

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT

UNIFIED MEDICAL, LLC  
a/a/o ROBERTO PRIN,

**CASE NO. 3D23-1**

L.T. Case No.: 21-003833-CC

Appellant,

v.

PROGRESSIVE PREFERRED  
INSURANCE COMPANY,

Appellee.

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**APPELLEE'S ANSWER BRIEF**

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## INTRODUCTION

Appellee/Defendant, PROGRESSIVE PREFERRED INSURANCE COMPANY, is referred to as "**Progressive Preferred**"; Appellant/Plaintiff, UNIFIED MEDICAL, LLC a/a/o ROBERTO PRIN, is referred to as "**Unified Medical**." "**I.B.**" designates citation to the Initial Brief appearing as (I.B. 1). "**R**" designates citation to the Record on Appeal appearing as (R. 1).

After the Record on Appeal was filed with this Court, this Court granted two motions to supplement. On July 7, 2023, Unified Medical filed an Unopposed Motion to Include December 5, 2022, Hearing in Record on Appeal. On July 12, 2023, this Court entered an order granting the Unopposed Motion and ordering that the Record on Appeal was supplemented with the attached Transcript. "**T**" designates citation to the Transcript of the December 5, 2022, hearing appearing as (T. 1).

On August 18, 2023, Progressive Preferred filed a Motion to Supplement Record with documents contained in an Appendix. On August 22, 2023, this Court entered an order granting the Motion and ordering that the Record on Appeal was supplemented with the attached Appendix. "**A**" designates citation to the Appendix as (A. 1).

## STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts in the Initial Brief does not comply with Florida Rule of Appellate Procedure 9.210(b)(3), which requires the inclusion of "references to the appropriate pages of the record or transcript." In fact, Unified Medical includes almost no citations to the record or transcript, likely because many of its factual assertions are not supported by any record evidence as was the case below. Instead, Unified Medical makes impermissible and unsupported argument disguised as statements of fact. See *Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000). Instead of pointing out each of these misstatements, Progressive Preferred provides its own Statement of the Case and Facts which complies with rule 9.210(b)(3).

Unified Medical filed the underlying **Complaint** for breach of contract in Miami-Dade County Court based on Mr. Prin's involvement in an automobile accident on December 7, 2019, in Florida. (R. 14-18) Unified Medical alleged that Mr. Prin, who was insured under a policy issued by Progressive American Insurance Company ("Progressive American"), sought treatment from Unified Medical. (R. 14-15) Mr. Prin assigned his personal injury protection ("PIP") benefits to Unified Medical, who submitted a claim to Progressive American that was denied. (R. 15-16)

Unified Medical asserted that Progressive American breached the insurance contract by failing to pay its PIP claim. (R. 16)

On March 17, 2021, Progressive American filed a **motion to dismiss** asserting that Unified Medical sued the wrong Progressive entity. (R. 22-25) Progressive American claimed that the insurance policy in question was issued by Progressive *Preferred*, not Progressive *American*. (R. 22) Progressive American also filed a Motion for Summary Judgment/Summary Disposition on the basis of Unified Medical's failure to identify the correct insurer. (R. 59-63)

The trial court **granted Progressive American's Motion to Dismiss with prejudice<sup>1</sup> and granted Unified Medical leave to amend** the Complaint to name Progressive Preferred as a Defendant. (R. 324-25) Unified Medical filed an **Amended Complaint** against Progressive Preferred on June 24, 2022. (R. 326-29)

The Amended Complaint contains the following assertion for purposes of personal jurisdiction: **"At all times material hereto, Defendant was a corporation duly licensed to transact business in the**

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<sup>1</sup> Progressive *American* moved for attorney's fees under § 768.79, Fla. Stat. and Fla. R. Civ. P. 1.442 based on a proposal for settlement. (R. 330-53). The trial court determined Progressive American was entitled to fees after the Record and supplements were filed in this Court. See *Dkt.* 83.

**State of Florida and maintained agents for the transaction of its customary business in MIAMI-DADE County, Florida." (R. 326)**

(Emphasis added.)

On August 23, 2022, Progressive Preferred filed a Limited Appearance Motion to Quash Service and to Dismiss ("**Motion to Quash and Dismiss**"). (A. 6-14) Progressive Preferred asserted that (1) it is incorporated in and a resident of the State of Ohio, (2) it does not have any agents or business locations in Florida or conduct any business in Florida, (3) it is not authorized to sell insurance in Florida, and (4) the policy of insurance at issue in this case was originated in Ohio and is governed by Ohio law. (A. 6-7, 13-14) In support of its assertions, Progressive Preferred referenced a Declaration that was to be filed. (A. 6-7) Progressive Preferred requested that the trial court quash service for lack of personal jurisdiction and dismiss the Amended Complaint. (A. 2, 12, 13, 14)

On September 19, 2022, Unified Medical filed a **Response** in which it argued that the Motion to Quash and Dismiss should be denied under an alter ego theory because Progressive Preferred was "part, parcel, controlled and run by the Progressive Corporation or Progressive Group," which conduct business in Florida. (R. 356) Specifically, Unified Medical

argued that Progressive Corporation or Progressive Group was a parent corporation of Progressive Preferred that "exercised such a degree of control over its subsidiary that the activities of the subsidiary were in fact the activities of the parent within the state." (R. 359)

As factual support for this assertion, Unified Medical attached **only website printouts** including (1) a Consent Order from the New York State Department of Financial Services ("**Consent Order**"), (2) LexisNexis Judgments & Lien Search Results for Progressive Preferred ("**LexisNexis Search**"), and (3) a Progressive Corporation News Release dated September 15, 2022 ("**News Release**"). (R. 362-91)

Progressive Preferred subsequently filed a Notice of Filing Declaration and Certification of Business Records. (A. 15) The Declaration consisted of a sworn **Declaration** executed by Ms. Jill M. Betts, a Senior Claims Manager with Progressive Preferred. (A. 17-19) In the Declaration, Ms. Betts attested that: (1) Progressive Preferred is incorporated in and a resident of the State of Ohio, (2) Progressive Preferred does not have any agents or business locations in Florida or conduct business in Florida, (3) the Policy was originated in Ohio, and (4) Progressive Preferred "does not represent, underwrite for, have any agents on behalf of, or conduct business for Defendant in the State of Florida."

(A. 18-19)

Judge Jeffrey Rosinek conducted a **hearing** on the Motion to Quash and Dismiss on December 5, 2022. (T. 1) Unified Medical argued that the Progressive parent corporation exercised sufficient control over Progressive Preferred that jurisdiction in Florida was proper under the alter ego theory. (T. 13-15) Unified Medical relied on the unauthenticated website printouts it had attached to its Response. (R. 12, 15) Unified Medical also relied on counsel's supposition that Ms. Betts and Progressive Preferred's attorneys were paid by Progressive's parent company. (T. 10-11) Unified Medical alternatively requested that the trial court allow jurisdictional discovery so that it could depose Ms. Betts and "ask her a couple of questions, like who writes her check, who writes her paycheck, who is she employed by." (T. 12)

Progressive Preferred argued that it was Unified Medical's burden to establish more than that the Progressive parent corporation signed its paychecks and that it had failed to do so. (T. 17) When it became clear that Unified Medical had failed to meet its burden of proof, Unified Medical repeated its request for jurisdictional discovery, asserting that "all this record evidence that counsel discusses is within her exclusive possession and control." (T. 20) The trial court said it understood that "discovery

could help a lot" and granted the motion to dismiss without prejudice to Unified Medical filing a new action against Progressive Preferred "with all this information to show us." (T. 20)

On December 7, 2022, the trial court rendered a final **Order** granting Progressive Preferred's Motion to Quash and Dismiss, dismissing the case without prejudice to the filing of a new action, and ordering that Progressive Preferred "shall go hence without day." (A. 160-63) The trial court found that the Amended "Complaint fails to allege sufficient facts to bring the action within the ambit of Florida's long-arm statute, Fla. Stat. 48.193" and Unified Medical "failed to demonstrate that Defendant has sufficient minimum contacts with the state of Florida to satisfy due process." (A. 161)

The trial court also found, "The only record evidence before the Court establishes that Defendant has no contacts with the state of Florida, therefore, this Court finds that Defendant had no reasonable anticipation of being subjected to defending a suit in Florida courts." (A. 161) The trial court ruled, "The fact that Defendant may have a parent company or an affiliate sharing the same parent company doing business in Florida is insufficient alone to confer personal jurisdiction over Defendant." (A. 161) Finally, the trial court exercised its discretion to deny Unified Medical's

request for jurisdictional discovery. (A. 161) Unified Medical filed a timely Notice of Appeal on January 2, 2023. (R. 494-98)

### **SUMMARY OF THE ARGUMENT**

Unified Medical failed to meet its burden to prove personal jurisdiction under *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989), which requires a showing of both long-arm jurisdiction and minimum contacts. As to long-arm jurisdiction, Unified Medical initially met its pleading burden by alleging that Progressive Preferred is licensed to conduct business in Florida and maintains agents here. Progressive Preferred then met its burden by producing a sworn Declaration attesting that it is an Ohio corporation that does not write policies in Florida, conducts no business in Florida, and has no agents or offices here. At this point the burden shifted back to Unified Medical to produce evidence to support its jurisdictional allegations, but it failed to do so offering only unauthenticated website printouts which are legally insufficient to establish jurisdiction.

Unified Medical also argued that long-arm jurisdiction was proper because Progressive Preferred was an alter ego or "shell" corporation controlled by a parent that conducted business in Florida. The trial court should not have considered this argument because it was not pled in the

Amended Complaint. Regardless, Unified Medical failed to prove that Progressive Preferred's parent corporation exercised such a degree of control over Progressive Preferred's daily operations that it had no corporate interests of its own. Indeed, the website printouts do not establish the exercise of **any** control over Progressive Preferred's daily operations. Because Unified Medical failed to establish long-arm jurisdiction, dismissal was proper.

Moreover, dismissal was proper because Unified Medical failed to meet its burden to prove that Progressive Preferred has the requisite minimum contacts with Florida to satisfy due process. As the trial court correctly found, the undisputed evidence established that Progressive Preferred has absolutely **no** contacts with Florida whatsoever. And Mr. Prin's unilateral acts of driving a covered vehicle into Florida and getting into an accident here are insufficient to establish the requisite minimum contacts. The fact that the Ohio Policy provides national coverage is likewise insufficient.

Next, the trial court did not abuse its discretion in denying Unified Medical's eleventh hour request for jurisdictional discovery. In Florida, parties are only entitled to such jurisdictional discovery if they have carried their burden of proof, which Unified Medical failed to do. Unified Medical

did not diligently pursue discovery prior to the hearing despite the opportunity to do so.

Finally, the trial court dismissed the Amended Complaint without prejudice to Unified Medical filing a separate, independent new action against Progressive Preferred if it could identify actually sufficient evidence of jurisdiction.

### **STANDARD OF REVIEW**

A trial court's ruling on a motion to dismiss for lack of personal jurisdiction is generally a question of law reviewed de novo. *Wendt v. Horowitz*, 822 So. 2d 1252, 1256-57 (Fla. 2002). The court's ruling on whether to allow for jurisdictional discovery is reviewed for an abuse of discretion. *Estes v. Rodin*, 259 So. 3d 183, 198 (Fla. 3d DCA 2018).

## **ARGUMENT**

### **I. DISMISSAL OF THE AMENDED COMPLAINT WAS PROPER BECAUSE UNIFIED MEDICAL FAILED TO ESTABLISH THAT PROGRESSIVE PREFERRED'S ALLEGED CONDUCT FALLS WITHIN FLORIDA'S LONG ARM STATUTE.**

Unified Medical repeats its losing argument on appeal just as it did below: with sweeping, unproven, speculative accusations that Progressive Preferred is a "shell" corporation and personal jurisdiction is therefore proper under an alter ego theory. As with its argument below, Unified Medical has cited absolutely no record, admissible evidence supporting these assertions. Instead, Unified Medical ignores the jurisdictional test set forth by the supreme court in *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). Once this framework is applied and the shifting burdens of proof are analyzed, it becomes clear that Progressive Preferred was entitled to dismissal.

#### **A. Venetian Salami's Jurisdictional Framework.**

Under *Venetian Salami*, determining personal jurisdiction is a two-step inquiry that begins with determining whether the plaintiff's alleged actions bring the case within the ambit of Florida's long-arm statute, section 48.193, Florida Statutes (2019). *Venetian Salami*, 554 So. 2d at 502. If the long arm statute is sufficiently pled, the second step of the test

is to determine whether sufficient "minimum contacts" are demonstrated to satisfy the Fourteenth Amendment's due process requirements. *Id.*

The inquiry into both long arm jurisdiction and minimum contacts involves a burden shifting analysis. *Venetian Salami*, 554 So. 2d at 502; *Kitroser v. Hurt*, 85 So. 3d 1084, 1087-88 (Fla. 2012). The plaintiff bears the initial burden of pleading a basis for jurisdiction under Florida's long arm statute. *Id.* To challenge jurisdiction, the defendant must file a motion to dismiss. This motion, standing alone, merely challenges whether jurisdiction is well pled. *Id.* A defendant challenging the substance of the complaint's jurisdictional allegations must produce a sworn affidavit that refutes those allegations. *Id.*

Upon the filing of such evidence, the burden then shifts back to the plaintiff to produce a sworn affidavit or other legally sufficient evidence to prove the pleaded basis for personal jurisdiction. *Venetian Salami*, 554 So. 2d at 502 ("The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained."); *Viking Acoustical Corp. v. Monco Sales Corp.*, 767 So. 2d 632, 634 (Fla. 5th DCA 2000) ("Where the defendant has filed one or more affidavits supporting a meritorious challenge, the plaintiff is required to rebut the affidavits with opposing affidavits, testimony or documents . . .").

If the plaintiff presents conflicting evidence that cannot be harmonized with the defendant's evidence, the trial court must hold a limited evidentiary hearing in order to determine personal jurisdiction. *Venetian Salami*, 554 So. 2d at 503; *Sun Coast Nursing Ctrs., Inc. v. Littman*, 293 So. 3d 1056 (Fla. 4th DCA 2020). "In most cases, the affidavits can be harmonized, and the court will be in a position to make a decision based upon facts which are essentially undisputed." *Venetian Salami*, 554 So. 2d at 502-03. That is exactly what happened in this case.

**B. Unified Medical Failed to Meet its Burden to Produce Counter-Evidence to Prove the Pled Basis for Jurisdiction.**

The personal jurisdiction analysis begins by determining whether the defendant's conduct falls within Florida's long-arm statute. *Id.* at 502. Florida's "long-arm statute must be strictly construed, and any doubts about applicability of the statute resolved in favor of the defendant and against a conclusion that personal jurisdiction exists." *Gadea v. Star Cruises, Ltd.*, 949 So. 2d 1143, 1150 (Fla. 3d DCA 2007).

Under the burden shifting model set forth in *Venetian Salami*, Unified Medical must plead the basis for personal jurisdiction under section 48.193 in the Amended Complaint. See 554 So. 2d at 502. The Amended Complaint contains the following assertion for purposes of personal

jurisdiction: **"At all times material hereto, Defendant was a corporation duly licensed to transact business in the State of Florida and maintained agents for the transaction of its customary business in MIAMI-DADE County, Florida."** (R. 326) (Emphasis added.)

This language appears to assert specific jurisdiction under section 48.193(1)(a)(1), Florida Statutes (2019), which provides for jurisdiction over persons **"[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state"** for causes of action arising from those acts. (Emphasis added.) By asserting a basis for personal jurisdiction under section 48.193(1)(a)(1), Unified Medical has met its initial pleading burden, at least as to section 48.193(1)(a)(1)<sup>2</sup>. See *Venetian Salami*, 554 So. 2d at 502. The burden therefore shifts to Progressive Preferred to produce admissible evidence refuting these jurisdictional facts. See *id.*

In support of its Motion to Quash and Dismiss, Progressive provided the sworn Declaration of Senior Claims Manager Jill M. Betts in which she

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<sup>2</sup> In its Initial Brief, Unified Medical argues, for the first time, that jurisdiction is proper under section 48.193(2), based on "substantial and not isolated activity within this state." (I.B. 7) However, this section asserts general jurisdiction, which was not pleaded in the Amended Complaint or argued below. Thus, the issue is not preserved for review. See *Erie Ins. Exch. v. Larose*, 202 So. 3d 148, 152 (Fla. 2d DCA 2016). Even if it were, the

established that: (1) Progressive Preferred is incorporated in and is a resident of the State of Ohio, (2) Progressive Preferred does not have any agents or offices in Florida or conduct business in Florida, (3) the insurance policy at issue was originated in Ohio, and (4) Progressive Preferred does not underwrite Florida insurance policies.

This evidence directly refutes Unified Medical's jurisdictional allegations that Progressive Preferred was licensed to transact business in Florida and maintained agents to conduct its customary business here. *See Hobbs v. Don Mealey Chevrolet, Inc.*, 642 So. 2d 1149, 1153 (Fla. 5th DCA 1994) (holding that an affidavit attesting that the defendant neither did business in Florida nor had an office in Florida effectively rebutted the plaintiff's jurisdictional allegations under section 48.193(1)(a)).

As such, the burden then shifts back to Unified Medical to produce legally sufficient counter-evidence to prove the pleaded basis for personal jurisdiction, which is that Progressive Preferred operated, conducted, engaged in, or carried on a business in Florida or had an office or agency there. *See Venetian Salami*, 554 So. 2d at 502; *Viking Acoustical*, 767 So. 2d at 634.

In support of its jurisdictional claims, Unified Medical only produced

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undisputed evidence establishes no contacts whatsoever with Florida.

three documents: (1) the Consent Order, (2) the LexisNexis Search, and (3) the News Release. These documents are **unauthenticated printouts from various internet websites**, and Unified Medical did not present any affidavits even attempting to authenticate them. Furthermore, all of these documents constitute inadmissible hearsay. *See Philip Morris USA, Inc. v. Pollari*, 228 So. 3d 115, 125 (Fla. 4th DCA 2017) ("Numerous cases have held that statements found on websites are hearsay, and must be viewed as such when considering whether they should be admitted into evidence.").

Unified Medical's documents are therefore insufficient to sustain Unified Medical's burden of proof under *Venetian Salami*, which requires the production of "**legally sufficient**" or "**admissible**" evidence to establish jurisdiction. *Kitroser*, 85 So. 3d at 1087; *see also Estes*, 259 So. 3d at 199 (holding that under *Venetian Salami* the plaintiff's counter-evidence "must constitute legally sufficient evidence to be considered by the court").

This Court could and should end its analysis here because Unified Medical's failure to meet its burden of producing legally sufficient counter-evidence to prove the pleaded basis for personal jurisdiction under *Venetian Salami* supports the trial court's entry of the final Order

dismissing the action. However, even if the documents presented by Unified Medical were legally sufficient, they do not meet its burden of producing evidence that directly refutes the evidence produced by Progressive Preferred, which is Ms. Betts' Declaration.

Only the LexisNexis Search was offered to establish that Progressive Preferred was **actually** operating, conducting, engaging in, or carrying on a business or business venture or had an office or agency in Florida as required by section 48.193(1)(a)(1). The LexisNexis Search reflects two judgments filed in Florida in 2003 and 2006 that list Florida addresses for Progressive Preferred. It also reflects nine judgments filed in Florida by Progressive Preferred from 1998-2022. Unified Medical argues that the LexisNexis Search establishes that Progressive Preferred (a) has been sued within Florida twice, (b) disclosed Florida addresses twice, and (c) has brought suit in Florida against various entities with the last suit recorded in 2022. (I.B. 5)

First, the fact there are Florida addresses listed for Progressive Preferred in 2003 and 2006 does not establish that it had offices in Florida at the time of the accident in **December 2019**, which was thirteen and sixteen years later, or any time subsequent. Second, the fact that Progressive Preferred has sued and been sued in Florida does not

establish that Progressive Preferred was operating, conducting, engaging in, or carrying on a business or business venture or had an office or agency there. Challenges to personal jurisdiction can be waived and are not always raised in the trial court. See *Allstate Mortg. Sols. Transfer, Inc. v. Bank of Am., N.A.*, 338 So. 3d 985, 987-88 (Fla. 3d DCA 2022). Thus, it is possible for judgments to be obtained for and against nonresident parties without regard to whether personal jurisdiction is established.

Therefore, the LexisNexis search does not refute the allegations in Ms. Betts' Declaration, and Unified Medical has failed to meet its burden of producing counter-evidence to prove that Progressive Preferred was **personally** operating, conducting, engaging in, or carrying on a business or business venture or had an office or agency in Florida. Accordingly, Unified Medical failed to establish that Progressive Preferred's alleged conduct falls within Florida's long arm statute as pled in the Amended Complaint, and dismissal of the Amended Complaint was proper.

**C. Unified Medical Failed to Meet its Burden to Produce Counter-Evidence to Prove Its Alter Ego Theory.**

In its Response to Progressive Preferred's Motion to Quash and Dismiss, Unified Medical argued that jurisdiction was proper under the alter ego theory because Progressive Preferred was "part, parcel, controlled

and run by the Progressive Corporation or Progressive Group," which conduct business in Florida. (R. 355-56) Specifically, Unified Medical argued that Progressive Corporation or Progressive Group was a parent corporation of Progressive Preferred that "exercised such a degree of control over its subsidiary that the activities of the subsidiary were in fact the activities of the parent within the state." (R. 359)

Unified Medical's alter ego theory of personal jurisdiction under section 48.193(1)(a) should not have been considered by the trial court because it was not pled in the Amended Complaint. *See Condor, S.A. v. Plurinational State of Bolivia*, 352 So. 3d 921, 928 (Fla. 3d DCA 2022). "Venetian Salami's burden shifting analysis is triggered, and the parties' competing affidavits become relevant, *only* when the operative pleading adequately alleges a basis for extending long-arm jurisdiction over a non-resident defendant; a non-resident defendant does not have to anticipate the plaintiff, in a responsive declaration, affidavit, or otherwise, asserting entirely new allegations in support of personal jurisdiction." *Id.* In other words, to correct a pleading deficiency, the plaintiff may not assert new allegations in either its response a motion to dismiss or sworn affidavit in opposition to the motion to dismiss. *Id.*

However, because the trial court considered and ruled upon Unified

Medical's alter ego argument, Progressive Preferred will address the merits. Succinctly, the argument has no merit because the “evidence” presented by Unified Medical does not meet the strict requirements for establishing personal jurisdiction of a subsidiary based on jurisdiction of its parent corporation under an alter ego theory.

“It is well settled that the mere presence of a subsidiary in Florida, without more, does not subject a non-Florida corporate parent to long-arm jurisdiction.” *Team Health Holdings, Inc. v. Caceres*, 357 So. 3d 746, 751 (Fla. 3d DCA 2023) (quoting *Gadea*, 949 So. 2d at 1146-47 (citations omitted)). “The corollary is also true—jurisdiction over a parent company does not, without more, confer jurisdiction over the subsidiary.” *Am. Exp. Ins. Servs. Europe Ltd. v. Duvall*, 972 So. 2d 1035, 1040 (Fla. 3d DCA 2008). However, when a parent corporation exercises sufficient control over its subsidiary, that control will establish an agency and personal jurisdiction. *Team Health*, 357 So. 3d at 752. “The amount of control exercised by the parent must be **high and very significant.**” *Id.* (quoting *Gadea*, 949 So. 2d at 1146-47) (emphasis added).

The key question is whether the parent corporation exercised control over the day-to-day operations of its subsidiary. *Team Health*, 357 So. 3d at 752; *Reynolds Am., Inc. v. Gero*, 56 So. 3d 117, 120 (Fla. 3d DCA

2011); *T.R.W. Vehicle Safety Sys., Inc. v. Santiso*, 980 So. 2d 1149, 1153 (Fla. 4th DCA 2008). "Indeed, 'the parent corporation . . . must exercise control to the extent that the subsidiary **'manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.'**" *Team Health*, 357 So. 3d at 752 (quoting *Enic, PLC v. F.F.S. & Co.*, 870 So. 2d 888, 891 (Fla. 5th DCA 2004) (emphasis added)).

"Even a parent-subsidary relationship that 'approaches an agency;' involves 'regular contact' between parent and subsidiary; or can be described as 'a very close working relationship' between a parent and subsidiary has been found to be insufficient where the evidence did not show that the parent exercised control over the subsidiary's 'basic operations.'" *Lee-Bolton v. Koppers, Inc.*, 2013 WL 11522040, at \*5; (N.D. Fla. Sept. 9, 2013) (quoting *Gen. Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1343-44 (S.D. Fla.), *aff'd*, 54 Fed. App'x 492 (11th Cir. 2002)).

In this case, Unified Medical has not produced any actual evidence to show that Progressive Preferred's parent corporation exercises **any control** over its basic daily operations, let alone that the parent corporation exercises so much control that Progressive Preferred has no separate

corporate interests of its own. In fact, Unified Medical has done no more than establish that Progressive Preferred is a subsidiary with a parent corporation. As the trial court recognized, this is insufficient in itself to meet its burden under Florida law. See *Team Health*, 357 So. 3d at 752; *Gadea*, 949 So. 2d at 1146-47.

Unified Medical argues that the Consent Order it produced establishes "that all of the so-called subsidiary companies are essentially alter egos of the parent." (I.B. 6) Unified Medical argues that the News Release establishes "that all of the Progressive companies have the same officers, the same managers, the same staff and utilize the same house counsel." (I.B. 11) Unified Medical relies on the fact that the financial report in the News Release "does not even attempt to disaggregate the data by the underwriting companies" but "lists the data together." *Id.* Unified Medical seriously mischaracterizes this evidence.

The Consent Order is between the New York State Department of Financial Services ("NY DFS") and "Progressive Group," which it states consists of, among others, Progressive Preferred. (R. 471) It reflects that the NY DFS investigated Progressive Group and determined that it "failed to timely report new business and other vehicle registration information to the New York State Department of Motor Vehicles ("DMV") as required by

New York Insurance Law § 317." (R. 472). It also reflects that the NY DFS and Progressive Group agreed to certain relief for those infractions.

The Consent Order is limited to **New York** business and does not have any connection to Florida. Nor does it make any findings that Progressive Group is a parent corporation or controls any operations of its subsidiary. Thus, it is insufficient to meet Unified Medical's burden of proof. *See State v. Am. Tobacco Co.*, 707 So. 2d 851, 856 (Fla. 4th DCA 1998) (holding that the parent's policy statements establishing goals for its subsidiaries were not sufficient to "show the *operational* control of the subsidiary which is necessary to establish personal jurisdiction").

The News Release about the August 2022 Progressive Corporation Report does not even mention **Progressive Preferred**. Nor does it set forth the names of officers, managers, staff, or house counsel. Instead, it merely provides that "Progressive offers personal and commercial insurance throughout the United States." (R. 483) This does not establish that Progressive Preferred's parent corporation exercises any **control** over its basic daily operations. *See Concordia Lutheran Ministries v. Wills*, 359 So. 3d 396, 403 (Fla. 2d DCA 2023) (holding that plaintiff failed to establish that the parent corporation controlled the day-to-day operations of its Florida facilities with tax forms "that say [the parent corporation] 'now

provides care in three states' and 'offers the full suite of senior care services through its continuum of care").

Furthermore, the fact that a parent "company discusses profits, losses, and operations as joint operations with its subsidiary in press releases, web sites, SEC filings or financial reports" is insufficient to establish sufficient operational control under the alter ego theory. *Lee-Bolton*, 2013 WL 11522040, at \*5; see also *Hudson Cap. Props. IV, LLC v. Iecho*, 341 So. 3d 1196, 1200 (Fla. 2d DCA 2022) ("Nor does the fact that Hudson Capital's investment portfolio may have included Westdale implicate the Long Arm Statute").

In its Initial Brief and at the hearing on the Motion to Quash and Dismiss, Unified Medical made the unsupported assertion that "Progressive House Counsel" was representing Progressive Preferred in the underlying action in an attempt to meet Unified Medical's burden of proof. (I.B. 11) Unified Medical also asserted that it would "bet dollars on doughnuts" that Ms. Betts was paid by the Progressive parent corporation. (T. 10)

However, Unified Medical misrepresents the burden of proof it bears in refuting Progressive Preferred's jurisdictional evidence. As the Florida Supreme Court has held, once the defendant meets its burden of

production the burden shifts back to the Plaintiff **to produce a sworn affidavit or other legally sufficient evidence to prove the pleaded basis for personal jurisdiction.** *Venetian Salami*, 554 So. 2d at 502; *Viking Acoustical*, 767 So. 2d at 634. Unified Medical's failure to present any evidence in support of these assertions precludes their consideration.

Regardless, the fact that a parent company provides counsel for its subsidiary does not establish any type of **control over the subsidiary's day-to-day operations.** See *Lee-Bolton*, 2013 WL 11522040, at \*5 (holding that a parent corporation's "general executive responsibility over the subsidiary" and "guaranteeing obligations of the subsidiary to banks" has "been deemed insufficient indicia of control"); *T.R.W.*, 980 So. 2d at 1153 (finding a parent corporation's issuance of paychecks for a subsidiary insufficient to establish alter ego jurisdiction).

In sum, Unified Medical has not produced any evidence to show that Progressive Preferred's parent corporation exercises **any control** over its basic daily operations, let alone the degree of control necessary to establish an alter ego theory. The unauthenticated website printouts produced by Unified Medical do not speak to the Progressive parent corporation's control over any of Progressive Preferred's daily operations. And the unsubstantiated claims of counsel that the Progressive parent

pays the salaries of Progressive Preferred's counsel are legally insufficient to meet its burden and also do not establish the degree of control necessary for agency. Unified Medical therefore failed to meet its burden to produce a sworn affidavit or other legally sufficient evidence to prove its alter ego theory, and the trial court correctly dismissed Unified Medical's Amended Complaint.

**II. DISMISSAL OF THE AMENDED COMPLAINT WAS PROPER BECAUSE UNIFIED MEDICAL FAILED TO ESTABLISH THAT PROGRESSIVE PREFERRED HAS THE REQUISITE MINIMUM CONTACTS WITH FLORIDA.**

In addition to proving long-arm jurisdiction, Unified Medical was also required to establish sufficient "minimum contacts" to satisfy the Fourteenth Amendment. "In order to subject a party to personal jurisdiction in Florida courts, that party must have certain 'minimum contacts' with Florida so that the maintenance of the suit does not 'offend traditional notions of fair play and substantial justice.'" *Meyer v. Auto Club Ins. Ass'n*, 492 So. 2d 1314, 1315 (Fla. 1986) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). There must also be "a showing that there was 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.'" *Erie Insurance*, 202 So. 3d at 155 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475

(1985)).

The unilateral acts of a person with some relationship to the non-resident defendant are insufficient to satisfy the minimum contacts requirement. *Meyer*, 492 So. 2d at 1315. "The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 1315-16 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The type of foreseeability that is crucial to this analysis "is that the *defendant's conduct and connection with the forum State* are such that he should reasonably anticipate being haled into court there." *Id.* at 1316 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The Declaration produced by Progressive Preferred establishes that it has not reached out from Ohio to Florida to conduct business in this State nor has it established any contacts with Florida. According to the Declaration, Progressive Preferred is incorporated in Ohio and has no offices, employees, or agents in Florida. It does not underwrite Florida insurance policies or conduct any business whatsoever in Florida. Simply put, Progressive Preferred has not taken any action to purposefully avail

itself of the privilege of conducting activities within the forum state. And as was discussed in issue I, Unified Medical has failed to present any evidence, admissible or otherwise, to refute these facts.

The Florida Supreme Court has expressly held that the unilateral acts of an insured's driving a covered motor vehicle in Florida and getting into an accident are insufficient in themselves to provide a non-resident insurer with the required minimum contacts. See *Meyer*, 492 So. 2d at 1315; *Erie Insurance*, 202 So. 3d at 155; *Strickland Ins. Grp. v. Shewmake*, 642 So. 2d 1159, 1161 (Fla. 5th DCA 1994). Similarly, the fact that the Ohio policy provides national coverage is likewise not sufficient to provide the kind of foreseeability that is critical to the due process component of Florida's jurisdictional analysis. *Meyer*, 492 So. 2d at 1315; *Erie Insurance*, 202 So. 3d at 155; *Shewmake*, 642 So. 2d at 1161.

In sum, the Declaration produced by Progressive Preferred established that it has not taken any action to purposefully avail itself of the privilege of conducting activities within Florida. The fact that the Ohio policy provides national coverage is insufficient in itself to establish minimum contacts, and so are Mr. Prin's unilateral acts of driving a covered motor vehicle in Florida and getting into an accident. Hence, Unified Medical has failed to establish that Progressive Preferred had the minimum

contacts with Florida necessary under the Fourteenth Amendment, and the trial court did not err in dismissing Unified Medical's Amended Complaint on this basis.

### **III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING UNIFIED MEDICAL'S REQUEST TO CONDUCT ADDITIONAL JURISDICTIONAL DISCOVERY.**

At the hearing on the Motion to Quash and Dismiss, Unified Medical argued it had met its burden of proof by producing the unauthenticated website printouts. Unified Medical also relied on counsel's supposition that Ms. Betts and Progressive Preferred's counsel were paid by Progressive's parent company. Unified Medical alternatively requested that the trial court allow jurisdictional discovery so it could depose Ms. Betts.

When it became clear that Unified Medical had failed to meet its burden of proof, Unified Medical repeated its request for jurisdictional discovery, asserting that "all this record evidence that counsel discusses is within her exclusive possession and control." (T. 20) The trial court denied the request for jurisdictional discovery, and Unified Medical summarily argues this was error. (I.B. 8-9)

The Florida Supreme Court has adopted the federal courts' policy of permitting jurisdictional discovery "because limited discovery in such instances will provide the trial court with additional information on which to

base its decision regarding jurisdiction." *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992). The court reasoned, "While a plaintiff should not file a frivolous complaint alleging personal jurisdiction, we recognize that averments made in good faith may not always rise to assertions which could be made under oath." *Id.* So a plaintiff should be permitted to gather facts to form the basis of its opposing affidavit. *Id.*

However, the trial court has wide discretion when ruling on requests for jurisdictional discovery, and appellate courts should not disturb the lower court's rulings unless that discretion is clearly abused. *Estes*, 259 So. 3d at 198. And parties are only entitled to jurisdictional discovery requested for the first time at the hearing on the motion to dismiss if they carry their burdens of production and the evidence in conflict and cannot be harmonized. See *Estes*, 259 So. 3d at 199; *Rizack v. Signature Bank, N.A.*, 267 So. 3d 24, 25 (Fla. 4th DCA 2019); *McMillan v. Troutman*, 740 So. 2d 1227, 1229 (Fla. 4th DCA 1999); *Magic Pan Int'l, Inc. v. Colonial Promenade*, 605 So. 2d 563, 567 (Fla. 5th DCA 1992).

When plaintiffs fail to meet their burden of presenting evidence to rebut the defendant's jurisdictional affidavits, the trial court does not abuse its discretion in denying the plaintiffs' request for "limited jurisdictional

discovery at the eleventh hour." *Estes*, 259 So. 3d at 198, 199. Indeed, a plaintiff who fails to produce an affidavit or other sworn proof to establish a jurisdictional basis "act[s] at her own peril in attending a non-evidentiary hearing at which the trial court would be able to consider only the complaint, the motion to dismiss, and [the defendant's] affidavit." *Id.* at 199 (quoting *Rollet v. de Bizemont*, 159 So.3d 351, 356 (Fla. 3d DCA 2015)).

As is established in issues I and II, Unified Medical failed to meet its burden of producing evidence to refute the Declaration produced by Progressive Preferred. Because Unified Medical failed to present conflicting evidence, there was no dispute of fact for the trial court to resolve. Under Florida law, Unified Medical acted at its own peril in attending the hearing without having conducted jurisdictional discovery, and it was disingenuous for it to assert that "all this record evidence that counsel discusses is within her exclusive possession and control." (T. 20)

Moreover, the Florida Supreme Court has adopted the federal courts' policy on jurisdictional discovery, and federal courts routinely deny jurisdictional discovery if "the party unduly delayed in propounding discovery or seeking leave to initiate discovery." *Herderos De Roberto Gomez Cabrera, LLC v. Teck Res., Ltd.*, 43 F.4th 1303, 1312 n.4 (11th Cir. 2022) (quoting *ACLU of Fla., Inc. v. City of Sarasota*, 859 F.3d 1337, 1341

(11th Cir. 2017)). So, "a district court does not abuse its discretion in dismissing the plaintiff's action for lack of personal jurisdiction, even before jurisdictional discovery occurs, when the plaintiff has not diligently pursued such discovery despite the opportunity to do so." *Henriquez v. El Pais Q'Hubocali.com*, 500 Fed. App'x 824, 830 (11th Cir. 2012).

In this case, Progressive Preferred filed its Motion to Quash and Dismiss on August 23, 2022. In the Motion, Progressive Preferred asserted that (1) it is incorporated in and a resident of the State of Ohio, (2) it does not have any agents in Florida, have any business locations in Florida, or conduct business in Florida, (3) it is not authorized to sell insurance in Florida, and (4) the policy of insurance at issue in this case was originated in Ohio and is governed by Ohio law. In support of its assertions, Progressive Preferred referenced a Declaration that was to be filed.

Unified Medical filed a Response on September 19, 2022, in which it asserted its alter ego theory. As factual support, Unified Medical attached website printouts of the Consent Order, LexisNexis Search, and News Release. At this point, Unified Medical clearly was aware that there was a challenge to personal jurisdiction and of its defense to same. But instead of requesting jurisdictional discovery, Unified Medical waited until the

December 2022 hearing to do so. The trial court did not abuse its discretion in denying this eleventh hour request. See *Henriquez*, 500 Fed. App'x at 830.

Finally, the trial court dismissed the Amended Complaint without prejudice to its filing a new complaint in a separate action "with all this information" Unified Medical claimed existed to support its alter ego theory. (T. 20) Accordingly, Unified Medical will not be prejudiced by the trial court's denial of its last minute request for jurisdictional discovery. Instead, it will have an opportunity to file a new action and then make a timely request for same when jurisdiction is challenged so that way, the trial court can consider more than sweeping allegations against Progressive Preferred. The bottom line is that the trial court did not abuse its discretion in denying jurisdictional discovery made in an attempt by Unified Medical to avoid the consequences of failing to meet its burden of proof.

## **CONCLUSION**

Progressive Preferred respectfully requests that this Court affirm the Order on Defendant's Limited Appearance Motion to Quash Service and to Dismiss for Failure to Attach Policy, Lack of Personal Jurisdiction and to Dismiss for Improper Venue Forum Non Conveniens.

Respectfully submitted,

*/ s / Joye B. Walford*

By:

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service through the Florida E-filing Portal to: **Jason Tenenbaum, Esquire**, [efiling@tenenbaumlawgroup.com](mailto:efiling@tenenbaumlawgroup.com), [jason@tenenbaumlawgroup.com](mailto:jason@tenenbaumlawgroup.com); Tenenbaum Law Group, PLLC, 1600 Ponce DeLeon Boulevard, 10th Floor, Coral Gables, FL 33134; this **5th** day of **September, 2023**.

*/ s / Joye B. Walford*

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## CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the applicable font and word count limit requirements.

*/ s / Joye B. Walford*

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