EXHIBIT F

To Be Submitted By:
Frank A. Longo

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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

RACQUEL LIVIDINI,

Plaintiff-Appellant,

against

HAROLD L. GOLDSTEIN, D.P.M., VINAI PRAKASH, D.P.M.,
RYE AMBULATORY SURGERY CENTER, L.L.C.
and WESTMED MEDICAL GROUP, P.C.,

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT RACQUEL LIVIDINI

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PRELIMINARY STATEMENT

Despite their efforts in three separate opposing briefs, defendants-respondents have still failed to overcome the unimpeachable fact that for many years preceding this case and again even after this motion was decided, defendant, HAROLD L. GOLDSTEIN, D.P.M., has repeatedly affirmatively represented to the N.Y.S. licensing authority in his triennial registration filings that his professional business address is in Bronx County.[1]

Thus, notwithstanding their dozens of pages of arguments, respondents have still not met their burden of establishing by non-conclusory, documentary proof that plaintiff improperly chose Bronx County as the venue for the trial of this matter.

Further, while defendants expend great quantities of effort and ink harping that the malpractice occurred in Westchester County, that point is irrelevant to whether venue was properly placed in Bronx County as a matter of right pursuant to CPLR §503(d) based on Goldstein's principal office location.

In stark contrast, plaintiff has established by documentary and other admissible proof that venue was properly placed in Bronx County, including:

- Goldstein's designation of Bronx County as his professional address on his official license registration documents with the New York State Education Department,

[1] Indeed, it is noteworthy that below, Goldstein never addressed, much less offered any evidence, as to how many years – or decades – he has been informing the State that his professional address is in the Bronx.

including his recent renewal of his registration at the same address even after this venue motion was decided below (R. 141-142; Appellant's Brief at 7, fn. 5);

- He works several days every week and treats at least 150-200 patients per month at St. Barnabas Hospital's podiatric clinic in the Bronx (R. 41);

- He is the assistant director of the podiatry residency program at St. Barnabas Hospital and teaches residents there (R. 146);

- He maintains three active office locations in the Bronx (R. 41, 146-147);

- He treats at least another 25-30 patients per week at a private office on Bronxdale Avenue in the Bronx (R. 41);

- The assistant surgeon for plaintiff's surgery, defendant Prakash, was one of Goldstein's residents from St. Barnabas (R. 42, 99-100);

- He maintains active privileges at St. Barnabas Hospital in the Bronx (R. 41).

In their briefs, defendants all relied erroneously on Goldstein's conclusory affidavit which was unsupported by any documentary proof to urge that despite all of the foregoing, his principal place of business was really in Westchester County where he is employed by and sees patients on behalf of defendant, WESTMED MEDICAL GROUP, P.C. ("WestMed"). Based on well-established case law, however, this is patently insufficient to rebut plaintiff's showing that Bronx County was properly selected in the first instance based upon defendant's professional registration filings with the State.

Finally, defendants utterly failed to establish that a discretionary change of venue is warranted under CPLR §510(3) based upon the convenience of material witnesses and interests of justice. They did not name even a single non-party witness – or for that matter any witness – who would be inconvenienced or prejudiced by having to testify in Bronx County instead of Westchester.

Based upon the foregoing, the orders of the lower court granting defendants' motions and cross-motion to transfer venue to Westchester County should be reversed and the case should be reinstated in Bronx County.

POINT I

DEFENDANTS HAVE FAILED TO DEMONSTRATE, AS WAS THEIR BURDEN, THAT PLAINTIFF IMPROPERLY CHOSE BRONX COUNTY AS THE VENUE FOR THIS ACTION

As set forth in Appellant's Brief, defendant Goldstein should be estopped from challenging the Bronx County venue selected by Ms. Lividini. She was entitled to rely on the address he affirmatively listed in his professional license filings with the State as the basis for selecting Bronx County for trial. It has long been the established policy of our courts to bind parties to the address they have affirmatively provided in official filings with state agencies, whether it be the Education Department, Secretary of State, Department of Motor Vehicles or other agencies. See Appellant's Brief, Point I, pp. 15-16.

At bar, defendants cavalierly dismiss the import of Goldstein's repeated, consistent filing of his professional address for many years with the Education Department. They ask the Court to treat his unqualified representations as meaningless, each one a nullity. They do so though the State itself scarcely treats this required filing so blithely, mandating that all licensees update any change of address within 30 days. Education Law §6502(5). Goldstein has never done so, even going so far as to again designate Bronx County his professional address in 2018, his most recent registration filing, long after this action was commenced. See Appellant's

Brief, p. 7, fn. 5. He did so despite making claims in his affidavit here that his principal place of business is in Westchester County (R. 40-42).[2] It should also be noted that a willful failure to comply with §6502(5) is considered to be an act of professional misconduct under Education Law §6530.

Thus, this case in on all fours with the well-reasoned decision by Hon. Alice Schlesinger is Cozby v. Oswald, 2013 WL 2367163 (Sup. Ct., N.Y. Cnty. 2013), the only case cited by any party which involves the same fact pattern as presented here. There, the court reasoned that the county listed by a physician as his professional address in his license registration filings with the Education Department was analogous to the county listed by a corporation as its principal place of business with the Secretary of State, and since the latter had long been deemed sufficient by the courts to establish the corporation's principal "office" for venue purposes under CPLR 503(c) – even if other proof, none submitted here, established that it did not actually have an office in that county – there was no reason why the former should

[2] Defendant Prakash's counsel makes the absurd claim, for the first time on this appeal and unsupported by any authority, that Goldstein is really being sued in his individual capacity and, therefore, CPLR §503(a) alone should apply. Since this is a malpractice case arising from Goldstein's professional activities as a practicing podiatrist, the case law is clear that an unincorporated professional – like Goldstein – sued in his professional capacity has two residences for venue purposes under CPLR §503(d), his residence and his principal office. See, Young Sun Chung v. Kwah, 122 A.D.3d 729, (2nd Dept. 2014). See also, DiCicco v. Cattani, 5 A.D.3d (1st Dept. 2004) [venue of malpractice action against physician should be in county where principal office was located].

Prakash's counsel also urges that "nothing in the Record indicates that Dr. Goldstein is an owner or partner in any business or medical practice, whether in Bronx County or any other county." Respondent's Brief at p. 4. Beside the absence of any Record support for this assertion, Goldstein admitted that he sees dozens of patients weekly at a private office on Bronxdale Avenue

not be sufficient to establish the principal "office" location of an unincorporated professional such as Goldstein under CPLR §503(d).

Justice Schlesinger then noted that even if the professional address listed by the defendant physician was not deemed controlling, nevertheless it would carry substantial evidentiary weight, especially when the physician, just as Goldstein at bar, never corrected or updated his registration filings despite ample opportunity to do so. Further, Justice Schlesinger recognized that while a physician's affidavit might be persuasive on the issue of determining their principal office location in some instances, this was entirely dependent on the quality of the affidavit:

> "[N]ot all affidavits are sufficient; it is the level of detail and convincing quality of the affidavit that is key. The burden is on the moving defendant to establish that plaintiff's choice of venue was an improper one. *Singh v. Empire Int'l ltd.*, 95 A.D.3d 793 (1st Dept. 2012). A self-serving affidavit that is conclusory in nature is insufficient to satisfy that burden. Thus, in the recent case of *Book v Horizon Asset Management*, 105 A.D.3df 661 (1st Dept. 2013), the appellate court reversed the trial court and granted the motion to change venue, finding that the plaintiff's self-serving and conclusory affidavit as to her residence was insufficient to establish residence in the face of evidence that she was living elsewhere."

Id. at p. 4 (italics in original, emphasis added). Justice Schlesinger then noted that defendant's affidavit there lacked sufficient "evidentiary" details to make it sufficiently persuasive to meet defendant's burden and denied the motion.

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in the Bronx, and has substantial, unexplained business affiliations with St. Barnabas Hospital and its podiatry clinic where he also sees patients several days each week.

Similarly, at bar, Goldstein's designation of a Bronx County address on his professional license registration filings should be binding; he should be estopped from claiming his principal office is located in a different county. And even if this mandatory, affirmative designation were to be deemed not binding, it nevertheless constitutes substantial evidentiary proof of the location of his principal office, requiring much more than the conveniently crafted, conclusory, unsupported-by-any-evidence affidavit Goldstein offered for defendants to meet their burden of establishing plaintiff's choice of venue was improper.

As previously demonstrated, Goldstein's affidavit provided merely a selective, self-serving account of his professional activities, unsupported by any of the easily available – if true – evidentiary proof on issues on which it engaged, such as tax returns, w-2's or 1099's. Indeed, while it provided a few details as to his Westchester activities, he offered only vague general statements regarding his Bronx activities. For example, while he listed specific hours and amounts of time allegedly spent at WestMed, no documentary or other evidence was provided.[3] He provided no specifics as to his Bronx activities, neither the hours spent seeing patients or

[3] Indeed, no support or basis was proffered for the estimates Goldstein made in his affidavit as to the number of patients he sees or the percentage of income he earns in Westchester. Nor does he recite what records or information he reviewed or relied upon to come up with the numbers he quoted. Hence, there is simply no way this Court or anyone else can assess the credibility, reliability or accuracy of any of his claims to overcome his repeated official filings attesting that Bronx County was his principal professional location. Similarly, defendant WestMed could easily have provided evidentiary support for Goldstein's claims about his hours and his estimates of the number of patients he purportedly sees there. Instead, other than confirming that Goldstein was its

supervising residents at the St. Barnabas clinic, his hours at his Bronxdale Avenue office or his hours performing his duties as assistant director of St. Barnabas's podiatry residency program. The affidavit was simply insufficient to establish that plaintiff's choice of venue was improper given the years-long, repeated contradictions filed by Goldstein every three years in his license registrations.

The lack of detail and evidentiary bases is also significant because the case upon which defendants rely primarily to support their contention that Goldstein's affidavit alone was sufficient to meet their burden, DiCicco v. Cattani, 5 A.D.3d 318 (1st Dept. 2004), evolved from an entirely distinct set of facts. There, this Court affirmed the lower court's order transferring venue from New York County to Richmond County where the lower court found that defendant's affidavit established that 80% of his time, not income, was spent at his principal office location in Richmond County.[4] At bar, Goldstein failed – clearly intentionally – to state how much or what percentage of his time is dedicated to his Westchester and Bronx activities, respectively.

DiCicco is also inapplicable because there, unlike at bar, the defendant's professional activities within New York County were nowhere as extensive and pervasive as those of Goldstein's admitted and proven activities in the Bronx.

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employee, the affidavit by WestMed's medical director was utterly silent as to all of these critical assertions. (R. 81-83)

[4] The lower court's order dated February 27, 2003 can be found online on e-Courts under Supreme Court, N.Y. County Index No. 123532/2002

Further, and perhaps most important, the defendant in DiCicco did not affirmatively represent in his State license registration filings that his professional address was in a county other than the one where he claimed to have his principal office.[5]

Defendants attempt to minimize this critical difference by arguing that defendant in DiCicco was not found to be bound by the New York County address he listed with the N.Y.S. Directory of Physicians, a privately compiled, published and distributed non-governmental medical directory. However, as Justice Schlesinger noted in Cozby, just as other courts of our state have noted in myriad other venue decisions, listing an office address for marketing or advertising purposes with a private company or website is qualitatively different than registering an address with an official state agency such the New York State Education Department, Secretary of State or Department of Motor Vehicles. In the latter instances, courts have consistently and routinely held a party to be bound by such a designation for venue purposes or, at the very least, have held that party to a very high standard of proof to the contrary, including credible documentary support, before even considering that their principal office or residence might actually be elsewhere. See Appellant's Brief,

[5] Incredibly, counsel for Goldstein argues that there is no proof or statutory support for plaintiff's claim that the address Goldstein listed in his professional license registration filings – the address of St. Barnabas Hospital where he conducts substantial professional business activities completely unrelated to his employment at WestMed – is meant to be his principal office or place of business. Simply put, there is no proof that it is not and since it was defendants' burden to prove plaintiff improperly selected venue, the lack of proof in this regard was yet another fatal deficiency in defendants' showing.

Point I, p. 18-21. Here, Goldstein's affidavit scarcely approaches – much less meets – any such standard.

This conclusion is supported as well by Lombardi Associates, Ltd. V. Champion Ambulette Service, Inc., 270 A.D.2d 775 (3rd Dept. 2000), relied upon by defendant Prakash. There, plaintiff, a corporation, placed venue of the action in Saratoga County. Defendant moved to change venue to Queens County, the location of its principal office, after learning that plaintiff corporation had listed Albany County as its principal place of business in its certificate of incorporation. In response, plaintiff claimed that its actual principal office was in Saratoga County, which it had listed as its place of business on its broker's license.

The court rejected plaintiff's argument, finding that pursuant to CPLR §503(c) and long-established case law, it was the place of business designated by the corporation in its certificate of corporation that conclusively determined its address for venue purposes, regardless of whether its actual office was in some other county. Hence, the fact that plaintiff may have listed a different address on its broker's license was irrelevant under the circumstances; defendant was entitled to a change of venue as the one initially selected by plaintiff was improper.

Thus, the court in Lombardi did not hold, as defendant Prakash's counsel suggests, that the professional address a party listed with a state licensing agency had "no bearing" on determining a party's principal office for venue purposes. Prakash

Brief at 7. To the contrary, the court there simply held that as far as a corporate party was concerned, it was the address it had listed in its official filing with the Secretary of State that controlled for venue purposes under CPLR §503(c), nothing else.

Of course, at bar, there is no corporation involved, but the only professional address registered with a State agency by Goldstein – for untold years and in an untold number of filings – was the Bronx County one he designated. Defendants begrudgingly concede that at a minimum, this professional address designation created a presumption that Bronx County was properly selected for venue. Further, this presumption could only be rebutted by non-conclusory proof supported by credible documentation that plaintiff's selection was improper. See, *e.g.*, Darbeau v. 136 West 3rd Street, LLC, 144 A.D.3d 420 (1st Dept. (2016); Fix v. B&B Mall Assocs., 118 A.D.3d 477 (1st Dept. 2014); Book v. Horizon Management, 105 A.D.3d 661 (1st Dept. 2013); Hernandez v. Seminatore, 48 A.D.3d 851 (1st Dept. 2008); Furth v. Elrac, 11 A.D.3d 569 (2nd Dept. 2004); Singh v. Empire International, Ltd., 95 A.D.3d 793 (1st Dept. 2012); Broderick v. R.Y. Management Co., Inc., 13 A.D.3d 197 (1st Dept. 2004).

Defendants persist, nevertheless, in asserting that a naked, conclusory affidavit by a defendant physician, devoid of any such supporting documentation, can nevertheless suffice to meet their burden and establish that plaintiff's choice was improper, citing DiCicco, Pasley v. St. Agnes Hospital, 244 A.D.2d 469 (2nd Dept.

1998) and Magrone v. Herzog, 304 A.D.2d 801 (2nd Dept. 2003). While it is somewhat unclear from these decisions whether documentary proof was also submitted along with the affidavits in issue, they are each inapplicable; not one involved a situation, as here, where there was flatly contradictory proof that a different professional address than the one claimed to justify changing venue had been provided by the doctor in his official license registration with the State Education Department.

Similarly, Goldstein's counsel's attempt to rely on Matter of Morris v. Velickovic, 2011 WL 197829 (Sup. Ct., N.Y. Cnty. 2011), as proof that his affidavit was sufficient is equally misplaced. First, like the previously-discussed cases, the physician in Morris whose professional office location was at issue had not listed a different professional address with the State. Second, the court denied defendants' motion to change venue because the "conclusory" affidavit submitted by the physician there was insufficient to meet his burden of establishing that his principal office was in a county different from the one designated by plaintiff.

In *dicta*, the Morris court then listed examples of the types of information that were not included in the affidavit there which might have assisted it in identifying where defendant actually had his principal office, such as where he conducted the majority of his work and where he spent the majority of his time.

There was no holding, however, as Goldstein's counsel claims, that these were "requirements" which, if met or included, mandated the motion's success.[6]

Regardless, Goldstein's self-serving affidavit suffers the same inherent defects and problems as the defendant's did in Morris; it failed to provide enough details regarding Goldstein's Bronx activities and provided no documentary or evidentiary support for Goldstein's claims as to his Westchester activities. Hence, given the contradictory licensing information Goldstein provided – and continues to provide – in his license registration filings, there is simply not enough credible or reliable evidence to confirm the accuracy of his claims and rebut the presumption that his principal office is in Bronx County.

POINT II

DEFENDANTS FAILED TO IDENTIFY A SINGLE WITNESS WHO WOULD BE INCONVENIENCED BY TRIAL IN BRONX COUNTY.

Finally, as set forth more fully in Appellant's Brief at Point I, subsection "*c*," defendants failed to establish that they are entitled to a change of venue based on the convenience of material witnesses and the interests of justice pursuant to CPLR §510(3).

[6] Morris was also decided by Justice Schlesinger.

Not a single material witness – non-party or otherwise – was identified who would be inconvenienced by trial in Bronx County. And of course, it is black-letter law that the convenience of the parties, or their employees, is not to be considered in weighing a discretionary change of venue for the convenience of witnesses. See, *e.g.*, Jacobs v. Banks, Shapiro, Gettinger, Waldinger & Brennan, 9 A.D.3d 299 (1st Dept. 2004); Parker v. Ferraro, 61 A.D.3d 470 (1st Dept. 2009); see also, O'Brien v. Vassar Bros. Hospital, 207 A.D.2d 169 (2nd Dept. 1995).

Nor have defendants made any showing, nor even claimed, that they will somehow be prejudiced by having to litigate this case in Bronx County. The only argument they raised in this regard was that the medical treatment occurred in Westchester County. That, standing alone, is simply insufficient to warrant a discretionary change of venue pursuant to CPLR §510(3) where plaintiff properly selected venue as of right pursuant to CPLR §503(d). See, Herrara v Conley, 52 A.D.3d 218 (1st Dept. 2008) [omission of proof that witnesses would have been inconvenienced by trial in Bronx County, and failure by defendants to identify any such witnesses, fatal to any application by defendants for a discretionary change of venue from Bronx County to Westchester even though plaintiff and one defendant resided in Westchester, treatment occurred in Westchester and remaining defendants resided in different counties].

CONCLUSION

Based upon the foregoing, the orders of the lower court should be reversed.

Venue of this action should be retained in Bronx County.

Dated: New York, NY
March 14, 2019

Respectfully submitted,

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