IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-564

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ACE AMERICAN INSURANCE COMPANY,
ACE PROPERTY & CASUALTY INSURANCE COMPANY,

Defendants Below, Petitioners,

v.

AMERISOURCEBERGEN DRUG CORPORATION, and
BELLCO DRUG CORPORATION,

Plaintiffs Below, Respondents.

PETITIONERS' BRIEF

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PRELIMINARY STATEMENT

This appeal arises from AmerisourceBergen's continued efforts to have the West Virginia courts block litigation from proceeding in courts of other states.

On appeal of the first injunction, this Court adopted the standard, well-established in federal courts and other state courts, that, due to concerns of interstate respect and comity, anti-suit injunctions are to be granted "sparingly" and only in "very special circumstances." *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724, 733 (W. Va. 2021). When defendant St. Paul initiated litigation in California that was parallel to litigation already proceeding in West Virginia, this Court held that the "exceptional remedy" of an anti-suit injunction *might* be appropriate based on the Circuit Court's statement that St. Paul initiated that suit for "improper purposes." *Id.* at 734, 736. Notwithstanding that conclusion, however, this Court reversed the original anti-suit injunction as "overbroad" because it limited the parties' ability to "effectively respond[]" to crossclaims filed by other insurers that were not—and are not—parties here. *Id.* at 736–37. This Court instructed "that the circuit court's order should have clearly and finely tailored a connection between the relief sought in ABDC's West Virginia action and the prohibition of the parties' actions in California." *Id.* at 737. Since the Court issued its decision, the non-party insurers that filed crossclaims in California have dropped those claims and initiated new coverage actions in Delaware against AmerisourceBergen. One of those actions also names ACE and St. Paul as defendants.

On remand, AmerisourceBergen renewed its motion for an anti-suit injunction. In granting that motion, the Circuit Court made findings that were focused entirely on whether the injunction could be supported as to ***St. Paul's California action***. The Circuit Court again found that the injunction was warranted because of the finding that St. Paul's "California Coverage Action was filed for improper purposes, namely forum shopping and the disruption of the orderly

resolution of the West Virginia Coverage Action." SPApp.13019 ¶ 129 (quotation marks and alterations omitted). But the Circuit Court did not—and could not—find that the non-party insurers filed the Delaware actions for an improper purpose. In fact, the Circuit Court did not analyze the Delaware actions at all. Nevertheless, the Circuit Court imposed a new injunction that enjoined ACE from litigating in the Delaware actions. Specifically, the renewed injunction enjoins "[a]ll parties" "from instituting or prosecuting ***any*** collateral litigation . . . for the prescription opioid liability lawsuits against ABC, ABDC, or any other affiliated entity." SPApp.13041 (emphasis added). Because that injunction prevents ACE from responding to claims filed against it in Delaware, it is unsupported by the Circuit Court's findings, overbroad, and must be reversed.

First, this Court instructed that to support an anti-suit injunction, the proponent must demonstrate both that a competing action is "substantially similar" and that "equity *compels*" the imposition of the injunction. *St. Paul*, 868 S.E. 2d at 734 (emphasis added). And even when those elements are satisfied, the injunction must "have clearly and finely tailored a connection" between the West Virginia action and the case that the parties are enjoined from litigating. *Id.* at 737. Thus, under this Court's prior decision—and case law around the country governing anti-suit injunctions—the ***mere existence of parallel litigation standing alone is insufficient to justify an anti-suit injunction***. Accordingly, the renewed injunction must be reversed or, at a minimum, modified because, other than noting the existence of the non-party insurers' Delaware actions, AmerisourceBergen presented no argument and the Circuit Court made no findings that could support an anti-suit injunction as to those Delaware actions. The renewed injunction is thus "an abuse of discretion in its breadth and focus," just like its predecessor was. *Id.* at 736.

Second, even if the Circuit Court had considered whether equity compelled an anti-suit injunction as to the Delaware actions (which, again, it did not), the record cannot support one. Unlike with the California action, for which this Court held a narrower anti-suit injunction could potentially lie based on the statement that St. Paul initiated that case with "improper motives," that predicate is inapplicable to the Delaware actions. The Delaware plaintiffs are ***all non-parties in the West Virginia action***. AmerisourceBergen has no argument that any of the parties to ***this*** case initiated the Delaware actions to circumvent or disrupt this litigation. In fact, the reason the Delaware plaintiff insurers are absent from the West Virginia action is simply because ***AmerisourceBergen chose not to include them***. Accordingly, AmerisourceBergen's own strategic choice to bring a coverage action in West Virginia that included some—but not all—of its general liability insurers, seeking coverage under some—but not all—of their insurance policies, for some—but not all—of the underlying opioid lawsuits, created the possibility that non-party insurers would seek adjudication of their rights in separate litigation.

Moreover, leaving the injunction in place puts ACE in peril of substantial prejudice. As it stands, AmerisourceBergen, ACE, and St. Paul are all named as defendants in a Delaware action that will address whether AmerisourceBergen is entitled to insurance coverage for opioid lawsuits. Because the plaintiff insurer in that Delaware action issued policies to AmerisourceBergen in policy years earlier than ACE's policy years, with respect to certain coverage issues ACE's interests ***run directly contrary to those of that Delaware plaintiff***. It is thus unfair to allow AmerisourceBergen—the proponent of the injunction—to be free to litigate issues of coverage against the Delaware plaintiffs, while the injunction forces ACE to run the risk that discovery is developed and substantive rulings are made in ACE's absence.

Accordingly, the injunction should be reversed or, at a minimum, modified to allow ACE to fully protect its interests in Delaware, including, if necessary, by filing crossclaims.

Third, separate insurance companies that are corporate affiliates of ACE also issued policies to certain AmerisourceBergen entities. To the extent the renewed injunction applies to those entities, it must be reversed or modified because they are not party to this action and thus not subject to the jurisdiction of the Court.

ASSIGNMENTS OF ERROR

1. The Circuit Court abused its discretion by granting an anti-suit injunction as to the Delaware actions. It is well-established that the mere existence of competing parallel litigation is insufficient to support an anti-suit injunction. But other than noting the Delaware actions' existence, the Circuit Court focused entirely on whether an anti-suit injunction could lie with respect to the California action (which it found was filed with an "improper purpose"). The Circuit Court made no findings relevant to the Delaware actions, and thus it was legal error to issue an anti-suit injunction that applied to those actions.

2. The Circuit Court abused its discretion for the additional reason that the elements of the anti-suit injunction cannot be established as to the Delaware Actions. The Delaware Actions were not filed with any "improper purpose" of evading the West Virginia coverage action; in fact, the Delaware Actions were not even filed by parties to this case. Nor does enjoining ACE and St. Paul do anything to prevent a "threat" to the West Virginia action because the injunction does not (and could not) enjoin the Delaware plaintiffs who are not parties here. And the possibility of multiple, parallel suits was the natural result of AmerisourceBergen's strategic choice to bring a limited coverage action in West Virginia that included some, but not all, of its liability insurers. Worst of all, leaving the injunction in place will prejudice ACE's ability to effectively respond to the Delaware Actions, the same circumstance that warranted

reversal of the original injunction. For all these reasons, it was legal error to enter an anti-suit injunction that covered the Delaware actions.

3. Finally, at a minimum the Circuit Court abused its discretion to the extent it granted an anti-suit injunction that applies to affiliates of ACE that are not parties to the West Virginia action. Those entities are not subject to the jurisdiction of the Court, and therefore the injunction is legally improper to the extent it applies to them.

STATEMENT OF THE CASE

A. Amerisource Initiates The West Virginia Action Against A Small Subset Of Its General Liability Insurers.

In June 2012, the West Virginia Attorney General sued AmerisourceBergen Drug Corporation ("ABDC," and, together with Bellco Drug Corporation, "AmerisourceBergen"), alleging that ABDC engaged in the "heavy distribution and sale of addictive controlled substances to Pill Mill pharmacies in unusually large quantities" despite knowing these drugs "would be diverted and/or improperly used thereby creating an unreasonable risk of harm" to the State. *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, No. 12-C-1 41, 2014 WL 12814021, at *7 (W. Va. Cir. Ct., Boone Cnty. Dec. 12, 2014) (the "WVAG Lawsuit"). ABDC thus "put [its] desire for profits above and beyond [its] duty to put in place effective controls and procedures to prevent diversion of controlled substances." *Id.* at *8. In January 2017, ABDC settled the WVAG Lawsuit, agreeing to pay the State of West Virginia $16 million. *See* SPApp.00199, SPApp.00201 (July 18, 2018 Am. Compl. ¶¶ 34, 37).[1]

[1] St. Paul has also appealed the Order that is the subject of this appeal. *See St. Paul Fire and Marine Insurance Co. v. AmerisourceBergen Drug Corp.,* (No. 22-575). In a separate filing today, the ACE Petitioners have moved to consolidate this appeal with St. Paul's appeal. In addition, for the convenience of the Court and the parties, the ACE Petitioners have not duplicated the materials already provided to the Court in the Appendix accompanying St. Paul's appeal brief. All references herein to "SPApp." are to St. Paul's Appendix. In the related appeal, St. Paul's brief details the reasons the order should be reversed in

In March 2017, ABDC commenced this action (the "West Virginia Action") seeking coverage for costs ABDC incurred defending and settling the WVAG Lawsuit and four other opioid-related lawsuits brought against it in West Virginia. Of the numerous insurance carriers from which it has purchased general liability policies, ABDC chose to name as defendants only ACE American Insurance Company and ACE Property & Casualty Insurance Company (together "ACE"), American Guaranty & Liability Insurance Company ("American Guarantee"), Endurance American Insurance Company ("Endurance"), and St. Paul Fire and Marine Insurance Company ("St. Paul"). *See* SPApp.00137 (ABDC Mar. 17, 2017 Compl.).

In July 2018, AmerisourceBergen filed an amended complaint (the operative complaint) that identified a total of 50 underlying opioid lawsuits in West Virginia, including the WVAG Lawsuit, as the subjects of the coverage dispute. *See* SPApp.00216–18 (July 18, 2018 Am. Compl. ¶¶ 89, 93).[2] The first paragraph of the amended complaint made clear that the action relates to West Virginia opioid lawsuits only.[3] AmerisourceBergen chose not to add any other insurers as defendants in its amended complaint.

On February 22, 2018, the Circuit Court entered an Order Granting Joint Motion For Bifurcation And Partial Stay. That order provided that "[l]itigation concerning ABDC's claim for coverage with respect to the WVAG Lawsuit will move forward, and . . . [l]itigation of

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its entirety, and ACE joins those arguments. ACE's appeal, however, focuses on the injunction's overbroad, unsupported application to the Delaware Actions.

[2] During discovery, ABDC informed the insurer defendants of 165 opioid-related lawsuits in West Virginia.

[3] *See* SPApp.00194–95 ("This is an insurance coverage action for (a) breach of contract, because of the Defendants' failure to defend and/or reimburse ABDC for . . . the prescription opioid lawsuit that the **State of West Virginia and other West Virginia state agencies filed against ABDC in 2012**, (b) breach of contract, because of Defendants' failure to defend and/or reimburse ABDC and Bellco for their defense costs in pending prescription opioid lawsuits filed against ABDC and Bellco **in West Virginia**, and (c) declaratory judgment . . . establishing that the Defendants' insurance policies provide coverage . . . in connection with prescription opioid lawsuits **filed in this State**." (emphases added)).

ABDC's claim for coverage with respect to the pending West Virginia Coverage Actions is stayed until further notice." SPApp.00188 (Feb. 22, 2018 Stay Order).

On July 8, 2022, the parties filed various motions for summary judgment, which the Circuit Court has scheduled for argument on October 17, 2022.

B. St. Paul Initiates A Coverage Action In California And The Circuit Court Enjoins All Parties From Litigating Parallel Coverage Litigation.

On November 5, 2020, St. Paul and four affiliated insurance companies that are not party to the West Virginia Action commenced an action in the Superior Court for the State of California in Orange County (the "California Action"). In the California Action, plaintiffs seek a declaration that they have no duty to defend or indemnify AmerisourceBergen with respect thousands of underlying opioid lawsuits not at issue in the West Virginia Action. *See* SPApp.03169, 03179, ¶¶ 1–5, 31 (Nov. 5, 2020 Cal. Compl.).

In addition to seeking declaratory judgments against eight ABDC affiliates, the California Action complaint also asserted claims for equitable contribution and equitable indemnification against 70 defendant-insurers. *See* SPApp.03185–86, ¶¶ 57–62. Several of those defendant insurers—including National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"); Arrowood Indemnity Company ("Arrowood"); and Hartford Casualty Insurance Company and Hartford Fire Insurance Company (together, "Hartford"), none of which are parties here—filed cross claims in the California Action. Each of these cross-plaintiffs sought a declaration that it has no duty to defend or indemnify AmerisourceBergen and its affiliates with respect to the thousands of underlying opioid lawsuits at issue in the California Action, and also

asserted claims for equitable contribution and equitable indemnification against St. Paul, ACE, and other insurers.[4]

Two weeks after the California Action was filed, AmerisourceBergen moved in the Circuit Court for an order "enjoin[ing] Defendant St. Paul Fire and Marine Insurance Company . . . from pursuing collateral declaratory judgment litigation in California or elsewhere against ABDC regarding the disputes currently pending before this [Circuit] Court." SPApp.00246 (Nov. 19, 2020 Motion). Even though the injunction motion was directed only to St. Paul, the final paragraph of the motion asked for a sweeping injunction prohibiting "*all other parties* to this lawsuit from proceeding with the California Coverage Action or instituting any further collateral lawsuits regarding the issues pending before this [Circuit] Court." SPApp.00260, ¶ 61 (emphasis added).

On January 7, 2021, the Circuit Court granted AmerisourceBergen's motion. SPApp.01956. According to that order, St. Paul in the California Action was "seek[ing] rulings regarding issues and cases that have been pending before [the Circuit Court] since [the filing of the complaint in the West Virginia Action], including issues and cases that are currently the subject of this Court's February 22, 2018 Stay Order." SPApp.01958, ¶ 8. The Circuit Court stated that St. Paul had employed an "artifice," with the "vexatious" purpose of interfering with the West Virginia Action and to "pursu[e] contradictory rulings." SPApp.01981–82, ¶¶ 135, 140. Based on that finding, the Circuit Court ruled that "[a]ll parties are hereby enjoined from

[4] SPApp.02089 (National Union Fire Ins. Co. of Pittsburgh, PA's Cross-Complaint For Declaratory Judgment, *St. Paul Fire and Marine Ins. Co. v. AmerisourceBergen Corp.*, No. 30-2020-01168930 (Cal. Super. Ct. Dec. 13, 2020)); SPApp.02210 (Arrowood Indemnity Co.'s Cross-Complaint For Declaratory Judgment, *St. Paul Fire and Marine Ins. Co. v. AmerisourceBergen Corp.*, No. 30-2020-01168930 (Cal. Super. Ct. Jan. 14, 2021)); SpApp.2294 (California Action Docket Sheet, noting Jan. 19, 2021 Cross-Complaint Filed by Hartford Casualty Insurance Company and Hartford Fire Insurance Company).

instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid lawsuits against ABC, ABDC, or any other affiliated entity." SPApp.01985, ¶ 164 (emphasis added).

In addition, the Circuit Court offered AmerisourceBergen an opportunity to amend the pleadings "to ensure that all issues, parties, and insurance policies the parties believe are necessary to protect their legitimate interests are included in this action." SPApp.01985, ¶ 162. Instead, AmerisourceBergen "confirmed that [it] do[es] not intend to seek leave to amend [its] complaint to add other insurers, insurance policies, or additional underlying claims for decision by the Court in this proceeding." SPApp.11863 (Jan. 20, 2021 Letter to Judge Thompson).

C. This Court Holds That A Narrower Injunction Could Potentially Be Supported By The Circuit Court's Finding That St. Paul Filed The California Action For "Improper Purposes," But Finds The Injunction To Be Overbroad.

St. Paul and ACE each appealed the anti-suit injunction to this Court. On November 15, 2021, this Court issued a decision affirming in part, reversing in part, and remanding. First, this Court "h[e]ld that an anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state. Whether the foreign state action is substantially similar involves assessing (1) the similarity of the parties; (2) the similarity of the issues; and (3) the capacity of the action in this state to dispose of the foreign state action." *St. Paul*, 868 S.E.2d at 734. The Court recognized, however, that "[a]n anti-suit injunction is an exceptional remedy" and "the principle of comity requires that a circuit court enter an anti-suit injunction cautiously and with restraint." *Id.* Accordingly, an anti-suit injunction may be appropriate only "when equity *compels* the circuit court: (1) to address a threat to the court's jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a

'race to judgment'; or (4) to protect a party from vexatious, inequitable or harassing litigation." *Id.* (emphasis added).

With respect to the California Action, the Court found "no error" in the Circuit Court's conclusion that the California Action involved "competing, parallel litigation" to the West Virginia Action. *Id.* at 735. The Court found that "the circuit court could fairly conclude that the resolution of the West Virginia action would dispose of a portion of the California action, certainly as to the interpretation of the sixteen insurance policies" at issue here, "and possibly as to other policies." *Id.*

The Court then turned to whether the anti-suit injunction was proper "in light of principles of comity and equity." *Id*. The Court found that the "circuit court fairly concluded that St. Paul's parallel suit in California was filed for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia suit." *Id.* at 736. Accordingly, the Court found no error in the decision to enter an anti-suit injunction considering the "threat to the court's jurisdiction" that the "improper" California Action posed. *Id.*

The Court also held that the Circuit Court abused its discretion in imposing the anti-suit injunction because the "[C]ircuit [C]ourt's order impairs the parties' ability to litigate, against each other or with third parties, over policies separate from the sixteen policies identified by ABDC." *Id.* at 737. The Court noted that "the California-only parties have proceeded to file cross-claims, counter-claims, and discovery requests" in the California action, "but the [C]ircuit [C]ourt's order precludes ABDC and the five insurers who are parties to the West Virginia action from effectively responding." *Id.* at 736. Thus, "despite the [C]ircuit [C]ourt's conclusion that St. Paul had questionable motives in filing its California Action, we find that the [C]ircuit [C]ourt's order should have clearly and finely tailored a connection between the relief sought in

ABDC's West Virginia action and the prohibition of the parties' actions in California." *Id.* at 737. Accordingly, the Court found the anti-suit injunction "to be overbroad" and "constitute an abuse of the [Circuit] [C]ourt's discretion," and reversed it. *Id*.

D. The California Courts Stay The California Action In Deference To The West Virginia Courts.

At the same time AmerisourceBergen moved the West Virginia courts for the original anti-suit injunction, it also sought relief from the California courts by moving to have St. Paul's California Action stayed or dismissed. On February 19, 2021, the California Superior Court entered a stay of the California Action out of deference to the West Virginia courts. Specifically, the Superior Court recognized that "some of the issues raised in th[e California] action are already before the court in Boone County, West Virginia," and thus entered a stay "in the interests of comity and the conservation of judicial resources." SPApp.11870. On June 20, 2022, the California Court of Appeal affirmed the stay of the California Action. *See St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Corp.*, 80 Cal. App. 5th 1 (2022).

AmerisourceBergen also moved the California Superior court to dismiss or stay the crossclaims of those insurers that AmerisourceBergen did not name as defendants in West Virginia (National Union, Arrowood, and Hartford). In that motion, AmerisourceBergen argued to the California court that a stay or dismissal was warranted because "there are multiple alternate forums that would be far more suitable" than California; AmerisourceBergen specifically cited Delaware as one such "far more suitable" forum. SPApp.02487, 02491 (ABDC Mar. 8, 2021 Mot. to Dismiss). Ultimately, the cross-claiming insurers voluntarily dismissed their California actions. SPApp.13141 (California Action Docket, noting disposition of cross-complaints).

E. Non-Parties To The West Virginia Action Institute Coverage Litigation Against AmerisourceBergen And Name ACE As A Defendant.

In early 2022, several of the insurers that filed crossclaims in California—none of which are party to this West Virginia Action—initiated new coverage litigation against AmerisourceBergen in Delaware Superior Court. Specifically, five different actions were initiated in Delaware, each seeking declarations with respect to the plaintiff insurer's obligations to AmerisourceBergen to provide defense or indemnity in relation to the thousands of opioid lawsuits under insurance policies for periods from 1994 to 2018 (the "Delaware Actions"). One of the five Delaware actions, filed by Arrowood, also names as defendants ACE and St. Paul. SPApp.03318 (Mar. 1, 2022 Arrowood Del. Am. Compl.).

According to Arrowood's amended Delaware complaint, it issued various general liability insurance policies to different AmerisourceBergen affiliates and predecessors covering the period from 1994 to 2001. SPApp.03319, ¶ 2. In its Delaware action, Arrowood seeks declarations that it does not have a duty to defend or indemnify AmerisourceBergen in the opioid lawsuits. Arrowood also seeks a declaration "as to the scope and amount of coverage required to be provided" by Arrowood, St. Paul, and ACE respectively, and a "declaratory judgment that it is entitled to contribution" from St. Paul and ACE. SPApp.03340–41 ¶¶ 68, 73.

Amerisource has made motions to dismiss or stay the various Delaware actions, arguing that those actions should defer to a resolution of this action (notwithstanding that none of the Delaware plaintiffs is a party to the West Virginia Action). *See, e.g.*, SPApp.13172 (Arrowood Delaware Action docket). Those motions remain pending.

F. The Circuit Court Grants AmerisourceBergen's Renewed Motion For An Anti-Suit Injunction But Makes No Relevant Findings As To The Delaware Actions.

On March 21, 2022, on remand from this Court's decision vacating the original injunction, AmerisourceBergen made a renewed motion for an antisuit injunction.

AmerisourceBergen argued that the "Renewed Motion for an Anti-Suit Injunction is necessitated by the bad faith litigation conduct of St. Paul." SPApp.03362, ¶1. AmerisourceBergen's motion focused entirely on why the elements of an anti-suit injunction are satisfied with respect to St. Paul's California Action. For example, AmerisourceBergen argued that "the California Coverage Action is . . . vexatious, inequitable, and harassing," and that "St. Paul's attempt to have coverage determined in California . . . was an attempt to evade West Virginia's important public policy considerations." SPApp.03394–95, ¶¶ 129, 132. With respect to the Delaware actions filed by non-party insurers, on the other hand, AmerisourceBergen made no arguments to establish that an injunction was warranted as to those actions. *See* SPApp.03402, ¶ 169.

In opposition, ACE and the other defendant insurers argued, among other things, that an injunction "*would allow AmerisourceBergen to litigate fully* against non-party insurers in California and Delaware . . . *but it would enjoin the Insurers* from prosecuting any claims or cross-claims against AmerisourceBergen as may be necessary to protect their interests in those other litigations." SPApp.11220–21, ¶ 33.

In an order dated June 10, 2022, the Circuit Court granted AmerisourceBergen's renewed motion. SPApp.12858. The Court made various findings of fact and conclusions of law regarding the California Action. For example, the Court found that the insurance policies at issue in both the California and West Virginia Actions are materially the same, and that there is "substantial overlap" in the parties between the California and West Virginia actions. SPApp.12884–87. In addition, the Circuit Court stated that *the California Action* was "a threat to the court's jurisdiction" because it "violated the terms and spirt" of the Stay Order, the California Action "was filed in an attempt to evade" West Virginia, and "that the California

Coverage Action was filed "for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia Coverage Action." SPApp.13018–19, ¶ 129.

With respect to the Delaware Actions, however, the Circuit Court made ***no findings*** that those actions—all initiated by non-parties here—violated the Stay Order, were initiated to evade West Virginia, or that they were filed for improper purposes. Nor could the Circuit Court have made any such findings, as the Delaware Actions were not filed by any of the parties to this West Virginia Action. The renewed injunction order's ***only*** mention of the Delaware Actions (other than enjoining the parties' from litigating those actions) was to note their existence. SPApp.13036, ¶ 196.

The Circuit Court's June 10, 2022 order states that it modified the original injunction by making the renewed injunction "temporary rather than permanent," insofar as it applies only "while [the West Virginia Action] remains pending." SPApp.13040. The Circuit Court also stated that the Injunction applies only where certain conditions are met, including that "[t]he collateral suit must concern insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates," and that "[t]he collateral suit must concern insurance coverage for prescription opioid liability lawsuits." SPApp.13040–41. Thus, while ambiguously drafted, the Circuit Court's order arguably enjoins ACE and ***any*** insurance company affiliated with ACE—including non-parties to the West Virginia litigation—from litigating whether ***any*** insurance policies ***any*** of those entities issued to AmerisourceBergen—or ***any*** of its predecessors or affiliates—covers ***any*** prescription opioid lawsuits. The Circuit Court concluded: "All parties are hereby enjoined from instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid liability lawsuits

against ABC, ABDC, or any other affiliated entity subject to the limitations set forth in this Order." SPApp.13040–41.

ACE timely filed its notice of appeal to this Court.

SUMMARY OF ARGUMENT

In deciding the first appeal, this Court adopted the well-established principle that, out of concern for comity with sister states, anti-suit injunctions are to be granted "sparingly" and in "only very special circumstances." It also made clear that, in West Virginia as in other states, it is not enough for "substantially similar" litigation to be pending elsewhere; rather, the circumstances of the competing litigation must be such that "equity compels" imposition of the injunction. And even when those two prerequisites are satisfied, the antisuit injunction must still have a "clearly and finely tailored connection" between the West Virginia action and the competing parallel litigation. The renewed injunction—as it applies to enjoin ACE's participation in the Delaware actions—violates these standards set by the Court.

The Circuit Court's analysis of the equities supporting the injunction focused entirely on its findings related to St. Paul's motives for filing the California action. But those findings have no bearing on whether equity compels an injunction ***as to the Delaware actions***, which were filed by insurers who are not parties to the West Virginia action. In fact, the Circuit Court merely noted that the Delaware actions exist. But parallel litigation, by itself, is commonplace and cannot alone mean that "equity compels" an anti-suit injunction.

But even if the Circuit Court had considered the question, the record is clear that the elements of an anti-suit injunction cannot be established as to the Delaware actions. Unlike with the California action—which the Circuit Court concluded was filed for "improper purposes," namely attempting to circumvent this action—there is no basis to argue that the Delaware actions were filed to avoid or disrupt the West Virginia action. Indeed, the Delaware actions were filed

by non-parties—the insurers whom AmerisourceBergen ***deliberately excluded*** from this action. The Circuit Court even gave AmerisourceBergen yet another opportunity, in the wake of the issuance of the original injunction, to add those insurers; AmerisourceBergen chose not to do so.

Moreover, because the actions were filed by insurers that are not parties here, the Delaware actions will proceed regardless of whether the injunction remains in place. That includes the Delaware action in which ACE has been named as a defendant. The injunction would substantially prejudice ACE by limiting its ability to effectively litigate in that action. In other words, while AmerisourceBergen is seeking to enjoin ACE's participation in Delaware, the Delaware plaintiffs ***and AmerisourceBergen*** will be able to fully litigate issues of coverage that could ultimately bear on ACE's rights. It is therefore inequitable to preclude ACE's participation simply because it has been named as a defendant in both the West Virginia and Delaware actions. The injunction should be reversed or, at a minimum, modified because it precludes ACE's participation in Delaware.

Finally, and at the very least, the injunction order must be reversed or modified to the extent it applies to affiliates of ACE ***that are not party to the West Virginia action***. Those entities are not subject to the jurisdiction of the court, and nothing in the record supports imposing an anti-suit injunction on those entities.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted under Rule 19 because this appeal involves "assignments of error in the application of settled law." W. Va. R. App. P. 19 (a) The Order contravenes the requirements for an anti-suit injunction that this Court established in its prior decision in this case. Even so, this Court may also consider hearing argument under Rule 20 because, given an anti-suit injunction's implication of concerns of interstate comity and respect, this appeal presents "issues of fundamental public importance." W. Va. R. App. P. 20 (a).

STANDARD OF REVIEW

This Court has jurisdiction to review "interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief," *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 844 S.E.2d 133, 137 (W. Va. 2020), including anti-suit injunctions. *See St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724, 731 (W. Va. 2021). The Court reviews a decision to issue a preliminary injunction for "abuse of discretion," reviewing all "questions of law" *de novo* and the Circuit Court's "underlying factual findings" under a "clearly erroneous standard." *Ne. Nat. Energy LLC*, 844 S.E.2d at 137.

ARGUMENT

I. The Renewed Injunction Is Overbroad As To The Delaware Actions Because The Mere Existence Of Parallel Litigation Is Insufficient To Warrant An Anti-Suit Injunction.

The Courts of West Virginia, like the courts of all the states and federal courts, accord respect to the lawful authority of other jurisdictions. This comity guides relations with sister states; it "rests on several principles," including "legal harmony and uniformity among the co-equal states." *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 300 (1992). Given the importance of comity to harmonious relations between the states in our federal system, state courts throughout the country consider anti-suit injunctions—which are a challenge to the "dignity and authority" of other courts—to be an extraordinary remedy. *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 236 (Cal. 2002), *as modified* (Mar. 5, 2003).[5]

[5] State courts evaluating anti-suit injunctions involving the courts of sister states regularly draw upon federal case law involving anti-suit injunctions directed at the courts of other nations, because both circumstances involve the concurrent jurisdiction of co-equal sovereigns. *See Advanced Bionics Corp.*, 59 P.3d at 240 (Moreno, J., concurring) ("The state law standards for interstate injunctions are often similar to those for international injunctions, and the authoritative cases tend to be used interchangeably."); *see also Auerbach v. Frank*, 685 A.2d 404, 408 (D.C. 1996) (applying the standard for international anti-suit injunctions to the state context, because "considerations of respect for the concurrent jurisdiction of another sovereign have induced a similarly restrictive view of the availability of the injunctive remedy among the better-reasoned

This Court joined the consensus in the first appeal of this anti-suit injunction. As this Court put it, the "principle of comity requires that courts exercise the power to enjoin foreign suits ***sparingly*** and only in ***very special circumstances*** where a clear equity is presented requiring the interposition of the court to prevent manifest wrong and an irreparable miscarriage of justice." *St. Paul*, 868 S.E.2d at 733 (emphases added) (quoting 42 Am. Jur. 2d Injunctions § 186 (2021)).

Importantly, the mere *existence* of parallel litigation is not a sufficient basis for an anti-suit injunction, ***even where that parallel litigation raises the possibility of inconsistent judgments***. As the D.C. Circuit explained in a case this Court has treated as authoritative on the subject of comity, "the possibility of . . . potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928–29 (D.C. Cir. 1984).[6] Indeed, "parallel proceedings are common, and an anti-suit injunction is not appropriate every time parallel proceedings may occur," because "[o]therwise, such injunctions would be commonplace rather than extraordinary." *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 480 (4th Cir. 2018), *as amended* (Mar. 27, 2018). There are numerous other cases, in federal and state courts around the country, that recognize the bedrock

state court decisions on the subject") (citing cases); *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651–52 (Tex. 1996) (relying on analysis of international anti-suit injunction in *Gannon v. Payne*, 706 S.W.2d 304 (Tex. 1996)).

[6] *See Gebr. Eickhoff Maschinenfabrik & Eisengieberei mbH v. Starcher*, 174 W.Va. 618, 627–32 (1985) (relying extensively on *Laker Airways* in holding that principles of comity require "first resort to t[he] procedures" of the Hague Evidence Convention before seeking evidence from a foreign party using the West Virginia Rules of Civil Procedure); *Pasquale*, 187 W. Va. at 300–02 & n.9 (noting the Court's reliance on *Laker Airways* to explain principles of comity).

principle that the possibility of inconsistent judgments alone can ***never*** suffice to justify an anti-suit injunction.[7]

This Court's decision reversing the original injunction comports with this consensus view. The Court explained that it is not enough for the moving party to demonstrate that a party to a West Virginia action instituted substantially similar litigation in another state. The proponent of the injunction must also demonstrate that this "exceptional remedy" is appropriate because "equity compels the circuit court: (1) to address a threat to the court's jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a 'race to judgment'; or (4) protect a party from vexatious, inequitable, or harassing litigation." *St. Paul*, 868 S.E.2d at 734.

Applying that standard, this Court held that an anti-suit injunction may be appropriate with respect to St. Paul's California Action in light of two critical findings of fact: (1) "St. Paul ***instituted*** competing, parallel litigation in California," and (2) "St. Paul's parallel suit in

[7] *See China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (finding that factors such as "a race to judgment causing additional expense . . . are likely to be present whenever parallel actions are proceeding concurrently, [and] an anti-suit injunction grounded on these additional factors alone would tend to undermine the policy that allows parallel proceedings to continue and disfavors anti-suit injunctions") (internal quotation marks and citation omitted); *TSMC N. Am. v. Semiconductor Mfg. Int'l Corp.*, 161 Cal. App. 4th 581, 597 (2008) ("[A]n injunction [is not] justified by the fact that the [foreign] action is now going forward and may reach judgment before the litigation in California.") (internal quotation marks and citation omitted); *Auerbach*, 685 A.2d at 409 ("[C]oncerns such as duplication of parties and issues, the expense and effort of simultaneous litigation in two courts, and the danger of a race to judgment and inconsistent adjudications, ordinarily will not be grounds to restrain a party from proceeding with a suit in a court having jurisdiction of the matter."); *Golden Rule Ins.*, 925 S.W.2d at 651 ("[W]e have never accepted the notion that a mirror image proceeding [in another state] is sufficient[] . . . to justify an injunction," including because "[t]his approach fails to give adequate weight to the principle of comity and threatens to allow the exception to swallow the rule."); *Rauland-Borg Corp. v. TCS Mgmt. Grp., Inc.*, No. 93 C 6096, 1995 WL 31569, at *3 (N.D. Ill. Jan. 26, 1995) ("[P]arallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in which one can be plead as res judicata. Consequently, injunctions or temporary restraining orders preventing litigants from proceeding in courts of foreign countries are rarely issued.") (internal quotation marks and citation omitted).

California was ***filed for improper purposes***, namely forum shopping and the disruption of the orderly resolution of the West Virginia suit." *Id.* at 735–36 (emphases added). But even those findings were insufficient to support the original injunction as written. This Court recognized that the anti-suit injunction as originally issued "preclude[d] ABDC and the five insurers who are parties to the West Virginia action from effectively responding" to the crossclaims of the insurers not party to the West Virginia action. *Id.* at 736. Thus, "despite the circuit court's conclusion that St. Paul had questionable motives in filing its California action," this Court held that "the circuit court's order should have ***clearly and finely tailored a connection*** between the relief sought in ABDC's West Virginia action and the prohibition of the parties' actions ***in California***." *Id.* at 737 (emphases added).

On remand, the renewed injunction—similar to the original—"preclude[s]" ACE "from effectively responding" to Arrowood's action in Delaware. *Id.* at 736. Thus, to support such an order, the Circuit Court should have determined that equity compelled the entry of such relief as to ACE, with respect to the Delaware Actions, ***and*** the Circuit Court was required to have "clearly and finely tailored a connection between the relief sought in ABDC's West Virginia action and the prohibition of the parties' actions [***in Delaware***]." *Id.* at 737. Regardless of whether the Circuit Court substantiated such a connection to the California Action, it is plain that it failed to do so as to the Delaware Actions. Indeed, AmerisourceBergen's motion for the renewed injunction did not even attempt to establish the elements for an anti-suit injunction were satisfied with respect to enjoining ACE's participation in the Delaware Actions. And the order's ***only mention*** of the Delaware Actions was to note their existence. SPApp.13036, ¶ 196. For this reason alone, the anti-suit injunction should be reversed or, at a minimum, modified to the extent it bars ACE from participating in the Delaware Actions.

II. The Elements For An Injunction Cannot Be Established For The Delaware Actions

But even if the Circuit Court had considered the issue, no anti-suit injunction as to the Delaware Actions could be warranted.

As an initial matter, an anti-suit injunction as to the Delaware Actions is unjustified for the simple fact that an anti-suit injunction "is an order barring parties to an action in this state from ***instituting*** or ***prosecuting*** substantially similar litigation in another state." *St. Paul*, 868 S.E.2d at 734 (emphases added). Yet the Delaware Actions were all ***instituted*** and are being ***prosecuted*** by ***non-party insurers*** that are not subject to the authority of the Circuit Court, thus, enjoining ACE from instituting or prosecuting those cases makes no sense. And, as is discussed immediately below, equity does not "compel" the injunction as to the Delaware Actions. For one, the Circuit Court's predicate for the injunction as to the California Actions is missing with respect to the Delaware Actions, because the Delaware Actions were not—and could not have been—filed for "improper purposes." Moreover, ACE will suffer substantial prejudice if it cannot fully protect its interests in the Delaware Actions.

A. The Delaware Actions Were Not Filed For Improper Purposes and thus do not Support an Anti-Suit Injunction.

Amerisource cannot show—and the Circuit Court did not find—that "equity compels" enjoining ACE from litigating in the Delaware Actions. With respect to the California Actions, the linchpin of the Circuit Court's equity analysis was its finding "that St. Paul ha[d] filed the California Coverage Action for improper purposes, namely, delay and forum shopping." SPApp.13016, 13018–19, ¶¶ 122, 129. But that finding does not and cannot apply to the Delaware Actions (and certainly not to ACE litigating to protect its interests in those actions). Nothing in the record supports a finding that the Delaware plaintiffs—all ***non-parties here***—filed their Delaware actions with an improper purpose.

Any argument to that effect would be directly contrary to the position AmerisourceBergen took when it moved to dismiss the Delaware plaintiffs' then-pending crossclaims. In that motion, AmerisourceBergen insisted that "West Virginia, Pennsylvania, ***or Delaware*** **are** ***far more suitable forums***" than California. SPApp.02490–91 (emphasis added). Thus, rather than being "vexatious, inequitable, or harassing," the Delaware Actions were virtually invited by AmerisourceBergen, since it recognized that Delaware would be an appropriate forum for the claims brought by the insurers not party to the West Virginia action.

Nor do the Delaware Actions "pose a threat to the court's jurisdiction and ability to resolve the West Virginia coverage suit," as the Circuit Court found the California Action did. "Specifically," the Circuit Court stated that it "was concerned that St. Paul's California Coverage Action 'violated the terms and spirit' of the West Virginia Stay Order and was 'effectively a means of litigating the coverage questions stayed by the circuit court.'" SPApp.13018 ¶ 129(l). But that statement cannot apply to the Delaware plaintiffs who are not parties to the West Virginia Action and thus not subject to the Stay Order.

For similar reasons, the renewed injunction does not "prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments." SPApp.13019 ¶ 129(n). The anti-suit injunction has no effect on whether those Delaware Actions go forward because the ***Delaware plaintiffs are not subject to the jurisdiction of the Court and their claims will proceed regardless of whether the anti-suit injunction remains in effect***.[8]

Moreover, the reason the Delaware plaintiffs are not party to this case and not subject to the jurisdiction of the Court—and thus were free to initiate their own actions—is because of

[8] AmerisourceBergen has moved to dismiss or stay the Delaware actions. Accordingly, it will be up to the Delaware courts whether and when those cases go forward.

AmerisourceBergen's own strategic choices. When it initiated the West Virginia Action and later amended its complaint, AmerisourceBergen chose to restrict the scope of the litigation to include some, but not all, of its general liability insurers. As a result of that choice, ***AmerisourceBergen created the possibility*** that its other insurers—*i.e.*, those whom AmerisourceBergen left out of its West Virginia Action—would initiate separate coverage litigation related to the opioid lawsuits to adjudicate ripe questions as to their own policies.

Further, after the Circuit Court issued the first anti-suit injunction, it gave AmerisourceBergen an opportunity to amend the pleadings "to ensure that ***all issues, parties, and insurance policies*** the parties believe are necessary to protect their legitimate interests are included in this action." SPApp.01985, ¶ 162 (emphasis added). AmerisourceBergen ***again declined*** to add as parties the insurers that are now plaintiffs in Delaware or to put their insurance policies at issue. SPApp.11863 (Jan. 20, 2021 Letter to Judge Thompson). AmerisourceBergen cannot now claim it is unfair that those insurers have initiated actions seeking to adjudicate coverage under their policies.

Therefore, the anti-suit injunction should be modified because AmerisourceBergen cannot demonstrate that "equity compels" an injunction that covers the Delaware actions.

B. ACE Would Suffer Substantial Prejudice if the Injunction Remains In Place.

This Court recognized that the prior injunction amounted to "an abuse of discretion in its breadth and focus" because it "precludes . . . the five insurers who are parties to the West Virginia action from effectively responding" to claims brought by non-party insurers. *St. Paul*, 868 S.E.2d at 736. As applied to the Delaware actions, that inability to respond effectively is ***the only thing that the renewed injunction does***, and therefore the renewed injunction will cause rather than prevent inequity.

Regardless of this Court's ruling on appeal, unless the Delaware courts stay the Delaware Actions, ***AmerisourceBergen will be litigating in Delaware*** issues of insurance coverage for opioid-related lawsuits under liability policies. But while AmerisourceBergen is permitted to litigate those issues against the Delaware plaintiffs, the injunction forces ACE to sit on the sidelines while important issues that may bear on ACE's policies are decided. In other words, "because the actions between [AmerisourceBergen] and certain [Delaware] plaintiffs will be proceeding, it would be inequitable to exclude [ACE] from participating in that litigation." *N. River Ins. Co. v. Mine Safety Appliances Co.*, 2013 WL 6713229, at *9 (Del. Ch. Dec. 20, 2013), *aff'd* 105 A.3d 369 (Del. 2014). Indeed, in *North River* a Delaware court refused to issue an injunction directed at a West Virginia action precisely because it would not prevent that action from proceeding but would merely prevent one of the Delaware parties from protecting its interests in the West Virginia litigation. Here, the Circuit Court refused to give Delaware courts the same comity that Delaware courts afforded to West Virginia's courts in *North River*.

Worse, ACE is prejudiced by the renewed injunction's application to the Delaware Actions because ACE's interests are not necessarily fully aligned with the Delaware plaintiff insurers. Arrowood, the Delaware plaintiff that named ACE as a defendant, issued policies to AmerisourceBergen entities that cover the period of 1994–2000, whereas ACE issued policies to AmerisourceBergen entities that cover 2007–2018. These contrasting policy periods could make a difference. In arguing that there is no coverage under the Arrowood policies, Arrowood will likely argue that—to the extent liability policies cover the opioid lawsuits at all—Arrowood's own policy years are not triggered, a position that may push coverage into later policy years and potentially into ACE's coverage period. ACE might well take the opposite position—that to the

extent there is coverage at all, a policy year that pre-dates ACE's policies would be triggered. Thus, ACE's arguments could run directly contrary to Arrowood's.

Were the injunction to stand, Amerisource and Arrowood would litigate both whether there is coverage and, if so, for what year. Yet ACE would be consigned to the sidelines, unable to assert crossclaims against Amerisource or otherwise fully advance its interests. ACE may have no say in the discovery that AmerisourceBergen produces or the arguments that are presented to the Court. Should the court conclude that there is coverage, Arrowood could then pursue contribution from ACE ***based on the record and rulings that were developed in ACE's absence***. That would be unfair.

It must be emphasized that there has been no finding—none—by any court anywhere that ACE has acted at all improperly. ACE's only offense has been to be named as a defendant in both the West Virginia and Delaware actions. Because an "injunction against [ACE] would inequitably preclude [ACE] from protecting its rights," *N. River*, 2013 WL 6713229, at *9, ACE should be allowed to fully defend its interests, including by asserting crossclaims against AmerisourceBergen in Delaware such that ACE can participate in the litigation of the threshold questions of coverage.

Accordingly, the anti-suit injunction must be reversed or, at a minimum, modified so as not to apply to the Delaware Actions.

III. The Renewed Injunction Is Overbroad To The Extent It Applies To Chubb Entities Not Party To The West Virginia Action.

Despite the order stating that it "shall only enjoin *the parties*," the order goes on to set a condition that any "collateral suit" subject to the injunction "must concern insurance policies issued by the Insurer Defendants in this case ***or their predecessors and affiliates***." SPApp.13040–41 (emphases added). The injunction order is therefore ambiguous as to whether

it applies only to the entities party to the West Virginia Action or whether it also enjoins other entities that have a corporate affiliation with those parties, including ACE. To the extent the injunction applies to enjoin entities beyond those that are before the Circuit Court, it must be modified.

At least two insurance companies that are corporate affiliates of ACE—Federal Insurance Company ("Federal") and Indemnity Insurance Company of America ("IINA")—issued policies to predecessors of AmerisourceBergen that cover the time period of 1995 to 2001. Like Arrowood and the other Delaware plaintiffs, AmerisourceBergen opted not to name Federal and IINA in the West Virginia Action. Therefore, they are not subject to the jurisdiction of the Circuit Court and should not be included in the anti-suit injunction. *See St. Paul*, 868 S.E.2d at 732 ("To be clear, an anti-suit injunction applies ***only to the parties before the circuit court*** . . . . (emphasis added)).

Moreover, this Court has made clear that "the corporate form will never be disregarded lightly" and a "mere showing that one corporation is owned by another or that they share common officers is not a sufficient justification for a court to disregard their separate corporate structure." *S. States Co-op., Inc. v. Dailey*, 167 W. Va. 920, 930 (1981). Nor is it enough when affiliates share some "mutuality of interest," without a further showing of disregard of the corporate form. *Id.*; *see also Pauley Petroleum Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 634 (Del. 1968) (affirming denial of anti-suit injunction as to non-party affiliate because "a Delaware Court will not interfere by injunctive process with the prosecution of a lawsuit in another jurisdiction . . . when the Delaware Court has not acquired jurisdiction over all of the parties."). Here, AmerisourceBergen presented nothing—and the Circuit Court made no findings—to support disregarding the corporate form as to ACE and its affiliates Federal and IINA, such that

Federal and IINA can be subject to the injunction. *Cf. Comp. Assocs. Int'l, Inc. v. Altai, Inc.*, 950 F. Supp. 48, 54 (E.D.N.Y. 1996) (denying anti-suit injunction because two entities were "not in privity for the purposes of the two proceedings at issue"). In addition, notwithstanding common ownership, it cannot be assumed that ACE's, Federal's, and IINA's interests would all align. To the contrary, the same potential divergence of interests between ACE and Arrowood described above would likely occur, because Federal's and IINA's policy years are earlier than ACE's policy years. Accordingly, their arguments related to the timing of coverage could conflict.

At the very least, because the Circuit Court made no findings to support imposing an injunction on ACE's affiliates, the anti-suit injunction must be reversed or, at a minimum, modified to the extent it applies to those entities. *St. Paul*, 868 S.E.2d at 737 (finding no "compelling reason to prevent the parties from litigating comparable questions of coverage for opioid lawsuits, regarding different policies, in other forums").

CONCLUSION

For the foregoing reasons, the Order should be reversed or, at a minimum, modified so as not to apply to (i) the Delaware Actions and (ii) affiliates of ACE not parties in West Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October 2022, the foregoing was served via File&ServeXpress and/or U.S. Mail as follows:

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