The Governor's Commission for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Michael A. Nolan

Office Address: (including county) 601 Summit Hill Dr.
Knoxville, Knox County, Tennessee 37902

Office Phone: 865 382 6260 Facsimile: Not applicable

Email Address:

Home Address: (including county)

INTRODUCTION

The State of Tennessee Executive Order No. 34 hereby charges the Governor's Commission 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 Commission's responsibility in answering the questions in this application questionnaire. 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 Commission 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 word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and eight (8) copies of the form and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am currently self employed as an attorney in the general practice of law.

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 Tennessee in 1981. My Board of Professional Responsibility number is: 009238.

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 am licensed to practice law in the State of Tennessee. My Board of Professional Responsibility number is 009238. I was licensed in 1981 and my license is currently active.

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).

I have not been denied admission or placed on inactive status by the Bar of any state.

5. State the name, dates and addresses for all firms, governmental agencies, or private business organizations by which you have been employed since receipt of your juris doctorate. Also include a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service).

From April, 2013 to present, I have engaged in the private practice of law as Michael A. Nolan, Attorney at Law. My street address is 1856 Cherokee Bluff Dr. Knoxville, TN 37902. From November, 2011, to March, 2013, I worked for the Tennessee Department of Labor and Workforce Development. That Department is located at 220 French Landing Dr. Nashville, TN 37243. From November, 2009, to September, 2011, I was engaged in the private practice of law as Michael A. Nolan, Attorney at Law (address as stated earlier). From December, 2007, to November, 2009, I was employed by the law firm of Stone and Hinds at 507 S. Gay Street Suite 700, Knoxville, TN 37902. From December, 2006, to November, 2007, I was employed at the Tennessee Department of Commerce and Insurance at 500 James Robertson Pkwy, Suite 660, Nashville, TN 37249. From January, 2006, to November, 2006, I engag in the private practice of law as Michael A. Nolan, Attorney at Law. From December, 2004, to December, 2005, I was employed by Bechtel Jacobs Company at Hwy 58, Oak Ridge, TN. From November, 1997, to December, 2004, I was employed by the Tennessee Department of Children's Services at 2600 Western

Avenue. Knoxville, TN 37921. From June, 1981, to October, 1997 I engaged in the private practic of law as Michael A. Nolan, Attorney at Law.

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 general nature of your current practice including any areas of board certification that you possess. Provide the percentage that each major area of law in which you practice constitutes of your total practice. If your current practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice.

I am currently engaged in private practice. I am not board certified in any area of law. My current practice includes domestic law 40%; criminal law 10%; business and commercial law 10%; worker's compensation 10%; employment law 10%; tort and personal injury law 40%; and intellectual property law 10%. In prior practices I have had greater worker's compensation responsibilities as at Bechtel Jacobs and other times of private practice. My practice has centered around litigation. I have consistently prepared necessary pleadings and researched areas of the law as necessary to resolve my clients' cases. I have litigated in all courts and several administrative bodies in the State of Tennessee.

8. If you are now an officer, director or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately should you be appointed to the position of Workers' Compensation Judge.

Not applicable.

9. What percentage of your appearances in courts in the last five years was in the following courts?

Federal Court 20% State Circuit/Chancery Court 20% Probate Court ___0_

Appellate Court _0__ State County Board __0__ Administrative Bodies __10%_

Criminal Court 25% Juvenile Court 25%

10. 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 Commission 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 Commission. Please provide detailed information that will allow the Commission 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.

During the periods of private practice I appeared in all state courts. I represented individuals in Circuit, Chancery, General Sessions and Juvenile Courts. I represented individuals in criminal courts in misdemeanor and felony matters in judge trials and jury trials. In civil matters I represented both individuals and businesses. I represented businesses in commercial matters and transactions. I represented individuals in personal injury cases and domestic matters including child support and custody. I also represented individuals before the Social Security Administration and in Workers' Comp cases regarding receipt of benefits. I occasionally appealed cases in both criminal matters and civil matters. I won several appeals in civil matters but I lost an appeal of a murder conviction which went to the Court of Appeals and the Tennessee Supreme Court. I personally prepared necessary pleadings and researched areas of the law as necessary to resolve my clients' cases.

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

While working for Bechtel Jacobs I also appeared before U.S. Department of Energy hearings.

12. 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.

From November 2011 to March 2013 I acted as a hearing officer for the Department of Labor and Workforce Development in unemployment appeals. The Department had developed a backlog of appeals of initial decisions and hired temporary hearing officers to help reduce the backlog. I was one of those temporary officers. I conducted hearings with parties for claimants and employers who presented evidence pursuant to UAPA rules. Sometimes attorneys appeared for the parties. I issued decisions which could be appealed to the Department's representative if one of the parties was unhappy. All hearings

were conducted in Knoxville, TN. I am thoroughly familiar with administrative procedures as a result of these hearings. Decisions for all cases were issued within 24 hours of the administrative hearing. I received high rankings in evaluations of my hearings and work product.

13. Please describe in detail your legal experience in the area of Tennessee workers' compensation law and your legal knowledge of the practice of Tennessee workers' compensation law.

During my periods of private practice I always included workers' compensation as one of the areas of law I practiced. That includes over 16 years of representing individual claimants or employers. While working at Bechtel Jacobs I was responsible for all litigation including workers comp. We settled or tried over a hundred cases in a year. If I was not involved personally in the cases I supervised outside counsel. I had to approve all decisions to either settle or proceed to hearing.

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

Not applicable.

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

Not applicable.

16. List all prior occasions on which you have submitted an application for judgeship to the Governor's Commission for Judicial Appointments or any predecessor 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

17. 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.

University of Tennessee College of Law from 1977 to 1980: Doctor of Jurisprudence

University of Tennessee College from 1970 to 1974: BA with a major in history and a minor in zoology. Graduated Cum Laude.

PERSONAL INFORMATION

18. State your age and date of birth.

I am 62 years old. I was born on January 3, 1952.

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

I have lived continuously in the State of Tennessee for 62 years.

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

I have lived continuously in Knox County for 6 years.

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

I am registered to vote in Knox County, Tennessee.

22. 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.

I have never served in the U.S. military.

23. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

Not applicable.

24. 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.

To my knowledge I am not under any investigations for violation of any statute or disciplinary rule.

25. Please state and provide relevant details regarding any formal complaints 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.

One chiropractor's office recently complained to the Board of Professional responsibility that I did not act professionally because I did not respond to inquiries about an individual's case. I responded to the contact from the Board of Professional Responsibility that the individual had not chosen to file a lawsuit and had not contacted me further. I have not heard anything further from the Board regarding this matter.

26. 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.

Not applicable.

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

Not applicable.

28. 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.

I was named as a party by a company in a lawsuit filed with Chancery Court in Knoxville, TN, which appealed the ruling of the Department of Labor and Workforce Development in a claim for unemployment benefits. I was the claimant in that matter.

29. 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.

None

30. If you have prior relationships or experience with any industry, group, association, business or other entity that you believe would limit your ability to preside over workers' compensation cases due to a conflict of interest, please list all such organizations and types of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as workers' compensation judge if any of these groups were a party. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

I do not know of any of my prior clients who would be the occasion of a conflict of interest unless it was someone I knew personally. I did not recuse myself from any cases while I was working as a hearing officer.

31. 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

32. 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.

I have been a member of the Knoxville Bar Association and the Tennessee Bar Association. I have not been a member of any committee nor an officer of either Bar association.

33. 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.

Not applicable.

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

None.

35. 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.

Not applicable.

36. 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.

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

Not applicable.

38. Attach to this questionnaire 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.

Two documents are attached: Response to Motion for Summary Judgment and Memo Regarding Trademark and Trade Dress. The Response to Motion for Summary Judgment was 100% my creation while 50% of the Memo Regarding Trademark and Trade Dress is my creation.

ESSAYS/PERSONAL STATEMENTS

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

I discovered during my time as a hearing officer with the Department of Labor that I enjoyed conducting hearings and insuring that each side received an opportunity to fully present their

case. I have been actively involved in administrative hearings throughout my career and enjoy the easier flow of cases and information. I also discovered that I have the temperament to act as an objective decision maker without upsetting the parties unnecessarily.

40. 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 have not received any awards for being involved in providing equal justice under the law. I have frequently provided services to clients who were unable to pay especially in "order of protection" cases and juvenile court proceedings.

41. 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 seeking a workers' compensation appeals judge position. I understand that there is a need for such judges as the legislature has created a new system for determining such cases. I do not have any information as to how many judges will be hired, or how many cases will be heard, but I believe I can bring efficiency and objectivity to the job and provide an east Tennessee presence on a system that will probably need judges from each of the three grand divisions of the State of Tennessee. As a hearing officer I conducted as many as six cases a day and issued the final decision within 24 hours.

42. 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)***

I am not currently involved in community services except to provide the bodies that are needed to assist in providing housing or distribute food to the needy. I would intend to be involved in similar activity as a judge. I do not mind doing the work but I do not believe that I could provide the time necessary to organize or supervise such activity.

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

I have been told by others that I am a good listener and that I have a calming effect on others. I enjoy people in general and enjoy hearing their stories. I often try to "fix" the problems of people that I know. I have been involved in workers' compensation cases from the position of the individual claimant and from the position of the employer. I believe that unique perspective would be a great benefit for a person in this position.

44. 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)***

I will uphold the law or rule even if I disagree with the substance of the law. I have faced that issue several times as a hearing officer and I have always ruled by the letter of the law without regard to the impact on the individuals case. A specific example would be the Uniform Administrative Procedure Act allows each party to submit evidence through affidavit. However, the rules require that the affidavit or document be provided to the opposing party and the hearing officer prior to the hearing. I had to rule on many occasions that the party wishing to introduce an affidavit or document as evidence could not do so because they had failed to provide copies to the hearing officer or the opposing party prior to the hearing.

REFERENCES

45. 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 Commission or someone on its behalf may contact these persons regarding your application.

A,	David A. Burkhalter, Attorney
B,	Craig Williamson, businessman
C.	Michael Mynatt, Banker
D.	Fred Bell, Attorney Tennessee Department of Labor,
E.	Deno Cole, Attorney

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] _Workers' Compensation Court_ of Tennessee, and if appointed by the Governor, 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 questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 3, 2014.

Michael A Nolan

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COMMISSION 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 Commission for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Commission for Judicial Appointments and to the Office of the Governor.

Michael A. Nolan

Type or Print Name

Michael A Nolan

Signature

June 3, 2014

Date

009238

BPR #

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

None

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

MICHAEL SCOTT WARD,
WEDO FUNDRAISING, INC.,
d/b/a FEREDONNA COMMUNICATIONS, &
PRINTVENTURE, INC.,
d/b/a FEREDONNA COMMUNICATIONS,

Plaintiffs,

v.

Docket No.: 3:11-CV-00438
(Varlan/Shirley)

KNOX COUNTY BOARD OF EDUCATION,
KNOX COUNTY, &
SCOTT BACON,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' TRADEMARK AND TRADE DRESS CLAIMS

Plaintiffs, by and through undersigned counsel, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, submit this Memorandum in Support of Motion for Summary Judgment on Plaintiffs' Trademark and Trade Dress Claims. Plaintiffs submit that based on the record, as well as the evidence and argument contained herein, there is no material dispute of fact respecting Plaintiffs' claims and that Plaintiffs are entitled to judgment as a matter of law. In the event that this Court is not disposed to grant Plaintiffs' Motion for Summary Judgment in totality, Plaintiffs request as alternate relief that the Court grant Plaintiffs summary judgment on certain elements of Plaintiffs' claims, as discussed herein.

UNDISPUTED MATERIAL FACTS

The coupon book campaign, which features a book containing coupons to multiple East Tennessee merchants, is Knox County Schools' district-wide fundraising vehicle. (See Mary Kerr

Deposition Transcript ("Kerr Tr."), at 8.)[1] Typically in September, Knox County Schools launches an annual district-wide campaign to sell as many coupon books as possible. (Kerr Tr., at 74.) The coupon book is sold for $10. (Kerr Tr., at 72-73.) Scott Bacon and Mary Kerr were the Knox County Schools employees responsible for managing the coupon book campaigns. (See Scott Bacon Deposition Transcript ("Bacon Tr."), at 5-6.)[2] Knox County Schools' official sales campaign lasts for approximately 2-3 weeks. (Kerr Tr., at 74.)

Plaintiffs used the trade name "School Coupons" on coupon book fundraising products at least as early as 1994. (Doc. 110, at ¶21.) Plaintiffs notified in writing Knox County Schools and Jefferson County, Alabama, the two markets in which it produced and published coupon book programs at that time, that it was registering the "School Coupons" trade name. (Doc. 110, at ¶23.) Plaintiffs applied for registration of the School Coupons® mark on September 29, 1997. (Ex. 3, Expert Witness Report of Dr. Mario S. Golab, at 6.) Plaintiff was granted registration on May 11, 1999, in the Supplemental Register (Registration #2,245,216; Serial #75365161). (Ex. 3, at 6; Doc. 110, at ¶22.) Neither Knox County nor Jefferson County, Alabama contested the registration of School Coupons®. (Doc. 110, at ¶¶24; Bacon Tr., at 89-90.)

Knox County Schools' coupon book campaigns follow a calendar cycle, with Knox County Schools' primary selling campaign running for 2-3 weeks in September. (Kerr Tr., at 74.) In order to prepare the next fall campaign's book, Defendants' recruit merchants in the spring, typically in the February through April timeframe. (Kerr Tr., at 8-9.) On or about February of 2010, Defendants sent out merchant application packets to merchants that participated in the 2009 School Coupons® coupon book. Defendants included a cover letter, dated February 5, 2010, signed by Scott Bacon and Mary Kerr, which purported to "re-brand" the School Coupons® coupon book campaign.

[1] A copy of Mary Kerr's Deposition Transcript is attached hereto as Exhibit 1.
[2] A copy of Scott Bacon's Deposition Transcript is attached hereto as Exhibit 2.

(Doc. 1-1, Ex. 4.) Included in the merchant recruitment packet is a document titled "2010 Merchant Participation Application." (Kerr Tr., at 8-9, 35-42; Ex. 4, 2010 Merchant Participation Application.) For merchants who participated in the 2009 School Coupons® coupon book (such as First Tennessee Bank as depicted in Exhibit 4, merchants were presented with a copy of their 2009 coupon from the School Coupons® coupon book and had the ability to check a box if they wished to "Repeat Current Offer." (Id.)

Included in Defendants' files, however, was an unsigned letter, addressed to the merchant community and dated February 6, 2010, contemporaneous with Defendants' solicitation of merchants to participate in the 2010 coupon book program. (See Ex. 5, Unsigned February 6, 2010 Letter.) In the unsigned letter, Defendants acknowledge, "Unfortunately, the school district does not own the School Coupons name. The company that has contracted to print and design the coupon book for Knox County Schools since 1995, PrintVentures DBA as Feredonna Communications, holds the trademark for the name School Coupons." (Ex. 5.)

Defendants became aware of confusion in the marketplace respecting the now-competing coupon books. (Kerr Tr., at 61-65; Oaks Deposition Transcript ("Oaks Tr.") at [Forthcoming].)[3] As an example, Farragut Putt-Putt, a long-standing prior participant in School Coupons®, received competing merchant applications requesting their participation in the 2010 editions of School Coupons® and Defendants' book. (Bacon Tr., at 78-80, 108-11.) The application Defendants sent to Farragut Putt-Putt was identical in format to Exhibit 4, discussed above, which showed the picture of their prior coupon in Plaintiffs' School Coupons® and included the option for the merchant to "Repeat Current Offer." (See Ex. 4.) Confusion on the part of Farragut Putt-Putt's owner, prompted him to contact Defendants, who recruited him away from School Coupons® (See Ex. 6.) When Knox County Schools was about to launch its campaign in September 2010,

[3] Plaintiffs took Mr. Oaks' deposition on April 17, 2014. A transcript of Mr. Oaks' deposition is not yet available. Plaintiffs intend to supplement this brief with Mr. Oaks' deposition transcript when Plaintiffs receive it.

Defendants engaged in a massive marketing and advertising blitz, due at least in part to a knowledge that there was confusion in the marketplace concerning the now-competing coupon books. (See, e.g., Doc. 1-1, Exs. 10-12.)

In years following 2010, Defendants expanded their marketing efforts outside of the Knox County School System. At a hearing before this Court on Plaintiffs' motion for a preliminary injunction, Mr. Oaks acknowledged that Defendants had been approached about selling Defendants' coupon books by two schools outside of the Knox County Schools System. (Doc. 16 at 29.) Specifically, Knox County Schools had discussions with Grace Christian Academy about the coupon book program in 2010 and with Linden Elementary (in Oak Ridge, Tennessee) in early 2011. (See Bacon Tr., at 91-92, 102-03.) In 2012 and 2013, Knox County Schools directly solicited the Principals of all schools in the counties contiguous to Knox County. (Bacon Tr., at 92, 102-06.)

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure allows a party to seek summary judgment on a claim or defense. Summary judgment is appropriate when the moving party shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering whether summary judgment is to be granted, the Court is to construe the allegations, evidence, and all reasonable inferences related thereto in a light favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 907 (6th Cir. 2001). The moving party bears the burden of establishing that no genuine issues of material fact exist. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Leary v. Daeschner, 349 F.3d 888, 897 (6th Cir. 2003).

Although the Court views the evidence in a favorable light for the non-moving party, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348; 89 L.

Ed. 2d 538 (1986); Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 907 (6th Cir. 2001), "the non-movant is not entitled to a trial based merely on its allegations; it must submit significant probative evidence to support its claims." Hopkins v. Sellers, Case No. 1:09-cv-304, U.S. Dist. LEXIS 58980, *9-10 (E.D. Tenn. Jun. 2, 2011) (citing Celotex, 477 U.S. at 324). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

ARGUMENT

POINT I

DEFENDANTS HAVE INFRINGED, AND CONTINUE TO INFRINGE UPON PLAINTIFFS' TRADEMARK.

The Lanham Act, 15 U.S.C. §1051, et seq., provides the basis for trademark protection in the United States. Under the Lanham Act, "any person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which — (A) is likely to cause confusion, or to cause mistake, or to deceive ... shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act." 15 U.S.C. §1125(a). Plaintiffs are the owners of the School Coupons® trademark, upon which Defendants' infringed with their 2010, 2011, 2012, and 2013 coupon books.

As this Court previously stated, "a trademark is 'any word, name, symbol, or device ... used by a person ... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.'" Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 609 (6th Cir. 2009) (quoting 15 U.S.C. §1127). In order to prevail on a trademark infringement claim, a plaintiff must prove: "(1)

ownership of a valid, protectable trademark," The Ohio State University v. Thomas, 738 F. Supp. 2d 743, 749 (S.D. Ohio 2010) (citation omitted); "(2) the defendant used the mark in commerce without the plaintiff's consent; and (3) the use was likely to cause confusion," Nagler v. Garcia, 370 F. App'x 678, 680 (6th Cir. 2010) (citing Hensley, 579 F.3d at 609).

A. Valid, Protectable Trademark

Trademarks are entitled to protection if they are distinctive. Tumblebus, Inc. v. Cranmer, 399 F.3d 754, 760–61 & n.4 (6th Cir. 2005) (citations omitted). Marks described as "arbitrary," "fanciful," or "suggestive" are "inherently distinctive" and protectable, but "generic" marks are not. Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 502 F.3d 504, 512-13 (6th Cir. 2007) (citations omitted). "Descriptive marks" lie between these two spectrums and "enjoy the benefit of protection only if they develop a 'secondary meaning.'" Id. at 513 (citations omitted). A descriptive mark is one that describes "the intended purpose, function or use of the goods . . . the class of users of the goods; a desirable characteristic of the goods; or the end effect upon the user." DeGidio v. West Grp. Corp., 355 F.3d 506, 510 (6th Cir. 2004) (ellipsis in original and citation omitted). "A descriptive mark achieves secondary meaning when 'in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product.'" Leelanau Wine Cellars, 502 F.3d at 513 (citation omitted).

In determining whether a trademark has acquired secondary meaning, the Court looks to the following factors: (1) direct consumer testimony; (2) consumer surveys; (3) exclusivity, length, and manner of use; (4) amount and manner of advertising; (5) amount of sales and number of customers; (6) established place in the market; and (7) proof of intentional copying. Herman Miller, Inc. v. Palazetti Imps. & Exps., Inc., 270 F.3d 298, 311–12 (6th Cir. 2001). "No single factor is determinative and every one need not be proven." Id. at 312.

After using the School Coupons® mark for some time, Plaintiffs applied for registration of the School Coupons® mark on September 29, 1997. (See Ex. 3, at 6.) Plaintiff was granted registration on May 11, 1999, in the Supplemental Register (Registration #2,245,216; Serial #75365161). (Ex. 3, at 6; Doc. 110, at ¶22.) Plaintiffs have used the mark in commerce exclusively and consistently for approximately 20 years. The annual School Coupons® coupon book campaign regularly received media attention and advertising. School Coupons® has raised over $23 million for local schools, selling well over 2,300,000 coupon books in the process. With this sort of history and continued usage, there is a presumption that the School Coupons® mark has taken on secondary meaning. (Ex. 3, at 7.)

Perhaps most damaging to Defendants' position, however, is the fact that Defendants were cognizant of Plaintiffs' ownership of a valid trademark when this entire situation began. Through deposition testimony, it is clear that the primary author of communications with the merchant community related to the coupon book campaign is conducted through Scott Bacon's office. (See, e.g., Bacon Tr., at 88-89.). When it comes to drafting letters to the merchant community, Bacon is typically the principal drafter of the letter (see id.), and the letters are signed jointly by Bacon and Kerr. (See, e.g., Doc. 1-1, Ex. 4.) Included in Defendants' files, however, was an unsigned letter, addressed to the merchant community and dated February 6, 2010, contemporaneous with Defendants' solicitation of merchants to participate in the 2010 coupon book program. (See Ex. 5.) The February 6, 2010 draft letter leaves no doubt whatsoever as to Defendants' knowledge and belief that Plaintiffs held a valid mark. In the February 6, 2010 draft, Bacon writes,

> Unfortunately, the school district does not own the School Coupons name. The company that has contracted to print and design the coupon book for Knox County Schools since 1995, PrintVentures DBA as Feredonna Communications, holds the trademark for the name School Coupons.

(Ex. 5.)[4] In light of the February 6, 2010 draft, the true colors of Defendants argument on whether Plaintiffs held a valid, enforceable trademark shine through: Defendants knew when they were soliciting merchants in 2010 that Plaintiffs have a valid trademark, and Defendants only now argue the invalidity of Plaintiffs' mark as part of their litigation strategy to avoid liability.

Thus, Plaintiffs submit that there is no dispute of material facts as to the validity and enforceability of Plaintiffs' trademark, and Plaintiffs' are entitled to judgment as a matter of law on this ground.

B. Defendants Used Plaintiffs' Mark in Commerce Without Consent

Especially disconcerting to Plaintiffs is that Defendants actually used Plaintiffs' mark itself in commerce without Plaintiffs' consent. Indeed, there is no material dispute that Defendants employed Plaintiffs' mark to induce local merchants to participate in Defendants' 2010 coupon book.

Knox County Schools' coupon book campaigns follow a calendar cycle. Knox County Schools' primary campaign runs for 2-3 weeks in September. (Kerr Tr., at 74.) In order to prepare the next fall campaign's book, Defendants' recruit merchants in the spring. (Kerr Tr., at 8-9.) On or about February of 2010, Defendants sent out merchant application packets to merchants that participated in the 2009 School Coupons® coupon book. Defendants included a cover letter, dated February 5, 2010, signed by Scott Bacon and Mary Kerr. (Doc. 1-1, Ex. 4.) The February 5, 2010 letter purported to "re-brand" School Coupons®, suggesting that Defendants somehow owned the rights to the mark.

> The Knox County School System is re-branding the coupon book program for 2010. The product that has been known as the School Coupons Campaign will now be known as the Knox County Schools Coupon Book.

[4] Plaintiffs further note that, in addition to being aware of Plaintiffs' trademark registration, Defendants never took formal action to contest Plaintiffs registration. (Bacon Tr., at 89.)

(Doc. 1-1, Ex. 4.) Also included in the merchant recruitment packet is a document titled "2010 Merchant Participation Application." (Ex. 4.) For merchants who participated in the 2009 School Coupons® coupon book (such as First Tennessee Bank as depicted in Exhibit 4), merchants were presented with a copy of their 2009 coupon from the School Coupons® coupon book and had the ability to check a box if they wished to "Repeat Current Offer." (Id.) Defendants, in recruiting for their 2010 coupon book, were approaching merchants with an image of a School Coupons® merchant coupon!

C. Likelihood of Confusion

The third factor to be considered, likelihood of confusion, requires the Court to consider "whether the defendant's use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties." Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr., 109 F.3d 275, 280 (6th Cir. 1997)). Plaintiffs submit that a discussion of the likelihood of confusion, taking into account certain undisputed material facts, must result in a finding as a matter of law that confusion was likely, and that, indeed, actual confusion existed.

Judge Friendly established the initial and preeminent standard of review for determining the likelihood of confusion between trademarks in Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492 (2d Cir. 1961). The factors considered by Judge Friendly in Polaroid included (1) the strength of plaintiff's mark; (2) the degree of similarity between the parties' marks; (3) the similarity of the products; (4) the likelihood that the prior owner will bridge the gap; (5) actual confusion; (6) the reciprocal of defendant's good faith in adopting its own mark; (7) the quality of defendant's product; and (8) the sophistication of the buyers. After years of evolution, the Sixth Circuit has reiterated the Polaroid factors, stating that to determine whether a likelihood of confusion exists, the Court must consider:

> In determining whether a "likelihood of confusion" exists, [the Court] must consider eight factors: (1) strength of the plaintiff's mark; (2) relatedness of the goods or services; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) intent of the defendant in selecting the mark; and (8) likelihood of expansion of the product lines.

Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 648 (6th Cir. 1982)). These factors "imply no mathematical precision, and a plaintiff need not show that all, or even most, of the factors listed are present in any particular case to be successful." PACCAR Inc. v. TeleScan Techs., L.L.C., 319 F.3d 243, 249–50 (6th Cir. 2003)). The "ultimate question [is] whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way." Champions Golf Club, Inc. v. The Champions Golf Club, Inc., 78 F.3d 1111, 1116 (6th Cir. 1996) (citing Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100, 1107 (6th Cir. 1991)).

1. Strength of the Mark

"A mark is strong and distinctive when the public readily accepts it as the hallmark of a particular source; such acceptance can occur when the mark is unique, when it has received intensive advertisement, or both." AutoZone, Inc. v. Tandy Corp., 373 F.3d 786, 793 (6th Cir. 2004) (quoting Daddy's Junky Music Stores, 109 F.3d at 280). The stronger the mark, "the greater the likelihood of confusion." Id. (citation omitted). In the case of Plaintiffs' School Coupons® mark, Plaintiffs have used the mark in commerce for roughly 20 years, and the mark has been registered for roughly 15 years. (Ex. 3, at 6; Doc. 110, at ¶¶21-22.) Moreover, an analysis of Plaintiffs' product indicates that,

> Plaintiff's mark, has not been used in any inconsistent manner that may confuse a reader or that may revert to its previous descriptive meaning. Plaintiff has been careful to use the mark in a manner that reaches a level of secondary meaning for the words 'school' and 'coupons' as associated and used in the mark.

(Ex. 3, at 9.) Plaintiffs' continued presence over the course of two decades, raising substantial funds for local schools, further indicates that the School Coupons® brand is very strong. See id.

2. Relatedness of the Goods

According to Sixth Circuit authority, goods are related if they "are marketed and consumed such that buyers are likely to believe that the services, similarly marketed, come from the same source, or are somehow connected with or sponsored by a common company." Daddy's Junky Music Stores, 109 F.3d at 283 (citation omitted). In this case, the Court previously found that "the goods at issue are related as their 'marks' are similar (i.e., both use 'school' and 'coupons'), and the goods are apparently marketed and consumed in a similar manner such that buyers could believe that they come from the same source or are connected in some way." (Doc. 16 at 25 (citing AutoZone, 373 F.3d at 797).) Plaintiffs add that both products are fundraising coupon books, sold by schoolchildren, for the benefit of local school districts.

Although it is not germane to the question of relatedness of the goods, Defendants previously asserted that no free and open marketplace exists in the fundraising market in which they compete. As will be discussed below in the context of marketing channels used and likely expansion of the product lines, Defendants' conduct belies any such argument. (See *infra*, at 14, 16-17.) Defendants, while attempting to use its central office authority to quash Plaintiffs' efforts to create public-private partnerships with schools, is actively engaging in the stream of commerce across county lines by actively and directly soliciting the business of individual Principals, circumventing other county boards of education in the process. (See *id.*)

3. Similarity of the Marks

Similarity of marks is a "factor of considerable weight," and "courts should examine the pronunciation, appearance, and verbal translation of conflicting marks." Daddy's Junky Music Stores, 109 F.3d at 283 (citations omitted). "[C]ourts must determine whether a given mark would confuse the public when viewed alone, in order to account for the possibility that sufficiently similar

marks may confuse consumers who do not have both marks before them but who may have a general, vague, or even hazy, impression or recollection' of the other party's mark." Id. (citation omitted and internal quotation marks omitted).

Plaintiffs' expert witness, Dr. Golab, found that the purportedly distinguishing features of the marks, in actuality, contribute to a likelihood of confusion. In the process of determining that Defendants' mark infringed upon Plaintiffs' School Coupons® trademark, Dr. Golab noted,

> The similarities of the marks may not be readily evident to a person who has not experienced the distinctiveness that Plaintiff's School Coupons® have acquired. Indeed, a prima facie observation of the marks may look different and may lead the reader to conclude that Plaintiff's School Coupons® may be different from Defendant's descriptive Coupon Books, but it is not.
>
> Defendant uses a mark that incorporates its name, Knox County Schools, and a descriptive legend, Coupon Book, but also incorporates the legends: "The Original" and "Established in 1989", all imposed over an oval with sun reflections.
>
> While the individual components of Defendant's mark taken separately do not resemble Plaintiff's mark, Defendant's mark, taken in its totality, has a strong meaning that is intended to convey precedence and similarity to Plaintiff's thus causing confusion to the average purchaser with Plaintiff's mark.
>
> While it could be argued that the noun "Schools" is part of the name of Knox County Schools, and furthermore the word "Coupon" is used as descriptive word, in the mind of the person familiar with the registered mark School Coupons®, looking at the totality of the elements, including the booklet dimensions, the similarities are obvious and evoke Plaintiff's mark.

(Ex. 3, at 10-11.) Despite any purported differences between Plaintiffs' and Defendants' marks, any differences are such that they magnify the possibilities for confusion rather than reduce them. Thus, when the Court views the marks "in their entirety and focus[es] on their overall impressions, not individual features" as directed by Daddy's Junky Music Stores, 109 F.3d at 283, this factor weighs in favor of Plaintiffs.

4. Evidence of Actual Confusion

As the Court previously stated when ruling on Plaintiffs' motion for a preliminary injunction, "evidence of actual confusion is undoubtedly the best evidence of likelihood of confusion." (Doc. 16 at 26 (quoting Daddy's Junky Music Stores, 109 F.3d at 284).) The Court then added the acknowledgement that, "due to the difficulty of securing evidence of actual confusion, a lack of such evidence is rarely significant, and the factor of actual confusion 'is weighted heavily only when there is evidence of past confusion, or perhaps, when the particular circumstances indicate such evidence should have been available.'" Id. (citation omitted). Now with the benefit of a more-developed record, it is clear that actual confusion occurred.

Defendants first brought about confusion in the marketplace when they sent a letter purporting to "re-brand" Plaintiffs' School Coupons® product in a letter sent to the Knox County business community on February 5, 2010. (See Doc. 1-1, Ex. 4.) When Knox County Schools was about to launch its campaign in September 2010, Bacon and Kerr went to the media to tout the Knox County Schools' book over Plaintiffs' book. (See, e.g., Doc. 1-1, Exs. 10-12.) The Court, in its ruling on Plaintiffs' motion for a preliminary injunction recognized that a Farragut Press article suggests that consumers were confused about Plaintiffs' and Defendants' coupon books. (Doc 16, at 27 (referencing Doc. 1-1, Ex. 11.) When asked in deposition why Defendants engaged in such a media blitz, Kerr acknowledged there was confusion. (See Kerr, at 61-65; Russ Oaks, Knox County Schools Chief of Staff, also recalled that there was confusion in the marketplace. (Oaks Tr., at [Forthcoming].) The inside, unvarnished look at Defendants' use of the media is revealing: Defendants took to the press not in an effort to avoid confusion in the marketplace between Plaintiffs' and Defendants' products, but because they knew there was confusion in the marketplace and wanted to direct consumers toward their Defendants' product.

5. Marketing Channels Used

The Court previously found that the marketing approaches of the parties are similar, both as to marketing coupon books through students and as to persuading merchants to participate in their respective products. (Doc. 16, at 27-28.) Indeed, the similarity of the channels presents a documented example of actual confusion in the marketplace. Farragut Putt-Putt participated in School Coupons® for several years through to the 2009 edition of School Coupons®. In 2010, Farragut Putt-Putt received competing merchant applications requesting their participation in the 2010 editions of School Coupons® and Defendants' book. The application Defendants sent to Farragut Putt-Putt was identical in format to Exhibit 4, discussed above, which showed the picture of their prior coupon in Plaintiffs' School Coupons® and included the option for the merchant to "Repeat Current Offer." (See Ex 4; Bacon Tr., at 78-80, 108-11.) As evident by email communications between the owner of Farragut Putt-Putt and Scott Bacon, the merchant was clearly confused by the competing approaches through the same channel.[5] Unfortunately, after communicating with Bacon, Bacon induced Farragut Putt-Putt to "renew" in Defendants' 2010 book, but not School Coupons®.

Although Defendants do not yet conduct business in all of the markets in which Plaintiffs have marketed or sold School Coupons®, there is a marked overlap of Plaintiffs' and Defendants' geographic footprints. The key point is that, for the markets in which they compete, Plaintiffs and Defendants use the exact same marketing channels, and this has led to actual confusion. Moreover, as will be addressed below, Defendants have expanded their current sales efforts outside of Knox County and into the surrounding counties in East Tennessee. (See, *infra*, at 16-17.)

[5] Plaintiffs note that the example of Farragut Putt-Putt is also yet more evidence of "actual confusion."

6. Likely Degree of Purchaser Care

The Court is well aware that in the context of likely degree of purchaser care, the Sixth Circuit's standard for assessing likelihood of confusion involves the typical buyer exercising ordinary caution. (Doc. 16, at 28 (citing Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100, 1111 (6th Cir. 1991).) In ruling on Plaintiffs' request for a preliminary injunction, the Court looked to Homeowners Grp., in which the Sixth Circuit stated,

> Generally, in assessing the likelihood of confusion to the public, the standard used by the courts is the typical buyer exercising ordinary caution. However, when a buyer has expertise or is otherwise more sophisticated with respect to the purchase of the services at issue, a higher standard is proper. Similarly, when services are expensive or unusual, the buyer can be expected to exercise greater care in her purchases. When services are sold to such buyers, other things being equal, there is less likelihood of confusion.

Id. at 1111. Homeowners Grp. addresses a dispute between two marks in the real estate industry. In that case, the owner of one mark provided services to real estate brokers who were purchasing services for their business or for resale through their business. See id. Meanwhile, the owner of the rival mark marketed services to regular consumers, but related to property sales, one of the more complicated commercial transactions in which the average consumer engages. See id. The types of services and transactions involved in Homeonwers Grp. clearly merit a degree of care from the consumer.

The situation before the Court in this case presents the polar opposite of one in which consumers would be expected to take great care. With no offense intended to either the market or the products involved, it does not present a buying decision that requires any sophistication. Before the Court are competing $10.00 books, being sold to the public at large by school-aged children, with the coupon books containing such value that the use of one or two coupons at the right dining establishment(s) pays for the book. How much ordinary caution can be expected from consumers

when presented with such a buying decision? Much the way that any one of us would buy boxed cookies from any child that knocks on our door, so goes the purchasing decision with respect to buying a coupon book.

7. Intent of the Defendant in Selecting the Mark

As this Court previously noted, "[i]f a party chooses a mark with the intent of causing confusion, that fact alone may be sufficient to justify an inference of confusing similarity." (Doc. 16, at 29 citing Homeowners Grp.) Defendants purport that they selected their new name, "The Original Knox County Schools Coupon Book" to identify the product as exclusive to Knox County. (Bacon Tr., at 82-83.) Yet while doing this, they were announcing a "re-branding" of School Coupons® to the business community (Doc. 1-1, Ex. 4.), and taking to the media waves to tout their book was the same as before. (See Doc. 1-1, Exs. 10-12.) Now, Defendants are marketing their book outside of Knox County, directly soliciting school Principals in surrounding counties. (Bacon Tr., at 92, 102-04.) Essentially, Defendants sought to supplant the Plaintiffs' incumbent product by suggesting that Defendants' product was the actual incumbent. Any suggestion that Defendants were attempting to avoid confusion misses the facts that, (a) confusion was already in the marketplace; (b) Defendants were responsible for creating confusion by suggesting they were "re-branding" Plaintiffs' product; and (c) Defendants were attempting to resolve the confusion in a way that drove consumers from Plaintiffs' product to Defendants' product.

8. Likelihood of Expansion of the Product Lines

Citing Homeowners Grp., this Court previously held, "[A] 'strong possibility' that either party will expand his business to compete with the other or be marketed to the same consumers will weigh in favor of finding that the present use is infringing." (Doc. 16 at 29, citing *Id.* at 1112 (citation omitted).) When Plaintiffs were before the Court and asserted that Defendants were

offering or would offer their coupon book beyond Knox County, the Court suggested that Plaintiffs did not provide any strong possibility of this expansion. (Doc. 16 at 29.) Mr. Oaks acknowledged that two schools approached Knox County Schools. (Doc. 16 at 29.) Having had an opportunity to develop the record, we find that Knox County Schools had discussions with Grace Christian Academy about the coupon book program in 2010 and with Linden Elementary (in Oak Ridge, Tennessee) in early 2011. (See Bacon Tr., at 91-92, 102-03.) Defendants have become even more aggressive, however. In 2012 and 2013, Knox County Schools directly solicited the Principals of all schools in the counties contiguous to Knox County.[6] (Bacon Tr., at 92, 102-06.) What Plaintiffs feared and originally sought to bring to the Court's attention has come to pass – after driving Plaintiff out of the Knox County market and consolidating their position, Defendants are now actively entering the stream of private commerce in a hope to acquire the market in the surrounding counties, too.

When the Court previously scrutinized all of the above factors in ruling on Plaintiffs' request for a preliminary injunction, the Court acknowledged that "some of these factors weigh in plaintiffs' favor." (Doc. 16 at 29-30.) Now, with a more developed record, it is becoming manifestly clear that Plaintiffs satisfy significantly more factors, and that actual confusion among consumers was and is taking place. Moreover, by actively soliciting business across county lines and in private schools, Defendants are accelerating their conduct in the direction of infringement and have essentially become a taxpayer funded goliath wading into the sphere of private enterprise.

[6] What Plaintiffs find especially ironic about this practice is that while Defendants castigate Mr. Ward from directly approaching "their" merchants and "their" schools, Scott Bacon is spearheading an effort to directly solicit the business of Principals in surrounding counties without first making a direct approach to their respective county boards of education. (Bacon Tr., at 105-06.)

POINT II

DEFENDANTS INFRINGED UPON PLAINTIFFS' TRADE DRESS.

In addition to infringing on Plaintiffs' trademark, Defendants are also guilty of infringing upon the trade dress of Plaintiffs' School Coupons® coupon book. Trade dress infringement claims go beyond situations in which the infringer has used or abused a mark, and instead consider whether the infringer has dressed its product in such a way as to capitalize on the trade dress holder's goodwill.

Trade dress need not be registered to be protected. The Lanham Act, 15 U.S.C. §1125(a), "protects from infringement the unregistered 'trade dress' of a product." Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 629 (6th Cir. 2002). "Trade dress refers to the image and overall appearance of a product. It embodies that arrangement of identifying characteristics or decorations connected with a product, whether by packaging or otherwise, [that] make[s] the source of the product distinguishable from another and ... promote[s] its sale." Id. at 630 (citations and internal quotation marks omitted). "Trade dress involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." Id. (citations and internal quotation marks omitted); see also John J. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983). "[A]ny 'thing' that dresses a good can constitute trade dress." Id.

In order to establish a cause of action for trade dress infringement, Plaintiffs must establish that (a) the design is non-functional; (b) the design is inherently distinctive or distinctive by virtue of having acquired a second meaning; and (c) there is a likelihood of confusion. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 770 (1992). The Sixth Circuit similarly expresses this standard,

> [T]o recover for trade dress infringement under §43(a), a party must prove by a preponderance of the evidence: 1) that the trade dress in question is distinctive in the

> marketplace, thereby indicating the source of the good it dresses, 2) that the trade dress is primarily nonfunctional, and 3) that the trade dress of the competing good is confusingly similar.[7]

Abercrombie, 280 F.3d at 629 (citations omitted).

A. Distinctiveness

Plaintiffs must demonstrate the distinctiveness of their product's appearance in order to prevail upon a claim for trade dress infringement. Distinctive trade dress can be shown, however, even without proof of secondary meaning. See Two Pesos, 505 U.S. at 770 (1992). Courts have found a variety of trade dress to be distinctive, including magazine cover formats, greeting card arrangements, waitress uniform's stitching, luggage designs, linen patterns, cereal configurations, and the interior and exterior features of commercial establishments. (Ex. 3, at 13.)

As discussed by Plaintiffs' expert witness, Dr. Golab,

> In the instant case physical appearance of Defendant's booklet is almost identical to Plaintiff's School Coupons®. Defendant's booklet has minor and negligible size differences with the original booklet produced by Plaintiff. The shape of Defendant's booklet is the same as Plaintiff's.
>
> The design of Defendant's 2010 coupon booklet front cover copies unique features that originate, and can be readily appreciated, in Plaintiff's 2009-2010 booklet. Defendant copies Plaintiff's use of a student photograph, with the first name written on the upper left side and continuing immediately by the student's last name written on the horizontal portion of the frame.
>
> Defendant even copies Plaintiff's size of the photograph, 13/16" by 13/16". Defendant uses a white background for the photograph, same as Plaintiff. Defendant places the name of the county, such that the letter "X" extends horizontally beyond the photograph's frame and aligns with the word COUNTY written on the right side, matching exactly not only Plaintiff's design but also the font and size of it. The red frame around Defendant's photograph does not diminish the feel that are one (Defendant's) copy of another (Plaintiff's).

[7] Defendants conceded during oral argument on Plaintiffs' motion for a preliminary injunction that it is inevitable that there could be some confusion regarding the coupon books because many schools sell them and they could easily look alike. (See Doc. 16, at 31, n. 2.) Plaintiffs further address the issue of confusion *supra*, however, noting that it is undisputed that there was actual confusion in the marketplace.

> The design is further copied by the listing of the sponsors. While there is not identical design to list a particular sponsor, and Defendant took care of changing their location, Defendant uses the same feel and text to announce them, namely "Sponsored by". The fact that three-fourths of sponsors are the same and all use their logo contributes to make Defendant's design confusingly similar to Plaintiff's for the unsuspected [sic] consumer.
>
> The color of Defendant coupon booklet front cover is different from Plaintiff's, yet Defendant uses a gradual change of color from light at the bottom to dark at top same as Plaintiff's booklet.
>
> Defendant's booklet uses almost exactly the same paper, in weight, shine, and feel, as Plaintiff's. Defendant's booklet exterior cover and the interior paper replicate the texture, quality, and weight of the original booklet produced by Plaintiff.

(Ex. 3, at 13-14.)

Moreover, although it is not required for a determination that Plaintiffs' School Coupons® coupon book had a distinctive trade dress, Plaintiffs submit that the combination of factors, including Plaintiffs' consistent use of the School Coupons® brand over time and the volume of sales accumulated for that duration, have resulted in the trade dress of School Coupons® taking on a secondary meaning, much as Plaintiffs' trademark.

B. Functionality

According to Sixth Circuit authority, a product feature is functional if "it is essential to the use or purpose of the article or when it affects the cost or quality of the article." Abercrombie, 280 F.3d at 641 (citing TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 32 (2001)). "A design is also functional where, without its use, competitors are at a significant non-reputation-related disadvantage." Fuji Kogyo Co. v. Pacific Bay Int'l, Inc., 461 F.3d 675, 684–85 (6th Cir. 2006) (internal quotation marks and citation omitted). Plaintiffs submit that the artistic elements of Defendants' coupon book which, as stated above so uncannily mirror elements from Plaintiffs' School Coupons® coupon book are not at all essential to the use or purpose of the book being a coupon book.

A review of various coupon books across different markets demonstrates the wide variety of different ways in which one can design a coupon book. As shown to the Court during the hearing on Plaintiffs' motion for a preliminary injunction, coupon books can be square or rectangular; short or tall; in color or otherwise; designed as checks or coupons; bound from the top or side. Each and every one of these formats can serve the function of a coupon book. Meanwhile, as analyzed by Dr. Golab, Defendants essentially copy, among other things: (1) the size and shape; (2) the use of a student photograph, with name written on the frame; (3) the size of the student photograph; (4) the background of the photograph; (5) the listing of sponsors; (6) color schemes on the cover; and (7) weight, shine, and feel of both the exterior cover and interior paper. (Ex. 3, at 13-14; see also Bacon Tr., at 109 ("And from their look, the only thing that would look different would be the front cover of the book. It should continue to serve their needs in terms of what their offers were and hopefully sell as many and get the exposure that they had been getting, which for them is substantial.").) Plaintiffs do not assert that the copying of any one of these elements itself, such as the small and thin size of the School Coupons® would give rise to a trade dress infringement. Rather, it is the confluence of all of these elements, taken together as a whole, which results in Defendants' book having the feeling, the dress of Plaintiffs' School Coupons® coupon book.

Paraphrasing the old adage, if it looks like a School Coupons®, walks like a School Coupons®, and quacks like a School Coupons®, it's a School Coupons®. Defendants' coupon books retain the distinctive elements that allowed School Coupons® to raise over $23 million for East Tennessee schools. Despite Defendants' "re-branding," the end result was a coupon book that looks and feels like a School Coupons® coupon book. Accordingly, Plaintiffs submit that there is no dispute of material fact and that Plaintiffs are entitled to judgment as a matter of law on their Trade Dress Infringement Claim.

CONCLUSION

Based on the record and the arguments and evidence contained herein, it is clear that no genuine material factual dispute exists concerning whether Defendants infringed upon Plaintiffs' trademark or trade dress. Plaintiffs, therefore, are entitled to summary judgment as a matter of law on their Trademark and Trade Dress claims and respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment. In the event that this Court is not disposed to grant Plaintiffs' Motion for Summary Judgment in totality, Plaintiffs request as alternate relief that the Court grant Plaintiffs summary judgment on certain elements of Plaintiffs' claims, as discussed above. Plaintiffs further request that the Court provide such other relief as justice may require.

Respectfully submitted this 20th day of April, 2014,

/s/ Michael A. Nolan
Michael A. Nolan (BPR #009238)
P.O. Box 51102
Knoxville, TN 37950
(865) 382-6260

/s/ Keith R. Wesolowski
Keith R. Wesolowski (BPR #029521)
Wesolowski & Associates, P.C.
6235 Smith Road
Hamburg, NY 14075
(865) 244-7867

Counsel for Plaintiffs Michael Scott Ward, WeDo Fundraising, Inc., d/b/a Feredonna Communications, and PrintVenture, Inc., d/b/a Feredonna Communications.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically through the Court's electronic case filing system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

This the 20th day of April, 2014.

/s/ Keith R. Wesolowski
Keith R. Wesolowski

IN THE CHANCERY COURT FOR DAVIDSON COUNTY TENNESSEE
AT NASHVILLE

FORD MOTOR CREDIT COMPANY,	)	
	)	
Plaintiff/Counter-Defendant/Cross Plaintiff	)	
	)	
v.	)	
	)	No. _____
JOHN DOE, AND JANE DOE	)	
	)	
Defendants/Counter-Plaintiffs/Third Party Plaintiffs	)	
	)	
WHALEY FORD LINCOLN, INC.	)	
	)	
Third Party Defendant	)	
	)	
And	)	
	)	
SUMMIT LIFE INSURANCE COMPANY, INC.	)	
	)	
Third Party Defendant/Cross-Defendant	)	

FORD MOTOR CREDIT COMPANY'S RESPONSE TO SUMMIT LIFE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Comes the Plaintiff/Counter-Defendant/Cross Plaintiff, Ford Motor Credit Company, (hereafter "FMCC"), pursuant to Tenn. R. Civ. P. 56 and requests that the Court deny Summit Life Insurance Company's Motion for Summary Judgment because as a matter of law, Summit Life Insurance Company is not entitled to a judgment, and there are disputed material facts that prohibit the entry of summary judgment.

I. PROCEDURAL HISTORY

On February 9, 2009, FMCC filed two Complaints against John Doe and Jane Doe (collectively referred to as the "Does") seeking recovery of deficiency balances under two separately executed Tennessee Simple Interest Vehicle Retail Installment Contracts between the

Does and Whaley Ford Lincoln, Inc. (hereinafter "WFLI"). On March 11, 2009, the Does filed an Answer to one of the FMCC Complaints. Subsequently, on March 20, 2009, the Does answered the second Complaint and simultaneously filed a Counter-Complaint against FMCC and a Third-Party Complaint against WFLI.

On June 12, 2009, a third complaint was filed by FMCC against the Does seeking recovery of a deficiency balance under a Tennessee Simple Interest Vehicle Retail Installment Contract between the Does and WFLI. Thereafter, the Does filed an Answer to that Complaint and a Counter-Complaint against FMCC. FMCC filed Responses to each of the Does' Counter-Complaints on October 9, 2009. By an Order dated June 26, 2009, the three cases were consolidated into the present action.

On August 25, 2009, the Does filed a Third-Party Complaint against Summit Life Insurance Company, Inc. (hereinafter "SLIC") seeking payment under two separately purchased Credit Life and Credit Disability Insurance policies. On October 9, 2009, FMCC filed a Cross-Claim against SLIC seeking a judgment against SLIC for any insurance proceeds payable to the Does. FMCC is listed as the "First Beneficiary-Creditor" on each Certificate of Insurance. SLIC filed an Answer to the Third-Party Complaint on October 9, 2009 and an Answer to FMCC's Cross-Claim on October 12, 2009. SLIC subsequently filed a Motion for Summary Judgment on October 27, 2009.

II. INTRODUCTION

SLIC bases its Motion for Summary Judgment on the alleged facts that WFLI, its insuring agent, failed to remit the Certificates of Insurance to SLIC, exceeded its authority, and failed to have the Does fill in the statement of debtor's physical condition portions of the certificates. However, as will be more fully shown below, SLIC, acting through its designated

agent, WFLI, issued to the Does two separate Certificates of Insurance which list the types and amounts of coverage, the amount of the insurance premium paid by the Does, the Group Policy/Certificate Number and which are signed by both the Does and a representative of WFLI. Under Tennessee Law, SLIC is estopped to deny the Does, and FMCC, the coverage agreed to under the two insurance contracts. SLIC is bound by the acts of its agent WFLI and is held to possess the same knowledge that its agent possessed at the time the insurance contracts were entered into. As a matter of law, SLIC is not entitled to summary judgment.

III. STATEMENT OF THE FACTS

On or about June 3, 2006, John Doe and Jane Doe (hereinafter "the Does") entered into negotiations with Jim Allen, a sales representative from WFLI, regarding the purchase of a 2004 Mercury Mountaineer. Third Party Complaint of John Doe and Jane Doe, ¶ 6. Prior to 2006, the Does had purchased numerous vehicles from WFLI and had dealt with the same representative. John Doe Aff. ¶ 4; Jane Doe Aff. ¶ 4. Due to their prior transactions, Mr. Allen had received and reviewed the Does' medical and financial information and as a result was fully aware of the Does' medical and financial conditions and other qualifications for Credit Life and Credit Disability Insurance Coverage. John Doe Aff. ¶ 4; Jane Doe Aff. ¶ 4.

As part of the negotiations for the 2004 Mercury Mountaineer, WFLI offered the Does Credit Life and Credit Disability insurance coverage through SLIC, as had been done in previous transactions. John Doe Aff. ¶¶ 4,5; Jane Doe Aff. ¶¶ 4, 5. The Does allege that the insurance coverage was a material part of the overall transaction and that they would not have agreed to purchase the vehicles without the insurance coverage promised by WFLI. John Doe Aff. ¶ 6; Jane Doe Aff. ¶ 6.

Mr. Allen had all of the paperwork drawn up and took the paperwork to the Does' home. Mr. Allen did not request that the Does fill out the Statement of Debtor's Physical Condition. Mr. Allen directed the Does to sign the set of documents, including the certificate of Insurance, and advised them that he would take care of the rest. John Doe Aff. ¶¶ 6, 7; Jane Doe Aff. ¶¶ 6, 7. This is the same procedure that Mr. Allen had used with many of the Does' previous vehicle purchases involving WFLI. Id.

Mr. Allen did not ask the Does any questions regarding the Does' health and informed the Does that everything was "...done and taken care of." Id. The Does were not asked to fill out the Statement of Debtor's Physical Condition on the Certificate of Insurance. John Doe Aff. ¶ 8; Jane Doe Aff. ¶ 8. After the Does had signed all of the paperwork, Mr. Allen informed the Does that the purchase was complete and that they would be covered with the insurance if something were to happen to them or to their stream of income. John Doe Aff. ¶ 10; Jane Doe Aff. ¶ 10.

The total amount of insurance coverage for the 2004 Mercury Mountaineer is $25,621.34. John Doe Aff., Exhibit 2. Mr. Allen prepared a Certificate of Insurance that identified the types of coverage the Does had purchased, the coverage amounts, and the Group Policy Certificate Number – 08265. Mr. Allen requested that the Does sign the Certificate of Insurance to finalize the agreement. John Doe Aff. ¶ 11, Exhibit 2; Jane Doe Aff. ¶ 11, Exhibit 2.

To finance the purchase of the 2004 Mercury Mountaineer, the Does executed a Tennessee Simple Interest Vehicle Retail Installment Contract. Exhibit 1 to Complaint of FMCC filed June 12, 2009; John Doe Aff., Exhibit 1. The Does were charged $1,559.88 for Credit Life Insurance and $1,559.88 for Credit Disability Insurance. Id. The Installment Contract was subsequently assigned to FMCC for value. Complaint of FMCC filed June 12, 2009, ¶ 6.

On or about July 31, 2006, the Does again entered into negotiations with Jim Allen, a sales representative for WFLI, regarding the purchase of a 2006 Lincoln Town Car. Complaint of FMCC, ¶ 4; John Doe Aff. ¶ 12; Jane Doe Aff. ¶ 12. As part of the negotiations for the 2006 Lincoln Towne Car, Jim Allen offered the Does Credit Life and Credit Disability insurance coverage through SLIC, as had been done in previous transactions. John Doe Aff. ¶¶ 4, 13; Jane Doe Aff. ¶¶ 4, 13.

The Does allege that the insurance coverage was a material part of the overall transaction and that they would not have agreed to purchase the Vehicles without the insurance coverage promised by WFLI. John Doe Aff. ¶ 14; Jane Doe Aff. ¶ 14. Mr. Allen prepared a Certificate of Insurance that identified the types of coverage the Does had purchased, the coverage amounts, and the Group Policy Certificate Number – 08263. Mr. Allen requested that the Does sign the Certificate of Insurance to finalize the agreement. John Doe Aff. ¶¶ 14, 19, Exhibit 4; Jane Doe Aff. ¶¶ 14, 19, Exhibit 4. Mr. Allen told the Does that once the documents were signed, he would take care of the rest. John Doe Aff. ¶ 15; Jane Doe Aff. ¶ 15.

The Does were not asked to fill out the Statement of Debtor's Physical Condition on the Certificate of Insurance. John Doe Aff. ¶ 16; Jane Doe Aff. ¶ 15. Mr. Allen did not ask the Does any questions regarding their health and told the Does that nothing else was required but their signatures on the certificate. John Doe Aff. ¶¶ 15, 16; Jane Doe Aff. ¶¶ 15, 16. After the Does had signed all of the paperwork, Mr. Allen informed the Does that the purchase was complete and that they would be covered with the insurance if something were to happen to them or to their stream of income. John Doe Aff. ¶ 18; Jane Doe Aff. ¶ 18. The total amount of insurance coverage for the 2006 Lincoln Town Car is $75,732.46. John Doe Aff., Exhibit 4.

To finance the purchase of the 2006 Lincoln Town Car, the Does executed a Tennessee Simple Interest Vehicle Retail Installment Contract. Complaint of FMCC filed February 9, 2009, Exhibit 1; John Doe Aff., Exhibit 3. The Does were charged $5,419.69 for Credit Life Insurance and $4,516.41 for Credit Disability Insurance. Id. The Installment Contract was subsequently assigned to FMCC for value. Complaint of FMCC filed February 9, 2009, ¶ 4.

Upon later investigation, the Does were informed that SLIC had taken the position that the Credit Life/Credit Disability Insurance which they purchased on the two aforementioned vehicles was never submitted to SLIC by WFLI, even though two Certificates of Insurance were issued and the Does paid $3,119.76 in insurance premiums for the purchase of the 2004 Mercury vehicles and $9,936.10 in insurance premiums for the purchase of the 2006 Lincoln vehicle. John Doe Aff. ¶ 23; Jane Doe Aff. ¶ 23.

At no point during the course of the June 3, 2006, or June 31, 2006 transactions did Mr. Allen ask the Does to review or sign an application for insurance with SLIC. Mr. Allen repeatedly informed the Does that they qualified for the retroactive Credit Life and Credit Disability Insurance coverage for both vehicles. John Doe Aff. ¶ 20; Jane Doe Aff. ¶ 20. At all times pertinent hereto, WFLI held itself out to the Does as having the authority to offer and contract for Credit Life and Credit Disability Insurance through SLIC and to receive premiums payment on behalf of SLIC for the same. John Doe Aff. ¶ 21; Jane Doe Aff. ¶ 21. Based upon the representations of Jim Allen, the Does believed that the Credit Life and Credit Disability Insurance Policies on those two vehicles were in full effect. John Doe Aff. ¶ 24; Jane Doe Aff. ¶ 24.

Subsequently, the Does defaulted in their payments under the installment contracts and the vehicles in question were returned to FMCC and sold in accordance with the terms of the

installment contracts. Complaint of FMCC filed February 9, 2009; Complaint of FMCC filed June 12, 2009. Prior to FMCC repossessing and selling the two vehicles, the Does were never notified that the Credit Life and Credit Disability Insurance policies had been cancelled and did not receive a refund of the $13,055.86 premiums paid for the Credit Life and Credit Disability Insurance on the respective vehicles. John Doe Aff. ¶ 22; Jane Doe Aff. ¶ 22. FMCC claims a deficiency balance in the amount of $28,929.93 for the 2006 Lincoln vehicle and $11,795.80 for the 2004 Mercury vehicle. The Credit Life and Credit Disability policies would have provided coverage for or abated any deficiency. Third Party Complaint of John and Jane Doe, ¶¶ 13-15.

IV. LEGAL STANDARD

The purpose of Summary Judgments under Rule 56 of the Tennessee Rules of Civil Procedure is to enable courts to conclude cases that can and should be resolved on dispositive legal issues. See Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993); Airport Props, Ltd. v. Gulf Coast Dev., Inc., 900 S.W.2d 695, 697 (Tenn. Ct. App. 1995). Summary Judgments are only appropriate when the facts material to the dispositive legal issues are undisputed. Accordingly, they should not be used to resolve factual disputes or to determine the factual inferences that should be drawn from the evidence when those inferences are in dispute. See Bellamy v. Federal Express Corp., 749 S.W.2d 31, 33 (Tenn. 1988).

To be entitled to a summary judgment, the moving party must demonstrate that no genuine issues of material fact exist and that he or she is entitled to judgment as a matter of law. See TENN. R. CIV. P. 56.04; Byrd v. Hall, 847 S.W.2d at 210; Planet Rock, Inc. v. Regis Ins. Co., 6 S.W.3d 484, 490 (Tenn. Ct. App. 1999). A summary judgment should not be granted, however, when a genuine dispute exists with regard to any material fact. Seavers v. Methodist Med. Ctr., 9 S.W.3d 86, 97 (Tenn. 1999).

Tenn. R. Civ. P. 56.04 provides that summary judgment is only appropriate where: (1) there is not genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. See Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993); Byrd v. Hall, 847 S.W.2d at 210. A party seeking a summary judgment must demonstrate the absence of any genuine and material factual issues. Id. at 214. To meet its burden of production and shift the burden to the nonmoving party, the moving party must affirmatively negate an essential element of the nonmoving party's claim. Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 8 (Tenn. 2008).

A court must view all the evidence in the light most favorable to the non-movant, and resolve all factual inferences in the non-movant's favor. See Luther v. Compton, 5 S.W.3d 635, 639 (Tenn. 1999). A summary judgment is only appropriate when the undisputed facts reasonably support only one conclusion – that the moving party is entitled to a judgment as a matter of law. White v. Lawrence, 975 S.W.2d 525, 529 (Tenn. 1998).

V. LAW & ARGUMENT

A. Summit Life Insurance Company is Bound by the Acts of its Agent Whaley Ford, Lincoln, Inc.

The law in Tennessee is that an insurer is bound by the acts of its agent. The law requires that an insurer be bound by what its agent agrees to and upon which the insured relies, and knowledge of matters affecting the risk or conditions of the policy acquired by the agent in soliciting the insurance is the knowledge of the insurer. Shelby Mutual Ins. Co. v. Wilson, 383 S.W.2d 791, 801 (Tenn. Ct. App. 1964). "[A]n insurance company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope

of his real or apparent authority." COUCH ON INSURANCE 2d § 71.9, fn. 8 (citation omitted). Similarly, "there is no rule of law more firmly established than the rule that an insurance company, by reason of its agent's conduct, may be estopped to deny a "waiver" of provisions inserted in the policy for the benefit of the company. Id.

As stated by the Tennessee Supreme Court in the influential case of Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720, 732-733 (Tenn. 1903) "an agent of an insurance company, having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority notwithstanding an actual excess of authority." In other words, "an agent acting within the scope of his apparent authority, though exceeding his authority, binds his principal." Industrial Life & Health Insurance Co. v. Trinkle, 185 Tenn. 434, 206 S.W.2d 414, 415 (Tenn. 1947).

Furthermore, it has long been held that in Tennessee an agent's representations regarding insurance coverage upon which an insured relies will estop by waiver the insurance company from denying coverage. See generally, Henry v. Southern Fire & Casualty Co., 46 Tenn. App. 335, 330 S.W.2d 18 (1958). As the Tennessee Court of Appeals Court held in American General Life Insurance Co. v. Gilbert, 595 S.W.2d 83 (Tenn. App. 1979), "the knowledge of the soliciting agent is imputed to the insurer" even when the result has the effect of broadening the coverage of the written policy. See Bill Brown Constr. Co. v. Glens Falls Ins. Co., 818 S.W.2d 1, 6 (Tenn. 1991), and the cases cited therein.

The same general principle of agency applies, and an insurer cannot void a policy agreed to by the agent, even when the acts or omissions of the agent materially increase the risk of loss under the policy. See e.g., Bland v. Allstate Ins. Co., 944 S.W.2d 372, 378 (Tenn. Ct. App.

1996) (holding that "an applicant who innocently signs an application in blank, trusting the agent to fill in the correct information, is not responsible for misrepresentations made by the agent, even if those misrepresentations increase the risk of loss on the policy for the insurance company."). In Henry v. Southern Fire & Cas. Co., 46 Tenn.App. 335, 330 S.W.2d 18 (1959), the Court approved of the following rule:

> In an action on a contract of insurance, the insurance company is generally considered estopped to deny liability on any matter arising out of the fraud, misconduct, or negligence of an agent of the company. If either party must suffer from an insurance agent's mistake, it must be the insurance company, his principal.

Henry v. Southern Fire & Cas. Co., 46 Tenn. App. 335, 330 S.W.2d 18 (1959) (Citing to 29A AM.JUR., INSURANCE, § 1049, p. 219). In short, "[a] buyer of insurance must rely on the words and acts of an agent of the insurer, and any mistake, neglect or intentional misconduct on the part of the agent will be imputed to the insurer." See Generally 1 TENN. JURIS., INSURANCE, § 9 (2009).

Similarly, an insurer cannot avoid payment under a policy where the insurer's agent has withheld the application or the premiums. As stated by the Tennessee Supreme Court in Richmond v. Travelers' Ins. Co., "delay may bind the insurance company where the applicant has been misled into believing that the application would be accepted, and, relying thereon, has refrained from obtaining other insurance." Richmond v. Travelers' Ins. Co., 123 Tenn. 307 (Tenn. 1910). More specific to the case at hand,

> Since an agent soliciting insurance can frequently bind an insurer as to matters pertaining to the taking and preparation of applications for insurance, an insurance company is chargeable with such agent's delay in retaining an application for an unreasonable length of time and in failing to forward it to such company for action.

Wille v. Farmers Equitable Ins. Co., 89 Ill. App. 2d 377, (Ill. App. Ct. December 6, 1967).

In summary, the law in Tennessee is abundantly clear that an insurer is bound by the acts and omissions of its agent, even when those acts or omissions constitute negligence, misconduct, fraud, or a misrepresentation, and that any knowledge that the agent possesses as to a transaction is imputed to the insurer. Furthermore, the insurer is bound by the provisions of a policy of insurance even when the agent has failed to remit the application or the premiums to the insurer. The relevant inquiry is not whether the agent was acting within the scope of its agency, or whether the insurer has approved of the agent's conduct, but whether the agent had apparent authority upon which the insured has relied to its detriment. See, e.g., Jackson v. Hayes, 1996 Tenn. App. LEXIS 31 (Tenn. Ct. App. Jan. 18, 1996) ("Generally, when an insured reasonably but detrimentally relies on the statements of an insurance agent, the insurance company will be estopped to deny coverage").

In the case at hand, SLIC bases its Motion for Summary Judgment on the fact that WFLI, its insuring agent, failed to remit the Certificate of Insurance to LIC, exceeded its authority, and failed to have the Does fill in the statement of debtor's physical condition portion of the certificate. SLIC would have this Court place the responsibility for SLIC agent's alleged negligent or fraudulent acts on the Does. Such a position is contrary to justice and to the law of this State. Furthermore, whether WFLI acted negligently or fraudulently is a disputed question of material fact that must be decided at the appropriate time by the trier of fact.

The facts on record with the Court for purposes of this Motion for Summary Judgment reveal that Mr. Allen, as an employee of WFLI and an agent of SLIC, had received and reviewed all of the Does' necessary medical and financial information. John Doe Aff. ¶ 4; Jane Doe Aff. ¶ 4. Mr. Allen prepared the necessary documents to complete the purchase of the vehicles, told the Does that he would take care of everything and that they were covered by the Credit Life and

Credit Disability insurance. John Doe Aff. ¶¶ 5, 6, 7, 10, 15, 18, 19, 24; Jane Doe Aff. ¶¶ 5, 6, 7, 10, 15, 18, 19, 24. Mr. Allen prepared Certificates of Insurance that that identified the types of coverage the Does had purchased, the coverage amounts, and the Group Policy Certificate Numbers. Mr. Allen requested that the Does sign the Certificate of Insurance to finalize the agreement. John Doe Aff. ¶ 11, 19; Jane Doe Aff. ¶ 11, 19. At no time did Mr. Allen request that the Does fill in the Statement of Debtor's Physical Condition on either certificate.

Jim Allen's actions, omissions and representations in the above transactions must be imputed to the insurer, SLIC. SLIC cannot escape payment under the Does' two Credit Life and Credit Disability policies by pointing to its own agent's failure to allegedly follow SLIC practices and procedures. The Does have alleged that the inclusion of the Credit Life/Disability policies was a material part of the underlying vehicle purchase transactions and the Does relied upon the assertions and representation of Jim Agent in agreeing to purchase the two vehicles. John Doe Aff. ¶¶ 6, 14; Jane Doe Aff. ¶¶ 6, 14.

As a matter of law, SLIC is not entitled to a summary judgment on any of the issues in this suit. Furthermore, if there are any questions of fact regarding the agency relationship between SLIC and WFLI, those facts are in dispute and must be viewed in the light most favorable to the Does. For these reasons, this Court should hold that SLIC is bound by the acts of WFLI and is not entitled to a judgment as a matter of law.

B. Whaley Ford, Lincoln, Inc. Acted with Actual and/or Apparent Authority in its Dealings with the Does

As stated above, an insurer is bound by the acts of its agent. In the case at hand, WFLI had the authority as agent for SLIC to issue Certificates of Insurance on behalf of SLIC. See John Doe Aff., Exhibits 2, 4; Does' Third-Party Complaint Against WFLI, Exhibit 1. Whether WFLI, through its employee Jim Allen, exceeded its authority is a question of fact for a trier of

fact to decide. Moreover, irregardless of whether WFLI exceeded its actual authority, Jim Allen was acting with apparent authority. Apparent or ostensible authority is that authority or power which the insurer knowingly permits the agent to assume or which the insurer holds the agent out as possessing. Rural Education Ass'n v. Bush, 42 Tenn. App. 34, 298 S.W.2d 761 (1956). This apparent authority can sometimes exceed the powers actually granted, but can be equally binding on the principal when the insured is unaware of the limitations or restrictions on the agent's authority. Corbitt v. Federal Kemper Ins. Co., 594 S.W.2d 728 (Tenn. Ct. App. 1980).

Apparent authority is most often defined as the authority that the "principal knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority *as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess*." Rich Printing Co. v. McKellar's Estate, 46 Tenn. App. 444, 330 S.W.2d 361, 376 (Tenn. App. 1959) (emphasis added). The Does had previously purchased vehicles from WFLI and had previously been offered and accepted both Credit Life and Credit Disability Insurance. John Doe Aff. ¶ 4; Jane Doe Aff. ¶ 4.

The Does' affidavits suggest that Jim Agent gave every impression to the Does that he had the authority to issue Certificates of Insurance to the Does; and in fact, Mr. Allen did issue those certificates. John Doe Aff. ¶¶ 5, 21; Jane Doe Aff. ¶¶ 5, 21. Mr. Allen acted in accordance with his usual practice in his previous course of dealings with the Does. John Doe Aff. ¶¶ 4, 8, 15; Jane Doe Aff. ¶ 4, 8, 15. It is undisputed that SLIC provided WFLI with the blank Certificates on Insurance and authorized WFLI to issue those certificates. See John Doe Aff., Exhibits 2, 4; Does' Third-Party Complaint Against WFLI, Exhibit 1. It is significant that nowhere on the Certificates of Insurance issued to the Does does it state that the coverage under

the policy is conditioned on subsequent approval by SLIC. In fact, the certificates state that SLIC may only ***void*** the certificate in cases where the insured has been guilty of fraud, etc. For insurance coverage to be voided, it must have existed in the first place.

Viewing the facts in the light most favorable to the Does, there is a disputed issue of material fact as to whether the Does relied upon past dealings with and the acts and representations of Jim Allen in entering into the vehicle purchase agreements. Moreover, it is evident that a reasonably prudent man, using diligence and discretion, would naturally suppose, in view of the Jim Allen's alleged conduct, that Mr. Allen possessed the authority to contract with the Does for the purchase of the Credit Life/Disability insurance. Alternatively, if this Court cannot find, based upon the record before it, that Jim Allen possessed actual or apparent authority to enter into said agreements, then the issue of the real or apparent authority is one to be determined by the trier of fact. See, e.g., Sloan v. Hall, 673 S.W.2d 548, 551 (Tenn. App. 1984).

C. Summit Life Insurance Company is Estopped to Deny Coverage under the Credit Life/Disability Policies Issued on the Vehicles at Issue in this Case.

As previously cited, an agent's representations regarding insurance coverage upon which an insured relies will estop by waiver the insurance company from denying coverage. Henry, 46 Tenn. App. 335, 330 S.W.2d 18. Furthermore, "[an] insurance company is generally considered estopped to deny liability on any matter arising out of the fraud, misconduct, or negligence of an agent of the company." Henry v. Southern Fire & Cas. Co., 46 Tenn. App. 335, 330 S.W.2d 18 (1959) (citing to 29A AM.JUR., INSURANCE, § 1049, p. 219).

In order to succeed on a claim of estoppel, a claimant must show conduct on the part of the insurer or its agent which amounts to a false representation, that there was an intention or expectation that the representation would be acted upon by the insured, and actual or

constructive knowledge of the facts. The insured must also show lack of knowledge and the means of knowledge of the truth as to the represented facts, reliance, and prejudicial change in position. See Osborne v. Mt. Life Ins. Co., 130 S.W.3d 769, 774 (Tenn. 2004); Robinson v. Tennessee Farmers Mut. Ins. Co., 857 S.W.2d 559 (Tenn.App.1993).

Jim Allen allegedly represented to the Does that by signing the Certificates of Insurance they would be covered under the Credit Life/Disability insurance. John Doe Aff. ¶¶ 11, 19; Jane Doe Aff. ¶¶ 11, 19. It is the Does position that they would not have purchased the vehicles but for the inclusion of the insurance John Doe Aff. ¶¶ 6, 14; Jane Doe Aff. ¶¶ 6, 14. As a result of Jim Allen's alleged misrepresentations, and the Does' subsequent reliance on said misrepresentations, the Does have been prejudiced in that they now face a deficiency balance in excess of $40,724.00. Third Party Complaint of John and Jane Doe, ¶ 14. Based on the representations of Jim Allen, the Does believed that the Credit Life and Credit Disability Insurance Policies on the two vehicles were in full effect. The Does had no knowledge of what WFLI or Jim Allen did after leaving the Does' home after each transaction. John Doe Aff. ¶ 25.

SLIC is estopped to deny coverage under the two separately issued Credit Life and Credit Disability insurance policies issued to the Does by WFLI. Alternatively, there are genuine issues of material fact as to whether Jim Allen, as an agent for SLIC, misrepresented to the Does that they were covered by the Credit Life/Credit Disability insurance policies and whether the Does detrimentally relied upon Mr. Allen's misrepresentations. For those reasons, this Court should deny SLIC's Motion for Summary Judgment.

VI. CONCLUSION:

The facts show that SLIC, through its authorized agent, issued signed and numbered Certificates of Insurance which, on their face, show both the amount and types of coverage

purchased by the Does and which name the Does as the insured and BACC as the beneficiary. Additionally, the facts before this Court show that the Does paid to SLIC's authorized agent, WFLI, $13,055.86 in insurance premiums for which they have received no refund. Neither SLIC or WFLI ever informed the Does or FMCC that the Certificates of Insurance had been voided. It is only now that SLIC claims the Certificates are void as it attempts to relieve itself of its contractual obligations by hiding behind the alleged acts of its agent. However, the law in Tennessee is clear that a principal cannot, ex post facto, separate itself from the actions of its authorized agent.

The facts on the record in the case do not demonstrate that SLIC is entitled to a judgment as a matter of law. In actuality, the facts before this Court, coupled with established Tennessee common law, more fully support a summary judgment on behalf of FMCC. Additionally, there are various issues of fact which are in dispute which also preclude judgment as a matter of law. For the forgoing reason, Ford Motor Credit Company respectfully requests this Court deny Summit Life Insurance Company's Motion for Summary Judgment.

Respectfully submitted this the _____ day of _____, 2010.

_____
Michael A. Nolan