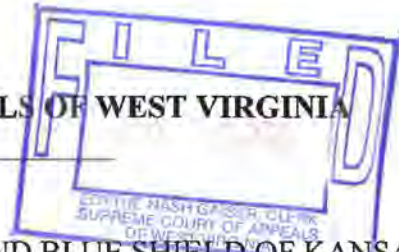


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NUMBER:

20-0297



STATE OF WEST VIRGINIA ex rel. BLUE CROSS AND BLUE SHIELD OF KANSAS, INC.
AND HEALTHNOW NEW YORK, INC. D/B/A BLUECROSS BLUESHIELD OF WESTERN
NEW YORK AND BLUESHIELD OF NORTHEASTERN NEW YORK,

Petitioners,

v.

THE HONORABLE SHAWN D. NINES, Judge of the Circuit Court of Wood County,
West Virginia, Business Court Division and MEDTEST LABORATORIES LLC,

Respondents.

PETITION OF BLUE CROSS AND BLUE SHIELD OF KANSAS AND
HEALTHNOW FOR A WRIT OF PROHIBITION

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

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QUESTIONS PRESENTED

1. Whether the Circuit Court erred in finding that Blue Cross and Blue Shield of Kansas, Inc. (“BCBS-KS”) and HealthNow New York Inc. d/b/a BlueCross BlueShield of Western New York and BlueShield of Northeastern New York (“HealthNow”) are subject to personal jurisdiction under the West Virginia long-arm statute even though MedTest did not allege any contract between BCBS-KS and HealthNow and any West Virginia entity.

2. Whether the Circuit Court erred in finding that exercising specific personal jurisdiction over BCBS-KS and HealthNow in West Virginia would comport with due process when the only connections with West Virginia were created by plaintiff or other parties, and not by BCBS-KS and HealthNow.

3. Whether the Circuit Court erred in finding that conspiracy allegations can establish personal jurisdiction over BCBS-KS and HealthNow when a conspiracy theory of jurisdiction has not been recognized under West Virginia law and is inconsistent with due process.

STATEMENT OF THE CASE

I. Procedural Background

On October 5, 2018, plaintiff Highmark West Virginia sued defendant MedTest Laboratories LLC and other defendants seeking to recover over \$6 million paid on claims for reimbursement for laboratory services defendants did not perform. Mem. in Supp. of Renewed Motion of BCBS-KS & HealthNow to Dismiss for Lack of Personal Jurisdiction (“Renewed Motion”) at 3, App’x 001428.¹

¹ “App’x” numbers refer to the appendix filed by other third-party defendants with their Petition for a Writ of Prohibition.

On April 8, 2019, MedTest answered Highmark's complaint and counterclaimed with breach of contract and negligence claims, alleging that Highmark breached its Network Agreement with MedTest by refusing to compensate MedTest for lab testing services MedTest provided to members of other Blue Cross Blue Shield Plans. *Id.* MedTest also filed a third-party complaint, sweeping in as third-party defendants every Blue Cross and Blue Shield Plan across the country (collectively, "Blue Plans"), including BCBS-KS and HealthNow. *Id.* On June 26, 2019, BCBS-KS and HealthNow moved to dismiss MedTest's original complaint for lack of personal jurisdiction and improper venue. *Id.*

On September 13, 2019, MedTest filed its first amended counterclaims and third-party complaint.² First Am. Counterclaims & Third-Party Compl. ("Am. Third-Party Compl.", App'x 000060). MedTest alleges that Highmark and "its fellow Blues misrepresented that MedTest was a participating provider in their National Networks" and are liable for millions of dollars in damages for unreimbursed laboratory testing services. Am. Third-Party Compl. ¶ 103, App'x 000106; *see also id.* ¶ 102, App'x 000105. MedTest alleges four causes of action against Highmark and the other Blue Plans: fraudulent misrepresentation and inducement (Count III), civil conspiracy (Count IV), joint venture (Count V), and unjust enrichment (Count VI). MedTest seeks compensatory, consequential and/or punitive damages or other economic relief. *Id.* at Prayer for Relief, p. 55, App'x 000112.

MedTest alleges that this Court has personal jurisdiction over "all defendants" under the West Virginia long-arm statute based on three theories: (1) defendants have significant business in West Virginia because their "members receive laboratory services and other health care

² Because MedTest's amended third-party complaint mooted BCBS-KS and HealthNow's June 26, 2019 motion to dismiss, BCBS-KS and HealthNow withdrew the motion on September 26, 2019. Renewed Motion, p. 3 n.2, App'x 001428.

services performed in West Virginia” through the BlueCard program³ and other national Blue Cross Blue Shield programs; (2) MedTest provided laboratory services to “one or more of each of the Defendants’ members under these national programs”; and (3) defendants participated in a conspiracy in West Virginia. *Id.* ¶ 6, App’x 000064.

On October 11, 2019, BCBS-KS and HealthNow filed a renewed motion to dismiss MedTest’s amended third-party complaint for lack of personal jurisdiction and improper venue. App’x 001418. MedTest filed its opposition on November 1, 2019,⁴ and BCBS-KS and HealthNow filed their reply on November 15, 2019 (App’x 001593). On January 28, 2020, the Circuit Court heard oral argument on BCBS-KS’s and HealthNow’s motion to dismiss, and on the motions of Highmark and other third-party defendants.⁵

II. Factual Background

BCBS-KS is a Kansas corporation headquartered in Kansas. BCBS-KS Aff. ¶ 2 (Ex. 1), App’x 001447; *see also* Am. Third-Party Compl. ¶ 33, App’x 000076. HealthNow is a New York corporation headquartered in New York. HealthNow Aff. ¶ 2 (Ex. 2), App’x 001450; *see also* Am. Third-Party Compl. ¶ 50, App’x 000085. BCBS-KS and HealthNow have no offices or mailing addresses in West Virginia, and they do not own any assets or lease any real property in West Virginia. BCBS-KS Aff. ¶¶ 4-5, App’x 001447; HealthNow Aff. ¶¶ 4-5, App’x 001451.

³ “The BlueCard Program is a national program that enables the members of one Blue Plan to obtain health care service benefits while traveling or living in another Blue Plan’s service area.” Highmark Am. Compl. ¶ 18, App’x 000013; *see* Am. Third-Party Compl. ¶¶ 80-81, App’x 000097-100.

⁴ MedTest’s opposition addressed BCBS-KS’s and HealthNow’s motion, as well as other third-party defendants’ motions to dismiss. Third-Party Plaintiff’s Mem. of Law in Opposition to Third-Party Defendants’ Motions to Dismiss MedTest’s Amended Third-Party Complaint for Lack of Personal Jurisdiction and Improper Venue (“Opp.”), App’x 001459.

⁵ BCBS-KS and HealthNow join the stay request filed by third-party defendants in the Circuit Court seeking a stay of the third-party action. Third-party defendants, including BCBS-KS and HealthNow, also filed a stay request with this Court.

BCBS-KS and HealthNow have no employees, representatives or agents for service of process in West Virginia. BCBS-KS Aff. ¶¶ 6-7, App'x 001447; HealthNow Aff. ¶¶ 6-7, App'x 001451. BCBS-KS and HealthNow maintain no bank accounts and file no tax returns in West Virginia. BCBS-KS Aff. ¶¶ 8-9, App'x 001447; HealthNow Aff. ¶¶ 8-9, App'x 001459.

BCBS-KS and HealthNow neither issue insurance contracts or policies, nor solicit business of any kind in West Virginia. BCBS-KS Aff. ¶¶ 10, 12, App'x 001447; HealthNow Aff. ¶¶ 10-11, App'x 001459. BCBS-KS and HealthNow are not registered or qualified to do business in West Virginia. BCBS-KS Aff. ¶ 3, App'x 1447; HealthNow Aff. ¶ 3, App'x 001451.

BCBS-KS and HealthNow do not provide group coverage or administrative services for groups headquartered in West Virginia. BCBS-KS Aff. ¶ 14, App'x 001447; HealthNow Aff. ¶ 13, App'x 001451. BCBS-KS and HealthNow do not have any direct contracts with providers in West Virginia. BCBS-KS Aff. ¶ 13, App'x 001447; HealthNow Aff. ¶ 12, App'x 001451.

In its amended third-party complaint, MedTest added allegations that each Blue Plan, including BCBS-KS and HealthNow, improperly listed MedTest as an in-network provider for certain provider networks on their websites. *See* Am. Third-Party Compl. ¶¶ 33 (BCBS-KS), 49-51 (HealthNow), App'x 000076, 000085-86; *see also id.* ¶¶ 79, 103-04, App'x 000097, 000106.⁶ But MedTest *still* does not allege that BCBS-KS or HealthNow made any representations in West Virginia. In fact, MedTest *still* does not allege any act or event in West Virginia involving BCBS-KS or HealthNow. MedTest *still* does not allege that any BCBS-KS or HealthNow member received services from MedTest in West Virginia. *See, e.g.,* Am. Third-Party Compl. ¶ 74, App'x 000096 (alleging only that MedTest performed laboratory testing services for "one or

⁶ MedTest also attached undated screenshots of each Blue Plan's website, including BCBS-KS and HealthNow, purporting to reflect these alleged improper listings. *See* Exs. B.20 (BCBS-KS), B.35-B.36 (HealthNow), App'x 000626, 000980-86.

more of each of the Defendants' members, either directly or by referring laboratory testing services to be performed under its supervision to its affiliate[s]").

III. The Circuit Court's Order.

The Circuit Court denied BCBS-KS's and HealthNow's motion to dismiss, incorporating by reference the Court's order on other third-party defendants' motions to dismiss. Apr. 14, 2020 Order Denying Renewed Motion of BCBS-KS & HealthNow to Dismiss for Lack of Personal Jurisdiction & Improper Venue, App'x 001626 (incorporating March 27, 2020 Order Denying Third-Party Defendants' Motion to Dismiss MedTest's First Amended Third-Party Complaint for Lack of Personal Jurisdiction, App'x 001611 ("March 27 Order")).

A. West Virginia Long-Arm Statute

The Circuit Court concluded that MedTest established personal jurisdiction under the West Virginia long-arm statute because BCBS-KS and HealthNow have "made a contract to be performed, in whole [or] in part, by any party thereto in this state." March 27 Order ¶ 31, App'x 001620 (citing W. Va. Code §§ 31D-15-1501(d)(1), 31E-14-1401(d)(1)). It did not identify any contract between BCBS-KS or HealthNow and MedTest or any other West Virginia company. Instead, it found that in order to participate in the BlueCard and other national programs, "each of the Blues entered into a series of contracts that require performance in West Virginia by Highmark WV and MedTest." *Id.* ¶ 30, App'x 001620.⁷ The Circuit Court found it irrelevant that MedTest has not alleged that it provided any services in West Virginia, focusing instead on the fact that "payments were alleged to be made by contract in and to West Virginia through the contracts with a West Virginia company." *Id.* ¶ 29, App'x 001619.

⁷ Under the BlueCard and other national programs, when a subscriber of an out-of-state Blue Plan is traveling or living in West Virginia and receives healthcare services from a West Virginia provider, Highmark is responsible for processing and paying the claim. March 27 Order ¶¶ 26, 27, App'x 001619. The out-of-state Blue Plan then reimburses Highmark. *Id.*, App'x 001619.

B. Due Process Requirements

The Circuit Court also concluded that exercising jurisdiction comports with the requirements of federal due process because certain of third-party defendants' online provider directories listed MedTest. The Circuit Court reasoned that these online provider directories represented to insureds/subscribers that they could send samples to MedTest and that the Blue Plans would pay for MedTest's services. *Id.* ¶ 36, App'x 001621. The Circuit Court found this was "purposeful availment" because it was "built into the design" of third-party defendants' health plans. *Id.* ¶¶ 34, 37, App'x 001621. The Circuit Court rejected third-party defendants' arguments that MedTest only alleged that third-parties had contacts with West Virginia. The Circuit Court reasoned that those third-party contacts "could have occurred" as a result of the "member or [his] health care provider" relying on representations in the online provider directories. *Id.* ¶ 40, App'x 001622.

The Circuit Court also found that the harm to MedTest was foreseeable because, as alleged, third-party defendants advertised to their members that they could use MedTest's services. *Id.* ¶¶ 39, 45, App'x 001622-23. Rejecting third-party defendants' arguments that MedTest did not allege that it provided any services in West Virginia, the Circuit Court reasoned that no matter where the services were performed, MedTest would lose money in West Virginia. *Id.* ¶ 29 n.8, App'x 001619.

The Circuit Court also concluded that MedTest's claims arise out of or relate to these contacts with West Virginia. *Id.* ¶ 41, App'x 001622.

Turning to the final due process consideration, the Circuit Court concluded that the exercise of jurisdiction is constitutionally reasonable. *Id.* ¶ 43, App'x 001623. First, there is no burden on third-party defendants because they "[chose] to do business with companies headquartered in" West Virginia "while building a national network." *Id.* ¶ 44, App'x 001623.

Second, West Virginia has an interest in allowing its companies to litigate claims against out-of-state defendants here. *Id.* ¶ 45, App’x 001623. Third, MedTest has an interest in obtaining relief in West Virginia because it would otherwise have to file suits all across the country. *Id.* ¶ 46, App’x 001623. Fourth, it is more efficient for the judicial system to have these claims heard in one court. *Id.* ¶ 47, App’x 001624. Fifth, it furthers no substantive social policy to make recovery difficult for MedTest by forcing it to litigate in dozens of jurisdictions. *Id.* ¶ 48, App’x 001624.

C. Conspiracy Theory of Personal Jurisdiction

Finally, the Circuit Court noted, without authority or analysis, that “because MedTest has pled a claim for conspiracy, it has undoubtedly established jurisdiction here.” *Id.* ¶ 49, App’x 001624.

SUMMARY OF THE ARGUMENT

BCBS-KS and HealthNow are entitled to a writ of prohibition to prevent the Circuit Court from proceeding in this case without personal jurisdiction over them. This Court has made clear that a writ of prohibition is available as a matter of right if a circuit court improperly denies a motion to dismiss for lack of personal jurisdiction.

MedTest does not allege that BCBS-KS or HealthNow is a party to any agreement with MedTest, Highmark WV, or any other West Virginia entity, or that it is a party to any agreement to be performed in West Virginia. The Circuit Court improperly found jurisdiction based on a supposed “series of contracts” without identifying any specific contract that meets the requirements of the West Virginia long-arm statute.

The Circuit Court did not address the separate question whether BCBS-KS and HealthNow are subject to personal jurisdiction under West Virginia Code § 56–3–33(a)(1).

MedTest offered no facts showing BCBS-KS or HealthNow transact business within West Virginia.

The Circuit Court erred in finding BCBS-KS and HealthNow had the minimum contacts required for specific jurisdiction under federal due process because the only West Virginia contacts identified were the contacts of plaintiff or third-parties. Under well-settled United States Supreme Court precedent, plaintiff's or third-parties' contacts with West Virginia cannot support specific personal jurisdiction over BCBS-KS and HealthNow.

Under both the West Virginia long-arm statute and federal due process, MedTest's claims must arise from BCBS-KS and HealthNow's contacts with West Virginia. The Circuit Court did not address how this requirement could be met under West Virginia law without identifying a contract BCBS-KS or HealthNow made, or any transaction of business by them, in West Virginia. The Circuit Court erred in finding this requirement was met under federal law because BCBS-KS's and HealthNow's "suit-related conduct" did not create any "substantial connection" with West Virginia.⁸

The Circuit Court improperly focused on the fact that MedTest felt the loss of money in West Virginia. Even if that loss was arguably foreseeable, it is not enough to establish specific personal jurisdiction over BCBS-KS and HealthNow. The question is not where plaintiff experienced injury but whether BCBS-KS's and HealthNow's conduct connects them to West Virginia in any meaningful way.

Because due process principally protects nonresident defendants, not the convenience of plaintiffs or third-parties, the Circuit Court incorrectly found that exercising personal jurisdiction here would be constitutionally reasonable.

⁸ See *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

Finally, the Circuit Court also cannot exercise personal jurisdiction over BCBS-KS and HealthNow under a conspiracy theory because that theory has not been recognized under West Virginia law, and it would be inconsistent with due process.

This Court should grant the writ of prohibition and direct that BCBS-KS and HealthNow be dismissed from the suit for lack of personal jurisdiction.

STATEMENT REGARDING 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 the important legal issues this case raises. BCBS-KS and HealthNow request oral argument under Rule 20, as this case involves matters of first impression regarding an issue of fundamental public importance. W. Va. R. App. P. 20(a)(1)-(2).

STANDARD OF REVIEW

This Court has original jurisdiction in prohibition proceedings. Art. VIII, § 3 of the Constitution of W.V.; *see* Rule 16(a), W.Va. R. App. P. Unless jurisdiction turns on contested facts—which it does not here—a writ of prohibition issues as a matter of right whenever the trial court lacks jurisdiction. *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 580, 788 S.E.2d 319, 326 (2016) (“When 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.”). This Court reviews findings of fact for clear error and conclusions of law *de novo*. *Id.* “Ostensible findings of fact, which entail application of law or constitute legal judgments that transcend ordinary factual findings, must be reviewed *de novo*.” *Id.*

Under West Virginia law, personal jurisdiction over a nonresident defendant is determined in a two-step process. *Ford Motor*, 237 W. Va. at 581, 788 S.E.2d at 327. First, the court analyzes whether defendant's actions satisfy one of West Virginia's long-arm statutes: W.

Va. Code § 56-3-33 and W. Va. Code § 31D-15-1501. *Id.* Second, the court analyzes whether defendant's contacts with West Virginia satisfy federal due process. *Id.* The analysis of due process includes both general and specific jurisdiction. *Id.*

Plaintiff bears the burden of establishing sufficient facts upon which the court may exercise jurisdiction over each defendant. *Lane v. Bos. Sci. Corp.*, 198 W. Va. 447, 451, 481 S.E.2d 753, 757 & n.7 (1996) (explaining that if more than one defendant challenges personal jurisdiction, plaintiff must establish jurisdictional facts as to each). Where, as here, defendant challenges jurisdiction with a supporting affidavit, plaintiff "may not stand on its pleadings and must come forward with affidavits or other proper evidence detailing specific facts demonstrating that the court has jurisdiction over the defendant." *Id.* at 452; *see also State ex rel Bell Atlantic-West Virginia v. Ranson*, 201 W. Va. 402, 415, 497 S.E.2d 755, 768 (1997).

ARGUMENT

MedTest alleged no specific actions in West Virginia by BCBS-KS and HealthNow. BCBS-KS and HealthNow did not make a contract to be performed in West Virginia, transact business in West Virginia, or have meaningful contacts with West Virginia. The attenuated West Virginia contacts alleged by MedTest do not satisfy due process under any theory of jurisdiction. There are no facts or viable legal theories that permit the Circuit Court to exercise jurisdiction over BCBS-KS and HealthNow.

I. MEDTEST CANNOT ESTABLISH PERSONAL JURISDICTION FOR BCBS-KS OR HEALTHNOW UNDER THE WEST VIRGINIA LONG-ARM STATUTE.

A. MedTest Does Not Establish That BCBS-KS And HealthNow Made A Contract To Be Performed In West Virginia.

The Circuit Court summarily concluded that MedTest established personal jurisdiction under the West Virginia long-arm statute because BCBS-KS and HealthNow have "made a contract to be performed, in whole [or] in part, by any party thereto in this state." March 27

Order ¶ 31, App'x 001620 (citing W. Va. Code §§ 31D-15-1501(d)(1), 31E-14-1401(d)(1)).⁹

This conclusion rests on a misinterpretation of the long-arm statute.

The plain language of the long-arm statute only supports jurisdiction where a defendant makes a contract that requires a party to perform in West Virginia. *See* W. Va. Code §§ 31D-15-1501(d)(1); *see also Eddy v. Ingenesis, Inc.*, No. 13-0888, 2014 WL 1672939, at *2 (W. Va. Apr. 25, 2014) (memorandum decision) (affirming dismissal for lack of personal jurisdiction even where plaintiff argued her employment contract was to be performed “in whole or in part” from her home office in West Virginia because defendant had no contracts for healthcare staffing in West Virginia, and plaintiff did not manage any healthcare providers in West Virginia on behalf of defendant).

In reaching its conclusion here, the Circuit Court did not identify any contract between BCBS-KS or HealthNow and MedTest or any other West Virginia company. It also did not identify any BCBS-KS or HealthNow contract requiring performance in West Virginia. MedTest alleges no such contracts. MedTest does not allege that BCBS-KS or HealthNow is a party to any agreement with MedTest, Highmark WV, or any other West Virginia entity, or that either is a party to any agreement to be performed in West Virginia. BCBS-KS and HealthNow do not have any direct contracts with providers in West Virginia and neither issues insurance contracts or policies in West Virginia. BCBS-KS Aff. ¶¶ 12, 13; HealthNow Aff. ¶¶ 11, 12. The

⁹ Although West Virginia Code § 31D-15-1501(d) addresses “jurisdiction over foreign corporations” and what constitutes “transacting business” for “for profit” corporations, that statute does not apply to BCBS-KS and HealthNow because neither is a “for profit” corporation. *See* W. Va. Code § 31D-1-150(4); *Ford Motor*, 237 W. Va. at 581, 788 S.E.2d. at 327 (W. Va. Code § 31D-15-1501(d) “applies to for profit corporations”); BCBS-KS Aff. ¶ 2, App'x 001447 (BCBS-KS is a not-for-profit corporation); HealthNow Aff. ¶ 2, App'x 001451 (HealthNow is a not-for-profit corporation). The not-for-profit statute does not mention jurisdiction or address what constitutes “transacting business.” W. Va. Code § 31E-14-1401(d)(1) (referring only to “conducting affairs”).

only agreement MedTest bases its claims on is the Network Agreement “between MedTest and Highmark” (Opp. 3, App’x 001465), which is why MedTest asserts breach of contract against solely Highmark. *See* Am. Third-Party Compl. (Count I), App’x 00107. BCBS-KS and HealthNow are not parties to that Network Agreement.

Instead, the Circuit Court found that in order to participate in the BlueCard and other national programs, “each of the Blues entered into a series of contracts that require performance in West Virginia by Highmark WV and MedTest.” March 27 Order ¶ 30, App’x 001620. The Circuit Court identified no specific contract and erred in finding that a nebulous “series of contracts” was sufficient to establish personal jurisdiction when MedTest did not allege that BCBS-KS or HealthNow was a party to any contract requiring performance by a party in West Virginia. *See generally Lane*, 198 W. Va. at 455, 481 S.E.2d at 761 (affirming dismissal for lack of jurisdiction because all contracts for sale of defendant’s products were formed at defendant’s location in Massachusetts and all such contracts were likewise performed in Massachusetts); *Marietta Mfg. Co. v. Brad Foote Gear Works, Inc.*, 377 F.2d 889, 890 (4th Cir. 1967) (affirming dismissal for lack of jurisdiction because the contract at issue “was neither made in West Virginia, nor was it intended to be performed there, nor in fact was it performed there”).

B. MedTest Does Not Establish BCBS-KS And HealthNow Transact Business In West Virginia.

West Virginia Code § 56–3–33(a)(1) confers jurisdiction over nonresidents who are “transacting any business in this State.” Although MedTest vaguely suggests that all third-party defendants transact business in West Virginia because their members receive health care services in West Virginia through the BlueCard program (*see* Am. Third-Party Compl. ¶ 6, App’x 000064), it does not allege any specific facts showing that BCBS-KS or HealthNow transacted business in West Virginia, through the BlueCard program or otherwise. As MedTest

acknowledges, BCBS-KS “is a Kansas corporation” that “provide[s] health care financing to members of various health care plans in Kansas.” *Id.* ¶ 33, App’x 000076. Similarly, MedTest acknowledges that HealthNow “is a New York corporation” that “provide[s] health care financing to members of various health care plans in New York.” *Id.* ¶ 50, App’x 000085. BCBS-KS and HealthNow are not registered, licensed or otherwise qualified or authorized to do business in West Virginia. BCBS-KS Aff. ¶ 2, App’x 001447; HealthNow Aff. ¶ 2, App’x 001451.

Because MedTest alleges no facts showing BCBS-KS or HealthNow transact business within West Virginia, it cannot rely on this statutory provision. *See Eddy*, 2014 WL 1672939, at *3 (affirming dismissal for lack of personal jurisdiction even where defendant “obtained a certificate of authority to transact business in West Virginia” because it did not show defendant “actually transacted business” in West Virginia); *Weirton Med. Ctr., Inc. v. Cmty. Health Sys., Inc.*, No. 5:15CV132, 2017 WL 6347171, at *5 (N.D.W. Va. Dec. 12, 2017) (finding no personal jurisdiction under § 56–3–33(a)(1) where defendant was “not registered to do business in West Virginia, ha[d] not appointed an agent for service of process in West Virginia, ha[d] no office or place of business in West Virginia, ha[d] not entered into any contracts in West Virginia, and [did] not advertise, market, or offer services for sale in West Virginia”); *Harris v. Armel*, No. 3:18-CV-94, 2019 WL 2366042, at *4 (N.D.W. Va. May 8, 2019), *report and recommendation adopted*, 3:18-CV-94, 2019 WL 2366018 (N.D.W. Va. June 4, 2019) (finding no personal jurisdiction where defendant was not a resident of West Virginia, did not engage in any of the

specified acts under the long-arm statute, and all of defendant's alleged actions took place outside of West Virginia).¹⁰

C. MedTest's Claims Do Not Arise Out Of Contacts With The State By BCBS-KS And HealthNow.

MedTest also must show that its claims "[a]rise from or grow[] out of one or more of" those acts. W. Va. Code § 56-3-33(b). A defendant's contacts with West Virginia are not considered if they are unrelated to the particular plaintiff and particular cause of action asserted. *See Lane*, 198 W. Va. at 458, 481 S.E.2d at 764 (affirming finding of no personal jurisdiction where relevant activities took place out of state and defendant's West Virginia contacts were unrelated to the cause of action); *Grove v. Maheswaran*, 201 W. Va. 502, 507, 498 S.E.2d 485, 490 (1997) (same).

Here, all alleged actions of BCBS-KS and HealthNow relating to the cause of action took place outside West Virginia. MedTest does not allege its causes of action arise from any contract or BCBS-KS's or HealthNow's purported transaction of business in West Virginia. The only wrongful act MedTest alleges as to BCBS-KS or HealthNow is that it misrepresented MedTest as an in-network provider. *See* Am. Third-Party Compl. ¶¶ 33, App'x 000076 (BCBS-KS), 49-51, App'x 000085-86 (HealthNow); *see also id.* ¶¶ 79, 103-04, App'x 000097,000106.

¹⁰ MedTest also argues that third-party defendants caused tortious injury in West Virginia. Opp. 4 (citing W. Va. Code § 56-3-33(a)(4)). Allegations of injury alone do not suffice, and MedTest alleges no facts showing BCBS-KS or HealthNow "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered" in West Virginia. *See Rosenthal v. Mihans*, No. 14-1041, 2015 WL 3952649, at *2 (W. Va. June 26, 2015) (memorandum decision) (affirming dismissal under § 56-3-33(a)(4) because defendant did not engage in any "persistent course of conduct" in West Virginia); *Kandas v. Stillwell*, No. 2:12-CV-02040, 2012 WL 3670265, at *3 (S.D.W. Va. Aug. 24, 2012) (finding no personal jurisdiction under § 56-3-33(a)(4) where defendant was not "licensed" in West Virginia, did not "maintain[] offices or agents," "own[] property," "deliberately engage[] in significant or long-term business activities," or "ma[ke] any in-person contact with . . . [p]laintiff" in West Virginia).

Since MedTest alleges BCBS-KS operates only in Kansas (*id.* ¶ 33, App’x 000076) and HealthNow operates only in New York (*id.* ¶ 50, App’x 85), this representation necessarily would have occurred in Kansas or New York, not West Virginia.

Further, MedTest does not allege it provided any services to members of BCBS-KS or HealthNow in West Virginia. See Am. Third-Party Compl. ¶ 74, App’x 000096 (alleging only that MedTest performed laboratory testing services for “one or more of each of the Defendants’ members”).¹¹ Thus, MedTest cannot rely on the West Virginia long-arm statute to establish personal jurisdiction over BCBS-KS and HealthNow.

D. MedTest Cannot Establish Personal Jurisdiction Under A Conspiracy Theory Of Personal Jurisdiction Because The Theory Is Not Recognized Under West Virginia Law.

Without analysis or authority, the Circuit Court concluded that because MedTest pled a claim for conspiracy, “it has undoubtedly established jurisdiction here.” March 27 Order ¶ 49, App’x 14. The Circuit Court failed to address whether the conspiracy theory of personal jurisdiction is recognized under West Virginia law. It is not.¹²

Whether a court can exercise personal jurisdiction under a conspiracy theory is a question of state law. See *Davis v. A & J Elecs.*, 792 F.2d 74, 76 (7th Cir. 1986). MedTest conceded this, arguing only that it sufficiently alleged a conspiracy. Opp. 12-13; see also Opp. 12 n. 5 (“there is no case on point” from this Court).

West Virginia’s long-arm statutes do not confer personal jurisdiction over a nonresident based solely on its participation in a conspiracy. BCBS-KS and HealthNow have not located any

¹¹ While MedTest alleges that all defendants’ members received laboratory and other health care services in West Virginia (Am. Third-Party Compl. ¶ 6, App’x 000064), at no point does MedTest allege that MedTest provided those services. MedTest alleges that it is a “nationwide provider of laboratory testing services, with its major testing sites in West Virginia, Arkansas and North Carolina.” Am. Third-Party Compl. ¶ 73, App’x 000038.

¹² See Renewed Motion, pp. 9-10, App’x 001434-35.

controlling West Virginia authorities adopting the conspiracy theory of personal jurisdiction.¹³ Without such authority, conspiracy allegations alone cannot serve as the basis for personal jurisdiction over BCBS-KS and HealthNow in West Virginia.

Regardless, personal jurisdiction under a conspiracy theory must still comport with the requirements of due process. *See Ford Motor*, 237 W. Va. at 581, 788 S.E.2d at 327. As discussed below, the exercise of personal jurisdiction here would not pass constitutional muster.

II. THE EXERCISE OF PERSONAL JURISDICTION OVER BCBS-KS AND HEALTHNOW WOULD VIOLATE DUE PROCESS.

Because MedTest does not establish a *prima facie* case of personal jurisdiction over BCBS-KS and HealthNow under the West Virginia long-arm statute, the Court does not need to determine whether their contacts with West Virginia satisfy federal due process. *See Lane*, 198 W. Va. at 453, 481 S.E.2d at 759. They do not.

Under the Fourteenth Amendment, a court may only exercise personal jurisdiction when a defendant has minimum contacts with the forum state and the exercise of personal jurisdiction does not offend “traditional notions of fair play and substantial justice.” *Ford Motor*, 237 W. Va. at 582, 788 S.E.2d at 328 (citing *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945)).

Courts consider whether a defendant’s contacts support either general or specific jurisdiction. *Id.* General jurisdiction requires “continuous and systematic general business contacts” with the forum, such that the defendant is “essentially at home” there. *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011). A corporation is “at home” in its state of incorporation or its principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117,

¹³ Although a few federal district courts in West Virginia have applied the theory, none of the cases relied on West Virginia law. *See, e.g., HSBC Bank USA, Nat. Ass’n v. Resh*, No. 3:12-CV-00668, 2015 WL 4772524, at *6-7 (S.D.W. Va. Aug. 12, 2015); *Cline v. Hanby*, No. CIV 2:05-0885, 2006 WL 3692647, at *6 (S.D.W. Va. Dec. 13, 2006).

137 (2013). MedTest cannot support a finding of general jurisdiction because it does not allege that BCBS-KS and HealthNow are incorporated or have their principal place of business in West Virginia. Am. Third-Party Compl. ¶¶ 33, 50, App’x 000076, 000085; *see also* BCBS-KS Aff. ¶ 2, App’x 001447; HealthNow Aff. ¶ 2, App’x 001451.

“[S]pecific jurisdiction requires the activities of the nonresident defendant in the forum be related to or give rise to the liabilities sued on.” *Ford Motor*, 237 W. Va. at 583, 788 S.E.2d at 329. The inquiry therefore “focuses on the relationship among the defendant, the forum, and the litigation.” *Id.* at 589 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). To determine whether the minimum contacts needed for specific jurisdiction exist, courts consider: (1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state; (2) whether the plaintiffs’ claims arise out of or relate to those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally “reasonable.” *Id.* at 589.

MedTest does not allege the requisite minimum contacts to support a finding of specific jurisdiction. Thus, there is no personal jurisdiction over BCBS-KS and HealthNow in West Virginia under either a general or specific theory of jurisdiction.¹⁴

A. MedTest Does Not Establish Minimum Contacts Because It Has Not Demonstrated Purposeful Availment By BCBS-KS Or HealthNow.

1. Contacts Of Others Cannot Establish Purposeful Availment By BCBS-KS And HealthNow.

The Circuit Court erred in finding minimum contacts based on contacts of MedTest, Highmark or third-parties. March 27 Order ¶¶ 40, 49, App’x 001622,001624. The Circuit Court acknowledged that BCBS-KS and HealthNow were at least one step away from any contact with

¹⁴ Because the Circuit Court did not find, and MedTest does not allege, general jurisdiction, BCBS-KS and HealthNow address only specific jurisdiction.

West Virginia but concluded that members', or their healthcare providers', contacts with West Virginia could be attributed to BCBS-KS or HealthNow because of online provider directories listing providers nationwide. March 27 Order ¶ 40, App'x 001622. "It is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Walden*, 571 U.S. at 291. The Court must look to BCBS-KS's and HealthNow's contacts with West Virginia, not the contacts others have with West Virginia. *Walden*, 571 U.S. at 285.

MedTest has not alleged BCBS-KS or HealthNow have any direct contacts with West Virginia. MedTest has not even alleged that any members of BCBS-KS or HealthNow reside or receive treatment in West Virginia. Even if it had, the mere presence of some of their members in West Virginia does not establish purposeful availment by BCBS-KS and HealthNow. *See Kindred Hosps. E., L.L.C. v. Buffalo Bd. of Educ.*, No. 8:17-CV-1106-T-24, 2017 WL 3622154, at *4 (M.D. Fla. Aug. 23, 2017).

MedTest also has not alleged any contract between BCBS-KS or HealthNow and MedTest or any other West Virginia entity. In any event, it is well-established a contract between a state resident and an out-of-state defendant does not automatically establish sufficient minimum contacts. *Walden*, 571 U.S. at 285-86.

MedTest's allegation that it suffered injury in West Virginia is not a basis for exercising personal jurisdiction over BCBS-KS and HealthNow. *See Walden*, 571 U.S. at 290 ("The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."); *Brighter Sky Prods., LLC v. Marriott Int'l, Inc.*, No. 5:17-CV-03254, 2018 WL 2248601, at *7 (S.D.W. Va. May 16, 2018) (holding specific jurisdiction not satisfied merely because "effects were felt in West Virginia").

MedTest has not alleged any facts that connect BCBS-KS or HealthNow to the forum “in a meaningful way.” *See Walden*, 571 U.S. at 290. Supreme Court precedent does not allow personal jurisdiction to be based on the contacts of others. *Id.* at 284 (“[T]he relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State.”). Therefore, the conspiracy theory of personal jurisdiction, which bases personal jurisdiction on the contacts of others, is not consistent with due process.¹⁵

2. Online Provider Directories Do Not Establish Purposeful Availment.

The Circuit Court incorrectly found that because Blue Plans have an online directory listing in-network providers nationwide, they purposefully availed themselves of the privilege of conducting activities in West Virginia. March 27 Order ¶¶ 36-39, App’x 001621-22. Courts have repeatedly held that merely making information available on a website “is insufficient to give courts personal jurisdiction over the defendant.” *Gilley v. C.H. Robinson Worldwide, Inc.*, No. CV 1:18-00536, 2020 WL 1272116, at *5 (S.D.W. Va. Mar. 16, 2020) (quoting *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 399 (4th Cir. 2003)); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (“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.”); *Brighter Sky*, 2018 WL 2248601, at *6 (finding defendants’ website did not create sufficient minimum contacts for specific personal jurisdiction absent “concrete evidence” that the website led to any specific contacts with the forum state).

¹⁵ Even if the conspiracy theory of personal jurisdiction could be exercised consistent with due process, MedTest’s vague and conclusory conspiracy allegations are insufficient to justify its application here. *See* Am. Third-Party Compl. ¶¶ 107, 126-29, App’x 000106, 000110; *HSBC Bank*, 2015 WL 4772524, at *6-7 (finding no personal jurisdiction where plaintiff did not allege “any specific facts that demonstrate an actual conspiracy or common plan among [defendant] and any actors who did business in West Virginia”).

Further, provider directories showing members that they can obtain in-network services nationwide (March 27 Order ¶ 38, App'x 001621) are not evidence that these Plans specifically target West Virginia. *See Gilley v. C.H. Robinson Worldwide, Inc.*, No. CV 1:18-00536, 2020 WL 1272116, at *5 (S.D.W. Va. Mar. 16, 2020) (finding no specific personal jurisdiction over out-of-state insurer offering nationwide coverage); *see also Baird v. Shagdarsuren*, No. 3:17-CV-2000-B, 2019 WL 6618934, at *5 (N.D. Tex. Dec. 5, 2019) (“wide-reaching insurance coverage, by itself, is not sufficient to create minimum contacts by an insurer with every covered state”).

Defendants can only be haled into court in West Virginia based on their “own affiliation” with the state, not based on the “random, fortuitous, or attenuated” contacts they make “by interacting with other persons affiliated with” West Virginia. *Walden*, 571 U.S. at 286. Listing MedTest as an in-network provider merely indicates that MedTest has an agreement with Highmark. *See* Am. Third-Party Compl. ¶ 109, App'x 000107. It neither shows an agreement between MedTest and BCBS-KS or HealthNow, nor provides a guarantee that BCBS-KS or HealthNow will pay MedTest. BCBS-KS and HealthNow had no say in whether Highmark chose to contract with MedTest or whether their members’ (or healthcare providers) chose to send samples to MedTest. BCBS-KS and HealthNow cannot be haled into court in West Virginia based on MedTest’s or third-parties’ contacts.

3. Participation in National Programs Does Not Establish Purposeful Availment in West Virginia.

Although the Circuit Court did not address it, MedTest alleges BCBS-KS and HealthNow have minimum contacts with West Virginia due to their participation in national programs such as BlueCard because their members receive laboratory services and other health care services

performed in West Virginia. *See* Am. Third-Party Compl. ¶ 6, App'x 000064. These allegations do not establish minimum contacts.

First, the fact that some of their members may receive treatment in West Virginia through the BlueCard program does not show that BCBS-KS and HealthNow “purposefully availed” themselves of the privilege of conducting business in West Virginia. Nonresident insurers’ membership in a national program that facilitates the provision of services to insureds around the country does not constitute purposeful availment. *See Choice Healthcare v. Kaiser Found. Health Plan of Colo.*, 615 F.3d 364, 369-71 (5th Cir. 2010) (citing *St. Luke’s Episcopal Hosp. v. La. Health Serv. & Indem. Co.*, Civ. A. No. H-08-1870, 2009 WL 47125, at *9-10 (S.D. Tex. Jan. 6, 2009)); *see also Resolution Trust Corp. v. First Am. Bank*, 796 F. Supp. 1333, 1337 (C.D. Cal. 1992) (holding that bank’s participation in national electronic fund clearinghouse, which allowed participating members’ clients to obtain wire transfers in foreign states from home banks through member entities, did not establish purposeful availment).¹⁶

In *Choice Healthcare*, the court focused on the fact that there was “no [forum] contract,” no “contract between the parties,” and no “substantial connection to [the forum].” 615 F.3d at 371; *accord Resolution Trust*, 796 F. Supp. at 1337. The same is true here. MedTest has not alleged that BCBS-KS or HealthNow contract with providers in West Virginia or have any

¹⁶ *See also Int’l Air Med. Servs. Inc. v. Triple-S Salud Inc.*, No. 15-cv-149, 2015 WL 5158832, at *4 (D. Ariz. Sept. 3, 2015) (finding “that merely contracting with an organization that does business in all fifty states does not thereby subject [a Blue Cross Blue Shield plan] to the jurisdiction of courts throughout the country”); *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 995 F. Supp. 2d 587, 618-19 (N.D. Tex. 2014) (following *Choice Healthcare* and *Resolution Trust* to find no jurisdiction over Blue Plan); *Bayada Nurses, Inc. v. Blue Cross Blue Shield of Mich.*, No. 08-cv-1241, 2008 WL 2945388, at *4, *7 (E.D. Pa. July 30, 2008) (holding conclusory allegations of BlueCard membership insufficient to support finding of general jurisdiction and payment through BlueCard insufficient to establish specific jurisdiction); *Whittaker v. Med. Mut. of Ohio*, 96 F. Supp. 2d 1197, 1201 (D. Kan. 2000) (reliance on Blue Plan in forum state to process claims does not equal purposeful availment of forum state).

substantial connection to the state. *See Choice Healthcare*, 615 F.3d at 371-72. Even if MedTest could identify a relevant contract (it cannot), courts do not find minimum contacts where “the contract was centered around [defendants’] operations outside” the forum state. *McFadin v. Gerber*, 587 F.3d 753, 760-61 (5th Cir. 2009) (finding no minimum contacts where the “hub of activities” was not in the forum).

Second, merely paying for services provided to members in the forum is not sufficient to establish personal jurisdiction. *See Bayada Nurses*, 2008 WL 2945388, at *7 (collecting cases); *Lucile Salter Packard Children’s Hosp. at Stanford v. Idaho AGC Self-Funded Benefit Tr.*, No. C 18-04927, 2019 WL 1427410, at *3 (N.D. Cal. Mar. 29, 2019); *Wiegering v. Blue Cross & Blue Shield of Mass., Inc.*, No. 16-23031-CIV, 2017 WL 1294907, at *8 (S.D. Fla. Feb. 2, 2017) (collecting cases); *Berg v. Blue Cross & Blue Shield of Utica-Watertown, Inc.*, No. C-93-2752, 1993 WL 467859, at *3-4 (N.D. Cal. Nov. 2, 1993); *see also Int’l Air Med. Servs.*, 2015 WL 5158832, at *4 (holding Arizona provider’s request for payment from out-of-state Blue Plan does not create contacts between Blue Plan and Arizona).

Third, MedTest does not allege, and the affidavits of BCBS-KS and HealthNow confirm, that these Plans do not operate or solicit business in West Virginia. Even if some of their members receive treatment there, that does not support a finding of “purposeful availment.” A defendant who does not operate or solicit business in the forum state does not purposefully direct its activities there by incidentally providing services to customers in the forum state. *See Hi-Tex, Inc. v. TSG, Inc.*, 87 F. Supp. 2d 738, 744 (E.D. Mich. 2000); *see also Intrust Fin. Corp. v. Entrust Fin. Credit Union*, No. 11-cv-1312, 2012 WL 2993893, at *4-6 (D. Kan. July 20, 2012) (regional company that knowingly accepted and provided services to limited number of customers in Kansas, outside of its primary state of operation, did not purposefully avail itself of

the privilege of conducting business in Kansas even though it contracted with entities outside of its primary state of operation to enable customers to receive services in other states).

As MedTest alleges, BCBS-KS's principal business activity is solicitation of business in Kansas and HealthNow's principal business activity is solicitation of business in New York. *See* Am. Third-Party Compl. ¶¶ 33, 50, App'x 000076, 000085. Thus, the "hub" of BCBS-KS's and HealthNow's business activities is in their home area. *See McFadin*, 587 F.3d at 761; *Wiegering*, 2017 WL 1294907, at *8 (Blue Plan "simply administers Boston Scientific's healthcare plan and does so exclusively within the territorial borders of the Commonwealth of Massachusetts"). BCBS-KS and HealthNow have not purposefully availed themselves of the privilege of conducting business in West Virginia even if some of their accounts have a small number of members receiving treatment in West Virginia. Any services that BCBS-KS and HealthNow provide to those members are incidental to the business that they solicit and transact in their home states.

B. MedTest's Claims Are Not Related To BCBS-KS's And HealthNow's Contacts With West Virginia.

The Circuit Court also erred in finding that MedTest's claims "arise out of or relate to these contacts with West Virginia." March 27 Order ¶ 41, App'x 001622. Neither the Circuit Court nor MedTest identified any "suit-related conduct" by BCBS-KS or HealthNow that "create[ed] a substantial connection with" West Virginia. *Walden*, 571 U.S. at 284. First, MedTest cannot show a "substantial connection" because its alleged injuries would have occurred regardless of whether BCBS-KS or HealthNow had contacts with West Virginia or not. *See Hartford Cas. Ins. Co., v. JR Mktg., LLC*, 511 F. Supp. 2d 644, 649 (E.D. Va. 2007). MedTest does not allege that it provided services to members of BCBS-KS or HealthNow in West Virginia.

Second, even if their members received treatment in West Virginia, that does not constitute a substantial connection to MedTest's fraudulent misrepresentation and inducement claims. *See* Am. Third-Party Compl. ¶¶ 121-25, App'x 000109. MedTest alleges that Highmark and all Blue Plans "misrepresented that MedTest was a participating provider in their National Networks." *Id.* ¶ 103, App'x 000106. The only misrepresentation MedTest alleges as to BCBS-KS or HealthNow is that it misrepresented MedTest as an in-network provider. *See* Am. Third-Party Compl. ¶¶ 33, App'x 000076 (BCBS-KS), 49-51, App'x 000085-86 (HealthNow); *see also id.* ¶¶ 79, 103-04, App'x 000097. Yet as MedTest alleges that BCBS-KS operates only in Kansas (*id.* ¶ 33, App'x 000076) and HealthNow operates only in New York (*id.* ¶ 50, App'x 000085), these representations necessarily would have occurred in Kansas or New York, not West Virginia. *See also Bristol-Myers Squibb Co. v. Super. Court of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1782 (2017) (no jurisdiction where "all the conduct giving rise to the [plaintiffs'] claims occurred elsewhere").

Third, any argument that BCBS-KS's and HealthNow's websites reached West Virginia residents and therefore created sufficient minimum contacts with the state also fails. *See, e.g., Brighter Sky*, 2018 WL 2248601, at *6 (finding website did not create sufficient minimum contacts and, even if it did, there was no personal jurisdiction because plaintiffs' claims did not arise from either the internet contacts or defendants' contacts with West Virginia).

C. Based On Their Limited Contacts With West Virginia, BCBS-KS And HealthNow Would Not Reasonably Anticipate Being Haled Into Court There.

The Circuit Court also erred in holding that BCBS-KS and HealthNow "should have reasonably anticipated being haled into court in West Virginia" if their online provider directories included MedTest and they failed to pay for MedTest's services. March 27 Order ¶ 39, App'x 001622. While foreseeability is a consideration, it "has never been a sufficient

benchmark for personal jurisdiction under the Due Process Clause” on its own. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); accord *Walden*, 571 U.S. at 289. The key is a defendant’s own conduct and connection with the forum state. *Id.*

The awareness of BCBS-KS and HealthNow that a small number of their members may seek treatment in West Virginia is insufficient to establish personal jurisdiction. See *Choice Healthcare*, 615 F.3d at 370-71; *Perez v. Pan Am. Life Ins. Co.*, 96 F.3d 1442, 1442 (5th Cir. 1996); *Wiegeling*, 2017 WL 1294907, at *8 n.4. None of the alleged contacts demonstrates that BCBS-KS and HealthNow should reasonably anticipate being haled into court in West Virginia, particularly in the absence of any evidence of purposeful availment. See *Carefirst of Maryland*, 334 F.3d at 401-02 (explaining that in order for defendant’s “website to bring [defendant] within the jurisdiction of the Maryland courts, the company must have done something more than merely place information on the Internet”); *Young v. F.D.I.C.*, 103 F.3d 1180, 1192 (4th Cir. 1997).

D. Exercising Personal Jurisdiction Over BCBS-KS And HealthNow Would Not Comport With “Fair Play And Substantial Justice.”

Because BCBS-KS and HealthNow do not have sufficient contacts with West Virginia, the Court need not inquire into the other factors, such as West Virginia’s interests or the convenience of the parties, to decide whether exercising personal jurisdiction would be reasonable, *i.e.*, comport with “fair play and substantial justice.” See *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985). But if the Court were to undertake this inquiry, the exercise of personal jurisdiction does not meet this requirement.

The factors considered in analyzing fairness are: (1) the burden on the defendant of litigating in the forum; (2) the interest of the forum state in adjudicating the dispute; (3) the plaintiff’s interest in obtaining relief; (4) the shared interest of the states in obtaining efficient

resolution of disputes; and (5) the interests of the states in furthering substantive social policies. *Ford Motor Co.*, 237 W. Va. at 589, 788 S.E.2d at 335.

Focusing on the interests of MedTest and West Virginia, the Circuit Court found the exercise of jurisdiction to be constitutionally reasonable. March 27 Order ¶¶ 43-48, App'x 001623-24. However, as the United States Supreme Court has explained, due process “principally protect[s] the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.” *Walden*, 571 U.S. at 284. The Due Process Clause can divest a state of jurisdiction “[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; [and] even if the forum State is the most convenient location for litigation.” *Bristol-Myers*, 137 S. Ct. at 1780–81. Thus, the “the ‘primary concern’ is ‘the burden on the defendant.’” *Id.* at 1780.

This burden is not just “practical problems” of “litigating in the forum” but also the “more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.” *Id.* The only direct connection MedTest has identified between West Virginia and its claims against BCBS-KS and HealthNow is its alleged injury. This is not enough to justify burdening BCBS-KS and HealthNow by subjecting them to jurisdiction in West Virginia. *See Walden*, 571 U.S. at 285 (“[H]owever significant the plaintiff’s contacts with the forum may be, those contacts cannot be decisive in determining whether the defendant’s due process rights are violated.”).

Here, the fairness and reasonableness requirements of due process are not met. BCBS-KS and HealthNow do not solicit or conduct business in West Virginia. Indeed, BCBS-KS operates only within the state of Kansas and HealthNow operates only within the state of New

York. *See* Am. Third-Party Compl. ¶¶ 33, 50, App’x 000076, 000085. Having to “mount an effective defense against a potentially substantial claim in a remote jurisdiction to which [they have] no real ties” would burden BCBS-KS and HealthNow. *Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1268 (N.D. Ala. 2000); *Kindred Hosps. E., L.L.C.*, 2017 WL 3622154, at *5 (Blue Plan “would be burdened by litigating . . . in Florida because all of [its] business operations are located in New York”); *see also Wiegering*, 2017 WL 1294907, at *9 (Blue Plan “will be burdened by litigating in [Florida] because all of its business operations are located in Massachusetts”).

West Virginia does not have a significant interest in adjudicating a dispute with a health insurer that is not registered with the state or licensed to operate within its borders and that lacks constitutionally sufficient contacts with the state. And, MedTest can obtain relief in another forum, because it is free to bring its claims in courts in Kansas and New York. This is consistent with the interests of the interstate judicial system because the interested states are where BCBS-KS and HealthNow operate. The claims against BCBS-KS and HealthNow can be disposed of efficiently in the states where they operate.

CONCLUSION

For these reasons, BCBS-KS and HealthNow respectfully request that the Court grant this Petition and direct that BCBS-KS and HealthNow be dismissed from this case for lack of personal jurisdiction and improper venue.

Respectfully submitted,



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VERIFICATION

I, Paula L. Durst, counsel for the Petitioners Blue Cross and Blue Shield of Kansas, Inc. ("BCBS-KS") and HealthNow New York Inc. d/b/a BlueCross BlueShield of Western New York and BlueShield of Northeastern New York ("HealthNow"), verify that the factual and legal arguments discussed herein are accurate and true to the best of my belief.



Paula L. Durst