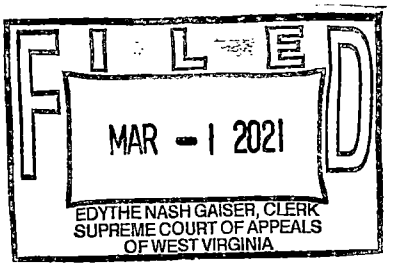

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant below / Petitioner,

v.

AMERISOURCEBERGEN DRUG CORPORATION and BELLCO DRUG CORPORATION,

Plaintiffs below / Respondent,

and

ACE AMERICAN INSURANCE COMPANY
and ACE PROPERTY & CASUALTY INSURANCE COMPANY

Defendants below / Intervenors.

(From the Circuit Court of Boone County, West Virginia
Civil Action No. 17-C-36)

AMERISOURCEBERGEN DRUG CORPORATION AND BELLCO DRUG CORPORATION'S BRIEF OF RESPONDENTS

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INTRODUCTION

This case, pending before Judge William S. Thompson in the Circuit Court of Boone County since 2017, concerns whether general liability insurance proceeds—including under policies written by Petitioner-Defendant St. Paul and Intervenor-Defendant ACE—will be available to help fund the defense and settlements of lawsuits stemming from the nation's opioid crisis. Nearly *four years* after AmerisourceBergen filed this coverage lawsuit in the Circuit Court, St. Paul filed suit in California against the same parties, relating to the same insurance policies, and raising the same issues as those presented here (including issues on which the Circuit Court has made rulings adverse to St. Paul) in a transparent effort to relitigate the Circuit Court's rulings elsewhere. Stated plainly: St. Paul's California lawsuit seeks a "do-over" in another jurisdiction, hoping to achieve a different result than the one reached by the Circuit Court.

The Circuit Court found that St. Paul's California lawsuit was duplicative of the case before it and was filed for improper purposes—to disrupt the West Virginia case and avoid the court's rulings. It concluded that St. Paul's collateral California action undermined the court's jurisdiction, that allowing St. Paul to pursue that lawsuit would frustrate important interests of West Virginia and its courts, and that it would also cause irreparable harm to AmerisourceBergen. Accordingly, on January 6, 2021, the Circuit Court enjoined the parties before it, including St. Paul, from prosecuting the California case and any other duplicative litigation regarding the issues already pending in the Circuit Court.[1] St. Paul and ACE now

[1] On January 7, 2021, the Circuit Court entered a Corrected Injunction Order. The Court's Corrected Injunction Order is included in St. Paul's Appendix at SPApp.1780-1825. The Injunction Order will be cited herein as "Order."

challenge that order, essentially asking this Court to give them free rein to pursue duplicative litigation in other states regarding the subject of this West Virginia lawsuit.

This Court reviews a Circuit Court's decision to issue an injunction for abuse of discretion. There was no abuse of discretion here. The law authorizes courts to protect their jurisdiction by enjoining the parties before them from pursuing duplicative litigation. The circumstances of this case present a paradigmatic example of when such an injunction is warranted and authorized by law. If St. Paul wishes to challenge the Circuit Court's rulings on coverage issues it should do so through an appeal to this Court, not by filing competing litigation in another jurisdiction. This Court, therefore, should affirm.

STATEMENT OF THE CASE

A. Overview Of The Nationwide Opioid Litigation And This Coverage Action

The West Virginia Attorney General ("WVAG") filed suit against AmerisourceBergen in 2012, alleging that AmerisourceBergen's distribution of prescription opioid medication contributed to opioid addiction and disease in West Virginia. SPApp.0028-30. That case and the companion cases the WVAG filed against other pharmaceutical distributors all were assigned to Judge Thompson. AmerisourceBergen settled its lawsuit in January 2017. SPApp.0031 ¶¶ 34-37. It provided written notice of the WVAG lawsuit and settlement to its insurers. SPApp.0029-31 ¶¶ 26, 31, 33. AmerisourceBergen's insurers have refused to cover any portion of AmerisourceBergen's defense and settlement costs. SPApp.0057 ¶ 131.

AmerisourceBergen Drug Corporation ("AmerisourceBergen") filed this lawsuit on March 16, 2017, seeking coverage for defense and settlement of the WVAG lawsuit from its general liability insurers who issued primary layer and first layer excess insurance coverage

during the period implicated by the WVAG Lawsuit (including St. Paul and ACE). SPApp.0001-17. This insurance coverage case also was assigned to Judge Thompson.

After AmerisourceBergen filed this suit, hundreds of additional prescription opioid lawsuits were filed against AmerisourceBergen (and other companies) in West Virginia and elsewhere. The vast majority of these cases, including many of those originally filed in West Virginia, have been consolidated in a federal multidistrict litigation styled *In Re: National Prescription Opiate Litigation*, No. 1:17-md-02804 (N.D. Ohio) (the "National Opioid MDL"). In addition, a second group of cases filed in West Virginia have been consolidated before the West Virginia Mass Litigation Panel, styled *In re: Opioid Litigation*, Kanawha County Civil Action No. 19-C-9000 (the "West Virginia MLP").

While the cases in the National Opioid MDL and the West Virginia MLP have been filed by different plaintiffs, they all are predicated on the same theories of liability, assert the same type of alleged injuries and harms, and seek the same basic relief. Indeed, the existence of the National Opioid MDL (and the West Virginia MLP) is a recognition of the significant similarity among these lawsuits. In creating the National Opioid MDL, the Judicial Panel on Multidistrict Litigation ("JPML") explained that the cases all "involve common factual questions about, *inter alia*, the manufacturing and distributor defendants' knowledge of and conduct regarding the alleged diversion of these prescription opiates." SPApp.1403.

Due to the factual and legal overlap among the prescription opioid cases, the coverage issues with regard to the underlying opioid lawsuits can be determined by looking at relevant subsets of cases, rather than assessing coverage for each individual action. *See* Statement Of The Case, § B, *infra*. Therefore, on July 18, 2018, AmerisourceBergen filed an Amended Complaint seeking rulings regarding the obligations of St. Paul, ACE, and the other

defendants to provide general liability insurance coverage for all pending West Virginia prescription opioid lawsuits, including those pending in the National Opioid MDL and the West Virginia MLP—coverage all defendants consistently have refused to provide. SPApp.00024-70; *see also* Order ¶ 31 (citing St. Paul's, ACE's and other defendants' answers).[2] The Amended Complaint further made clear that AmerisourceBergen also would seek coverage in the West Virginia action for subsequently filed prescription opioid lawsuits in the state. SPApp.0048 ¶ 92.

B. This Coverage Action Is A Bellwether for All Related Coverage Litigation

The implications of this coverage litigation are not limited to West Virginia for two reasons. The first relates to the representative nature of the underlying opioid cases that are the subject of this coverage litigation. The second relates to the particulars of the insurance policies at issue and the way these policies interact with other policies issued by St. Paul, ACE, and the other insurance companies.

As noted, the creation of the National Opioid MDL and the West Virginia MLP confirms that the opioid lawsuits all share common factual and legal questions that will repeat whether those suits were filed in West Virginia, California, or elsewhere. SPApp.1403. These cases also run the procedural gamut: The WVAG lawsuit is settled and fully resolved. Two West Virginia cases that were transferred to the National Opioid MDL, filed by Cabell County and the City of Huntington, were selected to serve as a bellwether trial and have been remanded to the West Virginia federal court where trial is scheduled to commence on May 3, 2021. *See* Order, *AmerisourceBergen Drug Corp. et al. v. Cabell Cnty. Comm. et al.*, No. 17-cv-01362, (S.D.W.V. Jan. 12, 2021) (ECF No. 1199). The other West Virginia

[2] The Amended Complaint added Bellco Drug Corporation as a plaintiff. *See* Order ¶ 4.

lawsuits all remain pending in the National Opioid MDL or West Virginia MLP, subject to those courts' various case management orders. Importantly, the West Virginia MLP is currently engaged in efforts to settle the cases pending before it, and it has been publicly reported that the parties to the National Opioid MDL have been engaged in efforts to reach a global settlement. *See* St. Paul. Br. at 6 nn. 2-4 (citing news articles reporting on settlement discussions).

The legal issues in this coverage case likewise are representative and consequential. This lawsuit concerns AmerisourceBergen's primary and first layer general liability insurance coverage and the interpretation of key contract language in those policies. Order ¶¶ 68-70, 94. The primary layer policies are the policies that have current payment obligations to AmerisourceBergen, and all insurers that issued those policies are the defendants here. *Id.* AmerisourceBergen also purchased insurance policies, referred to as "excess layers" of coverage, from ACE and other defendants. *Id.* ¶¶ 103-05. The excess layers are additional policies that provide coverage to AmerisourceBergen after the coverage provided by the primary layer policies has been exhausted. Critically, these excess polices are "follow-form" policies, that adopt the key terms of the primary layer policies. *Id.* ¶¶ 106-07. In practice, this means that any rulings by the Circuit Court regarding St. Paul and ACE's obligations under the policies at issue in this case will apply equally to future coverage determinations under all other "follow-form" policies. *Id.*

In combination, this means that the Circuit Court's rulings on coverage for West Virginia opioid lawsuits under the primary layer policies should effectively resolve the major coverage issues for all other prescription opioid lawsuits regardless of where such lawsuits originally were filed, or whether coverage is sought under a primary or excess layer policy.

And those rulings will inform all parties as to whether insurance is available to contribute to any potential settlement of those liabilities.

The Circuit Court has long understood that it can evaluate coverage and any coverage defenses using exemplar cases. This is reflected in the Circuit Court's management of the case. On February 22, 2018, the court bifurcated and partially stayed this case. SPApp.0018-23. In the first phase, the parties have been addressing AmerisourceBergen's claim for insurance coverage for defense and settlement of the WVAG lawsuit. In the context of this one case, the Circuit Court has been examining whether these cases fall within the policies' general liability coverage grant, and whether any of the insurers' affirmative defenses apply. Once coverage for the WVAG lawsuit is resolved, the parties will proceed to a second phase, if necessary, to litigate coverage for the remaining opioid lawsuits, including those lawsuits consolidated in the National Opioid MDL and West Virginia MLP. *Id.* In this regard, the determination of coverage for the WVAG lawsuit is serving as a bellwether that will resolve all substantially similar coverage issues for the remaining lawsuits.

C. Substantial Progress Has Been Made In This Case, Including Resolution Of A Threshold Coverage Issue Decided In AmerisourceBergen's Favor

Substantial progress has been made in this case. The parties completed written discovery and conducted a first round of corporate representative depositions of all parties. Order ¶¶ 38, 40. Additional depositions have been scheduled for this spring and fact discovery should be complete in 2021. *Id.* ¶ 39. During Phase 1, AmerisourceBergen has produced, pursuant to a Circuit Court order, all its documents, testimony, and trial exhibits from every prescription opioid lawsuit in the nation. *Id.* ¶ 37.

On July 22, 2019, St. Paul filed a motion for summary judgment on a threshold issue impacting insurance coverage for all prescription opioid lawsuits brought by government

entities: whether the WVAG lawsuit (and by extension all other suits brought by government entities for the costs of care and treatment of residents addicted to opioids) sought damages for "bodily injury" or "property damage." SPApp.0116-43; Order ¶ 44. St. Paul itself described this as a "threshold" issue because insurance coverage under general liability policies is triggered by suits seeking damages for bodily injury or property damage. Order ¶ 45 (citing St. Paul's Memo. of Law). St. Paul's motion was fully briefed and the Court held oral argument on January 23, 2020. *Id.* ¶¶ 44-47.

After the motion was fully briefed, five other courts have held that prescription opioid lawsuits brought by government entities—including cases addressing a companion opioid lawsuit filed by the WVAG and cases in the National Opioid MDL—*do* trigger coverage under general liability insurance policies whose terms are substantially similar to the policies at issue here. *Id.* ¶¶ 48-49 (citing cases). AmerisourceBergen submitted Notices of Supplemental Authority on each of these decisions. *Id.*¶¶ 50. The September 24, 2020 and November 10, 2020 notices are particularly relevant because both addressed decisions based on Pennsylvania law, which all parties agree governs the policies in this case and, thus, St. Paul's motion.[3]

On November 23, 2020, the Circuit Court independently reached the same conclusion as the one reached in these cases, denied St. Paul's summary judgment motion, and held that "insurance coverage is available under the general liability insurance coverage section of the St. Paul Policy for lawsuits by government entities seeking damages for injuries suffered by their citizens." SPApp.0132 ¶¶ 81-82; Order ¶ 51.

[3] *See Rite Aid Corp. v. ACE Am. Ins. Co.*, No. N19C-04-150, 2020 WL 5640817, at *12 (Del. Super. Ct. Sept. 22, 2020) (applying both Pennsylvania and Delaware law); *Giant Eagle, Inc. v. Am. Guarantee & Liab. Ins. Co.*, No. 2:19-CV-00904, 2020 WL 6565272, at *8 (W.D. Pa. Nov. 9, 2020).

D. After Nearly Four Years Of Litigation In The Circuit Court, St. Paul Files An Improper, Duplicative Lawsuit In California

Apparently seeing the writing on the wall, on November 5, 2020—while its summary judgment motion was pending and *nearly four years after* AmerisourceBergen filed suit in West Virginia—St. Paul filed a lawsuit in California, seeking declaratory relief as to its obligation to defend and indemnify AmerisourceBergen for *all opioid lawsuits on a nationwide basis*. SPApp.0094-115. St. Paul's California lawsuit—on its face—is duplicative of the lawsuit that has been pending and actively litigated in West Virginia for nearly four years. The California complaint is filed against *all of the parties* to this lawsuit, based on *all of the insurance policies* at issue in the West Virginia lawsuit, regarding *all prescription opioid lawsuits* filed anywhere, at any time, by any party. *Id.*; Order ¶¶ 7, 52-54. Put simply: St. Paul's California lawsuit seeks rulings in another jurisdiction on the same issues in front of, or already ruled upon, by the Circuit Court.

In the face of the obvious overlap between the two cases, St. Paul drafted its California complaint to include cosmetic differences between these two suits to try to distinguish the California suit from this action.

First, in addition to AmerisourceBergen, St. Paul's California complaint repeatedly refers to "Bergen Brunswig" and the "Bergen Brunswig Entities." SPApp.0094-115. It is undisputed, however, that *Bergen Brunswig does not exist*. In fact, Bergen Brunswig has not existed since 2001, when it merged with Amerisource Health to form AmerisourceBergen Corporation—the entity to whom the policies before the Circuit Court were issued. Order ¶¶ 60-62 (taking judicial notice based on SEC filings). And the entities described in the California complaint as the "Bergan Brunswig Entities" are, in fact, all current or former subsidiaries of AmerisourceBergen Corporation. *Id.* ¶ 64 (taking judicial notice based on SEC

filings). It thus is not surprising that the California complaint does not actually name Bergen Brunswig as a defendant.

Second, under the guise of seeking contribution toward the indemnification of AmerisourceBergen for these liabilities, St. Paul's California complaint named as defendants all other insurance companies that issued policies to AmerisourceBergen Corporation (or Bergen Brunswig prior to the 2001 merger) from 1995 to 2018—including entities not named as defendants in the Circuit Court. SPApp.0094-115; Order ¶ 66. As a threshold matter, more than twenty of those additional excess insurers in the California case are corporate affiliates of the defendants in the West Virginia action. *Id.* ¶¶ 67. And none of these insurers have paid *anything* and, therefore, such contribution claims are not yet ripe.

More fundamentally, adding these insurers doesn't materially change anything because, from 1995 to 2018, St. Paul and ACE were the only insurers that issued primary layer insurance to AmerisourceBergen (post-merger) or Bergen Brunswig (pre-merger). *Id.*¶¶ 68-70. The interpretation of these primary layer policies is before the West Virginia court. Critically, the relevant language of those primary layer policies is *identical* throughout the period covering both the AmerisourceBergen's West Virginia coverage lawsuit and St. Paul's California lawsuit. *Id.* ¶ 71. Moreover, the policies St. Paul identified in its California complaint excess of the St. Paul and ACE policies for this period all are "follow-form" policies that adopt the key provisions of the primary layer policies—so the additional defendants and their follow-form policies bring nothing new to the table. *Id.* ¶¶ 104-07

Third, despite expressly seeking a ruling regarding the availability of coverage for *all* policies and *all* opioid lawsuits, St. Paul stated an "inten[tion]," relegated to a footnote, to carve out the West Virginia lawsuits from any such ruling in California. SPApp.0110 n.11.

But St. Paul's California complaint does not explain how such an "intention"—which is directly at odds with the all-encompassing relief sought in the complaint—could be effectuated (particularly given that the cases in the National Opioid MDL, whether filed in West Virginia or elsewhere, are proceeding on a consolidated basis and that the factual and legal allegations in all cases are generally the same, for coverage purposes, whether filed in West Virginia or elsewhere). As the Circuit Court found, no carve out was possible. Order ¶¶ 110-18. And St. Paul has yet to explain how the rulings it seeks in California would not be applicable to West Virginia cases as well.

In short, regardless of which insurance companies are named or which policies are at issue, the key coverage questions in the California complaint are *identical* to those that have been at issue in the Circuit Court litigation for nearly four years.[4]

E. AmerisourceBergen Seeks, And the Circuit Court Enters, An Antisuit Injunction Enjoining St. Paul From Prosecuting Its Duplicative California Lawsuit

On November 25, 2020, AmerisourceBergen filed a motion for injunction asking the Circuit Court to enjoin St. Paul (and all other defendants) from pursuing collateral coverage litigation, and specifically St. Paul's California complaint. SPApp.0075-93. Notably, AmerisourceBergen did not seek to enjoin the California court itself, and sought to enjoin only the *parties* to the West Virginia litigation from prosecuting any duplicative lawsuits elsewhere. *Id.*

After a hearing on AmerisourceBergen's motion, the Circuit Court issued a detailed opinion, granting the motion and holding that "an anti-suit injunction is warranted in these

[4] Those questions are: (1) do the opioid lawsuits seek damages for bodily injury or property damage; (2) were the damages expected or intended; (3) does the known loss doctrine apply; and (4) how should the liabilities be allocated among the insurers. *Id.* ¶ 122.

unique, limited circumstances." Order ¶ 157.[5] The Circuit Court first explained that antisuit injunctions are authorized by West Virginia law, and are recognized by courts across the country. *Id.* ¶¶ 86-92. The court then comprehensively analyzed the arguments and evidence presented by both parties and concluded that the lawsuits were duplicative:

> Whatever differences exist between this action and St. Paul's California Coverage Action, at a minimum, St. Paul is asking the California court to issue declarations governing the parties already before this Court, interpreting the exact same insurance policy language already before this Court, regarding the same type of cases already before this Court, and regarding the same cases on which this Court permitted the Insurer Defendants to take discovery, raising the identical coverage issues already pending before this Court, including coverage issues on which this Court has already issued rulings.

Id. ¶ 124.

The Circuit Court also found that St. Paul filed the California action for improper purposes—to forum shop and disrupt the resolution of the Circuit Court case:

> [A]n anti-suit injunction is warranted in these unique, limited circumstances and specifically finds that St. Paul has filed the California Coverage Action for improper purposes, namely, delay and forum shopping and further finds that permitting St. Paul to pursue a collateral action would cause irreparable harm to [AmerisourceBergen] and would undermine the important governmental and judicial interests of West Virginia and this Court.

Id. ¶ 157.[6] And, as the Circuit Court concluded, St. Paul's purported intention to exclude West Virginia cases from its California complaint was a dead letter. *Id.* ¶¶ 110-18. Given the overlapping policy language, legal issues, and underlying allegations, St. Paul's California

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[5] St. Paul tries to make much ado about the circumstances that led to the Circuit Court's entry of AmerisourceBergen's proposed order. St. Paul's suggestion that something nefarious had occurred is untrue, misleading, and unfair. As AmerisourceBergen explained more fully in its opposition to St. Paul's motion to stay, any issue regarding how the Order was entered exclusively resulted from difficulty in using the WV E-File System's RTF Order Editor. AmerisourceBergen Resp. in Opp. to St. Paul Mot. for Expedited Relief and Mot. for Stay at 12 n.2 (filed Jan. 21, 2021).

[6] The Circuit Court also concluded that St. Paul had violated "both the terms and the spirit" of the February 22, 2018 stay, which precludes the parties from litigating disputes regarding the West Virginia cases transferred to the MDL until after resolution of the first phase of this case. *Id.* ¶ 154.

lawsuit interferes with the West Virginia lawsuit and St. Paul filed it to try to achieve a different result. *Id.* ¶¶ 134-35, 141, 154-57.

In addition to enjoining the insurer defendants from initiating and prosecuting duplicative litigation, the Circuit Court's order directed the parties to meet-and-confer "to discuss the amendment of the pleadings to add any parties, insurance policies, or underlying prescription opioid lawsuits they believe are necessary to the resolution of this dispute." *Id.* ¶ 166. Yet, St. Paul, ACE, and the other defendants declined to add any parties, policies, or lawsuits to this case. *See* ABDC-App.002.

This appeal followed. In addition to filing a Notice of Appeal, St. Paul filed a motion to stay enforcement of the Circuit Court's Injunction Order pending appeal. This Court denied the stay motion on January 28, 2021. St. Paul continues to press a similar motion to stay in the Circuit Court despite this Court's ruling, arguing that the Circuit Court should not be bound by this Court's decision. *See* ABDC-App.005. On February 9, 2021, ACE filed a motion to intervene in St. Paul's appeal, which was granted on February 12, 2021. In addition to joining in St. Paul's arguments on appeal, ACE asserted one additional assignment of error.

During the pendency of this appeal, the California Court issued an order staying that litigation pending the resolution of this West Virginia lawsuit. ABDC-App.016-17.[7] The California Court independently concluded that St. Paul's California lawsuit presented issues that overlapped with those in the West Virginia lawsuit and that, given California's interests in

[7] Because St. Paul refused to dismiss its complaint after the Circuit Court issued its Injunction Order, AmerisourceBergen needed to comply with pending deadlines in the California action and filed a motion to dismiss or, in the alternative, to stay, entering a special appearance to raise those challenges. That motion raised only jurisdictional arguments, including that the issues raised in the California action already are being litigated in the Circuit Court. *See id.*

comity and judicial efficiency, the California lawsuit should be stayed during the pendency of West Virginia lawsuit. *Id.*

SUMMARY OF THE ARGUMENT

An application of controlling law to the uncontroverted facts requires affirmance of the Circuit Court's Injunction Order. Antisuit injunctions—which enjoin parties within a court's jurisdiction, not other lawsuits or sister courts themselves—are a settled component of West Virginia law and flow directly from a circuit court's authority to issue injunctions directed to parties within in its jurisdiction. Such injunctions protect the West Virginia court's jurisdiction when a party before a West Virginia court has improperly filed a duplicative lawsuit—resulting in a waste of judicial resources and a threat of inconsistent decisions—and particularly when the party filing the duplicative lawsuit is forum shopping with an aim to seek a different result in a different court. West Virginia law is not alone in endorsing antisuit injunctions. Federal and state courts across the country recognize the propriety of such injunctions, the underlying rationale for such injunctions, and the legal standards that control the analysis when such an injunction is sought.

The Circuit Court correctly applied the standard governing antisuit injunctions and concluded one was warranted here. St. Paul's California lawsuit—filed nearly four years after AmerisourceBergen commenced the Circuit Court action—involves the same parties to the Circuit Court action, the same policies at issue in Circuit Court action, and the same underlying factual allegations at issue in the Circuit Court action. One of the core legal questions in the California lawsuit—whether the thousands of opioid lawsuits AmerisourceBergen is facing around the country seek damages for bodily injury or property damage as required to trigger general liability coverage—already is before and has been

decided (adverse to St. Paul) by the Circuit Court. In these circumstances, the Circuit Court was well within its discretion to enjoin the parties from prosecuting duplicative lawsuits during the pendency of the West Virginia litigation.

Faced with this conclusion, which is compelled by West Virginia law, St. Paul and ACE offer a series of arguments that are flawed as a matter of law, fact, or both. St. Paul's professed intention to exclude from its California lawsuit the underlying West Virginia lawsuits is belied by St. Paul's California complaint. What's more, St. Paul's supposed carve-out is not a carve-out at all, because it provides no solution to the problems engendered by the very existence of the two lawsuits addressing the same legal issues—namely, the waste of judicial resources and the risk of inconsistent rulings. St. Paul's comity and constitutional arguments are entirely unsupported—which is not surprising because antisuit injunctions do not offend principles of comity and federalism or interfere with the enjoined parties' rights. Indeed, two courts (the Circuit Court and California court) have independently concluded that it is *St. Paul's own conduct* in filing the California lawsuit that offends comity.

ACE's argument that equity should not "do a useless thing" fares no better for the same reasons. The injunction—which protects the Circuit Court's jurisdiction and avoids the other adverse consequences that will flow from duplicative lawsuits—is not "useless." It applies to any duplicative litigation, whether in California or elsewhere.

St. Paul's final salvo—that the Circuit Court should have applied the traditional injunction standard—is equally flawed because even if that were the correct standard, the Circuit Court made the exact type of findings in favor of the injunction that the traditional standard requires (related to irreparable harm, the absence of remedy at law, and the balance of harms) in entering the Injunction Order. This Court, accordingly, should affirm.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents AmerisourceBergen Drug Corporation and Bellco Drug Corporation request oral argument. Oral argument is warranted under Rule 20 because this case involves issues of "fundamental public importance" and St. Paul raises "constitutional questions regarding the validity of a ... court ruling." W. Va. R. App. P. 20(a).

ARGUMENT[8]

This Court's review of a circuit court's decision to grant injunctive relief consists of a "three-pronged *deferential* standard of review." *State ex rel. E.I. DuPont de Nemours & Co. v. Hill*, 214 W. Va. 760, 767, 591 S.E.2d 318, 325 (2003) (emphasis added). First, this Court "review[s] the final order granting the ... injunction and the ultimate disposition under an abuse of discretion standard." *Id.* (citing *West v. Nat'l Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981)). Second, this Court reviews the circuit court's underlying factual findings for clear error. *Id.* (citing *State by & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 114, Syl. Pt. 1 (1996)). And third, this Court reviews questions of law *de novo*. *Id.*

I. The Circuit Court Adhered To West Virginia Law And Properly Exercised Its Discretion In Entering The Injunction Order

The law authorizes antisuit injunctions to prevent litigants from engaging in exactly the type of conduct St. Paul has engaged in here—filing a substantially similar lawsuit in a foreign

[8] St. Paul's Brief of Petitioner lists six assignments of error. The argument section of its brief, however, does not strictly align with those assignments. This Respondents' Brief responds to all of St. Paul's assignments of error as follows: Section I addresses all of St. Paul's argument that antisuit injunctions are not authorized by law. St. Paul's assignment No. 2 (relating to the legal standard for issuing an injunction) is also addressed in Section II. The additional assignment of error contained in ACE's Intervenor's Brief is addressed in Section I.E.

jurisdiction for improper purposes or where the second suit would interfere with the original action. *See* §§ I.A and B, *infra*. Indeed, at least one court has issued an antisuit injunction *at St. Paul's request* based on many of the grounds on which the Circuit Court's Injunction Order here is built. That directly contradicts St. Paul's assertion that antisuit injunctions are somehow so extraordinary that they are almost never granted.

Contrary to St. Paul's assertions—which are based on mischaracterizations of the Circuit Court's Injunction Order—the order is entirely consistent with this longstanding precedent, and falls within the Circuit Court's substantial discretion. The Order does not enjoin the California court—instead, it enjoins the *parties* before the Circuit Court from prosecuting collateral litigation on the issues that have been litigated in the Circuit Court for nearly four years. Given the substantial overlap between the West Virginia lawsuit and St. Paul's California complaint and the likelihood that allowing the California action to proceed would interfere with the resolution of, and rulings in, the West Virginia case, the Circuit Court was within its discretion to enjoin St. Paul and the other insurer defendants from proceeding in California—or elsewhere—and attempting an end-run around the West Virginia court's jurisdiction. *See* § I.C, *infra*. Finally, neither comity nor the prohibition on "equity doing a useless thing" are impediments to the Circuit Court's order. To the contrary, those principles only further buttress the Circuit Court's ruling. *See* §§ I.D and E, *infra*.

A. West Virginia Law Authorizes Anti-Suit Injunctions To Enjoin Parties From Filing Duplicative Lawsuits In Other Jurisdictions To Protect The Court's Jurisdiction And To Avoid The Waste Of Resources And Risk Of Inconsistent Results

"Every judge of a circuit court shall have general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of his circuit, or the party against whose proceeding the injunction be asked reside in or out of the same." W. Va. Code § 53-5-4.

Pursuant to that statutory authorization, circuit courts have wide discretion in determining when injunctive relief is appropriate, based on the circumstances of the particular case. *Jefferson Cnty. Bd. of Educ. v. Jefferson Cnty. Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990) ("The granting or refusal of an injunction, ... calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award ...." (internal quotation marks omitted)).

The courts of this State have long recognized circuit courts' authority to protect their jurisdiction over ongoing proceedings by enjoining individuals from taking action outside of the county or the state that would undermine the court's exercise of its jurisdiction. *See, e.g. Kessel v. Leavitt*, 204 W. Va. 95, 150, 511 S.E.2d 720, 725-26 (1998) (recognizing that courts are permitted "to enjoin acts occurring outside of their territorial jurisdiction where the injunctive relief is merely ancillary to an underlying proceeding over which the court unquestionably has jurisdiction"). Moreover, "a court having jurisdiction *in personam*, may require the [party] to do, or refrain from doing, beyond its territorial jurisdiction, anything which it has the power to require him to do or omit within the limits of its territory." *Id.* (citing *State v. Fredlock*, 52 W. Va. 232, 240, 43 S.E. 153 (1902)).

For more than a century this Court has recognized a circuit court's authority to enjoin a party to proceedings in a West Virginia court from seeking the same relief in a different court where "unfair use is being made of the other legal forum":

> It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that,

> where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity.

Fredlock, 52 W. Va. at 241, 43 S.E. at 156-57. Where a court enters an injunction to prevent the mischief that will result from duplicative litigation in another court, the injunction "is directed, not to the [other] court, but to the litigant parties, and in no manner denies the jurisdiction of the [other] tribunal. It merely seeks to control the person to whom it is addressed, and to prevent him from using the process of courts of law where it would be against conscience to allow him to proceed." *Id.* at 247-48, 43 S.E. at 159.

The Circuit Court acted well within its discretion in enjoining parties subject to its jurisdiction from prosecuting the California collateral coverage litigation. Indeed, the court did exactly what West Virginia law explicitly instructed it to do: it carefully considered the specific facts of this case; it weighed the potential harms to both sides and to the sovereignty of West Virginia courts; and, based on those considerations, it issued a limited injunction only until the conclusion of this case. *See* Section I.C, *infra*.

B. Courts Across The Country Likewise Authorize Antisuit Injunctions For These Same Reasons

West Virginia is not an outlier in authorizing antisuit injunctions. Nor are antisuit injunctions so extraordinary as to be rarely—if ever—granted, as St. Paul suggests. *See e.g Monihan v. Monihan,* 264 A.2d 653, 655 (Pa. 1970) (Roberts, J., concurring) ("Antisuit injunctions are hardly novel ... cases [since at least 1890] do not even bother to question the constitutional validity of such injunctions.") (citing, inter alia, *Cole v. Cunningham*, 133 U.S. 107, 134 (1890)).

Indeed, St. Paul itself has sought, and obtained, an antisuit injunction relying on the same arguments AmerisourceBergen makes here. In *St. Paul Mercury Insurance Co. v. Northern States Power Co.*, St. Paul filed suit in Minnesota regarding insurance coverage for cleanup of certain contaminated properties. No. A05-486, 2005 Minn. App. Unpub. LEXIS 626 at *3 (Minn. Ct. App. Dec. 27, 2005). Several weeks later, the defendant in the Minnesota suit sought declaratory relief in Wisconsin. *Id.* St. Paul moved for, and the Minnesota trial court entered, an injunction prohibiting defendants in the suit from moving forward in the Wisconsin suit. Applying the same basic analysis as the Circuit Court applied here, the Minnesota appellate court affirmed the entry of an antisuit injunction *for St. Paul*, finding that the Minnesota suit was first-filed and that the parties and issues in the Minnesota and Wisconsin lawsuits were substantially the same; thus, it would be a waste of judicial resources and time to proceed in both forums and that the risk of inconsistent adjudications weighed in favor of the injunction. *Id.* at *7.

The law across the country is in accord, recognizing that courts have the inherent authority to enjoin litigants subject to their jurisdiction from prosecuting foreign suits where necessary "to prevent vexatious or oppressive litigation." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996); *see also Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 711 (2002) (explaining that "[s]tate courts have the power to issue antisuit injunctions; they can restrain litigants from proceeding in suits brought in a sister state or in a foreign nation" and collecting cases).

The cases recognize that antisuit injunctions "are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum." *Filler v. Lernout (In re Lernout & Hauspie Sec. Litig.)*, 2003 U.S.

Dist. LEXIS 22466, at *18 (D. Mass. Dec. 12, 2003) (collecting cases); *Sanders v. Blockbuster, Inc.*, 127 S.W.3d 382, 387 (Tex. App.—Beaumont 2004, pet. denied) ("The court's powers of enforcement include the issuance of antisuit injunctions to prevent relitigating the identical issues in a foreign court.") (internal quotation marks omitted); *John Hancock Mut. Life Ins. Co. v. Fiorilla*, 199 A.2d 65, 68-69 (N.J. Super. Ct. Ch. Div. 1964) ("[T]here is the general rule, essential to the orderly administration of justice, that as between courts otherwise equally entitled to entertain jurisdiction, that court which *first obtains possession of the controversy* ought to be allowed to proceed and dispose of it without interference.") (internal citation omitted).

Of particular relevance here, courts routinely uphold injunctions where it can be shown the second suit "is not brought in good faith, or that it was brought for the purpose of vexing, annoying and harassing the party seeking the injunction.'" *IRB-Brazil Resseguros S.A. v. Portobello Int'l Ltd.*, 59 A.D.3d 366, 366-67 (N.Y. App. Div. 2009) (quoting *Paramount Pictures Inc. v. Blumenthal*, 256 A.D. 756 (N.Y. App. Div. 1939)). A long delay in bringing the second suit is indicative of bad faith. For example, in *IRB-Brazil*, the court found that an injunction was warranted because the defendant's delay of a year and a half (far less than St. Paul's nearly four-year delay) in instituting a lawsuit involving the same claims in a foreign tribunal was "evidence of bad faith" litigation tactics, as was the defendant's motivation to avoid New York law. *Id.* at 367. The court recognized that "a contrary decision in [the foreign court] would interfere with the New York court's ability to resolve the issues before it," and "[c]omity does not require our courts to defer to foreign jurisdiction under such circumstances." *Id.*; *see also Williams v. Payne*, 94 P.2d 341, 344 (Kan. 1939) (reversing the

denial of an injunction against a party to a lawsuit in Kansas who waited over a year to file a substantially similar action in Missouri).

As each of these cases demonstrate, it is well settled that a court may enjoin a litigant from prosecuting collateral litigation in order to prevent duplicative litigation, a waste of resources, and potentially inconsistent outcomes. That is especially true when the second lawsuit is a bald effort to secure a "do over" and obtain a different ruling from a different court. St. Paul offers no case law to the contrary. Instead, it points to statements to the effect that antisuit injunctions are rare, and suggests the Circuit Court somehow usurped the jurisdiction of the California courts. These contentions are misleading and, ultimately, wrong. Courts universally authorize antisuit injunctions in circumstances just like those here.

C. The Circuit Court Properly Exercised Its Discretion To Issue An Injunction

Consistent with the legal principles discussed above, the Circuit Court properly focused its Injunction Order on the need to prevent a multiplicity of suits addressing the same issue and to prevent St. Paul from engaging in "vexatious or oppressive litigation." *See John Hancock*, 199 A.2d at 68; *Kaepa*, 76 F.3d at 626; Order ¶ 90. The Circuit Court concluded—correctly—that an antisuit injunction was warranted because there is a substantial overlap between this litigation and the California litigation. Indeed, the court spent much of its opinion addressing this overlap and why it necessitated injunctive relief. *See* Order ¶¶ 93-157. Issuing an injunction based on this detailed analysis was a proper exercise of the Circuit Court's discretion.

As the Circuit Court explained, the identity of legal issues and the factual overlap between the West Virginia and California cases confirms the need for antisuit injunctive relief:

> In the California Coverage Action, St. Paul seeks a declaratory judgment (a) against ABDC, Bellco, ACE, American Guarantee, and Endurance, i.e., *all*

> *of the parties to this dispute*; (b) under *all of the insurance policies at issue in this dispute*; (c) regarding ABDC's and Bellco's rights, and the rights of certain of their affiliates to insurance coverage *under those same insurance policies*; (d) for all prescription opioid lawsuits filed against ABDC, Bellco, and certain of their affiliates on a nationwide basis, including the National Opioid MDL.

Id. ¶ 95 (emphasis added). In other words, the parties, the policies, the underlying lawsuits, and the legal issues raised in both lawsuits are substantially the same, which is all that is required to justify an antisuit injunction. *See id.*¶¶ 93-125; *see also First State Ins. Co. v. Minn. Mining & Mfg. Co.*, 535 N.W.2d 684, 688 (Minn. App. 1995) (affirming antisuit injunction of later-filed state court suit in insurance coverage action because the later-filed action substantially overlapped with the earlier filed case).

St. Paul argues that differences between the California and West Virginia actions "make[] abundantly clear that there is no relationship between the two actions." St. Paul Br. at 23. That is patently false. The Circuit Court correctly found that the parties, the policies, and the underlying claims in both actions are all substantially the same.

The Parties. St. Paul's assertion that the presence of additional parties in the California action differentiates the two cases is manufactured window dressing that does not undermine the Circuit Court's injunction. For starters, all of the plaintiffs in the California action—including St. Paul—are subsidiaries of the Travelers Companies, Inc. Order ¶ 67.

Nineteen of the other insurer defendants St. Paul names in the California action are affiliates of parties to this action, including ten that are subsidiaries of Chubb Limited (along with the ACE insurers here), six that are subsidiaries of Zurich Insurance Group AG (like American Guarantee and Liability Insurance Company, a defendant here), and three that are subsidiaries of Sompo Holdings Inc. Group (like Endurance American Insurance Company, also a defendant here). *See id.* ¶ 67. The insurer defendants in the California action that

issued coverage in excess of St. Paul and ACE primary layer policies issued "follow-form" insurance policies, which incorporate the same terms and conditions as the St. Paul and ACE primary policies that are at issue in the Circuit Court case. *See id.* ¶ 106. Coverage under those policies will be determined by evaluating the exact same policy terms that the Circuit Court has interpreted and will be interpreting. *Id.* ¶ 107. The Circuit Court therefore correctly recognized that "the status of these insurers as excess insurers diminishes the[ir] import ... to the present dispute." *Id.* ¶ 105. St. Paul's decision not to amend its pleadings to name these additional insurer defendants after the Circuit Court invited it to add any insurers necessary to "protect its legitimate interests" only serves to confirm that they are not necessary to the resolution of the dispute.

As for the insured entities named in the California action, they all are subsidiaries of AmerisourceBergen Corporation, which was formed in 2001 after Bergen Brunswig and Amerisource Health merged. *See id.* ¶¶ 60-64. To that end, St. Paul's use of the invented term "Bergen Brunswig Affiliates" is just a clumsy sleight of hand. *See, e.g.*, St. Paul Br. at 7. Bergen Brunswig no longer exists, and all of the additional insured entities (to the extent any such entities actually exist) are current or former subsidiaries of AmerisourceBergen Corporation. Order ¶ 64. If St. Paul wanted to add these entities (most of which have been named as defendants in only a handful of the underlying opioid suits) to this lawsuit, it could have done do. Indeed, the Circuit Court invited such additions. *See id.* ¶ 162. The fact that St. Paul did not add any additional parties this action telling.

The Policies. St. Paul's assertion that there are additional policies at issue in California is misleading for two reasons. First, it ignores that the policies St. Paul says it has added in the California Action include more than a dozen primary and first layer excess

policies that already are before the Circuit Court. Second, St. Paul ignores the fact—confirmed by the Circuit Court—that "from 1995 to 2018, St. Paul and ACE were the only insurers that issued primary layer insurance to ABC [AmerisourceBergen Corporation] (from 2001 to 2018) or Bergen Brunswig Corporation (from 1995 to 2001)" and that "[d]uring that period the St. Paul and ACE policies' insuring agreements were identical in all material respects." *See id.* ¶¶ 68-71. Those primary layer policies are represented in the Circuit Court action. *Id.* Further, as explained, the insurance policies that are excess of the St. Paul and ACE Policies "are 'follow-form' policies that, in relevant part, incorporate the same terms and conditions of the primary layer policies issued by St. Paul and ACE that are before this Court." *Id.* ¶ 106.

Given that all of the policies at issue in California include or incorporate the same language as the primary layer policies at issue here, the Circuit Court concluded that "[d]ue to the overlap in policy terms and allegations in the underlying claims, the Court's November 23, 2020 [summary judgment] ruling should be broadly applicable to ABDC's rights to coverage for *all prescription opioid lawsuits*, including those consolidated in the National Opioid MDL, under *all insurance policies that could potentially apply* to these liabilities." *Id.* ¶ 132 (emphasis added). St. Paul's insistence that there are other policies at issue in the California litigation ignores this simple fact.

The Underlying Claims. In the California action, St. Paul requests a broad declaration that there is no coverage for defense and indemnification of the prescription opioid lawsuits, including such a declaration as to all lawsuits consolidated into the National Opioid MDL. *See id.* ¶ 72. This broad request necessarily includes the prescription opioid lawsuits at issue in the Circuit Court action.

First, as the Circuit Court found, "many of the prescription opioid lawsuits for which ABDC seeks coverage in [West Virginia] are, or have been, consolidated in the National Opioid MDL," and there "is no practicable way, therefore, to segregate 'West Virginia defense costs' or 'West Virginia indemnity costs' from the defense and indemnity costs in the National Opioid MDL." *See id.* ¶¶ 114-15. Thus, the Circuit Court concluded that "the declaration St. Paul seeks in Count V of its California Complaint ... would necessarily call for a ruling on the precise coverage issues for the precise underlying cases that have been pending before [the West Virginia] Court since March 16, 2017." *Id.* ¶ 117.

Even if St. Paul could somehow segregate the coverage questions relating to the West Virginia cases from the coverage questions relating to the National Opioid MDL cases, the material underlying allegations in these cases are the same for coverage purposes. The fact that the underlying prescription opioid lawsuits "implicate common fact questions" is why the National Opioid MDL was formed in the first place, and why St. Paul is treating all of those underlying lawsuits together without differentiation for purposes of the California coverage action. *Id.* ¶¶ 119-20. St. Paul's California lawsuit, which seeks a ruling on *all* policies and coverage for *all* opioid suits thus will necessarily turn on the exact same legal issues that already are before and, in some instances already decided by, the Circuit Court.

St. Paul's fixation on the fact that "[o]nly the 50 West Virginia-based lawsuits named in AmerisourceBergen's complaint are at issue in this case; [while] none of the thousands of other opioid suits in the Opioid MDL are before the Circuit Court" does not change the calculus. St. Paul Br. at 24-25. Setting aside the fact that there are 165 currently pending West Virginia prescription opioid lawsuits at issue in this case (not 50), the key legal and

factual issues in all prescription opioid lawsuits are, for purposes of insurance coverage, identical. As the Circuit Court—relying on the JPML—found:

> Even to the extent the West Virginia Liabilities could be segregated from the National Opioid MDL, the material underlying allegations for purposes of evaluating insurance coverage are identical among all prescription opioid lawsuits and would result in substantial overlap between the California Coverage Action and this coverage action.
>
> ...
>
> The Court takes judicial notice that the [JPML] found that – whether brought by government entities, Indian Tribes, individuals, or third party payors – the prescription opioid lawsuits against ABDC and other pharmaceutical distributors, can all be expected to implicate common fact questions as to the allegedly improper marketing and widespread diversion of opiates into state, counties, and cities across the nation ....

Order ¶ 118-19.[9]

St. Paul does not offer any reason to second guess the Circuit Court's amply supported conclusion that this action and the California action "involve 'substantially identical issues and parties'" and that, as a result, "opening a new front on this coverage litigation nearly four years after [AmerisourceBergen] first filed its breach of contract action 'would impose upon all parties an additional economic burden that is both unnecessary and avoidable, would foster delay in many respects, and would create the risk of inconsistent adjudications leaving dispositive issues unresolved.'" *Id.* ¶¶ 125-26 (citations omitted).

St. Paul seems to suggest that perfect identity of parties and issues is required to justify an antisuit injunction. St. Paul Br. at 23-24 & n.7. As discussed above, however, complete identity is not required, and none of the decisions St. Paul cites hold as much. *See, e.g. First*

[9] Notably, the California court independently concluded that the action before it was sufficiently duplicative to merit a stay pending the resolution of the West Virginia coverage litigation. ABDC-App.016-17.

State, 535 N.W.2d at 688 (affirming grant of antisuit injunction because the later-filed action substantially overlapped with the earlier filed case); *see also Cajun Elec. Power Co-op., Inc. v. Triton Coal Co.*, 590 So.2d 813, 817 (La. Ct. App. 4th Cir. 1991) (reversing order denying antisuit injunction and concluding that the fact that the two suits did not involve identical parties was not dispositive); *St. Paul Mercury*, 2005 Minn. App. Unpub. LEXIS 626, at *10-11 (rejecting argument that subsequent suit should not be enjoined because it added additional parties). And that legal principle is sound because requiring perfect identity would allow litigants to avoid an antisuit injunction merely by adding or subtracting parties or focusing on cosmetic factual differences between the cases—as St. Paul tries to do here.[10]

To make matters worse for St. Paul, this case presents an even more extreme example of the gamesmanship that supported the antisuit injunctions in *IRB Brazil* and *Williams*—with St. Paul waiting almost three times longer than the defendants in *IRB-Brazil* and *Williams* to bring its duplicative case in another forum. Underscoring St. Paul's bad faith, it commenced the California suit after a growing number of courts around the country had issued decisions rejecting the exact coverage defense St. Paul was advancing in its summary judgment motion in the Circuit Court.[11] And St. Paul filed its California lawsuit that attempted an end-run around these decisions knowing that both the West Virginia MLP and parties to the National Opioid MDL were pursuing settlement discussions, for which insurance proceeds would need

[10] Even if more of an overlap were necessary (it was not), the Circuit Court directed the parties to meet and confer to determine "whether any amendment of the pleadings in this action is necessary to ensure that all issues, parties, and insurance policies the parties believe are necessary to protect their legitimate interests are included in this action." Order ¶ 162. Despite the opportunity to make such amendments, St. Paul, ACE and the other insurers filed none—apparently believing nothing more was required to protect their interests. ABDC-App.002.

[11] *See* SPApp.0094-115; Order ¶¶ 48-52.

to play a role. *See* ACE Br. at 1 (emphasizing that St. Paul filed its California complaint just two days after an article was published "announc[ing] that AmerisourceBergen and other opioid distributors had reached a $21 billion global settlement"). These facts provide further justification for the Circuit Court's antisuit injunction.[12]

D. Neither Comity Nor The Constitution Preclude An Antisuit Injunction

Faced with the overwhelming legal and factual basis for granting an antisuit injunction, St. Paul tries to attack the propriety of the injunction on comity and constitutional grounds. *See* St. Paul Br. at 27-29. Neither argument has merit.

First, St. Paul argues that the Circuit Court's order "enjoin[ed] proceedings in another state" and therefore violates principles of comity, federalism, and sovereignty. *Id.* at 27 (internal quotation marks and citation omitted). This argument, however, is flat wrong. West Virginia law makes clear that the term "anti*suit* injunction" actually is a misnomer. The foreign *suit* itself is not being enjoined. Rather, it is the *party* subject to the West Virginia court's jurisdiction that is being enjoined. Indeed, for more than a century, it has been established law that such injunctions are "directed, not to the [other] court, but to the litigant parties, and in no manner den[y] the jurisdiction of the [other] tribunal. It merely seeks to control the person to whom it is addressed, and to prevent him from using the process of courts of law where it would be against conscience to allow him to proceed." *Fredlock*, 52

[12] While not an assignment of error, St. Paul argues in Section V.B.5 of its brief that it did not violate the Circuit Court's 2018 bifurcation and stay order when it filed its California action. St. Paul Br. at 30. St. Paul is wrong on the merits, as the Circuit Court concluded. *See* Order ¶ 154-56. Regardless, even if this Court were to conclude that St. Paul did not violate the stay, that would not change the outcome here. Violation of a court order, like the Circuit Court's stay order, is not a required element for the issuance of an antisuit injunction. Instead, it is simply additional evidence of St. Paul's bad faith litigation conduct and the resulting harm to AmerisourceBergen.

W. Va. at 247-48, 43 S.E. at 159. The Circuit Court did exactly that—and explicitly said as much in doing so. Order ¶ 89.

St. Paul's comity argument also ignores the fact that *its own actions* violated principles of comity and federalism by imperiling the Circuit Court's jurisdiction. As the Circuit Court recognized, "St. Paul's pursuit of contradictory rulings from a California court undermines principles of comity among the courts, [and] will ... put the parties in an impossible position of trying to reconcile conflicting rulings on substantially the same issues from different states." *Id.* ¶ 135. Further underscoring that the Circuit Court's Injunction Order does not violate principles of comity, the California court presiding over the California action itself independently concluded that principles of comity weighed in *favor* of staying the California action during the pendency of the Circuit Court action, explaining that it is "in the interests of comity and the conservation of judicial resources to avoid potential conflicting rulings and allow the earlier-filed case to proceed first, eliminating the risk of multiple and inconsistent judgments in different cases." ABDC-App.017 (citing California authority).

Among the fundamental purposes underlying antisuit injunctions is protection of the jurisdiction of the court where the dispute originated and avoidance of conflicting rulings from other states. For example, in *Tennessee Farmers Mutual Insurance Co. v. Wheeler*, parents brought a wrongful death claim in Georgia against the uninsured driver of the car their deceased daughter was riding in, as well as the parents' insurer, Tennessee Farmers Mutual. 317 S.E.2d 269, 270 (Ga. Ct. App. 1984). When the Georgia court ruled against Farmers on several issues, Farmers filed a declaratory judgment action against the parents in Tennessee state court seeking to resolve certain coverage questions. *Id.* The Georgia trial court enjoined Farmers from pursuing the Tennessee declaratory judgment action, and on appeal, the

appellate court recognized that "[h]ad the trial court not restrained appellant from proceeding with its declaratory judgment action in Tennessee, the trial court would have ceded its earlier acquired jurisdiction to the Tennessee courts ... and the trial court's determination as to the coverage issues would have amounted to no more than an advisory opinion." *Id.* at 272. West Virginia courts similarly have held that protecting their jurisdiction over an already filed controversy is a valid basis for entering an antisuit injunction. *Kessel*, 204 W. Va. at 150, 511 S.E.2d at 775.

The court in *Tennessee Farmers* also rejected another argument similar to one St. Paul makes here: specifically, that California courts have a "compelling interest" in this suit because "California law will be front and center in the California Action." St. Paul Br. at 27.[13] As an initial matter, St. Paul is wrong about the role California law plays in the contract interpretation questions here—indeed, it has agreed that Pennsylvania law governs the interpretation of the policies issued to AmerisourceBergen Corporation and, with the potential exception of a handful of policies issued prior to 2001, none of the insurance policies in the California case are subject to California law. What's more, no matter what law applies, the mere fact that a foreign state's law may be implicated in a court that unquestionably has jurisdiction over a lawsuit (as the Circuit Court does here), has no bearing on whether that court may exercise its jurisdiction over a litigant (like St. Paul) that has submitted to it. *See Tennessee Farmers*, 317 S.E.2d at 272 ("Even if Tennessee law must ultimately govern the determination of the coverage issues ... this would not support appellant's contentions that the

[13] It appears that the California court presiding over the St. Paul's California lawsuit disagrees, and recognizes the impact the Circuit Court's decisions will have on the St. Paul's California lawsuit. *See* ABDC-App.016-17 (noting that the "answer" to questions regarding the "interpret[ation] ... of St. Paul's policies to determine whether they cover opioid litigation ... presumably will be the same whether the underlying litigation is in West Virginia or some other state").

trial court erred by enjoining the Tennessee action, as the Georgia court may apply the Tennessee law if it is correct and proper to do so.").

In sum, St. Paul's comity and federalism arguments have it backwards. The Circuit Court has not exercised control over the California court; to the contrary, it has appropriately protected its own jurisdiction (which AmerisourceBergen invoked almost four years before the California action began) and exercised its discretion to ensure that it retains control over the parties and legal issues before it until its case concludes. And, the principles of comity and federalism support the issuance of the Injunction Order.

Second, St. Paul's constitutional argument—*i.e.*, that it supposedly is being deprived of the ability to defend itself—fares no better. Initially, the Injunction Order enjoins the parties from prosecuting or initiating collateral litigation "against one another." Order ¶ 164. If independent actions are asserted by other parties (to the extent any such claims are ripe), St. Paul can defend itself. Moreover, St. Paul ignores the critical fact that *it created this situation* by improperly running to the California court in the first place, hoping for a different result on the same underlying issues the Circuit Court already has addressed or will address.

St. Paul cites no decision where a party in AmerisourceBergen's position was prevented from seeking an antisuit injunction based on the other parties' constitutional right to seek redress in the courts. That is not surprising. "[I]t is constitutionally permissible for one state to enjoin a litigant from proceeding with litigation in another state, even where that other state has jurisdiction to proceed with the litigation. Antisuit injunctions are hardly novel ... cases [since at least 1890] do not even bother to question the constitutional validity of such injunctions." *See Monihan*, 264 A.2d at 655 (Roberts, J., concurring) (citing, *inter alia*, *Cole*, 133 U.S. at 134).

In the end, St. Paul's pleas to constitutional due process are belied by its bald efforts to make an end-run around the Circuit Court's jurisdiction. As the Circuit Court correctly found, the West Virginia and the California underlying cases all stem from the same factual situation and present the same legal issues. Under such circumstances, neither comity nor the constitution is a barrier to the Circuit Court's discretion to protect its jurisdiction.

E. ACE's Argument That "Equity Will Not Do A Useless Thing" Fails

Intervenor ACE advances an additional assignment of error, arguing that the Circuit Court's Injunction Order violates the notion that "equity will not do a useless thing." ACE Br. at 3. ACE bases this argument on the same exaggerated and misleading assertions about the lack of perfect overlap among the parties to this case and the California action, which has been addressed above and which the Circuit Court correctly rejected for the canard that it is. *Compare* ACE Br. at 2-3, *with* Order ¶¶ 102-09. While neither ACE nor St. Paul advanced this specific argument in the Circuit Court, the argument rises and falls based on the same facts and legal principles the Circuit Court already has assessed and applied.

Even if ACE's argument regarding the identity of parties had any merit (it does not), the Circuit Court's Injunction Order is far from "useless." St. Paul and ACE are the only insurers that issued primary layer polices to AmerisourceBergen or Bergen Brunswig. The injunction applies to them—and the policies they issued will define coverage for all of the additional follow-form excess policies. The injunction stops these parties from disrupting the orderly resolution of the West Virginia suit, and it protects the jurisdiction of the Circuit Court to ensure that it can resolve the coverage issues under those core insurance policies without the interference of duplicative lawsuits in other jurisdictions. And the injunction protects this Court's authority as the sole judicial body with the right to review the Circuit Court's

decisions on those coverage issues—avoiding St. Paul and ACE's preferred procedure of empowering a California trial court to essentially review the West Virginia Circuit Court's orders.

Ultimately, regardless of whether some portion of the California action could or would continue—a question of California procedure—the injunction does ensure that the California action would not involve interpretation of the precise legal and factual questions at issue here. For a host of reasons—judicial efficiency, comity, avoiding inconsistent rulings, and protecting the jurisdiction of West Virginia courts—that is hardly "a useless thing."

ACE's reliance on the *North River* decision is misplaced. *See* ACE Br. at 4 (citing *North River Ins. Co. v. Mine Safety Appliance, Co.*, No. 8456-VCG, 2013 WL 6713229, at *1 (Del. Ch. Dec. 20, 2013)). *North River* involved a highly fact-specific scenario that is materially different from the one presented here. There, Mine Safety Appliances ("MSA") had been sued by, and settled with, black-lung tort plaintiffs. 2013 WL 6713299, at *2-5. As part of the settlements, and pursuant to a specific West Virginia statute, MSA assigned to the tort plaintiffs the right to recover under a North River insurance policy. *Id.* at *4-5. The tort plaintiffs then filed amended complaints against North River—again, as specifically authorized by West Virginia law. *Id.* North River asked the Delaware Chancery Court—one of multiple jurisdictions where coverage litigation was proceeding between North River and MSA—to enjoin MSA's ongoing participation in the tort cases in West Virginia. *Id.* at *6-7.

While recognizing its power to issue antisuit injunctions,[14] the Delaware Chancery Court declined to do so, explaining that the tort plaintiffs' lawsuits were specifically

[14] "Litigation in multiple jurisdictions in consideration of a single issue can result in gross inefficiency, and risks inconsistent judgments. This Court has the power to enjoin litigants before it from litigating
Continued on next page

authorized by West Virginia law. *Id.* at *8-9. Because the terms of the same MSA policies at issue in Delaware would continue to be litigated in West Virginia regardless of whether an injunction was ordered, the Chancery Court concluded it would be unfair to exclude MSA from participating in that litigation. *Id.* at *9.

North River is distinguishable from this case for at least two reasons. First, it involved a lawsuit initiated by a true third-party who was not subject to the court's jurisdiction. Here, St. Paul is a party to this lawsuit and subject to this Court's jurisdiction. And second, the allegedly duplicative lawsuit would proceed, pursuant to a specific state statute, and would result in legal findings on the terms of the very policies at issue. Here, enjoining St. Paul and ACE would, at a minimum, remove the primary layer policies from the California case.[15]

The Circuit Court's injunction order was entered with a specific purpose: to enjoin the parties before it from prosecuting duplicative litigation in another forum. In achieving that purpose it will, usefully, (i) protect the Circuit Court's jurisdiction; (ii) avoid the potential for conflicting rulings as to the same parties on the same policies regarding the same issues; (iii) avoid duplicative and wasteful discovery; and (iv) avoid these defendants from manipulating a foreign court from interfering with the timely resolution of this case which is of substantial importance to West Virginia. ACE's argument, at bottom, faults the Circuit Court's order for not being able to do *more* than it was designed to do. The Court should reject this straw man argument.

Continued from previous page
in other jurisdictions, where justice and equity so require." *Id.* at *1.

[15] Since interpretation of the excess policies necessarily depends of the construction of the primary policies' language, it is far from certain that the California case will proceed before the Circuit Court litigation concludes.

AmerisourceBergen notes that since this appeal has been pending, the California Court issued a stay, preventing any litigation of St. Paul's California Complaint until this lawsuit is resolved. This further undermines ACE's argument. Yet, based on arguments St. Paul already has raised in the Circuit Court, AmerisourceBergen anticipates ACE and St. Paul may argue on reply that the California Court's ruling makes the Injunction Order "useless" because AmerisourceBergen obtained all the relief it requires in California.[16] *See* ABDC-App.020-021. To the extent this argument is raised, it should be rejected.

The purpose of the injunction is to protect the jurisdiction of the *Circuit Court* and the investment that court and the parties have made in moving that suit toward a timely resolution—a resolution that is of paramount importance given the ongoing settlement discussions of the underlying liabilities. St. Paul, however, refuses to abide by the Circuit Court's order. In fact, after the California stay was issued, St. Paul told the Circuit Court that its Injunction Order should be lifted because it prevents "St. Paul from litigating in any other states." Precisely. The injunction was designed to prohibit all parties—including AmerisourceBergen—from disrupting these proceedings with collateral litigation, not only the California action. The California court's stay *reinforces* the injunction's impact in California; but it does *not obviate* the need for the Injunction Order, there or anywhere else. The insurers should not be permitted to use an order that supports the reasoning of the injunction to undermine it.

[16] In a recent letter to the Circuit Court, St. Paul argues that the California stay "only serves to underscore that the Injunction Order was improperly sought by AmerisourceBergen in the first place," and that "the California courts should be permitted to manage the California Action without the undue interference of the Injunction Order." And yet in that same letter, St. Paul also states that it "believes that the California Minute Order was incorrectly decided, and St. Paul reserves all rights with respect to the California Superior Court's rulings." St. Paul is using the California stay as both a shield and a sword. *See* ABDC-App.020-21.

II. Although The Traditional Injunction Factors Do Not Apply To Antisuit Injunctions, The Circuit Court's Ruling Addressed Those Factors, All Of Which Weighed In Favor Of An Antisuit Injunction

Faced with the weight of authority discussed above holding that an antisuit injunction can issue in circumstances just like those here, St. Paul argues that the Circuit Court should have applied a preliminary injunction standard. St. Paul Br. at 18-22. This is wrong on both procedure and substance.[17] Courts correctly conclude that the traditional injunction test is largely irrelevant to the antisuit injunction analysis. *See, e.g. E.&J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006) ("Thus, we hold that [movant] need not meet our usual test of a likelihood of success on the merits of the underlying claim to obtain an anti-suit injunction against [respondent] to halt the Ecuadorian proceedings. Rather, [movant] need only demonstrate that the factors specific to an anti-suit injunction weigh in favor of granting the injunction.").

But even if the traditional test applied (it doesn't) the Circuit Court considered all of the factors for issuing a traditional injunction and concluded that each of them weighed in favor of enjoining St. Paul.

A. The Traditional Injunction Factors

When considering whether a traditional preliminary injunction is warranted, circuit courts must determine whether the moving party has demonstrated: (1) the presence of irreparable harm; (2) the absence of any other appropriate remedy at law; and (3) the balance

[17] The only case St. Paul cites for this proposition is a memorandum decision by this Court, *Markwest Liberty Midstream & Res. v. Nutt*, No. 17-0138, 2018 W.Va. LEXIS 72 (W. Va. Jan. 24, 2018). *Markwest* is easily distinguishable, however, because it *did not address an antisuit injunction*, and moreover, the circuit court issuing the injunction engaged in no analysis whatsoever; instead, it merely "indicated that it found the Trust's argument that injunctive relief was necessary to maintain the status quo and prevent spoliation of evidence persuasive." *Id.* at *6. Here, by contrast, the Circuit Court provided a detailed opinion outlining its reasons for finding that injunctive relief was appropriate.

of harms weighs in favor of injunctive relief, including (a) the likelihood of irreparable harm to the moving party absent an injunction; (b) the likelihood of harm to the opposing party with an injunction; (c) the moving party's likelihood of success on the merits; and (d) the public interest. *Jefferson Cnty.*, 183 W. Va. at 24, 393 S.E.2d at 662; *see also Norfolk & W. Ry. Co. v. Daniels*, 40 F. Supp. 2d 356 (E.D. Va. 1999) (recognizing that injunctive relief is governed by equitable principles, and thus a movant must demonstrate irreparable harm, lack of an adequate legal remedy, and that the balance of hardships favors the movant). As noted, St. Paul's brief omits any mention of likelihood of success on the merits.

Weighing these factors involves a "flexible interplay" that falls squarely within the trial court's discretion. *Jefferson Cnty.*, 183 W. Va. at 24, 393 S.E.2d at 662; *see also Chapman v. Catron*, 220 W. Va. 393, 396, 647 S.E.2d 829, 832 (2007) (recognizing that "the power to grant ... a temporary or a permanent injunction ... ordinarily rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case; and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion" (internal quotations omitted)).

B. The Injunction is Necessary To Prevent Irreparable Harm

The Circuit Court correctly recognized that "the harm to ABDC [of allowing the California action to proceed] goes far beyond being deprived of funding to which it may be entitled." Order ¶ 139. The court identified a number of the same factors discussed above in support of its finding that AmerisourceBergen would be irreparably harmed absent an injunction, including the harm flowing from the potential inconsistent rulings issued by West Virginia and California courts on the same legal issues, involving many of the same parties. *Id.*¶ 135. These intangible harms are exactly the types of nonmonetary harm that courts

routinely remedy with antisuit injunctions. *See* §§ I.A and B, *supra*. St. Paul focuses solely on one aspect of the Circuit Court's ruling—the potential delay in payment of claims by St. Paul—that it contends amounts to nothing more than money damages. St. Paul Br. at 20. This argument misses the mark, however, because it ignores the other harms that stem from allowing duplicative suits to proceed.[18]

St. Paul also suggests that AmerisourceBergen had to do more to establish irreparable harm—specifically contending that "none of AmerisourceBergen's motion papers include a factual affidavit ... or any other manner of evidence supporting the requisite criteria for issuance of an injunction under West Virginia law." St. Paul Br. at 18; *see also id.* at 9. No such affidavit was necessary, however, because the harms are self-evident. Moreover, the two cases St. Paul relies on in suggesting that an affidavit was required are easily distinguishable.

First, St. Paul relies heavily on the unpublished decision in *Markwest*, which states that "a cursory affidavit is insufficient to support the issuance of a *preliminary injunction*." 2018 W. Va. LEXIS 72, at *11 (emphasis added). But *Markwest* says nothing about an antisuit injunction, which, as discussed above, requires a different showing than the one required for a preliminary injunction. In the context of antisuit injunctions, the factual basis for the injunction largely exists in the public court filings that the Circuit Court could—and did—examine, including the pleadings in West Virginia and California, as well as the JPML Transfer Order. Based on that review, the Circuit Court concluded that there was sufficient

[18] For its part, ACE concedes the potential for harm from inconsistent rulings. ACE writes: "A number of the additional parties assert claims in the California action, *seeking coverage rulings with respect to AmerisourceBergen on the same policy language that, according to the Circuit Court, is at issue here.*" ACE Br. at 2 (emphasis added). Somewhat incredibly, ACE points to this risk of inconsistent rulings as a reason *not* to affirm the Circuit Court's injunction order: "Thus, neither the principal harm identified by AmerisourceBergen—the risk of inconsistent rulings—nor any other ostensible harm is eliminated by the Order. The injunction is futile and therefore inequitable." *Id.* at 2-3.

overlap in these lawsuits to warrant an antisuit injunction. Order ¶¶ 93-125. The Circuit Court has been presiding over this case since 2017 and recently issued a summary judgment ruling on a threshold issue. It did not need an affidavit to be told what it had been doing for the last four years. Under these circumstances, identifying the public records (of which the Court properly took judicial notice) and entries on the Court's own docket is sufficient.

Second, St. Paul cites this Court's decision in *Camden-Clark Memorial Hospital Corp. v. Turner*, which discusses affidavits, but only in the limited—and unique—context of an ex parte temporary restraining order. 212 W. Va. 752, 757, 575 S.E.2d 362, 367 (2002). The affidavit (or verified complaint) referenced in *Camden-Clark* is an "additional procedural hoop[]" needed to protect a defendant that has yet to receive notice of the request for injunctive relief—not for a party like St. Paul that has had an opportunity to respond and knows full well the reason for, and the nature of, the requested antisuit injunction. *Id.*

In sum, the record before the Circuit Court was more than sufficiently developed for the court to exercise its discretion and to determine that an antisuit injunction was warranted, regardless of whether AmerisourceBergen submitted an affidavit in support of its motion.

C. AmerisourceBergen Has No Other Adequate Remedy At Law

An antisuit injunction is necessary to put an end to St. Paul's ongoing procedural gamesmanship. AmerisourceBergen has every reason to anticipate that St. Paul will continue pursuing its efforts to relitigate in California the coverage issues that have been properly before the West Virginia Court for nearly four years. The injunction is the only way to ensure that St. Paul will finally cease its efforts to evade the Circuit Court's rulings. This Court recognized as much in *State v. Fredlock*—the seminal case on antisuit injunctions in this state—when it recognized that an antisuit injunction "is granted on the ground that an unfair

use is being made of the [other] legal forum, which, from circumstances of which equity alone can take cognizance, should be restrained *lest an injury be committed wholly remediless at law.*" *Fredlock*, 52 W. Va. at 248, 43 S.E. at 159 (emphasis added).

On this point, St. Paul tries to change the subject by contending that "AmerisourceBergen is entitled to all of the same legal rights and remedies in the California Court as is every one of the other parties to the California Action." St. Paul Br. at 20. But whether AmerisourceBergen *can* defend itself in the California litigation is irrelevant, because the real question before this Court is whether AmerisourceBergen *should have to do so*. After almost four years of litigation in West Virginia, forcing AmerisourceBergen to re-litigate the same legal issues in a new forum is the paradigm case of the "unfair use" of that forum, as West Virginia law has recognized for more than a century. *Fredlock*, 52 W. Va. at 246, 43 S.E. at 159.

St. Paul also cites *Auerbach v. Frank* for the proposition that "duplication of parties and issues" is not a basis for an antisuit injunction, because—according to St. Paul—the party seeking the injunction can move to stay or dismiss the other proceedings. St. Paul Br. at 21 (citing *Auerbach*, 685 A.2d 404, 409 (D.C. Ct. App. 1996). *Auerbach* does not help St. Paul. As discussed above, protecting a court's jurisdiction, and avoiding duplicative suits and their risk of conflicting rulings are exactly the types of interests served by antisuit injunctive relief. *See* §§ I.A and B, *supra*. More importantly, however, *Auerbach* recognized that antisuit injunctions are unquestionably proper in certain circumstances, and noted that one circumstance calling for such relief is the existence of "bad faith" litigation tactics. 685 A.2d at 406, 409. As explained, the circumstances at issue here easily fit the definition of bad faith. *See IRB-Brazil*, 59 A.D.3d at 367. Moreover, the Injunction Order here protects only

AmerisourceBergen, but also the *Circuit Court's* jurisdiction. And, because the Order prevents the parties from going to another jurisdiction where they believe they can find a friendly court—not just to California—it avoids the need for repeated injunction motions in the Circuit Court. Thus, even if the narrow holding of *Auerbach* applies, this case presents circumstances where antisuit injunctive relief is appropriate.

D. The Balance Of The Equities Favors An Injunction

AmerisourceBergen. AmerisourceBergen will be irreparably harmed as a result of St. Paul's duplicative California lawsuit. As explained, the risk of inconsistent rulings and waste of resources that will result if St. Paul is permitted to prosecute its duplicative California lawsuit will impose an unwarranted and inequitable hardship on AmerisourceBergen—particularly here, where the issues raised in the California litigation substantially overlap with those that are well on their way to being resolved by the Circuit Court. *See* §§ I.C and II.B, *supra*.

St. Paul and ACE. St. Paul and ACE, by contrast, will suffer no harm from the injunction, which lasts only until the end of the West Virginia proceedings. St. Paul argues that the injunction "preclud[es] [it] from preserving its legal rights in the California Action," St. Paul Br. at 21, but all St. Paul needs to do in order to preserve its rights in the California litigation is to dismiss its lawsuit without prejudice or seek to stay its deadlines in that proceeding based on the fact that the same issues are being litigated in West Virginia. It also bears note that the Circuit Court invited the parties to amend the pleadings to add any other parties, insurance policies, or underlying lawsuits that any party believed were necessary to protect its legitimate interests in West Virginia. Both St. Paul and ACE declined to do so.

The public interest. St. Paul engages in no substantive discussion of the public interest in its brief other than to offer the comity and constitutional arguments discussed above. *See* St. Paul Br. at 22. But, as explained, neither of those arguments demonstrates that the Circuit Court abused its discretion by entering the injunction. *See* § I.D, *supra*. The Circuit Court recognized as much, acknowledging that "St. Paul's pursuit of contradictory rulings from a California court undermines principles of comity among the courts," and that "[c]reating uncertainty as to the unavailability of insurance coverage and delaying resolution of these disputes creates both a private and public harm." Order ¶¶ 135-36. More broadly, however, the issues at stake in this case have the potential to impact thousands of other opioid lawsuits around the country, and the ability of the defendants in those suits to obtain insurance coverage for their defense. This unquestionably impacts the public—who has an interest in the underlying lawsuits. Other courts, too, have arrived at the same conclusion: antisuit injunctions serve the public interest by conserving judicial resources, and ensuring the "comprehensive disposition of litigation." *See Rich v. Butowsky*, No. 18-681, 2020 U.S. Dist. LEXIS 225078, at *7 (D.D.C. Mar. 31, 2020) (citing *Am. Horse Protection Ass'n v. Lyng*, 690 F. Supp. 40, 42 (D.D.C. 1988) (recognizing that inconsistent or conflicting decisions can have an effect on the public interest as well)).

In sum, all of the traditional requirements for injunctive relief weigh strongly in favor of the antisuit injunction here—just as the Circuit Court concluded. Thus, even if this Court concludes that the traditional test for injunctive relief is the proper way to analyze requests for antisuit injunctions, it can easily affirm.

CONCLUSION

This Court should affirm the Circuit Court's entry of the Corrected Order Granting Plaintiffs' Motion for Injunction dated January 7, 2021.

Dated this the 1st day of March, 2021.

/s/ #6939
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0036

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY

Defendant below,
Petitioner,

v.

AMERISOURCEBERGEN DRUG
CORPORATION and BELLCO
DRUG CORPORATION,

Plaintiffs below,
Respondents.

and

ACE AMERICAN INSURANCE COMPANY
and ACE PROPERTY AND CASUALTY
INSURANCE COMPANY

Defendants below,
Intervenors-as-Petitioners

CERTIFICATE OF SERVICE

I, Todd A. Mount, do hereby certify that service of the foregoing **AMERISOURCEBERGEN DRUG CORPORATION AND BELLCO DRUG CORPORATION'S BRIEF OF RESPONDENTS** has been made upon counsel of record on this 1st day of March, 2021, via electronic mail as follows:

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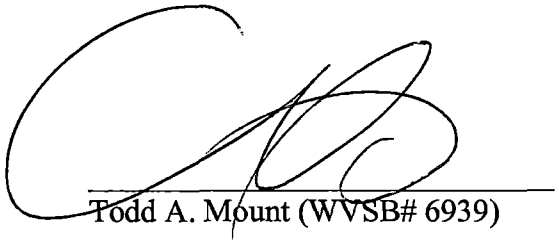

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