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March 17, 2020

Via FedEx
Hon. John P. Asiello
Chief Clerk and Legal Counsel
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207-1095

Re: Lividini v. Goldstein, et al.
APL Docket No.: 2019-00235

Dear Mr. Asiello:

Pursuant to §500.11 of the Court of Appeals Rules of Practice, plaintiff-respondent, Racquel Lividini, submits this letter brief in opposition to the brief submitted by defendants-appellants Westchester Medical Group, P.C. and Rye Ambulatory Surgery Center, P.C. (hereinafter collectively referred to as "Westmed"), seeking reversal of the decision and order by the Appellate Division, First Department, which denied their application to change the venue of this matter from Bronx County to Westchester County.[1]

[1] Copies of the Appellate Division Briefs submitted by the parties below, as well as the Record on Appeal, have been submitted to this Court by appellants. Plaintiff-respondent, the appellant below, adopts and incorporates by reference the arguments in support of her position made in her Appellant and Reply Briefs.

The Appellate Division held that plaintiff had properly placed venue in Bronx County, reversing the order of the trial court. In doing so, the First Department majority correctly concluded that:

> "Defendant Dr. Goldstein failed to show that plaintiff's designation of Bronx as the venue at the commencement of the action was improper. It is defendant's burden to show that venue was improperly placed, and not plaintiff's, as the dissent appears to suggest. Plaintiff relied on documentary evidence to establish residency; Dr. Goldstein did not dispute this evidence, did not submit documentary evidence, and indeed admitted in his own affidavit that he maintains a regular practice in the Bronx." (emphasis added)

Lividini v. Goldstein, 175 A.D.3d 420 (1st Dept 2019) (emphasis added).

Significantly, defendant Harold Goldstein, D.P.M. – whose purported principal office location in Westchester County forms the sole basis for Westmed's appeal – did not move for permission to appeal to this Court; he has abandoned his effort to change venue. In doing so, Goldstein effectively conceded that Bronx County was properly selected by plaintiff based upon his principal office location pursuant to CPLR §503(d), precisely as the Appellate Division found. [2]

a. Background.

Westmed's appeal must be denied. Venue was properly placed in Bronx County based upon Goldstein's principal office location – established both by his official filings

[2] Defendant Prakash also failed to move for permission to appeal.

under oath and ample support of the following undisputed facts:

- Goldstein affirmatively designated Bronx County as his professional address on his sworn official license registration documents with the New York State Education Department, even renewing his registration at that same address while this appeal was pending in the First Department (R. 141-142; Appellant's Brief at 7, fn. 5);[3]

- Goldstein admittedly works several days every week in the Bronx, has three different office locations in the Bronx and treats at least 150-200 patients per month at St. Barnabas Hospital's podiatric clinic in the Bronx (R. 41, 146-147);

- Goldstein is the assistant director of the Podiatry residency program at St. Barnabas Hospital in the Bronx and teaches residents there (R. 146);

- Goldstein treats numerous patients per month at his private office on Bronxdale Avenue in the Bronx, which is where the summons and complaint were served upon him without objection (R. 29-31, 41, 143);

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

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

As the First Department's majority also correctly found, since plaintiff demonstrated that venue had been properly selected pursuant to §503(d), it was defendants' burden to rebut this overwhelming proof to justify a change of venue. Yet

[3] References to "(R. __)" are to the Record on Appeal.

they submitted no documentary proof whatsoever supporting Goldstein's self-serving and selective affidavit claiming that the majority of his time engaged in professional activities was spent in Westchester County. See, plaintiff-respondent's Appellate Division Reply Brief at pp. 7-9.[4] Nor was any proof whatsoever submitted to support Goldstein's conclusory claim that 75% of his income was allegedly derived from his Westchester business activities.

b. Defendant failed to establish that venue was improperly selected.

The failure to submit any documentary proof is fatal to Westmed's application at bar, especially given Goldstein's sworn registration filings and numerous proven and admitted professional activities in Bronx County. Further, the failure to submit any documentary proof deprives this Court – as it did the lower courts – of any means by which to verify whether Goldstein's carefully crafted claims in his affidavit were true, or even plausible. See, Singh v. Empire International, Ltd., 95 A.D.3d 793 (1st Dept. 2012); Fix v. B&B Mall Associates, Inc., 118 A.D.3d 477 (1st Dept. 2014). Broderick v. R.Y. Management Co., Inc., 13 A.D.3d 197 (1st Dept. 2004); Hernandez v. Seminatore, 48

[4] The dissenting justices below appear to have misinterpreted the majority's decision, asserting that the majority found venue properly placed pursuant to CPLR §503(a). No such holding or language appears anywhere in the majority opinion, however. Rather, the majority determined that venue had been properly placed in the Bronx – as plaintiff-respondent has always maintained – based upon Goldstein's principal office location, not his purported residence. Hence, that he may live in Westchester is in no way germane to the question of whether venue is proper based on his principal office location under §503(d).

A.D.3d 851 (1st Dept. 2008).[5]

In fact, despite ample opportunity to do so below, Westmed and the other moving defendants made a deliberate, conscious decision not to submit any easily available documentary proof, such as work schedules, tax records, billing records, appointment books or the like, which might have supported Goldstein's claims. Indeed, Westmed provided only the most minimal "support," an affidavit by its medical director which simply asserted that Goldstein was one of its employees, nothing more, not even anything attesting to or corroborating his claimed hours, work schedule or length of employment. (R. 81-83)

Nevertheless, Westmed asks this Court to afford them special treatment by ignoring Goldstein's repeated, official, sworn N.Y.S. professional registration filings as well as the fatal deficiencies in its proof. Further, the circumstances at bar are qualitatively and substantively different from the proof submitted by plaintiff in DiCicco v. Cattani, 5 A.D.3d 318 (1st Dept. 2004), upon which Westmed relies. In DiCicco, the proof consisted not of sworn filings, but only of unofficial medical websites and a copy of defendant's letterhead, both of which listed defendant's office addresses. Similarly, in Kielczwewski v. Pinnacle Restoration Corp., 226 A.D.2d 211 (1st Dept. 1996), also relied

[5] Nor did Goldstein ever explain why his affidavit, which directly contradicted his sworn registration filings as to his professional address, should have been accepted at face value. Indeed, he has never sought to explain why he knowingly listed his professional address in the Bronx, where he spends several days each week engaging in his private practice, participating in multiple surgeries and teaching, even though, allegedly, he now swears his primary practice has really been in Westchester for 20 years. Hence, his affidavit should be treated as "feigned" for the purpose of changing venue. (R. 29-33, 143).

upon by Westmed, the proof of defendant's principal office location amounted to nothing more than a "c/o" mailing address set forth in an unsworn filing with the County Clerk, not a sworn registration statement filed with the State licensing agency.

c. Westmed is bound by Goldstein's sworn listing of Bronx County as his professional address.

Official state filings by a party, on the other hand, have always been treated as qualitatively different, routinely deemed by our courts as sufficient and binding proof of residency, professional or otherwise, for purposes of establishing proper venue or jurisdiction. That these registration filings are meant to be more than just a simple mailing address, as both the dissent below and Westmed's counsel would have it, is supported by the mandate that any change of address must be reported to the Education Department within 30 days and the failure to do so is defined as an act of professional misconduct. See, Education Law §§6502(5) and 6530.

Thus, for example, corporations are bound by the county designated in their filings with the Secretary of State as to their principal office location, even where the record demonstrates unequivocally that the corporation has no office in that county, the action has no nexus to that county and the corporation has its principal place of business in a different county. See, *e.g.*, Janis v. Janson Supermarkets, LLC, 161 A.D.3d 480(1st Dept. 2018) [defendant's designation of New York County as its place of business in its application to Secretary of State was controlling for venue purposes even if it had no

actual office in New York County]; Dryer-Arnow v. Ambrosio and Co., Inc., 2020 N.Y. Slip. Op. 01601 (2nd Dept. 2020) [plaintiff properly selected venue in N.Y. County based upon corporate defendant's designation of that county as its principal place of business in its certificate of incorporation filed with Secretary of State, even though defendant's actual office was located in Suffolk County and underlying events occurred in Nassau County].

Also on point is Cozby v. Oswald, 2013 WL 2367163 (Sup. Ct., N.Y. Cnty., Schlesinger J. 2013). There, defendant chiropractor claimed, as Goldstein does here, that venue had been improperly placed in New York County because his principal office location was actually in Rockland County, where the underlying treatment had been rendered. The defendant moved to change venue in a manner almost identical to Goldstein's here, claiming that while he maintained a satellite office in New York County, the majority of his professional activities really occurred in his office in Rockland County, where he had also lived for the past 22 years.

The Cozby court denied defendant's motion to change venue, finding that despite defendant's claims, his affirmative listing of his New York office as his professional address with the N.Y.S. Department of Education's Division of Professional licensing, as Goldstein did here, as well as his failure to timely notify the State of the change of his professional address within 30 days as required by Education Law §6502(5), were sufficient to establish that venue was properly laid in N.Y. County by

plaintiff based on defendant's principal office in accordance with CPLR §503(d). Similarly, here Goldstein must also be bound by his affirmative designation of Bronx County as his professional address with the State licensing authority. See also, Day v. Davis, 47 A.D.3d 750 (2nd Dept. 2008) ["since defendant held out the address where process was served as his business address, including maintaining that address as his business address on his registration with the Office of Court Administration ... he cannot now disclaim such address as his 'actual place of business' for purposes of service of process." (emphasis added)].

Moreover, courts have consistently and repeatedly estopped individuals from claiming a different address from the one they listed with the Department of Motor Vehicles, regardless of whether they actually reside at that address or the cause of action has any relation to the county selected. Mighty v. Deshommes, 178 A.D.3d 912 (2d Dept. 2019) [defendant estopped from claiming address where plaintiff attempted service of summons and complaint was improper based on his affirmative listing of that address with the Department of Motor Vehicles and subsequent failure to timely update his address after he moved] Darbeau v. 136 West 3rd Street, LLC, 144 A.D.3d 420 (1st Dept. (2016) [plaintiff properly selected Bronx County venue based on address defendant listed with Department of Motor Vehicles]; Furth v. Elrac, Inc., 11 A.D.3d 509 (2nd Dept. 2004) [plaintiff properly selected venue based on defendant driver's address as set forth on police report]; Hernandez v. Seminatore, *supra*.

Equally on point is Vid v. Kaufman, 282 A.D.2d 739 (2nd Dept. 2001). There, plaintiff served the summons and complaint upon defendant-physician Karafiol at his actual place of business, defendant OB/GYN Associates of Long Island, P.C., based upon current telephone listings, as well as Karafiol's name on signs in both the building lobby and on the P.C.'s office door and a current business card identifying him as a member of the practice. Karafiol, however, disputed that he was properly served at his place of business and moved to dismiss, asserting that despite plaintiff's proof, he had had a stroke and had sold his interest in the practice months before service was attempted and had no control over the P.C.'s continued listing of him as being part of the practice.

While the lower court granted Karafiol's motion, the Second Department reversed. In doing do, it found that Karafiol's claim that he had no control over the P.C.s continued use of his name "strain[ed] credulity." More important, the Court found that Karafiol had also affirmatively held himself out as being affiliated with the P.C. by submitting a verified statement to that effect with the N.Y.S. Medical Directory and by his failure to notify the State's Division of Professional Licensing of his change of address as required by Education Law §6502(5), even after service had been effected. Thus, the Appellate Division found that since Karafiol had failed to take prompt steps to change the address of his place of business and disassociate himself from the P.C., service at the P.C. was proper and reinstated plaintiff's complaint. See also, Melton v. Brotman Foot Care Group, 198 A.D.2d 481 (2nd Dept. 199) [service of summons and complaint

under CPLR §308(2) was proper where process was mailed to the address listed by defendant with the New York State Department of Education Division of Professional Licensing; defendant's failure to timely notify the State of his new address in compliance with Education Law §6502(5) estopped him from claiming he was served at the wrong address].

Similarly, at bar, Goldstein has affirmatively and repeatedly – for years – sworn that his professional address was in Bronx County, where he has admitted he continues to maintain a significant and active professional presence, including multiple offices. Not only has he never taken any of the legally-mandated steps to update his address with the N.Y.S. Department of Education's Division of Professional Licensing, but he even re-filed designating that same Bronx address during the pendency of his appeal below to the Appellate Division.

Thus, plaintiff properly selected Bronx County as the venue for this matter and Goldstein's self-serving statements to the contrary, unsupported by any objective or documentary proof are markedly insufficient to show that venue was improperly chosen.[6]

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[6] Westmed's counsel argues that despite Goldstein's sworn filings and other undisputed proof of his numerous Bronx professional activities, the contradictory claims in his affidavit should be accepted at face value and, therefore, his affidavit alone is sufficient to support a change of venue. However, the few cases he cited in this regard, Palsey v. St. Agnes Hospital, 244 A.D.2d 469 (2nd Dept. 1997) and Kielczewski, *supra*, scarcely support such a conclusion. In neither, nor in DiCicco *supra*, were the courts faced with a situation like the one at bar where the claims in a defendant's affidavit were directly contradicted by his own prior sworn statements and filings. In such situations, the courts have held the party claiming a different office or residence address to a higher burden of proof, requiring not just a conclusory, self-serving affidavit but also other supporting documentation or proof. See subsection *b, supra*. Goldstein has not proffered any such proof here. Finally, while the court in Harvey v. Ogunfowora, 179 A.D.3d 779 (2nd Dept. 2020), may have denied the defendants'

d. There is no requirement under CPLR §503(d) that the underlying events giving rise to the action must have occurred in the county wherein defendant's office was located.

In an effort to circumvent these fatal deficiencies, Westmed's counsel attempts to bootstrap an additional requirement as a basis for venue under §503(d) – that the underlying malpractice or events must also have occurred in the county of defendant's principal office. This argument has no merit.

The only requirement for venue based on a professional's office location is that the underlying events relate to the defendant's business or profession, not that they must also have occurred in the same county. Thus, in the seminal case of Chung v. Kwah, 122 A.D.3d 729 (2nd Dept. 2014), the court held that plaintiff had correctly chosen Kings County as the venue for his medical malpractice action based upon defendant's principal office location in Kings County, even though no party resided in Kings County and the malpractice had occurred in Queens County. See, Chung v. Kwah, 2013 WL 5184731 (Sup. Ct., Kings Cnty. 2013)[trial court decision]. Hence, Westmed's claim at p. 12 of its Letter Brief that no appellate court has upheld venue under such circumstances is simply incorrect.

Similarly, Westmed's reliance on Venuti v. Novelli, 179 A.D.2d 477 (1st Dept.

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motion to change venue because it found that an attorney's affirmation alone, absent supporting affidavits by the defendants themselves, was insufficient to *prima facie* establish defendants' residency in a different county, there was no broader statement or pronouncement that such an affidavit by a defendant would satisfy a defendant's burden of proof as to residency in every case regardless of the facts or other proof of residency submitted by the parties.

1992) is also misplaced. There, the court held that Bronx County had been chosen improperly based upon defendant's principal office location because the underlying claims had nothing to do with defendant's video repair business located in the Bronx, not because the underling events had not occurred in the Bronx. Notably, the Court recognized that venue would have been proper in the Bronx had those underlying events – which occurred in Westchester County – had some connection to defendant's video repair business. The same result was reached in Berman v. Gucciardo, 50 A.D.3d 717 (2nd Dept. 2008), where venue was held to be improper in the county of plaintiff's principal office location because the underlying events were "not related to plaintiff's law practice," not because they had not occurred in Queens. See also, Law v. Friedman, 60 A.D.2d 832 (1st Dept. 1978)[action involving issue of ownership of cooperative apartment in Manhattan was improperly venued in Kings County, the location of one defendant's law practice, because the underlying claims were unrelated to the defendant's practice of law].

Hence, there has never been any requirement under §503(d) that the underlying events also be connected to the county wherein defendant's principal office is located, only that the underlying events be related to the defendant's professional or business activities. Westmed has cited no authority to the contrary and that fact that they found several older cases where a change of venue was granted because the defendant's principal office location was in another county where the underlying events also happen

to have occurred scarcely mandates the opposite result here. See, Shanahan v. Klinginstein, 280 A.D.2d 464, (2nd Dept 2001); Castro-Recio v Rottenberg, 287 A.D.2d 532 (2nd Dept. 2001); and, Magrone v. Herzog, 304 A.D.2d 801 (2nd Dept. 2003).

Rather, in each those cases, after specifically finding that venue was not properly placed in the county of defendant's principal office location, the court simply noted in passing that the underlying events had occurred in the county where the defendant's office was located. None of these cases, however, dictated or created a mandate or additional requirement under §503(d) that the underlying events must also have occurred in the county of defendant's principal office for venue to be properly selected on that basis, and the Second Department's later holding in Chung v. Kwah, *supra,* proved that this was not the rule defendants would have this Court enact.

At bar, since there is no question that plaintiff's claims arise from Goldstein's professional activities as a podiatrist, the fact that the underlying treatment may have occurred in Westchester does not render venue in Bronx County improper.[7]

[7] Moreover, even if – as Westmed's counsel wrongly suggests – some actual connection of the underlying events to Bronx County was required, such a connection did, in fact, exist. Defendant-respondent Prakash, the assistant surgeon during the procedure in which the malpractice took place, was a podiatry resident in Goldstein's teaching program at St. Barnabas Hospital and participated in plaintiff's surgery under Goldstein's supervision only because of his role as a resident in that hospital's program. Goldstein, assistant director of the St. Barnabas residency program was acting in that role with Prakash during the very procedure in which plaintiff alleges she was injured. Hence, a significant connection to Goldstein's professional activities in the Bronx does exist.

e. There is no legislative preference that matters be venued in the County where the underlying events occur.

Finally, the recent amendment to CPLR §503(a) – which added a provision permitting venue to be placed in the county in which the underlying events occurred – does not mandate or support any change of venue at bar. Westmed's suggestion that a change of venue would be consistent with this amendment is not just unpersuasive but irrelevant; it should also be rejected.

When plaintiff commenced this action in January 2018, plaintiff had the option of placing venue based upon her residence, the place of occurrence, defendant's residence or defendant's principal office location. All of these options stood on equal legal footing for her to choose from, based upon the legislative scheme; no choice was then or is now somehow favored or preferred under the statute than any other.

When the legislature added the *situs* of events as a choice, had it intended also to affirmatively make venue based upon the *situs* a preferred choice, as Westmed's counsel now argues, it could simply have replaced the venue provisions based upon residency or principal office, not just added an additional option to those existing which it left intact. It could also have made the location of the events an option or a supportive factor for a discretionary change of venue; it did not. Thus, plaintiff's choice is entirely consistent with the statutory scheme which afforded her those options.

Indeed, as the sponsoring memorandum quoted by Westmed explains, it was

the legislature's view that the venue options were too "restrictive" and should also allow venue to be based upon the place of the underlying events if that was what a plaintiff chose. But at the end of the day, after the amendment, it remained and remains a plaintiff's choice, and so long as venue was properly selected based upon the principal office location of one of the parties, as it was here, there is simply no statutory basis for changing venue based upon where the underlying events occurred.

Moreover, it is abundantly clear based upon the case law and the statutory framework regarding venue that except for cases involving municipalities or public authorities, New York has never traditionally preferred venue based upon the *situs* of the events in cases involving private litigants, and had never required that there be any nexus between the county selected and the underlying events. Even now, venue based upon residence of one of the parties, whether the home or principal office location, can only be changed to the place of the incident where a discretionary change of venue is sought under CPLR §510(3) in the interests of justice or for the convenience of non-party witnesses.

Notably, while Westmed made the argument at *nisi prius* that non-party witnesses' convenience warranted such a change of venue at bar, it never submitted any of the required proof to support it. Westmed made the same half-hearted argument in the Appellate Division, which the majority of that court also rejected, but does not advance any such argument in its Brief to this Court. Hence, Westmed has abandoned its

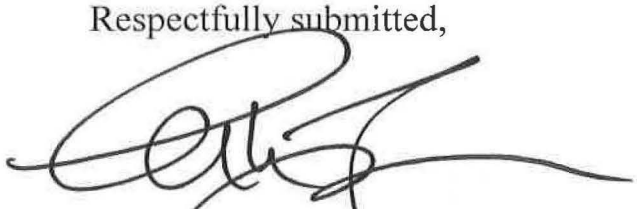
attempt to obtain a discretionary change of venue. See, Court of Appeals Rules of Practice, §500.11(f).

Finally, Westmed's claim that a jury in Westchester should decide whether the care rendered by defendants met or was consistent with "community" standards is meritless. Beside the fact that counsel has not addressed how, in this day and age, the standards for care and treatment in the Bronx may somehow differ from those in adjacent Westchester, much less submitted any proof to that effect, it was and is plaintiff's right under the statutory scheme – not defendant's – to select the community which will decide the fate of her case.

f. Conclusion.

Based upon the foregoing and for all of the reasons set forth in plaintiff's Appellant and Reply briefs below, Westmed's appeal should be denied in its entirety.

Respectfully submitted,



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cc: All Counsel of Record

CERTIFICATION OF COMPLIANCE

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 500.11(m)

The foregoing brief was prepared on a computer (word processor). A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14, with 12 point in footnotes

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 3,551 words.

GOLOMB & LONGO, PLLC

By: _____
Frank A. Longo

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

NATALIIA PETRYCHUK, being sworn, deposes and says: I am not a party to the action, am over 18 years of age and have a business address of 370 Lexington Avenue, New York, New York 10017.

That on March 17, 2020, I served the within **PLAINTIFF-RESPONDENT'S LETTER BRIEF TO COURT OF APPEALS**, by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

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NATALIIA PETRYCHUK

Sworn to before me this
17th day of March, 2020

NOTARY PUBLIC

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Qualified in Westchester County
Commission Expires 4/19/20 23