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application to change venue. Plaintiffs cite no statute or case law stating otherwise. Instead, Plaintiffs simply assert that this case should be “deemed” to be already transferred from Clinton County. This argument is wholly without merit. The Applications have not yet been acted upon by the Court. Consequently, venue remains at this time in Clinton County, where all parties have continued to file numerous briefs and other documents with this Court under the original Clinton County case number. Because a change of venue has not yet been effected, there is nothing procedurally improper in NBL and the Prime Defendants withdrawing their Applications (the “Withdrawals”).

There also is nothing unique about subsequently withdrawing a filed motion. See, e.g., Cross v. Drury Inns, Inc., 32 S.W.3d 632, 636 (Mo. Ct. App. E.D. 2000) (“When a movant needs to supplement the [summary judgment] motion with new facts, the movant should withdraw the original motion and file a new or amended motion incorporating the additional evidence.”); State v. Sanning, 271 S.W.3d 56, 58 (Mo. Ct. App. E.D. 2008) (upholding the defendant’s right to withdraw a motion for new trial); State ex rel. Hilker v. Sweeney, 877 S.W.2d 624, 626 (Mo. 1994) (mentioning with approval the withdrawal of a motion for leave to amend pleadings).<sup>1</sup>

Plaintiffs’ contention that State v. Smith, 293 S.W.3d 149 (Mo. Ct. App. 2009), and State ex rel. Dilliner v. Cummins, 92 S.W.2d 605 (Mo. 1936), have no relevance here based on Plaintiffs’ assertion that those cases addressed current and former criminal change of venue rules carries no weight. First, Cummins was not a criminal case. Rather, that case involved an election dispute and the then-applicable civil venue statute. Second, although Cummins was a civil case, the court there cited to several criminal cases in which Missouri courts allowed defendants to withdraw applications for change of venue, 92 S.W.2d at 607-608, to support the

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<sup>1</sup> Indeed, in Missouri plaintiffs can dismiss an entire case without prejudice at any time before it is finally submitted to a jury. See Mo. Rev. Stat. § 510.130.

proposition that “[t]he right to a change of venue is not a constitutional right, but is a mere statutory privilege which the parties may waive either before or after the change has been granted.” Id. at 607 [emphasis added].<sup>2</sup> Thus, the relevant teaching of Smith and Cummins for this case is that a party certainly may withdraw its application to change venue before the court has ruled on it.

Moreover, Plaintiffs have no valid basis to assert reliance on Defendants’ Applications. Generally, parties are responsible for invoking their own procedural protections. See McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473, 477-478 (Mo. 2009). Accordingly, a party waives its right to a change of venue if it does not timely file an application, just as a party waives other procedural positions such as lack of personal jurisdiction and insufficient service of process if not timely raised. See Mo. R. Civ. P. 51.03(a); 55.27(g). Here, Plaintiffs chose not to file a timely application for change of venue. As they have no right to rely on Defendants’ Applications, they cannot claim undue prejudice by its withdrawal.

#### As to Alternative Venue Arguments

For the reasons discussed above, Plaintiffs’ arguments in support of their contention that the Court should establish venue of this case in Jackson County is moot. However, if the Court chooses to address alternative venues notwithstanding Defendants’ withdrawals of their Applications, NBL joins in the arguments by Defendants Burns & McDonnell Engineering Company, Inc. and Elementis LTP L.P. opposing the transfer of venue of this action to Jackson County.

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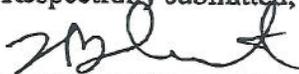
<sup>2</sup> In Cummins, Dilliner contested the result of an election and applied for change of venue, which was ordered. Dilliner’s opponent appeared and successfully moved for remand to the original venue on the grounds that the statute governing election disputes did not authorize venue changes. However, Judge Cummins refused to honor the remand because he believed he was without authority to do so following his order sustaining Dilliner’s application for a change of venue. Dilliner then sought to withdraw his application, but Judge Cummins was unmoved. The Supreme Court of Missouri, though, issued a writ of mandamus directing Judge Cummins to honor the withdrawal of the application for change of venue and to exercise his jurisdiction over the matter.

**Conclusion**

In summary, there is no procedural rule or precedent that prohibits NBL and the Prime Defendants from withdrawing their Applications for change of venue; Plaintiffs failed to timely submit their own application for change of venue; and Plaintiffs have provided no authority to justify their supposed reliance on Defendants' Applications. Accordingly, this Court should consider Defendants' Applications to have been withdrawn upon the filing of their Withdrawals.

Date: May 20, 2010

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **DEFENDANT NATIONAL BEEF LEATHERS, LLC'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL SUGGESTIONS REGARDING CHANGE OF VENUE PURSUANT TO MO. CT. RULE 51.03 AND SUGGESTIONS IN OPPOSITION TO DEFENDANTS' PROPOSED WITHDRAWAL OF THEIR MOTION TO CHANGE VENUE** has been deposited in the U.S. Mail, first class postage prepaid, this 20th day of May, 2010, to the following:

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