

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

WILLIAM KEMPER, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 PRIME TANNING CORP., et al.,)
)
 Defendants.)

Case No. 09CN-CV00333

F I L E D
MAY 10 2010

MOLLY LIVINGSTON
 Clerk of Clinton Co. Circuit Court

**DEFENDANTS ELEMENTIS LTP L.P. AND
 BURNS & MCDONNELL ENGINEERING COMPANY, INC.'S
 MOTION AND SUPPORTING SUGGESTIONS TO STRIKE
 "PLAINTIFFS' SUPPLEMENTAL SUGGESTIONS REGARDING CHANGE OF
 VENUE PURSUANT TO MO. CT. RULE 51.03 AND
 SUGGESTIONS IN OPPOSITION TO DEFENDANTS' WITHDRAWAL
 OF THEIR MOTIONS TO CHANGE VENUE"
 (SUBMITTED PER COURT'S LETTER-REQUEST OF APRIL 21, 2010)**

Defendants Elementis LTP L.P. ("Elementis") and Burns & McDonnell Engineering Company, Inc. ("Burns & McDonnell"), by and through counsel, seek an Order of this Court striking the pleading entitled "Plaintiffs' Supplemental Suggestions Regarding Change of Venue Pursuant to Mo. Ct. Rule 51.03 and Suggestions in Opposition to Defendants' Withdrawal of their Motions to Change Venue" on the basis that there is no pending motion to which these "Suggestions" could apply.

Suggestions in Support of this Motion are included and incorporated herein.

SUGGESTIONS IN SUPPORT

On or about April 29, 2010, Defendants National Beef Leathers, LLC ("NBL") and Prime Tanning Corp. and Prime Tanning Co., Inc. (the "Prime defendants") withdrew previously filed applications for change of venue. The original applications to change venue were filed prior to the time that Defendants Elementis and Burns and

McDonnell were brought into this lawsuit, and were argued before either had filed an answer. Thus, this Motion is these defendants' first opportunity to address the issue. Elementis and Burns and McDonnell submit this Motion and Suggestions in response to the Court's April 21, 2010 letter inviting written positions.¹

In response to co-defendants' withdrawal of motions to change venue, Plaintiffs filed "Supplemental Suggestions" and "Suggestions in Opposition" in a single document on or about May 5, 2010. At the time of that filing, however, there was no motion pending before the Court against which Suggestions in Opposition or Supplemental Suggestions could be filed. National Beef Leathers and the Prime Tanning defendants each filed a simple withdrawal, which gave notice to the Court and the parties that their motions were no longer pending. There was and is **nothing** pending before the Court regarding change of venue under Rule 51.03.²

Generally speaking in Missouri, there is no limitation on a party's ability to withdraw its own previously filed motion as long as it has not been ruled upon by the Court. There is no requirement to seek leave to file a withdrawal of an unaddressed application for change of venue, and there is no Order that is entered in response to the withdrawal. This issue was addressed in the context of a pending application for change of venue in the case State v. Perkins, 339 Mo. 27, 95 S.W.2d 75 (Mo.banc.1936). Albeit in the context of a criminal venue statute, the Missouri Supreme Court held that "[t]he right to a change of venue is not a constitutional right, but is a statutory privilege which can be waived. *Defendant had a right to insist upon her application for change of venue*

¹ Please note that Elementis and Burns and McDonnell did not receive the Court's letter until April 30, 2010.

² Notably, a motion is pending regarding transfer of venue of only one plaintiff under Rule 51.045. That motion raises a completely separate issue and analysis.

or withdraw it." *Id.*, 95 S.W.2d at 78 (emphasis added). In this case, each defendant's motion to change venue was mooted immediately upon the filing of the withdrawals.

Plaintiffs attempt a peculiar argument that Rule 51.03 somehow effectuates a change of venue upon the original filing of the motion for change. Notably, they cite no case law for this proposition. This argument is illogical and runs counter to common sense since, by its very nature, the filing of any motion or application requires a ruling by a court. In the absence of a specific ruling granting or denying relief, the application remains nothing more than a request. There is nothing in Rule 51.03 that supports plaintiffs' argument that the mere filing of a motion, without a subsequent order, automatically effects a change of venue.

Further, plaintiffs' suggestion that they have somehow been prejudiced by defendants' withdrawal is inconsistent with their own activity in this case. If plaintiffs had been interested in a change of venue or felt they were prejudiced by the venue in which they filed this lawsuit, they had the equal opportunity to file a timely motion for a venue change. Yet, they failed to do so. Clearly, plaintiffs did not feel that remaining in Clinton County was prejudicial to them or they would have filed an application that would have been granted as a matter of right under Rule 51.03. Plaintiffs cannot now say that they somehow relied on a motion, filed by their opposition, to preserve an option that they could have had as a matter of right upon their own timely filing. Plaintiffs' choice not to move for change of venue under Rule 51.03. They are out of time to do so now.

This case was filed in Clinton County and should continue to be venued in Clinton County.³ There is no change of venue motion before the Court that properly

³ Subject to the Motion to Transfer Venue filed by Elementis and Burns & McDonnell pursuant to Rule 51.045, which pertains to Plaintiff Janet Lasher.

requests that the Court move the case out of Clinton County. If the Court feels that there is a basis for addressing plaintiffs' Suggestions and is inclined to move the proceedings to a different venue, Defendants Elementis and Burns & McDonnell believe that the only potentially appropriate venues would be Barton, Lawrence or Greene counties.⁴ However, these defendants have not been able to identify a basis upon which a change of venue would be proper following the withdrawal of co-defendants' motions.

WHEREFORE, Defendants Elementis LTP L.P. and Burns & McDonnell Engineering Company, Inc. respectfully request that the Court strike plaintiffs' Suggestions as they seek to address a moot issue.

⁴ Jackson and Cass counties are not appropriate venues for the reasons discussed in earlier briefing filed by Prime Tanning. Due to the intense Kansas City area media attention given to this litigation and allegations regarding the Prime Tanning land application, those venues are presently, and will likely continue to be, targets for non-objective reporting that is highly prejudicial to the defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by First Class United States Mail, Postage Prepaid, on the following counsel of record this 7th day of May, 2010:

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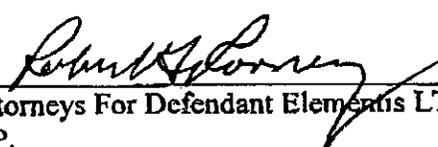
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