

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

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

FILED
JUN - 8 2009
MOLLY LIVINGSTON
CLERK OF CIRCUIT COURT

Case No. 09CN-CV00333

**DEFENDANT PRIME TANNING CORP.'S
APPLICATION FOR CHANGE OF JUDGE AND CHANGE OF VENUE**

Defendant Prime Tanning Corp. (sometimes referred to as "this defendant"), by and through counsel, respectfully moves this Court for a change of judge pursuant to Mo. R. Civ. P. 51.05, and for a change of venue as a matter of right pursuant to Mo. R. Civ. P. 51.03 and suggests that the matter be transferred to Livingston County, Missouri. Alternatively, this defendant moves for a change of venue for cause under Rule 51.04 on the basis that the residents of Clinton, DeKalb, Andrew, Buchanan, Jackson, Cass, Clay, and Platte counties are prejudiced against this defendant. Additionally, should the Court require further evidence respecting its alternative motion for change of venue for cause under Rule 51.04, Prime Tanning Corp. moves the Court for a four month period of time within which to conduct discovery to support its Rule 51.04 application for change of venue before its application for change of venue is ruled. In support of this motion, Prime Tanning Corp. states as follows:

Summary of Applicable Procedure

Rule 51.06 provides that when a party seeks both a change of judge and a change of venue, the requests must be brought in a single application. Mo. R. Civ. P. 56.01(a). Upon being timely presented with such an application, the judge originally assigned to the action "shall

sustain the application for change of judge and transfer the case in accordance with the procedures of Rule 51.05(c)." Rule 51.06(b). The newly assigned judge is the one vested with authority to rule on the application for change of venue. Rule 51.06(c).

In this case, Prime Tanning Corp. is principally seeking a change of venue outside the counties of Clinton, DeKalb, Andrew, Buchanan, Jackson, Clay, Cass, and Platte due to the Plaintiffs' position that harmful sludge was distributed in the first four counties, and due to the significant adverse press in all of these counties much of which has originated out of the Kansas City and St. Joseph media markets. This defendant moves for a change of venue as a matter of right under Rule 51.03 and suggests Livingston County, Missouri because it is convenient to the parties but also because a transfer to Livingston County avoids the necessity of taking up and addressing the issue of prejudice in various other counties. Alternatively, Prime Tanning Corp. seeks a change of venue for cause and should the Court deem it necessary, Prime Tanning Corp. requests time to conduct discovery in order to determine the extent of the prejudice arising from Plaintiffs' media blitz and the resulting adverse publicity, and to determine "where the cause or causes do not exist." See Rule 51.04(e).

Application for Change of Judge

Pursuant to Mo. R. Civ. P. 51.05, a change of judge "shall" be ordered upon the timely application of a party. "The application need not allege or prove any cause for such change of judge and need not be verified." *Id.* An application for change of judge is timely if made within (a) 60 days of service of process or (b) 30 days from the designation of the trial judge, whichever is longer. *Id.* This application is timely as Prime Tanning Corp. was served with process on April 29, 2009. Upon timely presentation of an application for change of judge, as this application is, the judge initially designated must either transfer the case to the presiding judge

for assignment to another judge in this Circuit, or request the Missouri Supreme Court to assign a judge.

Application for Change of Venue as of Right

Prime Tanning Corp. seeks a change of venue as of right under Rule 51.03 because Clinton County has 75,000 or less inhabitants. Rule 51.03 provides that a timely application for change of venue as of right “shall be ordered in a civil action triable by jury that is pending in a county having seventy-five thousand or less inhabitants” Rule 51.03(a) (emphasis added). Such an application is timely if made within “ten days after answer is due to be filed.” Prime Tanning Corp. was served on April 29, 2009, making its answer due on May 29, 2009. Prime Tanning Corp.’s motion is therefore timely. In addition, the Court may take judicial notice that Clinton County has 75,000 or less inhabitants. Thus, Prime Tanning Corp. is entitled to a change of venue as of right. Pursuant to Rule 51.03, the court is to transfer the case “to some other county convenient to the parties,” and this defendant suggests that the matter be transferred to Livingston County, Missouri.

Application for Change of Venue for Cause

Alternatively, Prime Tanning Corp. requests a change of venue for cause under Rule 51.04(a). Under that rule, a change of venue may be granted if “the inhabitants of the county are prejudiced against the applicant.” Rule 51.04(a)(1). In the instant case, Plaintiffs’ media blitz and town-hall meetings have resulted in substantial negative publicity to this defendant, which has only been heightened by the celebrity of Erin Brokovich who has been the spokesperson for Plaintiffs’ action. See Affidavit of Todd H. Bartels, ¶ 3, attached hereto as **Exhibit A**. This action has received considerable, widespread print and television news coverage not only in Clinton, DeKalb, Andrew, and Buchanan counties but also in the Kansas City and St. Joseph area media. *Id.*, ¶ 4. A sampling of just some of the news reports concerning this case are

attached hereto as **Exhibit A-1**. Prime Tanning Corp. submits that such widespread, high profile, negative publicity, particularly when it carries the imprimatur of a well-known celebrity, substantially prejudices the community from which potential jurors will be drawn. *See Exhibit A, ¶ 8.*

Moreover, the initial filing in the above-styled case and related media blitz has been followed by the filing of at least five other related lawsuits in Clinton and DeKalb counties. **Exhibit A, ¶ 5.** Two of these actions seek to certify a plaintiff class of every single resident of Clinton, DeKalb, Andrew, and Buchanan counties with alleged damages against Prime Tanning Corp. *Id., ¶ 6.* *See* Class Action Petition filed in the case styled *Ruth Nicholson et al. v. Prime Tanning Corp. et al.*, Case No. 09DK-CC00052, pending in the Circuit Court of DeKalb County, and proposed Amended Class Action Petition – Medical Monitoring in the case styled *Carol Helms v. Rockwool Industries, Inc. et al.*, Case No. 08CN-CV00693, pending in the Circuit Court of Clinton County, true and accurate copies of which are attached hereto as **Exhibits A-2 and A-3**, respectively.

A third class action seeks to certify a class of all property owners in Clinton, DeKalb, Andrew, and Buchanan counties seeking alleged damages for remediation and loss of property values. *Id., ¶ 7.* *See Cyndee Gardner v. Rockwool Industries, Inc., et al.*, Case No. 08CN-CV00692, pending in the Circuit Court of Clinton County, a true and accurate copy of which is attached hereto as **Exhibit A-4**. The prospect of every resident of this county being a member of a plaintiff class with alleged damages against Prime Tanning Corp. arising from the same core of facts as the instant case, obviously prejudices this defendant.

If the Court deems such evidence insufficient to grant its alternative motion under Rule 51.04 (for cause), Prime Tanning Corp. requests a four month time period during which to

conduct such discovery as may bear on the issue of prejudice, including through written discovery, issuance of subpoenas, and depositions, and that a hearing be held upon completion of that discovery.

WHEREFORE, Prime Tanning Corp. respectfully requests this Court to:

- (a) grant its application for a change of judge;
- (b) grant it a change of venue as a matter of right to Livingston County, Missouri;
- (c) alternatively, grant it a change of venue for cause and if the Court deems it necessary, for a four month period of time within which to conduct discovery as to the prejudice against Prime Tanning Corp.; and
- (d) for such further relief as the Court deems just and proper.

Dated: June 8, 2009

Respectfully submitted,

POLSINELLI SHUGHART PC



R. Dan Boulware MO #24289

DBoulware@polsinelli.com

Todd H. Bartels MO #45677

TBartels@polsinelli.com

Seth C. Wright MO #51830

SCWright@polsinelli.com

3101 Frederick Avenue

St. Joseph, MO 64506

Phone: (816) 364-2117

Fax: (816) 279-3977

Dennis J. Dobbels MO #32378

DDobbels@polsinelli.com

Twelve Wyandotte Plaza

120 West 12th Street

Kansas City, MO 64105

Phone: (816) 421-3355

Fax: (816) 374-0509

Melissa A. Hewey
DRUMMONDWOODSUM
84 Marginal Way, Suite 600
Portland, ME 04101
Phone: (207) 772-1941
Fax: (207) 772-3627
mhewey@dwmlaw.com

**ATTORNEYS FOR DEFENDANT
PRIME TANNING CORP.**

CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2009, copies of the foregoing were transmitted via first class U.S. mail, postage prepaid, to:

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 Boulevard
Los Angeles, CA 90017-1904

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

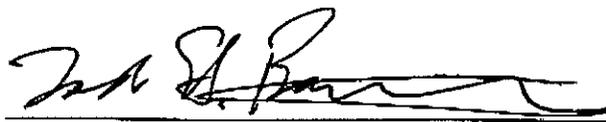
ATTORNEYS FOR PLAINTIFFS

William Crawford Blanton, Jr.
Stephen J. Torline
HUSCH BLACKWELL SANDERS LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112

**ATTORNEYS FOR DEFENDANT
NATIONAL BEEF LEATHERS CO. LLC**

Scott R. Ast
Todd A. Scharnhorst
SCHARNHORST AST & KENNARD, P.C.
1000 Walnut, Suite 1550
Kansas City, MO 64106

**ATTORNEYS FOR DEFENDANT
RICK REAM**


Attorneys for Defendant Prime Tanning Corp.

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

WILLIAM KEMPER, et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No. 09CN-CV00333
PRIME TANNING CORP., et al.,)	
)	
Defendants.)	

AFFIDAVIT OF TODD H. BARTELS

STATE OF MISSOURI)
) ss.
 COUNTY OF BUCHANAN)

COMES NOW the Affiant, Todd H. Bartels, and after being duly sworn on his oath, states as follows:

1. My name is Todd H. Bartels. I am more than eighteen years of age and competent to testify.

2. I represent Prime Tanning Corp. in the above-styled matter and submit this Affidavit in support of its Application for Change of Judge and Change of Venue.

3. Attached hereto as **Exhibit A-1** are true and accurate copies of press reports which have resulted from the filing of the above-styled case, related actions, and Plaintiffs' media blitz and town hall meetings. The resulting negative publicity to Prime Tanning Corp. has only been heightened by the celebrity of Erin Brokovich, who has been the spokesperson for the Plaintiffs' action.

4. This action has received considerable, widespread television and newspaper coverage not only in Clinton, DeKalb, Andrew, and Buchanan counties, but also from the Kansas City and St. Joseph area media.

EXHIBIT A

5. The initial filing in the above-styled case and related media blitz, has been followed by the filing of at least five other related lawsuits in Clinton and DeKalb counties.

6. Two of these actions seek to certify a plaintiff class of every single resident of Clinton, DeKalb, Andrew, and Buchanan counties with alleged damages against Prime Tanning Corp. See Class Action Petition filed in the case styled *Ruth Nicholson et al. v. Prime Tanning Corp. et al.*, Case No. 09DK-CC00052, pending in the Circuit Court of DeKalb County, and proposed Amended Class Action Petition – Medical Monitoring in the case styled *Carol Helms v. Rockwool Industries, Inc. et al.*, Case No. 08CN-CV00693, pending in the Circuit Court of Clinton County, true and accurate copies of which are attached hereto as **Exhibits A-2 and A-3**, respectively.

7. A third class action seeks to certify a class of all property owners in Clinton, DeKalb, Andrew, and Buchanan counties seeking alleged damages from Prime Tanning Corp. for remediation and loss of property values. See *Cyndee Gardner v. Rockwool Industries, Inc., et al.*, Case No. 08CN-CV00692, pending in the Circuit Court of Clinton County, a true and accurate copy of which is attached hereto as **Exhibit A-4**.

8. Prime Tanning Corp. submits that the substantial adverse publicity, including that in the Kansas City and St. Joseph media markets, in addition to the fact that there are actions pending which seek to certify every resident of Clinton County as part of a plaintiff class, substantially prejudices this defendant should this matter proceed in this county.

9. While Prime Tanning Corp. submits there presently exist sufficient grounds to grant its motion for change of venue for cause, should the Court disagree this defendant requests discovery on the issue of prejudice, including written discovery, issuance of subpoenas, and depositions.

Further Affiant sayeth not.

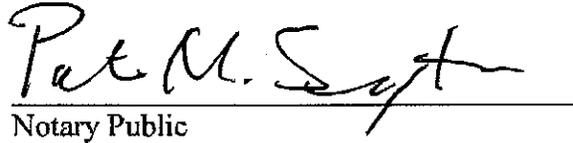
Dated: June 8, 2009



Todd H. Bartels

SUBSCRIBED AND SWORN TO before me this 8th day of June, 2009.

(seal)



Notary Public