTest does not even allege that the testing services for which it claims compensation were actually performed in West Virginia or even performed by MedTest. By the same token, the passive websites give rise to exactly the same analysis: there is no connection to MedTest's claims. MedTest does not allege that anyone inside or outside of West Virginia accessed the out-of-state Health Plans' websites, found the MedTest listing there, and then chose to obtain testing services from MedTest in West Virginia. Indeed, there is no allegation that MedTest provided any of the disputed services, or that the testing was performed in West Virginia.

The Circuit Court nevertheless found that the "arise out of or relate to" prong of the specific jurisdiction test had been met because "the system under which MedTest provided services to the subscribers of the Blues involves a series of contracts that bind the Blues, Highmark WV, and MedTest." Order ¶ 42; App. 1622. But that assertion does not establish that MedTest's claims actually arose from conduct of the out-of-state Health Plans directed at West Virginia, particularly when the underlying services were not performed in West Virginia. If connecting dots between the plaintiff and defendant through an undefined "a series of contracts" is all that is required, then defendants can be haled into courts all across the country based not on their own conduct, but rather based on the conduct and dealings of those with whom they contract — a position directly at odds with the constitutionally mandated requirement that specific jurisdiction must arise from the defendants' own conduct. *See Bristol-Myers*, 137 S. Ct. at 1783 ("The bare fact that [defendant] contracted with a California distributor is not enough to

establish personal jurisdiction in the State.”). MedTest thus failed to meet the second prong of the jurisdictional analysis, and this Court should grant this writ to direct the result controlling law requires. This Court’s intervention will avoid the repetition of this error, too.

3. MedTest’s conclusory allegations of conspiracy cannot support jurisdiction over the out-of-state Health Plans

The Circuit Court found that MedTest’s conspiracy allegation independently supplied a basis for West Virginia to exercise jurisdiction. Its single sentence ruling to that effect contains no analysis or authority. But there is no case, from this Court or the U.S. Supreme Court, suggesting that a conclusory allegation of conspiracy is sufficient to create the requisite connection to support specific jurisdiction in a case like this one. And there is no case that does so where the conspiracy allegation lacks — as it does here — any factual detail that would support an assertion of specific jurisdiction over the out-of-state Health Plans under controlling law.

Thus, in looking at the conspiracy allegations in this case, there is not a single jurisdictional fact alleged as to any of the out-of-state Health Plans related either to the formation of the conspiracy or the carrying out of its purported purpose. For example, MedTest never alleges that the out-of-state Health Plans conspired to induce them to perform services for their insureds or plan members in West Virginia. MedTest never alleges that it actually performed laboratory services in West Virginia. To the contrary, MedTest admits that it simply billed for services performed by other, out-of-state laboratories who routed their claims for those services through MedTest’s billing department. App. 31, 96. Because MedTest was not performing any services in West Virginia, the out-of-state Health Plans have not engaged in forum-related activity that would subject them to being sued in West Virginia on the basis of allegedly not paying for the services in question.

In particular, the FATPC alleges that the out-of-state Health Plans conspired to misrepresent MedTest as an in-network provider, (FATPC ¶ 107), and to induce MedTest to perform laboratory testing services without paying for them. FATPC ¶¶ 127-129; App. 110. The jurisdictional allegation is lacking because the FATPC fails to allege that MedTest performed those services in West Virginia. Indeed, given that the claims at issue arise from services performed by out-of-state laboratories, the conclusory allegation of “conspiracy” that fails to describe any agreement directed towards West Virginia and relating to MedTest’s claims fails to establish the jurisdictional nexus. *Westfield Ins. Co. v. Mitchell*, No. 2:12-CV-00585, 2013 WL 4742832, at *7 (S.D.W. Va. Sept. 3, 2013) (dismissing conspiracy claim that rested on “conclusory allegations stating that the parties ‘conspired’”).

The failure to connect the out-of-state Health Plans to the oversight or performance of any overt act within this State, or any attempt to control or direct any activity within it, sets this case apart from those that have considered or adopted the conspiracy doctrine as a basis for jurisdiction. As the Fourth Circuit has noted:

To succeed in this theory, the plaintiffs would have to make a plausible claim (1) that a conspiracy existed; (2) that the . . . defendants participated in the conspiracy; and (3) that a coconspirator’s activities in furtherance of the conspiracy had sufficient contacts with [the forum state] to subject that conspirator to jurisdiction in [the forum state]. *See Lolavar v. de Santibanes*, 430 F.3d 221, 229 (4th Cir. 2005); *McLaughlin v. McPhail*, 707 F.3d 800, 807 (4th Cir. 1983) (per curiam). To satisfy these requirements, the plaintiffs would have to rely on more than “bare allegations.” *Lolavar*, 430 F.3d at 229 (internal quotation marks omitted); *see also Jungquist v. Sheikh Sulton Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (“(T)he plaintiff must plead with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy” (internal quotation marks omitted.)).

Unspam Techs, Inc. v. Chernuk, 716 F.3d 322, 329 (4th Cir. 2013).

As this passage illustrates, *Unspam* puts the focus of the conspiracy theory where it must be: on the defendant’s contacts with the forum, and — conspiracy or no conspiracy — that is

where an assertion of specific jurisdiction must rest. Yet, MedTest offers only an insufficient “bare allegation” of conspiracy, with no corresponding allegations of any activities undertaken by the out-of-state Health Plans sufficient to confer jurisdiction in this forum. The only possible connection to the forum is MedTest’s unilateral act of submitting claims for services provided by other laboratories in other states to Highmark WV with the expectation that Highmark WV would pay them under its contract. Again, the Circuit Court improperly focused on *MedTest’s* actions, rather than those of the Health Plans. That does not come close to the conduct required by the Fourth Circuit to support jurisdiction on a conspiracy theory.¹⁵ Nor does it come close to what U.S. Supreme Court precedents would demand for the needed jurisdictional nexus.

On the contrary, *Walden* and like cases confirm that “the relationship [between the defendant and the forum] must arise out of contacts that the defendant *himself* creates with the forum State.” 571 U.S. at 284. And in *Rush v. Savchuk*, 444 U.S. 320 (1980), the Supreme Court squarely rejected the aggregation of forum contacts among defendants to establish jurisdiction over a co-defendant with no connection to the forum. As the Court put it, “[s]uch a result is plainly unconstitutional” because “[t]he requirements of *International Shoe* . . . must be met *as to each defendant*.” *Id.* at 331-32 (emphasis added).

There is no reason to think that the U.S. Supreme Court would double back on its reasoning and abandon its prior holdings in *Walden* and *Rush* simply because a conclusory allegation of conspiracy is injected. Under the Circuit Court’s holding, that bare allegation confers jurisdiction even though the requirements for specific jurisdiction or general jurisdiction *cannot* be otherwise met because of the lack of purposeful forum-related conduct on the part of

¹⁵ The Circuit Court found the conspiracy allegation adequate to withstand the out-of-state Health Plans’ motion to dismiss on the merits. App. 1624. That ruling, however, has no relevance to the jurisdictional analysis raised here. The adequacy of MedTest’s complaint in this instance depends on allegations supporting the exercise of jurisdiction. Irrespective of the merits, those allegations do not exist.

the targeted defendant related to the particular plaintiffs' claims. In *Bristol-Myers*, the Court rejected as "spurious" an attempt to deviate from this claim-specific focus, 137 S. Ct. at 1780-81, yet embracing MedTest's proposed conspiracy theory of jurisdiction on the record in this case would do just that. It would provide an end run around the very jurisdictional limitations the U.S. Supreme Court has taken pains to clarify and enforce. In that sense, this is just another "spurious" attempt to circumvent what the Supreme Court's holdings demand before an exercise of jurisdiction can be permitted consistent with due process.

The addition of the conspiracy allegation does not change the jurisdictional analysis. MedTest was required to allege that through the conspiracy, the out-of-state Health Plans intentionally directed some activity in the forum state. MedTest has not done so. This Court should grant this writ to put a stop to this unwarranted expansion of existing law.

B. West Virginia's Assertion Of Jurisdiction Over The Out-Of-State Health Plans Is Constitutionally Unreasonable

There is no basis for this State to assert specific jurisdiction under the controlling case law and this Court need look no further to grant this writ and so hold. But a further barrier exists on the record here: an exercise of jurisdiction over the out-of-state Health Plans would impermissibly and exponentially expand the constitutional boundary of reasonableness and cannot be permitted for this reason also.

As this Court has established, the relevant factors to the reasonableness inquiry include the burden on the defendant, the interests of the state, the interest of the plaintiff in obtaining relief, the interstate judicial system's interest in obtaining efficient resolution of controversies, and the shared interests of states in furthering fundamental substantive social policies. *See McGraw*, 788 S.E.2d at 343. The reasonableness inquiry "evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of

unreasonableness to defeat jurisdiction.” *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994). Here, these factors all weigh heavily against the exercise of jurisdiction.

First, the burden on the out-of-state Health Plans in litigating in West Virginia is substantial. All of them are based outside of West Virginia, and many are located a great distance from here. The convenience of the defendant “consistently has been declared deserving of the greatest weight” in reasonableness analysis. *Ticketmaster-New York, Inc.*, 26 F.3d at 210. And, it is fundamentally unfair to force the out-of-state Health Plans to litigate in a State where they have made no purposeful contact. *See Fed. Deposit Ins. Corp. v. British-Am. Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987) (“In a case such as this, in which the defendant has done little to reach out to the forum state, the burden of defending itself in a foreign forum militates against exercising jurisdiction.”).

Second, the interests of West Virginia are met and fulfilled by resolving the dispute between the two West Virginia entities: Highmark WV and MedTest. Here, MedTest’s alleged injury is that it was denied reimbursement under its contract with Highmark WV for the provision of laboratory services to Blue Cross Blue Shield members. FATPC ¶ 3; App. 63. If MedTest prevails in the underlying suit, its injury will be remedied by Highmark WV, and its suit against the out-of-state Health Plans becomes moot. That’s why MedTest’s third-party claims against the out-of-state Health Plans are pleaded in the alternative to its counterclaims against Highmark WV. *See* FATPC ¶¶ 4, 103; App. 63, 106.

Third, for the reasons just noted, MedTest can obtain complete relief from Highmark WV, and there is nothing stopping MedTest from vigorously pursuing its claims against Highmark WV. There is no reason to involve the out-of-state Health Plans in that dispute.

Fourth, the inclusion of every Blue Cross Blue Shield licensee in the country in a contract dispute between two West Virginia entities runs counter to the interstate judicial system's interest in obtaining efficient resolution of controversies. Appending claims implicating dozens of out-of-state entities to a straightforward dispute between contracting parties runs the risk of introducing needless delay and adding to the Circuit Court's burden in overseeing the litigation even if the underlying dispute proceeds on its schedule, as it should.

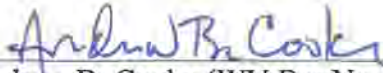
Fifth, there are no shared interests of the states in West Virginia's exercise of specific jurisdiction over the out-of-state Health Plans. States have an interest in facilitating the "free flow of commerce." *See Froning & Deppe, Inc. v. Cont'l Ill. Nat'l Bank & Tr. Co.*, 695 F.2d 289, 294 (7th Cir. 1982). The out-of-state Health Plans thus should not be penalized for participating in the BlueCard program by being haled into court here without requisite contacts with the forum. Further, the states have an interest in allowing health plans to form national networks to facilitate treatment for their citizens nationwide. The result MedTest demands would discourage health plans from establishing national networks for the benefit of consumers, which inhibits the free flow of commerce the law should promote. *See id.* (finding that exercise of jurisdiction would have a chilling effect on states' interest in "free flow of commerce").

Here, each of the reasonableness factors individually, and certainly all of them taken together, weigh against subjecting the out-of-state Health Plans to specific jurisdiction in West Virginia. No assertion of jurisdiction is constitutionally permissible for this reason.

VIII. CONCLUSION

For the foregoing reasons, this Court should grant the writ of prohibition and direct that the out-of-state Health Plans be dismissed from this case for lack of personal jurisdiction.

Dated: May 22, 2020



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IX. VERIFICATIONS

Verification

I, Andrew B. Cooke, counsel for the Petitioners, Health Care Service Corporation, A Mutual Legal Reserve Company (operating as Blue Cross and Blue Shield of Texas; Blue Cross and Blue Shield of Illinois; Blue Cross and Blue Shield of Montana; Blue Cross and Blue Shield of Oklahoma; and Blue Cross and Blue Shield of New Mexico); Blue Cross and Blue Shield of Alabama; Premiera Blue Cross; Highmark Inc.; Highmark BCBS Inc. d/b/a Highmark Blue Cross and Blue Shield of Delaware; Blue Cross of Idaho Health Service, Inc.; Blue Cross and Blue Shield of Kansas City; Blue Cross and Blue Shield of Nebraska, Inc.; Noridian Mutual Insurance Company d/b/a Blue Cross Blue Shield of North Dakota; BlueCross BlueShield of Tennessee, Inc.; Blue Cross & Blue Shield of Wyoming; and Blue Cross Blue Shield of Arizona, verify that the factual and legal arguments discussed herein are accurate and true to the best of my belief.



Andrew B. Cooke

Verification

I, Melissa Foster Bird, counsel for the Petitioners Anthem, Inc.; Blue Cross of California d/b/a Anthem Blue Cross; Rocky Mountain Hospital and Medical Service, Inc. d/b/a Anthem Blue Cross and Blue Shield, Anthem Blue Cross and Blue Shield; Anthem Blue Cross and Blue Shield; Anthem Health Plans, Inc. d/b/a Anthem Blue Cross and Blue Shield of Connecticut; Blue Cross and Blue Shield of Georgia, Inc.; Anthem Insurance Companies, Inc. d/b/a Anthem Blue Cross and Blue Shield of Indiana; Anthem Health Plans of Kentucky, Inc. d/b/a Anthem Blue Cross and Blue Shield of Kentucky; Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield of Maine; HMO Missouri, Inc. d/b/a Anthem Blue Cross and Blue Shield of Missouri; Anthem Blue Cross and Blue Shield of Nevada; Anthem Health Plans of New Hampshire, Inc. d/b/a Anthem Blue Cross and Blue Shield of New Hampshire; Empire Health Choice Assurance, Inc. d/b/a Empire BlueCross BlueShield; Community Insurance Company d/b/a Anthem Blue Cross and Blue Shield of Ohio; Anthem Health Plans of Virginia, Inc. d/b/a Anthem Blue Cross and Blue Shield of Virginia, Inc.; Blue Cross Blue Shield of Wisconsin d/b/a Anthem Blue Cross and Blue Shield of Wisconsin; verify that the factual and legal arguments discussed herein are accurate and true to the best of my belief.

A handwritten signature in black ink, appearing to read 'Melissa Foster Bird', is written over a horizontal line. The signature is fluid and cursive.

Melissa Foster Bird

Verification

I, Eric W. Iskra, counsel for the Petitioners Blue Cross Blue Shield of Michigan; and Capital BlueCross; verify that the factual and legal arguments discussed herein are accurate and true to the best of my belief.

A handwritten signature in blue ink, appearing to read 'Eric W. Iskra', is written above a horizontal line.

Eric W. Iskra

Verification

I, Thomas J. Hurney, Jr., counsel for the Petitioners Louisiana Health Service & Indemnity Company, PAC d/b/a Blue Cross and Blue Shield of Louisiana; Excellus Health Plan, Inc. d/b/a Excellus BlueCross BlueShield; Cambia Health Solutions, Inc. and its subsidiaries and affiliated companies Regence BlueCross BlueShield of Oregon, Regence BlueShield, Regence BlueCross BlueShield of Utah, and Regence BlueShield of Idaho, Inc.; USABLE Mutual Insurance Company d/b/a Arkansas Blue Cross and Blue Shield and Blue Advantage Administrators of Arkansas; Blue Cross Blue Shield of South Carolina; Blue Cross and Blue Shield of Massachusetts, Inc.; California Physicians' Service d/b/a Blue Shield of California; Blue Cross and Blue Shield of North Carolina; Blue Cross & Blue Shield of Mississippi, A Mutual Insurance Company; Blue Cross & Blue Shield of Rhode Island; BCBSM, Inc. d/b/a Blue Cross and Blue Shield of Minnesota; CareFirst, Inc. and its subsidiaries and affiliated companies CareFirst of Maryland, Inc. d/b/a CareFirst BlueCross BlueShield, and Group Hospitalization and Medical Services, Inc. d/b/a CareFirst BlueCross BlueShield; Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey; Triple-S Salud, Inc.; Wellmark, Inc. d/b/a Wellmark Blue Cross and Blue Shield of Iowa, and its affiliated company Wellmark of South Dakota, Inc. d/b/a Wellmark Blue Cross and Blue Shield of South Dakota; Blue Cross and Blue Shield of Vermont; Independence Hospital Indemnity Plan, Inc.; Blue Cross and Blue Shield of Florida, Inc.; verify that the factual and legal arguments discussed herein are accurate and true to the best of my belief.



Thomas J. Hurney, Jr.