STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

Index No.: 18-45164

REPLY MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR LEAVE TO REARGUE

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, NY 11040
Email: lizsteinlaw@gmail.com
Phone: (516) 747-4726

Steven M. Wise, Esq.
Of the Bar of the State of Massachusetts
Subject to *pro hac vice* admission
5195 NW 112th Terrace
Coral Springs, FL 33076
Email: swise@nonhumanrights.org
Phone: (954) 648-9864

Attorneys for Petitioner

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I. Introduction

Petitioner, the Nonhuman Rights Project, Inc. ("NhRP"), submits this Reply Memorandum, dated January 30, 2019, in response to the Memorandum of Law in Opposition to Motions for Stay and Reargument ("Zoo Memorandum 4"), dated January 25, 2019, that the Respondents James J. Breheny and the Wildlife Conservation Society ("Bronx Zoo") submitted in response to the NhRP's motion for leave to reargue ("Motion to Reargue") and accompanying Memorandum of Law in Support of Petitioner's Motion for Leave to Reargue ("Reargument Memorandum"), dated January 23, 2019.

Instead of replying to the material errors the NhRP pointed out, the Bronx Zoo merely perpetuated this Court's misunderstandings of "some venue questions unique to habeas practice," Vincent C. Alexander, *Supplementary Practice Commentaries*, McKinney's CPLR 7001 (2017), added others, and then repeated an outrageous and false claim that the NhRP was "forum shopping," which should be immediately withdrawn. As demonstrated below, these misunderstandings include: (1) the misunderstanding that CPLR 503 applies to special proceedings such as Article 70 habeas corpus, when it is CPLR 506 that applies; (2) the misunderstanding that the *first sentence* of CPLR 7004(c), which only applies to individuals detained in "state institutions"—not nonprofit organizations such as the Bronx Zoo—applies to the case at bar, when it is the *second sentence* of CPLR 7004(c) that applies; (3) the misunderstanding that this Court did not issue a writ of habeas corpus when it signed the Order to Show Cause, when it did, as an order to show cause under CPLR 7003(a) is simply a writ of habeas corpus issued when the respondent is not required to bring a detainee into court; and the related misunderstanding that an issuance of a writ of habeas corpus is the grant of a habeas petition on the merits, when it is not; (4) the misunderstanding that this Court had discretion to transfer venue under CPLR 7004(c) after it issued the Order to Show

Cause and made it returnable in the county of issuance, when it did not; and (5) the outrageous and false claim that the NhRP is improperly engaged in "forum shopping," when it is not.

Accordingly, this Court should grant the NhRP's Motion to Reargue and reverse its order, dated January 18, 2019 ("Transfer Order"), that granted Respondents' motion to transfer venue.[1]

II. This Court should grant the NhRP's Motion to Reargue then reverse its Transfer Order.

A. Venue is, and always had been, proper in Orleans County.

In its Reargument Memorandum, at 4 – 12, the NhRP demonstrated that, contrary to this Court's determination, habeas corpus venue is governed by CPLR 506(a), 7002(b), and 7004(c), and *not* by CPLR 503(a), as repeatedly asserted by the Bronx Zoo. Venue therefore is, and always has been, proper in Orleans County.

In its Zoo Memorandum 4, at 5, the Bronx Zoo claims:

> NRP cannot dispute that the general venue principles of CPLR Article 5 apply to habeas corpus proceedings. *Greene v. Sup. Ct. Westchester Cty*, 31 A.D.2d 649, 649 (2d Dep't 1968); *State ex rel. Cox v. Appelton*, 309 N.Y.S.2d 290, 292 (Onondaga Cty. 1970) (habeas corpus for juvenile in need of supervision properly venued pursuant to CPLR Article 5). This Court correctly applied those principles in holding that Bronx County is the proper venue for this special proceeding, finding that Bronx County was a more convenient venue for all fact witnesses and potential experts. Chen Aff. Ex. 3 at 28-30.

The problem for the Bronx Zoo is that the express provisions of the relevant sections of CPLR Article 5 *require* venue to be in Orleans County and *prohibit* venue from being in Bronx County, as follows.

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[1] Contrary to the Bronx Zoo's misrepresentation, Zoo Memorandum 4, at 3, counsel for the NhRP did not make a "motion to reargue" at the December 14, 2018 hearing when he requested "one attempt to change [the Court's] mind." Under CPLR Rule 2221(d)(1) and (3), a motion for leave to reargue "shall be i*dentified specifically as such*" and "shall be made within thirty days *after service of a copy of the order* determining the prior motion and written notice of its entry." (emphasis added). As the transcript demonstrates, at the hearing the NhRP's counsel did not "specifically" identify his "one attempt to change [the Court's] mind" as a motion for leave to reargue; counsel for the Bronx Zoo merely chose to misidentify it as such. The Transfer Order, dated January 18, 2019, obviously did not yet exist, and therefore no motion for reargument was even possible at the time. This Court should not be misled by the Bronx Zoo's false assertion that the NhRP's Motion to Reargue is a "third opportunity" or "third stab" at argument on the transfer of venue, Zoo Memorandum 4, at 2.

First, CPLR Article 5 obviously applies to a habeas corpus case. But *CPLR 503 does not.* That section *does not apply* when "*the specific statutes authorizing special proceedings include controlling venue provisions*." 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 401.02[2] (emphasis added); *see* Reargument Memorandum, at 5-6, 10. Habeas corpus is a special proceeding authorized by CPLR Article 70 which includes the controlling venue provisions. That is why the Bronx Zoo has always been unable to cite to a single case that applies CPLR 503 to habeas corpus venue.

Second, CPLR 506(a) is the section of Article 5 that applies to special proceedings such as habeas corpus, which is a special proceeding. *See* CPLR 7001. That is why the Bronx Zoo's attempt to rely upon *Greene* to support its claim that CPLR 503(a) applies to the case at bar falters, Reargument Memorandum, at 9-11, for nowhere does *Greene* mention CPLR 503. However, *Greene* correctly cites to CPLR 506 in support of that court's statement that "[w]e think that a habeas corpus proceeding, a special proceeding (CPLR 7001), is subject to the practice provisions governing venue generally (cf. *CPLR 506*)"). *Greene*, 31 A.D.2d at 649 (emphasis added); *see also Weingarten v. Board of Educ of City School Dist of City of New York*, 3 Misc.3d 418, 424 (Sup. Ct. 2004) ("*CPLR 506 governs* the venue of special proceedings") (emphasis added).

Third, CPLR 506(a), which governs special proceedings, in turn refers this Court to the "law authorizing the proceedings," which is Article 70 in a habeas corpus case. The venue sections of Article 70 are CPLR 7002(b) and CPLR 7004(c). *See* David D. Siegal, New York Practice § 549 at 1056 [6th Ed] (CPLR 506(a) "take[s] whatever county the *special statute offers as proper venue in the given instance* and authorizes the proceeding to be brought in that county or any other 'within the judicial district.'") (emphasis added); Reargument Memorandum, at 5-6, 10.

Fourth, the Bronx Zoo's reliance on *Appelton* is misplaced. *Appelton* involved a thirteen-year old relator detained in *Ulster County* in the custody of the Superintendent of a training school for children. His Petitioner mother commenced a habeas corpus action by an order to show cause in *Onondaga County*, where she resided. The court correctly held that venue in Onondaga County was appropriate. *Appelton*, 309 N.Y.S.2d 290, 292. Like *Greene*, *Appelton* does not cite to CPLR 503(a). *Id*. at 292 ("Article 5 of the CPLR provides that a special proceeding may be commenced in the County where the petitioner (in this case Laureen Cox, mother of the relator) resides, which is Onondaga County.") Venue was merely held appropriate in the county where the action was commenced, which was *not* the county of detention, but the county of issuance, and is entirely consistent with the position that the applicable venue provisions are CPLR 506(a), 7002(b), and 7004(c), and *not* 503(a).

Appelton therefore provides no support whatsoever for a claim that venue in the county where the action was commenced, there in Onondaga County, here in Orleans County, is *improper*, which the Bronx Zoo, as the moving party, was *required to show* in support of its motion to transfer venue under CPLR 510(1). *See Agway v. Inc., Kervin*, 188 A.D.2d 1076, 1077 (4th Dept. 1992) ("To effect a change of venue as of right, *a defendant must show both that plaintiff's choice of venue is improper* and that defendant's is proper.") (emphasis added); Reargument Memorandum, at 10-11.

Fifth, the Bronx Zoo continues to ignore this Court's error, discussed in Reargument Memorandum, at 7-9, in treating the Bronx Zoo as a "state institution," by requiring that venue has "some nexus" to this proceeding. The Court erroneously applied the *first* sentence of CPLR 7004(c), rather than the *second*, at the December 14, 2018 hearing:

> I believe that you could have asked any judge in the Supreme Court to sign your papers to start off your writ of the habeas corpus proceeding, but it needed to

> be made returnable before some county that had any—some nexus to this elephant and his condition—his conditions of captivity.
>
> *I'll just read this part. It says, "It shall be made returnable before a justice of the Supreme Court or a County Court judge being or residing within the county where the person is detained."*
>
> If we accept your belief that an animal—or this animal is a person within the meaning of the law, that animal is being detained in the Bronx County. I don't think it's even questionable that this proceeding should be here. […]

Transcript, at 28-29 (emphasis added). As the Bronx Zoo is *not* a "state institution," the Court should have applied the *second* sentence of CPLR 7004(c), not the first. *See Hogan v. Culkin*, 18 N.Y.2d 330, 335 (1966). Reargument Memorandum, at 7 – 9.

Sixth, contrary to the Bronx Zoo's misrepresentation, Zoo Memorandum 4, at 7, the NhRP did *not* rely upon *Hogan* to support an argument that this Court lacked discretion to change venue under CPLR 7004(c). Instead, the NhRP relied upon *Hogan* to explain the distinction between the two sentences in CPLR 7004(c), Reargument Memorandum, at 8, and for the proposition that CPLR 7004(c) specifically authorized this Court to make the writ returnable in Orleans County, the county of issuance, thereby making venue proper in Orleans County,[2] Reargument Memorandum, at 9.

B. The Court erroneously granted the Transfer Order on the ground that Bronx County "was a more convenient venue for all fact witnesses and potential experts."

The Bronx Zoo claims that "[i]n an effort to create the illusion of error, NRP misreads this Court's decision by contending the Court 'erroneously, and *sua sponte*' based its ruling on CPLR 510(3). NRP. Mem. at 13. NRP's characterization of the decision as *sua sponte* ignores the fact

[2] *See also* Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7004(c) ("*In cases not involving detainees in state institutions, the writ generally must be returnable in the county in which the writ was issued.* See CPLR 7002(b). If the issuing judge was a Supreme Court Justice, the writ may be made returnable in the county of detention.") (emphasis added).

that Respondents timely moved the Court to transfer venue pursuant to CPLR 511 and 7004(c)," Zoo Memorandum 4, at 5, and that the "NRP similarly mischaracterizes Respondents' motion as being based solely upon CPLR 510(1). In fact, Respondents stated in their notice of motion that their motion was based upon CPLR 511 and 7004." *Id.* at 6. In short, says the Bronx Zoo, this Court correctly found that "Bronx County was a more convenient venue for all fact witnesses and potential experts." *Id.* at 5.

There is no "illusion of error," but actual material error.

First, the Bronx Zoo's Demand for Change of Venue, dated November 21, 2018, made pursuant to CPLR Rule 511, was expressly, and erroneously, grounded upon CPLR 503, CPLR 510(1) and CPLR 7004(c).

Second, the Bronx Zoo's motion to transfer venue could not be *grounded* upon CPLR 511, as that section merely regulates the time for filing a written demand to change the place of trial (sec. b) and the time for filing a motion for change of place of trial (sec. a).[3] Nor could the motion be *grounded* upon CPLR 7004(c), as that section merely governs where an issued writ is to be made returnable by a Supreme Court Justice.[4] Unlike CPLR 510, neither CPLR 511 nor CPLR 7004(c) provides the *grounds* for a motion to change venue.[5]

Third, the Bronx Zoo has never demanded that the place of trial be changed *based on the convenience of material witnesses*, as required by CPLR 510(3): not in its CPLR 511 demand to change venue that relied upon CPLR 503, not in its motion to transfer venue under CPLR 511 and CPLR 7004(c), not at oral argument, and not anywhere else. The Bronx Zoo's *sole argument* for

[3] CPLR 511 merely provides the *procedures* for a motion to change venue. *See* Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 511 at 511:1.
[4] CPLR 7004(c) "governs venue for the return of the writ," Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7004(c).
[5] "CPLR 510 specifies three *grounds* for a motion to change venue." (emphasis added) Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:1.

transferring venue was that Orleans County is an improper venue, the ground set forth in CPLR 510(1). Under CPLR 510, "*[s]ubdivision (1) provides for such motion when venue is improper*, i.e., plaintiff has failed to comply with the *rules specified in CPLR 501 and 503-508* or some other venue-regulating statute (e.g., CPLR 7502(a))." (emphasis added) Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 510 at C510:1. The Bronx Zoo's argument was based on the obvious error that CPLR 503(a) governs, when it is CPLR 506 that actually governs this habeas corpus action. Thus, this Court's decision to transfer venue on the ground of the convenience of material witnesses was improperly made *sua sponte. See Mimassi v. Town of Whitestown Zoning Bd of Appeals*, 104 A.D.3d 1280 (4th Dept. 2013) (A court "'is authorized to change venue only upon motion and may not do so upon its own initiative.'") (citation omitted); *Travelers Indem. Co. of Illinois v. Nnamani*, 286 A.D.2d 769, 770 (2d Dept. 2001) ("a court may not sua sponte transfer venue."); Reargument Memorandum, at 12-13.

Fourth, this Court's *sua sponte* finding "that Bronx County was a more convenient venue for all fact witnesses and potential experts" satisfied none of the numerous requirements set forth by CPLR 510(3), even if the Bronx Zoo had properly raised the issue. Reargument Memorandum, at 17 – 21.

Fifth, the Bronx Zoo fails to address the following material errors identified by the NhRP: (1) the erroneous factual finding that the Bronx Zoo's affiants were actual experts, when they are not, Reargument Memorandum, at 16, 18, and (2) the misapprehension that the *relevant* facts are in dispute, when they are not, Reargument Memorandum, at 19-20.

C. The Bronx Zoo misrepresents standard habeas corpus procedure under Article 70.

The Bronx Zoo erroneously argues:

> Contrary to NRP's contentions, the Court did not issue a writ nor make a decision as to where this proceeding would be returnable "just be signing [Petitioner's] order to show

> cause" (Chen Aff. Ex. 3, at 32), which by its very nature "is merely an alternative way of bringing on a contested motion." N.Y. McKinney's Ann. C22:214:24, Order to Show Cause. Given the nature of this special proceeding, the Court was required to make all motions returnable on the same day (CPLR 406), and the Court made clear that it signed the Order to Show Cause merely to avoid "depriv[ing] [NRP of] the ability to make a record that [it] asked this Court to entertain these issues. That's really the sole reason [the court] issue[d] the order to show cause." Chen Aff. Ex. 3, at 32-33. At the return date, the Court decided only Respondents' motion to change venue, and expressly reserved decision on all other pending applications, including NRP's petition for a writ of habeas corpus. Chen Aff. Ex. 3 at 31.
>
> Because the petition for writ of habeas corpus has not been decided—and therefore no writ has issued—the Court had the discretion under CPLR 7004(c) to transfer venue of this proceeding.

Zoo Memorandum 4, at 7.

The Bronx Zoo thereby misrepresents how a habeas corpus case begins and how it ends by conflating the *issuance of the writ*, *including an order to show cause why the person detained should not be released* (which is how it begins), with *the final grant or denial of a petition for habeas corpus* (which is how it ends).

First, the court's *issuance of a writ* is *not* a decision on the merits of the habeas corpus petition. It is merely a formal mechanism – akin to a summons in a civil case – that requires the respondent to appear in court with the detainee herself and provide a legally sufficient reason to justify his imprisonment of the detainee. *See People ex rel. Williams v. Smith*, 51 Misc.3d 1219(A) at *1 (Sup. Ct. 2015) ("The Court *issued a Writ of Habeas Corpus* setting the return date for October 25, 2015. . .") (emphasis added).

Second, CPLR 7003(a) provides for the issuance of the writ in two ways. The first permits a petitioner to demand the production of the detainee at the hearing where the respondent is required to present a legally sufficient reason for the detention.[6] The second is when "the petitioner

[6] In such cases, "the proceeding is initiated by the filing of a petition requesting the court, ex parte, to issue a writ of habeas corpus "to inquire into the cause of ... detention and for deliverance." CPLR 7002(a) The petition may be made by the detainee or someone acting on the detainee's behalf. *If the writ is issued* (CPLR 7003(a)), *it is served upon the custodian of the person whose detention is disputed.* CPLR 7004(b), 7005. *Such custodian must make a "return"* at

does not demand production of the person detained." In that instance, the court issues an "*order [for] the respondent to show cause* why the person detained should not be released."(emphasis added). CPLR 7003(a).[7]

In such cases, the respondent is not required to produce the detainee in court. This second way was once "served by the writ of certiorari under the civil practice act." *Legislative Studies and Reports*, McKinney's CPLR 7003. Now it utilizes an order to show cause.[8] *See* Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7001 (as indicated in CPLR 7001, "the *common law writ of certiorari to inquire into detention has been merged with habeas corpus*. The only significant difference between a writ of habeas corpus and a writ of certiorari to inquire into detention is that the former requires production of the prisoner for the hearing on the writ, whereas the latter dispenses with such presence") (emphasis added); *Legislative Studies and Reports*, McKinney's CPLR 7001 ("this *sentence includes writs of certiorari since they are merged with writs of habeas corpus*.") (emphasis added).

"[T]he writ of certiorari to inquire into detention has been abolished," but its substance "is carried forward in CPLR 7003(a), which gives the court discretion to issue, instead of a writ of habeas corpus, an order to show cause why the person detained should not be released." Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7003. A habeas petition that does not request a prisoner's production is "in effect, a petition for a writ of certiorari." *Legislative Studies*

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the time and place specified in the writ and, if required by the writ, "produce the body of the person detained." CPLR 7006(a). Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7001 (emphasis added).

[7] The Bronx Zoo derives its misunderstanding of an order to show cause in the *habeas corpus context*, as "merely an alternative way of bringing on a contested motion," from its understanding of what an order to show cause is in the *non-habeas corpus context*, citing the Practice Commentary to CPLR Rule 2214(d). To correctly understand what an order to show cause in the *habeas corpus context* means, one must consult the provisions of CPLR Article 70, e.g., CPLR 7003(a).

[8] The first sentence of CPLR 7001 states: "Except as otherwise prescribed by statute, the provisions of this article are applicable to common law or statutory *writs of habeas corpus and common law writs of certiorari to inquire into detention*." (emphasis added).

and Reports, McKinney's CPLR 7003.[9] *See Stanley*, 16 N.Y.S.3d. at 906-907. Therefore, when this Court signed the Order to Show Cause, it issued a writ of habeas corpus (formerly the writ of certiorari to inquire into detention) that did not require the detainee's production.[10]

D. The Bronx Zoo incorrectly claims this Court had discretion under CPLR 7004(c) to change venue.

The Bronx Zoo erroneously claims:

> Even if this Court decided to grant NRP's petition and issue a writ of habeas corpus (though it did not), the Court nevertheless retained express authority to "make the writ returnable before any judge authorized to issue it in the county of detention." CPLR 7004(c) Respondents' moved on this discretionary basis as well, and the Court had ample authority to grant the motion as such.

Zoo Memorandum 4, at 8.

The Bronx Zoo has no support for its claim. This Court's discretion to determine venue pursuant to CPLR 7004(c) ended with its having signed the Order to Show Cause and making it returnable in the county of issuance. The *second* sentence of CPLR 7004(c) does *not* provide this Court with discretion to transfer venue after the signing of the Order to Show Cause and making it returnable to Orleans County:

> In all other cases, the writ shall be made returnable in the county where it was issued, except that where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention.

See Hogan v. Culkin, 18 N.Y.2d 330, 335 (1966).

[9] The terms "writ of habeas corpus" and "order to show cause" are used interchangeably in describing where "the writ" is made returnable under CPLR 7004(c). As an example, the NhRP cited *Article 70 of CPLR for a Writ of Habeas Corpus, The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S 3d. 898 (Sup. Ct. 2015), Reargument Memorandum, at 1.

[10] In *State ex rel Cox v. Appelton*, 62 Misc.2d 403, 405 (Sup. Ct. 1970), which the Bronx Zoo cites, a habeas action "was commenced by service of a show cause order because [the relator's] production was not deemed necessary."

After the order to show cause was issued and made returnable to Orleans County, the only way to change venue was in accordance with CPLR 510. *See* Reargument Memorandum, at 12 – 17.

III. As the NhRP's choice of venue in Orleans County was clearly proper and not the result of fraud or duplicity, the Bronx Zoo's outrageous, false and persistent claim that the NhRP improperly engaged in "forum-shopping" should be withdrawn.

The Bronx Zoo urges this Court to "preclude NRP's continued forum-shopping efforts by denying NRP's request to reargue outright." Zoo Memorandum 4, at 9. As demonstrated herein and in its filings, the NhRP unquestionably had the authority to bring the Petition in the Orleans County Supreme Court, which unquestionably had the authority to issue the Order to Show Cause and make it returnable in the county of issuance. Under 7004(c), prior to issuing the Order to Show Cause, the Court had the opportunity to make the writ returnable in Bronx County as the county of Happy's detention, but chose not to. As venue is therefore proper in Orleans County, the reasons for the NhRP's choice of venue are in fact irrelevant.

Respondents' allegation of "forum-shopping" merely serves to further mislead the Court as to why it should deny the NhRP's Motion to Reargue. Courts negate a choice of venue where "venue is designated *as a result of duplicity*," as that "amounts to a *fraud upon the court*." *Koschak v. Gates Constr Corp*, 225 A.D.2d 315, 316 (1st Dept. 1996) (emphasis added); *Opriciu v. Cleveland Tankers Inc*, 298 A.D.2d 913 (4th Dept. 2002) ("duplicity") (quoting *Koschak*); *CDR Creances SA v. Cohen*, 104 A.D.3d 17, 24 (1st Dept. 2012) ("In this jurisdiction, '*fraud upon the court*' is a term used to describe the *perversion of the judicial process* as a result of *misconduct by the party of counsel*") (emphasis added).

The Bronx Zoo has repeatedly sought to change venue on the ground that the NhRP was engaged in "forum-shopping," by relying upon *Koschak* in its two previous memoranda of law,[11] yet without citing any facts that would support an allegation of "duplicity" or "fraud upon the court." That is because these facts do not exist.

The Bronx Zoo acknowledges that the NhRP "candidly admits" *why* this habeas action was filed within the Fourth Department and not within the First Department, where the prospect of securing Happy's freedom would drastically diminish. This is not fraud. It is not duplicity. It is not collusion. And it does not serve as a legal ground upon which this Court should grant a change of venue. *See Martinez v. Tsung*, 14 A.D.3d 399, 400 (1st Dept. 2005) ("Unlike the plaintiffs in *Koschak*, *who colluded with their attorney in setting up a fraudulent living arrangement to establish venue in the Bronx*, respondents allege no such fraud by this plaintiff." (emphasis added).[12] The Bronx Zoo must immediately withdraw this baseless and false claim and this Court should not further tolerate it.

IV. Conclusion

Because this Court's decision to grant the Transfer Order is based on numerous clear misapprehensions of law and fact, and because the Bronx Zoo has not successfully defended those

[11] Reply Memorandum of Law in Further Support of Motion to Dismiss of Transfer Venue and in Opposition to Petitioner's Motion for Preliminary Injunction, dated December 13, 2018, at 2. Memorandum of Law in Support of Motion to Dismiss or Transfer Venue and in Opposition to Petition for Habeas Corpus, dated December 3, 2018, at 7.

[12] For other examples of where courts have found no improper forum shopping, s*ee Obas v. Grappell,* 43 A.D.3d 431, 432 (2d Dept. 2007) ("record does not establish that the *plaintiff misled the defendants or sought to manipulate the venue rules*") (emphasis added) (citing, *inter alia*, *Koschak*); *Peoples v. Vohra*, 113 A.D.3d 664 (2d Dept. 2014) ("moving defendants failed to establish that the appointment of Peoples as administrator of the decedent's estate 'amounts to a fraud upon the court'") (quoting *Koschak*); *Yanez v. Western Beef Inc*, 28 A.D.3d 751 (2d Dept. 2006) (no demonstration that "the plaintiff improperly engaged in forum shopping by naming a nominal party as a defendant"); *KM Jr ex rel KM Sr v. City of New York*, 17 Misc.3d 1131(A) at *3 (Sup. Ct. 2007) ("*Defendant alleges no wrongdoing or improper motive in Plaintiff's bringing this action in Kings County*," even though "it requires no depth of social perception to suspect that a plaintiff in a police misconduct action might anticipate a more receptive forum in Kings County than in Richmond County." But "unless the Court reads sections 510 and 511 out of the CPLR and ignores implementing caselaw, no discretion appears to send this action to Richmond County.") (emphasis added) (citing, *inter alia*, *Koschak*)

material errors, the NhRP respectfully requests the Court to grant its Motion to Reargue, reverse its Transfer Order and proceed with the case in Orleans County, together with such other and further relief as the Court may deem just and equitable.

Dated: January 30, 2019

Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
lizsteinlaw@gmail.com

Steven M. Wise, Esq.
Attorney for Petition (*pro hac vice*)
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
swise@nonhumanrights.org