The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am an attorney with Bone McAllester Norton, PLLC.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was licensed to practice law in 2014. My BPR No. is 033270.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I became licensed to practice law in Tennessee in 2014. My bar number is 033270.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

I was hired at the law firm of Hagan & Farrar, PLLC as an Associate Attorney right after taking the Tennessee bar exam. My work there consisted of various matters, inclusive of construction litigation, civil litigation, real property disputes, family law and appellate law practice.

I continued to remain with Mary Beth Hagan at the newly formed Hagan Law Group, PLLC after the dissolution of Hagan & Farrar, PLLC. There I continued to hone my construction law practice. I also represented clients in business transactions and disputes and a variety of other civil litigation and employment law matters. There I also began representing clients regarding expungements on a pro bono basis.

I always wanted to move my practice to Nashville, so in April 2017 I joined the law firm of Leitner, Williams, Dooley & Napolitan, PLLC as an Associate Attorney. There my practice grew to consist of complex commercial litigation, construction law, worker's compensation

defense and the defense of other civil litigation matters.

In September 2018 I was offered a position as an Attorney with Bone McAllester Norton, PLLC where I currently practice. My practice at Bone McAllester includes multiple areas of civil litigation, complex commercial litigation, expungement work and commercial transactions.

Prior to my career as a lawyer, I worked in Consumer-Packaged Goods (CPG) sales for the Procter & Gamble Company (P&G). There I was a member of the team that sold CPG goods to the Dollar General Company. I was responsible for assisting with the launch of the new Charmin Ultra Strong product. I also developed a coupon tracking program which allowed our marketing team to interface and collaborate with the coupon warehouse to track ROI on coupon promotions in the sales field. Prior to my work with P&G, I worked in New York City at a private equity firm dealing in private acquisitions and IPOs.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My current practice consists of commercial litigation (60%), which is comprised of complex construction litigation, arbitrations and real estate litigation; business litigation (10%) and employment litigation (10%). My transactional practice makes up about (20%) of my practice which is comprised mainly of construction contract negotiations and some administrative law practice. I also work with clients on a pro bono basis with expungements of misdemeanors and felony convictions.

I practice in both state and federal courts with my complex commercial litigation practice. This practice regularly involves multi-party litigation regarding construction claims, breach of contract issues, disputes over payment claims and workmanship issues. I regularly represent claims in both state and federal courts, arbitrations and mediations. A large part of this practice area is also involves working with my construction and real estate clients to keep their projects moving onto successful completion without the need for dispute resolution.

My employment law practice involves the representation of both employers and employees. I represent employers and often counsel and advise them regarding employment law matters with employees and non-compete issues with former employees. I also regularly review employment contracts for both employers and employees advising them on various contractual issues.

My employment litigation practice is comprised of representing both employers and employees. I work with employers regarding issues in federal court concerning the Fair Labor Standards Act claims and investigations with the department of labor. I represent employees regarding claims against employers in federal and state court regarding EEOC complaints for employment discrimination and Title VII claims.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I knew I wanted to be a trial lawyer, so upon completion of my law degree I accepted a position with Hagan & Farrar, PLLC (Hagan Law Group, PLLC). Being a part of a small firm, I was given responsibility for litigation files immediately working with each of the managing partners.

I regularly appeared in the trial courts of Rutherford and Davidson counties representing clients on a wide range of matters including construction, breach of contract, property disputes and probate estate matters.

I also have had the opportunity to work on appellate briefs with my managing partners, taking entire sections of the brief and penning the reply briefs. My work experience as a student law clerk with the Court of Appeals was instrumental to my knowledge and analysis as I worked on briefs in private practice.

My litigation experience has also expanded over the years into more complex litigation matters in the Chancery, Circuit and U.S. District Courts. Some of the types of litigation I regularly handle are multi-party construction litigation disputes and employment law matters inclusive of Title VII litigation and Tennessee Human Right Commission claims. Additionally, I work with my clients to resolve business litigation disputes, contract disputes, Tennessee Consumer Protection Act claims and arbitrations.

At this point in my practice, I sit first chair, developing the strategy and responsibility for the entire file. I also work with younger and more senior attorneys within the firm. I am responsible for all aspects of the files that I originate or that are construction related. This includes management of the file from the client intake, discovery, motion practice, trial preparation and settlements. I thoroughly enjoy the writing part of my practice. Be it a letter or motion, I love being able to support my legal argument with the caselaw, which makes oral argument exciting.

One of the areas of my practice that I love most is my pro bono work with clients with prior convictions and felonies, as I assist them in the statutory expunction of their records. This work has been a valuable part of my practice in the area of criminal justice reform. It is fulfilling to watch a life be restored.

Not only do I have a busy litigation practice, but I also have a robust transactional practice. There I have worked on many large construction deals in the downtown Nashville where I negotiate the construction contract with the general contractor, owner and subcontractors. I regularly advise my clients from the contract negotiations at the beginning of the build, consulting with them throughout the construction and developing ways to keep the project on track. If we are unsuccessful in keeping a project on track, I handle any dispute resolution starting with the written demand for a non-judicial resolution, mediations and ultimate trials and/or arbitrations with the American Arbitration Association.

Lastly, I represent both Plaintiffs and Defendants in my practice. This has been valuable to my practice as I am able to glean knowledge from working on both sides. The ability to see both sides of a legal issue has sharpened my analysis and application of the law to those issues as I am able to anticipate the arguments from the other side.

I am personally involved in all aspects of the cases in which I appear.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have had the opportunity to work with my managing partner, Amy Farrar, as an Associate Attorney, on the noteworthy case of *Holdsworth v. Holdsworth*, No. W201301948COA R3 CV, 2015 WL 3488929 (Tenn. Ct. App. June 3, 2015) which involved a contentious divorce regarding the trial court's holding relative to the dissipation of marital assets.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not served in these capacities.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have not served in these capacities.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I was honored to serve as a judicial law clerk with the Honorable Judge Richard H. Dinkins at the Court of Appeals after my first year of law school. Working with Judge Dinkins set the foundation for the lawyer I am today. In this role, I was responsible for the analysis of appellate briefs submitted by the parties; the preparation of bench memoranda for use during oral argument; the attendance at oral argument and the preparation of the final opinion. As part of the final briefing for the opinion, I performed legal research and analysis. This experience was invaluable to me as I honed my legal skills regarding issue identification, legal analysis and writing skills. Working with Judge Dinkins also gave me the perspective of how the appellate court viewed the record and the process that the appellate judges undertook as they wrote and issued opinions. Though this experience was in law school and prior to my licensure, it set a foundation for me as a practicing attorney regarding the record and how to truly prepare a case at the trial level in the event it is sent to the appellate level for review.

I also had the opportunity to clerk with the Rutherford County District Attorney's Office with a limited license to practice law during my last year of law school. There I put into practice the rules of criminal procedure. I worked in both Circuit and General Sessions Courts. Under the supervision of the DAs in the office. I conducted preliminary hearings in General Sessions

which were bound over to the Circuit Court. I regularly assisted in trial preparations and trials in the Circuit Courts dealing with crimes against child victims and homicide cases. I dealt directly with Defendants in negotiating pleas and prepared legal motions and memorandum for use with pre-trial motions and argument before the Circuit Court. While working with the DA I learned the importance of trial preparation and the record. Having first been with the Court of Appeals, I was meticulous in how the record was preserved should a matter have to go up on appeals.

Both of these experiences were invaluable to me as I began my legal career.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Belmont University, 1997-2001- William Randolph Hearst Presidential Scholar (Full Tuition Scholarship), Bachelor of Music Minor Music Business and Marketing

Belmont University College of Law, 2011-2014- Juris Doctorate degree (Bell Tower Law Scholar (Full tuition academic award); Belmont University College of Law Board of Advocates (2012-2014); Vis Moot Court Competition Team Vienna, Austria (2012-2013); First Place in Oral Advocacy Competition (Spring 2012); Semi-Finalist in Dean's Cup Invitational Moot Court Competition (Fall 2012))

PERSONAL INFORMATION

15. State your age and date of birth.

41; [redacted] 1978

16. How long have you lived continuously in the State of Tennessee?

I have lived continuously in the State of Tennessee since 2006.

17. How long have you lived continuously in the county where you are now living?

I have lived continuously in Davidson County, Tennessee for 18 months.

18. State the county in which you are registered to vote.

I am registered to vote in Davidson County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

Not applicable.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes. I was involved in an uncontested irreconcilable differences divorce which was resolved by agreement. The final decree was issued on November 12, 2019. The docket number and style of the case is Myles Dihigo v. Dihigo - Docket No. 19D1159.

I was also involved in a parentage and child support case involving my oldest son in the juvenile court for Davidson County, Tennessee. That case was resolved in mediation where I was named the primary parent of my minor son. The agreed order regarding the parenting plan was entered March 2011. The docket number and style of that case is Bell v. Myles - Docket No.2007-001029. There was additional litigation regarding parenting time when I sought to leave the State of Tennessee to take a job promotion and attend law school in Cincinnati Ohio where I am from, however, I chose to remain in Tennessee so that my son could remain in contact with his father.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

United Way of Rutherford and Cannon Counties Board of Directors (2016-2019)

Discovery Center of Middle Tennessee – Guild (2020-present)

Elevate Development- Board of Directors- (2020-present)

First Baptist Church, Murfreesboro, Tennessee (serving in a variety of areas)- (2018-present)

Strong Tower Bible Church, Nashville, Tennessee (serving in the Children's Ministry and Adult Education Classes) (2016)

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Napier Looby Bar Association (2014-present)

- Board of Directors Treasurer- (2020)

American Bar Association, Construction Law Forum- (2017-present)

- Forum Diversity & Inclusion Committee (2018- present)
- Forum Division IV Steering Committee (2019-present)
- Forum Membership Committee (2019- present)

Tennessee Bar Association- 2011- present

- Diversity Leadership Institute (2014)
- District 7 Representative for the Young Lawyer's Division (2015-2017)
- Middle Tennessee District Captain (2017-2018)
- Executive Committee Construction Law Section (2020)

Tennessee Association for Construction Counsel (2019-2020)

Nashville Bar Association (2016-present)

Harry Phillips American Inns of Court (2018 to present)

Lawyers Association for Women- (2017-present)

- Diversity and Inclusion Committee- (2019-2020)

Defense Research Institute- (2016-2019)

Associated General Contractors (2018-present)

- Legal Advisory Committee

National Association for Women in Construction (2018-2019)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Tennessee Supreme Court Attorney for Justice (2016 and 2017)

ABA Forum on Construction Law Diversity Fellow (2018-2021)

National Black Lawyers' Top 40 Under 40 (2018)

Mid-South Super Lawyers- Rising Star (2019)

Murfreesboro Top 40 Under 40 (2018)

Speaking Engagements:
"Litigation and Best Practices After the Storm": ABA Annual Meeting: Forum on Construction Law; New Orleans, LA, April 2018

"The End Game: How to Develop and Implement Your Resolution Strategy" DRI Voice of the Defense Bar Construction Law Bootcamp; Chicago, IL, November 2018

"Dealing with Natural Disasters – Here Comes the Flood (of Legal Issues)" ABA Annual Meeting: Forum on Construction Law; Session Coordinator; Hollywood, FL, Spring 2019

30. List the citations of any legal articles or books you have published.

Cost-Plus Contract Agreement and the Disorganized Contractor, Under Construction, Vol. 19 No. 3, Spring 2018

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Tennessee Bar Association Construction/Creditor's Practice- Construction Payment Disputes-

2019

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See the attached writing samples, both of which are my own work. The latter of the two was reviewed by my law partner, Sam Jackson prior to its submission to the Court.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I truly believe that a life of service is a life well-lived. I became a lawyer to serve my community and my fellow Tennesseans. It is the service to others that brings my heart true fulfillment. I am committed to fair and equitable courts for all persons and believe that the access to justice should not be limited or hampered in anyway. As a lawyer, I get to serve a diverse cross-section of clients daily, and it is an honor to help them resolve their legal issues. Being a judge would give me the opportunity to continue serve the greater community and public at large with my legal analysis and writing, ensuring that all persons before the court are heard, that all are treated equally and most importantly that the laws of the State of Tennessee are applied with equity to every person in the judicial system.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I'm a two-time recipient of the Tennessee Supreme Court's Attorney for Justice recognition for my pro bono work.

I regularly hold free expungement clinics in Rutherford County, one of which was just completed on Saturday. With the help of the Supreme Court's Access of Justice Commission and TJFA, I, a team of lawyers and law students served 44 clients. As a part of this work, I also

partner with local churches and job agencies to provide career counseling to clients seeking better employment once their records are expunged. I also volunteer on a regular basis with expungement clinics in Davidson and Shelby counties.

Additionally, I love speaking to students regarding the legal profession. Part of ensuring the equal application of justice in Tennessee is inspiring the next generation of diverse youth to enter the profession. Seeing an example of what you can be is life changing for many students especially young women.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am applying for the open seat on the Court of Criminal Appeals for the Middle Grand Division. This court handles direct appeals of both felony and misdemeanor convictions from the Circuit and Criminal Courts in the 41 counties of Middle Tennessee. The court currently seats four judges. The selection of a young, diverse, female lawyer who is committed to the equal application of the law for all parties regardless of race, religion, creed and gender would have an implication on the equity of this Tennessee court for years to come. If appointed, my selection to the court would enable it to continue to timely provide review and legal analysis of trial court decisions ensuring that the claims of both victims and the accused are given their due process at the appellate level in a timely fashion.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

The commitment to service was instilled in me during law school and is actually how I came to work with my first firm. As I've grown my practice, I continue to serve my community with my legal skills. In addition to my expungement work, I currently serve on the Board for Elevated Development. There we work to provide financial literary tools and concepts to high school students. I'm a former Board Member for the United Way of Rutherford & Cannon counties. There I served on the policy committee and further served Middle Tennessee through various initiatives and programs of UW. I'm also an active member of my church, First Baptist, Murfreesboro where I regularly participate in church activities and community events.

If appointed Judge, as permitted by the Cannons of Judicial Conduct, I would like to continue my expungement clinics. This work is vital to my commitment to equal justice, because many times my clients in these clinics experience hardships in the areas of housing and jobs long after they have completed their sentence. Helping people get their records cleared, as the Legislature intended, is restorative to entire communities and families.

Finally, I would like to continue speaking to and mentoring students regarding the legal profession and my board service with Elevated Development. I will continue to serve my church as well. I also plan to continue working with the Discovery Center Guild around diversity and inclusion through play at their center in Murfreesboro.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I'm up working each morning at 4:00 A.M. I'm a hard worker and I've had a job since I was 14. My father says that once I make up my mind to do something, I will not relent until I've exceeded my goal. Some call that GRIT, others tenacity or determination; I call it persistence and perseverance. I bring that work ethic to each of my cases. That determination is also present in my legal writing and analysis. I will bring that hard work ethic to this Court.

I've had the opportunity to excel in my practice as a minority female in construction law. I've worked on many significant projects and have served my clients throughout litigation, arbitration and dispute resolution. I've served my clients with the resolution of business disputes, workplace discrimination and through restorative justice initiatives. My mentor instilled in me that developing good lawyering skills is imperative to any practice area; the skills of a good lawyer are transferrable to any subject matter. I've worked hard to develop good analytical, writing and lawyering skills throughout my law practice. My prior business career has also aided those skills and acumen. However, it's my passion for service and my commitment to the equal application of the law for all Tennesseans that brings me to apply to this particular position on the Court. I would love the opportunity to bring my hard work, determination, legal analysis and writing to the cases presented at the Court of Criminal Appeals.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, I will uphold the law even if I disagree with its substance. I firmly believe in the separation of powers. The legislative branch in the State of Tennessee writes the laws. The judiciary is a separate, but equal, branch which applies the laws as written to the facts of each individual case. When a law is unclear on its face, it is critical to look to the legislative history to determine the intent behind the law, however, it is not the job of the judiciary to make the law. It would be my duty, upon taking the oath of office to uphold and, "support the Constitution of the United States of America and the Constitution of the State of Tennessee…administer justice without respect of persons and….faithfully and impartially discharge all duties…as judge…" In my practice, my job is to zealously advocate for the position and best interests of my clients. Though I may not always agree with the law or believe that a particular law is fair, I do believe in the equal application of the law above all else and my job is to distinguish why a law should or should not apply. This is advocacy. I often times have frank discussions with my clients as to why a particular law is not favorable to our position. I view those discussions as truly advocating for my clients interest and sometimes hard decisions are made which may affect our case strategy and outcome to obtain the best outcome.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Honorable Richard H. Dinkins, Supreme Court Building, Suite 208, [redacted] Nashville, TN; [redacted]
B. Andrea P. Perry, Member and Board of Directors, Bone McAllester Norton, PLLC, [redacted] Nashville, TN; [redacted]
C. Bruce Gill, Managing Member, Leitner, Williams, Dooley & Napolitan, PLLC; [redacted]
D. Dr. Susan West, Vice President & Chief of Staff, Belmont University, [redacted] Nashville, TN; [redacted]
E. Shawn Kaplan, Former Rutherford County Commissioner, Senior Mortgage Officer for The Kaplan Team of Legacy Mutual Mortgage; [redacted], Franklin, TN; [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals in the Middle Grand Division of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 6, 2020.

/s/ I'Ashea L. Myles
Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

I'Ashea Myles Dihigo
Print Name

/s/ I'Ashea Myles Dihigo
Signature

October 6, 2020
Date

033270
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

WRITING SAMPLES

IN THE CHANCERY COURT FOR DICKSON COUNTY, TENNESSEE
AT CHARLOTTE, TENNESSEE

SUNIL PATEL, DHAVALKUMAR PATEL, and PARESH PATEL, et al.	)	
Plaintiff,	)	
	)	**Docket No. 2016-CV-324**
v.	)	
THE ESTATE OF BOBBIE JUNE SOMERVILLE, TERESA FISHER, EXECUTIX, TAMMY SOMERVILLE and TERESA FISHER Individually	)	
Defendants.		

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST SUNIL PATEL, DHAVALKUMAR PATEL, and PARESH PATEL

Come now the Estate of Bobbie June Somerville, Teresa Fisher, Executrix, Tammy Somerville and Teresa Fisher, Individually (collectively known as "Defendants"), by and through counsel, and in support of their Motion for Summary Judgment, the Defendants state:

INTRODUCTION

This case arises out of an offer to purchase a plat of unimproved real property owned by the decedent at the time of her death. The Plaintiffs allege generally that:

1. They are entitled to the remedy of specific performance; and
2. They should treated as third-party beneficiaries to the Listing Agreement.

(Patel Compl. ¶¶ 10-11)

The Complaint alleges, in generalities, that Plaintiffs are entitled to the remedy of specific performance for an offer they made that did not result in a written contract. Plaintiffs submitted an offer on June 23, 2016 to purchase a plat of unimproved real property that the decedent, Bobbie June Somerville ("Testator") left to the named beneficiaries in her residual

estate pursuant to her will. (Patel Compl. ¶ 10; see Plaintiffs' Exhibit "B".) Plaintiffs' offer expired on June 24, 2016 at 6:00 P.M. pursuant to its terms. (Patel Compl. ¶ 10; see Plaintiffs' Exhibit "B"; Intervening Compl. ¶ 14.) There was no acceptance of Plaintiffs' offer prior to its expiration.

The submission of an offer does not meet the elements of an enforceable contract to support a claim for the relief of specific performance. Under the statute of frauds, real property cannot be transferred without a written agreement signed by the party to be charged. Plaintiffs assert that they are third-party beneficiaries to the Listing Agreement. However, the Supreme Court has held that third-party beneficiary status may only be conferred where the third party is the intended beneficiary and not merely incidental. In this case, the Plaintiffs do not meet the requirements to be treated as third-party beneficiaries to the Listing Agreement. Therefore, Plaintiffs' Complaint should be dismissed as a matter of law because there was never an enforceable contract.

FACTS

Bobbie June Somerville ("Testator") died testate on October 8, 2015. (Patel Compl. ¶¶ 2, 14.; Affidavit of Teresa Fisher, Executrix ¶ 3) Her will was duly probated in the Probate Court for Dickson County, Tennessee. (Patel Compl. ¶ 14; Fisher Aff. ¶ 3.) Ms. Fisher is the Executrix of the Estate. (Patel Compl. ¶ 2; Fisher Aff. ¶ 3.)

Prior to her death, Testator signed a Listing Agreement with Chris Dotson & Associates ("Broker") and its Designated Agent, Jim Hill ("Agent") to broker and to be the exclusive listing agent for the sale of a parcel of unimproved real property located on Pump Hill Road. (Patel Compl. ¶ 7; Exhibit A to Patel Compl., p. 8, lns.369-372; p. 6, lns. 283-288.) The listing agreement gave Broker the exclusive right to market and advertise the land for sale; it did not

confer to Broker or Agent the authority to enter into a subsequent purchase and sale agreement. (Patel Compl. ¶ 7; Exhibit A to Patel Compl., p. 3, lns. 127-128; Affidavit of Tammy Somerville ¶6; Affidavit of Teresa Fisher, Executrix¶7.)

Following the Testator's death, Agent authored an offer for Plaintiffs to purchase the unimproved real property. (Exhibit B to Patel Compl., p.1-9, footer lines.) The offer was signed by the Plaintiffs at 3:18 P.M. on June 23, 2016. (Exhibit B to Patel Compl. P. 9, lns. 437-441; Affidavit of Tammy Somerville ¶8; Affidavit of Teresa Fisher, Executrix¶13.)

Pursuant to the terms of their offer,

> **16. Time Limit of Offer.** This Offer may be withdrawn at any time before acceptance with Notice. Offer terminates if not countered or accepted by 6 o'clock p.m. on the 24th day of June 2016.

(Exhibit B to Patel Compl. P. 9, lns. 429-430.) Agent submitted the offer to the probate attorney for the Estate who was out of town at the time. (Intervening Compl. ¶14; Harrington Aff. ¶8.) Pursuant to the terms of the offer, it expired on June 24, 2016 at 6:00 P.M. without acceptance or a counteroffer. (Exhibit B to Patel Compl., p.9, lns. 429-449; Intervening Compl. ¶14; Fisher Aff. ¶15; Somerville Aff. ¶10.)

It is undisputed that there is no contract for the purchase of the unimproved real property on Pump Hill Road signed by the decedent Bobbie June Somerville and the Plaintiffs. (Exhibit B to Patel Compl. p.9, lns. 437-449; Fisher Aff. ¶18; Somerville Aff. ¶13.) Likewise, there is no contract for the sale of the real property signed by Ms. Fisher, Executrix and the Plaintiffs. (Exhibit B to Patel Compl. p.9, lns. 437-449; Fisher Aff. ¶19; Somerville Aff. ¶12.) There is no contract for the sale of the real property signed by any other heir to the Somerville Estate and the Plaintiffs. (Exhibit B to Patel Compl. p.9, lns. 437-449; Fisher Aff. ¶17; Somerville Aff. ¶12.)

After the expiration of the offer, Agent did not speak with Ms. Fisher, Ms. Somerville or any other heir to the Somerville Estate regarding the offer. (Patel Compl., Exhibit B Addendum 1; Fisher Aff. ¶ ¶ 20-23; Harrington Aff. ¶¶3-6;11-12)

On June 27, 2016, Agent submitted an Addendum to Plaintiffs' offer which purported to accept the offer extension request of Ms. Harrington. (Patel Compl., Exhibit B Addendum 1; Fisher Aff. ¶26.) This Addendum was not agreed to, signed or acknowledged by Ms. Fisher, Executrix, Ms. Somerville or any other heir to the Somerville Estate. (Patel Compl., Exhibit B Addendum 1, lns. 29-38; Fisher Aff. ¶¶26-29; Somerville Aff. ¶¶ 15-17.)

There has been no closing on the Pump Hill property and no signed purchase and sale agreement. (Fisher Aff. ¶30; Somerville Aff. ¶18.)

STANDARD FOR MOTION FOR SUMMARY JUDGMENT

In motions for summary judgment, the moving party, who does not bear the burden of proof at trial, shall prevail on its motion for summary judgment if it: (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or(2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. TENN. CODE ANN. § 20-16-101. Summary judgment is appropriate where there are no genuine issues of material fact for trial and the moving party is entitled to a judgment as a matter of law. See Byrd v. Hall, 847 S.W. 2d 208, 214-216 (Tenn. 1993). Often referred to as the "put up or shut up standard," in Tennessee:

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a

> conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial.

Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 264 (Tenn. 2015).

ARGUMENT

I. THE PLAINTIFFS LACK STANDING TO SUE FOR SPECIFIC PERFORMANCE BECAUSE THEY DO NOT HAVE AN ENFORCEABLE CONTRACT TO BUY THE REAL PROPERTY.

Plaintiffs' claim for specific performance fails as a matter of law because the Plaintiffs do not have an enforceable Purchase and Sale Agreement that comports with the Statute of Frauds. Therefore, the Plaintiffs lack standing to sue for the remedy of specific performance.

A. The Patels Lack Standing to Sue for Specific Performance.

Standing is a judge-made doctrine used to analyze whether individuals possess a sufficient stake in a controversy to warrant the exercise of judicial power on their behalf. Metropolitan Air Research Testing Auth. v. Metropolitan Gov't of Nashville and Davidson County, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992). To establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give. Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976). When a party asserting a claim lacks a legally protectable and tangible interest in the dispute, dismissal is required regardless of the case's merits. Id.

To request a decree of specific performance, there must first be a contract. Hillard v. Franklin, 41 S.W.3d 106, 111 (Tenn. Ct. App. 2000). To be enforceable, a contract must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon sufficient consideration, free from fraud or undue influence, not against public policy and

sufficiently definite to be enforced. Staubach Retail Servs.-Se, LLC v. H.G. Realty Co., 160 S.W.3d 521, 524 (Tenn. 2005). The contract must be "clear, complete and definite in all its essential terms." Hillard, 41 S.W.3d at 111. (quoting Parsons v. Hall, 184 Tenn. 363, 199 S.W.2d 99, 100 (Tenn. 1947)). It must show beyond doubt that the minds of the parties actually met. Id. The Court will not create a contract for the parties. Morrow v. Jones, 165 S.W.3d 254, 258 (Tenn. Ct. App. 2004).

Under the Statute of Frauds, certain types of contracts require an extra showing of proof to be enforceable. Waddle v. Elrod, 367 S.W.3d 217, 222 (Tenn. 2012). Contracts for the sale of real property are subject to the Statute of Fraud's requirements. Id. With respect to real property, Tennessee's Statute of Frauds provides:

> No action shall be brought . . . upon any contract for the sale of lands, tenements, or hereditaments, . . . unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party. . . . In a contract for the sale of lands, tenements, or hereditaments, the party to be charged is the party against whom enforcement of the contract is sought.

TENN. CODE ANN. § 29-2-101(a). The Court has long emphasized that the Statute of Frauds should be strictly adhered to and construed. Waddle, 367 S.W.3d at 223.

If there is no written contract, the Court cannot order specific performance. To transfer real property, a written contract must be signed by the party against whom it is being enforced. Blair v. Brownson, 197 S.W.3d 681, 684 (Tenn. 2006). No outside evidence is permissible, there must be a writing. Patton v. M'Clure, 8 Tenn. 332, 338-39 (Tenn. 1828).

The most critical undisputed fact in this case is that there is no contract or writing signed by the party to be charged which would cause the sale of this property. (Exhibit B to Patel Compl. p.9, lns. 437-449; Fisher Aff. ¶¶17-19; Somerville Aff. ¶¶12-13.) The Plaintiffs only submitted an offer to purchase the property on June 23, 2016. (Exhibit B to Patel Compl. p.9,

lns. 437-449.) Plaintiffs, through Agent, authored their own offer and set the terms of acceptance. (Exhibit B to Patel Compl. p.9, lns. 429-430) By its own terms, the offer expired on June 24, 2016 at 6:00 p.m. (Exhibit B to Patel Compl. p.9, lns. 429-43.; Intervening Compl. ¶14; Fisher Aff. ¶15; Somerville Aff. ¶10.) Plaintiffs did not receive an acceptance or counter to their offer prior to its expiration, and the offer attached to their Complaint is unsigned by the party to be charged. (Exhibit B to Patel Compl. p.9, lns. 429-449; Intervening Compl. ¶14; Fisher Aff. ¶17-19; Somerville Aff. ¶12-13.) Therefore, they do not have an enforceable contract for the purchase of the real property.

No claim for breach of contract with a request for specific performance can stand as a matter of law, given the allegations in the Complaint and the undisputed facts in the record. There is no signed by the Testator or her heirs. The undisputed facts prove there was no meeting of the minds, mutual assent to the terms, or consideration to form the basis of an enforceable contract. Accordingly, the remedy of specific performance does not apply. The claim against the Defendants for the remedy of specific performance is without factual or legal merit. Therefore, it should be dismissed as a matter of law.

II. THE PLAINTIFFS' CLAIM THAT THEY ARE THIRD-PARTY BENEFICIARIES TO THE LISTING AGREEMENT FAILS AS A MATTER OF LAW BECAUSE THEY ARE MERELY INCIDENTAL BENEFICARIES TO THE LISTING AGREEMENT

Likewise, the Plaintiffs' claim that they are third-party beneficiaries to the listing agreement must also fail as a matter of law. Tennessee recognizes two categories of third-party beneficiaries, intended and incidental. First Tenn. Bank Nat'l Ass'n v. Thoroughbred Motor Cars, 932 S.W.2d 928, 930 (Tenn. Ct. App. 1996); Owner-Operator Indep. Drivers Ass'n v. Concord EFS, 59 S.W.3d 63, 71 (Tenn. 2001). An intended beneficiary is the only party that

may maintain an action to enforce the contract. First Tenn. Bank, 932 S.W.2d at 930. In this case, the Plaintiffs are merely incidental beneficiaries and therefore cannot maintain an action to enforce the sale agreement.

In Owner-Operator Independent Drivers Ass'n v. Concord EFS, Inc., which is the leading case in Tennessee for third-party beneficiary status, the Supreme Court set forth the analysis for evaluating when a party is an intended third-party beneficiary versus an incidental third-party beneficiary. Concord, 59 S.W.3d at 70. The Court provided an analytical framework that allows the contracting parties to control the terms of their agreement, yet remain sufficiently broad enough to ensure that the rights of intended third-party beneficiaries will be protected. Concord, 59 S.W.3d at 70. The Concord Court announced a three-prong test to be used in determining whether a third-party is an intended third-party beneficiary of a contract. The Court held that, (1) the parties to the contract have not otherwise agreed; (2) the recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and (3) the terms of the contract or the circumstances surrounding performance indicate that either: (a) the performance of the promise will satisfy an obligation or discharge a duty owed by the promisee to the beneficiary; or (b) the promisee intends to give the beneficiary the benefit of the promised performance. Id. at 70.; First Tenn. Bank, 932 S.W.2d at 931.

The Court instructed that when determining whether a party is an intended third-party beneficiary, the "primary focus is upon the intent of the contracting parties" and, accordingly, "courts should honor any expression of intent by the parties to reserve to themselves the benefits of the contract." Concord, 59 S.W.3d at 70. In First Tennessee the Court of Appeals gave examples of contract language that demonstrated that the parties did not intend to benefit any third party. “Paragraph … states that the agreement shall be binding only on the parties, their

heirs, successors and assigns, and legal representatives….Paragraph … provided that changes in the agreement could be made only in writing signed by both parties…" First Tenn. 932 S.W.2d at 931. The Supreme Court and Court of Appeals have held that this language demonstrates that the terms of the contract were intended only to benefit the parties to the contract. Id.; Concord, 59 S.W.3d at 71. In determining the contracting parties' intent, the proper focus is upon the promisee's intent, the party receiving the benefit, and not the promisor's, the party giving the benefit. Id. at 71. The right of a potential third-party beneficiary does not depend upon the purpose, motive, or intent of the promisor but the promisee. Id.

Consistent with this focus on the parties' intent, the first prong of the test annunciated by the Court provides that, in order for there to be an intended third-party beneficiary of any contract, the parties to the contract must have not otherwise agreed." AmSouth Erectors, L.L.C., No. W2002-01944-COA-R3-CV, 2003 Tenn. App. LEXIS 551, *9-10 (Tenn. Ct. App. 2003) (copy attached). In this case it is undisputed that the Plaintiffs are not parties to the Listing Agreement. (Exhibit A to Patel Compl.) The Agreement at issue is between Testator and the Broker. ("Listing Agreement Parties").

The most critical undisputed fact to defeat the Plaintiffs' argument is that the Listing Agreement Parties specifically agreed that no third-party beneficiaries were intended. (Exhibit A to Patel Compl., p. 7, ¶ 15 (A).) The Listing Agreement Parties stated, "This Agreement may only be assigned with the written consent of both parties." (Id.) It is undisputed that Plaintiffs have shown no evidence that there was a writing between Testator and Broker granting the assignment. The Concord Court held that similar statements have been "held to demonstrate that the terms of the contract were intended to only benefit the parties to the contract." Concord, 59 S.W.3d at 71; see also First Tenn. 932 S.W.2d at 931. By the terms of the Listing Agreement,

the Listing Agreement Parties did not intend to confer their Listing Agreement on any third-party beneficiary. Therefore, the Plaintiffs cannot be intended third-party beneficiaries and have failed the first prong of the three-part test.

Further, the promise in the Listing Agreement is that the Testator, as the promisor, gave the Broker, the promissee, the exclusive ability to list the property. (Exhibit A to Patel Compl., p. 3, lns. 127-128.) The listing of the property did not satisfy an obligation or discharge a duty owed by the Broker to the *Plaintiffs*. The Plaintiffs thus fail the second prong of the test.

Lastly, the Broker did not intend to confer the primary benefit of the exclusive ability to list the real property upon the Plaintiffs. The Listing Agreement in and of itself does not transfer any ownership rights to the real property. (Exhibit A to Patel Compl.) As such, the Plaintiffs also fail the third prong of the test.

Under no circumstances as set forth in the Complaint could the Plaintiffs be construed as intended third-party beneficiaries who can enforce an unsigned purchase contract. The undisputed facts are that the Plaintiffs' allegations fail to qualify Plaintiffs as intended beneficiaries to the Listing Agreement. Where the benefit flowing to the third party is not intended, but is merely incidental, the third party acquires no right to enforce the contract. Concord, 59 S.W.3d at 68. Therefore, the Plaintiffs' claim as a third-party beneficiary must be dismissed as a matter of law.

Because the Plaintiffs' claim to be treated as third-party beneficiaries to the Listing Agreement cannot stand as a matter of law, the Defendants are entitled to recover their reasonable attorneys' fees, costs, and expenses incurred in defending the Plaintiffs' claim to be treated as third-party beneficiaries. (Compl. ¶ 11.) Counsel requests leave to submit an affidavit of attorneys' fees at the conclusion of the hearing.

CONCLUSION

The Estate of Bobbie June Somerville, Teresa Fisher, Executrix, Tammy Somerville and Teresa Fisher, Individually, respectfully request the Court to grant their Motion for Partial Summary Judgment and dismiss all claims made against them by the Plaintiffs. The Plaintiffs' request for the remedy of specific performance fails because the Plaintiffs offer, which they authored, to purchase the real property expired by its terms prior to any acceptance or counter from the Defendants or other heirs to the Estate. Plaintiffs further do not have a contract for the purchase that comports with the Statute of Frauds as required by Tennessee Code Annotated § 29-2-101(a). The request to be treated as third-party beneficiaries to the Listing Agreement fails because the Plaintiffs fail to meet any of the three requirements for such treatment.

The Estate of Bobbie June Somerville, Teresa Fisher, Executrix, Tammy Somerville and Teresa Fisher, Individually also respectfully request the Court to award them their reasonable attorneys' fees and costs incurred to defend against the Plaintiffs' claims for specific performance and requests the ability to file a supporting affidavit of their attorneys' fees. Further, the Estate of Bobbie June Somerville, Teresa Fisher, Executrix, Tammy Somerville and Teresa Fisher, Individually respectfully request the Court to award them their reasonable attorneys' fees, costs, and expenses incurred in defending the Plaintiffs claim to be treated as third-party beneficiaries to the Listing Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by United States mail, postage prepaid, on this the ____th day of March 2017 to:

Henry F. Todd
404 East College Street
Dickson, TN 37055

Barney Regen
465 Henslee Drive, Unit C-1
Dickson, Tennessee 37056-0190

_____
I'Ashea Myles-Dihigo

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK BETZ ASSOCIATES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:17-cv-0786**
	)	
LANDMARK HOMES OF TENNESSEE, INC. and GARY WISNIEWSKI,	)	**Magistrate Judge Brown**
	)	
Defendants.	)	
	)	

RESPONSE IN OPPOSITION TO GRANGE MUTUAL CASUALTY'S PROPOSED MOTION TO INTERVENE

Landmark Homes of Tennessee, Inc. and Gary Wisniewski (collectively known as "Defendants") submit their response in opposition to Grange Mutual Casualty's proposed Motion to Intervene. This Court should deny Grange Mutual Casualty's (hereinafter known as "Grange") motion to intervene for the following reasons: 1) Grange's Motion to Intervene is untimely; 2) Grange does not possess a substantial interest in the underlying ligation which would permit an intervention pursuant to Federal Rules of Civil Procedure 24 (a); 3) Grange cites no common question of law or fact in the underlying litigation which would support permissive intervention; and 4) the Defendants will be unduly prejudiced by the intervention of Grange which is providing an active defense, under a reservation of rights in the underlying litigation.

THE UNDERLYING LITIGATION

On May 2, 2017, Frank Betz Associates, Inc. (hereinafter known as "Plaintiff") filed its complaint against Landmark Homes of Tennessee, Inc. (hereinafter "Landmark") and Gary

Wisniewski (hereinafter "Mr. Wisniewski"). (Doc. 1). In its complaint, Plaintiff alleged damages as a result of alleged copyright infringement by the Defendants. (*Id.*) On June 28, 2017 Defendants filed their Answer and Counterclaim filed. (Doc. 17). The parties have been actively litigating this matter since the filing of the initial complaint in May of 2017.[1] An initial trial date was set for December 18, 2018. (Doc. 29). On December 1, 2017, the Plaintiff sought leave of this court to amend its complaint. (Doc. 34). Leave was granted and Plaintiff filed its First Amended Complaint on January 4, 2018. (Doc.46). In its Amended Complaint, Plaintiff asserted it was damaged by additional alleged infringing activity of the Defendants. (*Id*.). Plaintiff again alleged damages as a result of Defendant's actions. (*Id*.). The parties participated in mediation on September 5, 2018. The mediation was unsuccessful.

On May 24, 2018, Grange accepted the defense of Defendants in this matter under a reservation of rights. (*Exhibit B*). At the time Grange accepted the defense, the case had been in active litigation for over a year. On August 2, 2018, Grange sent an updated Reservation of Rights letter to Landmark and Mr. Wisniewski which reserved its right to have coverage judicially determined. (*Exhibit C*). To date, Grange has provided and continues to actively provide a defense to Landmark and Mr. Wisniewski under a reservation of rights.

On October 28, 2018 over five (5) months after accepting the tender of defense, Grange attempted to file a separate intervening complaint in this matter without benefit of a Motion to Intervene. (*See* Doc. 77). Grange's Motion to Intervene was filed over a year after the litigation began and over five (5) months after Grange became active in the case. At all times relevant hereto Grange has been aware of its potential interest in the matter and has admitted that its interest is "contingent." (*See Id.* at pg. 5). Grange seeks to have this court adjudicate its contract of insurance to declare whether or not there is coverage for Landmark and Mr. Wisniewski for

[1] *See* Chronology of the Case (*Exhibit A*).

this matter. (*Id.* at pg. 2). Grange further asserts that it has, "an interest relating to the subject of the action, in that it is being requested to provide a defense, and ultimately, coverage, on behalf of Landmark and Mr. Wisniewski and/or to indemnify Landmark and Mr. Wisniewski for any damages that may be awarded." (*Id*. at pg. 5). Grange further admits that its "…interest is contingent upon an adverse ruling…" (*Id*.) Granger further, "denies that it owes coverage to Landmark or Mr. Wisniewski for the claims in the complaint under the policies of insurance that it issued." (*Id*. at pg. 3)

LAW & ARGUMENT

I. The Legal Standard for Intervention

Third parties that wish to intervene in a federal case must meet the requirements as set forth in Federal Rule of Civil Procedure 24 (a) and (b). The rule states in pertinent part:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
> (b) Permissive Intervention.
> (1) In general. On timely motion, the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24. Intervention balances two competing interests, judicial economy resulting from the disposition of related issues in a single lawsuit and focused litigation resulting from the need to govern the complexity of a single lawsuit. *Jansen v. City of Cincinnati*, 904 F.2d 336, 339–40 (6th Cir. 1990). As a general rule, a person cannot be deprived of his or her legal rights in a proceeding to which such person is neither a party nor summoned to appear in the legal

proceeding. *Id*. Applicants for intervention as a matter of right must have a significant legal interest in the subject matter of the litigation. *Id.* at 341.

A. Intervention As of Right

The Sixth Circuit has interpreted Rule 24(a) as establishing four elements which must be satisfied before intervention as of right will be granted: "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Infrasource Const. Serv., LLC v. E&M Piping, LLC,* No. 1:12CV0261, 2012 WL 13026852, at *3 (N.D. Ohio Sept. 27, 2012);*Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000); *See also Michigan State AFL–CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir.1997); S*ee Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir.1999). The proposed intervenor must prove each of the four-parts. Failure to prove each of the four-parts will require that the motion be denied. *See United States v. Michigan,* 424 F.3d 438, at 444, (6th Cir. 2005). Grange has failed to prove each of the four-parts, as hereinafter explained, so its motion to intervene pursuant to Fed. R. Civ. P. 24(a) must be denied as a matter of law.

i. Grange's motion to intervene pursuant to Fed. R. Civ. P. 24(a) fails because it is untimely

The first requirement, a timely application, is a threshold requirement. *Infrasource Const. Serv., LLC,*2012 WL 13026852, at *3. Timeliness is evaluated in the context of all relevant circumstances. *Frank Betz Assoc., Inc. v. J.O. Clark Constr., LLC*, No. 3:08CV00159, 2010 WL 2375871, at *1 (M.D. Tenn. 2010) (citing *Stupak-Thrall*, 226 F.3d 467, 472-473). The Sixth Circuit has identified five factors as particularly relevant on timeliness: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of

time preceding the application during which the proposed intervenors knew or reasonably should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Infrasource Const. Serv., LLC*, 2012 WL 13026852, at *3.

Courts have found that where little time has elapsed since the suit was filed, and little discovery has taken place, there is little prejudice to the existing parties on the basis of timeliness. *Id*. at *4. The reverse must also be true. Where substantial time has passed and substantial discovery has taken place there is a prejudice that ensues to the existing parties on the basis of timeliness.

In this case, more than ample time has passed since the underlying complaint was filed, and extensive and complicated discovery has occurred. The parties have also engaged in mediation and written discovery. Party depositions are complete. Dispositive motions have also been filed. (Doc.69, 71). Critical steps along the continuum of this case and benchmarks have been met. The intervention of Grange at this point would prejudice the Defendants based upon the stage and progression of the case. A substantial amount of time, discovery and case progression has occurred. Therefore, this Court should as a threshold matter, deny Grange's motion to intervene as untimely.

ii. Grange does not have an as of right intervention under Fed. R. Civ. P. 24(a) because it does not have a substantial interest in the underlying case

To obtain an invention as of right, pursuant to Fed. R. Civ. P. 24(a), an intervenor must have a substantial legal interest in the case. *Stupak-Thrall*, 226 F.3d at 471. The applicant's "interest" in the action must be "sufficiently direct and immediate to justify his entry as a matter

of right." *Siding & Insulation Co. v. Beachwood Hair Clinic, Inc*., No. 1:11-CV-01074, 2012 WL 645996, at *1 (N.D. Ohio Feb. 28, 2012).

The Sixth Circuit "has opted for a rather expansive notion of the interest sufficient to invoke intervention of right." *Infrasource Const. Serv., LLC*, 2012 WL 13026852, at *4; *See also Michigan State AFL-CIO*, 103 F.3d 1240, 1245. Nevertheless, "this does not mean that any articulated interest will do." *Id*. The analysis addressing the existence of a substantial legal interest "is necessarily fact-specific." *Id.*

While Tennessee law does not govern the standards of federal intervention, it is helpful to look at the interests at stake in the context of an insurer's duty to defend its insured. An insurance company's duty to defend its insured is largely determined by the allegations in the complaint filed against the insured. *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d 433, 436 (6th Cir. 2005) (internal citations omitted). If the allegations in the complaint are within the risk insured against and there is a potential basis for recovery, the insurance company is obligated to defend its policyholder. *Id.* In *Great Lake Reinsurance (UK) PLC v. MP & T Hotels, LLC,* the court articulated that an insurer may not properly refuse to defend an action against its insured unless it is plain from the face of the complaint that the allegations fail to state facts that bring the case within or potentially within the policy's coverage. *Great Lakes Reinsurance (UK) PLC v. MP & T Hotels, LLC*, No. 3:14-CV-2018, 2015 WL 541705, at *4 (M.D. Tenn. Feb. 10, 2015).

Grange is currently providing a defense under a reservation of rights for both Landmark and Mr. Wisniewski. However, it seeks to intervene in the underlying case in order for this court to declare that there is no coverage for either Defendant for this matter. (Doc. 77 at 2). Grange's interest is in no way related to the underlying copyright infringement suit. Grange itself asserts

that it has, "an interest relating to the subject of the action, in that it is being requested to provide a defense, and ultimately, coverage, on behalf of Landmark and Mr. Wisniewski and/or to indemnify Landmark and Mr. Wisniewski for any damages that may be awarded." (Doc. 77 at pg. 5) Grange goes on to admit that its, "…interest is contingent upon an adverse ruling…" (*Id*.)

There are several cases that are instructive for this court when an insurer has sought an intervention under a reservation of rights. *See, e.g., Infrasource Const. Serv., LLC*, 2012 WL 13026852, at *5; *Nieto v. Kapoor, 61* F.Supp.2d 1177, 1192 (D. N.M. 1999), aff'd, 268 F.3d 1208 (10th Cir. 2001); *ADT Servs. AG v. Brady,* No. 10-2107, 2014 WL 4415955, at *2 (W.D. Tenn. Sept. 8, 2014).

In *Nieto Kapoor,* the court affirmed the denial of intervention, holding that the insurers' interest in minimizing its insured's liability was contingent, precisely because the insurers contested coverage. *Nieto Kapoor,* 61 F.Supp.2d 1177. In addition, the court cited the "well-established policy that an insurer who reserves the right to deny coverage cannot control the defense of the lawsuit brought against its insured by an insured party." *Id.* at 1193. To permit intervention where coverage is in dispute would allow an insurer to "interfere with and in effect control the defense. *Id.* Such intervention would unfairly restrict the insured, which faces the very real risk of an uninsured liability, and grant the insurer a 'double bite' at escaping liability." *Id. Quoting United Serv. Automobile Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246, 251 (1987). The court went on to hold that an insurer cannot intervene in order to establish that the policy in effect does not provide coverage. *Id*. at 1193. The insurer's interest in adjudicating coverage, like its interest in minimizing its insured's liability, has no bearing on the underlying action. *Id.*

In *Travelers Indemnity Co. v. Dingwell,* 884 F.2d 629,637 (1st Cir.1989), the insurers sought invention under Federal Rule of Civil Procedure 24 (a) and (b). The court affirmed the

denial of intervention, holding that the insurers' interest in minimizing its insured's liability was contingent, precisely because the insurers contested coverage. *Id*. at 638–39. The Court went on to say that when the insurer offers to defend the insured but reserves the right to deny coverage, the insurer's interest in the liability phase of the proceeding is contingent on the resolution of the coverage issue. *Id.* at 638. *See Restor–A–Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.,* 725 F.2d 871, 874 (2d Cir.1984).

In *Restor–A–Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, a regularly cited case regarding the intervention of insurers, involved a contract and breach of warranty action where the defendant's insurer sought to intervene in the trial. *Id.* at 873. The appellate court, in reviewing the lower court's decision to deny intervention, reasoned that the insurer did not have an interest in the underlying contract dispute. *Id* at 875. The court held that the interest the insurer asserted depended upon two contingencies: a finding of liability in the contract action, and a finding that the insurer was not liable for indemnification. *Id.* The Court went on to explain that absent a subrogation interest the insurer's interest in the outcome of the litigation was too contingent to be given effect in a motion to intervene. *Id.*

In *Ross v. Marshall*, the Fifth Circuit outlined its views on the requirement of a "direct" interest to intervene as of right when it held:

> "The interest required to intervene as of right is a "direct" interest. By definition, an interest is not direct when it is contingent on the outcome of a subsequent lawsuit. An insurer who defends its insured under a full reservation of rights provides a defense in the liability action, but reserves the right to contest coverage later. When an insurer defends under a full reservation of rights, their interest in the liability lawsuit is contingent upon the outcome of the coverage lawsuit. That interest, without more, is insufficient for intervention."

Ross v. Marshall, 456 F.3d 442, 443 (5th Cir. 2006), cert. denied, 549 U.S. 1166 (2007) (citations omitted) *See also Infrasource Const. Serv., LLC*, 2012 WL 13026852, at *5.

The court has further pointed out that in cases where the insurer is defending a suit on behalf of its insured (with a reservation of rights), but wants to intervene as a party based on a limited scope, intervention has been denied. Davila v. Arlasky, 141 F.R.D. 68, 70-71 (N.D. Ill. 1991). This case is no different.

In *Infrasource Const. Serv., LLC v. E&M Piping, LLC*, this court further analyzed the case law in many of the other circuits regarding an insurers' intervention as of right in a case where the insurer seeks to intervene to determine coverage. *Infrasource Const. Serv., LLC* 2012 WL 13026852, at *9. The court reasoned that the First and Second Circuits have "refused to allow intervention when an insurer seeks to minimize its insured's liability or to adjudicate a coverage issue." *Id.* The court went on to say that, "This court shares the concern raised by the *Nieto* court, that an insurer who reserves the right to deny coverage cannot interfere with or influence the defense of the lawsuit brought against its insured. *Nieto,* 61 F.Supp.2d at 1193 (quoting *Travelers*, 884 F.2d at 639)." *Id.* Such an intervention runs the risk that the insurer would interfere with the defense to the possible detriment of the insured. *Id*

Grange has failed to state a substantial interest which would grant it as of right intervention as set forth in Federal Rule of Civil procedure 24 (a). Its interest, by its own admission, is contingent upon the outcome of the underlying case. Further Grange's sole reason for intervention is to determine whether or not it has a duty to defend or indemnify Landmark and Mr. Wisniewski, which it has already agreed to do under a reservation of rights. The case law from this circuit and the other circuits establish that Grange's interference in this lawsuit is not a substantial interest which would permit intervention, therefore, its motion must be denied. To allow Grange to intervene in this underlying case to protect its contingent interest would allow it to interfere and control the defense of the copyright infringement case and align itself

with the Plaintiff in this case against the Defendants. *See Travelers Indem. Co.* 884 F.2d 629, 639. Such intervention would unfairly restrict these Defendants, who faces the very real risk of an uninsured liability, and grant the insurer a "double bite at escaping liability." *Id*. Instead, this court should reflect the well-established policy that an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit brought against its insured by an injured party. *Id.* Grange's interest in adjudicating coverage, like its interest in minimizing its insured's liability, has no bearing on this underlying action and would unfairly restrict the insured.

Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied." *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir.1989). Therefore, based upon Grange's failure to establish a substantial interest in the underlying litigation, its motion to intervene as of right should be denied.

iii. Grange Has Failed to Show That Its Interest Would Be Impaired

To satisfy this element of the intervention test, a would-be intervenor must show that impairment of its substantial legal interest is possible if intervention is denied. *Michigan State AFL-CIO*, 103 F.3d 1240, 1247. Grange has failed to prove, and legally cannot prove, that its interests will be impaired without intervention. Grange argues that, "if the matter proceeds and Frank Betz obtains a judgment against Landmark and Wisniewski, Landmark and Wisniewski will demand that Grange pay any judgment…potentially subjecting Grange to a complaint." (Doc. 77 at 5). Grange goes on to assert that neither Defendant has an interest in delineating the insurance coverage. (See Doc. 77 at 5). This is a contingent interest and would only come to fruition should Grange be unsuccessful in its defense and a judgment rendered against its clients. Grange cites no authority to support that its interest would be impaired other than to state that its burden is minimal.

However, as previously stated, Grange has failed to establish that it has a substantial interest in this litigation to begin with. This court, and the precedent established by other courts discussed above, has regularly denied the intervention of insurers that are providing a defense under a reservation of rights to their insureds. *Davila* 141 F.R.D. 68, 70-71. Grange itself refers to its interest as contingent and not substantial. Therefore without a substantial legal interest in the case, Grange cannot assert that it would be impaired as required by the rule. Grange has failed to show that it has a substantial interest which would be impaired if intervention is denied. Further, nothing prevents Grange from filing a separate action in state court to determine its coverage obligations to the Defendants.

Based on Grange's failure to show that its' interest is substantial and impaired, its request to intervene as of right should be denied.

Grange has failed to establish that its motion is timely; that a substantial legal interest is involved; and that its interests will be impaired without intervention. It is not without a remedy to determine its coverage obligations under the insurance contract. Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied." *Grubbs* 870 F.2d 343, 345. Grange has failed to meet several factors. Therefore, Grange's motion to intervene as a matter of right, pursuant to Fed. R. Civ. P. 24(a), must be denied as a matter of law.

B. Permissive Intervention

i. Intervention Pursuant to Federal Rule of Civil Procedure 24(b) Would Unduly Prejudice Landmark and Mr. Wisniewski

Pursuant to Fed. R. Civ. P. 24(b)(1)(B) a court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B). However, when considering a motion to intervene, a court must consider

whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *See* Fed. R. Civ. P. 24(b)(3).

Grange's motion for permission to intervene must be denied because of the prejudice that it would cause to Landmark and Mr. Wisniewski should it be granted. In seeking this intervention, Grange interests are blatantly hostile, antagonistic and in direct opposition to that of the Defendants which it agreed to defend. Grange is providing a defense to these Defendants with a reservation of rights. Trial courts have consistently denied the attempts of insurers to permissively intervene in the underlying actions against their insureds, because such interventions create conflicts of interests for the attorneys retained by the insurer to defend the insureds. *See Travelers Indem. Co. v. Dingwell,* 884 F2d 629 (1st Cir. 1989) and *Frank Betz Associates, Inc. v. J.O. Clark Construction,* L.L.C., 3:08-CV-00159, 2010 WL 2375871 (M.D. Tenn. 2010).

The case at bar is factually similar to the case of *Frank Betz Assocs., Inc. v. J.O. Clark Const., L.L.C.* In that case, Plaintiff Frank Betz sued J.O. Clark Construction, LLC and Clark & Howell Building Group, LLC for copyright infringement. *Id.* at *1 The insurance company, Association Company Insurance (AIC), which was providing a defense to J.O. Clark and the Building Group, filed a Motion to intervene in the underlying lawsuit pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. *Id*. Like Grange, AIC, provided a defense to the J.O. Clark and the Building Group under a reservation of rights. *Id*. The Court weighed several factors when it determined that AIC's motion for intervention should be denied. *Id*. at *3. The Court reasoned that because AIC was providing a defense, under a reservation of rights to the Defendants, a conflict of interest would be created for the lawyers if the insurer, AIC, would intervene. *Id*. The Court then referenced the *Nieto* case, wherein the court reasoned that

permitting the defendant's insurer to intervene would impose on the defendant "[n]ot only ... the burden of presenting a defense to Plaintiffs' accusations, but [also] the additional burden of having his insurer interfere with his defense." *Id*. The court then went onto explain that AIC's failure to provide a copy of the insurance policy or to identify precise common questions of law or fact involved in the underlying case and intervening case meant that there was no "great need" to intervene. *Id*.

The same is true in this instant case. Grange, like AIC, is currently providing a defense to both Landmark and Mr. Wisniewski under a reservation of rights. The cases set forth above explain in depth how permitting an insurer who is currently defending on behalf of its insured would prejudice the Defendant. *See e.g.* (*Nieto 61* F.Supp.2d 1177, 1192; *Infrasource Const. Serv., LLC*, 2012 WL 13026852, at *5; *Restor–A–Dent Dental Labs., Inc.* 725 F.2d 871, 874; *Travelers Indemnity Co.* 884 F.2d 629,637; *Ross v. Marshall,* 456 F.3d 442, 443). Allowing Grange to intervene while providing a defense under its reservation of rights would create a conflict of interest for the lawyers representing the Defendants as it did in the Frank Betz case. *Id.* at *3. Further, if this court were to permit Grange to intervene while its providing a defense, it would allow Grange to control the defense of the lawsuit brought against its insured by the insurer which is contrary to well-established policy. *Travelers Indemnity Co.* 884 F.2d 629,639. Like AIC, Grange has not provided a copy of its policy or asserted precisely in any pleading the common questions of law or fact involved in its action to declare that it has no liability under the policy and the underlying copyright infringement case brought by the Plaintiff. Should this Court grant the motion to intervene, Grange's counsel would have to present a defense with respect to the plaintiffs' claims, and also deal with having its insurer interfere with its defense, which is wholly contrary to public policy and the interests of the client. This conflict of interest

can be avoided by denying intervention. However, if granted this court would condone the creation of a conflict between the attorney retained by Grange to defend these Defendants and the attorney Grange retained to file a cross-claim as an intervening defendant seeking a declaratory judgment in its favor against these Defendants. That conflict of interest will prejudice the adjudication of the plaintiff's claims and the defense of the Defendants in violation of Fed. R. Civ. P. 24(b)(3). The permissive intervention of Grange would greatly prejudice the Defendants in this case creating a conflict of interest and would be contrary to the policy adopted by this Court. Based on the foregoing, like AIC, Grange's motion for permissive intervention should also be denied.

Conclusion

Grange has failed to establish that it has a right to intervene in this case. It has failed to demonstrate to this Court how its contingent interest in a determination of its coverage responsibilities to Landmark and Mr. Wisniewski is a substantial interest in the underlying copyright infringement litigation as required by Fed. R. Civ. P. 24(a). Further, Grange has failed to show that its claimed contingent interest is substantial thereby causing it to have an impaired right in this case. Given the time that Grange has been involved defending Landmark and Mr. Wisniewski in this matter, and the substantial advancement of the litigation, Grange has failed to show that its motion is timely. Grange has also failed to allege with any precision any common facts or elements that it shares with the allegations in the underlying case that would support intervention as of right. Allowing Grange to intervene in a wholly unrelated case to which it is providing a defense is against public policy, creates a conflict of interest and is prejudicial to the Defendants that it has agreed to defend. Grange's motion to intervene as a matter of right, pursuant to Fed. R. Civ. P. 24(a), must be denied as a matter of law. Grange's motion to

intervene pursuant to Fed. R. Civ. P. 24(b), must also be denied, as the prejudicial effect to the Defendants in this case cannot be cured. Grange has other methods with which it can seek a determination of coverage in a jurisdiction which governs the insurance contract between the parties.

Therefore, Landmark and Mr. Wisniewski respectfully request that Grange's motion to intervene be denied.

DATED this the 29th day of November, 2018.

Respectfully submitted,

_____

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