

IN THE MISSOURI SUPREME COURT

Appeal No. 87855

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**STATE OF MISSOURI ex rel. MCDONALD'S CORPORATION AND KRIS  
DAVISON, INC.,**

**Relators,**

**vs.**

**THE HONORABLE ANN MESLE,  
JUDGE, DIVISION SEVEN, CIRCUIT COURT OF  
JACKSON COUNTY, MISSOURI,**

**Respondent.**

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Writ of Prohibition Directed to the Circuit Court of Jackson County  
Cause No. 0516-CV10447  
Division Seven  
Honorable Ann Mesle, Judge

**REPLY BRIEF OF RELATORS MCDONALD'S CORPORATION AND  
KRIS DAVISON, INC.**

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**POINTS RELIED ON**

**THIS COURT SHOULD MAKE ITS ORDER GRANTING RELATORS' PETITION FOR ISSUANCE OF A WRIT OF PROHIBITION PERMANENT AND ORDER RESPONDENT TO ISSUE HER ORDER TRANSFERRING VENUE TO TANEY COUNTY AS RESPONDENT EXCEEDED HER JURISDICTION OR ABUSED HER DISCRETION IN DENYING RELATORS' MOTION TO TRANSFER FOR IMPROPER VENUE BECAUSE VENUE IS IMPROPER IN THE CIRCUIT COURT OF JACKSON COUNTY UNDER THE PROVISIONS OF §508.040 R.S.Mo. (2000) IN THAT THE CAUSE OF ACTION ACCRUED IN TANEY COUNTY, MISSOURI; RELATOR KRIS DAVISON, INC IS A RESIDENT OF TANEY COUNTY, MISSOURI; AND NEITHER KRIS DAVISON, INC., NOR MCDONALD'S CORPORATION HAS OFFICES OR AGENTS FOR THE TRANSACTION OF USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY, MISSOURI.**

§508.040 R.S.Mo. (2000)

## ARGUMENT

**THIS COURT SHOULD MAKE ITS ORDER GRANTING RELATORS' PETITION FOR ISSUANCE OF A WRIT OF PROHIBITION PERMANENT AND ORDER RESPONDENT TO ISSUE HER ORDER TRASFERRING VENUE TO TANEY COUNTY AS RESPONDENT EXCEEDED HER JURISDICTION OR ABUSED HER DISCRETION IN DENYING RELATORS' MOTION TO TRANSFER FOR IMPROPER VENUE BECAUSE VENUE IS IMPROPER IN THE CIRCUIT COURT OF JACKSON COUNTY UNDER THE PROVISIONS OF §508.040 R.S.Mo. (2000) IN THAT THE CAUSE OF ACTION ACCRUED IN TANEY COUNTY, MISSOURI; RELATOR KRIS DAVISON, INC IS A RESIDENT OF TANEY COUNTY, MISSOURI; AND NEITHER KRIS DAVISON, INC., NOR MCDONALD'S CORPORATION HAS OFFICES OR AGENTS FOR THE TRANSACTION OF USUAL AND CUSTOMARY BUSINESS IN JACKSON COUNTY, MISSOURI.**

### Lack of Proper Venue

In Respondent's brief, Respondent first argues that venue is proper in Jackson County because the land on which thirty McDonald's Restaurant franchisees sit is owned or leased by Relator McDonald's Corporation. Respondent then argues that the mere ownership of the land is sufficient to constitute "an office

or agent for the transaction of [a company's] usual and customary business" for venue purposes.

Respondent cites no case law in support of the proposition that the term "office" has ever been so broadly defined. Indeed, Relator is aware of no Missouri case that has held that the mere ownership of land, or leasing of land, in a given venue somehow can qualify as "an office or agent" under the terms of §508.040 (2000). Indeed, as noted in Relator's brief, the Missouri legislature demonstrated quite clearly that it had a full understanding of how to make land ownership by itself a basis for venue. See §508.020 (2000). The legislature did not utilize such language in determining the requisites for corporate venue. Hence, it must be presumed that the legislature did not intend that the mere ownership of land be deemed sufficient, in and of itself, to serve as a basis for venue.

Respondent also argues that the three Jackson County restaurants operated by McDonald's Corporation's wholly owned indirect subsidiary, somehow allow for venue to properly rest in Jackson County. In *State ex rel. Ford Motor Company v. Bacon*, 63 S.W.3d 641, 642 (Mo.banc 2002), this Court determined that the requirements for a finding of agency applied to wholly owned subsidiaries of a corporation. These requirements include: the necessity that an agent hold the power to alter legal relations between the principal and a third party; that the agent be a fiduciary with respect to matters within the scope of the agency; and that the

principal have the right to control the conduct of the agent with respect to matters entrusted to the agent; *Bacon*, 63 S.W.23d at 642. The absence of any one of the elements is fatal to claim of agency. *Id.*

In *Bacon*, the Court found that Ford Motor Company's supporting affidavit was dispositive on the issue as the affidavit provided uncontroverted factual allegations that Ford Motor Company is not a party to Ford Credit's contracts, and that Ford Credit was not subject to any agreement with Ford Motor Company restricting or conditioning its ability to finance vehicles. *Id. at 644.* The Court concluded:

Absent allegations and evidence that would justify piercing the corporate veil, Ford Credit does in fact operate independently from Ford. Although Ford owns Ford Credit, and in that sense Ford engages in the business of financing purchases of Ford Products and floor plans for Ford dealers, it does not follow that Ford Credit has the power to alter legal relations between Ford and any third party. Neither plaintiff nor the dissent has identified any acts or representations – other than Ford's ownership of Ford Credit as a financial services company – that would lead a reasonable person to believe that Ford Credit has the power to do so. *Id.*

In the present matter, there is no evidence justifying piercing the corporate veil, and Plaintiffs' Petition does not suggest otherwise. McDonald's Corporation and McDonald's Restaurants of Missouri, Inc. are separate corporations, incorporated in separate states, with separate Boards of Directors. McDonald's Corporation is in the business of franchising McDonald's restaurant businesses that are owned and operated by other entities. McDonald's Restaurants of Missouri, Inc. is in the business of operating certain McDonald's restaurant locations in Missouri. McDonald's Corporation is not in the usual and customary business of operating McDonald's restaurants. McDonald's Corporation is not a party to contracts that are entered into by either McDonald's Restaurants of Missouri, Inc. or by independent owner/operators with third parties; and neither McDonald's Restaurants of Missouri, Inc. or independent owner/operators are parties to contracts between McDonald's Corporation and third parties. McDonald's Restaurants of Missouri, Inc. does not have the power to alter contractual relations or legal relations between McDonald's Corporation and third parties. The presence of the subsidiaries does not create venue in Jackson County,

Respondent next argues that the franchisees may be agents as Respondent believes that the franchisees may pay franchise fees to McDonald's or monthly service fees based upon the restaurants performance. (See opposition at 16). As the Missouri Court of Appeals noted in *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941

S.W.2d 663 (Mo.App. 1997), however, such payments are irrelevant. See *State ex rel. Domino's Pizza, Inc.*, 941 S.W.2d at 666-667. Any such monies would be due and owing from contractual obligations between the franchises and McDonald's and do not indicate a right of the franchisee to bind McDonald's in contracts with third parties. *Id.* Nor do such payments create a fiduciary relationship. *Id.*

Plaintiffs also argues that McDonald's Corporation might have the right to ensure that the franchises are maintained in good order and to tell the franchisees how to dress their employees. As noted in Relator's brief, this is irrelevant as these matters would not place the franchisees in a position where they could alter the legal relations of McDonald's with a third party and, as noted in the *State ex rel. Domino's Pizza, Inc.* case, quality assurance does not create a fiduciary relationship. See *State ex rel. Domino's Pizza, Inc.*, 941 S.W.2d at 666. Further, such restrictions and controls do not indicate the franchisee is operating primarily for the benefit of the franchisor. The franchisees are independent businesses and wish to make a profit from their sales. Their operations are primarily for their own benefit, not that of McDonald's. *Id.* See also, exhibits B and C.

Finally, Respondent argues that Plaintiffs should be entitled to discovery on the venue issue. First, Relator notes that Respondent's order was a denial of the motions to transfer and not an order permitting the Plaintiffs to perform a few months worth of venue discovery. More importantly, Respondent has not identified

anything to be gained from any such discovery that would impact on venue.

Instead, the things Respondent suggests might be discovered relate to issues that have no relevance to agency and which the *State ex rel. Domino's Pizza, Inc* Court expressly rejected as any basis for venue. As Respondent has not indicated what could be discovered that would make venue proper in Jackson County, and as Respondent denied the motion outright, this is not a matter where discovery is at issue.

## **CONCLUSION**

Based upon the above, Relators hereby request this Court issue its order in prohibition to prevent Respondent from taking any further actions in this matter other than ordering the case transferred to the proper venue.

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STATE OF MISSOURI        )  
  )  
COUNTY OF ST. LOUIS    )

**AFFIDAVIT OF SERVICE**

Comes now Jeffrey J. Brinker, and after being duly sworn upon his oath states that he did on the \_\_\_\_\_ day of December, 2006 place in the United States mail in Clayton, Missouri an envelope containing two copies of the Reply Brief of Relators and that proper postage was affixed on said envelopes and that they were plainly addressed to:

The Honorable Ann Mesle  
Division 7  
Jackson County Courthouse—Kansas City  
415 East 12<sup>th</sup> Street, 3<sup>rd</sup> Floor  
Kansas City, MO 64106

Kathleen M. Hagen  
Henri J. Watson  
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Kansas City, MO 64108  
*Attorney for Respondent*

\_\_\_\_\_

Subscribed and sworn to before me, a Notary Public, this \_\_\_\_\_ day of  
December, 2006.

\_\_\_\_\_

NOTARY PUBLIC

My Commission Expires:  
\_\_\_\_\_

**CERTIFICATE OF COMPLIANCE**

I, one of the attorneys for Relators, certify that the number of words in the Reply Brief of Relators is 1,888, as directed by MRCP 84.06(c) which is based on a word count of the word processing system. The name and version of the word processing software used to prepare the brief is Microsoft Word 2003.

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Subscribed and sworn to before me, a Notary Public, this \_\_\_\_\_ day of  
December, 2006.

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NOTARY PUBLIC

My Commission Expires:

  

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**MEMORANDUM FILING DISK OF BRIEF**

COME NOW Relators and hereby files its reply brief on disk with the Court. The brief was prepared in Microsoft Word 2003. The disk has been scanned for viruses using Norton Antivirus, Corporate Edition, and no viruses were found.

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Subscribed and sworn to before me, a Notary Public, this \_\_\_\_\_ day of  
December, 2006.

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NOTARY PUBLIC

My Commission Expires:

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