IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0296

STATE EX REL. THIRD-PARTY DEFENDANT HEALTHPLANS, et al.,

Petitioners,

V.

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

Respondents.

RESPONDENT MEDTEST LABORATORIES, LLC'S OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

QUESTION PRESENTED

Specific jurisdiction over a nonresident defendant comports with due process when the defendant has minimum contacts with West Virginia, the plaintiff's claims arise out of those contacts, and jurisdiction comports with "fair play and justice." *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 589, 788 S.E.2d 319, 335 (2016). Here, the nonresident defendants engaged in continuous economic activity in West Virginia through contracts with a West Virginia insurer to process and pay claims in West Virginia for services by the plaintiff, a West Virginia healthcare provider. The plaintiff's claims arise from the sudden and wrongful decision to stop paying for those services, which injured the plaintiff in West Virginia. The question presented is: If a nonresident enjoys the benefits of a contract with West Virginia residents that requires performance in West Virginia, is it subject to the jurisdiction of West Virginia courts when it harms those West Virginia residents?

STATEMENT OF THE CASE

I. The Blues Entered into Contracts with a West Virginia Insurer That Require Performance in West Virginia.

The briefs of the Petitioners (the "Blue Plans" or the "Blues") paint a severely incomplete picture of the contracts that bind the parties in this case. Every one of the Blues has entered into a series of contracts that require West Virginia healthcare providers (including Respondent MedTest) to provide services to the Blues' members, and for Highmark WV (a West Virginia resident) to process and pay claims for those services in West Virginia.

Each of the Blues is a member of the Blue Cross Blue Shield Association, an organization they collectively control. App. 1463, App. 1465; App. 1618; Supp. App. 53–54; *In re Blue Cross Blue Shield Antitrust Litig. (Blue Cross I)*, 225 F. Supp. 3d 1269, 1280 (N.D. Ala. 2016); *In re Blue Cross Blue Shield Antitrust Litig. (Blue Cross II)*, 308 F. Supp. 3d 1241, 1250 (N.D. Ala. 2018). Through this association, the Blues contract with each other by means of a "License Agreement"

that requires them to participate in the BlueCard program and other national programs. App. 1465; App. 1619; Supp. App. 53–54; *Blue Cross II*, 308 F. Supp. 3d at 1254–55. Under these programs, when a healthcare provider in West Virginia provides a service to a member of a Blue Plan located in another state, Highmark WV is responsible for processing the claim. App. 13; App. 1465; App. 1619; Supp. App. 54. Highmark WV pays the provider and is reimbursed by the out-of-state Blue Plan. App. 1465; App. 1619; Supp. App.. 54; *Blue Cross II*, 308 F. Supp. 3d at 1255.

This contractual agreement among all the Blues and Highmark WV is incorporated by reference in the Network Agreement between MedTest and Highmark WV, which provides,

> To the extent that Highmark WV participates in national or interregional networks, Provider shall provide services as defined by said program to persons who have coverage under such programs. Compensation for such services ... shall be obtained from Highmark WV upon submission of a properly submitted claim form or electronic record/format documenting the services provided.

App. 96. Thus, MedTest is obligated by contract to provide services to the members of each of the Blues, and it is entitled by contract to compensation for those services—compensation ultimately paid by the Blues. In other words, as the Circuit Court found, "each of the Blues entered into a series of contracts that require performance in West Virginia by Highmark WV and MedTest." App. 1620.

II. Performing Services in West Virginia Was Not Random or Fortuitous; It Was the Very Purpose of the Contracts.

Although Blues each sell insurance in a limited geographic area, they compete with larger insurers by advertising that they provide national coverage, allowing their members to use healthcare providers across the country. App. 65-95; App. 1621-1622; Supp. App. 61. The contracts described above are what allow the Blues to make this claim; the Blues rely on their business relationship with Highmark WV and West Virginia healthcare providers to make their product more attractive. App. 1621-1622; Supp. App. 61. The Blues publish directories of "in-network"

providers, including MedTest, assuring that if a member uses that provider, the service will be paid for. App. 79; App. 1621-1622. When a member of the Arkansas Blue Plan, for example, uses MedTest, it is not an accident; it is an action encouraged by the Arkansas Blue Plan, fulfilling its promise to that member.

Consistent with their contracts and the design of their system, the Blues do substantial business with West Virginia healthcare providers, year after year. For MedTest alone, the Blues paid more than $6 million for the course of about 18 months, before suddenly and collectively ceasing payment for MedTest's services. App. 17. At that point, paying MedTest to provide services to the Blues' members, and having Highmark WV process claims in West Virginia, was not an isolated, random, or fortuitous event; it was an ongoing multimillion-dollar course of dealing, directed by the Blues toward West Virginia.

III. MedTest's Claims Arise from the Blues' Course of Dealing in West Virginia.

At the heart of MedTest's case are its submission of claims to Highmark WV for services it provided to members of other Blues (under MedTest's contract, which explicitly incorporated the Blues' contractual agreements with Highmark WV), and the Blues' refusal to pay those claims, communicated to MedTest through Highmark WV. App. 63; 12(b)(6) App. 1615-1620. Both of these actions undisputedly took place in West Virginia. Moreover, the reason that MedTest did such significant business with Blues located outside West Virginia is that those Blues encouraged their members (and their members' doctors) to submit claims to MedTest in West Virginia, as described above. When MedTest was injured by the Blues' failure to pay for its services, it suffered that injury in West Virginia.

The Blues' petitions imply that MedTest performed no services in West Virginia, instead referring its testing to labs in other states. That is not correct, and as MedTest explains below, the Circuit Court correctly found that it would be irrelevant even if it were correct, because MedTest was

injured in West Virginia. App. 1619 n.8. In any event, the Blues cannot rely on this argument because it contradicts MedTest's complaint. Because the Blues' motion to dismiss was decided without jurisdictional discovery, "the court must view [MedTest's] allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction." *State ex rel. Bell Atl.-W. Va., Inc. v. Ranson*, 201 W. Va. 402, 415, 497 S.E.2d 755, 768 (1997). MedTest alleged,

> all Defendants have significant business in and contacts with West Virginia through national Blue Cross and Blue Shield programs, including the Blue Card Program, in that their members receive laboratory services and other health care services performed in West Virginia. Third, MedTest provided laboratory services to one or more of each of the Defendants' members under these national programs.

App. 64. MedTest further alleged that its "West Virginia testing site has been certified as a clinical laboratory and permitted to perform laboratory testing," and that "MedTest performed laboratory testing services for one or more of each of the Defendants' members, either directly or by referring laboratory testing services to be performed under its supervision to its affiliate Vitas Laboratory, LLC ('Vitas') and others." App. 95-96. Viewed in the light most favorable to MedTest, these allegations mean that MedTest performed services in West Virginia for the Blues' members. If the Blues believed that MedTest outsourced all its services to other states (it didn't), and that this fact was relevant to the jurisdictional analysis (it's not), they could have asked the Circuit Court for jurisdictional discovery into the location of the testing. *Bowers v. Wurzburg*, 202 W. Va. 43, 48, 501 S.E.2d 479, 484 (1998) ("It is well established that discovery is available for the limited purpose of developing jurisdictional facts when the trial court's jurisdiction has been challenged."). Instead, the Blues are trying to take an impermissible shortcut, reading the allegations in the light *least* favorable to MedTest, drawing all inferences *against* jurisdiction. To the extent the Blues' petitions assert that MedTest performed no services in West Virginia, those assertions must be ignored.

SUMMARY OF ARGUMENT

Each of the Blues sells insurance in a limited geographic area, but guarantees coverage for its members through a set of national programs. Those programs are created by contracts the Blues entered into with each other through an association they control. The Blues encourage their members to use healthcare providers in the Blues' networks, and advertise that MedTest, a West Virginia company, is in those networks. MedTest is required by contract to serve the members of all the Blues, and to submit claims for its services to Highmark WV in West Virginia. Under its contracts with the other Blues, Highmark WV is required to process those claims in West Virginia, and pay MedTest in West Virginia. Under those same contracts, the other Blues reimburse Highmark WV in West Virginia. None of this is by chance; the Blues have designed their system this way, for their own business purposes. When Highmark and the other Blues decided to stop paying for services, they induced MedTest to provide, MedTest naturally was injured in West Virginia. There is nothing random, fortuitous, unexpected, unfair, or unconstitutional about making the Blues defend claims by MedTest in West Virginia: a state the Blues have chosen to incorporate deeply into their business model, and the state at the heart of the conduct giving rise to MedTest's claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under Rule 18(a)(4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. If oral argument is nevertheless ordered, it should be a Rule 19 argument because this case involves assignments of error in the application of settled law. There is no dispute about the standards that govern the Circuit Court's exercise of jurisdiction in this case; the parties merely disagree about the application of those standards to MedTest's allegations. *See* Petitioners' Br. at 2 (describing the relevant precedent as "uniform and controlling");

Kansas–HealthNow Br. at 8 (claiming that whether the Blues had minimum contacts with West Virginia is governed by "well-settled United States Supreme Court precedent").

ARGUMENT

I. Because the Blues Did Not Seek Jurisdictional Discovery, They Must Clear a High Bar to Obtain a Writ of Prohibition.

The Blues chose not to seek jurisdictional discovery before moving to dismiss this case for lack of personal jurisdiction, and they resisted jurisdictional discovery in their briefing below. App. 1583-1584; App. 1602-1603. Without jurisdictional discovery, "the party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction." *State ex rel. Bell Atl.-W. Va., Inc. v. Ranson*, 201 W. Va. 402, 415, 497 S.E.2d 755, 768 (1997). While the party asserting jurisdiction "must allege the requisite jurisdictional contact in his or her complaint," he or she does *not* have to "prove jurisdiction by a preponderance of the evidence." *Bowers v. Wurzburg*, 202 W. Va. 43, 49, 51, 501 S.E.2d 479, 485, 487 (1998). Moreover, "[a]lthough a writ of prohibition is the traditional remedy to challenge the actions of a trial court when that court acts without jurisdiction, the right to prohibition must be clearly shown before a petitioner is entitled to this extraordinary remedy." *Norfolk S. Ry. Co. v. Maynard*, 190 W. Va. 113, 120, 437 S.E.2d 277, 284 (1993). Therefore, the question here is not, "Did MedTest prove jurisdiction?" but, "Have the Blues clearly shown that MedTest did not even make a *prima facie* showing of jurisdiction, viewing the complaint in the light most favorable to

MedTest?" The Blues, whose ongoing, multimillion-dollar business with two West Virginia companies is the subject of this case, have not clearly made such a showing.[1]

II. The Blues' Contractual Relationships with Highmark WV and MedTest Plainly Satisfy the Statutory Requirements for Jurisdiction.

West Virginia courts may exercise personal jurisdiction over a defendant who transacts "any business in this state" or causes "tortious injury in this state by an act or omission outside this state if he or she 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 this state." W. Va. Code § 56-3-33(a)(1), (4). When the defendant is a corporation, whether for-profit or non-profit, the "transacts any business" test is satisfied if "[t]he corporation makes a contract to be performed, in whole or in part, by any party thereto in this state." *Id.* §§ 31D-15-1501(d)(1), 31E-14-1401(d)(1).

The Circuit Court held that the Blues' activities meet these requirements, and sixty-two of the sixty-four Petitioners offer no argument otherwise. Petitioners' Br. at 11 n.10 (stating that they argued the issue to the Circuit Court, but not developing those arguments in the petition). The remaining two Petitioners fail to show why the requirements of the statute are not met, as all of the Blues have entered into contracts to be performed in this state, and MedTest's alleged tortious injury was suffered in this state.

---

[1] Three of the Blues submitted affidavits to the Circuit Court that denied a number of connections with West Virginia, such as owning property or having employees here. Those affidavits do not deny the crucial fact that each of these Blue Plans represents to its subscribers that it will cover testing performed by MedTest, and has done substantial business with MedTest and Highmark WV. Because that is the basis for jurisdiction, the affidavits are meaningless and do not shift the burden onto MedTest to submit affidavits of its own. The Circuit Court properly declined to shift the burden of proof onto MedTest, just as the court in *Blue Cross* rejected substantially identical affidavits when exercising personal jurisdiction over the Blues. *In re Blue Cross Blue Shield Antitrust Litig. ("Blue Cross I")*, 225 F. Supp. 3d 1269, 1281–82 (N.D. Ala. 2016).

A. The Blues Have Made Contracts to Be Performed by a Party in This State.

As the Circuit Court noted in its order, MedTest argued "the BlueCard program and other national programs are governed by contracts signed by the Blues, which require each of the Blues to participate." App. 1619. Those programs require performance in this state: Highmark WV must process claims in West Virginia for healthcare services performed by West Virginia providers. App. 1619. Those same programs require MedTest to submit claims for its services to Highmark WV in West Virginia, and for Highmark WV to pay MedTest in West Virginia. Importantly, "at the hearing [on the Blues' motions to dismiss], no Blue stated that it did not have a contract with Highmark WV, a West Virginia non-profit corporation, and/or MedTest, a West Virginia Limited Liability Company." App. 1619.[2] Because the existence of these contracts is undisputed, there is no basis to challenge the Circuit Court's conclusion that "[i]t has been pled that each of the Blues entered into a series of contracts that require performance in West Virginia by Highmark WV and MedTest," and thus that "in order to participate in the national programs as alleged in the pleadings, the Blues have 'made a contract to be performed, in whole [or] in part, by any party thereto in this state.'" App. 1620] (quoting W. Va. Code §§ 31D-15-1501(d)(1), 31E-14-1401(d)(1)).[3]

---

[2] None of the Blues other than Highmark WV has a *direct* contract with MedTest, but Highmark WV's contract with MedTest incorporates the requirements of Highmark WV's contract with the other Blues. App. 96. This incorporation is crucial to the BlueCard program and other national programs; without it, the Blues would not be able to compel providers in other states, like MedTest, to serve their members.

[3] In a footnote, Petitioners Blue Cross and Blue Shield of Kansas and HealthNow point out that the statute governing non-profit corporations uses the term "conducting affairs" instead of "transacting business." Kansas–HealthNow Br. at 11 n.9. But they cite no authority that non-profit companies should be treated differently than for-profit companies for purposes of personal jurisdiction, or even suggest a reason why this would be so. Their argument is too scant to merit any attention here. *See Sale ex rel. Sale v. Goldman*, 208 W. Va. 186, 199 n.22, 539 S.E.2d 446, 459 n.22 (2000) (holding that a "terse" argument without "any authority to support it" was "not much longer than a footnote, and should be deemed waived").

B. MedTest Suffered a Tortious Injury in West Virginia, Arising from the Blues' Persistent Course of Conduct Here.

Count III of MedTest's complaint alleges how the Blues induced their members, as well as healthcare providers, to use MedTest's services with the representation that MedTest was an in-network provider, and then refused to compensate MedTest for its services. App. 109. MedTest has been tortiously injured in West Virginia by providing services to the Blues without compensation. This is true for all of the Blues: every Blue Plan has arranged, through Highmark WV, to obtain MedTest's services for its members. And every Blue Plan paid for MedTest's services, until the Blues decided to stop doing so. Paying a West Virginia provider over and over, for more than a year, is a "persistent course of conduct" by any definition. Therefore, every Blue Plan is subject to jurisdiction on the grounds that it has caused "tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct." W. Va. Code § 56-3-33(a)(4).

III. Exercising Jurisdiction Over the Blues Comports with Due Process.

In addition to meeting the statutory requirements for jurisdiction, the Blues' "contacts with West Virginia are such that the maintenance of the suit does not offend constitutional due process concerns of fair play and substantial justice." *McGraw*, 237 W. Va. at 582, 788 S.E.2d at 328. Specific jurisdiction comports with due process if it satisfies a three-prong test:

> The first prong requires a determination that the nonresident defendant has minimum contacts with the forum. Establishing minimum contacts involves an examination of whether the defendant purposefully availed itself of the privilege of conducting activities within the forum. Two general methods for assessing minimum contacts for purposes of specific personal jurisdiction are stream of commerce and stream of commerce plus. To meet the second prong, it must be determined that the plaintiff's claims arise out of or relate to the defendant's contacts with the forum. Under the third prong, it must be constitutionally reasonable to assert the jurisdiction so as to comport with fair play and justice.

Id., 237 W. Va. at 589, 788 S.E.2d at 335. The Blues' conduct meets all three.

A. The Blues Purposefully Availed Themselves of the Privilege of Conducting Activities in West Virginia by Entering into Contracts for the Processing of Claims Here, And Paying for MedTest's Services.

The "purposeful availment" requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted). "Moreover, where individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities ...." *Id.* at 473–74 (citations and internal quotation marks omitted). Here, the Blues advertised that their members (and their members' health care providers) could send samples to MedTest, a West Virginia company, and that the Blues would pay for MedTest's services. App. 67-95. They also entered into contracts that required Highmark WV to process and pay claims for MedTest's services here. In doing so, they obtained valuable benefits: more choice for members and their doctors in selecting a laboratory, and easier administration of claims by having Highmark WV process claims in West Virginia. App. 1621-1622. This was not random or fortuitous; it was built into the design of the Blues' own health plans, and the BlueCard program.

The Blues' response is that any decision to use MedTest was a unilateral action that does not constitute purposeful availment. Their support is a line of cases holding that when an insured travels to another state for treatment for reasons beyond the insurer's control, the insurer does not automatically become subject to jurisdiction in those states. Petitioners' Br. at 21–22; Kansas–HealthNow Br. at 19. But what about jurisdiction in this case, where insureds (and their doctors) did *not* travel to West Virginia, but used the services of a West Virginia provider from their own hometown, with the blessing of their own Blue Plan?

That question was convincingly answered in *Blue Cross*, a federal multidistrict litigation in which many of the Blues argued that they were not subject to personal jurisdiction in Alabama for claims arising from alleged antitrust violations that resulted in lower payments to Alabama healthcare providers.[4] In that case, the court rejected the Blues' reliance on this same line of cases, pointing out that the Blues had agreed to cover patients living in Alabama, and thus knew that those patients would receive services from Alabama providers. *Blue Cross I*, 225 F. Supp. 3d at 1308–11. The principle is the same here: MedTest's patients have not traveled to West Virginia for reasons beyond the Blues' control. Blue Cross and Blue Shield of Kansas, for example, informs its *Kansas* members that MedTest is an in-network provider, meaning that they can expect MedTest's services to be covered. App. 76, App. 626. Therefore, its coverage of MedTest's services was not "random" or "fortuitous," but designed and intended. In fact, Blue Cross and Blue Shield of Kansas, along with the other Blues, paid for MedTest's services before this suit was filed, and continued to list MedTest as an in-network provider even *after* this suit was filed. App. 67-95. The Blues purposefully availed themselves of the privilege of conducting business with West Virginia companies by virtue of (1) entering into contracts requiring MedTest to treat their members and submit claims in West Virginia for its services, (2) advertising MedTest as an in-network provider for all their members (and not just those who travel to West Virginia), (3) requiring Highmark WV to process and pay MedTest's claims in West Virginia, and (4) sending payment to Highmark WV in West Virginia for MedTest's services.

Blue Cross is not alone on this point. Another case more like this one than the "traveler" cases is *Nieves v. Houston Industries, Inc.*, 771 F. Supp. 159 (M.D. La. 1991), in which the plaintiff had been employed by a Houston company and was covered by its employee medical plan. When she

[4] Oddly, even though many of the same attorneys for the Petitioners participated in *Blue Cross*, they did not mention that case in their petitions, even if only to distinguish it.

took a leave of absence and moved with her family to Louisiana, her company agreed to continue her coverage as long as she paid the premiums, and the plan paid her claims for medical services provided in Louisiana. *Id.* at 160. The plaintiff later sued the company and the plan in Louisiana when the plan refused to pay for medical care for her husband. *Id.* The court held that personal jurisdiction over the defendants was proper in Louisiana, stating that the defendants could have anticipated that they might have to defend an action there. *Id.* Similarly, the Blues allow their members to use MedTest's services from their own hometowns, and they have made payments in West Virginia for MedTest's services. Therefore, personal jurisdiction comports with due process because, as the Circuit Court correctly held, the Blues' contacts with West Virginia are "not 'random' or 'fortuitous.' Instead, this was built into the design of [the Blues'] own health plans. It was [the Blues'] deliberate choice to do business with a company in another state." App. 1621.

Binding precedent from the United States Supreme Court confirms the difference between "random" or "fortuitous" contacts (which were present in the "traveler" cases on which the Blues rely), and a defendant's deliberate choice to do business with a company in another state (which happened here). In *World-Wide Volkswagen Corp. v. Woodson*, the Court held that a car dealership in New York, which had sold a car to New York residents, was not subject to personal jurisdiction in Oklahoma when the New York residents had an accident while passing through that state. 444 U.S. 286 (1980). In *Burger King Corp. v. Rudzewicz*, by contrast, the Court held that a Michigan restaurant franchisee was subject to personal jurisdiction in Florida because he entered into a franchise agreement with Burger King, a corporation located there. 471 U.S. 462 (1985). The Court noted that "we have emphasized that parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." *Id.* at 473 (internal quotation marks

omitted). By listing MedTest as an in-network provider for their members in their own states (and not just those who travel), and entering into a continuing business relationship with Highmark WV and MedTest, the Blues have subjected themselves to personal jurisdiction in West Virginia for claims arising from nonpayment for MedTest's services.

This Court, relying on *World-Wide Volkswagen*, came to the same conclusion in holding that a Pennsylvania medical practice was subject to personal jurisdiction in West Virginia because it "it was required to arrange a competent source of treatment in West Virginia that could intelligently provide follow-up care" to its patient, a West Virginia resident. *S.R. v. City of Fairmont*, 167 W. Va. 880, 886, 280 S.E.2d 712, 716 (1981). The Court explained that the Pennsylvania defendant should have been aware that its failure to make "satisfactory arrangements for follow-up care would result in severe damage to the plaintiff" in West Virginia. *Id.* at 887, 280 S.E.2d at 716. "This reasoning," the Court held, "comports with another factor of the minimum contacts test discussed in *World-Wide Volkswagen*, supra, 'that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Id.* Likewise, by advertising to their subscribers that they could use MedTest's services, arranging for Highmark WV to process claims and pay for those services in West Virginia, and then refusing to pay for those services, the Blues should have reasonably anticipated being haled into court here. It was with good reason, then, that at the Circuit Court hearing on the Blues' motions to dismiss, one of the Blues' attorneys conceded that the "the traveling Blue Cross member cases," on which the Petitions rely, "aren't really relevant here." Tr. 98.

B. The Blues' Arguments About Websites and the Location of MedTest's Laboratories Are Red Herrings.

The Blues give their websites far more emphasis than they deserve. The Blues argued below, and they do so again here, that making a passive website available in a state does not subject the

publisher of the website to jurisdiction in that state. Petitioners' Br. at 20–22, 25; Kansas–Health-Now Br. at 19. That argument is both correct and irrelevant. MedTest never based its claim to jurisdiction on the availability of the Blues' websites in West Virginia. In fact, MedTest never based its claim to jurisdiction specifically on the Blues' websites at all; the paragraph of MedTest's complaint that lays out its theory of personal jurisdiction does not mention them. App. 64. But MedTest did allege that the Blues inform their members, their members' doctors, and MedTest that their plans cover MedTest's services. App. 106. MedTest listed the Blues' websites as an example, but not the only example. App. 106. The Circuit Court put this issue in its proper context, correctly holding that the Blues' representations, not the availability of their websites, were relevant to jurisdiction:

> The Court considers the case law provided by [the Blues] regarding situations where a defendant has simply posted information on an Internet web site accessible to users in foreign jurisdictions.
>
> The Court, however, considers that posting the information on the Blues' websites is simply an online version of the paper directory of providers that insureds can use to determine if a provider will be covered. The Court differentiates this from traditional passive website cases. Here, it is claimed that the [Blues] held out and advertised to insureds/subscribers that they could send samples to MedTest, a West Virginia Limited Liability Company, and that they would pay for MedTest['s] services via both online and paper versions of listings of covered providers. The Court notes the Blues even admit in their Memorandum that these are "online provider directories".

App. 1621. In short, jurisdiction over the Blues springs from the fundamental design of their system, not their websites.

The Blues also take exception to the location of MedTest's laboratories. Although they concede that MedTest has alleged that it "provided laboratory services to one or more of each of the [Third-Party] Defendants' members," App. 64, they highlight MedTest's allegations that it has testing sites in Arkansas and North Carolina (in addition to West Virginia), and that it refers some testing to an

affiliated laboratory. Petitioners' Br. at 24; Kansas–HealthNow Br. at 15 n.11 (citing App, 95). The Circuit Court correctly recognized that none of this matters because MedTest has alleged that it is a West Virginia resident injured in West Virginia by the Blues' actions. App. 1619 n.8. MedTest is specifically permitted by its contract with Highmark WV to refer testing services to other providers. App. 103-105. The claims MedTest submitted to Highmark WV in West Virginia, however, are the subject of this suit. If MedTest sends a sample to its Arkansas laboratory instead of its West Virginia laboratory, and one of the Third-Party Defendants refuses to pay for the service, MedTest loses money in West Virginia on a claim submitted to Highmark WV in West Virginia, based on a service it was required to provide under its contract with Highmark WV, which was executed in West Virginia and is governed by West Virginia law. App. 120, § VI.K. Unless the Third-Party Defendants believe that they *are* subject to jurisdiction in Arkansas and North Carolina (which they surely do not), the location of the actual testing is immaterial to MedTest's claims.[5]

C. MedTest's Claims Arise out of and Relate to the Blues' Contacts with West Virginia.

Under the second prong of the due process analysis, "it must be determined that the plaintiff's claims arise out of or relate to the defendant's contacts with the forum." *McGraw*, 237 W. Va. at 589, 788 S.E.2d at 335. MedTest's claims could not be tied more closely with the Blues' conduct. Here are those claims against the Blues in a nutshell: The Blues represented that they would pay MedTest in West Virginia for MedTest's services. Relying on this representation, as well as a contract that incorporates the Blues' agreements with Highmark WV, MedTest provided services to the Blues' members and submitted bills to Highmark WV in West Virginia. Pursuant to its contract

[5] Additionally, the Third-Party Defendants' attempt to interpret "West Virginia, Arkansas, or North Carolina" to mean "not West Virginia" conflicts with the Court's duty to "view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction." *Ranson*, 201 W. Va. at 415, 497 S.E.2d at 768.

with the Blues, Highmark WV processed MedTest's, claims, paid for those services, and was reimbursed by the Blues, all in West Virginia. Then one day, Highmark WV and the Blues stopped paying, injuring MedTest in West Virginia. Through this conduct, all of which occurred in or was directed toward West Virginia, the Blues committed fraudulent representation and inducement (Count III of MedTest's counterclaims), conspired with Highmark WV to obtain MedTest's services without paying for them (Count IV), participated in a joint venture that injured MedTest (Count V), and were unjustly enriched (Count VI). App. 109-112. The Blues moved to dismiss these counts for failure to state a claim. That motion was denied in full, so it must be assumed for purposes of this appeal that MedTest adequately alleged the elements of each.

The overlap between the conduct that supports jurisdiction and the conduct from which MedTest's claims arise is precise and complete. Instead of arguing that the second prong is not met because there is no connection between their alleged conduct and MedTest's claims, the Blues repeat their argument on the first prong—that none of their conduct was directed at West Virginia. Petitioners' Br. at 23–26; Kansas–HealthNow Br. at 23–24. The Blues miss the point. If none of their conduct was directed toward West Virginia, then there is no purposeful availment, and no need to reach the second prong at all. But if their conduct does constitute purposeful availment, it is indisputable that MedTest's claims arise out of the Blues' contacts with West Virginia.[6] Therefore, the second prong is clearly met.

[6] Most of the Petitioners contend that MedTest's claims arise from its contract with Highmark WV, and that the Blues did not enter into contracts in West Virginia. This is incorrect, for all the reasons explained here and in Section I of the Statement of the Case. Regardless, no contract is required to show that the Blues unjustly enriched themselves by encouraging their members to use MedTest's services with the promise that they would pay for those services, and then paying MedTest nothing. *See Realmark Developments, Inc. v. Ranson*, 214 W. Va. 161, 164–65, 588 S.E.2d 150, 153–54 (explaining the origins of unjust enrichment as a cause of action).

D. Jurisdiction over the Third-Party Defendants Comports with Fair Play and Justice.

"Under the third prong [of the due process analysis], it must be constitutionally reasonable to assert the jurisdiction so as to comport with fair play and justice." *McGraw*, 237 W. Va. at 589, 788 S.E.2d at 335. This Court has identified five factors for determining reasonableness: (1) the burden on the defendant, (2) the interests of the forum state, (3) the plaintiff's interest in obtaining relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* The Blues argue that jurisdiction is unreasonable under these factors. This argument was soundly and correctly rejected both in *Blue Cross* and in the Circuit Court below.

The Blues claim that defending this suit in West Virginia will be burdensome, but they make no attempt to quantify this burden or show how it is constitutionally significant. Petitioners' Br. at 30; Kansas–HealthNow Br. at 26–27. That is fatal to their claim, as it is not enough to claim any burden at all; they must make a "compelling case" that jurisdiction is so unreasonable that it reaches "constitutional magnitude." *Burger King*, 471 U.S. at 477, 484. Here, the Blues' reasoning is so vague that it could apply to any out-of-state defendant in any case. Most of it, in fact, is yet another repetition of the Blues' arguments that they do not have minimum contacts with West Virginia, which belong in the first prong of the analysis, not the third. For this very reason, the court in *Blue Cross* rejected the Blues' argument that litigating in Alabama would be unduly burdensome. *Blue Cross I*, 225 F. Supp. 3d at 1299–1300. The Blues, many of whom are sharing counsel in this case and thus paying only a fraction of the cost of defending it, have not met their steep burden to make a compelling case of a constitutionally significant burden.

As to the second factor, West Virginia "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U.S.

at 473 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). The United States Supreme Court has noted that "where individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Id.* at 473–74.

The third factor, the plaintiff's interest in obtaining relief, also weighs in favor of jurisdiction over the Blues. If the Circuit Court cannot exercise jurisdiction, then the only way for MedTest to hold each of the Blues accountable would be to file dozens of suits across the country, likely having to spend more on attorneys' fees than its claims are worth in many jurisdictions. This is plainly unreasonable when the case can be resolved in just one suit in the state to which each of the Blues directed its actions. The prospect that MedTest could obtain full relief against Highmark WV is uncertain; MedTest alleged a claim for unjust enrichment against the Blues, and it is possible that MedTest could prevail on this claim even if it does not prevail on its contractual claim against Highmark WV. Supp. App. 108–09. Moreover, this is at best a case management issue; Highmark WV has asked the Circuit Court to bifurcate the case so that claims against Highmark WV proceed first. The Blues have identified no authority suggesting that the mere possibility that a plaintiff could recover from an in-state defendant can make or break the constitutionality of personal jurisdiction.

Likewise, the fourth factor, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, weighs heavily in favor of exercising jurisdiction here. If the only way for MedTest to obtain complete relief is to file dozens of suits, the process will be self-evidently inefficient and create a serious risk of conflicting results.

Finally, "the shared interest of the several States in furthering fundamental substantive social policies" also favors jurisdiction here. If an association of dozens of members can enter into agreements that harm a resident of West Virginia, it furthers no substantive policy to make recovery extraordinarily difficult by forcing the West Virginia resident to litigate the same case dozens of times in dozens of jurisdictions.

In short, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Not only have the Blues failed to make a compelling case; each of the "other considerations" actually *supports* jurisdiction.

IV. This Court Need Not Break New Ground to Determine That the Blues' Conspiracy Supports Jurisdiction as Well.

In Count IV of its counterclaim, MedTest alleged a civil conspiracy:

> Highmark WV and its fellow defendants [the Blues] combined, through concerted action, to accomplish an unlawful purpose by devising and perpetrating a fraudulent scheme to induce MedTest to provide laboratory testing services to their health insurance plan members without paying for them, carrying out that scheme by representing to MedTest, other health care providers and their health insurance plan members that MedTest was an in-network provider of laboratory testing services but refusing to compensate MedTest for the provision of such services.

App. 110. Highmark WV and the Blues moved to dismiss this Count for failure to state a claim. That motion was denied, and the Blues do not challenge that denial here. 12(b)(6) App. 1618-1619. Therefore, it can be assumed for purposes of this petition that MedTest has adequately alleged the conspiracy described in its counterclaim.

When deciding the Blues' motions to dismiss for lack of jurisdiction, the Circuit Court thoroughly applied the Blues' alleged conduct to the statutory and constitutional requirements for jurisdiction, and concluded that all of them supported jurisdiction. App. 1617-1627. Then, as an

additional ground for jurisdiction, the Circuit Court held that "MedTest pled that the Blues participated in this conspiracy, therefore, because MedTest has pled a claim for conspiracy, it has undoubtedly established jurisdiction here." App. 1624.

Because the Circuit Court had already held that every requirement for jurisdiction was satisfied before addressing MedTest's conspiracy claim, this Court has the option not to address the conspiracy claim at all. It could simply deny the writ for the other reasons the Circuit Court identified. But if this Court would like to address the conspiracy claim, it can do so within the bounds of existing precedent. It is well settled that West Virginia law applies the standards of *federal* due process when determining if personal jurisdiction exists. *Ranson*, 201 W. Va. at 413, 497 S.E.2d at 766. And the Blues appear to concede that the United States Court of Appeals for the Fourth Circuit, as well as the federal district courts in West Virginia, have uniformly held that the conspiracy theory of jurisdiction comports with due process. Petitioners' Br. at 27; Kansas–HealthNow Br. at 16 n.13. Applying the conspiracy theory of jurisdiction here would not make any new law; it would apply existing state and federal law to the facts of this case.

According to the case on which the Blues primarily rely, participation in a conspiracy will justify personal jurisdiction if a plaintiff "make[s] a plausible claim (1) that a conspiracy existed; (2) that the ... defendants participated in the conspiracy; and (3) that a coconspirator's activities in furtherance of the conspiracy had sufficient contacts with [the forum state] to subject that conspirator to jurisdiction in [the forum state]." Petitioners' Br. at 27 (quoting *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013)). MedTest has already defeated a Rule 12(b)(6) motion to dismiss its claim that (1) a conspiracy existed, (2) the Blues participated in that conspiracy, and (3) one of the co-conspirators, Highmark WV, took steps in furtherance of that conspiracy in West

Virginia. App. 95-96, 100-103, 105-106, 110; 12(b)(6) App. 1618-1619. Therefore, it has undoubtedly established conspiracy jurisdiction here.[7] *See Blue Cross I*, 225 F. Supp. 3d at 1301 (holding that all the Blues were subject to personal jurisdiction in Alabama because they allegedly were parties to a conspiracy with Blue Cross and Blue Shield of Alabama). And even if this Court is not ready to fully endorse the conspiracy theory of jurisdiction, it could hold that the alleged conspiracy in this particular case is tied so closely to West Virginia that the exercise of jurisdiction is justified.

V. If Jurisdiction Is Unclear, the Court Should Allow Jurisdictional Discovery Instead of Granting the Writ.

For the reasons above, the Blues have fallen far short of a clear showing that MedTest did not make out a *prima facie* case of jurisdiction. But if this Court disagrees, it "should permit limited jurisdictional discovery." *Bowers*, 202 W. Va. at 51, 501 S.E.2d at 487. This is what happened in *Blue Cross*. Following extensive briefing on the Blues' motions to dismiss, the court concluded that the record was inadequate to make a decision, and ordered the parties to work on a discovery plan. *In re Blue Cross Blue Shield Antitrust Litig.*, Case No. 13-cv-20000, Doc. No. 369 (N.D. Ala. May 27, 2015). After discovery was complete, the court held that all the Blues were subject to jurisdiction in Alabama. *Blue Cross I*, 225 F. Supp. 3d at 1295–99 (examining the evidentiary record).

If there are doubts about jurisdiction, it would be especially appropriate to allow discovery because any evidentiary shortcomings are largely the fault of the system established by Highmark WV and the Blues. When MedTest provides services to one of the Blues' members, it must submit the claim to Highmark WV. App. 96. This makes it difficult for MedTest to keep good records on

[7] The Blues argue that MedTest has not sufficiently alleged the conspiracy or its connection with West Virginia, but this is yet another rehash of their argument on the "purposeful availment" prong of the due process analysis.

whose subscribers it is serving, where those subscribers reside, and the volume of its business with each of the Blues. As this Court has held, "it is inequitable to require a plaintiff to come forward with proper evidence detailing specific facts demonstrating personal jurisdiction, yet deny him or her access to reasonable jurisdictional discovery through which such evidence may be obtained, particularly in a complex case ...." *Bowers*, 202 W. Va. at 52, 501 S.E.2d at 488 (internal quotation marks omitted). MedTest should at least have the opportunity for a decision on jurisdiction based on an accurate record.

Such discovery is all but certain to confirm that jurisdiction is appropriate. Since MedTest filed its complaint, it has been able to take a limited amount of discovery from Highmark WV, which did not contest jurisdiction; that discovery shows even deeper contacts between the other Blues and West Virginia than MedTest could have known when this case began. It is now clear that the decision to stop paying for MedTest's services involved an agreement among the Blues and Highmark WV that Highmark WV would lead the investigation on the Blues' behalf in West Virginia, and that the Blues collaborated with Highmark WV on the decision to stop paying for MedTest's services. Supp. App. 66. The recent discovery of this evidence is a prime example of the inequity that would result from finding a lack of jurisdiction without the opportunity for discovery; neither Highmark WV nor the Blues disclosed any of this to MedTest until discovery began.

CONCLUSION

The Blues have made continuous, systematic contacts with West Virginia a cornerstone of their business. Through those contacts, they have injured a West Virginia plaintiff. It is more than fair to require the Blues to defend themselves in West Virginia.

Dated: July 6, 2020

Respectfully Submitted,

BAILEY & GLASSER LLP
Benjamin L. Bailey (WVSB #200)
Samuel A. Hrko (WVSB #7727)
209 Capitol Street
Charleston, WV 25301
(304) 345-6555 (Telephone)
(304) 342-1110 (Facsimile)
bbailey@baileyglasser.com
shrko@baileyglasser.com

WHATLEY KALLAS, LLP
Patrick J. Sheehan (*pro hac vice* admission pending)
Henry C. Quillen (*pro hac vice* admission pending)
1180 Avenue of the Americas, 20th Floor
New York, New York 10036
(212) 447-7060 (Telephone)
(800) 922-4851 (Facsimile)
psheehan@whatleykallas.com
hquillen@whatleykallas.com

Counsel for MedTest Laboratories, LLC