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No. 22-0217



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA *ex rel.* HISTORIC ARMS CORPORATION,

Petitioner,

FILE COPY

v.

THE HONORABLE C. CARTER WILLIAMS, Judge of the Circuit Court of Hardy
County, West Virginia; DARRICK J. GUST and EMILY GUST,

Respondents.

*From the Circuit Court of
Hardy County, West Virginia
Civil Action No. 20-C-25*

BRIEF OF RESPONDENTS DARRICK J. GUST AND EMILY GUST

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STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, these Respondents offer the following corrections and additions to Historic Arms' Statement of the Case.

First, Historic Arms glosses over the allegations and connections between it and its West Virginia-based subsidiary, Panthera Training, LLC ("Panthera"). Not only is Historic Arms the "sole member" of Panthera, it undisputedly

- Owns all capital accounts in Panthera (*see* HAC000175, HAC000279);
- Caused the formation of Panthera (*see* HAC000284);
- Financed Panthera (*see* HAC000279);
- Shares a common officer and director with Panthera via Robert L. Starer, who is manager of Panthera and Vice President and Registered Agent of Historic Arms (*see* HAC000202–206);
- Undertook business expenses associated with Panthera's business by providing component parts of explosives that would otherwise have been purchased (*see Second Affidavit of Darrick J. Gust* ("Gust Aff."), HAC000207, ¶ 2; *see also Transcript of the Deposition of William White* ("White Depo."), HAC000081–82, HAC000091 (testifying that the defective fuse came from Historic Arms' Cape Charles facility and that Historic Arms maintained the storage where such fuses come from); and,
- Filed a joint tax return with Panthera for 2019 (*see* HAC000208–210).

Second, Historic Arms omits several of the allegations against it in the *Amended Complaint* filed by these Respondents, which asserts Historic Arms "possessed and supplied / distributed components of explosives, including the components used to create the explosive device at issue in this litigation, to its subsidiary entity, Panthera Training, LLC." *See Amended Complaint*, HAC000031, ¶ 5. These Respondents further allege that "Panthera Training manufactured and assembled explosives . . . with component parts provided to it by Historic Arms and/or Mr. Starer." *Id.*, HAC000035, ¶ 16. These Respondents allege that the fuse

assembly of the explosive device was defective, subjecting Historic Arms to strict products liability as the distributor of the fuse assembly; that distribution of components of explosives is abnormally dangerous and/or ultrahazardous, subjecting Historic Arms to strict liability for damages arising therefrom; and, that Historic Arms was negligent in failing to properly inspect, maintain, store and distribute component parts of explosive devices, among other allegations. *Id.*, HAC000039, ¶¶ 24, 27; HAC000040–41, ¶¶ 33–34.

Third, Historic Arms’ recitation of William White’s deposition testimony is misleading. Mr. White testified that Historic Arms maintained “storage facilities” at its Cape Charles headquarters in which it stored “plastic canisters or other implements that can be used in connection with making an explosive device.” White Depo., HAC000081. Mr. White then testified that Mr. Starer—Vice President of Historic Arms—told him that Historic Arms stored “fuses or fuse components . . . at Historic Arms.” *Id.* at HAC000082. Finally, Mr. White confirmed that the defective fuse utilized in the explosive which amputated Darrick Gust’s arm came from the same Cape Charles storage facility (the one maintained by Historic Arms in which Historic Arms stores fuses). *Id.* at HAC000091.

Fourth, as a point of clarification, Historic Arms’ brief asserts that Mr. Starer physically transported the defective fuse into West Virginia while acting as manager of Panthera; however, Historic Arms omits this finding by the Circuit Court:

It is obvious from the facts and evidence presented to date that Mr. Starer utilized his knowledge as Vice President of Historic Arms to identify and produce the component parts Panthera needed to craft the explosive devices . . .

See Order Denying Defendant Historic Arms Corporation’s Motion to Amend (the “MTA Order”), HAC000006.

Fifth, Historic Arms omits the majority of the Circuit Court’s reasoning in denying

Historic Arms' Motion to Dismiss. In its *Order Denying Defendant Historic Arms Corporations' Motion to Dismiss Amended Complaint* (the "MTD Order"), the Circuit Court found that (1) the acts alleged against Historic Arms satisfy West Virginia's long-arm statutes applicable to personal jurisdiction over foreign corporations (W. Va. Code § 56-3-33 and W. Va. Code § 31D-15-1501(d)(3)); (2) assertion of jurisdiction over Historic Arms does promote fair play and justice; (3) the relevant factors of jurisdiction comport with due process and favor this Court asserting (and retaining) jurisdiction over Historic Arms; (4) that a significant majority of the elements of the jurisdictional test found in *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998) favor jurisdiction over Historic Arms as a non-resident parent corporation; and, (5) as a result of the foregoing, personal jurisdiction over Historic Arms is properly established before this Court. *See* MTD Order, HAC000014–22.

In reaching these findings, the Court made the following observation about Mr. Starer's dual role as manager of Panthera and Vice President of Historic Arms:

The Court is cognizant that Mr. Starer may have been acting in both of his roles concerning these items – as an agent of Historic Arms in acting upon his knowledge of the existence, supply, storage, use, ownership, etc. of the fuses and components located at the principle place of business of Historic Arms located in Virginia, and as an agent of Panthera in transferring them to West Virginia for use in contracted training exercises, which apparently Panthera could not have carried out in the absence of such items.

See MTD Order, HAC000015, ¶ 16. The Circuit Court further observed that in granting Mr. Starer's individual motion for summary judgment, it "did not address the matter of what entity was the owner, and therefore the supplier of the defective fuses or component parts." *Id.* at HAC000015, n. 2. Historic Arms' emphasis to this Court that the Circuit Court's jurisdictional determination is based solely on Historic Arms physically transporting the defective fuse into West Virginia is simply false.

SUMMARY OF ARGUMENT

This Court should affirm the finding by the Circuit Court that it has jurisdiction over Historic Arms in the underlying case.

First, the salient issue before this Court is whether a business which intentionally distributes a product to West Virginia is subject to personal jurisdiction in West Virginia when that product is defective and causes an injury in West Virginia. As held by courts throughout the country, the answer is yes because such a contact between a foreign corporation and this State is “substantial” so that the exercise of personal jurisdiction by a West Virginia court comports with due process.

The only jurisdictional issue appealed is whether Historic Arms had sufficient contact with West Virginia to be subject to personal jurisdiction under federal due process. In this case, Historic Arms knew that the explosives components it was distributing to Panthera were going to Old Fields, West Virginia. Those very explosives components were then used to construct an explosive device that, when used by Respondent Darrick J. Gust on September 29, 2019, detonated prematurely and traumatically amputated Mr. Gust’s arm. As explained by the Circuit Court:

knowing and intentional distribution of a product into West Virginia constitutes conduct in the State of West Virginia for jurisdictional purposes . . . Historic Arms at least provided Mr. Starer with the component parts of the explosive device with knowledge and purpose that those component parts would be going to Old Fields, West Virginia.

Order Denying Defendant Historic Arms Corporation’s Motion to Amend (“MTA Order”), HAC000008–9, ¶ 16. Intentional distribution of a product which causes an injury in the forum state is a “substantial” contact with the forum state which confers jurisdiction.

Second, Historic Arms’ attempt to ignore this legal principle is due to its desire to rely on

the unintentional stream of commerce cases, which are fundamentally different from this case due to Historic Arms' deliberate and purposeful distribution to West Virginia. However, even if this were a traditional "stream of commerce" case, the Circuit Court's exercise of jurisdiction is consistent with West Virginia law, which only requires that a product be placed in the stream of commerce without the need to show additional conduct by the defendant aimed at West Virginia to satisfy federal due process. Not only did Historic Arms place the defective fuse assembly into the stream of commerce, it did so knowing that the product was going to Panthera Training, LLC ("Panthera") and, in turn, knew that the product would ultimately end up in West Virginia. *See Transcript of the Deposition of William White* ("White Depo."), HAC000081–82, 000091, *see also Second Affidavit of Darrick J. Gust* ("Gust Aff."), HAC000207, ¶ 2. The Circuit Court's exercise of specific jurisdiction is, therefore, consistent with West Virginia law.

Third, Historic Arms claims that the doctrine of issue preclusion prevents the Circuit Court from finding that Robert Starer was acting in his capacity as Vice President of Historic Arms during the transport of the defective fuse assembly to West Virginia; therefore, the Circuit Court abused its discretion in finding to the contrary. While this argument has no bearing on the ultimate disposition of this matter, Historic Arms' issue preclusion argument is inaccurate.

The finding on which Historic Arms relies is that, at the time he was transporting the defective fuse assembly from Cape Charles, Virginia to Old Fields, West Virginia, Mr. Starer was "acting as manager of Panthera during the time in question." *See Order Granting Defendant Robert L. Starer's Motion for Summary Judgment* ("Starer Order"), HAC000027, ¶ 14. In that same order, on the very same page, the Circuit Court expressly stated that Mr. Starer "may have been wearing more than one hat during the time in question" and specifically referenced his role as "Historic Arms' Vice President." *Id.* at HAC000027, ¶ 12.

In the subsequent *Order Denying Defendant Historic Arms Corporations' Motion to Dismiss Amended Complaint* ("MTD Order"), the Circuit Court elaborated on this distinction, stating Mr. Starer "may have been acting in both of his roles concerning these items" including "as an agent of Historic Arms in acting upon his knowledge of the existence, supply, storage, use, ownership, etc. of the fuses and components." MTD Order, HAC000015, ¶ 16.

Mr. Starer can act in more than one capacity simultaneously; Historic Arms does not even attempt to dispute this in its Petition. Therefore, the question of whether Mr. Starer was acting as manager of Panthera is *not* mutually exclusive from the question of whether Mr. Starer was acting as Vice President of Historic Arms, nor did the Circuit Court make that ruling or intend to make that ruling. The issues are distinct, and Historic Arms' claim of issue preclusion fails. This Court should affirm the Circuit Court's finding that issue preclusion does not apply.

Fourth, Historic Arms argues that the Circuit Court's findings under *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998) are insufficient to confer jurisdiction. Historic Arms' argument is perplexing because (1) the Circuit Court never found that *Bowers* alone conferred jurisdiction; and, (2) the issues surrounding *Bowers* are functionally moot, as Historic Arms does not appeal the Circuit Court's finding that jurisdiction comports with West Virginia's applicable long-arm statutes.

Fifth, and finally, Historic Arms represents to this Court that these Respondents did not provide, and the Circuit Court did not rely upon, "proper evidence detailing specific facts demonstrating that the court has jurisdiction." This is a false statement.

Witness William White testified that Historic Arms maintained "storage facilities" at its Cape Charles, Virginia headquarters in which it stored "plastic canisters or other implements that can be used in connection with making an explosive device." White Depo., HAC000081. Mr.

White then testified that Mr. Starer—Vice President of Historic Arms—told him that Historic Arms stored “fuses or fuse components . . . at Historic Arms.” *Id.* at HAC000082. Finally, Mr. White confirmed that the defective fuse utilized in the explosive which amputated Darrick Gust’s arm came from the same Cape Charles storage facility (the one maintained by Historic Arms in which Historic Arms stores fuses). *Id.* at HAC000091. This sworn testimony comports with the *Second Affidavit of Darrick J. Gust*, which also states that the component parts came from “Historic Arms Corporation’s principal place of business.” *See* HAC000207, ¶ 2.

Thus, the Circuit Court relied upon both “affidavits” and “other proper evidence” in finding it had jurisdiction over Historic Arms, and its orders should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents Darrick J. Gust and Emily Gust do not believe that oral argument is warranted in this matter as settled authority disposes of this appeal.

ARGUMENT

This Court should affirm the rulings of the Circuit Court of Hardy County, West Virginia because

- (1) jurisdiction over Petitioner Historic Arms Corporation (“Historic Arms”) comports with due process as Historic Arms created a “substantial contact” with West Virginia by purposely and intentionally distributing a product into West Virginia, where it ultimately caused injury;
- (2) Historic Arms’ *Petition for Writ of Prohibition* (“Petition”) applies the incorrect “stream of commerce” standard, as its distribution of the defective product to West Virginia was intentional, not accidental;
- (3) The Circuit Court did not abuse its discretion in finding the doctrine of issue preclusion inapplicable to the question of whether Mr. Starer was acting as manager of Panthera Training, LLC (“Panthera”) or Vice President of Historic Arms because the two capacities are not mutually exclusive, and the Circuit Court found that Mr. Starer was acting in both capacities;
- (4) the Circuit Court’s jurisdictional findings pursuant to *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998) are correct, though because Historic Arms is not appealing satisfaction of West Virginia’s long-arm statutes, whether *Bowers* was met or not is irrelevant to the outcome of this jurisdictional question; and,
- (5) Historic Arms’ claim that there is no evidence supporting the Circuit Court’s findings is false.

A. Legal Standards

There are two legal standards which overlay each other for purposes of this appeal: (1)

the legal standard for a Motion to Dismiss pursuant to Rule 12(b)(2) of the West Virginia Rules of Civil Procedure where no evidentiary hearing has been conducted; and, (2) the legal standard for writs of prohibition.

While several affidavits and other documentary evidence, as well as oral argument, has informed the Circuit Court's decision, no evidentiary hearing occurred on Historic Arms' Rule 12(b)(2) Motion to Dismiss. As such, at "this stage, the party asserting jurisdiction need only make a prima facie showing of personal jurisdiction in order to survive the motion to dismiss." *See Easterling v. Am. Optical Corp.*, 207 W. Va. 123, 127, 529 S.E.2d 588, 592 (2000) (*quoting* syl. pt. 4, *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W. Va. 402, 497 S.E.2d 755 (1997)). Likewise, these Respondents' factual allegations must be accepted as true. Historic Arms ignores the fact that, despite the presence of some documentary evidence, a mere prima facie showing of jurisdiction is all that is required to affirm the Circuit Court's findings.

Furthermore, as recently noted by this Court, it grants writs of prohibition

to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

State ex rel. W. Va. Univ. Hosps., Inc. v. Scott, 866 S.E.2d 350, 355 (W. Va. 2021) (internal citations omitted).

Therefore, in order for Historic Arms' Petition to succeed, Historic Arms must demonstrate that the Circuit Court's finding that these Respondents made a prima facie showing of personal jurisdiction over Historic Arms is plainly in contravention of statutory, constitutional or common law mandate, and that this alleged error can be resolved *independently of any disputed facts*. It is against this backdrop that this Court should consider Historic Arms'

Petition.

B. The Circuit Court Correctly Found that its Exercise of Jurisdiction Over Historic Arms Comports with Due Process and the “Substantial Contact” Requirement.

The core issue presented to this Court is whether Historic Arms’ intentional and purposeful distribution of a defective product into West Virginia, where it ultimately seriously injured Respondent Darrick J. Gust, constitutes a “substantial contact” between Historic Arms and State of West Virginia sufficient to confer jurisdiction over Historic Arms consistent with federal due process. As courts throughout the country have found, the answer is yes.

Whether Historic Arms’ contact with West Virginia satisfies federal due process is the second prong of the two-part jurisdictional inquiry and the only prong of the inquiry that is at issue in this appeal. *See* syl. pt. 5, *Abbott v. Owens-Corning Fiberglas Corp.*, 191 W. Va. 198, 444 S.E.2d 285 (1994). There are two ways to assert personal jurisdiction satisfactory to federal due process: (1) general jurisdiction; and, (2) specific jurisdiction. The Circuit Court of Hardy County, West Virginia has specific jurisdiction over Historic Arms in this case.

Specific jurisdiction arises when the “in-state activities of the non-resident defendant give rise to or are related to the cause of action sued on.” *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 589, 788 S.E.2d 319, 335 (2016) (*quoting Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014)). For at least the last 37 years, “in-state activities” does *not* equate to physical presence in the forum state:

Jurisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are “purposefully directed”

toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); *see also Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1031 (2020). This Court likewise adheres to this fundamental jurisdictional principle. *See, e.g., State ex rel. Health Plans v. Nines*, 244 W. Va. 184, 195, 852 S.E.2d 251, 262 (2020). Historic Arms’ repeated emphasis on “in the forum state,” “in-state activities” and “the conduct of Historic Arms in West Virginia” is, therefore, confusing given this well-established rule of law.

Regardless, Historic Arms’ physical presence in West Virginia is not a requirement. Instead, the question of whether Historic Arms’ contact with West Virginia comports with due process breaks into three prongs: (1) whether Historic Arms has purposefully availed itself of the privilege of conducting activities in West Virginia; (2) whether Plaintiffs’ claims arise out of or relate to Historic Arms’ contacts with West Virginia; and, (3) whether it is “constitutionally reasonable to assert the jurisdiction so as to comport with fair play and substantial justice.” *Ford*, 237 W. Va. at 589, 788 S.E.2d at 335.

i. Historic Arms Purposely Directed its Defective Product to West Virginia and, Therefore, Purposefully Availed Itself of the Privilege of Conducting Activities in West Virginia.

The threshold inquiry is whether Historic Arms’ contact with West Virginia constitutes its purposefully availing itself of the privilege of conducting activities in West Virginia. *See id.* In other words, whether “defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296–97 (1980).

Historic Arms argues that its alleged¹ single contact cannot possibly be sufficient to confer jurisdiction over it. *See* Petition, p. 16–17. Its legal presumption is incorrect. In *Burger King*, the United States Supreme Court expressly stated that “[s]o long as the act has substantial connection to the forum, even a single act can support jurisdiction.” *Burger King*, 471 U.S. at 475, n. 18. It is not the volume of contacts that governs; rather, particularly in “products-liability cases like this one, it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘traditional notions of fair play and substantial justice.’” *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (*quoting Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)).

In the context of products liability litigation involving a foreign corporation with no physical contacts to the forum state, there is an established, bright-line distinction between intentional and accidental distribution to the forum state (the latter being the “stream of commerce” theory of jurisdiction). While “stream of commerce” has been the subject of debate for decades, it is firmly established that the transmission of goods to the forum state “where the defendant can be said to have targeted the forum” permits the exercise of specific jurisdiction. *Id.* at 881.

Application of these two established jurisdictional principles leads to an obvious conclusion: “a single contact may be sufficient to create jurisdiction when the cause of action arises out of that single contact, provided that the principle of ‘fair play and substantial justice’ is not thereby offended.” *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003) (*quoting Burger King*, 471 U.S. at 477–78; *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957)); *see also Coastal Labs., Inc. v. Jolly*, 502 F. Supp. 3d 1003, 1019 (D. Md. 2020) (same). This is particularly true if “that single contact [is] ‘purposeful,’ and directed

¹ These Respondents have not been given the opportunity to conduct discovery to evaluate whether Historic Arms’ claim of a single act in West Virginia is truthful or accurate.

at the forum.” *Mason v. Shelby Cty. Health Care Corp.*, 919 F. Supp. 235, 238 (S.D. Miss. 1996) (citing *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990)).

This Court has adhered to these jurisdictional principles, itself recognizing that the “critical element for determining minimum contacts is not the volume of activity but rather ‘the quality and nature of the activity in relation to the fair and orderly administration of the laws.’” *Easterling*, 207 W. Va. at 130, 529 S.E.2d at 595 (quoting *Norfolk S. Ry. Co. v. Maynard*, 190 W. Va. 113, 116, 437 S.E.2d 277, 280 (1993)). This Court is firmly in the mainstream; this qualitative evaluation of contact between the defendant and forum state is ubiquitous and consistent. *See, e.g., Boyer v. Smith*, 42 N.E.3d 505, 511 (Ind. 2015) (“just ‘[a] single contact with the forum state may be sufficient to establish . . . a substantial connection with the forum state’ and establish personal jurisdiction for a ‘suit . . . related to that connection.’”); *Lee Living Trust v. Lebenthal*, 2020 U.S. Dist. LEXIS 235029, at * 11 (D.N.D. Dec. 15, 2020) (internal citations omitted) (“It is well-established that specific jurisdiction can arise from a single contact with the forum state.”); *Fulton v. Chicago, Rock Island & P.R. Co.*, 481 F.2d 326, 334–35 (8th Cir. 1973) (“we reject Soo's contention the exercise of jurisdiction upon a ‘single act’ is constitutionally impermissible.”); *Ribeiro v. Baby Trend, Inc.*, 2016 U.S. Dist. LEXIS 71190, at * 26 (D. Neb. June 1, 2016) (finding that distributing product with specific knowledge that the product would end up in the forum state constitutes invocation of the benefits and protections of that forum state); *Kraft Foods Grp. Brands LLC v. TC Heartland, LLC*, 2015 U.S. Dist. LEXIS 106515, at * 13 (D. Del. Aug. 13, 2015) (finding that knowingly and intentionally shipping products directly to the forum state is purposeful availment of the privilege of conducting activities within the forum state and invocation of the benefits and protections of its laws.); *Sage Computer Tech. v. P-Code Distrib. Corp.*, 576 F. Supp. 1194, 1197 (D. Nev. 1983) (“Even a

single contact with or activity in the forum state may satisfy the constitutional test for minimum contacts where the claim for relief arises therefrom.”); *Parti-Line Int'l, L.L.C. v. Bill Ferrell Co.*, 2005 U.S. Dist. LEXIS 3834 (E.D. La. March 4, 2005) (same and collecting cases).

Of particular note is the very recent decision of the United States District Court for the Southern District of West Virginia in *Philips N. Am. Llc v. Radon Med. Imaging Corp.-Wv*. See 2022 U.S. Dist. LEXIS 46629 (S.D. W. Va. Mar. 15, 2022). In that matter, Defendant Ultrasound Online’s only contact with West Virginia was “its single delivery of the two machines at issue.” *Id.* at * 5. As such, Ultrasound Online asserted that it lacked sufficient contacts with West Virginia to confer jurisdiction on a West Virginia court. *Id.* However, Judge Goodwin disagreed: “Although Ultrasound Online’s contact with this forum is slight, specific personal jurisdiction is properly exercised here because at this preliminary stage, Philips has made a prima facie showing that its claims arise out of Ultrasound Online's contact.” *Id.* at * 15.

Also instructive is *IP Innovation, LLC v. RealNetworks, Inc.*, 310 F. Supp. 2d 1209 (W.D. Wash. 2004). In *IP Innovation*, a patent dispute, the defendant’s *only* contact with the State of Washington was a single transaction involving the shipment of goods into the State. Nonetheless, because the lawsuit arose out of and related to that specific transaction, the court found that sufficient minimum contacts existed to allow the exercise of jurisdiction. *Id.* at 1212.

Applying the foregoing legal principles to the facts on this appeal, the Circuit Court reached the correct conclusion. Historic Arms stored explosives components at its Cape Charles, Virginia storage facility. See White Depo., HAC000081–82, 000091; see also Gust Aff., HAC000207, ¶ 2 Historic Arms then distributed those explosives components—including the defective fuse assembly which injured Mr. Gust—to Panthera; this much is admitted by Historic Arms, as Historic Arms repeatedly asserts Mr. Starer’s transport of the defective fuse assembly

from Historic Arms' storage facility in Cape Charles, Virginia to Panthera's Old Fields, West Virginia facility was performed in his role as manager of Panthera. *See, e.g.*, Petition, p. 14. Likewise, this comports with common sense; Panthera and Historic Arms are separate entities. An agent of one company does not simply go into the facility of another company and ransack it for parts. Mr. Starer's entry, location and gathering of the component parts (including the defective fuse assembly) was obviously in his capacity as Vice President of Historic Arms.

Historic Arms did this "with knowledge and purpose that those component parts would be going to Old Fields, West Virginia." MTA Order, HAC000008, ¶ 16. Historic Arms knew where the defective fuse assembly was going because its agent—Mr. Starer—knew where he intended to transport the fuse assembly. Finally, as is not in dispute, the defective fuse assembly caused an explosive device to prematurely detonate, traumatically amputating Mr. Gust's arm.

Thus, the evidence in the case to date indicates that the nature and quality of Historic Arms' contact with West Virginia is that it purposefully and intentionally distributed component parts of explosives, including a defective fuse assembly, directly to Old Fields, West Virginia. Such substantial contact with West Virginia falls squarely within the scope of specific jurisdiction, as demonstrated *supra*. *See Philips N. Am. Llc*, 2022 U.S. Dist. LEXIS 46629, at * 15; *see also IP Innovation*, 310 F. Supp. 2d at 1212. In turn, this Court should affirm the Circuit Court's finding that it maintains specific jurisdiction over Historic Arms.

ii. Mr. and Mrs. Gust's Claims Arise Out of and Relate to Historic Arms' Contact with West Virginia.

The second prong of the specific jurisdiction inquiry is whether the claims asserted against the foreign corporation "'arise out of or relate to' the nonresident defendant's activities in the forum." *Ford*, 237 W. Va. at 596, 788 S.E.2d at 342 (*quoting Burger King*, 471 U.S. at 472). Crucially, Historic Arms does not appeal the Circuit Court's ruling on this prong, as it

completely fails to address the issue in its Petition. *See* syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) (“Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.”); *see also* *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) (“Issues not raised on appeal or merely mentioned in passing are deemed waived.”).

However, should the Court elect to consider the prong, it will find that the claims both “arise out of” and “relate to” Historic Arms’ pertinent contact with West Virginia—the distribution of the defective fuse assembly to Panthera. First, the claims “arise out of” the contact between Historic Arms and West Virginia. The claims asserted against Historic Arms are product-based, as all claims relate to the possession and distribution of the defective fuse assembly which directly and proximately caused the traumatic amputation of Mr. Gust’s arm. *See generally Amended Complaint*, HAC000029–48. Mr. Gust’s arm is not blown off if Historic Arms does not distribute its defective product to Panthera. In turn, as all of Respondents’ claims arise out of an incident involving Historic Arms’ defective fuse assembly—the distribution of which is the contact at issue between Historic Arms and West Virginia—this case arises out of the contact. *See Ford*, 237 W. Va. at 589, 788 S.E.2d at 335.

Second, even if this Court were to conclude that these Respondents’ claims do not “arise out of” the contact, there is no legitimate dispute as to whether the claims “relate to” the contact. *Id.* The “inquiry does not always require proof . . . that the plaintiff’s claim came about because of the defendant’s in-state conduct.” *Philips N. Am. Llc*, 2022 U.S. Dist. LEXIS 46629, at * 11–12 (*quoting Ford Motor Co.*, 141 S. Ct. at 1026). Historic Arms’ negligent maintenance and inspection of the explosives components, including the defective fuse assembly, “relate to” contact with West Virginia—the purposeful distribution of said explosives components to West

Virginia. Furthermore, West Virginia is “the most natural State” for this lawsuit, given that the product was distributed to West Virginia, the explosive was used in West Virginia, the explosive malfunctioned and prematurely detonated in West Virginia, and Mr. Gust’s arm was traumatically amputated in West Virginia. *Ford Motor Co.*, 141 S. Ct. at 1031.

For the reasons stated *supra*, the Circuit Court was correct to conclude that these Respondents’ claims arise out of and relate to Historic Arms’ contact with West Virginia. This Court should affirm the Circuit Court’s findings.

iii. Jurisdiction Over Historic Arms in the Circuit Court of Hardy County, West Virginia is Constitutionally Reasonable.

The final prong of the specific jurisdiction inquiry is whether it would be “constitutionally reasonable” for the Circuit Court of Hardy County, West Virginia to have jurisdiction over Historic Arms when Historic Arms’ distribution of a defective product to Hardy County, West Virginia resulted in a severe injury. *Ford*, 237 W. Va. at 589, 788 S.E.2d at 335. As with the second prong, Historic Arms completely ignores the third prong of the specific jurisdiction analysis; as such, Historic Arms has waived any right to further consideration as to whether the exercise of specific jurisdiction is constitutionally reasonable. *See* syl. pt. 6, *Addair*, 168 W. Va. at 306, 284 S.E.2d at 374; *see also Tiernan*, 203 W.Va. at 140 n. 10, 506 S.E.2d at 583, n. 10.

However, should the Court elect to address this matter, the exercise of jurisdiction by the Circuit Court of Hardy County, West Virginia is constitutionally reasonable. When considering the fairness and reasonableness of asserting specific personal jurisdiction, this Court has enumerated several factors to be considered:

the burden on the defendant, the interests of the state, the interest of the plaintiff in obtaining relief, the interstate judicial system’s interest in obtaining efficient resolution of controversies, and the

shared interests of states in furthering fundamental substantive social policies. The analysis is case specific, and all factors need not be present in all cases.

Ford, 237 W. Va. at 597, 788 S.E.2d at 342. As found by the Circuit Court, each of these factors weighs in favor of asserting jurisdiction.

First, the burden on Historic Arms is minimal. The Circuit Court expressly found that, when transporting the defective fuse from Cape Charles, Virginia to Old Fields, West Virginia, Mr. Starer was acting in a dual capacity: manager of Panthera and Vice President of Historic Arms. See MTA Order, HAC000007, ¶ 14. Historic Arms' burden to appear and defend against the claims arising from that delivery is small.

However, even if this Court were to accept Historic Arms' claim that Mr. Starer was not acting in a dual capacity at the time of transport, the burden remains insufficient to render jurisdiction constitutionally unreasonable. Historic Arms specifically targeted Hardy County, West Virginia for the distribution of a defective product; upon doing so, Historic Arms should reasonably have anticipated that it would be haled into Court in Hardy County, West Virginia. See *World-Wide*, 444 U.S. at 296–97. This factor favors jurisdiction.

Second, West Virginia has a substantial interest in this litigation. Indeed, “West Virginia has a strong public policy that persons injured by . . . another should be able to recover in tort.” *State ex rel. Am. Elec. Power Co. v. Swope*, 239 W. Va. 470, 478, 801 S.E.2d 485, 493 (2017). This case involves the distribution, from another state, of a defective component of explosive devices. That defective component was used in an explosive device assembled in West Virginia, used in West Virginia and traumatically amputated a man's arm in West Virginia. West Virginia has an interest in ensuring people injured in this state have an opportunity to seek justice. Furthermore, West Virginia has an interest in ensuring that companies that send components of

explosives specifically into West Virginia are held accountable for their negligence. *See, e.g., Sovereign Bank v. BJ's Wholesale Club, Inc.*, 395 F. Supp. 2d 183, 193–94 (M.D. Pa. 2005) (“the public interest favors holding BJ's accountable for its negligence.”); *Auto Owners Ins. Co. v. Callaghan*, 952 N.E.2d 119, 127 (Ill. Ct. App. 2011) (Holdridge, J., dissenting) (“it serves the public interest if negligent actors are held responsible for the damage or injury they cause.”). In fact, the policy implications of failing to hold an entity that imports ultra-hazardous goods into West Virginia not subject to jurisdiction here would be very troubling. This factor favors jurisdiction.

Third, these Respondents have a strong interest in obtaining relief in Hardy County, West Virginia. The “plaintiff's choice of forum should rarely be disturbed.” *Edith Nezan v. Aries Techs., Inc.*, 226 W. Va. 631, 644, 704 S.E.2d 631, 644 (2010). Mr. Gust's injuries occurred in Hardy County, West Virginia and these Respondents chose Hardy County, West Virginia as their venue for this litigation. These Respondents' interest in obtaining justice and relief in this forum favors jurisdiction.

Fourth, Hardy County, West Virginia is the most efficient locale for the resolution of these controversies. The events giving rise to this litigation occurred in Hardy County. Suit has already been filed in Hardy County, and discovery has been served in this case. Given that jurisdiction is proper in Hardy County, efficiency favors this Court affirming the Circuit Court's retaining that jurisdiction as opposed to starting over somewhere else.

Fifth, the furtherance of fundamental social policies in West Virginia favor jurisdiction. Again, West Virginia has a “strong public policy” that people injured by the tortious conduct of others are able to recover. *Swope*, 239 W. Va. at 478, 801 S.E.2d at 493. “West Virginia and its citizens have an important interest in the proper resolution of this case, the conduct of the

Defendants, and the claims of the Plaintiffs.” *Id.* at 479, 494. West Virginia’s fundamental social policy is that those injured by the wrongs of another have a forum to recover for those losses; permitting these Respondents to utilize that forum favors jurisdiction in this case.

In sum, every factor of the specific jurisdiction analysis favors affirming the Circuit Court’s retention of jurisdiction. This Court should do so.

C. This is Not a Traditional Stream of Commerce Case.

Throughout the Petition, Historic Arms improperly blends the two separate concepts of purposeful distribution to a forum state with the more traditional “stream of commerce” concept, which provides that “as long as a participant in [the anticipated flow of products from manufacture to distribution to retail sale] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” *Ford*, 237 W. Va. at 592, 788 S.E.2d at 337 (quoting *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987)). To be clear, this case is not primarily a stream of commerce case, because Historic Arms did not merely place the defective fuse assembly in the stream of commerce which ultimately fed into West Virginia. Instead, Historic Arms purposefully and intentionally sent the defective fuse assembly to West Virginia.

However, even if this were a traditional stream of commerce case, the Circuit Court still properly exercised jurisdiction over Historic Arms. As recognized by this Court in *Ford*, “[p]ersonal jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause and can be exercised without the need to show additional conduct by the defendant aimed at the forum state.” *Id.* at 594, 339 (quoting syl. pt. 2, *Hill by Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 425 S.E.2d 609 (1992)). In upholding *Hill* via *Ford*, this Court specifically recognized this principle and the finding that specific jurisdiction

premised on the stream of commerce concept is consistent with the federal due process analysis. *Id.* As such, Historic Arms' apparent attempt to differentiate the concepts of federal due process and stream of commerce under *Hill* is inconsistent with West Virginia law; indeed, Historic Arms' own case law makes it clear that *Hill* comported with the two-step analysis of jurisdiction, with the stream of commerce concept being the second prong thereof. *See Abbott*, 191 W. Va. at 206, 444 S.E.2d at 293.

In this case, the evidence establishes that Historic Arms was well aware of the fact that the defective fuse assembly was being distributed to Panthera. *See White Depo.*, HAC000081–82, 000091; *see also Gust Aff.*, HAC000207, ¶ 2. As such, it had knowledge that West Virginia was a market in which its product would ultimately be distributed, consistent with *Hill* and *Asahi*. In turn, this stream of commerce analysis warrants a finding of jurisdiction as consistent with federal due process, as directed in *Hill*.

Historic Arms does attempt to undermine *Hill* by quoting *Asahi*'s "substantial connection" language. *See* Petition, p. 17. Historic Arms neglects to remind this Court that its quote from *Asahi* comes from Justice O'Connor's opinion (also known as the "stream of commerce plus" theory), which is the competing opinion to Justice Brennan's "stream of commerce" theory. *See Asahi*, 480 U.S. at 112. Historic Arms' omission is telling, given that this Court expressly and specifically rejected Justice O'Connor's theory in *Hill*, and affirmed Justice Brennan's theory as the law of West Virginia in *Ford*. *See Hill*, 188 W. Va. at 661, 425 S.E.2d at 616; *see also Ford*, 237 W. Va. at 595, 788 S.E.2d at 340. In essence, Historic Arms is suggesting that this Court overrule *Ford* and *Hill* in favor of a more restrictive test. This Court, as it has for decades, should reject that request.

In sum, this case is not a traditional "stream of commerce" case as contemplated by *Hill*;

however, even if it were, jurisdiction is appropriate in that framework. This Court should affirm the Circuit Court's finding to that effect.

D. The Doctrine of Issue Preclusion Does Not Apply When Issues are not Identical.

Historic Arms' leading argument is that the doctrine of issue preclusion prevents the Circuit Court from holding that Mr. Starer was acting in his capacity as manager of Panthera and Vice President of Historic Arms simultaneously on the basis of some cherry-picked language from the Starer Order. This Court should reject Historic Arms' attempt to extend issue preclusion beyond precluding identical issues.

The doctrine of issue preclusion, also known as collateral estoppel, applies to bar parties from relitigating previously decided issues when four conditions are met:

- (1) The issue previously decided is identical to the one presented in the action in question;
- (2) there is a final adjudication on the merits of the prior action;
- (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and
- (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. pt. 3, *State ex rel. McGraw v. Johnson & Johnson*, 226 W. Va. 677, 679–80, 704 S.E.2d 677, 679–80 (2010) (quoting syl. pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)). As is implicit in the concept, issue preclusion “does not apply to matters that could have been litigated but were not.” *Miller*, 194 W. Va. at 9, n. 6, 459 S.E.2d at 120, n. 6. **Crucially**, whether “the doctrine of collateral estoppel will be applied in a particular case . . . rests within the sound discretion of the trial court.” *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 178, 680 S.E.2d 791, 809 (2009). As such, the standard of review for the Circuit Court's ruling on issue preclusion is abuse of discretion. *Id.* at 179, 810.

The issue Historic Arms claims has been decided is whether, during the transport of the defective fuse assembly from Cape Charles, Virginia to Old Fields, West Virginia, Mr. Starer

was acting in his capacity as Vice President of Historic Arms. *See* Petition, p. 14–15. Historic Arms relies on the Circuit Court’s findings in the order dismissing Mr. Starer, individually, from the lawsuit on workers’ compensation immunity grounds. Specifically, the Circuit Court stated that “no genuine issue of material fact exists that Defendant Starer was acting as manager of Panthera during the time in question.” Starer Order, HAC000027, ¶ 14. The Circuit Court also stated that, in terms of Mr. Starer’s individual liability, it could not discern any “alternative, practical or logical reason for Mr. Starer (the manager’s) actions regarding the fuse assemblies other than acting in furtherance of Panthera’s business.” *Id.* at ¶ 11.

The Circuit Court was clearly stating that Mr. Starer had no personal, non-business reason for transporting the defective fuse assembly to Old Fields, West Virginia. This context is apparent when this Court considers the rest of the Circuit Court’s language in the Starer Order (on the same page):

Clearly, Defendant Starer may have been wearing more than one hat during the time in question. Specifically, he was not only the manager of Panthera, a manager-managed limited liability company, but also Historic Arms’ Vice President.

Id. at ¶ 12. In the subsequent order denying Historic Arms’ motion to dismiss, the Circuit Court elaborated on this issue, stating that it

is cognizant that Mr. Starer may have been acting in both of his roles concerning these items – as an agent of Historic Arms in acting upon his knowledge of the existence, supply, storage, use, ownership, etc. of the fuses and components located at the principle place of business of Historic Arms located in Virginia, and as an agent of Panthera in transferring them to West Virginia for use in contracted training exercises, which apparently Panthera could not have carried out in the absence of such items.

MTD Order, HAC000015, ¶ 16. Thus, when Historic Arms attempted to invoke issue preclusion, the Circuit Court properly rejected the concept, noting that the

Court has already recognized that Mr. Starer may have been wearing more than one hat during the time in question. It is obvious from the facts and evidence presented to date that Mr. Starer utilized his knowledge as Vice President of Historic Arms to identify and produce the component parts Panthera needed to craft the explosive devices and perform the Panthera's contracts. In other words, it is logical to determine that Mr. Starer was actively operating in both roles simultaneously during the time in question, because the knowledge obtained from both roles was necessary to complete the act at issue in this case (the procurement and transport of the component parts from Virginia to West Virginia).

MTA Order, HAC000006-7, ¶ 13.

Even cursory review of the facts of this case support the Circuit Court's discretion. There are two separate issues present: (1) whether Mr. Starer was acting as manager of Panthera during the relevant events; and, (2) whether Mr. Starer was acting as Vice President of Historic Arms during the relevant events. Succinctly stated, issue preclusion cannot apply to these two issues because the issues are not mutually exclusive: Mr. Starer can easily act in both capacities simultaneously. *See, e.g., Short v. State Farm Fire & Cas. Co.*, 719 So. 2d 519, 521 (La. Ct. App. 1998); *Armstrong v. Foxcroft Nurseries Inc.*, 283 A.D.2d 814, 815 (NY App. Ct. 2001) (recognizing ability to work in dual capacity for multiple employers simultaneously).

In this case, Mr. Starer travelled to Cape Charles, Virginia—principal place of business of Historic Arms—and took components of explosive devices from a warehouse facility owned and maintained by Historic Arms. *See White Depo.*, HAC000081-82, 000091; *see also Gust Aff.*, HAC000207, ¶ 2. Obviously, since Panthera is a separate and distinct legal entity, Mr. Starer's act of entering Historic Arms' facilities and taking property therefrom is consistent with his acting as Vice President of Historic Arms; after all, if he were *not* acting as Vice President of Historic Arms, these acts would constitute trespass and theft, respectively. Mr. Starer then transported the components to Panthera's facility in Old Fields, West Virginia, which the Circuit

Court determined could have been done in both Mr. Starer's Historic Arms and Panthera capacities based on the evidence presented. As is its burden, Historic Arms has not produced a single shred of evidence to demonstrate that the Circuit Court abused its discretion when it reached this decision. In turn, this Court should affirm the Circuit Court's ruling on issue preclusion.

Finally, to the extent that this Court finds that issue preclusion were to bar a ruling that Mr. Starer was acting in his capacity as Vice President of Historic Arms during the transport of the explosives components to Old Fields, West Virginia, it must be emphasized that this does not change the outcome for the reasons stated *supra*.

E. The *Bowers v. Wurzburg* Analysis was Conducted Properly by the Circuit Court.

The Circuit Court, among other bases for personal jurisdiction, found that the *Bowers v. Wurzburg* factors for asserting personal jurisdiction over a parent corporation are consistent with the exercise of personal jurisdiction over Historic Arms. See MTD Order, HAC000022, ¶ 41. Historic Arms correctly points out that *Bowers* also requires a finding that jurisdiction comports with federal due process. *Bowers*, 202 W. Va. at 54, 501 S.E.2d at 490. However, the Circuit Court never stated that the *Bowers* elements obviated the need for a federal due process analysis, nor did the Circuit Court premise its finding that personal jurisdiction comports with federal due process on its *Bowers* findings. Furthermore, the *Bowers* factors are ultimately immaterial to the ultimate disposition of jurisdiction over Historic Arms, as Historic Arms does not contest satisfaction of West Virginia's long-arm statutes. See generally Petition. Indeed, Historic Arms does not even appear to challenge the propriety of the Circuit Court's findings on the *Bowers* factors; rather, Historic Arms states that the factors alone are insufficient. *Id.* at p. 18.

This Court should affirm the Circuit Court's findings under *Bowers*.

F. The Circuit Court’s Rulings Are Based on Proper Evidence.

Historic Arms’ representation to this Court that the Circuit Court or these Respondents failed to utilize proper evidence in connection with jurisdiction is simply false. Indeed, Historic Arms ignores the *Second Affidavit of Darrick J. Gust* and the deposition testimony of William White, instead claiming that “the Circuit Court simply relied on the Plaintiffs’ unsupported allegations.” Petition, p. 19.

As noted by Historic Arms, when affidavits are offered to contest personal jurisdiction, the non-moving party must come forward with “affidavits or other proper evidence detailed specific facts demonstrating that the court has jurisdiction over the defendant.” *Ranson*, 201 W. Va. at 415, 497 S.E.2d at 768. What Historic Arms either fails or, more likely, refuses to realize is that the *Second Affidavit of Darrick J. Gust* and the sworn deposition testimony of William White are both proper evidence on which the Circuit Court relied in reaching its conclusions on jurisdiction. *See supra*, Part A. This evidence—along with the admissions of Mr. Starer in his affidavits and pleadings—demonstrates that Historic Arms owned and maintained the storage facility in which the explosives components were stored; that, contrary to Mr. Starer’s claim, the defective fuse assembly was purchased before Panthera was even formed and, therefore, could not possibly have been purchased on behalf of Panthera; and, that Mr. Starer procured the explosives components from Historic Arms that were ultimately utilized in the explosive that blew off Mr. Gust’s hand. *See White Depo.*, HAC000092 (“So in the same sense, then the purchase of the fuses would predate Panthera Training, LLC, correct? A. To my knowledge, yes.”).

Historic Arms cannot credibly dispute that sworn deposition testimony and affidavits are proper evidence. *See Ranson*, 201 W. Va. at 415, 497 S.E.2d at 768. Rather, Historic Arms takes

issue with the facts contained in those documents because those facts give rise to jurisdiction over Historic Arms in the Circuit Court of Hardy County, West Virginia. This Court should reject Historic Arms' efforts to ignore inconvenient proper evidence in the record and affirm the Circuit Court's finding of personal jurisdiction over Historic Arms.

CONCLUSION

Based on the foregoing evidence and law, this Court should affirm the Circuit Court's finding that it properly exercises personal jurisdiction over Historic Arms. Additionally, these Respondents request that this Court grant them all other relief as is just and appropriate.

DARRICK J. GUST AND EMILY GUST

By Counsel,

/s/



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CERTIFICATE OF SERVICE

I, the undersigned counsel for plaintiff, does hereby certify that on this 25th day of April, 2022, the foregoing **“BRIEF OF RESPONDENTS DARRICK J. GUST AND EMILY GUST”** was filed with the West Virginia Supreme Court of Appeals and served upon all counsel of record by depositing an envelope containing the same in the United States Mail as follows:

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