

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

FILED  
JUL - 9 2009

MOLLY LIVINGSTON  
CLERK OF CIRCUIT COURT

BEVERLY LONG, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 PRIME TANNING CORP., et al., )  
 )  
 Defendants. )

Case No. 09CN-CV00422

**DEFENDANTS PRIME TANNING CORP.'S AND PRIME TANNING CO., INC.'S  
APPLICATION FOR CHANGE OF JUDGE AND CHANGE OF VENUE**

Defendants Prime Tanning Corp. and Prime Tanning Co., Inc. (sometimes referred to as "these defendants"), 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 suggest that the matter be transferred to Livingston County, Missouri. Alternatively, these defendants move 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, these defendants move the Court for a four month period of time within which to conduct discovery to support their Rule 51.04 application for change of venue before their application for change of venue is ruled. In support of this motion, Prime Tanning Corp. and Prime Tanning Co., Inc. state 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, these defendants are 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. These defendants move for a change of venue as a matter of right under Rule 51.03 and suggest 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, these defendants seek a change of venue for cause and should the Court deem it necessary, these defendants request 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.* 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**

These defendants seek 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.’s and Prime Tanning Co., Inc.’s motion is clearly timely. In addition, the Court may take judicial notice that Clinton County has 75,000 or less inhabitants. Thus, these defendants are 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 these defendants suggest that the matter be transferred to Livingston County, Missouri.

**Application for Change of Venue for Cause**

Alternatively, these defendants request 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**. These defendants submit 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 these defendants, *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 these defendants arising from the same core of facts as the instant case, obviously prejudices these defendants.

If the Court deems such evidence insufficient to grant its alternative motion under Rule 51.04 (for cause), these defendants request 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. and Prime Tanning Co., Inc. respectfully request this Court to:

- (a) grant their application for a change of judge;
- (b) grant them a change of venue as a matter of right to Livingston County, Missouri;
- (c) alternatively, grant them 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 Prime Tanning Co., Inc.; and
- (d) for such further relief as the Court deems just and proper.

Dated: July 9, 2009

Respectfully submitted,

**POLSINELLI SHUGHART PC**



R. Dan Boulware MO #24289

[DBoulware@polsinelli.com](mailto:DBoulware@polsinelli.com)

Todd H. Bartels MO #45677

[TBartels@polsinelli.com](mailto:TBartels@polsinelli.com)

Seth C. Wright MO #51830

[SCWright@polsinelli.com](mailto: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](mailto:DDobbels@polsinelli.com)

Twelve Wyandotte Plaza

120 West 12<sup>th</sup> 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](mailto:mhewey@dwmlaw.com)

**ATTORNEYS FOR DEFENDANTS  
PRIME TANNING CORP. and  
PRIME TANNING CO., INC.**

**CERTIFICATE OF SERVICE**

I certify that on this 9<sup>th</sup> day of July, 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 Defendants Prime Tanning Corp.  
and Prime Tanning Co., Inc.

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	)	
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. and Prime Tanning Co., Inc. in the above-styled matter and submit this Affidavit in support of their 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. and Prime Tanning Co., Inc. has only been heightened by the celebrity of Erin Brokovich, who has been the spokesperson for the Plaintiffs' action.

EXHIBIT A

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.

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.

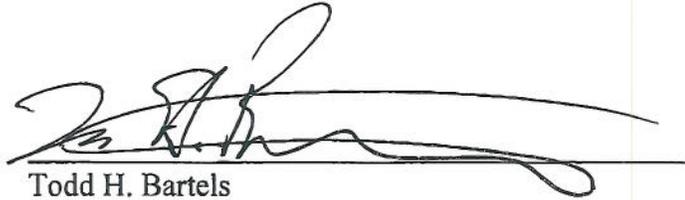
7. A third class action seeks to certify a class of all property owners in Clinton, DeKalb, Andrew, and Buchanan counties seeking alleged damages from Prime Tanning Corp. for remediation and loss of property values. See *Cyndee Gardner v. Rockwool Industries, Inc., et al.*, Case No. 08CN-CV00692, pending 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. and Prime Tanning Co., Inc. submit 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. and Prime Tanning Co., Inc. submit 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.

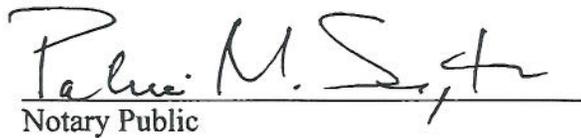
Further Affiant sayeth not.

Dated: July 9, 2009



Todd H. Bartels

SUBSCRIBED AND SWORN TO before me this 9<sup>th</sup> day of July, 2009.



Notary Public