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## **STATEMENT OF FACTS**

Relator's statement of facts does not comply with Rule 84.04 in that it is argumentative. In this regard, Relator's statement of facts includes citations to legal authorities and argument in support of various legal conclusions. Because Relator's statement of facts is improperly argumentative, Plaintiffs provide the following unbiased statement of the pertinent facts in this writ proceeding.

Plaintiffs initiated the underlying lawsuit on October 15, 2003, by serving a summons and a copy of the petition upon Roger Burnett, the corporate representative of Relator Ford Motor Company (hereinafter "Ford"), in Jackson County, Missouri. (A1).<sup>1</sup> On December 10, 2003, a summons and a copy of the petition was served on Danny Baker, the personal representative of the estate of Terry G. Baker (hereinafter "Baker"), in Jackson County, Missouri. (A14). Plaintiffs' petition states claims on behalf of Rusty Herring, Marissa Herring and Megan Herring against defendants Ford and Baker. (A3). Each count of Plaintiffs' petition states a claim on behalf of all Plaintiffs, including Rusty Herring. (A3-A12). Plaintiffs' petition alleges that Rusty Herring resides in Jackson County, Missouri. (A3).

On November 20, 2003, Ford filed a motion for change of venue in which it

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<sup>1</sup> All record cites refer to the Appendix filed by Relator.

alleged that venue was not proper in Jackson County because neither of the defendants resides in Jackson County. (A17-A20). Ford's motion to dismiss did not include any allegations regarding the residence of Plaintiffs. (A17-A20). On December 10, 2003, Plaintiffs filed a reply to Ford's motion in which they explained that venue was proper in Jackson County pursuant to R.S.Mo. § 508.010(1) because both of the defendants had been found in Jackson County. (A21-A25). On December 27, 2003, Ford filed its reply to Plaintiffs' reply to Ford's motion. (A30-A35). Ford's reply did not include any allegations regarding the residence of Plaintiffs. (A30-A35). On January 9, 2004, defendant Baker filed a motion for change of venue. (A13-15). Defendant Baker subsequently withdrew his motion for change of venue on January 19, 2004. (A46).

On March 16, 2004, the trial court issued an order in which it noted that defendant Baker, by withdrawing his motion for change of venue, had consented to venue in Jackson County. (A49). The court asked the parties to submit additional briefing on the following question: "Where one defendant consents to venue, what effect does that consent have on the right of other defendants to change venue?" (A49). Ford and Plaintiffs both filed supplemental briefs on this issue. (A51-A59). On April 22, 2004, the trial court issued an order in which it found that there was no controlling precedent on the question that it had previously submitted to the parties.

(A60-A62). The court held that, in the absence of controlling precedent, it would not transfer part of a case to a different venue because such action would be contrary to the policy of avoiding piecemeal and redundant litigation. (A62).

On May 6, 2004, Ford filed a petition for writ of prohibition in the Court of Appeals for the Western District. (A63-A74). In that writ petition, Ford raised the issue of Rusty Herring's residence for the first time, arguing that Rusty Herring's residence could not serve as a basis for venue because no claims were stated on behalf of Rusty Herring in Plaintiffs' petition. (A63-A64). On May 19, 2004, the Court of Appeals for the Western District denied Ford's writ petition. (A106).

Ford filed a petition for writ of prohibition in this Court on June 18, 2004. This Court issued a preliminary writ of prohibition on August 24, 2004. Plaintiffs filed their answer to petition for writ of prohibition on September 22, 2004. (A107-A117). This writ proceeding followed.

## ARGUMENT

**I. RESPONSE TO FORD’S POINT RELIED ON NO. 1: FORD IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN TRANSFERRING THIS CASE TO ANOTHER COUNTY BECAUSE VENUE IS PROPER IN JACKSON COUNTY IN THAT PLAINTIFFS’ ALLEGATION OF VENUE IS BASED UPON R.S.MO. § 508.010(1) AND BOTH OF THE DEFENDANTS WERE FOUND IN JACKSON COUNTY.**

Ford seeks a writ of prohibition on the ground that Respondent has misconstrued or misapplied the law with respect to application of the general venue statute, R.S.Mo. § 508.010. In this regard, Ford makes two separate arguments. First, Ford argues that subsection (1) of the general venue statute cannot be applied in a case that involves multiple defendants. Second, Ford argues that it was not “found” in Plaintiffs’ county of residence because the individual who was served in Plaintiffs’ county of residence is not a “general agent.” Plaintiffs will address both of these arguments. However, as a preliminary matter, Plaintiffs believe it is important for this Court to understand the necessity of drawing a clear line between these two issues.

The first issue – whether venue may be established under subsection (1) in an action involving multiple defendants – pertains to both of the defendants in this action. Although neither of the defendants in this action resides in Jackson County, Plaintiffs have served both of the defendants in Jackson County and have premised venue on the fact that both defendants were “found” in Jackson County. Thus, if this Court holds that subsection (1) cannot be applied in a case involving multiple defendants, then subsection (1) cannot serve as a basis for venue as to either of the defendants in this action.

The second issue – whether Ford was “found” in Plaintiffs’ county of residence – pertains only to Ford. Thus, if this Court holds that subsection (1) can be applied in an action involving multiple defendants, but also finds that Ford was not “found” in Plaintiffs’ county of residence, then venue will be deemed improper only as to Ford. Under these circumstances, venue would still be proper as to defendant Baker because defendant Baker has not challenged the fact that he was “found” in Plaintiffs’ county of residence.

In issuing its opinion, it is important that this Court clearly delineate between these two separate issues.

**A. R.S.Mo. § 508.010(1) Applies To Actions That Involve Multiple Defendants.**

As Ford acknowledges in its brief, the general venue statute (section 508.010) applies in this case because Plaintiffs' petition names both an individual and a corporation as defendants. Section 508.010 states in pertinent part as follows:

Suits instituted by summons shall, except as otherwise provided by law, be brought:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides.

R.S.Mo. § 508.010 (emphasis added).

Plaintiffs contend that venue is proper in Jackson County pursuant to subsection (1) of the general venue statute because both of the defendants in this case were "found" and served in Jackson County. In contrast, Ford argues that venue

cannot be obtained under subsection (1) because subsection (2) can be applied when there are multiple defendants. Stated another way, Ford argues that, when there are multiple defendants, subsection (2) must be applied to the exclusion of subsection (1). Ford's argument is contrary to Missouri case law and is inconsistent with standard principles of statutory construction.

**1. Missouri courts have consistently held that subsection (1) of the general venue statute may be applied in actions that involve multiple defendants.**

Missouri courts have long recognized that section 508.010(1) applies regardless of the number of defendants that are involved in the action. In State ex rel. Bartlett v. McQueen, 238 S.W.2d 393 (Mo. Banc 1951), this Court stated this principle as follows:

Where an action is instituted in the county of plaintiff's residence against more than one defendant residing in another county or counties, the jurisdiction of the circuit court in which the action is instituted is limited to those defendants found and served with process in the county of plaintiff's residence. The word 'defendant' appearing near the close of clause (1) of Sec. 508.010, supra, must be construed to mean defendant

in the collective sense.

Id. at 395-96 (overruled on other grounds).<sup>2</sup>

The decision in Bartlett was consistent with an earlier decision, State of Missouri to use of McCormick v. McDougal, 16 Mo.App. 414, 1885 WL 7639, (Mo. App. 1885). In McCormick, the court addressed a factual situation that was similar to the instant case in all significant aspects. The plaintiff, a resident of the City of St. Louis, brought an action against two defendants, one of whom resided in the state of Illinois and one of whom resided in Clark County, Missouri. Id. at \*1. The action was

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<sup>2</sup> The Bartlett decision was subsequently overruled, along with numerous other venue decisions, by this Court's decision in State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 821 (Mo. Banc 1994). In DePaul Health Center, this Court recognized that the concepts of venue and jurisdiction had been severed and overruled prior decisions that had connected the two concepts. Id. at 822. While DePaul Health Center overruled prior venue decisions with regard to the issue of whether venue and jurisdiction were connected, DePaul Health Center did not overrule the other principles pertaining to venue that had been stated in Bartlett and similar decisions. Indeed, Ford cites a case in its own brief – State ex rel. Minihan v. Aronson, 165 S.W.2d 404 (Mo. 1942) – that was also subsequently overruled by DePaul Health Center. (Ford's Brief, p. 19).

brought in the City of St. Louis and both of the defendants were found and served in the City of St. Louis. Id. The defendant argued that venue could only be determined under the third subsection of the venue statute which pertained to actions involving both resident and non-resident defendants. Id. The court rejected this argument and held that venue was proper under the first subsection of the venue statute because both of the defendants were found in the county of the plaintiff's residence. Id. The venue provision in question was an earlier codification of the general venue statute that is virtually identical to section 508.010. Id.

Subsequent cases have also applied the principle that was set forth in Bartlett. In Sledge v. Town & Country Tire Centers, Inc., 654 S.W.2d 176 (Mo. App. 1983), the court reaffirmed the holding from Bartlett that, in an action against multiple defendants, venue is proper as to each defendant who is "found" within the county of plaintiff's residence. Id. at 189. Likewise, the court in Kissenger v. Allison, 328 S.W.2d 952, 959 (Mo.App. 1959) reaffirmed the holding of Bartlett and restated the principle from Bartlett virtually word for word. Id. at 959.

The decisions in Bartlett, McCormick, Sledge and Kissenger plainly indicate that subsection (1) of the general venue statute may be applied in cases involving multiple defendants. In the briefing before the trial court and the Western District Court of appeals, Plaintiffs focused upon the Kissenger decision because it is the most recent

case to address this issue in detail. In the brief that Ford has filed with this Court, Ford argues that Kissenger is the only case that supports Plaintiffs' position and attempts to portray Kissenger as an isolated case that is inconsistent with Missouri law. As Plaintiffs have explained, this is simply not true. Kissenger is not an isolated case, but is instead one of several cases to hold that subsection (1) of the general venue statute applies to actions that involve multiple defendants. Indeed, the holding in Kissenger is virtually identical to this Court's earlier holding in Bartlett. Nevertheless, because Ford's brief focuses solely upon Kissenger, Plaintiffs will address the specific criticisms that Ford levels at Kissenger.

Ford does not deny the basic holding of Kissenger. Indeed, given the clear and unequivocal language of the Kissenger decision, Ford would be hard pressed to argue that the Kissenger court did not mean exactly what it said. Rather than addressing the content of Kissenger, Ford attempts to sidestep Kissenger by essentially arguing that Kissenger is no longer good law in Missouri or is not binding in this action. In this regard, Ford makes three arguments: (1) Ford argues that Kissenger did not involve corporate defendants, (2) Ford argues that Kissenger was not submitted to this Court for review, and (3) Ford argues that other cases since Kissenger have applied subsection (2) when dealing with multiple defendants. None of these arguments holds up to close scrutiny.

Although Ford points out that neither of the defendants in Kissenger were corporations, Ford offers no explanation for why this distinction is at all significant. The general venue statute does not distinguish between individual defendants and corporate defendants. The general venue statute merely speaks in terms of “defendants.” Thus, it would appear to make no difference whatsoever that the defendants in Kissenger happened to be individuals rather than corporations. Of course, if all of the defendants in an action were corporations then the corporate venue statute would apply rather than the general venue statute. However, in terms of the general venue statute, there is no distinction between a case that involves all individual defendants and a case that involves both individual and corporate defendants. Finally, at least one Missouri case has found that the principle stated in Kissenger applies in an action involving both individual defendants and corporate defendants. See Sledge, 654 S.W.2d at 179 (Noting, in a case involving both individual and corporate defendants, that venue was proper as to any defendant that was found in the plaintiff’s county of residence.).

As for Ford’s argument that Kissenger was not submitted to this Court for review, the obvious explanation is that the Kissenger court was applying a standard that had previously been established by this Court. As Plaintiffs have already noted, the pertinent language in Kissenger is virtually identical to the pertinent language in this

Court's preceding decision in Bartlett. Furthermore, the Kissenger court specifically stated that it was following the law as stated in Bartlett. Kissenger, 328 S.W.2d at 959. Thus, it makes no difference that Kissenger was not submitted to this Court for review.

Finally, Ford argues that Kissenger is no longer good law because other cases have applied subsection (2) of the general venue statute in actions involving multiple defendants. Plaintiffs will address this point in more detail in the section of this brief that immediately follows. As Plaintiffs will explain, the essential fallacy in this argument is the underlying assumption that venue cannot arise under more than one subsection of the general venue statute.

**2. The cases cited by Ford do not support the proposition that subsection (2) of the general venue statute applies to the exclusion of subsection (1).**

In arguing that subsection (2) of the general venue statute must be applied in an action that involves multiple defendants, Ford relies primarily upon cases in which courts have addressed the propriety of venue under subsection (2) in various circumstances. The problem is that none of these cases address the issue in this case: whether subsection (1) of the general venue statute may be applied in an action

involving multiple defendants. A brief review of the cases cited by Ford illustrates this point.

C In State ex rel. England v. Koehr, 849 S.W.2d 168 (Mo. App. 1993), the court addressed the issue of “whether where an unregistered foreign corporation maintains an office in St. Louis City that city may be treated as the corporation’s residence for purposes of venue.” Id. at 169. In that regard, the court stated as follows: “Where individual and corporation are joined, venue may be obtained only at a ‘residence’ of one of the defendants (or at the venue of the tort). An unregistered foreign corporation does not have a ‘residence’ under the statutes.” Id. at 169-70.

C In State ex rel. Riley v. McHenry, 801 S.W.2d 779 (Mo. App. 1991), the court considered whether subsection (2) or (3) applied to determine venue when one of the defendants is a foreign insurance company. Id. at 780-81. Specifically, the court considered whether a foreign insurance company’s designation of the Director of the Division of Insurance to receive process, pursuant to R.S.Mo. § 375.906, was sufficient to establish that company’s residence in Cole County for venue purposes. Id. at 781.

- C In State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. Banc 1991), the Court considered the following question: “[w]here does a foreign insurance corporation, as distinguished from a foreign business corporation, reside for venue purposes pursuant to § 508.010(2).” Id. at 197. The Court concluded that “[t]he county of residence for a business corporation for purposes of § 508.010(2) is the county where its registered office and agent is maintained.” Id. at 198.
- In State Farm Mutual Automobile Insurance Co. v. Ryan, 766 S.W.2d 727 (Mo. App. 1989), the court considered the application of subsection (2) to a foreign insurance corporation. Id. at 728. In this regard, the court noted that “Missouri has long recognized that a foreign corporation licensed to do business in this state ‘resides’ in the county where its registered office and registered agent is located.” Id. The court concluded that venue was not proper in the City of St. Louis under subsection (2) because none of the defendants resided in the City of St. Louis. Id.
  - In State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140 (Mo. Banc 2002), the Court described the issue before it as follows: “This case presents the narrow issue whether the special nonprofit corporate

venue statute, section 355.176.4, or the general venue statute, section 508.010(2), governs when a nonprofit corporation and an individual are sued together.” Id. at 140-41. The Court concluded that section 355.176.4 provides the exclusive venue provision in an action against a nonprofit corporation. Id. at 145.

- In State ex rel. Minihan v. Aronson, 165 S.W.2d 404 (Mo. 1942), the Court considered the question of whether service could be in a county other than the county of venue when venue was obtained under the special venue statute for public carriers. Id. at 406. In this regard, the Court stated as follows: “In the absence of a special venue statute the general venue statutes and the general service statutes are construed together and if the action is personal the suit must be instituted in the county of the defendant's residence or in the county of the plaintiff's residence when the defendant is found there, except, of course, when there are several defendants.” Id. at 407. The Court concluded that service could not be had in a county different than the county of venue. Id. at 407-08.
- In State ex rel. Parks v. Corcoran, 625 S.W.2d 686 (Mo. App. 1981), the court considered whether venue was proper under subsection (2) based

upon the location of a corporate defendant's registered office. Id. at 688. The defendant took the position that the corporate venue statute (508.040) applied even though the action stated claims against both individual and corporate defendants. Id. The court rejected this argument, citing to the long line of cases which hold that the general venue statute (508.010) applies under such circumstances. Id.

It is clear that none of the cases cited by Ford address the issue of whether venue may be obtained under subsection (1) of the general venue statute when an action is brought against multiple defendants. Five of Ford's cases – England, Riley, Rothermich, Ryan and Parks – address the following question: When a claim of venue is premised upon subsections (2) or (3), how does the court go about determining where a defendant resides? One of Ford's cases – SSM Health Care – addresses the question of whether the general venue statute or a special venue statute applies. Ford's other case – Minihan – addresses the question of whether service can be had in a different county than the county of venue when proceeding under the venue statute that pertains to public carriers. None of Ford's cases considers the application of subsection (1) and none of Ford's cases addresses the issue of whether subsections (2) and (3) apply to the exclusion of subsection (1).

Although Ford's cases indicate that subsections (2) and (3) may be applied when there are multiple defendants, Ford's cases do not indicate that subsection (1) may not be applied when there are multiple defendants. The fundamental fallacy in Ford's argument is Ford's assumption that only one subsection of the general venue may apply under a given state of facts. Ford essentially argues that because venue may be determined under subsection (2) when there are multiple defendants, it necessarily follows that venue may not be determined under subsection (1). However, none of the cases cited by Ford support this argument. Furthermore, this same line of argument was rejected in Kissenger.

In Kissenger, the defendant argued that subsection (1) of the general venue statute could not be applied in a case involving multiple defendants because other cases had applied subsection (3) in actions involving multiple defendants. Kissenger, 328 S.W.2d at 955-57. The court rejected this line of argument, stating as follows:

These authorities relied upon by relator do not in any way support his contention on the facts in the particular case. Each case must be considered upon the particular facts involved. In the above case, venue was not conferred upon the defendants by subsection (1). The action was on a promissory note, an action in personam. It was brought where the plaintiff lived but the defendant or defendants were not found in the

jurisdiction of the county of plaintiff's residence and plaintiff attempted to get service on the defendants in another county. Under the venue statute, on these facts, the suit necessarily should have been brought in the county where the defendants resided. It does not hold or even intimate that subsection (3) of § 508.010 fixes exclusive venue in a civil action on facts as in the case at bar. It is not in conflict nor does it repeal by implication the opinion in the St. Louis Court of Appeals in State, to Use of McCormick v. McDougal.

Id. at 958.

The above-quoted portion of Kissenger recognizes a basic point: a number of venue cases address the application of subsection (2) or (3) of the general venue statute in relation to multiple defendants because, in those cases, the plaintiff attempted to establish venue based upon the residence of the defendants. When the plaintiff is focusing on the residence of the defendants and is proceeding under subsections (2) or (3), it necessarily follows that the court's discussion will be limited to subsections (2) or (3). However, this does not mean that a plaintiff is barred from obtaining venue under subsection (1) by focusing upon the location where the defendants are "found" as opposed to the location where the defendants "reside." In short, the cases that address the application of subsections (2) and (3) do so because the plaintiff had

chosen to proceed under one of those subsections. In this case, Plaintiffs chose to proceed under subsection (1), so the cases that address the application of subsections (2) and (3) are inapposite.

**3. Standard principles of statutory construction support the conclusion that venue may be established under subsection (1) in an action involving multiple defendants.**

Ford argues that subsection (1) of the general venue statute cannot apply in situations involving multiple defendants because subsections (2) and (3) contain the words “when there are several defendants.” Ford argues that the inclusion of these words means that these two subsections apply to the exclusion of subsection (1) when there are multiple defendants. As an initial observation, Plaintiffs would point out that this line of reasoning was necessarily rejected by the decisions in Bartlett, McCormick, Sledge and Kissenger. The venue statute that was considered in each of those cases included the exact same language and the courts held, nonetheless, that subsection (1) could be applied in a case involving multiple defendants. Furthermore, in McCormick the court directly addressed and rejected this line of argument.

In McCormick, the defendant claimed that venue could only be obtained under subsection (3) of the general venue statute because there were multiple defendants in

the action, some of whom were non-residents. McCormick, 1885 WL at \*1. The court rejected this argument, stating as follows:

The defendants maintain that by the terms of the third clause, this suit could properly be brought no where but in Clark County, Missouri, where one of the defendants resides. Such a construction, ignoring all the other parts of the law, would set aside the plainest rules of statutory interpretation. If the clause stood entirely alone, there might be some plausibility in the claim.

The idea involved in the defendants' point is that, inasmuch as "there are several defendants, some residents and others non-residents of the state," the third clause is the only provision applicable; and that, as to each defendant, although "found" in the city of the plaintiff's residence, the second alternative of the first clause can not be applied, because it is superseded by the special provision made in the third clause for this particular class of cases. This would amount to a repeal by implication. Let us apply the same test to the operation of the second clause. By that interpretation, if there are several defendants residing in different counties in this state, a suit against them can be brought no where but in one of those counties.

To illustrate: A, residing in the city of St. Louis, holds a promissory note signed by B and C, who reside in different counties in this state, outside of St. Louis. If B be found in St. Louis A may sue him there, by virtue of the second alternative in the first clause. If C be afterwards found in the same place A may sue him also in the same court. But if unfortunately he should happen to sue them both in one proceeding, the jurisdiction must fail, because of the special provision made for all such cases in the second clause. Could any conclusion be more absurd? The illustration would equally fit an application of the third clause to the situation of the parties in the present case. The plaintiff might sue defendant Million under the first clause, because he was found in the city of St. Louis, where the plaintiff resides. He might sue defendant McDougal in the same jurisdiction, because, under the fourth clause, a non-resident defendant may be sued in any county. Yet, though a complete jurisdiction was thus acquired over each defendant, by virtue of the provisions applicable, respectively, to their several conditions, there could be no jurisdiction over both, because there happens to be still another provision by which, cumulatively, they might also be sued in the county of Million's residence. In other words the first and fourth clauses,

as to either defendant, are repealed by implication in the third. The law intends no such incongruities. They all vanish before a very familiar rule of statutory interpretation. In construing any part of a law, the whole must be considered; and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency. Sedgw. on Stat., 200. Thus the several clauses in the section under consideration are to be regarded as cumulative provisions for securing the jurisdiction over parties defendant, and not as repealing or superseding each other. If, by virtue of one provision, jurisdiction may be acquired over any defendant the practical effect of such provision is not to be annulled by the fact that another provision might subject him to jurisdiction in a different place, by reason of his association with other defendants. Effect must be given to all the provisions in a law, whenever possible; and there is no difficulty about so doing in the present instance.

Id.<sup>3</sup>

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<sup>3</sup> Because McCormick predates the division of venue and jurisdiction under Missouri law, the court used the word “jurisdiction” in place of “venue.” However, this distinction does not affect the court’s analysis.

Finally, logical analysis dictates that the inclusion of the phrase “when there are several defendants” was not intended to exclude the application of subsection (1), but rather to limit the application of subsections (2) and (3). Subsection (1) indicates that an action may be brought in the plaintiff’s county of residence if the defendant is “found” in that county. Obviously, either a single defendant or multiple defendants could be “found” in the plaintiff’s county. Thus, subsection (1) could apply in a case involving a single defendant or in a case involving multiple defendants. In contrast, subsections (2) and (3) indicate that the plaintiff may bring an action in any one of several counties where defendants reside. If a case involves a single defendant, that single defendant would reside in a single county, and the plaintiff could only choose one county that is the defendant’s county of residence. Thus, subsections (2) and (3), which involve a choice among several counties of residence, could not possibly apply in a case that involved only a single defendant. The limiting phrase “when there are several defendants” merely recognizes this inherent limitation upon the application of subsections (2) and (3). In other words, subsection (1) could apply to a single defendant or multiple defendants, but subsections (2) and (3) could only apply to multiple defendants, so the limiting language is included in the limited venue provisions stated in subsections (2) and (3).

**B. The Terms Of R.S.Mo. § 508.010(1) Have Been Met In This Case.**

Ford argues that Plaintiffs' service upon Roger Burnett in Jackson County does not comply with the terms of subsection (1) of the general venue statute because Mr. Burnett was merely an engineer who worked for Ford and was not Ford's "general agent." Ford's argument mischaracterizes both the law and the facts.

Rule 54.13 provides that service is effective upon an officer or general agent of a corporation. Ford relies upon State ex rel. MFA Mutual Insurance Company v. Rooney, 406 S.W.2d 1 (Mo. Banc 1966) for the proposition that a "general agent" is one empowered to transact all business of the principal at any particular time or any particular place. However, Ford fails to note that the court in MFA expanded upon the definition of general agent in the same paragraph cited by Ford, stating as follows: "[I]t is said that a general agent is one whom one puts in his place to transact all of his business in a particular line, and that such agent has all of the authority over the transaction of such business as the principal had." Id. (Emphasis added.) (Internal quotation marks omitted.). Thus, while Ford would have this Court believe that only a person who controls all aspects of a business could be a general agent, Missouri courts have recognized that a person of limited authority pertaining to specific aspects of a business may also fall within this category.

Roger Burnett was authorized to appear on Ford's behalf in legal actions that were brought against Ford. One aspect of Ford's business is conducting such litigation. In this regard, Ford maintains an Office of General Counsel and an Automotive Safety Office, the purpose of which is to manage and conduct the day-to-day affairs of this aspect of Ford's business. Ford's Automotive Safety Office employs engineers and others whose sole function is to consult on and testify in litigation matters. In short, Ford employs engineers whose sole purpose is to serve as consultants in litigation and to appear on Ford's behalf in litigation.

Roger Burnett is employed by Ford as a Design Analysis Engineer. In other words, Roger Burnett is a professional in-house litigation consultant and testifier for Ford. In this capacity, Mr. Burnett testifies as a corporate representative on behalf of Ford and has authority to represent Ford in this aspect of its business. When acting in this capacity as a corporate representative, Mr. Burnett is one who Ford puts in its place to transact all of Ford's business in a particular line, and in that capacity Roger Burnett has all of the authority over the transaction of such business.

When acting in his capacity as corporate representative, Roger Burnett is the physical embodiment of Ford. His testimony is the testimony of Ford and his admissions are the admissions of Ford. His power and authority are so great in this capacity that Mr. Burnett has the ability to bind Ford to admissions of liability. This

capacity precisely fits the definition of “general agent” stated by the court in MFA. Under the definition set forth in MFA, Roger Burnett was a “general agent” of Ford.

Ford argues that, in order to qualify as a general agent, an individual must have control over virtually all aspects of a corporation’s business. However, this is clearly not the standard applied by Missouri courts. In Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. Banc 1963), the Court considered a situation in which the petition was served upon an individual who sold the defendant’s products. Id. The individual was a manufacturer’s representative who maintained his own home office at his own expense and who worked strictly on a commission basis. Id. at 43-44. He was free to establish his own routes and methods of selling, although he could not change the basic price of the product that he sold. Id. at 44. In applying a prior version of Rule 54.06 that used the same language as Rule 54.13 – “by delivering a copy of the summons and the petition to an officer, partner, or a managing or general agent” – the court held that this individual was “the kind of agent described in the rule.” Id. at 47.

If the individual in Morrow, who worked solely in the area of sales, could qualify as a general agent, then surely Roger Burnett, who served as Ford’s representative in matters of litigation, would qualify as a general agent. Indeed, the facts of this case provide a much stronger argument for finding that the individual who was served was a general agent. Roger Burnett’s primary duties with Ford were

related to litigation. Thus, it is natural to expect that Mr. Burnett would be an appropriate person to serve with process. The same cannot be said of the individual who was served in Morrow – an individual who performed duties that were totally unrelated to litigation.

The Morrow decision clearly illustrates a willingness on the part of Missouri courts to find that individuals of limited authority may nonetheless qualify as a general agent. Missouri courts have reached the same conclusion in other industries. For example, in the context of the insurance industry, Missouri courts have held that a person who “has authority to sign, countersign and issue policies is a general agent.” State ex rel. MFA Mutual Insurance Co., 406 S.W.2d at 4. Obviously a person who fits this description does not have control over all aspects of an insurance company’s business. But such a person does have authority over one specific aspect of an insurance company’s business, and that limited authority is sufficient to qualify the person as a general agent.

Finally, because there are not a large number of Missouri cases that have attempted to define the term “general agent” for purposes of service, it may be helpful for this Court to consider cases which have interpreted substantially similar federal rules. Pursuant to the Federal Rules of Civil Procedure, service upon a corporation may be made “by delivering a copy of the summons and of the complaint to an

officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.” Fed.R.Civ.P. 4(h)(1). In defining the phrase “managing or general agent,” the federal courts have “established the proposition that one invested with general powers involving the exercise of independent judgment and discretion is such an agent.” Jim Fox Enterprises, Inc. v. Air France, 664 F.2d 63, 64 (5<sup>th</sup> Cir. 1981).

Federal courts have recognized that “service of process is not limited solely to officially designated officers, managing agents or agents appointed by law for the receipt of process. Service has been found sufficient when made upon individual who stands in such a position as to render it fair, reasonable and just to imply the authority on [her] part to receive service.” Schwartz & Associates v. Elite Line, Inc., 751 F.Supp. 1366, 1370 (E.D.Mo. 1990) (Internal citations and quotation marks omitted.). In this case, service was made upon an individual who acted as Ford’s representative in matters of litigation. Thus, it was certainly fair and reasonable to conclude that this individual had the authority to receive service in a matter of litigation. You would expect that a person who has the authority to bind Ford in litigation would also have the authority to receive notice of litigation on behalf of Ford. “A person not in charge of a corporation’s activities within a state may still qualify as a general or managing agent [under federal rules] if his position is one of sufficient responsibility so that it is

reasonable to assume he will transmit notice of the commencement of the action to his organizational superiors.” Alloway v. Wain-Roy Corp., 52 F.R.D. 203, 204 (E.D. Penn. 1971). In this case, it was reasonable to assume that a petition served upon Ford’s litigation representative would be transmitted to his superiors in the department that handles litigation on behalf of Ford.

In addition to arguing that Plaintiffs’ service upon Roger Burnett in Jackson County does not comply with the terms of subsection (1) of the general venue statute, Ford also argues that Plaintiffs failed to comply with the terms of subsection (1) because Plaintiffs did not establish that Plaintiffs reside in the county in which the action was brought. Once again, this argument is contrary to both the facts and the law.

Before addressing Ford’s argument regarding the Plaintiffs’ residence, Plaintiffs would point out that Ford raised this issue for the first time in the writ proceedings and did not raise this issue before the trial court. In the underlying proceedings before the trial court, Ford’s argument was based solely upon the premise that Roger Burnett was not Ford’s general agent. Ford did not present any argument to the trial court regarding Plaintiffs’ alleged failure to establish their residence in Jackson County. Plaintiffs contend that it is improper for Ford to raise this issue for the first time in these writ proceedings. Indeed, it is difficult to see how Ford can argue that the trial

court misapplied the law with respect to this issue if Ford never presented this issue to the trial court.

Assuming, for the sake argument, that it is proper for Ford to present this issue for the first time in these writ proceedings, it is nonetheless true that Ford's argument mischaracterizes the facts. Ford claims that although Rusty Herring is designated as an individual plaintiff in this action, he does not state any individual claims for injuries. This is simply incorrect. Every count in Plaintiffs' petition is stated on behalf of all of the plaintiffs, including Rusty Herring. (A5-A12). If Ford is arguing that Plaintiffs' petition is not sufficiently definite, then Ford should have filed a motion to make the petition more definite. Ford is not entitled to superimpose its own interpretation upon Plaintiffs' petition for purposes of arguing that Plaintiffs have failed to establish venue.

Ford's argument is also inconsistent with Missouri law regarding the burden of proof on the issue of venue. Under Missouri law, a plaintiff is not required to plead venue. State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 31 (Mo. App. 2002); Wood v. Wood, 716 S.W.2d 491, 494 (Mo. App. 1986). Rather, "[t]he party attacking venue has the burden of persuasion and proof that venue is improper." Coale v. Grady Brothers Siding and Remodeling, Inc., 865 S.W.2d 887, 889 (Mo. App. 1993); see also Etter, Inc., 70 S.W.3d at 31; Pierce v. Pierce, 621 S.W.2d 530, 531 (Mo. App. 1981). Ford attempts to turn this standard on its head by arguing that Plaintiffs failed

to plead venue and by simply pointing to Plaintiffs' petition in support of this argument. Plaintiffs were not required to plead venue and if Ford wanted to challenge venue Ford had the burden of presenting evidence in support of its challenge. Ford has presented no evidence regarding the residence of any of the Plaintiffs. Thus, Ford has necessarily failed to meet its burden of proof.

Finally, so that there will be no doubt about the matter, Plaintiffs do assert that they were residents of Jackson County at the time their petition was filed and served. Had Ford raised this issue before the trial court, Plaintiffs would have been happy to amend their pleading to make this matter more definite and/or to provide the court with evidence of Plaintiffs' residence. However, as previously noted, Ford raised this issue for the first time in its writ petition before the Court of Appeals for the Western District. Thus, Plaintiffs had no opportunity to address this issue with additional evidence.

**II. RESPONSE TO FORD’S POINT RELIED ON NO. 2: FORD IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING FURTHER ACTION ON THIS MATTER OTHER THAN TRANSFERRING THIS CASE TO ANOTHER COUNTY BECAUSE VENUE IS PROPER IN JACKSON COUNTY IN THAT FORD’S CO-DEFENDANT CONSENTED TO VENUE.**

The trial court, finding that there was no applicable precedent regarding the effect that one defendant’s waiver of venue has upon a co-defendant, concluded that it was preferable, for reasons of judicial efficiency, to retain the entire action in a single venue. Although there is no direct Missouri precedent on this issue, there is compelling Missouri authority regarding the analogous policy against splitting a claim.

Missouri courts have expressed a “strong bias against the splitting of claims [that] arises from the judicial desirability of litigating all claims in one suit rather than wasting the court’s time on separate lawsuits for separate claims between the same parties arising out of the same transaction.” McCrary v. Truman Medical Center, Inc., 943 S.W.2d 695, 697 (Mo. App. 1997). “The rule against splitting a cause of action serves to prevent a multiplicity of suits and appeals with respect to a single cause of action, and is designed to protect defendants against fragmented litigation, which is

vexatious and costly. The rule also implements a public and judicial policy applied by federal and state courts to foster the efficient and economic administration of the judicial system by forestalling an undue clogging of the courts.” Bagsby v. Gehres, 139 S.W.3d 611, 615 (Mo. App. 2004); see also Shelter Mutual Insurance Co. v. Vulgamott, 96 S.W.3d 96, 105 n.6 (Mo. App. 2003); Hutnick v. Beil, 84 S.W.3d 463, 466 (Mo. App. 2002). “The prohibition against splitting a single cause of action serves to protect both the courts and the litigants from the harassment of repetitious litigation.” Property Exchange & Sales, Inc. v. Garrett, 924 S.W.2d 30, 32 (Mo. App. 1996).

The situation that the trial court faced in the instant case is similar to the situation arising when a party attempts to split a claim. In the case of splitting a claim, a party attempts to pursue separate claims against the same defendant in separate actions, resulting in a multiplicity of lawsuits and a loss of judicial efficiency. In the instant case, a transfer of venue as to one defendant would result in Plaintiffs pursuing the same claims against jointly liable defendants in separate actions, again resulting in a multiplicity of lawsuits and a loss of judicial efficiency. In each situation, the underlying principle is the same: it is preferable to try claims that arise from the same transaction or same set of operative facts in a single forum in order to avoid fragmented and piecemeal litigation that is vexatious and costly to both the parties and

the courts.

While the public policy of avoiding fragmented and piecemeal litigation clearly weighs against transferring venue as to one of two defendants, it is also important to note that there is no fundamental impropriety in requiring a defendant to remain in a particular venue for purposes of judicial efficiency. Indeed, pursuant to subsections (2) and (3) of the general venue statute, defendants are frequently required to submit to a venue in which they do not reside.

In short, the trial court's decision is well reasoned and is consistent with Missouri public policy pertaining to the avoidance of fragmented and piecemeal litigation.

### **CONCLUSION**

For the reasons stated herein, Plaintiffs respectfully request that this Court not issue a permanent writ of prohibition in this action.

Respectfully submitted,

**LANGDON & EMISON**

By: \_\_\_\_\_

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