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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No.

(Underlying Mingo County Civil Action No. 21-C-21)

# 21-0899

THORNHILL MOTOR CAR, INC. d/b/a/  
THORNHILL CHRYSLER DODGE JEEP RAM,

Petitioners/ Defendants Below,

v.

DO NOT REMOVE  
FROM FILE

THE HONORABLE MIKI THOMPSON,  
Judge of the 30<sup>th</sup> Judicial Circuit, and MOORE CHRYSLER, INC.,

Respondents/Plaintiffs Below.

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MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. ISSUES PRESENTED .....	1
II. STATEMENT OF THE CASE .....	1
III. SUMMARY OF THE ARGUMENT .....	3
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	5
V. ARGUMENT .....	5
A. STANDARD OF REVIEW .....	6
1. A WRIT OF PROHIBITION IS THE PETITIONER’S ONLY RECOURSE AS IT CANNOT DIRECTLY APPEAL THE LOWER COURT’S ERROR.....	7
2. PETITIONER HAS NO OTHER ADEQUATE MEANS TO OBTAIN RELIEF, PETITIONER WILL BE DAMAGED AND PREJUDICED IN A WAY THAT IS NOT CORRECTABLE ON APPEAL IF THE CASE IS ALLOWED TO PROCEED. ....	8
3. THE LOWER COURT’S ORDER DISMISSING PETITIONER’S MOTION TO DISMISS FOR IMPROPER VENUE CONTAINS SEVERAL CLEAR LEGAL ERRORS THAT WARRANT THE ISSUANCE OF A WRIT OF PROHIBITION.....	8
B. THE LOWER COURT’S ORDER IS CLEARLY ERRONEOUS AS A MATTER OF LAW. ....	8
1. WEST VIRGINIA §17A-6A-12(3) AND THE VENUE PROVISION FOUND THEREIN IS NOT APPLICABLE TO RESPONDENT’S CAUSE OF ACTION. ....	8
2. ALLOWING RESPONDENTS TO BRING A DECLARATORY JUDGMENT ACTION PURSUANT TO § 17A-6A-12(3) UNDERMINES THE STATUTE’S LEGISLATIVE INTENT AND PUBLIC POLICY.....	13
C. UNDER THE WEST VIRGINIA VENUE STATUTE, WEST VIRGINIA CODE §56-1-1, PROPER VENUE DOES NOT LIE IN MINGO COUNTY, WEST VIRGINIA. ....	13
VI. CONCLUSION.....	17

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Airsquid Ventures, Inc. v. Hummel</i> , 236 W. Va. 142, 778 S.E.2d 591 (2015).....	15
<i>Appalachian Power Co. v. State Tax Dep't of W.Va.</i> , 195 W.Va. 573, 466 S.E.2d 424 (1995) .....	7
<i>Crawford v. Carson</i> , 138 W.Va. 852, 78 S.E.2d 268 (1953).....	16
<i>Crawford v. Taylor</i> , 138 W. Va. 207, 75 S.E.2d 370 (1952).....	7
<i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E. 2d 12 (1996).....	7
<i>State ex rel. Smith v. Maynard</i> , 193 W. Va. 1, 2, 454 S.E.2d 46, 47 (1994).....	8
<i>State ex rel. State v. Sims</i> 240 W.Va. 18, 807 S.E.2d 266 (2017).....	7

### **STATUTES**

W.VA. Code § 17A-6A <i>et seq</i> .....	11
W.VA. Code § 17A-6A-1 <i>et seq</i> .....	4, 5, 6, 10, 11, 13
W.VA. Code § 17A-6A-1 .....	6, 11, 12, 13
W.VA. Code § 17A-6A-3 <i>et seq</i> .....	9
W.VA. Code § 17A-6A-3(4) .....	2
W.VA. Code § 17A-6A-3(13) .....	10
W.VA. Code § 17A-6A-3(14) .....	2
W.VA. Code § 17A-6A-12(1) .....	2, 12, 13

W.VA. Code § 17A-6A-12(2) .....	9, 11, 12
W.VA. Code § 17A-6A-12(3) .....	1, 4, 5, 6, 8, 9, 11, 12, 13, 14
W.VA. Code § 53-1-1 .....	4, 7
W.VA. Code § 56-1-1 <i>et seq</i> .....	5, 6, 8
W.VA. Code § 56-1-1(a) .....	5, 6, 14, 17
W.VA. Code § 56-1-1(a)(1).....	17
W.VA. Code § 56-1-1(a)(2).....	17
W.VA. Code § 56-1-1(b) .....	17

## **RULES**

Rule 16, W.Va.R. App.P .....	4
Rule 19, W.Va.R. App.P .....	6
Rule 12(B)(3), W.Va.R. Civ.P .....	2, 17

NOW COMES the Petitioner, Thornhill Motor Car, Inc., by and through counsel, Johnnie E. Brown, Donovan M. Powell, and the law firm of Pullin, Fowler, Flanagan, Brown & Poe, PLLC, and respectfully submits this Memorandum of Law in Support of Petition for Writ of Prohibition. In support of its Petition for Writ of Prohibition, the Defendant, as Petitioner, states as follows:

## **I. ISSUES PRESENTED**

Whether the Circuit Court of Mingo County erred in its *Order Denying Defendant's Motion to Dismiss* by finding that Mingo County is proper venue for this action brought by Moore Chrysler, Inc. under *West Virginia Code §17A-6A-12(3)* when Defendant, Thornhill Motor Car, Inc. is not a “Manufacturer” or “Distributor”, and declining to apply West Virginia’s general venue statute, *W. Va. Code §56-1-1*?

## **II. STATEMENT OF THE CASE**

This case presents from Plaintiff and Respondent, Moore Chrysler, Inc.’s (hereinafter “Moore”) Verified Complaint, Petition for Declaratory Judgment and Motion for Injunctive Relief filed on February 18, 2021. (App. 1-19). Moore requests that the Court issue temporary and permanent injunctions that prohibit Thornhill from engaging in the sale, marketing, service, delivery or “other acts and practices of a Chrysler Dodge Jeep Ram new motor vehicle dealer franchisee at, on, or adjacent to the property known as the Fountain Place Mall, situate adjacent to U.S. Route 119 in Logan, Logan County, West Virginia.” (App., 1).

Moore’s claims arise from three properties it alleges Thornhill is currently using, or which have been used in the past, to sell Fiat Chrysler Automobiles (hereinafter “FCA”) and which collectively violate West Virginia Code §17A-6A-3(4), §17A-6A-12(1), and §17A-6A-3(14). It is

undisputed that each of these three properties are located within Logan County, all relevant actions giving rise to Plaintiff's claims were within Logan County, Defendant's principal office is located in Logan County, and its chief officer, Wally Thornhill, resides in Logan County.

Pursuant to West Virginia Code §56-1-1 and Rule 12(B)(3) of the West Virginia Rules of Civil Procedure, Petitioner timely filed its Rule 12(B)(3) Motion to Dismiss for Improper Venue on March 18, 2021, asserting that W.Va. Code §56-1-1 should determine venue rather than §17A-6A-12(3). (*See App. 33-45*). The Court heard oral argument from both parties regarding Thornhill's Motion to Dismiss on May 11, 2021 and entered its Order Denying Defendant's Motion to Dismiss on June 29, 2021. (*See App. 46-49*).

In its Order Denying Defendant's Motion to Dismiss, the lower court ordered that the Circuit Court of Mingo County is a proper venue for the underlying action. Notably, the lower court stated: "... [i]t is clear from the language used by the Legislature that it specifically intended for W.Va. Code §56-1-1 to be subordinate to specific venue statutes, such as W.Va. Code §17A-6A-12(3)." (*App. 48*).

Moore then filed a Motion to Compel Discovery Response on July 2, 2021. (*See App. 50-58*). On July 9, 2021, Thornhill filed its Answer to Plaintiff's Complaint, Petition for Declaratory Judgment and Motion for Injunctive Relief denying Plaintiff's allegations. (*See App. 59-70*). On July 12, 2021, Thornhill filed its Motion to Refer to the Business Court Division with the Clerk of the Supreme Court of Appeals of West Virginia, pursuant to West Virginia Trial Court Rule 29.06(b). (*See App. 71-158*). On this same date Thornhill filed its Motion for Protective Order with the Circuit Court of Mingo County, West Virginia. (*See App. 159-162*).

On July 29, 2021, the lower Court heard oral argument on Thornhill's Motion for Protective Order and issued its Order Granting Defendant, Thornhill Motor Car, Inc.'s Motion for Protective

Order. (*See App. 163-165*). The lower court, finding due cause, stated that, [a]t the time, Thornhill is not required to answer Plaintiff's discovery pending the ruling by the Supreme Court of Appeals of West Virginia on its Motion to Refer to the Business Court. Plaintiff suffers no prejudice by this short delay. (*See App. 164*).

A status hearing was held on September 28, 2021, to evaluate the then current status of the Chief Justice's ruling on Defendant's Motion to Refer to the Business Court Division. (*See App. 165*). At the time of this status hearing, Thornhill's Motion to Refer to the Business Court Division had been assigned a Business Court case number but had not yet been ruled on by the Chief Justice. (*See App. 168*). At this status hearing, Moore stated it planned to serve Thornhill with a limited set of discovery requests to which the lower court stated it would allow in conjunction with granting a 45 day stay in the case. (*App. 173*). The Chief Justice entered his Order Denying Thornhill's Referral on October 22, 2021, of which Thornhill did not receive until October 29, 2021. (*See App. 175*).

Upon receiving the Chief Justice's Order Denying it Motion to Refer to the Business Division Thornhill is filing this Memorandum supporting its Writ of Prohibition pursuant to W. Va. Code §53-1-1 and Rule 16 of the West Virginia Rules of Appellate Procedure asserting the lower court erred in finding the Circuit Court of Mingo County was proper venue for the underlying action. In addition to filing this Writ, Thornhill has simultaneously submitted its Motion to Stay to the Circuit Court of Mingo County. Petitioner requests that it be afforded the opportunity to contest this action on its merits in the correct venue, the Circuit Court of Logan County, West Virginia.

### **III.SUMMARY OF THE ARGUMENT**

The lower court erred in deeming venue proper in the Circuit Court of Mingo County, by



concluding "... it is clear from the language used by the Legislature that it specifically intended for *W. Va. Code* §56-1-1 to be subordinate to specific venue statutes, such as *W. Va. Code* §17A-6A-12(3)." (*See App.* 46-49).

The first issue which comes before the Court asks if a cause of action brought pursuant to *W. Va. Code* §17A-6A-12(3) by a plaintiff who is a "new motor vehicle dealer" against a defendant who is also a "new motor vehicle dealer" is subject to the language providing for venue in §17A-6A-12(3) or, if the West Virginia general venue statute, *W. Va. Code* §56-1-1 applies. If, as Thornhill asserts, §56-1-1 controls venue in this action, the second question presented requires a determination of whether proper venue lies in the Circuit Court of Mingo County or the Circuit Court of Logan County, West Virginia.

Plaintiff, argues that because this action was brought under *W. Va. §17A-6A-1 et seq.*, it is subject to the statute's specific venue provision making venue proper in Mingo County, West Virginia. Specifically, Plaintiff asserts venue is proper in Mingo County pursuant to *W. Va. §17A-6A-12(3)* which deems venue to be proper "in the circuit court for the county in which the new motor vehicle dealer is located." (*See App.* 177,178). However, it is clear *W. Va. §17A-6A-1 et seq.* is intended to apply to actions brought by a "new motor vehicle dealer" against a "manufacturer or distributor," The statute does not reference suits between a "new motor vehicle dealer" and a "proposed new vehicle dealer," or a "new motor vehicle dealer" and a "new motor vehicle dealer." Plaintiff's argument is contrary to the express language of the statute which states that a declaratory judgment is to be brought by a "new motor vehicle dealer" against a "manufacturer or distributor." Thus, the venue provision provided in §17A-6A-12(3) is only applicable to an action brought by a "new motor vehicle dealer" against a "manufacturer or distributor." Its application is improper in the case below.



Thornhill argues the West Virginia general venue statute, *W. Va. Code §56-1-1 et seq.*, should determine venue. (See App. 33-45). Specifically, *W. Va. Code §56-1-1(a)* states:

- (a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
  - (1) where in any of the defendants may reside or the cause of action arose...;
  - (2) if any corporation or other corporate entity is a defendant, where in its principal office is or where and its mayor, president, or other chief officer resides...

Thornhill's "chief officer," Wally Thornhill, resides in Logan County, Thornhill's principal office is located in Logan County, and the allegations giving rise to this action also arose in Logan County, West Virginia. The fact Plaintiff's principal office is located in Mingo County is not material under West Virginia law and does not render venue proper in Mingo County thus, Thornhill requests that this action be dismissed accordingly.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, which specifies that cases involving assignments of error in the application of settled law and cases involving a narrow issue of law are suitable for Rule 19 argument. As shown below, the Petitioner believes that the lower court misapplied *W. Va. Code §17A-6A-12(3)* and *§56-1-1(a)*. Accordingly, the Petitioner opines that oral argument will aid the Court in understanding the lower court's misapplication of the law. The minimum time for argument set forth in Rule 19 will be sufficient.

#### **V. ARGUMENT**

The lower court found that Mingo County is proper venue for this action by applying the venue provision provided by *W. Va. Code §17A-6A-12(3)* rather than the general venue statute, *§56-*

*1-1 et seq.* The court agreed with Respondent’s argument and found that the specific venue provision in *W. Va. Code §17A-6A-12(3)* applies. The lower court ruled that *§56-1-1(a)*, the general venue statute yields, to *§17A-6A-12(3)* as the latter “specifically provided” venue for Respondent’s action. (*See App. 46-49*).

Respectfully, the lower court has misinterpreted *§17A-6A-12(3)* by stating that the statute specifically provides venue for this action and it is not subject to *§56-1-1(a)*. This conclusion is in clear contrast to the Legislative finding and public policy set forth in *§17A-6A-1* and in opposite of the express language of *§17A-6A-12(3)*. As the lower court noted, Respondents are seeking to enforce *§17A-6A-1 et seq.* *Id.* However, contrary to the court’s order, Moore’s effort to enforce the provisions of the statute does not mean the specific venue provision provided by *§17A-6A-12(3)* applies. Section *17A-6A-12(3)*’s venue provision only applies to the specific right of a “new motor vehicle dealer” to bring a declaratory judgment action against a “manufacturer or distributor.”

#### **A. Standard Of Review**

“The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” *W. Va. Code § 53-1-1*; *see also Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). In that regard, this Honorable Court, speaking through Justice Cleckley, has held:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) Whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or

substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impressions.

*State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E. 2d 12 (1996); *State ex rel. State v. Sims* 240 W.Va. 18, 807 S.E.2d 266 (2017).” These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.” *Hoover*, 199, W.Va. 12, 483 S.E.2d 12; *Sims*, 240 W.Va. 18, 807 S.E.2d 266. The party seeking the writ is not required to satisfy all five factors but “it is clear that the third factor, the existence of clear error as a matter of law should be given substantial weight.” *Hoover*, 199 W.Va. 12, 483 S.E.2d; *Sims*, 240 W.Va. 18, 268, 807 S.E.2d 266. This Court has held that “[i]nterpreting a statute...presents a purely legal question subject to *de novo* review.” *Appalachian Power Co. v. State Tax Dep’t of W.Va.*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The West Virginia Supreme Court of Appeals has recognized that circuit courts have broad discretion under W. Va. Code § 56-1-1(b) to dismiss this action for improper venue. *State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 570, 759 S.E.2d 795, 801 (2014). The Court has stated W. Va. Code, 56-1-1(b) permits a defendant to move the circuit court to transfer the case to a county wherein one or more of the defendants reside. To have this motion granted, a defendant must show that the proposed county is more convenient for those involved in the case and “the ends of justice would be better served by such a change.” *See W. Va. Code, 56-1-1(b)* (1986); *State ex rel. Smith v. Maynard*, 193 W. Va. 1, 2, 454 S.E.2d 46, 47 (1994). As shown below, the lower court exceeded and abused its legitimate powers in this matter, as the Circuit Court of Mingo County is clearly not a proper venue.

**1. A Writ Of Prohibition Is The Petitioner’s Only Recourse As It Cannot Directly Appeal The Lower Court’s Error.**

Addressing the first element, the Petitioner cannot directly appeal the matter because there

has been no final order, and the matter is not ripe for interlocutory appeal. Without this subject Writ of Prohibition Petitioner would be compelled to litigate the case in the improper venue.

**2. Petitioner Has No Other Adequate Means To Obtain Relief, Petitioner Will Be Damaged And Prejudiced In A Way That Is Not Correctable On Appeal If The Case Is Allowed To Proceed.**

Second, the Petitioner would be irreparably damaged, because the entire proceedings would take place in the wrong venue. Allowing discovery to take place in the wrong venue would severely damage Petitioner as it would be contesting this case on its merits in the wrong venue. A correction of venue at this stage would further the interests of efficiency and judicial economy.

**3. The Lower Court's Order Dismissing Petitioner's Motion To Dismiss for Improper Venue Contains Several Clear Legal Errors That Warrant The Issuance Of A Writ Of Prohibition.**

As shown below, the lower court's Order clearly shows that it disregarded the express language in *W.Va. Code §17A-6A-12(3)* and the applicable venue statute at *§56-1-1 et seq.* In its Argument, the Petitioner focuses on the third element: whether the lower court's order is clearly erroneous as a matter of law. This court should place "substantial weight" on this issue.

**B. The lower court's Order is clearly erroneous as a matter of law.**

**1. West Virginia Code §17A-6A-12(3) and the venue provision found therein is not applicable to Respondent's cause of action.**

As set forth above, the Petitioner's Writ of Prohibition is based upon the Circuit Court's July 29, 2021, Order, which dismissed Thornhill's 12(b)(3) *Motion to Dismiss for Improper Venue*. *W. Va. Code §17A-6A-12(2) and §17A-6A-12(3)* state in relevant part:

(2) Before a **manufacturer or distributor** enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line-make is represented, the **manufacturer or distributor** shall give written notice to each **new motor vehicle dealer** of the same line-make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.

(3) Within sixty days after receiving the notice provided in subsection (2) of this section, or within sixty days after the end of **any appeal procedure provided by the manufacturer or distributor**, a **new motor vehicle dealer** of the same line-make within the affected relevant market area **may bring a declaratory judgment action in the circuit court for the county in which the new motor vehicle dealer is located to determine whether good cause exists for the establishing or relocating of the proposed new motor vehicle dealer...** Once an action has been filed, the **manufacturer or distributor may not establish or relocate the proposed new motor vehicle dealer until the circuit court has rendered a decision on the matter...** The **manufacturer** has the burden of proving that good cause exists for establishing or relocating a **proposed new motor vehicle dealer. (emphasis added)**

The Legislature has defined "Dealer agreement," "New motor vehicle dealer," "Proposed new motor vehicle dealer," "Manufacturer," and "Distributor" in *W.Va. Code §17A-6A-3 et seq.*, in relevant part, as follows:

(1) "Dealer agreement" means the franchise, agreement or contract in writing **between a manufacturer, distributor and a new motor vehicle dealer** which purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the purchase, lease or sale of new motor vehicles, accessories, service and sale of parts for motor vehicles.

(3) "Distributor" means any person, resident or nonresident who, in whole or in part, offers for sale, sells or distributes any new motor vehicle to a new motor vehicle dealer...

(8) "Manufacturer" means any person who manufactures or assembles new motor vehicles; or any distributor, factory branch or factory...

(11) "New motor vehicle dealer" means a person who holds a dealer agreement granted by a manufacturer or distributor for the sale of its motor vehicles, who is engaged in the business of purchasing, selling, leasing, exchanging or dealing in new motor vehicles...

(13) "Proposed new motor vehicle dealer" means a **person who has an application pending for a new dealer agreement with a manufacturer or distributor. "Proposed motor vehicle dealer" does not include a person whose dealer agreement is being renewed or continued. (emphasis added)**

Plaintiff below asserts that by bringing its action to enforce *§17A-6A-1 et seq.*, the Legislature provides that a declaratory judgment action can be brought in the Circuit Court for the county in which the

new motor vehicle is located. Plaintiff fails to recognize that Thornhill is not a “proposed new motor vehicle dealer” nor a “relocating new motor vehicle dealer” as defined by the West Virginia Code Thornhill is not a “manufacturer or distributor,” nor is the declaratory judgment action brought by the Respondent the type of declaratory judgment action governed by §17A-6A-12(3). Furthermore, §17A-6A-3(13) specifically states that a “‘Proposed motor vehicle dealer’ does not include a motor vehicle dealer whose dealer agreement is being renewed or continued.” Thornhill’s dealer agreement with FCA is not being renewed or continued nor is Thornhill being presented with a new dealer agreement. In fact, this language further shows that any declaratory judgment brought in accordance with this statute should have been brought earlier and against FCA. Specifically, for Plaintiff to have correctly brought an action, it should have been brought during the period when Plaintiff alleges FCA contacted them informing Plaintiff of its intent to allow Thornhill to open a new location. An action brought under this code section should have been against FCA, not Thornhill.

Thornhill is clearly not a “manufacturer” nor a “distributor” and thus, it is clear that both parties to this action are “New motor vehicle dealers” as defined by West Virginia Code. This action is not one to be governed by §17A-6A-12(3) or its venue provision. Section 17A-6A-12(3) does not provide venue for any action aside from one brought by a “New Motor Vehicle Dealer” against a “Manufacturer or Distributor” in accordance with §17A-6A-12(3) and §17A-6A-12(2).

The West Virginia Legislature set forth its intent and public policy behind the drafting of §17A-6A-1 when it stated in relevant part:

...in order to promote the public welfare...it is necessary to regulate motor vehicle dealers, manufacturers, distributors and representatives of vehicle manufacturers and distributors doing business in this state **in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor...**and to **protect and preserve the investments and properties of the citizens** and motor vehicle dealers of this state.

*W.Va. Code §17A-6A-1. (emphasis added)*

Section 17A-6A *et seq.* is intended to prevent “undue control of the independent new motor



vehicle dealer by the vehicle manufacturer or distributor.” This is further evidenced by §17A-6A-12 itself. *W.Va. Code §17A-6A-12(2)*, as set forth above, states that prior to any relocation of a same make and line new motor vehicle dealership the manufacturer or distributor must inform the non-relocating dealership of its intent to relocate the proposed new dealership to within its relevant market area. Although Thornhill is not a “Proposed New Vehicle Dealer,” Plaintiff admits in its Complaint that the manufacturer or distributor did contact Plaintiff proposing the placement of a Thornhill dealership within its established market area. (*See App. 3*).

If Plaintiff wanted to file its action in Mingo County is must bring its action against the manufacturer or distributor sixty days (60) after this communication or sixty days (60) after the completion of any manufacturer or distributor’s appeal process, per §17A-6A-12(2) and §17A-6A-12(3). Nowhere else in §17A-6A-1 *et seq.* is venue provided. The venue provision provided in §17A-6A-12(3) specifically references the relationship between each party to the declaratory judgment action, as described in §17A-6A-12(2), and the venue provided in §17A-6A-12(3).

The relationship between Plaintiff and the manufacturer or distributor (FCA) is exactly the kind of action which *W.Va. Code §17A-6A-12(3)* provides venue. *W.Va. Code §17A-6A-12(3)* states that within sixty days (60) of the **notice** given to Plaintiff by the manufacturer or distributor, or sixty days (60) after the end of any appeal procedure provided by the manufacturer or distributor, the new motor vehicle dealer can then file its action seeking declaratory judgement to see if good cause exists for relocating the proposed dealership. The “notice” referenced in §17A-6A-12(3) and emphasized in bold above is explicitly defined in §17A-6A-12(2). Clearly, all the language in *W.Va. Code §17A-6A-12(2)*, §17A-6A-12(3), and §17A-6A-1 speak to the duties and obligations between an outside manufacturer or distributor doing business in this state and a new motor vehicle dealership in this state.



Section *17A-6A-12(2)* states that “Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area...the manufacturer or distributor shall give written notice to each new motor vehicle dealer...with its intention to establish an additional dealer or to relocate an existing dealer within the relevant market area.” These are obligations and duties that a manufacturer or distributor has to a new motor vehicle dealer, not between a new motor vehicle dealer and another new or proposed motor vehicle dealer. This is applicable to *§17A-6A-12(3)* just as it applies in *§17A-6A-12(2)*.

Moreover, Thornhill’s movement of the dealership in dispute does not constitute a “relocation” as defined by *§17A-6A-12(1)* and which Thornhill is alleged to have violated. Section *17A-6A-12(3)* reads “‘relocate’ and ‘relocation’ do not include the relocation of a new motor vehicle dealer within four miles of its established place of business...” (emphasis added) (*App. 7*) It is undisputed that Thornhill’s move is within four miles of its prior location making Thornhill an existing motor vehicle dealer and not a “Relocating Motor Vehicle Dealer.” Accordingly, Plaintiff does not have standing to bring its action against Thornhill nor, in the case Plaintiffs brought its action against the proper defendant, the Manufacturer or Distributor. By the clear language of the statute, no “relocation” is occurring.

Section *17A-6A-12(1)* also states that “The relocation of a new motor vehicle dealer to a site within the area of sales responsibility assigned to the dealer by the manufacturing branch or distributor may not be within six air miles of another dealer of the same line-make.” Thornhill’s location at issue is not within six air miles of Plaintiff’s dealership. Not only does *§17A-6A-1 et seq.* not determine proper venue, but Plaintiff also lacks standing to bring this action under *17A-6A-1 et seq.*

2. ***Allowing Respondents to bring a declaratory judgment action pursuant to §17A-6A-12(3) undermines the statute's legislative intent and public policy.***

In the Order denying Thornhill's motion to dismiss entered by the lower court on June 29, 2021, it stated that to "infer" §17A-6A-12(3) is only applicable to actions against manufacturers or distributors when "...no such limitation is explicit in the statute, would frustrate the clear public policy set out by the Legislature in W.Va. §17A-6A-1 and negatively affect the general economy and public welfare of the State of West Virginia." (*See App. 22*). The West Virginia Legislature set forth its intent in drafting §17-6A's when it stated the following in §17A-6A-1:

The Legislature finds and declares that the distribution and sale of motor vehicles in this state vitally affects the general economy and the public welfare and **that in order to promote the public welfare** and in exercise of its police power, it is necessary to regulate motor vehicle dealers, manufacturers, distributors and representatives of vehicle manufacturers and distributors doing business in this state in order **to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor** and to ensure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally, and **to protect and preserve the investments and properties of the citizens and motor vehicle dealers of this state. (emphasis added)**

The Legislature drafted the statute in dispute "to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor" and to "protect and preserve the investments and properties of the citizens and motor vehicle dealers of this state." Article 6A is intended to protect dealerships within this state from outside manufacturers or distributors and thus, as a matter of public policy, protecting its citizens' investments. As stated previously, §17A-6A-12(3) only provides for actions against a manufacturer or distributor.

**C. Under the West Virginia venue statute, West Virginia Code §56-1-1, proper venue does not lie in Mingo County, West Virginia.**

In its July 29, 2021, *Order Denying Defendant's Motion to Dismiss*, the Court stated West Virginia's general venue statute, §56-1-1, yields to §17A-6A-12(3) and thus does not apply to this

instant case. (*See App. 48*) In support of its Order the lower court cites §56-1-1(a) which reads:

- (a) Any action or other proceeding, except where it is otherwise specifically provided, may hereafter be brought in the Circuit Court of any county...

(*See Id.*)

Venue for Plaintiff's action is determined by §56-1-1 which reads:

- (a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
  - (1) Where in any of the defendants may reside or the cause of action arose...;
  - (2) If a corporation or other corporate entity is a defendant, wherein its principal office is or where in its mayor, president or other chief officer resides...

Because Thornhill Motor car, Inc. is a corporate entity, under West Virginia law, this action should be brought where Defendant's principal office is located or where its "chief officer" resides. Here, as Plaintiff admits on page one (1) of its *Verified Complaint, Petition for Declaratory Judgment and Motion for Injunctive Relief*, Defendant Thornhill Motor Car, Inc.'s principal office is located in Logan County, West Virginia. Moreover, Defendant's chief officer, Wally Thornhill, resides in Logan County and each allegation occurred in Logan County. This makes Plaintiff's claims defective as a matter of law.

The West Virginia Supreme Court of Appeals has commented specifically on the intent of §56-1-1, stating the statute allows "an action to be brought in the county in which the action arose when a corporate defendant has been sued in addition to the 'residency' locations specified in §56-1-1 (a)(2). *State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014). The *Thornhill* Court concluded that the two controlling factors for venue are the place of the defendant's residence and the place where the cause of action arose. *Thornhill Group*, 233 W. Va. at 571. Given the fact that residency unquestionably favors dismissal, Plaintiff must establish that the actions at issue were somewhere other than Logan County. If no defendants reside in the venue which Plaintiff

brings its suit and if it is undisputed that the corporate or individual defendant resides in another county, the only way the case can remain in the venue in which Plaintiff has brought it is if the cause of action arose there. *Id.* The Supreme Court has already dealt with this exact venue issue. “Venue lies in Logan County.” *Id.* at 568.

As the *Thornhill Group* Court reasoned, subsection (a)(2) has been interpreted to allow a case against a corporate defendant to be brought in the county in which the action arose. The residency requirements have no bearing on an extra-jurisdictional defendant’s ability to seek redress where the action arose.

As stated previously, the two primary factors to be used in determining venue under §56-1-1 are where the defendant resides and where the cause of action arose. *See State ex rel. Airsquad Ventures, Inc. v. Hummel*, 236 W. Va. 142, 778 S.E.2d 591 (2015). In *Airsquad Ventures*, the factual allegations in Plaintiff’s Complaint giving rise to the causes of action therein took place in Logan County and Defendant resided in Logan County. Simply put, there is no justification for going forward with this case in Mingo County, a county where the Defendant does not reside and a county where the actions did not occur. Under W. Va. Code § 56-1-1(b):

Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

Further, the Court has held that when the Legislature enacted §56-1-1(b), they did so with the intent to give circuit courts “broader discretion than was permissible under the old rule of forum

non-conveniens.” *State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 570, 759 S.E.2d 795, 801 (2014). This gives the circuit court discretion to decide the forum which previously had been chosen by the plaintiff. Thus, under § 56-1-1(b), “the plaintiff’s choice of forum is no longer the dominant factor that it was prior to the adoption of this section.” *Id.* The Court continues on to state that under the general venue statute, “the place of the plaintiff’s residency has no independent bearing on where an action may be maintained. The plaintiff’s residence, without more, does not establish venue in the absence of statute or other principle of law.” *Id.* at 564, 565

It appears that Plaintiff selected Mingo County as the venue for this action based on its own principal office being located in the same. However, the fact that Plaintiff’s principal office is located in Mingo County is not material under West Virginia law and does not render venue proper in Mingo County. “Under the provisions of our general venue statute, the place of the Plaintiff’s residency has no independent bearing on where an action may be maintained.” *State ex rel. Thornhill Grp., Inc. v. King* at 570–571, 801–802 (citing “Syl. Pt. 2, *Crawford v. Carson*, 138 W.Va. 852, 78 S.E.2d 268 (1953)).

Because the causes of action arose in, the witnesses are located in, and this Defendant’s principal office and chief officer are all located in Logan County, venue in this action is improper and dismissal of Plaintiff’s Complaint based on the above stated grounds is necessary. The facts show that in the interest of convenience and justice the law requires dismissal of Plaintiff’s suit. Therefore, under West Virginia Code § 56-1-1(a)(1), (a)(2), and (b), the lower court erred in denying Thornhill’s Motion to Dismiss for Improper Venue ad venue is improper in Mingo County.

**D. CONCLUSION**

**WHEREFORE**, for the foregoing reasons, the Petitioner, Thornhill Motor Car, Inc., respectfully requests this Honorable Court:

1. **PROHIBIT** the Circuit Court from deeming itself a proper venue for the instant civil action;
2. **GRANT** the Petition and **ISSUE** a Writ of Prohibition vacating the June 29<sup>th</sup>, 2021, *Order Denying Defendant's Motion to Dismiss* of the Circuit Court of Mingo County and directing the Circuit Court to issue an order dismissing the civil action pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure.
3. **GRANT** any other relief decreed proper by this Honorable Court.

Respectfully submitted,

THORNHILL MOTOR CAR, INC. D/B/A  
THORNHILL CHRYSLER DODGE JEEP  
RAM,

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**Docket No.**

*(Underlying Mingo County Civil Action No. 21-C-21)*

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THORNHILL MOTOR CAR, INC. d/b/a/  
THORNHILL CHRYSLER DODGE JEEP RAM,

Petitioners/ Defendants Below,

v.

THE HONORABLE MIKI THOMPSON,  
Judge of the 30<sup>th</sup> Judicial Circuit, and MOORE CHRYSLER, INC.,

Respondents/Plaintiffs Below.

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**CERTIFICATE OF SERVICE**

The undersigned, counsel of record for Petitioners, Thornhill, does hereby certify on this 2nd day of November 2021, that a true copy of the foregoing "***Memorandum of Law in Support of Petition for Writ of Prohibition***" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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The Honorable Miki Thompson  
Mingo County Courthouse  
78 East Second Avenue, Room 232  
Williamson, WV 25661  
***Circuit Court Judge***



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