

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

FILED  
MAY 20 2010

BEVERLY LONG, et al.,  
Plaintiffs,  
vs.  
PRIME TANNING CORP., et al.,  
Defendants.

Case No. 09CN-CV00427  
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"**

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 plaintiffs' "Suggestions" could apply.

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

**SUGGESTIONS IN SUPPORT**

**A. The Application for Change of Venue Has Been Withdrawn**

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. Neither Elementis nor Burns and McDonnell sought a change of venue under Rule 51.03.

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 6, 2010. Plaintiffs' filing, therefore, occurred over a week after co-defendants had withdrawn their motions for change of venue. As a result, there was no motion pending before the Court against which plaintiffs' 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.

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. The withdrawal is effective upon its filing. The right to withdraw a pending application for change of venue was addressed 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 or withdraw it.*" Id., 95 S.W.2d at 78 (emphasis added). In this case, each co-defendant's prior motion to change venue was mooted immediately upon the filing of the withdrawals.

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**B. Plaintiffs' Request That the Court "Ignore" the Withdrawals Has No Basis**

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 or the case law that supports plaintiffs' argument that the mere filing of a motion, without a subsequent order, automatically effects a change of venue. There is no basis to "ignore" the withdrawals.

**C. Plaintiffs Are Not Prejudiced By the Withdrawals**

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 chose not to move for change of venue under Rule 51.03 and cannot do so now.

**D. Plaintiffs' Request for Venue in Jackson County Is Also Without Basis and, If Allowed, Would Severely Prejudice the Defendants**

This case was filed in Clinton County and should continue to be venued in Clinton County. There is no timely-filed change of venue application before the Court that properly requests that the Court move the case out of Clinton County.

Despite the absence of an application, plaintiffs ask the Court to unilaterally move this case to Jackson County. They cite no legal basis for this proposal because there is no basis to move the case under either the Missouri Rules or case law. Even though this case involves only *two plaintiffs*, counsel for plaintiffs describes it as a "mass tort" case. Clinton County is fully capable of handling a matter involving two plaintiffs.

Plaintiffs are silent as to their true motivation for seeking a change to Jackson County. Despite filing the case in Clinton County (where plaintiffs allege that proper venue lies), they wish to have access to a jury pool in Kansas City. Also, plaintiffs' counsel is well aware of the substantial publicity generated by the Kansas City media about the alleged facts related to this litigation. *For example, a search for related stories between March 2005, and March 2010, shows that there were seventy-nine (79) news stories broadcast on Kansas City stations, and forty (40) hits in the Kansas City print media.* These numbers are roughly **twenty times more numerous** than the local media coverage in a representative northwest Missouri county (Livingston County was compared). Attached as Exhibit A are examples of print stories from a *one-month* period (April-May 2009) from the Kansas City media market.

Finally, in the absence of a pending application to change venue, any move to Jackson County will violate Mo. Rev. Stat. Section 508.010 -- the venue statute that *plaintiffs* cite in their petition as supporting venue in *Clinton County*.

For all these reasons, plaintiffs request for venue in Jackson County, Missouri has not been timely filed and should be denied. The two plaintiffs in this case will not create an administrative hardship for the Clinton County Court and the defendants will be severely prejudiced if the case is moved to Kansas City.<sup>1</sup> If the Court sees a basis for moving the venue in the absence of a timely-filed application, defendants request that they be given some notice to confer with plaintiffs and, if necessary, present the court with additional information on venue options.

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, and also because plaintiffs have not filed a timely application for change of venue.

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<sup>1</sup> As discussed in the Court's last hearing, all Defendants are willing to handle all pre-trial matters in Columbia, Missouri so that the Court is not required to travel.

Respectfully submitted,

LATHROP & GAGE LLP

By: *Robert G. Rooney*  
William G. Beck (26849)  
Douglas R. Dagleish (35203)  
Robert G. Rooney (43381)  
2345 Grand Boulevard, Suite 2200  
Kansas City, Missouri 64108-26 8  
Telephone: (816) 292-2000  
Telecopier: (816) 292-2001

Attorney for Defendant  
Elementis LTP L.P.

SHOOK, HARDY & BACON, LLP

By: *Mark D. Anstoetter*  
Mark D. Anstoetter (47638)  
George E. Wolf (35920)  
Christopher M. McDonald (39559)  
2555 Grand Blvd.  
Kansas City, MO 64108  
Telephone: (816) 474-6550  
Telecopier: (816) 421-5547

Attorney for Defendant  
Burns & McDonnell Engineering  
Company, Inc.

## 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 20th day of May, 2010:

Thomas P. Cartmell  
 Brian J. Madden  
 Thomas L. Wagstaff  
 WAGSTAFF & CARTMELL LLP  
 4740 Grand Avenue, Suite 300  
 Kansas City, MO 64112

Thomas V. Girardi  
 GIRARDI KEESE  
 1126 Wilshire Blvd.  
 Los Angeles, CA 90017-1904

Stephen Griffin  
 W. Mitchell Elliott  
 Troy Dietrich  
 GRIFFIN DIETRICH ELLIOTT  
 416 N. Walnut  
 Cameron, MO 64429

R. Dan Boulware  
 Todd H. Bartels  
 Seth C. Wright  
 POLSINELLI SHUGHART PC  
 3101 Frederick Avenue  
 St. Joseph, MO 64506

Melissa A. Hewey  
 DRUMMOND WOODSUM  
 84 Marginal Way, Suite 600  
 Portland, ME 04101

Dennis J. Dobbels  
 POLSINELLI SHUGHART PC  
 Twelve Wyandotte Plaza  
 120 W. 12<sup>th</sup>  
 Kansas City, MO 64105

W.C. Blanton  
 Stephen J. Torline  
 HUSCH BLACKWELL SANDERS L.L.P.  
 4801 Main St., Suite 1000  
 Kansas City, MO 64112

  
 Attorneys For Defendant Elementis LTF  
 L.P.