IN THE SUPREME COURT OF MISSOURI

STATE EX REL.	)	
	)	
VACATION MANAGEMENT SOLUTIONS LLC,	)	
	)	
Relator,	)	
	)	
v.	)	**No: SC98323**
	)	
HON. JOAN L. MORIARTY, CIRCUIT JUDGE, CITY OF ST. LOUIS CIRCIUT COURT	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

Table of Contents ..... i-ii

Table of Authorities 1-4

Statement of Facts 5-6

Points Relied On 7

Standard of Review 8

Argument 9

I. The Relator Is Not Entitled to a Permanent Writ Because the Trial Court Did Not Abuse Its Discretion, In that Relator Neglected to Call Its Motion to Transfer Venue for Hearing Pursuant to the City of St. Louis's Local Rule 33.7.2 10-14

II. Relator Is Not Entitled to a Permanent Writ Because the Trial Court Did Not Abuse its Discretion, In that Venue Was Not Improper In the City of St. Louis. 14-20

III. Relator is Not Entitled to a Permanent Writ Because Even Assuming a Ninety-Day "Automatic" Deadline Originally Existed, Relator Can No Longer Rely Upon Such a Deadline In That Relator Agreed in Writing to Waive It Pursuant to Section 508.010(10) 21-23

Conclusion 23

Certificate of Compliance 24

Certificate of Service 25

TABLE OF AUTHORITIES

Bourgeois v. Live Nation Entm't, Inc., 3 F. Supp. 3d 423 (D. Md. 2014), as corrected (Mar. 20, 2014).	20
Control Tech. & Sols. v. Malden R-1 Sch. Dist., 181 S.W.3d 80 (Mo. Ct. App. 2005).	18
Cook v. Newman, 142 S.W.3d 880 (Mo. App. W.D. 2004).	8
Digital Equipment Corp. v. AltaVista Technology, Inc., 960 F. Supp. 456 (D. Mass. 1997).	19
Henningsen v. Independent Petrochem. Corp., 875 S.W.2d 117 (Mo. App. E.D. 1994).	12
In re: Transit Casualty Co., 900 S.W.2d 671, 675 (Mo. App. W.D. 1995).	7, 12
Lincoln Credit Co. v. Peach, 636 S.W.2d 31 (Mo. 1982).	7, 14
McCoy v. The Hershewe Law Firm, PC, 366 SW.3d 586 (Mo. App. W.D. 2012).	8
Peterson, et al. v. Monsanto Company, et al., City of St. Louis Case No. 1622-CC01071 (Jun. 3, 2019).	12

Rooks v. Lincoln Cty. Farmers Fire & Lightning Mut. Ins. Co., 830 S.W.2d 507 (Mo. App. E.D. 1992).	7, 21
Scherder v. Sonntag, 450 S.W.3d 856 (Mo. App. E.D. 2014).	8
Securities and Exchange Commission v. Traffic Monsoon, LLC, 245 F.Supp.3d 1275 (D. Utah 2017).	19-20
Smith v. City of St. Louis, 395 S.W.3d 20 (Mo. 2013).	19
State ex rel. Bugg v. Roper, 179 S.W.3d 898 (Mo. 2005).	16
State ex rel. City of Jennings v. Riley, 236 S.W.3d 630 (Mo. banc 2007).	7, 8, 17-18
State ex rel. Collector of Winchester v. Jamison, 357 S.W.3d 589 (Mo. banc 2012).	16
State ex rel. Elson v. Koehr, 856 S.W.2d 57 (Mo. banc 1993).	20
State ex rel. Govero v. Kehm, 850 S.W.2d 100 (Mo. 1993).	7, 15
State ex rel. HeplerBroom, LLC v. Moriarty, 566 S.W.3d 240 (Mo. banc 2019).	17, 19

State ex rel. Kansas City Southern Railway Co. v. Nixon, 282 S.W.3d 363 (Mo. 2009).	16, 22
State ex rel. Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d 232 (Mo. banc 2006).	13
State ex rel. Public Service Commission v. Joyce, 258 S.W.3d 58 (Mo. banc 2008).	8, 15
State ex rel. Schwarz Pharma, Inc. v. Dowd, 432 S.W.3d 764 (Mo. banc 2014).	7, 15-16
State ex rel. Selimanovic v. Dierker, 246 S.W.3d 931 (Mo. banc 2008).	19
State ex rel. Trans World Airlines, Inc. v. David, 158 S.W.3d 232 (Mo. 2005).	18
State ex rel. Union Elec. Co. v. Barnes, 893 S.W.2d 804 (Mo. banc 1995).	16
State ex rel. Valentine v. Orr, 366 S.W.3d 534 (Mo. banc 2012).	8
Mo. Rev. Stat. § 407.025	7, 9, 15, 17, 20
Mo. Rev. Stat. § 508.010	*passim*
Mo. Sup. Ct. R. 50.01.	14

Mo. Sup. Ct. R 51.045	*passim*
Twenty-Second Circuit Court's Local Rule 33.7.2	7, 10, 12, 22

STATEMENT OF FACTS

Relator sold a vacation package to Plaintiff at Innsbrook, Missouri through a popular third-party website. *Respondent's Appendix* at A5-A10 (*Plaintiff's Petition*, ¶¶ 7-9). After accepting payment, Relator informed Plaintiff that it would have to cancel the reservation and would re-book the reservation through a different website honoring the same price. *Id.* at ¶ 12. Against Plaintiff's wishes, Relator canceled the original reservation, and made a new one, but informed Plaintiff that it could no longer offer the property at the price advertised. *Id.* at ¶¶ 13-15. The new reservation Relator created required Plaintiff to pay nearly double the original amount. *Id.* at ¶ 16. When Plaintiff pointed out the misrepresentation, Relator canceled Plaintiff's reservation altogether. *Id.* at ¶¶ 17-18. Plaintiff then had to pay significantly more for a comparable vacation package based on the short notice. *Id.* at ¶¶ 19-20. Plaintiff filed this suit in the Circuit Court of St. Louis City seeking relief under the Missouri Merchandising Practices Act ("MMPA"). *Appendix* at A1 (*docket entries).*

On June 17, 2019, Relator filed both a motion to dismiss and a separate motion to transfer venue. *Id.* Twenty-nine days later, on July 16, 2019, Relator filed a Notice of Hearing on the motion to dismiss only. *Appendix* at A11 *(Notice of Hearing on Motion to Dismiss).* The parties argued the Motion to Dismiss on August 8, 2019, at which time Respondent, the Honorable Judge Joan Moriarty, took the matter under advertisement. *Appendix* at A12 *(Order dated August 8, 2019).*

Notably, Relator did not seek a writ on September 15, 2019, which represents 90 days after Relator filed its motion to transfer venue. If Relator truly believed it was entitled to a writ to prohibit the trial court from taking any action as a result of improper venue, that is when it should have done so.

Instead, Relator waited until November 7, 2019, months after arguing its motion to dismiss before filing a notice of hearing on its motion to transfer venue. *Appendix* at A2. On November 12, 2019, Plaintiff's counsel appeared for the motion when it was called, but Relator's counsel had already left the courtroom. *Appendix* at A13 *(Plaintiff's proposed Order)* and A14 *(Defendant's proposed Order)*.[1] As such, the Trial Court never had an opportunity to hear Relator's motion to transfer venue.

On December 30, 2019, Respondent issued her ruling denying Relator's Motion to Dismiss. *Appendix* at A15-A19 *(Order dated Dec. 30, 2019).* Only then did Relator file a Writ with the Court of Appeals the following day, on December 31, 2019.

[1] Per the proposed Order Plaintiff's counsel filed, prior to the motion being called, Relator's counsel attempted to provide the Court *ex parte* with a proposed Order (that Plaintiff did not see or approve) before leaving. *See Appendix* at A13.

POINTS RELIED ON

I. Relator Is Not Entitled to a Permanent Writ Because the Trial Court Did Not Abuse Its Discretion, In that Relator Neglected to Call Its Motion to Transfer Venue for Hearing Pursuant to the City of St. Louis's Local Rule 33.7.2.

In re: Transit Casualty Co., 900 S.W.2d 671 (Mo. App. W.D. 1995).

Lincoln Credit Co. v. Peach, 636 S.W.2d 31 (Mo. 1982).

Twenty-Second Circuit Court's Local Rule 33.7.2.

II. Relator Is Not Entitled to a Permanent Writ Because the Trial Court Did Not Abuse Its Discretion, In that Venue Was Not Improper In the City of St. Louis.

State ex rel. Schwarz Pharma, Inc. v. Dowd, 432 S.W.3d 764 (Mo. banc 2014).

State ex rel. City of Jennings v. Riley, 236 S.W.3d 630 (Mo. 2007).

State ex rel. Govero v. Kehm, 850 S.W.2d 100 (Mo. 1993).

Mo. Rev. Stat. § 407.025

Missouri Rule of Civil Procedure 51.045

III. Relator is Not Entitled to a Permanent Writ Because Even Assuming a Ninety-Day "Automatic" Deadline Originally Existed, Relator Can No Longer Rely Upon Such a Deadline In That Relator Agreed in Writing to Waive It Pursuant to Section 508.010(10).

Rooks v. Lincoln Cty. Farmers Fire & Lightning Mut. Ins. Co., 830 S.W.2d 507, (Mo. App. E.D. 1992).

Mo. Rev. Stat. § 508.010

STANDARD OF REVIEW

Generally, the standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion. *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007).

"To the extent to which the venue decision is governed by the interpretation of a statute, the ruling is a question of law, and accordingly this court reviews the ruling to determine whether the trial court misinterpreted or misapplied the law." *McCoy v. The Hershewe Law Firm, PC*, 366 SW.3d 586, 592 (Mo. App. W.D. 2012) *citing Cook v. Newman*, 142 S.W.3d 880, 886 (Mo. App. W.D. 2004); *accord Scherder v. Sonntag*, 450 S.W.3d 856, 861-862 (Mo. App. E.D. 2014).

Similarly, because this case is still pending in the City of St. Louis, and this writ is directed at the "transferring judge," a writ of prohibition would normally be the appropriate remedy. *See State ex rel. Public Service Commission v. Joyce*, 258 S.W.3d 58, 60 (Mo. banc 2008). However, Respondent has not entered any order relating to Relator's Motion for Transfer of Venue, such that Relator seeks to compel Respondent to do so with a writ of mandamus. Thus, it is Relator's burden to "allege and prove that he [or she] has a clear, unequivocal, specific right to a thing claimed." *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. banc 2012).

ARGUMENT

Respondent has not made a determination that venue is improper in the City of St. Louis, yet Relator wants this Court to issue a writ forcing Respondent to transfer the case. Relator assumes, without analysis, that venue is improper in the City of St. Louis, but Rule 51.045 and section 508.010 both first require that the Trial Court make such a determination. In this case, Respondent was deprived of this opportunity because Relator failed to have its motion for transfer of venue heard. Relator made the strategic decision to first argue its motion to dismiss, thus waiving the ninety-day time limit found in section 508.010(10). In fact, Relator did not even file its notice of hearing on its motion to transfer venue until after the 90-day period expired.

Relator's reliance on section 508.010(10) is also misplaced. Venue in this case is controlled by section 407.025, not section 508.010. Therefore, Missouri Rule of Civil Procedure 51.045(c) dictates the procedures for transfer of venue, which does not include any deadline for the Trial Court to rule. Since the entirety of Relator's Brief is premised upon the "automatic" 90-day deadline (an argument that this Court has already rejected, and which only applies after the Trial Court has determined the current venue is improper even assuming section 508.010 controlled), Respondent, by and through counsel for Plaintiff, respectfully requests that this Court deny the writ and remand for further proceedings in the Twenty-Second Circuit Court.

I. Relator Is Not Entitled to a Permanent Writ Because the Trial Court Did Not Abuse Its Discretion, In that Relator Neglected to Call Its Motion to Transfer Venue for Hearing Pursuant to the City of St. Louis's Local Rule 33.7.2.

The Twenty-Second Circuit Court's Local Rule 33.7.2 requires all motions, including but not limited to motions to transfer venue, to be called for hearing before being ruled upon. *Respondent's Appendix* at A27 (L.R. 33.7.2 (providing that "***[a]ll other pretrial motions*** in cases pending in Division 1 ***shall be heard*** and determined in a motion/equity division determined by administrative order of the presiding judge.")) (emphasis added). But the record before this Court reveals that Relator never appeared or argued its motion to transfer venue before the Trial Court. As such, it is premature to make the writ permanent.

In this case, Relator filed a notice of hearing to argue its motion to transfer venue on November 12, 2019. The timing of this hearing is important for two reasons. First, the hearing was *after* Relator argued its motion to dismiss but *before* Respondent denied it. This allowed Relator to first assess the Trial Court's reception to its motion to dismiss before determining whether it wanted to remain in the City of St. Louis. This alone should cast significant doubt on Relator's motivation behind the instant Writ as well as the arguments stemming from it. Second, the eventual hearing date was months after Relator now argues the Trial Court should have already transferred the case. If Relator believed the Trial Court should have automatically granted the motion without a hearing, Relator

would have filed this Writ on or after the purported "automatic" 90-day deadline expired. There would have been no reason to set a motion for a hearing that Relator now claims was already deemed granted as a matter of law. Contrary to the representations Relator is making to this Honorable Court, Relator's actions demonstrate the truth. Relator was well-aware of its obligation to call the motion for a hearing in order to allow the Trial Court to rule on its motion and to make the requisite determination of whether the City of St. Louis was an "improper venue" pursuant to Rule 51.045. *See Section II, infra*.

Despite this duty, Relator never presented its argument to the Trial Court at its own hearing. Instead, Relator submitted a proposed order *ex parte* – one that Plaintiff's counsel had not been consulted about much less approved – and left the courtroom. *See Respondent's Appendix* at A13-A14 *(Defendant's proposed order for transfer of venue and Plaintiff's proposed Order from Nov. 12, 2019).* Relator was not present when the Trial Court called the motion for hearing. Plaintiff's counsel, on the other hand, remained in the courtroom, but Respondent declined to sign Plaintiff's proposed order without both parties present, which had been drafted after Relator's counsel had disappeared and therefore was also without consent. *See id.* As of November 12, 2019, the parties had not participated in a hearing on the motion to transfer venue. In other words, there was no abuse of discretion because there was nothing to which Respondent could have exercised discretion.

Other judges within the 22nd Circuit Court recognize the Local Rule requiring parties to call their motions for hearing and have denied motions to transfer venue on that basis:

> [T]he motion was not noticed for hearing and argued to the Court within the ninety day requirement of § 508.010.10.

> Local Rule 33.7.2 requires that pre-trial motions be heard by the judge to which they are assigned. Rule 44.01(d) requires that written motions be noticed for hearing no less than five days before the scheduled hearing. Because there was no hearing within 90 days of the motion's filing, there was no opportunity for the Court to deny the motion within that time.

See Respondent's Appendix at A20-24 *(Ronald Peterson, et al. v. Monsanto Company, et al.*, City of St. Louis Case No. 1622-CC01071 (Jun. 3, 2019) (Hon. M. Mullen)). This local rule is also harmonious with Missouri Rule of Civil Procedure 51.045, which requires a finding that venue is improper before a motion is granted (regardless of whether a reply has been filed).[2] While a trial court could sift through the pleadings *sua sponte*, the proper procedure is to have the parties appear to argue their positions.

"Fundamental fairness and due process require that a trial court is not allowed to dispense with a procedural rule of its own making." *In re: Transit Casualty Co.*, 900 S.W.2d 671, 675 (Mo. App. W.D. 1995) *citing Henningsen v. Independent Petrochem. Corp.*, 875 S.W.2d 117, 120 (Mo. App. E.D. 1994). To hold otherwise would put trial courts in an untenable position. First, they would have to have a system to identify every incoming motion to transfer venue. Second, they would need a system to track each motion to transfer venue. Third, they would have to guess whether and when parties intended to

[2] Local Rule 33.7.2 is also harmonious with the section 508.010(10), should this Court find the statute applies to this case. Once a motion to transfer venue is called for hearing, the trial court should rule upon it within ninety days.

file a notice of hearing. Finally, if no notice of hearing was forthcoming, trial courts would be put into the position of becoming an advocate for a litigant that had not yet had an opportunity to advance its argument to the court. The cumulative effect may well be an increase in writs, making the courts of appeal the actual arbiter of venue instead of the trial courts.

If a litigant is not required to call a motion to transfer venue for hearing, it could also file the motion and purposefully *avoid* setting it for hearing. The parties might then litigate for years, even conduct a trial, while a movant nevertheless preserved its ability to file a writ of mandamus if things did not go well arguing that the court lacked authority to take any action other than transfer venue. The only way to prevent this gamesmanship would be for the court to *sua sponte* set the motion for hearing or put the opposing party in the curious position of calling for hearing an opponent's own motion. That is why if a litigant wants to pursue its motion to transfer venue, then it possesses the minimal obligation of noticing it for hearing. It cannot, as Relator did here, wait months until after seeing how the Trial Court would rule on its motion to dismiss and then complain about the lack of a ruling on its motion to transfer venue. Not only is this conduct contrary to the local rules, it is also antithetical to the inherent purpose of a motion to transfer venue, which is designed to save "judicial resources" upon a "timely application" of a motion to change venue. *State ex rel. Lebanon Sch. Dist. R-III v. Winfrey*, 183 S.W.3d 232, 237 (Mo. banc 2006).

This is a prototypical case for the proposition that this Court "will not, on review, convict a lower court of error on an issue which was not put before it to decide." *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. 1982). Relator has not yet had the motion heard. The Local Rules require a hearing before the Court can rule on a motion. "[T]rial courts may make rules governing the administration of judicial business if the rules are not inconsistent with the rules of this Court, the Constitution or statutory law in force." Mo. Sup. Ct. R. 50.01.

Therefore, the Trial Court not only has not had a chance to rule upon the motion to transfer venue, it is not required to do so. Relator has not identified a single case in which a movant failed to set its motion for transfer of venue for hearing. This is not an oversight; every case that has addressed a question of venue began after a trial court had an opportunity to issue a ruling. The proper remedy in this case is to remand to the Trial Court to await oral argument, which may address whether the City of St. Louis is the improper venue, pursuant to Rule 51.045. *See Section II, infra*.

II. Relator Is Not Entitled to a Permanent Writ Because the Trial Court Did Not Abuse its Discretion, In that Venue Was Not Improper In the City of St. Louis.

Relator relies on the text of section 508.010(10) for a ninety-day "deadline" before a venue motion should be granted, but that provision has no applicability to the case at bar. The Missouri Merchandising Practices Act ("MMPA") contains its own venue clause, which provides that a consumer "may bring a private civil action in either the circuit court

of the county in which the seller or lessor resides or in which the transaction complained of took place." Mo. Rev. Stat. § 407.025.1. In general, "a special venue statute…trumps section 508.010." *State ex rel. Govero v. Kehm*, 850 S.W.2d 100, 102 (Mo. 1993).[3] Therefore, whether venue was proper in this case turns on a determination of where "the transaction complained of took place," with no need to reference section 508.010 at all. Instead, Relator must rely on Missouri Rule of Civil Procedure 51.045 for the procedure on transfer of venue.

Missouri Rule of Civil Procedure 51.045 contains no clause limiting the time of the trial court to rule on a motion for transfer of venue. Instead, it simply states that "[i]f no reply is filed, the court shall order transfer to one of the counties specified in the motion." Mo. Sup. Ct. R. 51.045(c). While similar to the statute, the Rule contains no reference to a specific time limit. This absence is in direct conflict with the statutory language. There cannot be both a deadline and no deadline to rule on a motion. While Plaintiff is cognizant that this Court has declined to find a conflict, the Honorable David L. Dowd recognized that "to the extent section 508.010.10 could be read to require a court to grant a motion to transfer venue after 90 days without regard to whether the motion was timely or whether venue was improper in the initial jurisdiction and proper in the proposed jurisdiction, it was

[3] This Court has rejected the argument that the word "notwithstanding" in section 508.010.4 abrogates special venue provisions already enacted. *See State ex rel. Public Service Commission v. Joyce*, 258 S.W.3d 58, 62 (Mo. 2008).

inconsistent with Rule 51.045 and could not be followed." *State ex rel. Schwarz Pharma, Inc. v. Dowd*, 432 S.W.3d 764, 767 (Mo. banc 2014).

As a result, Rule 51.045(c) provides the only enforceable provisions relating to a trial court's decision on venue motions. "If there is a conflict between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings." *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995); *accord State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589, 594 (Mo. banc 2012). This Court recognizes that venue is a procedural question that "goes to process rather than substantive rights." *State ex rel. Kansas City Southern Railway Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. 2009). As such, Rule 51.045(c) controls how Respondent should handle her docket. In addition, the reference to a "motion to dismiss…based upon a claim of improper venue" found within section 508.010 is outdated. Mo. Rev. Stat. § 508.010(10). This Court also recognizes that a motion to dismiss is "not a correct motion" because transfer to a proper venue is the only valid remedy. *State ex rel. Bugg v. Roper*, 179 S.W.3d 898, 894 (Mo. 2005). Thus, Rule 51.045 prevails over section 508.010(1), insofar as the existence of a time limit to rule on a venue motion in an MMPA case is concerned.

It makes more sense to approach the issue from the standpoint of the timing of a response to a motion to transfer venue, pursuant to Rule 51.045, than it does to impose artificial limits on the time for a motion to be granted, pursuant to section 508.010. This is because there are numerous factors that affect the timing of a trial court issuing a decision, including available hearing dates, and other pending motions and trials, that are out of the

control of any litigant. Setting a 90-day deadline could prejudice a plaintiff defending a proper choice of venue from an erroneous motion. If that plaintiff could not get an optimal hearing date, or the trial court is otherwise prevented from issuing a timely decision, a case could be subject to transfer even though there was no valid legal basis.

Rule 51.045, therefore, also provides an important mechanism to deter improper or unpersuasive motions to transfer venue. The Rule states, in relevant part, that "[a]n action brought in a court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed." Mo. Sup. Ct. R 51.045(a) (emphasis added). Because of this language, a trial court's duty to transfer only arises if venue is, in fact, improper. In this regard, Relator's reliance on *State ex rel. HeplerBroom, LLC v. Moriarty*, 566 S.W.3d 240, 242-244 (Mo. banc 2019) is misplaced. There, not only did the parties actually argue the motion to transfer, but there was no dispute that section 508.010 applied (unlike in this case, where section 407.025 controls), and that movant met its burden to show that the initial choice of venue was improper. *Id.* None of those facts are present here.

This Court has already considered and rejected the argument that a trial court has a duty to sustain a motion to transfer venue solely "because plaintiff failed to file a reply." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. 2007). In *Riley*, this Court explained that Rule 51.045 has "no application because the threshold showing required in Rule 51.045(a) that the action was 'brought in a court where venue is improper' was not

met." *Id.* Because venue was proper in the City of St. Louis, this Court quashed the writ. *Id.*

Because this Court has already rejected the argument that the lack of a reply in opposition at the trial court level automatically entitles the movant to a writ, Relator cannot meet its burden in this matter. *See State ex rel. City of Jennings v. Riley*, 236 S.W.3d at 632. [4] As the party challenging venue, Relator "bears the burden of persuasion and proof that venue is improper." *State ex rel. Trans World Airlines, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. 2005) (White, J., dissenting). Yet, Relator's brief does not provide any arguments about whether venue was actually improper in the City of St. Louis. At most, Relator has identified other venues that would also be proper; however, "the fact that venue is proper in one county does not mean that venue is improper in another." *Control Tech. & Sols. v. Malden R-1 Sch. Dist.*, 181 S.W.3d 80, 82 (Mo. App. E.D. 2005).

Relator has consistently avoided the necessary analysis as to whether the City of St. Louis is an improper, instead taking the erroneous position that it was automatically entitled to a transfer. *See Appendix* at A25-26 (*Reply to Petitioner's [sic] Proposed Order)).* Relator's argument places this Court in the position of having to "sift through the

[4] The same reasoning this Court adopted in *Riley* would apply with equal force to the application of section 508.010(10), because like Rule 51.045(a), that statute also requires a finding of "improper venue." *See also* section 508.010(15) R.S.Mo. ("If the county where the plaintiff's claim is filed is not a proper venue…") (emphasis added).

record and, in effect, assume the role of advocate." *Smith v. City of St. Louis*, 395 S.W.3d 20, 29 (Mo. 2013). Appellant respectfully suggests that the Court should decline to engage in the analysis that Relator itself failed to perform, and instead deny the writ and remand to the Trial Court.

The analysis of the proper venue in this case actually presents a novel question. Plaintiff has not identified cases that interpret where an internet transaction "takes place" for the purposes of a venue analysis under the MMPA. Plaintiff pleaded that he is a "legal resident of the City of St. Louis, Missouri." *Appendix* at A5 *(Plaintiff's Petition,* ¶ 1). His purchase of the condo unit took place via the internet, and Plaintiff's actions all originated from the computer at his residence. *Id.* at A6 (*(Plaintiff's Petition,* ¶¶ 7-9); *Plaintiff's Answer to Relator's Petition for Writ of Mandamus*, ¶ 22. This Court has held that venue for a plaintiff who suffers a financial injury is not in the county where the underlying violative act occurred but rather the county in which "the condition of being subject to financial loss" is felt. *State ex rel. Selimanovic v. Dierker*, 246 S.W.3d 931, 932 (Mo. banc 2008); *accord State ex rel. HeplerBroom v. Moriarty*, 566 S.W.3d 240 at 242. Other jurisdictions have reached similar conclusions when it comes to internet transactions. *See Digital Equipment Corp. v. AltaVista Technology, Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997) ("When business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere."); *cf. Securities and Exchange Commission v. Traffic Monsoon, LLC,* 245 F.Supp.3d 1275, 1296 (D. Utah 2017) (holding that where non-

exchange listed securities are offered and sold over the internet, the sale takes place in both the location of the seller and the location of the buyer.); *Bourgeois v. Live Nation Entm't, Inc.*, 3 F. Supp. 3d 423, 448 (D. Md. 2014), as corrected (Mar. 20, 2014) (finding that the "location" of internet sales requires more factual development, including, *inter alia*, the location from which the purchaser accessed the website and the location at which the purchaser received the goods).

In Missouri, the primary purpose of the venue statutes is to provide a "convenient, logical, and orderly forum for the resolution of disputes." *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo. banc 1993). Plaintiff submits that litigation in the forum where he performed his actions and where he felt the financial consequences of Relator's violations of the MMPA, is the most logical venue and, of equal importance, is consistent with the paternalistic consumer-focused nature of section 407.025 R.S.Mo.

That said, Plaintiff recognizes this writ may not be the best vehicle to address this important issue of first impression. Not only did Relator not even address the issue of whether the City of St. Louis was improper, much less fully develop the issues of where a transaction "takes place" within the meaning of the MMPA, but Relator also failed to provide the Trial Court an opportunity to make any findings about it. Plaintiff respectfully submits that this case can be remanded to the Trial Court with instructions to make the predicate finding on whether the City of St. Louis is a proper venue.

III. Relator is Not Entitled to a Permanent Writ Because Even Assuming a Ninety-Day "Automatic" Deadline Originally Existed, Relator Can No Longer Rely Upon Such a Deadline In That Relator Agreed in Writing to Waive It Pursuant to Section 508.010(10).

In the alternative, even if 508.010(10) applied in this case, which Plaintiff specifically denies, Relator agreed in writing that the ninety-day time period to rule on the motion for transfer of venue was waived. Relator filed both a motion to dismiss and a separate motion to transfer venue. Initially, though, Relator called only its motion to dismiss for hearing on August 8, 2019. By asking the Court to exercise its authority to rule on its motion to dismiss, via the motion and its notice of hearing, Relator specifically chose to have the Court *first* exercise its authority to rule on a motion to dismiss, without regard to the time limits found in section 508.010(10) R.S.Mo.

"Waiver is founded upon the intentional relinquishment of a known right." *Rooks v. Lincoln Cty. Farmers Fire & Lightning Mut. Ins. Co.*, 830 S.W.2d 507, 511 (Mo. App. E.D. 1992). Importantly, counsel for Relator's signature appears on the August 8, 2019 Order relating to its motion to dismiss wherein Relator consented to the matter being "called, heard, and submitted" in St. Louis City. In this way, Relator again agreed in writing to waive the time period for Respondent to rule upon a claim of improper venue, until such time as she first ruled upon the motion to dismiss. *See Mo. Rev. Stat. § 508.010(10).* Relator could have withdrawn the motion to dismiss, given its position regarding an impending deadline for the Court to rule on the motion for transfer of venue. This strategy may well

have preserved Relator's ability to call for hearing the motion to dismiss in a new venue. Instead, Relator proceeded with the motion to dismiss in the Twenty-Second Circuit Court.

A motion to transfer venue is not designed to act as a placeholder, to allow litigants to test the waters in one court only to seek transfer later after receiving and/or anticipating a negative ruling. In fact, it was the reason to curtail this gamesmanship that this Court "formally severed the concepts of jurisdiction and venue in *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820." *State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d at 365. Just because Relator did not like how the hearing on its motion to dismiss went does not allow it to change its mind and now assert that the ninety-day time period found in section 508.010(10) expired while Relator was pursuing its separate motion to dismiss.

Relator made the strategic decision to set only its motion to dismiss for hearing. That strategy required Relator to forego the ninety-day time period in section 508.010(1). Only after realizing the Court's skeptical reaction to the motion to dismiss at the hearing (as is reinforced by the Court's ultimate denial of the motion), did Relator then decide to hedge its bets by setting its motion to transfer venue for hearing on November 12, 2019. Rather than reset the motion for transfer of venue for an actual hearing after it lost the motion to dismiss, though, Relator disregarded Local Rule 33.7.2 and filed this writ in a misguided attempt to nullify Respondent's Order denying the motion to dismiss. That Order, having been entered prior to this Court issuing its preliminary writ of prohibition, should not be disturbed. Furthermore, Plaintiff respectfully submits that given Relator's

waiver, this writ should be denied in its entirety and the matter remanded to the Trial Court for further determination in accordance with Rule 51.045.

CONCLUSION

Respondent, by and through counsel for Plaintiff Kyle Klosterman, respectfully requests that this Court remand the case for further proceedings in the City of St. Louis in accordance with the Missouri Rules of Civil Procedure.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

STATE EX REL.	)	
	)	
VACATION MANAGEMENT SOLUTIONS LLC,	)	
	)	
Relator,	)	
	)	
v.	)	**No: SC98323**
	)	
HON. JOAN L. MORIARTY, CIRCUIT JUDGE, CITY OF ST. LOUIS CIRCIUT COURT	)	
	)	
Respondent.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule84.06(b).

Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,973.

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Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned does hereby certify that, on this April 29, 2020, a true and correct copy of the foregoing Brief was electronically served upon the attorney for Relator, Benjamin David Scrivner, via case.net at the date and time filed.

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