



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.  
3C LLC, a Colorado limited liability company,  
and JUSTIN JOURNAY, an individual.

Petitioners/Defendants,

v.

Lower Court Case No.  
20-C-113

HONORABLE JUDGE ERIC O'BRIANT,

Respondent,

Case No. 21-0441

TRI-STATE WHOLESALE, INC.  
d/b/a TRI-STATE CANNABIS,  
a West Virginia Corporation,

Appellee/Respondent Plaintiff.

**VERIFIED PETITION FOR WRIT OF PROHIBITION**

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## QUESTION PRESENTED

Should the Court enter a writ of prohibition to enforce a forum-selection clause between two sophisticated commercial parties where (1) both parties were aware of the clause; (2) there is no allegation of fraud in the formation of the clause; and (3) the claims at issue seek to enforce the very contract that contains the forum-selection clause

## STATEMENT OF CASE

This matter arises out of a distributorship agreement (the “Agreement”) for hemp-derived cartridges for what are known as “vaping” devices. Defendant 3C LLC (“3Chi”) makes these cartridges and sells them in various states throughout the country. [Appendix at p. 42, ¶ 1.] Defendant Justin Journey is the sole member of 3Chi. [Appendix at p. 43, ¶ 7.] 3Chi’s business operations are located in Hamilton County, Indiana and Mr. Journey both works and lives there. [Appendix at p. 166.]

Plaintiff Tri-State Wholesale, Inc. d/b/a Tri-State Cannabis (“Tri-State”) is a distributor of the type of hemp-derived vape cartridges that 3Chi manufactures (the “Products”). [Appendix at pp. 42-43, ¶¶ 1, 4.] Tri-State is located in West Virginia. [Appendix at pp. 42-43, ¶¶ 1, 4.]

The parties entered into the Agreement on April 29, 2020. [Appendix at p. 44, ¶ 11.] The Agreement requires Tri-State to purchase the Products only from 3Chi. [Appendix at p. 46, ¶¶ 25, 26.] The Agreement also identifies Tri-State as the “exclusive distributor” for the Products in a defined territory. [Appendix at p. 45, ¶¶ 16-19.] The Agreement originally covered all of West Virginia and some of Kentucky. [Appendix at p. 46, ¶ 23.] The parties later expanded the territory to include all of both West Virginia and Kentucky. [Appendix at p. 46, ¶ 24.]

The Products covered by the Agreement include “Delta 8” cartridges that are derived from hemp and contain less than .3 percent of a chemical known as Delta 9 THC. [Appendix at pp. 60-75.] Federal law allows the sale of products with this low amount of Delta 9 THC. [Appendix at p. 45, ¶¶ 19-20.]

After executing the Agreement, Tri-State marketed the Products in its territory through contracts with retailers who sold the Products to the end users. [Appendix at pp. 46-47, ¶¶ 29-32.]

In August of 2020, the U.S. Drug Enforcement Agency (“DEA”) issued what is styled as an “interim final rule” that allegedly called into question whether Tri-State can sell the Products under the parties’ Agreement. [Appendix at p. 47, ¶¶ 36-39.] Tri-State claims there is confusion within the industry whether items like the Products can continue to be sold under the DEA’s interim final rule. [Appendix at p. 48, ¶¶ 41-42.]

Tri-State further claims that 3Chi posted a notice on its website stating that the DEA had made the sale of the Products illegal under the DEA’s interim final rule. [Appendix at p. 48, ¶ 42.] The complaint alleges that this notice made the sale of the Products “financially infeasible.” [Appendix at p. 48, ¶ 43.]

Both parties have sued for non-performance under the Agreement. [Appendix at pp. 42-78 and 200-24.] In accordance with the Agreement, 3Chi filed suit in the Circuit Court of Hamilton County, Indiana, on March 8, 2021. [Appendix at pp. 200-24.] That complaint alleges that Tri-State breached the Agreement by refusing to continue to sell the Products in West Virginia and Kentucky after the DEA issued its interim rule.

Rather than adhere to the forum selection clause contained in the Agreement, Tri-State filed its own complaint in the Circuit Court of Logan County, West Virginia, on November 9, 2020. [Appendix at 6-41] In its complaint, Tri-State asserted four

claims: (1) breach of a contractual refund provision in the event of a change in law; (2) breach of the exclusivity term of the Agreement; (3) a claim of fraud that the statement on the website was fraudulent and caused Tri-State to lose the benefits of the Agreement, including its exclusivity provision; and (4) a claim of tortious inference with the contracts Tri-State maintained with retailers it used to market the Products under the Agreement. [Appendix at pp. 48-57, ¶¶ 45-105.]

The parties' Agreement contained a clause requiring both: (1) mediation prior to the bringing of suit; and (2) the filing of any suit in Hamilton County, Indiana, where 3Chi's operations and headquarters are located.<sup>1</sup> [Appendix at p. 74.] These provisions in the Agreement state that:

#### 26. Dispute Resolution

The Parties agree that in the event a dispute may arise concerning any aspect of this Agreement, that said dispute will be first submitted to mediation and that each party waives their right to file any legal action within the federal and state courts of Indiana or any other jurisdiction until mediation is held. To begin such mediation, any party shall forward, in writing and by certified mail, a request for mediation to the other party. The parties shall then consult and if a single mediator cannot be agreed upon within 30 days, each party shall appoint a mediator/representative and those two mediators/representatives shall then agree to single and final mediator. Said mediation shall occur in Hamilton County, Indiana within sixty (60) days of the initial letter requesting mediation unless otherwise agreed upon by the parties and each side shall bear their own costs and fees associated with said mediation.

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<sup>1</sup> Tri-State's initial complaint attached a copy of the Agreement that excluded the specific page of the Agreement containing the forum selection provision. [Appendix at pp. 24-38.] Subsequently, Tri-State amended its complaint to include the entire Agreement, including the page containing the forum selection provision. [Appendix at pp. 60-75.]

If the dispute cannot be resolved at mediation, EACH PARTY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT. **Any legal suit, action, or proceeding arising out of the breach of this Agreement or shall occur in the Circuit Court of Hamilton County, Indiana.** The prevailing party or parties shall be entitled to an award of its reasonable attorney fees and costs through every stage of the proceeding and in obtaining and enforcing any judgment.

[See Appendix at p. 74 (emphasis added) (capitalization in original).]

Before the parties executed the Agreement, 3Chi advised Tri-State that the dispute resolution provision provided for Hamilton County, Indiana, because “[t]hat’s where [3Chi’s] headquarters will officially be in a month or so and where we currently operate[.]” [Appendix at p. 109.] In response to that email, Tri-State responded as follows: “Here is the contract that you sent me. I have executed this contract. No changes have been made. This contract is in [its] original form that you sent us.” [Appendix at p. 110.]

3Chi moved to dismiss the case because Tri-State had not mediated the dispute and filed the case in an inappropriate forum. [Appendix at pp. 80-92.] After 3Chi filed the motion, Tri-State agreed to the mediation and that mediation was completed without a settlement. [Appendix at p. 172.] Tri-State claimed that it could avoid the forum-selection clause because Mr. Journay did not sign it in a personal capacity and because it had alleged fraud against 3Chi and Mr. Journay. [Appendix at pp. 112-38.]

After oral argument, the trial court agreed and denied the motion to dismiss. [Appendix at pp. 1-5.] The trial court’s decision concluded that Tri-State could not avoid the forum-selection clause because Mr. Journay was not a party to it and



because Tri-State's fraud claim against 3Chi and Mr. Journey, when taken as true, would make enforcement of the forum-selection clause unreasonable as to Tri-State. [Appendix at pp. 2-3.]

### SUMMARY OF ARGUMENT

The Agreement between these two sophisticated parties requires the parties to bring suit in Hamilton County, Indiana. The trial court refused to enforce this mutually agreed provision. The forum-selection clause satisfies all of the requirements the Court set out for forum-selection clauses in *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E.2d 322 (2009). 3Chi made Tri-State expressly aware of the forum selection clause before the parties executed it. The forum-selection clause is mandatory because it states any litigation "shall" be filed in Hamilton County, Indiana. The forum-selection clause applies to this dispute because all of Tri-State's claims rely upon the Agreement and intertwined with the requirements of the Agreement. Mr. Journey can enforce the forum-selection clause because the claims against him are not distinct from the claims against 3Chi. Finally, the trial court improperly determined that Tri-State's fraud claims prevent the enforcement of the forum-selection clause. The Court does not invalidate forum-selection clauses just because a party asserts fraud. Tri-State must allege that the forum-selection clause itself was fraudulently induced, which Tri-State cannot do because 3Chi expressly informed Tri-State of the forum-selection before the parties entered the Agreement.

The Court should enter a writ of prohibition preventing further litigation in violation of the forum-selection clause. Absent a writ, Tri-State will be able to

frustrate its contractual agreement to litigate in Hamilton County, Indiana. A post-judgment appeal cannot provide an adequate remedy for the breach of a clause requiring litigation elsewhere.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to W. V. App. R. 18(a) because none of the criteria for forgoing argument under Rule 18(a) apply to this case. Oral argument should be set under W. V. App. R. 19 because the case involves an assignment of error in the application of settled law, namely the Court's rules for enforcing forum-selection clauses established in *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E.2d 322 (2009).

#### ARGUMENT

**I. This Court should enter a writ preventing further proceedings in the Circuit Court of Logan County, West Virginia, and requiring that Tri-State litigate its claims in Indiana.**

Because this matter arises on a motion to enforce a forum selection clause, it is governed by the rules set out in the Court's decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E.2d 322 (2009). *Caperton* explained that "[w]hile forum-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable." *Id.*, 225 W. Va. at 141, 690 S.E.2d at 335. The Court recognized West Virginia's interest in enforcing contracts as written and explained that the "modern trend is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them." *Id.* (quoting 7 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 15:15, at 290-31). The *Caperton* Court similarly

explained that forum selection clauses are not against public policy. *Id.* The Court then explained that “a strong presumption in enforceability attaches to forum selection clauses.” *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

The Court in *Caperton* then adopted a four-part test for determining when a particular forum-selection clause is enforceable. *Caperton*, 225 W.Va. at 142. The first three factors ask whether:

1. the clause was reasonably communicated to the party resisting enforcement;
2. the clause is mandatory, meaning that a party is required to bring any dispute to the designated forum and not simply permitted to do so; and
3. the claims and parties involved in the suit are subject to the forum selection clause.

*Caperton*, 225 W.Va. at 142, 690 S.E.2d at 336 (citing *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir. 2007)).

If these criteria are satisfied, the burden shifts to the party resisting the forum-selection clause to “make a sufficiently strong showing that ‘enforcement would be unreasonable [and] unjust, or that the clause was invalid for such reasons as fraud or overreaching.’” *Id.* (quoting *Phillips*, 494 F.3d at 383-84) (quoting in turn *M/S Bremen*, 407 U.S. at 15).

3Chi established the first three factors based both on the face of the complaint and the supporting record. [Appendix at pp. 42-75, 80-110, 140-67..] Tri-State knew of the forum-selection clause. [Appendix at pp. 109-110.] It requires litigation in a

state connected to the dispute. [Appendix at pp. 109-110, 166-67.] The forum-selection clause applies to both the claims and the parties in this case. Tri-State has not carried its burden to make a “strong” showing that the enforcement of the clause would be “unreasonable” or “unjust.” *Id.* Tri-State is attempting to obtain the benefit of the Agreement. It is not unreasonable or unjust to require Tri-State to meet its obligations under that Agreement.

**A. The record establishes that Tri-State was aware of the forum-selection clause.**

There is no dispute that 3Chi made Tri-State aware of the forum-selection clause. 3Chi advised Tri-State of the forum selection clause requiring litigation in Indiana because “[t]hat’s where [3Chi’s] headquarters will officially be in a month or so and where we currently operate[.]” [Appendix at p. 109.] After being advised and after reviewing the Agreement, Tri-State executed the Agreement without requesting any revisions. [Appendix at p. 110.]

Before the trial court, Tri-State argued that there was **no** connection between this case and Indiana. [Appendix at pp. 120-22, 127-35, 271-78.] This argument ignores the documented fact that not only does 3Chi maintain its operations in Hamilton County, Indiana, but that Tri-State knew of that fact before executing the Agreement. [Appendix at pp. 109-110, 166-67.]

**B. The forum-selection clause contains mandatory language requiring its enforcement.**

*Caperton’s* second requirement looks to whether the clause is mandatory or permissive. *Caperton*, 225 W.Va. at 142, 690 S.E.2d at 336. The Agreement’s forum-selection clause is mandatory and requires litigation in Indiana. [Appendix at p. 74.]

The Agreement says that disputes “**shall** occur in the Circuit Court of Hamilton County, Indiana.” [See Appendix at p. 74, ¶ 26 (emphasis added) (capitalization in original).] The Agreement’s use of “shall” makes clear that the parties intended the forum-selection clause to be mandatory. As the Court explained in *Caperton*. “[i]f jurisdiction is specified with mandatory terms such as ‘shall,’ or exclusive terms such as ‘sole,’ ‘only,’ or ‘exclusive,’ the clause will be enforced as a mandatory forum-selection clause.” *Caperton*, 225 W. Va. at 145, 690 S.E.2d at 339. The Agreement used precisely this language to make the forum-selection clause mandatory. [Appendix at p. 74, ¶ 26.]

**C. The plain language of the forum-selection clause contained in the Agreement applies to the parties’ dispute.**

The forum-selection clause applies to this dispute. Under the Agreement, Tri-State agreed that “**any** legal suit, action, or proceeding arising out of the breach of this Agreement shall occur in the Circuit Court of Hamilton County, Indiana.” [See Appendix at p. 74, ¶ 26 (emphasis added) (capitalization in original).] This language does not limit the type of claims to which the clause will apply. It requires litigation in the Circuit Court of Hamilton County, Indiana, so long as a suit “arises out of” a breach of the Agreement.<sup>2</sup>

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<sup>2</sup> This Court in *State ex rel. Gorlin v. Webster*, 2019 WL 5858074 (W. Va. 2019) considered similar language contained in a forum-selection clause. Specifically, this Court looked at the words “arising out of” contained in the forum-selection clause and determined that “arising,” in plain language, is defined to mean “to originate from.” *Id.* at \*5. This Court then applied the plain language contained in the forum-selection clause to hold that respondents’ complaint, which sounded in breach of contract, promissory estoppel, negligence, fraud, and civil conspiracy, all arose out of the

Tri-State's complaint "arises out of" an alleged breach the Agreement. [Appendix at pp. 42-77.] The first two counts of the complaint expressly seek a remedy for alleged breaches of that contract. [Appendix at pp. 48-52, ¶¶45-72.] The first count claims that 3Chi breached the Agreement by failing to provide a refund to which Tri-State claims it is entitled in light of the statement on the 3Chi website. [Appendix at pp. 48-49, ¶¶ 45-53.] The second count alleges that 3Chi breached the Agreement by selling Products in its exclusive territory after Tri-State refused to continue those sales. [Appendix at pp. 50-52, ¶¶ 54-72.]

Tri-State also asserts two tort theories, both of which rest on its assertion that 3Chi deprive Tri-State of the benefits of the Agreement. The fraud claim rests on Tri-State's assertions that: (1) it was owed a refund under the Agreement after the DEA interim rule was issued, and (2) 3Chi sought to resume sales in West Virginia after Tri-State refused to continue performing under the Agreement. [Appendix at p. 53, ¶¶ 80-84.] Tri-State's tortious interference claim similarly asserts that 3Chi tortiously interfered with the contracts Tri-State maintained with retailers. That claim seeks damages that Tri-State claims arose when 3Chi breached the Agreement by selling the Products in West Virginia despite the exclusivity provision in the Agreement. [Appendix at p. 56, ¶¶ 101-02.]

The mere fact that these claims are not identified as breach of contract claims does not take them outside the scope of the forum-selection clause. As *Caperton*

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parties' agreement, which meant the forum-selection clause must be applied. *Id.* at \* 5-6.

explained, “the deciding court must base its determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.” *Caperton*, 225 W.Va. at 146, 390 S.E.2d at 322. The Court must examine “the substance of those claims, shorn of their labels.” *Id.* (quoting *Phillips*, 494 F.3d at 388). These tort theories are clearly intertwined with the Agreement. The claims arise out of the terms of that Agreement and Tri-State’s expectations under the Agreement. Because all of Tri-State’s claims arise out of Tri-State’ allegation that 3Chi breached the Agreement, the forum-selection clause applies to this lawsuit and requires Tri-Sate to live up to its promise of litigating its claims in the Circuit Court of Hamilton County, Indiana.

**D. Both 3Chi and Mr. Journey may enforce the forum-selection clause.**

The trial court declined to enforce the forum-selection clause, in part, because Mr. Journey was not a signatory to the Agreement. However, this Court holds that parties cannot avoid the effectiveness of a forum-selection clause simply by adding named defendants as additional parties who are not signatories to the contract. *Caperton*, 225 W.Va. at 150, 690 S.E.2d at 344. The *Caperton* Court recognized that non-parties can be “so closely related to the contractual relationship that the forum selection clause applies to all defendants.” *Id.* As *Caperton* explained, “in order for a non-signatory to benefit from or be subject to a forum selection clause, the non-signatory must be closely related to the dispute such that it becomes foreseeable that the non-signatory may benefit from or be subject to the forum selection clause.” *Id.* This does not require the party to be a third-party beneficiary to the Agreement. *Id.*

In *Commerce Limited Partnership v. Olivieri, Shousky and Kiss, P.A.*, this Court dealt with a similar issue concerning whether non-signatories should be bound by a forum-selection provision contained in an architectural design contract. 2013 WL 5418527 (W. Va. 2013). In that case, the circuit court dismissed a lawsuit against an architectural design company based upon the forum-selection clause contained in the parties' agreement. *Id.* at \*1-2. On appeal, the petitioner asserted that the circuit court erred in holding that all of the petitioners were bound by the contract's forum-selection clause because not all of the petitioners were signatories to the agreement—but rather, third-party beneficiaries. *Id.* at \*3-4. This Court upheld the circuit court's dismissal under the forum-selection clause because “[i]t is clear from the complaint that all of petitioners' claims arise either directly or indirectly from the contract for architectural services. The very nature of the claims brought requires an examination of respondents' performance under the contract.” *Id.* at \*4.

In this case, it was foreseeable to Tri-State that Mr. Journey would be a party subject to any lawsuit arising under the Agreement. The amended complaint focuses exclusively on the conduct of 3Chi, not Mr. Journey. There are no allegations of specific misconduct by Mr. Journey. Tri-State did not, and cannot, identify any actions he took separately from his role with 3Chi. Instead, the amended complaint alleges that there is no difference between 3Chi and Mr. Journey: “Mr. Journey is the sole member of 3Chi and, upon information and belief, so controls 3Chi, disregarding the limited liability company formalities, that there is an identity of interests between Mr. Journey and 3Chi.” [Appendix at p. 43, ¶ 7.] There is no factual support



for this claim and 3Chi denies it. But Tri-State must stand by its own allegation. If Mr. Journey and 3Chi are one-and-the-same, they both should have the right to enforce the forum-selection clause contained in the Agreement.

The plain language of the forum selection clause supports this result. It does not apply just to the parties. It extends to “**any** legal suit, action, or proceeding” regardless of the parties to it. [Appendix at p. 74, ¶ 26 (emphasis added).] The drafters could have limited the clause to claims brought by or against the parties but chose broader language that allows non-parties to invoke the clause if a dispute arises relating to the Agreement. It is inescapable that Tri-State’s claims against Mr. Journey relate directly, or at the very least, indirectly, to the Agreement. After all, but for Tri-State entering into the Agreement, Tri-State would not have any cognizable claims against either 3Chi or Mr. Journey.

**E. Tri-State cannot carry its “heavy burden” to show that the enforcement of the forum selection clause is unreasonable.**

Because each of the first three *Caperton* factors supports enforcing the forum-selection clause, the burden shifts to Tri-State to make a “sufficiently strong showing” that the forum-selection clause is unreasonable. *Caperton*, 225 W.Va. at 142, 690 S.E.2d at 336. “Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party will for all practical purposes be deprived of his day in court’ because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state.” *Id.*, 226 W. Va. at 128, 690

S.E.2d at 348 (quoting *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996)). None of these considerations supports finding that the forum-selection clause is unreasonable or unjust.

First, the forum selection clause contained in the Agreement was not induced by fraud or overreaching. *Caperton*, 225 W.Va. at 142, 690 S.E.2d at 336. The Agreement's terms are plain and unambiguous on their face. [Appendix at p. 74, ¶ 26.] Chi expressly informed Tri-State that the Agreement contained a forum-selection clause. [Appendix at pp. 109-110.] Tri-State signed that Agreement without question. [Appendix at p. 110.] It was no secret to Tri-State that it would be required to litigate any claims arising from the Agreement in the Circuit Court of Hamilton County, Indiana. [Appendix at p. 74, ¶ 26.] There is nothing unreasonable or unjust in requiring Tri-State—a sophisticated entity—to comply with a contractual term to which it agreed.

The trial court concluded that enforcement of the forum-selection clause would be unreasonable and unjust simply because Tri-State raised a fraud claim. [Appendix at p. 3.] This Court has never held that simply alleging fraud defeats a forum-selection clause. There was even a fraud claim at issue in *Caperton*. See *Caperton*, 225 W. Va. at 149, 690 S.E.2d at 322. The question is not whether the plaintiff asserts a fraud claim, but whether the forum-selection clause was procured through fraud. *Caperton* looks to the forum-selection itself to determine whether it is “unreasonable or unjust.” 225 W.Va. at 152. The party opposing a forum-selection clause must show that its “**formation** was induced by fraud or overreaching.” *Id.*, 225 W. Va. at 155,

690 S.E.2d at 349. Tri-State has not argued or produced an iota of evidence indicating 3Chi or Mr. Journey engaged in fraud or overreach regarding the formation of the forum-selection clause contained in the Agreement. 3Chi made sure that Tri-State knew of it before the parties executed the Agreement. [Appendix at pp. 109-110.] The clause does not select any random forum, but the district where 3Chi conducts its business operations. [Appendix at pp. 109-110, 166-67.]

Tri-State's allegation of fraud does not relate to the formation of the Agreement or seek to set it aside. [Appendix at pp. 52-55, ¶¶ 73-97.] Tri-State alleges instead that fraud arose from a statement arising **after** the parties executed the Agreement. [Appendix at pp. 52-55, ¶¶ 73-97.] It seeks to enforce the same Agreement it now breaches by bringing suit outside Hamilton County, Indiana. Tri-State does not allege that the Agreement is invalid because of fraud, but that it is fully enforceable against 3Chi. [Appendix at pp. 42-59.] Tri-State seeks to litigate its rights under the Agreement, and 3Chi has the same right to enforce **its** rights under the Agreement, including the forum-selection clause.

Second, litigating in Hamilton County, Indiana, will not deprive Tri-State of its day in court or of a remedy. Tri-State is a sophisticated business entity capable of bringing its claims in the Circuit Court of Hamilton County, Indiana. It is already a party to litigation in the Circuit Court of Hamilton County, Indiana, by virtue of 3Chi's lawsuit against it. Having these claims heard in one consolidated case and in the forum required by the Agreement would make for a more efficient resolution for all parties. Tri-State does business outside of West Virginia. In fact, the Agreement

made Tri-State the exclusive distributor of the Products in all of Kentucky. [Appendix at p. 46, ¶¶ 23, 24.] Given this context, bringing a lawsuit in the Circuit Court of Hamilton County, Indiana, presents no substantial burden to Tri-State.

Finally, the enforcement of the forum-selection clause would not violate public policy. Tri-State was aware of the forum-selection clause when it executed the Agreement. There is no public policy prohibiting a sophisticated commercial entity from living up to contractual obligations that it knowingly enters into.

**II. Because Tri-State must comply with the forum-selection clause, the Court should issue a writ of prohibition preventing further litigation in the Circuit Court of Logan County, West Virginia, in breach of the Agreement.**

A writ of prohibition is necessary to prevent Tri-State from continuing to litigate its claims in breach of the Agreement. A writ of prohibition applies when the lower court had jurisdiction but exceeded its powers. *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 304, 685 S.E.2d 693, 698 (2009). The Court looks to five factors in determining whether to issue a writ of prohibition:

1. whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
2. whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
3. whether the lower tribunal's order is clearly erroneous as a matter of law;
4. whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
5. whether the lower tribunal's order raises new and important problems or issues of law of first impression.

*Id.* (quoting *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)).

These factors are not requirements but act as “general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.” *Id.* “Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.*

These factors weigh in favor of issuing the writ to prevent further litigation in the trial court. The trial court’s denial of the motion to dismiss erred as a matter of law as discussed above. The matter should have been dismissed to enforce the valid forum-selection clause contained in the Agreement. This error of law satisfies the third factor of *Clites* and amounts to a serious and clearly erroneous mistake of law.

A writ is also necessary because a remedy after appeal is insufficient. Delaying an appeal to after final judgment would defeat the purpose of the forum-selection clause. The clause would hardly have meaning if Tri-State could litigate the case to judgment in an improper forum before the clause is finally enforced. For these same reasons, the Court has previously instructed that writs of prohibition are the appropriate mechanism for addressing the similar issue of venue. *See State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 567, 759 S.E.2d 795, 798 (2014) (“That the issue of venue may properly be addressed through a writ of prohibition is well-settled.”). This Court has explained that “[c]onsidering the inadequacy of the relief permitted by appeal, we believe this issue should be settled in this original action if it is to be settled at all. In recent times in every case that has had a substantial legal

issue regarding venue, we have recognized the importance of resolving the issue in an original action.” *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 124, 464 S.E.2d 763, 766 (1995).

This is just such a case. The weight of these factors supports entering the writ of prohibition. Doing so will not impair the substantive rights of either party but will ensure that Tri-State meets its obligations under the very Agreement it seeks to enforce in this case.

### CONCLUSION

3Chi respectfully requests that the Court enter a writ of prohibition preventing the trial court from continuing any further proceedings in this case and requiring Tri-State to litigate its claims in Hamilton County, Indiana—the forum chosen by the parties.

3C LLC and Justin Journey,

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.  
3C LLC, a Colorado limited liability company,  
and JUSTIN JOURNAY, an individual.

Petitioners/Defendants,

v.

Lower Court Case No.  
20-C-113

HONORABLE JUDGE ERIC O'BRIANT,

Respondent,

Case No. \_\_\_\_\_

TRI-STATE WHOLESALE, INC.  
d/b/a TRI-STATE CANNABIS,  
a West Virginia Corporation,

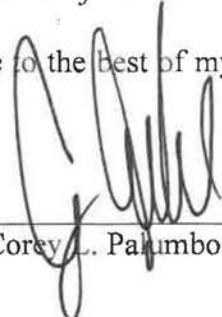
Appellee/Respondent Plaintiff.

VERIFICATION

STATE OF WEST VIRGINIA


COUNTY OF KANAWHA, to wit:

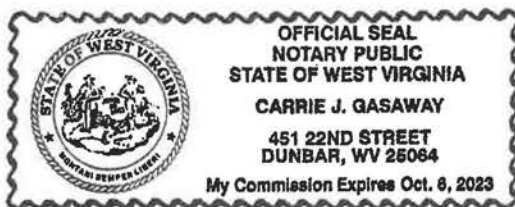
I, Corey L. Palumbo, counsel for Petitioners, being duly sworn, depose and say that I have reviewed the foregoing *Verified Petition for Writ of Prohibition* and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.

  
\_\_\_\_\_  
Corey L. Palumbo (SBID No. 7765)

Taken, subscribed, and sworn to me before this 28th day of May 2021.

My commission expires: October 6, 2023

  
\_\_\_\_\_  
Notary Public



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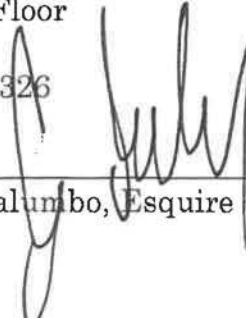
Appellee/Respondent Plaintiff.

**CERTIFICATE OF SERVICE**

I, Corey L. Palumbo, counsel for Petitioners, do hereby certify that service of the foregoing *Verified Petition for Writ of Prohibition* was made upon all parties, or their counsel of record, via first-class U.S. mail, postage prepaid, on this 28th day of May 2021.

The Honorable Eric H. O'Briant  
Judge, Seventh Judicial Circuit  
Logan County Courthouse  
300 Stratton Street  
Logan, WV 25601

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