The Governor's Commission for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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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.

Member, Gullett, Sanford, Robinson & Martin, PLLC, Suite 1700, 150 Third Avenue, South, Nashville, Davidson County, Tennessee 37201

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

1981. BPR No. 9205.

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.

Alabama. Bar number 0036-N74L. I was licensed September 28, 1976. I am a Special Member of the Alabama State Bar, which means that I am allowed to appear in a court in Alabama without having to be admitted *pro hac vice*, but not to practice fulltime in Alabama.

Tennessee. Bar number 9205. I was licensed June 17, 1981. My license is currently active.

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

No.

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

August 1976 – July 1980: Associate, Balch, Bingham, Baker, Hawthorne, Williams & Ward (now Balch & Bingham), Birmingham, Alabama

June 1981 – August 1982: Law Clerk, Justice Frank F. Drowota, Tennessee Supreme Court

September 1982 – Mid-1986: Associate, Martin & Cochran, Nashville, Tennessee (merged with Gullett, Sanford & Robinson, mid-1986)

Mid-1986 – Present: Associate, then Partner, then Member, Gullett, Sanford, Robinson & Martin, PLLC, Nashville, Tennessee

Occupations I have ever been engaged in other than the practice of law:

Summer 1969: Clerk at Jack Holland's Bandbox, a women's clothing store in Jackson, Tennessee. The store went out of business many years ago.

September 1971 – December 1972: Bank teller, Exchange National Bank, Colorado Springs, Colorado, while my husband was stationed with the Army at Ft. Carson, Colorado. The bank no longer exists under that name.

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.

My husband and I moved to Nashville in the summer of 1980. A few weeks later, Justice Frank Drowota appointed me to serve as his law clerk. The position began in the summer of 1981. During the intervening months, I was a homemaker, studied for and sat for the February 1981 Tennessee Bar Examination, and worked on the estate of my father, who died in January 1981.

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

Bankruptcy law occupies perhaps 80% of my total practice. This encompasses a wide variety of non-bankruptcy issues and is quite general.

Commercial litigation occupies perhaps 15% of my total practice.

The remaining 5% of my law practice is miscellaneous work, such as real estate, probate/trust and transactional.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the 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.

Alabama: For my first four years as a licensed attorney, I was an associate with the Birmingham, Alabama firm then called Balch, Bingham, Baker, Hawthorne, Williams & Ward (now Balch & Bingham). It was one of the largest firms in Alabama, with about 35 attorneys

and offices in Birmingham and Montgomery. I was its first female attorney. The firm was engaged in a broad civil practice, representing all types of business clients, as well as individuals. The firm followed what was then the Atlanta model, having associates spend much of their time on research, writing and assisting more senior attorneys. I worked with attorneys in several areas of the firm's practice, including utility and real estate law. I became familiar with construction law and was designated to attend a seminar in Washington, D.C. presented by Prof. Alfred Kahn, Chair of President Carter's Council on Wage and Price Stability. I performed an enormous amount of legal research and drafting of documents. I assisted attorneys in preparing discovery.

One of the firm's largest areas of practice was utility law. It represented Alabama Power Co., its parent (The Southern Company), its sister utilities (e.g., Georgia Power, Gulf Power, Mississippi Power) and an affiliate, Southern Services. I worked on major matters including rate cases, and defense of lawsuits brought by property owners whose land had been flooded when Alabama Power acted on the orders of the Corps of Engineers in opening their dams. I did collection work to recover delinquent utility bills. (I called upon a friend, Tom Buckner, who is still practicing law in Memphis, repossess a washer and dryer that someone had purchased from Alabama Power Co.)

I was heavily involved in a contentious stockholder derivative suit brought by a disgruntled ex-employee of Alabama Power Co. I recall researching subjects as wide-ranging as loan participations and "cut, skid and haul" contracts pertaining to forestry. While I was still a summer clerk, I worked on litigation in which numerous utilities were suing Westinghouse concerning uranium. *See* https://archive.org/details/commercialimposs00josk

I recall a matter involving a will for a person of modest means, which must have been a *pro bono* matter.

Alabama Power frequently acquired real property for rights-of-way, substations, offices, power plants, etc. I spent substantial time preparing title opinions, learning a great deal about real estate law. One opinion took an entire month, covering a block in downtown Montgomery.

I worked closely with one of the senior partners who was bond counsel for industrial revenue bond issues. I became familiar with how bond issues work and are documented, and attended numerous closings of these large transactions.

A lawsuit that took a great deal of time was brought by descendants of Mr. Robert I. Ingalls, seeking to have several trust documents construed to allow the most remote generation to share in the trusts during the lives of their mothers, i.e., a *per capita* distribution scheme, when all of the trust documents expressly stated that the distribution scheme was *per stirpes*. Several prominent Birmingham firms participated in the litigation. My firm represented the Ingalls Iron Works Company, whose stock was held by the trusts, in defending the *per stirpes* distribution scheme. Bradley, Arant, Rose & White (now Bradley, Arant, Boult Cummings) represented another client taking the same position. In reviewing the case, I discovered earlier trust litigation involving the same minor plaintiffs, whose fathers as their guardians had assented to the premise that the distribution scheme was *per stirpes*. The topic on which I drafted the Alabama Supreme Court brief for our client (under the name of my senior partner) was res judicata or collateral estoppel. There was little or no law on the precise point – that the outcome of the earlier case could not have been as it was unless the distribution scheme was *per stirpes*. I argued this issue during our share of the Supreme Court argument time. The Supreme Court upheld the *per*

stirpes distribution scheme, and devoted a substantial portion of its opinion to holding that collateral estoppel applied. *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190 (Ala. 1978). Please note: The firm's representation of Ingalls Iron Works Co. does not appear in the Lexis version of this case. The West Reporter does show our client as a party, represented by my senior partner. The Supreme Court does not have a record of who argued.

In 1979, I served on a jury in a week-long condemnation case. I was elected foreperson.

Supreme Court Clerkship: As noted, my husband and I moved to Nashville in the summer of 1980. He joined the Law Department of the former NLT Corp. We moved within five years after being admitted to practice in Alabama, so we were required to take the Tennessee Bar Examination in February 1981. As we had two very young daughters and my father had died the month before the exam, preparation was difficult. We passed the exam and were admitted that spring. That summer, I began my clerkship with Justice Frank Drowota. Fortunately, I was able to work with my predecessor, Mr. George T. (Buck) Lewis, III, for a short period.

It was an incomparable privilege to work with Justice Drowota. There could not have been a finer appellate judge, lawyer or gentleman, and I continue to treasure his friendship. He was a wonderful mentor, placing a great deal of confidence in my reviews of the records on appeal, analyses of the facts and law, and drafting of opinions for his consideration. Naturally, these opinions dealt with a variety of substantive and procedural issues, from workers' compensation to a death penalty case. Clerking for Justice Drowota allowed me to observe the Justices off the bench, to attend the arguments, to read all of the briefs, records on appeal, trial and intermediate court opinions, etc., and study and apply the Rules of Civil, Criminal and Appellate Procedure, both in cases in which the court granted permission to appeal, and in cases in which permission to appeal was not granted (including petitions denied and petitions denied concurring in result only ("DCRO").

Some of the opinions with which I assisted Justice Drowota are:

State v. Melson, 638 S.W.2d 342 (Tenn. 1982) (death penalty – farm worker bludgeoned employer's wife to death with ball peen hammer, including many issues)

Anderson v. Chattanooga Gen. Services Co., 631 S.W.2d 380 (Tenn. 1981) (workers' compensation – employee intentionally failed to disclose condition when she applied for job)

Drew v. The Tappan Co., 630 S.W.2d 624 (Tenn. 1982) (workers' compensation - whether employee's injury arose out of and in the course of his employment)

Watkins v. Naifeh, 635 S.W.2d 104 (Tenn. 1982) (validity and interpretation of ordinance governing distance of beer establishments from churches and schools)

State v. Campbell, 641 S.W. 2d 890 (Tenn. 1982) (whether, where prosecuting instrument was a warrant, the disposition of the case must be on that instrument, so that State could not prosecute defendant on a presentment (or indictment) after dismissal of the warrant)

Tenn. Nat. Gas Lines, Inc. v. King, 635 S.W.2d 95 (Tenn. 1982) (correct manner of computing credit for corporate excise taxes, which credit is deducted from gross receipts taxes paid by certain utilities and other types of businesses)

Hale v. Commercial Union Assurance Cos., 637 S.W.2d 865 (Tenn. 1982) (workers' compensation – whether case should have been dismissed based on finding that plaintiff had

elected Arkansas benefits and was precluded from seeking Tennessee benefits)

Goldsmith's Division, Federated Dept. Stores, Inc. v. City of Memphis, 631 S.W.2d 396 (Tenn. 1982) (tax - appeal of dismissal of Goldsmith's action for relief from overpayment of taxes under the Business Tax Act, Tenn. Code Ann. (T.C.A.) § 67-5801 *et seq*.)

Wester v. Childress, 625 S.W.2d 710 (Tenn. 1981) (whether Tenn. R. Civ. P. 53.04(1), which requires the clerk to send notice of the filing of a Master's report to all parties, contemplates that when a party is represented by an attorney, service shall be made upon the attorney)

State v. Travis, 622 S.W.2d 529 (Tenn. 1982) (criminal - correctness of denying probation to defendant who pled guilty to involuntary manslaughter and proper factors for trial court to consider)

State v. Smith, 627 S.W.2d 356 (Tenn. 1982) (criminal - correctness of jury instructions)

Allstate Ins. Co. v. Young, 639 S.W.2d 916 (Tenn. 1982) (insurance – dispute about coverage under policy)

Private Practice in Nashville: My clerkship ended in August 1982. On September 1, 1982, I joined the Nashville firm of Martin & Cochran as an associate.

Martin & Cochran had two dominant practice areas. Messrs. Joseph Martin, Sr. and Jr. practiced labor and employment law. Messrs. G. Rhea Bucy, M. Taylor (Tad) Harris, Jr. and Wm. Robert Pope, Jr. primarily practiced bankruptcy law and commercial litigation. About a year after I joined the firm, Mr. Thomas H. Forrester joined as an associate, and our firm was complete.

Martin & Cochran merged with Gullett, Sanford & Robinson in 1986, and became Gullett, Sanford, Robinson & Martin. In 1987, I was promoted to partner. The firm later became a PLLC, and my title became member.

Our bankruptcy practice is varied and sophisticated. We have the benefit of representing many kinds of interests, including both secured and unsecured creditors and borrowers, lessors and lessees, creditors' committees, debtors in business reorganization and liquidation cases, bankruptcy trustees, parties in bankruptcy litigation, and purchasers of assets. We represent clients in industries including retail, manufacturing, agriculture, transportation, hospitality and service, food production, insurance, real estate and title insurance, healthcare, banking and equipment lending/leasing. Consequently, I understand the perspectives of all sides to litigation or a transaction and would be particularly able to adjudicate cases impartially.

Our bankruptcy practice includes a wonderful mixture of litigation and transactional work. In addition to a complex and technical statutory code that governs bankruptcies of all kinds of entities (other than states), a bankruptcy case can involve any issue of federal or state nonbankruptcy law, such as secured and unsecured lending, landlord-tenant law, health law, tort law, estate and trust law, domestic relations law, franchise law, securities law, corporate and partnership law, consumer law, federal and state criminal law and federal and state tax law, motor vehicle law and commercial law.

One of our cases was the first in the nation to reach a Circuit Court. This was *In re First Merchants Acceptance Corp.*, 198 F.3d 394 (3rd Cir. 1999), involving whether a member of a creditors' committee could be reimbursed for its attorney fees incurred in the performance of its duties. The Court of Appeals ruled in favor of our client, J. C. Bradford & Co. I was the

primary author of the appellate brief.

Bankruptcy trials and hearings are before the bench (although jury trials may happen rarely), so lawyers use the same skills that apply in appellate work. One approaches the matter in an effort to anticipate the points that will be of interest to the court and on which the outcome will turn. One seeks to persuade the court on proper application of the law to the facts.

It is important to realize that bankruptcy practice allows one to observe all facets of human nature. Whatever a party's relationship to the case might be, there is much stress. This is true whether one is destitute, or wealthy but in financial difficulty. It is true whether one is the debtor, a creditor, or a party that has been sued by a Trustee. Bankruptcy can bring out the best and the worst in people. Bankruptcy attorneys learn to discern who is an honest debtor acting in good faith and who is "gaming the system." This, too, is good preparation for an appellate judgeship.

Bankruptcy cases involve the full panoply of pretrial and post-trial procedural issues that arise in trial courts, including drafting of pleadings, briefs and other documents; preparing and arguing motions to dismiss and for summary judgment; dealing with the rules of evidence; pursuing or defending motions to alter or amend and the equivalent of Rule 60 motions. Bankruptcy appeals are to the District Court, Circuit Court, or Bankruptcy Appellate Panel, and ultimately to the Supreme Court. They utilize the Federal and Local Rules of Civil Procedure, the Federal and Local Rules of Bankruptcy Procedure, and the Federal Rules of Evidence. Our Bankruptcy Judges often delegate to prevailing counsel the preparation of orders and memorandum opinions (findings of fact and conclusions of law), or assign to both counsel the task of preparing an order that reflects the court's ruling. Of course, bankruptcy litigation also involves enforcing and collecting judgments.

In addition to our bankruptcy and commercial litigation work, I have handled many other types of matters, including negotiating and closing transactions and workouts/forbearances. I have done a fair amount of title insurance litigation. I have done such disparate work as assisting a wife in being appointed her husband's guardian, representing an employer defending an unemployment insurance claim, appealing *ad valorem* tax appraisals, and persuading a judge to set aside a judgment based upon a garnishment that our client had failed to answer. While at Martin & Cochran, I worked on a plaintiff's personal injury case with Tad Harris, and we won a jury verdict in Davidson County Circuit Court. I have dealt with a variety of statutes, such as the Tennessee Consumer Protection Act, the mechanics' and materialmen's lien statute, the Contribution Among Tortfeasors Act, real estate statutes and insurance and tax statutes. I have studied all of the titles and chapters governing the courts and judges. I have read every Tennessee statute dealing with bond issues. I have conducted foreclosure sales. I have worked extensively with the Uniform Commercial Code. I have dealt with procedural matters such as pretrial and scheduling matters, discovery and discovery disputes, stays, injunctions, motions to alter or amend, Rule 60 motions, and appeals, both interlocutory and as of right.

I am respectful of the interaction between federal and state law. For example, in a bankruptcy case in East Tennessee, the court had to interpret a 1987 Tennessee statute that had never been construed by a Tennessee court. I thought that the state courts should have the first opportunity to construe the statute, so I invoked Supreme Court Rule 23. The Supreme Court accepted the referral and definitively interpreted the statute. *See* Question 34, Exhibit A.

The bankruptcy practice in Nashville is quite collaborative. There are good communications among consumer and business bankruptcy attorneys, the bench, the Clerk's office, the office of the United States Trustee, the panel Trustees, the standing Chapter 13 Trustee, and others. There is an active Nashville Bar Bankruptcy Committee, and we work together on drafting amendments to the Local Rules and otherwise improving the practice. We use electronic filing and have just begun to use electronic exhibits during hearings and trials. I would carry these practices and experiences into a Supreme Court judgeship, with an interest in improving trial and appellate court efficiency, cost savings, and collegiality within the state judicial system.

Special Cases:

A local federal lawsuit between Brentwood Academy and the Tennessee Secondary Schools Athletic Association ("TSSAA") went to the United States Supreme Court twice. The dispute had to do with the TSSAA's sanctioning of Brentwood Academy under its recruiting rule. The alleged infraction was notifying boys who had been accepted for admission and had committed to enter the Academy in the fall, that they were allowed to attend spring football practice. This was done because one boy had asked the Academy whether he could attend practice. Since the answer was "yes," the school felt that all admitted and committed students were entitled to the information. The first appeal to the Supreme Court was as to whether the TSSAA was a state actor such that the First Amendment of the U. S. Constitution applied. When the Supreme Court granted the Academy's petition for a writ of certiorari, Mr. Lee Barfield, counsel for the Academy, asked me whether TLAW would write an *amicus curiae* brief in support of the Academy's position that the TSSAA was a state actor. Mr. Brantley Phillips, with Mr. Barfield's firm, met with the TLAW Board. We voted to submit a brief, and I wrote the brief and attended the argument. This was done *pro bono*. The Court held that the TSSAA was a state actor. *Brentwood Academy v. TSSAA*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001).

When the Supreme Court granted a second petition for writ of certiorari, Mr. Barfield again asked TLAW to submit an *amicus* brief, we agreed, and I again wrote the brief *pro bono*. This time, the TSSAA prevailed on the merits. *TSSAA v. Brentwood Academy*, 551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166 (2007).

I was listed as an author on an *amicus curiae* Supreme Court brief in the appeal of the Patient Protective and Affordable Care Act ("PPACA") or "Obamacare." The brief focused on the premise that the "individual mandate" is unconstitutional under the Tenth Amendment of the U. S. Constitution. Tennessee had passed the Tennessee Health Freedom Act, T.C.A. § 56-7-1016, which brought the interaction between the Tenth Amendment and "Obamacare" squarely into play. I worked with several legislators to recruit Senators and Representatives to serve as *amici*. Seventy-five Senators and Representatives signed on. (The General Assembly was in recess and other legislators who would likely have joined could not be reached in time.) The brief was authored by the Goldwater Institute in Arizona, and because I reviewed, added points and suggested edits to the brief, the principal author listed my name as co-counsel of record along with an attorney in another state.

Other Activities:

Tennessee Economic Council on Women - In 1998, the General Assembly created the Tennessee Economic Council on Women. Its purpose is to "address the economic concerns and needs of women in Tennessee, which concerns and needs include, but are not limited to, employment

policies and practices, educational needs and opportunities, child care, property rights, health care, domestic relations, and the effect of federal and state laws on women. In order to address these concerns and needs of women, the council may conduct research, hold hearings, develop recommendations and policy, educate the public and engage in activities for the benefit of women."

The Council has 21 members, most coming from designated constituencies. They serve without compensation. I was an at-large member, nominated by TLAW, and was Secretary for my entire six-year term. The Council was and remains active and visible. I devoted a substantial amount of time to my position. We made speeches and held hearings around the state. We interacted with the Legislature, local governments, small and large businesses, and women's and other groups. One issue on which we engaged in significant research was the economic effect of domestic violence. The issue had never been approached from that perspective, and the findings generated a lot of attention. The research has continued for years and resulted in a report to the General Assembly after my term ended: http://www.tn.gov/sos/ecw/The%20Cost%20of%20Domestic%20Violence.pdf

The Council applied for and received a grant from the Tennessee Attorney General. The funds came to that office from the settlement of an out-of-state class action lawsuit. That inspired the Council to form a foundation in order to raise additional funds beyond its state appropriation. The Executive Committee of the Council also sits on the Board of the Foundation, and I was Secretary of that entity as well. The Foundation holds a Women's Economic Summit each year in Nashville, awarding scholarships and attracting national speakers such as retired Justice Sandra Day O'Connor.

My term ended in 2004 and I was not eligible for reappointment for two years. It was expected that I would be reappointed in 2006, but my appointment to the Tennessee Ethics Commission precluded that.

Board of Professional Responsibility - In 2003, I was appointed to be a hearing officer for the Board of Professional Responsibility. This entailed reviewing and approving matters in which the Board's staff recommended dismissal. In some cases, it involved performing the functions of a trial judge, entering scheduling orders, holding preliminary hearings, etc. One complicated case went through the entire contested case procedure, with two hearings.

Tennessee Ethics Commission - My reappointment to the Tennessee Economic Council on Women was in the works in 2006, when two women who were leaders in the House Republican Caucus (now-Speaker Beth Harwell and now-Senator Dolores Gresham) asked me to allow my name to be submitted for appointment to the newly-created Tennessee Ethics Commission. The Commission was a response to the "Tennessee Waltz" scandal. It regulates lobbying and entertainment of and gifts to state officials. It enforces registration requirements for lobbyists and employers of lobbyists, and the filing of financial disclosure statements by candidates and officeholders of all three branches of state and local government.

The appointing authorities are the Governor, the Lieutenant Governor and the Speaker of the House, each of whom appoints a Republican and a Democrat. Speaker Jimmy Naifeh appointed me along with my Democrat colleague, Ms. Dianne F. Neal, former counsel to Governor Ned McWherter and former General Counsel of the Public Service Commission, later the Tennessee Regulatory Authority.

This service lasted from the spring of 2006 until November 2010. The position was uncompensated and required from 10 to 40 hours of my time per week, which obviously included a great deal of evening and weekend time. We usually met monthly, and meetings lasted all day. My service was both rewarding and challenging. The position enabled me to have significant interaction with members of the Legislature and legislative staff of both parties, attend and testify at committee hearings in both houses, and attend floor sessions. We interacted with the Attorney General's Office and the Office of the Secretary of State (which, by statute, provided administrative support). I drafted or extensively edited documents issued by the Commission. We held hearings and adjudicated the imposition of civil penalties on regulated persons. We administered complaints alleging that officials, candidates, lobbyists and employers of lobbyists had violated the law. We engaged in rulemaking. In the early years of the Commission, much time was spent on the preparation and issuance of advisory opinions sought by regulated persons. I wrote Commission opinions that were the equivalent of judicial opinions. We dealt with administrative issues affecting a state agency, such as management, budgeting and the Internet.

The Commission's proceedings are governed by the Open Meetings Act and the Uniform Administrative Procedures Act. Its records are subject to the Public Records Act. Hence, I became familiar with all of those statutes, reading all of the relevant case law. In addition, I researched many other points, and paid my firm's Lexis charges at my own expense.

The Commission entered its sunset year, so I became familiar with the "Sunset Law" and was heavily involved in the activities and hearings that led to its continuation as a division of the new Bureau of Ethics and Campaign Finance.

The terms of the initial appointees were staggered. My colleague Dianne Neal and I, the House appointees, were the only initial appointees to serve a full term.

First Amendment Moot Court Competition - Although this is not judicial experience, I would like to mention the fact that each year, I serve as a U. S. Supreme Court Justice for the moot court competition held by the First Amendment Center and Vanderbilt Law School. This includes reading a substantial bench brief on the First Amendment issue being addressed, attending an interesting CLE program, and presiding at mock Supreme Court arguments by moot court teams from law schools around the country.

This is one of my favorite professional activities. One reason for this is that it allows me to pursue my strong interest in constitutional law and increase my familiarity with the First Amendment and the equivalent provisions of the Tennessee Constitution.

Jury Duty - While practicing in Nashville, I have been called to jury duty twice. The first time, I did not sit on a panel. The second time, I sat as a juror on a criminal case in which I again served as foreperson.

Other – I am interested in many areas of law. I enjoy reading state and federal cases and articles that strike my notice. I enjoy studying the Constitutions and legal history and reading treatises, biographies and histories.

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

This question is duplicated in Question 8 above and was answered there.

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

I served as a quasi-judicial officer as a member of the Tennessee Ethics Commission from 2006 through 2010, including participating in a UAPA contested hearing with an Administrative Law Judge. The Commission has jurisdiction to impose civil penalties of up to $10,000.00. Most of the matters consisted of imposing civil penalties on lobbyists, employers of lobbyists, officials and candidates who had not filed financial disclosures on time. Often, the violator asked for reconsideration, seeking reduction of the penalty. With regard to this category of civil penalties, I devised a grid, which the Commission approved, to allow penalties to be as consistent as possible.

Beyond that, complaints were filed under T.C.A. § 3-6-201, *et seq.*, such as for violations of the prohibition against giving gifts to officials. By statute, nearly all of these remain confidential. One proceeding that became public is the subject of an opinion that I wrote, *In re Complaint of Mikhael Shor*, Docket No. C 08-08 (Tenn. Ethics Commission 2008), Exhibit G to this application.

One individual who filed a complaint filed two appeals of the dismissal of the complaint for lack of jurisdiction, once by the staff and once by the Commission itself. I wrote a detailed opinion when the Commission dismissed the complaint. The Chancery Court affirmed the dismissal. Even though the dismissal was appealed, the proceeding remained confidential from the Commission's standpoint, so I cannot give more detail.

These cases were significant because they were the earliest decisions and precedents interpreting and applying the recently-enacted and much-publicized ethics statute.

I also served as a quasi-judicial officer as a hearing panel member for the Board of Professional Responsibility from March 2003 until March 2009, including a case in which I chaired a panel at two significant hearings and wrote lengthy opinions. I am reluctant to give identifying information about the proceeding. The attorney had been convicted of a felony. The Supreme Court upheld the conviction so it was not a matter of dispute. The hearing panel followed the ABA and Tennessee guidelines for the imposition of sanctions. The attorney's original counsel withdrew. The attorney obtained new counsel, who was willing to challenge the hearing panel's decisions. He did so, even though he admitted at a hearing that he had never read the statute that his client had been convicted of violating. This case was significant because it entailed a close study of the standards for the imposition of sanctions and the law governing recusal.

11. 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.

I am a Co-Trustee of my father's testamentary trust and the Trustee of my mother's testamentary trust. I have served as Executrix or Co-Executrix of the estates of family members. I have served as attorney-in-fact for several family members. I have drafted wills, trusts, powers of attorney, living wills, etc., for family members.

I participated with my husband in working with an institution in Virginia that was the guardian for his aunt, who was incompetent, and assisting his mother as Executrix of the aunt's (her sister's) estate and Trustee of her inter vivos trust.

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

In addition to the states in which I am admitted to practice (*see* Question 3), I am admitted to practice before the following:

United States Supreme Court
United States Courts of Appeals for the Sixth and Third Circuits
United States District Courts for the Western, Middle and Eastern Districts of Tennessee, Eastern District of Wisconsin and Northern District of Alabama

13. 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.

I applied to the Judicial Selection Commission for judgeships on the Court of Appeals in 1997 and 1998. The dates of the meetings are not available, but they were in the late summers or early falls of 1997 and 1998. The body did not submit my name to the Governor as a nominee. I applied to the Judicial Nominating Commission for a position on the Court of Appeals in 2013. Because the Commission's existence was about to expire, the Commission submitted two groups of three nominees to the Governor. I was in the second group submitted.

EDUCATION

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

Sweet Briar College. Sweet Briar, Virginia: September 1967 – May 1968; September 1968 - May 1969. Major: Government. I did not receive a degree because I decided to transfer to Vanderbilt to complete my undergraduate education.

Lambuth College, Jackson, Tennessee: Summer 1968. I did not receive a degree because I was only enrolled in summer school, earning 6 hours of credit in Economics.

Vanderbilt University, Nashville, Tennessee: September 1969 - May 1970; September 1970 – May 1971. B.A. *cum laude*. Major: Political Science. Phi Beta Kappa; Dean's List; Undergraduate Political Science Association; Delegate, Model United Nations, St. Louis, Missouri; Delegate, Student Council on U. S. Affairs, U. S. Military Academy; Member and Officer, Vanderbilt Young Republicans; Campus Chairman, Winfield Dunn for Governor, 1970; Vanderbilt Concert Choir; I. B. Tigrett Memorial Scholarship (Full Tuition).

University of North Carolina at Chapel Hill: Summer 1970. I did not receive a degree because I was only enrolled in summer school, earning 12 hours of credit.

Cumberland School of Law: September 1973 – May 1974; September 1974 – May 1975; September 1975 - May 1976. J. D., *magna cum laude*. Class Rank: Third; *Curia Honoris* Honor Society; Dean's List; Who's Who Among Students in American Colleges and Universities; Associate Editor, *Cumberland Law Review*; Cumberland Moot Court Board; Winner, Moot Court Appellate Argument Competition, Law Day 1975; Academic Standards Committee; Full Tuition Merit Scholarship; American Jurisprudence Book Awards: Civil Procedure, Real Property, Corporations, Estates and Trusts, Uniform Commercial Code, Domestic Relations; Phi Delta Phi Legal Fraternity; Assistant to professor in editing his treatise on the UCC.

PERSONAL INFORMATION

15. State your age and date of birth.

65. February 14, 1949.

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

Over 33 years, since July 1980.

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

Over 33 years, since July 1980.

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

Davidson.

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

I have not served in the military.

My husband was a Regular Army officer during the first two years of our marriage, and later served in the Army Reserves.

20. 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.

No.

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

No.

22. Please 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.

Not applicable.

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

No, nor at any time more than five (5) years ago.

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

No.

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

I filed a collection lawsuit in Alabama in 1977. I have no record of the docket number. The lawsuit was filed in Civil Court, the Alabama equivalent of General Sessions Court. I won a default judgment and collected what I was owed through garnishment.

A person who filed a Complaint with the Tennessee Ethics Commission appealed the Commission's dismissal of the case under T.C.A. § 3-6-203(a) because the Complaint did not allege conduct that was within the Commission's jurisdiction. He twice appealed the dismissal to the Chancery Court of Davidson County. The Commission as an entity was the named appellee, so my name does not appear. The appeals were consolidated and the court affirmed the Commission. Under T.C.A. § 3-6-201(a), the Commission's records never became public, as the matter never reached the stage of a determination of probable cause. Violation of the confidentiality of the record is a misdemeanor under § 3-6-201(b). There is no exception for the situation where a complainant appeals a dismissal and thus makes it a public record himself. Out of an abundance of caution, I am not disclosing identifying information.

As Executrix of relatives' estates, I have participated in proceedings to open, administer and close their probate estates and amend the trust created under my father's will.

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

Appointed by Speaker Jimmy Naifeh to newly-created Tennessee Ethics Commission; confirmed unanimously by Tennessee House of Representatives, April 19, 2006, for four-year term ending in 2010

Nashville and Tennessee Women's Political Collaboratives (Director-at-Large of NWPC in 2004)

Nashville Kiwanis Club

Phi Beta Kappa

Phi Beta Kappa Association of Nashville (Secretary, 2005 to Present)

Sugartree Homeowners' Association (Board Member, 2006-2008; Secretary 2007-08; Past Board Member, Three-Year Term; Past Chair, Architectural Review Committee and Covenants and Bylaws Committee)

Westminster Presbyterian Church

Sweet Briar, Vanderbilt and Cumberland Alumnae/Alumni Associations (Sweet Briar Class President, 2006-2011)

Nashville and Tennessee Republican Women's Clubs

First Tuesday Republican Luncheon Club

Republican National Lawyers Association

English-Speaking Union of the United States and Nashville Branch*

*The English-Speaking Union is not an "English First" organization. It was founded in England and its website, http://www.esu.org/, lists chapters in 59 countries from Albania to Yemen. Until 2011, the President of the E-SU was Prince Philip. Since his retirement, the President has been Princess Anne. Former Representative Patricia Schroeder is the outgoing Chair of the English-Speaking Union of the United States (http://www.esuus.org/esu/). One of her predecessors was President Dwight D. Eisenhower. Activities include sponsoring scholarships for students, providing grants to send teachers to other countries, holding Shakespeare competitions, and other endeavors to foster international understanding. The Nashville Branch (http://www.esuus.org/nashville/) sends a high school teacher to a Shakespeare workshop either at the Globe Theatre in London, or at one of two locations in the United States. Each year, it hosts a teacher from another country, such as Argentina, who is touring cities in the United States. It holds local get-togethers ranging from dinners with guest speakers, to Sunday afternoon teas, to a Twelfth Night pot-luck dinner.

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

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

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

In response to Question 27.a.:

I belonged to a high school sorority from tenth through twelfth grades.

I belonged to the Brownie Scouts and Girl Scouts from third through eighth grades.

When I attended Sweet Briar College, which was a women's college, I belonged to various campus organizations.

I was nominated by the Tennessee Lawyers' Association for Women and appointed by Governor Don Sundquist to be one of the original members of the Tennessee Economic Council on Women, created under T.C.A. § 4-50-101, *et seq*. For most of my tenure, the Council consisted only of women. The governing statute does not limit membership to women, except that one member shall be appointed from the legislative women's caucus. The Governor and Speakers appoint the Council members, who are nominated by statutorily-designated constituencies. Undoubtedly, the nominating constituencies and appointing authorities were inclined to nominate and appoint women to such an entity.

Late in my term, a male legislator was appointed, and a different male legislator is now on the Council. My term ended in 2004, and the statute prohibited those original members who had served a full six-year term from being reappointed, T.C.A. § 4-50-101(d).

Question 27.b. is not applicable.

ACHIEVEMENTS

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

Special Member, Alabama State Bar
American Bar Association
    Sections on Litigation and Law Practice Management (Women Rainmakers Committee)
Elected to American Bar Foundation, 2012
Tennessee Bar Association
    Section on Bankruptcy Law
Elected to Tennessee Bar Foundation, 2007
Federal Bar Association
    Nashville Chapter, Treasurer 2012 to present
Hearing Officer, Tennessee Board of Professional Responsibility, 2 Terms, March 2003 - March 2009
Tennessee Supreme Court Historical Society Board of Directors, 2004 -2013
    Chair, Publication Committee, 2006 to present; Secretary, 2012-2014
Tennessee Judicial Conference Bench-Bar Relations Committee, 2000-2003, 2005-2014
    Chair, 2001-2002
Nashville Bar Association
    Secretary and Board Member, 2006; CLE Committee (Vice-Chair, 2000, Chair 2001, CLE Excellence Award, 2005); Appellate Practice Committee; Bankruptcy Court Committee (Chair, 1997); Federal Court Committee
Elected to Nashville Bar Foundation, 1999
Tennessee Lawyers' Association for Women
    President, 2000-2001
        Ex Officio Member, Tennessee Bar Association Board of Governors
        Ex Officio Member, Tennessee Judicial Conference Executive Committee
    President-Elect, 1999-2000
    Board Member, 2001-2004
    Treasurer, 1994-1995, 2004 to Present
    Past Chair, Judicial Appointments and Elections Committee and Bylaws Committee
Wrote Two *Pro Bono Amicus Curiae* Briefs in United States Supreme Court: *Brentwood Academy v. Tenn. Secondary Schools Athletic Assn*, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001); *Tenn. Secondary Schools Athletic Assn v. Brentwood Academy*, 552 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166 (2007)

Nashville Lawyers' Association for Women
Chair, Networking Committee, 2005-2006; Past Chair, New Admittee Breakfast
American Bankruptcy Institute
International Women's Insolvency and Restructuring Confederation
National Association of Chapter 13 Trustees (Dates Not Certain)

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

Martindale-Hubbell AV rating (at least 20 years).

Elected to American, Tennessee and Nashville Bar Foundations.

Served as President and Treasurer (for many years) of TLAW.

Served as Secretary of Nashville Bar Association.

Served as Chair of the Tennessee Judicial Conference Bench-Bar Relations Committee.

Recipient of Nashville Bar Association CLE Excellence Award.

I believe that my appointments to the Tennessee Economic Council on Women and the Tennessee Ethics Commission were based upon my professional accomplishments and reputation. At the conclusion of our service, the House and Senate adopted a Joint Resolution commending my colleague Dianne Neal and me for our service.

I have been asked to present numerous speeches at programs such as CLE's.

In March 2014, in celebrating the centennial of coeducation, Samford University is recognizing women who have shaped the university from across the academics units. Cumberland School of Law is profiling me to showcase my professional success. More than a dozen alumnae will be profiled during March 2014 on Samford University's website.

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

Article on firm's website: "Special Priority for Sellers of Goods in Customers' Bankruptcy Cases," January 2010
Paper: "Expanding 11 U.S.C. § 330(a)(4)(B) to Compensation for Attorneys Representing Chapter 11 Debtors," for ABA Business Law Section, Business Bankruptcy Committee, Individual Chapter 11 Subcommittee Meeting, October 25, 2012
Collaborated with Bench-Bar Relations Committee subcommittee to prepare materials and produce and present continuing education programs on judicial ethics to trial court judges and General Sessions judges, ca. 2000

Seminar materials:
TBA seminar, 1995 (can no longer access materials)
Creditors' rights seminar, 1997 (can no longer access materials)
Heritage seminar, "Ethical Problems and Considerations in Bankruptcy Law," September 24 and 25, 1997
NBA bankruptcy seminar, May 19, 1998 (can no longer access materials)
Heritage seminar, "Collection Law and Strategies for Lenders and Creditors" (Segment on Consumer Bankruptcy Law), July 15, 1999
Lorman seminar, "Advanced Collection Law in Tennessee" (Segment on Bankruptcy: Does the Collection Stop?), March 22, 2001
NBA seminar, "Post-Judgment Collection," March 14, 2002
NBA seminar, "How Would Bankruptcy Affect Your Client?" (Segment on Bankruptcy Basics), October 17, 2002
NBA seminar, "Perfecting Your Appeal" (Segment on Supreme Court Rule 23), January 2003
LSI Law Seminars International, "Advanced Workshop on Real Estate Remedies – Single-Asset Bankruptcy Cases," March 6, 2003
Sterling seminar, UCC Article 9, "Protecting Existing Loans Under Revised Article 9 and Making the Transition," January 13, 2004
Sterling seminar, "Foreclosure and Repossession" (Segment on Bankruptcy and Foreclosure), April 6, 2004
NBA seminar, "How to Win the War After Winning the Battle: A Systematic Approach to Execution of a Tennessee Judgment," July 2005
NBA seminar, "Follow the Money: Campaign Finance Law for the 2006 Tennessee Races" (Segment on What's Special About Judicial Races?), November 1, 2005
Lorman seminar, "Issues in Commercial Mortgage Foreclosure in Tennessee," March 16, 2006
National Business Institute ("NBI") seminar, "Impact of Bankruptcy on Real Estate and Title Insurance," March 28, 2006
NBA seminar, "Federal Rules Update: Discovery of Electronic Information," September 25, 2006
Legal Secretaries International, Inc. seminar, "Federal Rules Update: Discovery of Electronic Information," October 26, 2007
NBI seminar, "Impact of Bankruptcy on Real Estate and Title Insurance," March 6, 2008
NBI seminar, "Protecting the Creditor's Rights in Bankruptcy" (Segment on Special Rights in Particular Property), 2011
NBI seminar, "Real Estate Law: Advanced Issues and Answers" (Segment on Liens Against Real Property: Perfection and Enforcement Thereof), December 3, 2012

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

Please note that my service on the Ethics Commission (2006 - 2010) required a tremendous amount of time. I had to forego many activities, including presenting at seminars.
In addition to seminars that I have produced, I have presented at the following seminars for which credit was given, in the last five years:
NBI seminar, Protecting the Creditor's Rights in Bankruptcy (Segment on Special Rights in Particular Property), 2011

NBI seminar, Real Estate Law: Advanced Issues and Answers (Segment on Liens Against Real Property: Perfection and Enforcement Thereof), December 3, 2012

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

I have held two (2) public offices. Further information is in the response to Question 8 above.

I was nominated by the Tennessee Lawyers' Association for Women, and appointed by Governor Don Sundquist, to be one of the original members of the Tennessee Economic Council on Women. The governing statute is T.C.A. §§ 4-50-101, *et seq*.

In 2006, I was nominated by the House Republican Caucus and appointed by Speaker Jimmy Naifeh to be one of the original members of the Tennessee Ethics Commission.

I have been an applicant or candidate for office four (4) times:

In 2008, President George W. Bush intended to appoint me to the Board of the Securities Investor Protection Corp. (SIPC), which administers insolvent securities brokerages. I was investigated by the FBI and spent months communicating with the Office of White House Personnel, the White House Counsel's Office and the Office of Governmental Ethics. This took the entire summer of 2008. The appointment required Senate confirmation. The nomination would have gone through the Senate Banking Committee in September of 2008, exactly when the banking crisis occurred. At that late point in President Bush's term, no Presidential appointments were being confirmed, and the Senate Banking Committee was completely consumed by the financial crisis. Therefore, the appointment did not go forward.

I applied three times for appointment to the Tennessee Court of Appeals, in 1997, 1998 and 2013. The position would have been appointive, but if I had been appointed, the position would have become elective.

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

No. However, I was a member of the Tennessee Ethics Commission, which regulates lobbyists.

34. 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.

Exhibit A. *Jahn v. Community Trust and Banking Co. (In re Akins)*, Docket No. M2002-00337-SC-R23-CQ. This was a Chapter 7 Trustee's adversary proceeding in the U. S. Bankruptcy Court for the Eastern District of Tennessee, seeking to avoid (nullify) a deed of trust lien, contending that the acknowledgment was defective. It required interpretation of a 1987 statute that had never been construed, T.C.A. § 66-22-114(b). The title insurance company that had insured the lender's lien engaged me to defend the lender. I invoked Supreme Court Rule 23 so that the highest state court could interpret the statute. This is my Supreme Court brief. The

Court upheld my position in *In re Akins*, 87 S.W.3d 488 (Tenn. 2002). This is entirely my personal effort.

Exhibit B. *AXA Equitable Life Ins. Co. v. Grissom*, Docket No. Case No. 3:11-0618 (M.D. Tenn.). This was a memorandum of law in support of a motion for a temporary restraining order and preliminary injunction. I represented the Plaintiff/Movant, AXA Equitable. The District Court granted the TRO, and the parties entered into an agreed preliminary injunction (both of which documents I drafted). This is entirely my personal effort.

Exhibit C. *Rogers v. Lang (In re Lang)*, Adversary Proceeding No. 3:12-90215 (Bankr. M.D. Tenn.). My firm represented Ms. Pamela Evans of California, who objected to a proposed settlement of the adversary proceeding between the Langs' Chapter 7 Trustee and a California attorney and his law firm, who had committed legal malpractice in Ms. Evans' wrongful death action. All of the research was mine. The initial draft was entirely mine. My law partner, Mr. Thomas H. Forrester, reviewed the draft and I am sure suggested some changes. I estimate that this is 98% my personal effort.

Exhibit D. *Bank of America, N.A. v. Nashville Commons, L.P.*, Docket No. 12-490-II (Chancery Court for Davidson County, Tenn.). This was a receivership proceeding, initiated by Bank of America under its loan documents with Nashville Commons, the owner of a shopping center in Davidson County. My law partner, Mr. G. Rhea Bucy, was the Receiver. Certain litigation was resolved in the U. S. District Court and the Receiver collected some $4.2 million from a letter of credit that had been improperly drawn by the District Court defendant. The receivership was ready to be concluded. At the last minute, a construction company decided to attempt to capture some of those funds by seeking to intervene in the receivership. The Receiver and Bank of America opposed the motions and the Chancellor ruled in their favor, announcing her findings from the bench. The exhibit is the Memorandum Opinion that we prepared to embody her ruling. The initial draft was entirely mine. Mr. Bucy added Paragraph 2 and some additional edits. I estimate that this is 90% my personal effort.

Exhibit E. *Woosley v. Woosley*, Docket No. 3:09-cv-0910 (M.D. Tenn.). I represented the former wife of a Chapter 7 Debtor, who sought to discharge his obligations under a contract with Ms. Woosley that modified their Williamson County marital dissolution agreement, despite the nondischargeability of such obligations under 11 U.S.C. §§ 523(a)(5) and (a)(15). The Bankruptcy Court entered a partial summary judgment in my client's favor, in a Memorandum Opinion which I drafted. The Debtor appealed to the District Court. This exhibit is my brief in the District Court appeal. The District Court affirmed the Bankruptcy Court in *Woosley v. Woosley*, 2010 U.S. Dist. LEXIS 10304 (M.D. Tenn. 2010). This is entirely my personal effort.

Exhibit F. *Mariner's Pointe Interval Owners Association, Inc. v. Econ Marketing, Inc.,* Tennessee Supreme Court Docket No. 01S01-9803-FD-00052. This was a bankruptcy case in which Judge Keith Lundin referred a question of Tennessee law to the Supreme Court under Rule 23. My firm represented Mariner's Pointe. The case was never argued because after we filed our brief, Econ Marketing promptly settled. As this was a 1998 case, I cannot state with specificity the percentage that constitutes my effort as opposed to that of my partner, Mr. Bucy, but the research and drafting were mine with his input and suggestions.

Exhibit G. *In re Complaint of Mikhael Shor*, Docket No. C 08-08 (Tenn. Ethics Commission 2008). Previously, two legislators had requested the Ethics Commission to issue an advisory opinion under T.C.A. § 3-6-107(3), on whether a business and individuals were illegally

lobbying without registering. The Commission declined to issue an opinion because we concluded that only a person actually affected by an advisory opinion could submit a request. Then, an individual filed a Complaint under T.C.A. § 3-6-201(a)(1). The Commission held a hearing and dismissed the Complaint because, as a matter of law, the activity did not constitute lobbying and the alleged violators were not lobbyists. The attachment is the Memorandum Opinion and Order dismissing the Complaint. This is 99.99% my personal effort; I believe that another member of the Commission suggested a couple of words.

ESSAYS/PERSONAL STATEMENTS

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

I am called to serve the public and my profession, and am well-qualified for this position. I love the practice and the study of the law. I enjoy research, analysis and writing, carefully analyzing a complicated factual puzzle and the applicable legal principles -- common law, the United States or Tennessee Constitution, federal or state legislation, or rules of procedure or evidence -- to reach the correct result. The amount at issue or the identity of the parties does not govern my level of interest or effort, or my conclusion. I am conscious of both the practical and precedential aspects of appellate opinions and the need to avoid unintended consequences. I possess common sense, a strong sense of duty, and will work hard and serve with honor and integrity.

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

I have represented numerous people of limited means for greatly reduced fees or gratis (through the *pro bono* program, or privately). My customary rates would have amounted to several hundred thousand dollars. Some matters lasted for years. One involved an appeal to the Sixth Circuit and a petition for writ of certiorari to the Supreme Court.

A client referred by the *pro bono* program in 1994 became a personal friend and long-term *pro bono* client. We talked frequently about his personal problems in addition to his various legal problems. My husband got to know him and gave him clothing, and we gave him food. One of my partners prepared his will. He moved to Georgia and died several years ago.

I have devoted hundreds of hours to activities that qualify for *pro bono* credit.

I applaud the Access to Justice program.

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

Tennessee Supreme Court.

Statewide.

Civil and criminal cases.

Five (5) judges.

My selection would have a positive impact on the administration of justice in Tennessee. I have experience in many areas of substantive and procedural law. I have dealt with parties from indigent individuals to large corporations on all sides of issues, and understand their perspectives. Bankruptcy law is a complicated structure, which may involve any area of federal or state law. Nonjury trials and motion practice utilize the same skills as appellate work. I am able to perceive the nuances and "culture" of a case and discern the decisive facts and points of law. I am deeply interested in constitutional law and legal history. I enjoy the rigorous research, analysis and writing that this judgeship would require. I am collegial, cooperative, supportive of others, and would work well with the other judges, staff, the bench and the bar.

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

The community organizations in which I participate are listed in response to Question 26.

If I am appointed to this judgeship, my first priority will be to devote myself to the duties of my position and to discover how I can best serve the judiciary and be an ambassador to the legal profession and the public. I will be eager to speak to civic groups, students, and other audiences. I will be active in the Tennessee Judicial Conference and, if time permits, in the judiciary at the national level.

I will want to take appropriate courses through the National Judicial College and within Tennessee, such as the Tennessee Judicial Academy. I will present at and continue to attend education courses, conferences and seminars on a variety of subjects.

I expect to remain active in the TBA, NBA, TLAW and LAW, and continue to serve on committees.

I cannot be certain at this time what other community involvement I would have.

39. 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 was raised in a small town, Jackson. My parents were extraordinary individuals, who taught me sound values and life skills by word and example. They set high standards and instilled a love of learning as well as a love of life and my fellow human beings. I was surrounded by adults who were fine people and showed interest in me.

Small town life is quite egalitarian, and I was raised to treat everyone with the same courtesy.

I never believed that a girl could not excel academically or in life. In public school, expectations for girls were the same as for boys.

I succeeded in school and participated in many extracurricular activities. I was Valedictorian of my high school class and a National Merit Semifinalist. (My father declined to submit the

paperwork for me to become a Merit Scholar.)

I have a facility for language and know a smattering of Spanish, French, German and Italian.

I excel at science and math, and would understand medical, engineering, chemical, financial and similar issues.

I believe in professional courtesy and collegiality, and generally get along famously with fellow - and opposing - counsel.

I have had the pleasure of serving on committees with state and federal judges, getting to know them as intelligent, interesting people and not as authority figures remote from day-to-day life.

I possess a sense of humor and love laughter. If I were a judge, I would remain humble and unassuming while conducting myself with appropriate dignity.

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

Yes.

There have been occasions when, in my opinion, a statute could have been worded better or should have been different. I have disagreed with trial and appellate court rulings. Nevertheless, I am bound by statutes and rules as enacted and by court rulings, unless a lower-court ruling is reversed on appeal, or it would be appropriate to urge a change in existing law or interpretation thereof, or to assert that a statute is unconstitutional.

There are provisions of the Bankruptcy Code, particularly the 2005 amendments, and Supreme Court opinions on bankruptcy law, with which I disagree, but I must comply with them. There are provisions of the Tennessee Ethics Act which could have been improved upon, but it was my duty to apply the statute as written.

By submitting this application, I am a candidate for judicial office as defined in Supreme Court Rule 10, the Code of Judicial Conduct. Canon 4 applies to me as a candidate. I am concerned that I could violate that Canon by naming specific statutes, rules or cases with which I disagree.

REFERENCES

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

A. Mr. Thomas H. Forrester
Member, Gullett, Sanford, Robinson & Martin, PLLC
Suite 1700
150 Third Ave., South
Nashville, TN 37201

	615-244-4994
B.	Mr. M. Taylor Harris, Jr. Member, Gullett, Sanford, Robinson & Martin, PLLC Suite 1700 150 Third Ave., South Nashville, TN 37201 615-244-4994
C.	Ms. Dianne F. Neal Faculty, Nashville School of Law
D.	Dr. William Ford Weatherford Chair of Finance Room N330, Bldg. BAS MTSU Box 0027 Murfreesboro, TN 37132 (615) 898-2889
E.	Ms. Yvonne Wood Chair, Tennessee Economic Council on Women

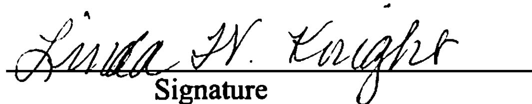
AFFIRMATION CONCERNING APPLICATION

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 Justice of the Supreme 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: February 21, 2014.



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.

Linda W. Knight
Type or Print Name

Linda W. Knight
Signature

February 21, 2014
Date

9205
BPR #

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

Alabama – Special Member No. 0036-N74L

EXHIBIT A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

COMMUNITY TRUST & BANKING COMPANY,	
Movant/Petitioner,	Docket No. M2002-00337-SC-R23-CQ
v.	
RICHARD P. JAHN, JR., TRUSTEE,	
Respondent.	
In re:	
RONALD AKINS,	United States Bankruptcy Court for the Eastern District of Tennessee Case No. 01-13388 Chapter 7 Judge John C. Cook
Debtor.	
RICHARD P. JAHN JR., TRUSTEE,	
Plaintiff,	
v.	
COMMUNITY TRUST & BANKING COMPANY,	Adversary Proceeding No. 01-1182
Defendant.	

ON CERTIFICATION UNDER TENNESSEE SUPREME COURT RULE 23, "CERTIFICATION OF QUESTIONS OF STATE LAW FROM FEDERAL COURT" -- BRIEF OF COMMUNITY TRUST & BANKING COMPANY REGARDING QUESTION CERTIFIED TO THIS COURT BY THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

COMMUNITY TRUST & BANKING COMPANY,	)	
Movant/Petitioner,	)	Docket No. M2002-00337-SC-R23-CQ
v.	)	
RICHARD P. JAHN, JR., TRUSTEE,	)	
Respondent.	)	
In re:	)	
RONALD AKINS,	)	United States Bankruptcy Court for the Eastern District of Tennessee Case No. 01-13388 Chapter 7 Judge John C. Cook
Debtor.	)	
RICHARD P. JAHN JR., TRUSTEE,	)	
Plaintiff,	)	
v.	)	
COMMUNITY TRUST & BANKING COMPANY,	)	Adversary Proceeding No. 01-1182
Defendant.	)	

BRIEF OF COMMUNITY TRUST & BANKING COMPANY REGARDING QUESTION OF TENNESSEE LAW CERTIFIED BY THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

MAY IT PLEASE THE COURT:

Community Trust & Banking Company ("CTB") of Ooltewah, Tennessee files this Brief pursuant to the certification of a question of Tennessee law to this Court by the United States Bankruptcy Court for the Eastern District of Tennessee. CTB was designated the moving party/petitioner.

JURISDICTIONAL STATEMENT

This matter is before this Court under Tennessee Supreme Court Rule 23, "Certification of Questions of State Law from Federal Court."

STATEMENT OF ISSUES PRESENTED

1. Whether the following acknowledgement on a deed of trust is valid under Tennessee law:

> State of Tennessee
> County of Bradley
>
> I, Tammy Bentley, a Notary Public of the county and state first above written, do hereby certify that Ronald L. Akins, unmarried, personally appeared before me this day and acknowledged the execution of the foregoing instrument.
>
> Witness my hand and official seal, this 12th day of April, 2000.
>
> //s// Tammy Bentley
> Notary Public
> My commission expires: 2/26/2003.

2. If the foregoing certificate of acknowledgement is not valid, then whether the admittedly valid acknowledgment on the assignment of rents cures the defective acknowledgement on the deed of trust under the circumstances of this case.

STATEMENT OF THE CASE

The Debtor, Ronald L. Akins, Sr., filed a petition under Chapter 7 of Title 11, United States Code on May 25, 2001, in the United States Bankruptcy Court for the Eastern District of Tennessee, Case No. 01-13388. Richard P. Jahn, Jr. was appointed substitute Chapter 7 Trustee on June 7, 2001.

The Trustee filed an adversary proceeding[1] on August 14, 2001, styled Richard P. Jahn, Jr., Trustee v. Community Trust & Banking Company, Adversary Proceeding No. 01-1182 (the "Adversary Proceeding"). The Trustee seeks to "avoid," i.e., nullify, a lien under a deed of trust of which CTB is the beneficiary.[2] A copy of the Complaint is attached hereto as **Appendix 1**.

CTB filed its Answer on September 14, 2001, a copy of which is attached hereto as **Appendix 2**, and its Amended Answer on October 4, 2001, a copy of which is attached hereto as **Appendix 3**.

On January 11, 2002, the Trustee filed his Motion for Partial Summary Judgment, a copy of which is attached hereto as **Appendix 4**.

On January 14, 2002, the parties filed their Stipulation of Facts and Documents, with Exhibits A and B attached thereto, a copy of which is attached hereto as **Appendix 5**. The stipulated documents included the Petition and the Schedules of Debts and Property that Ronald Akins filed, as all debtors in bankruptcy must.[3] These Schedules were not included with the

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[1] Some proceedings in Bankruptcy Court are full-blown lawsuits, or adversary proceedings. The proceedings that must be adversary proceedings are listed in Federal Rule of Bankruptcy Procedure ("FRBP") 7001, and include actions to avoid liens, which is the relief sought in the Adversary Proceeding. An adversary proceeding is commenced by the filing of a Summons and Complaint, etc. FRBP 7004. The judgment adjudicating the Adversary Proceeding will be a final order, reviewable on appeal. 28 U.S.C. §§ 157(b), 158(a)(1) (1993). Other kinds of proceedings within a bankruptcy case are commenced by the filing of a motion, and are referred to as "contested matters." FRBP 9014. A copy of the aforementioned Rules and FRBP 1007(b)(1), mentioned in Footnote 3 below, is attached hereto as **Exhibit A**.

[2] To the best of CTB's knowledge, no portion of the official record in the Bankruptcy Case has been transmitted to this Court. Hence, copies of pertinent documents in the record in the Bankruptcy Case are attached hereto as appendices in order to aid the Court in determining the issues before it.

[3]"A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." 11 U.S.C. § 301 (1993).

"Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of

Stipulations and are attached hereto as **Appendix 6**.

On January 25, 2002, CTB filed its Motion for Partial Summary Judgment, Combined With Response to Trustee's Motion for Partial Summary Judgment, a copy of which is attached hereto as **Appendix 7**.

On February 12, 2002, the Bankruptcy Court entered its Order Certifying Questions of Tennessee Law to the Tennessee Supreme Court, a copy of which is attached hereto as **Appendix 8**.

STATEMENT OF FACTS

The parties have stipulated the relevant facts, set forth in their Stipulation of Facts and Documents, a copy of which is attached hereto as **Appendix 5**. The following are the facts that are not set forth in the Statement of the Case, supra at 2-4.

1. Among other assets, the Debtor, Ronald Akins, owned an interest in two parcels of real estate on his petition date. These parcels were a 69-acre farm in Meigs County, Tennessee (the "69 Acres") and a small tract of less than an acre known as The Shoreline Restaurant property, also in Meigs County (the "Restaurant"). The Debtor owned the 69 Acres as a tenant-in-common with his brother, Curtis L. Akins. The Restaurant was solely owned by the Debtor and had been leased or rented to a tenant who operated the restaurant. The tenant continued to operate the Restaurant postpetition.

2. In April, 2000, CTB made a loan of $175,000.00 (the "$175,000.00 Loan") to the Debtor. The loan was to be secured by a lien against the 69 Acres and the Restaurant. The Debtor alone signed a note dated April 12, 2000 for $175,000.00 to CTB (the "$175,000.00 Note").

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executory contracts and unexpired leases, and a statement of financial affairs, prepared as prescribed by the appropriate Official Forms." FRBP 1007(b)(1).

3. On April 24, 2000 a Deed of Trust (the "$175,000.00 Deed of Trust") was recorded in the Office of the Register of Deeds of Meigs County, Tennessee ("ROMCT"), securing payment of the $175,000.00 Note, encumbering the 69 Acres and the Restaurant. The document on its face reflects that both Ronald and Curtis Akins executed it and acknowledged it on April 12, 2000.

4. The separate acknowledgment clauses on the $175,000.00 Deed of Trust for both the Debtor and Curtis Akins were the same. The Debtor's clause read as follows:

> State of Tennessee
> County of Bradley
>
> I, Tammy Bentley, a Notary Public of the county and state first above written, do hereby certify that Ronald L. Akins, unmarried, personally appeared before me this day and acknowledged the execution of the foregoing instrument.
>
> Witness my hand and official seal, this 12th day of April, 2000.
>
> //s// Tammy Bentley
> Notary Public
> My commission expires: 2/26/2003.

5. To secure the loan further, the Debtor also executed a Collateral Assignment of Rents (the "Assignment of Rents") in favor of CTB as to the Restaurant. This document was signed by Ronald L. Akins and acknowledged before Tammy Bentley, Notary Public, on April 12, 2000. This document was duly recorded in the ROMCT on April 24, 2000 at Book 82, Pages 197-200. The Trustee does not dispute the validity of this document or its acknowledgment.

6. On the face of the $175,000.00 Deed of Trust, the Meigs County Register of Deeds wrote the following: "See Assignment in Trust Bk 82, pages 197-200. 4-24-00 Janie Steiner."

7. Curtis Akins died in December, 2000. He left no will and his estate was not probated as of the petition date.

8. As of the petition date the Debtor owed CTB $179,362.78 on the $175,000.00 Note.

9. In the course of the administration of the estate, the Trustee conducted a public sale of the 69 Acres pursuant to § 363(h) of the Bankruptcy Code. The gross proceeds of the sale were approximately $290,000.00. The net proceeds from the sale were approximately $251,000.00.

10. The Trustee is also in the process of concluding a private sale of the Restaurant pursuant to § 363(f) of the Bankruptcy Code and anticipates receiving approximately $35,000.00 for same. The parties stipulate that $1,000.00 of the sale proceeds would be attributable to restaurant equipment, with the remainder being attributable to the real estate, with the costs of sale to be apportioned between the $1,000.00 and the $34,000.00 in the same proportions. To date, the estate has not received any prepetition or postpetition rents from the tenant in the restaurant.

11. Attached to the Stipulations (**Appendix 5**) were a true copy of the $175,000.00 Note and $175,000.00 Deed of Trust dated April 12, 2000 (Exhibit A) and a true copy of the Assignment of Rents dated April 12, 2000 (Exhibit B).

SUMMARY OF ARGUMENT

Richard P. Jahn, Jr., the Trustee in the above-styled Chapter 7 case, filed an adversary proceeding pursuant to 11 U.S.C. § 544 (2001), seeking to avoid CTB's liens. The Trustee alleges that the certificate of acknowledgment on a deed of trust given by the Debtor in favor of CTB is defective under Tennessee law and that the liens created thereunder are avoidable.

CTB asserts that the acknowledgment is valid and that the Trustee cannot avoid CTB's liens. The acknowledgement clearly evidences the intent of the Grantor under the deed of trust, Ronald Akins, to acknowledge the instrument, and complies with TENN. CODE ANN. § 66-22-114

(1993) (hereinafter, "TCA § _________").

Furthermore, there is a separate Assignment of Rents that is one of the loan documents involved in this same transaction. The Assignment of Rents bears an acknowledgment that is unquestionably valid. The Assignment of Rents is of record as the document adjacent to the challenged Deed of Trust in the Office of the Register of Deeds. The Register of Deeds wrote on the face of the Deed of Trust a reference to the recorded assignment of rents.

The loan transaction should be examined in its entirety, and the valid acknowledgment on the Assignment of Rents should be incorporated into the Deed of Trust, thereby validating the acknowledgement on the Deed of Trust if that acknowledgement is not valid in its own right.

For the reasons set forth in this Brief, CTB respectfully requests that this Court rule that under Tennessee law, the acknowledgement on the Deed of Trust is valid. Additionally, CTB requests that this Court rule that if there is a valid certificate of acknowledgement on a second recorded document that is part of the same transaction, such as the Assignment of Rents, the valid acknowledgement on the second document would validate a certificate of acknowledgement on a document, such as the Deed of Trust, that is questioned.

ARGUMENT

I. The Certificate of Acknowledgment on the Deed of Trust is Valid Under Current Tennessee Law.

A. The History of the Law Regarding Certificates of Acknowledgment Must Be Examined.

The first issue before the Court requires an analysis of legislation dealing with certificates of acknowledgment and the courts' interpretation of that legislation.

The requirements for certificates of acknowledgment were first imposed by the Tennessee Legislature in 1831. 1831 Tenn. Pub. Acts ch. 90, § 3, a copy of which is attached hereto as **Exhibit B**. In that year, the Legislature passed a law that is substantially similar to

TCA § 66-22-107. Section 66-22-107 provides as follows:

> (a) If the acknowledgment is made before a county clerk or deputy, or clerk and master, or notary public, or before any of the officers out of the state who are commissioned or accredited to act at the place where the acknowledgment is taken, and having an official seal, viz: those named in §§ 66-22-103 and 66-22-104, and, also, any consular officer of the United States having an official seal, such officer shall write upon or annex to the instrument the following certificate, in which the officer shall set forth such officer's official capacity:
>
> State of Tennessee)
> County of ______________)
>
> Personally appeared before me, (name of clerk or deputy), clerk (or deputy clerk) of this county, (bargainor's name), the within named bargainor, <u>with whom I am personally acquainted</u> (or proved to me on the basis of satisfactory evidence), and who acknowledged that such person executed the within instrument for the purposes therein contained.
>
> Witness my hand, at office, this _____ day of ________________, 19___.
>
> (b) Or, in the alternative, the following certificate, in case of natural persons acting in their own right:
>
> State of Tennessee)
> County of ______________)
>
> On this _____ day of __________, 19_____, before me personally appeared ____________, <u>to me known to be the person (or persons) described in and who executed the foregoing instrument</u>, and acknowledged that such person (or persons) executed the same as such person (or person's) [sic] free act and deed.
>
> . . .

(Emphasis added.)

In 1845, the Legislature passed another law pertaining to certificates of acknowledgment, 1845-46 Tenn. Pub. Acts ch. 77, a copy of which is attached hereto as **<u>Exhibit C</u>**. That provision was virtually identical to the present TCA § 66-26-113. Section 66-26-113 provides as follows:

> The unintentional omission by the clerk or other officer of any words in a certificate of an acknowledgment, or probate of any deed or other instrument, shall in nowise vitiate the validity of such deed, but the same shall be good and valid to all intents and purposes, <u>if the substance of the authentication required by law is in the certificate</u>.

(Emphasis added.)

Thus, in 1845 the Legislature decreed that certificates of acknowledgment were to be judged by the "substantial compliance" test.[4]

Soon after the original predecessor of § 66-22-107 was enacted, this Court addressed the issue of whether certificates of acknowledgment must contain language indicating that the officer was acquainted, or personally acquainted, with the bargainor in order substantially to comply with the statute. The Court concluded that they must do so. Peacock v. Tompkins, 20 Tenn. 135 (1839). After Peacock, the rule was reaffirmed, with courts holding that the absence of the language or its functional equivalent was a fatal defect. See Stockton v. Murray, 25 Tenn. App. 371, 157 S.W.2d 859 (1941).[5]

As expected, this highly formalistic rule served to nullify many otherwise valid instruments, including those about which there could be no contention of fraud or irregularity. A particularly egregious application of the rule occurred in McAllester v. Aldridge (In re Anderson), 30 B.R. 995 (Bankr. M.D. Tenn. 1983). The Bankruptcy Court nullified seven deeds of trust solely because the acknowledgements did not contain the "with whom I am personally acquainted" language. The documents were otherwise perfectly valid; there was no hint that fraud or irregularity was actually involved in any way.[6]

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[4] See Davis v. Bogle, 58 Tenn. 315 (1872) (explaining that a rigid, literal adherence to the statue is not required, but that validity of certificates is to be determined by the "substantial compliance test").

[5] But note that Stockton stated that the omission of the words "the within named bargainor" did not invalidate the acknowledgment if the acknowledgment also stated that the bargainor was personally known to the officer taking the acknowledgment, citing a Tennessee Supreme Court case. Thus, the complete omission of words or an "element" of an acknowledgment was permitted.

[6] The Trustee has pointed out that the Anderson court rejected the contention that the acknowledgment law was archaic. However, this was before the Tennessee Legislature essentially agreed that it was archaic by amending it in 1986 and 1987.

Another example of the unduly formalistic treatment afforded to certificates of acknowledgment occurred that same year. In David Leonard Assocs. v. Airport-81 Nursing Care, Inc. (In re Airport-81 Nursing Care, Inc.), 29 B.R. 501 (Bankr. E.D. Tenn. 1983), which involved a corporate mortgagor, the Bankruptcy Court invalidated a deed of trust solely because the parties used an individual form (as in TCA § 66-22-107) instead of a corporate form (as in TCA § 66-22-108). Again, the instrument was otherwise completely valid and without any hint of irregularity.

In 1986, the Legislature repealed TCA §§ 66-22-107 and 66-22-108 (1986 Tenn. Pub. Acts ch. 717, § 3, a copy of which is attached hereto as **Exhibit D**), and enacted the following provisions:

> If the acknowledgment be made before any of the officers who are authorized to take such acknowledgment under the provisions of this chapter or any consular officer of the United States having an official seal, such officer shall write upon or annex to the instrument a certificate containing the elements in the following form:
>
> State of ______________)
> County of ____________)
>
> Personally appeared before me, (name of officer), (official capacity of officer), (name of the natural person executing the instrument), with whom I am personally acquainted, and who acknowledged that such person executed the within instrument for the purposes therein contained (the following to be included only where the natural person is executing as agent), and who further acknowledged that such person is the (identification of the agency position of the natural person executing the instrument, such as "attorney-in-fact" or "president" or "general partner") of the maker or a constituent of the maker and is authorized by the maker or by its constituent, the constituent being authorized by the maker, to execute this instrument on behalf of the maker.
>
> Witness my hand, at office, this _____ day of ____________, 19_____.
>
> Such a certificate shall be valid if the substance of the foregoing is in the certificate, no specific form of the certificate being required.

1986 Tenn. Pub. Acts ch. 717, § 2 (emphasis added).

The 1986 amendment thus adopted a new "universal" acknowledgement form in lieu of the older individual and corporate forms at TCA §§ 66-22-107 and 66-22-108. As the emphasized language indicates, however, the amendment expressly provided that the "substantial compliance" test would continue to determine the validity of certificates that did not repeat the new form verbatim.

This change in the law was short-lived. In its very next session, the Legislature, believing that form had prevailed over substance long enough, repealed the repeal of the old individual and corporate forms. 1987 Tenn. Pub. Acts ch. 125, § 3. While retaining the new form set forth in the 1986 amendment (codified at TCA § 66-22-114(a)), the Legislature provided that the new form was not exclusive. 1987 Tenn. Pub. Acts ch. 125, § 1. In so doing, the General Assembly made it clear that all three statutory forms were acceptable. Id. A copy of 1987 Tenn. Pub. Acts ch. 125 is attached hereto as **Exhibit E**.

The crucial change made in 1987 was that, in addition to altering the statutory forms, the Legislature altered the standard by which the validity of certificates of acknowledgment was to be judged by the courts. Specifically, it deleted the language "Such a certificate shall be valid if the substance of the foregoing is on the certificate, no specific form being required," which was part of the 1986 amendment. In doing so, it deleted the "substantial compliance" test. The Legislature substituted the following language:

> Any certificate clearly evidencing intent to authenticate, acknowledge, or verify a document shall constitute a valid certificate of acknowledgment for purposes of this chapter and for any other purpose for which certificate may be used under the law. It is the legislative intent that no specific form or wording be required in such certificate and that the ownership of property, or the determination of any other right or obligation shall not be affected by the inclusion or omission of any specific words.

1987 Tenn. Pub. Acts ch. 125, § 2. This language is currently codified at TCA § 66-22-114(b).

Finally, in 1995, the General Assembly enacted TCA § 66-22-115, which provides in

pertinent part:

> (a) The form of a certificate of acknowledgment used by a person whose authority is recognized under §§ 66-22-103 and 66-22-104, shall be accepted in this state if the:
>
> (1) Certificate is in a form prescribed by the laws or regulations of this state; or
>
> (2) Certificate is in a form prescribed by the laws or regulations applicable in the other state, or territory, or foreign country in which the acknowledgment is taken.

In turn, TCA § 66-22-103 provides that

> [i]f the person executing the instrument resides or is beyond or without the limits of the state, but within the union or its territories or districts, the acknowledgment may be made:
>
> (1) Before any court of record, or before the clerk of any court of record; or, before a commissioner for Tennessee, appointed by the governor; or before a notary public authorized there to take proof or acknowledgments. . . .

B. The Trustee's Premise is Incorrect.

The Trustee contends that the certificate of acknowledgment in the Akins Deed of Trust is defective because it does not contain "with whom I am personally acquainted," or nearly verbatim language. This premise is incorrect because it disregards the plain language of TCA § 66-22-114(b), and it assumes that the "substantial compliance" test continues to be the exclusive means for determining the validity of certificates of acknowledgment.

C. The Plain Meaning of TCA § 66-22-114(b) Demonstrates that the Certificate of Acknowledgment is Valid.

A comparison of the 1986 and 1987 acts clearly illustrates that the Legislature expressly deleted the "substantial compliance" test and substituted a new test -- whether the certificate "clearly evidences an intent to authenticate, acknowledge or verify." 1987 Tenn. Pub. Acts ch. 125, § 2, codified at TCA § 66-22-114(b). This demonstrates that the Legislature did not intend that the "substantial compliance" test continue to be the sole means of judging the validity of certificates of acknowledgment.

Since the enactment of TCA § 66-22-114(b), the correct test has been the "intent" test. The Legislature clearly said, "It is the legislative intent that no specific form or wording be required in such certificate and that the ownership of property, or the determination of any other right or obligation shall not be affected by the inclusion or omission of any specific words." (Emphasis added.) Not only do the exact or almost exact words not have to be included, but also the Legislature went further, and specified that no specific form is necessary.

This Court noted in State v. Walls, 62 S.W.3d 119 (Tenn. 2001):

> Issues of statutory construction are questions of law that this Court reviews *de novo* without a presumption of correctness. Freeman v. Marco Transp. Co., 27 S.W.3d 909, 911 (Tenn. 2000). Our duty in interpreting statutes is to ascertain and give effect to the intent and purpose of the legislature. Id.; see also Mooney v. Sneed, 30 S.W.3d 304, 306 (Tenn. 2000). If the language in a statute is devoid of ambiguity, we must apply its plain meaning without a forced interpretation that would limit or expand the statute's application. Mooney v. Sneed, 30 S.W.3d at 306.

Id. at 121.[7] See also U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026, 108 L. Ed. 2d 290 (1989). Only if a statute is ambiguous will a court consider the legislative history and other guidelines for interpretation. State v. Walls, supra.

D. The Legislative History of TCA § 66-22-114(b) Demonstrates that the Acknowledgment is Valid.

When the language of a statute is clear and unambiguous, a court does not have to resort to the legislative history. Nevertheless, the plain meaning of TCA § 66-22-114(b) is corroborated by the statement of Senator Douglas Henry at the beginning of a lengthy and wide-ranging discussion of the 1987 bill in the Senate Commerce Committee, as follows:

There was a case decided in the bankruptcy court in the eastern division of

[7] This Court's most recent statement on statutory construction is State v. Morrow, ___ S.W.3d ___, *available at* 2002 Tenn. LEXIS 1, 2002 WL 27513 (Tenn. 2002), in which it repeated the general rule. However, the issue was different, because the court was construing a single statute. It determined whether circuit court judges were authorized to impose a work release sentence, when the statute referred only to general sessions judges. The court held that circuit judges could not impose such sentences.

> Tennessee which held that because the acknowledgment on a deed of trust was in the individual form instead of the corporate form when the corporation was giving the acknowledgment, that that deed of trust was invalid against the trustee in bankruptcy years after it was executed. What this bill does . . . is change the law which prescribes the form of acknowledgment on a deed. Right now the law says that "if the acknowledgment etc., a certificate containing the elements in the following form" and then it sets out the form that is always right. It says it's got to contain those elements. And the last part of the law says "such a certificate shall be valid if the substance of the form is in the certificate. No specific form of certificate being required." What this bill would do would say that this form is a valid certificate of acknowledgment. It strikes out "a certificate containing elements in the following form . . . ." Then going down in section 2 as to what would suffice, the bill would say this: "any certificate clearly evidencing intent to authenticate, acknowledge, or verify a document shall constitute a valid certificate of acknowledgment." And then, "It is the legislative intent that no specific form or wording be required in such certificate and that the ownership of property or the determination of any other right or obligation shall not be affected by the inclusion or omission of any specific words." So if this becomes law, Mr. Chairman, <u>the test for the court would be whether the authentication appearing on the instrument "clearly evidenced an intent to authenticate, acknowledge, or verify."</u>

TENN. SENATE COM. COMM., Mar. 10, 1987, Tape Nos. 1, 2 (emphasis added).

E. The Rules of Statutory Construction Substantiate that TCA § 66-22-114(b) Validates the Certificate of Acknowledgment.

1. TCA § 66-22-114(b) Impliedly Repealed TCA § 66-26-113.

The original legislative embodiment of the "substantial compliance" test, TCA § 66-26-113, was not expressly repealed in 1987, and technically remains codified. The Legislature's failure expressly to repeal TCA § 66-26-113 does not mean that the "substantial compliance" test is still viable under Tennessee law. CTB respectfully contends that the enactment of TCA § 66-22-114(b) in 1987 impliedly repealed the "substantial compliance" test contained in TCA § 66-26-113. Although statutes will be construed harmoniously with one another when possible,

> [i]n the event two acts conflict and cannot be reconciled, the prior act will be repealed or amended by implication to the extent of the inconsistency between the two, because the Legislature is presumed to have knowledge of its prior enactments and to know the state of the law at the time it passes legislation. <u>Wilson v. Johnson County</u>, 879 S.W.2d at 809. Repeals by implication are not favored, however, and will be recognized only when no fair and reasonable construction will permit the statutes to stand together. <u>Id.</u>

Cronin v. Howe, 906 S.W.2d 910, 912 (Tenn. 1995), cited in Frye v. Blue Ridge Neuroscience Center, P.C., 2001 Tenn. App. LEXIS 147 at *7, 2001 WL 242587 (Tenn. Ct. App. 2001), permission to appeal granted, 2001 Tenn. LEXIS 675 (Tenn. 2001), a copy of which is attached hereto as **Exhibit F**.

Like the statute tbat was examined in Darden v. Smith, 1988 WL 36461 (Tenn. Ct. App. 1988), a copy of which is attached as **Exhibit G**, TCA § 66-22-114(b) "is a later, more specific statute than [66-26-113]," id., and should therefore be given effect even if that effect may seem inconsistent with the earlier statute.

It should be noted that the "substantial compliance" test that seems to survive in TCA § 66-26-113 is located in a different chapter of Title 66 than the sections containing the approved language for acknowledgments. That supports the inference that the Legislature simply failed to consider § 66-26-113 when it enacted § 66-22-114(b), and should be deemed to have repealed it.

Although implied repeal is not favored, the sole purpose of statutory construction is to discern the Legislature's meaning. Sometimes, the Legislature might inadvertently overlook inconsistent language that it intended no longer to be applicable. Thus, in certain situations, courts should construe one statute as having impliedly repealed another, in order to arrive at the correct result.

This is such an instance, especially since TCA § 66-22-114(b) expressly repealed the "substantial compliance" test in the 1986[8] statute, which survived for only one year.

Under TCA § 1-3-103, TCA § 66-22-114(b) must take precedence over TCA § 66-26-113 in determining the standard for judging the validity of a certificate of acknowledgement under Chapter 22 of Title 66. TCA § 1-3-103 provides as follows: "If provisions of different

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[8] 1986 Tenn. Pub. Acts ch. 717, § 2, discussed supra at 10.

titles or chapters of the code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter." See Schaad's Do-It Center v. Walker, 1997 Tenn. App. LEXIS 377 at *9, 1997 WL 280288 (Tenn. Ct. App. 1997), a copy of which is attached hereto as **Exhibit J**, and case cited therein.

2. Alternatively, TCA § 66-22-114(b) and TCA § 66-26-113 Constitute Alternative Standards to Judge the Validity of Acknowledgments.

The fact that TCA § 66-26-113 is still on the books certainly does not mean that the test is the exclusive standard for judging a certificate of acknowledgment. If this Court declines to rule that TCA § 66-22-114(b) impliedly repealed TCA § 66-26-113, CTB respectfully asserts that the Court should rule that the Legislature intended, by passing TCA § 66-22-114(b), to establish alternative means of judging the validity of certificates of acknowledgment. In other words, a certificate of acknowledgment must be declared valid if it satisfies either the "intent" test or the "substantial compliance" test.

Such a result gives effect to both statutes. The Legislature's intent in passing TCA § 66-22-114(b) -- greatly reducing the formality required in certificates of acknowledgment – would be honored.

The Trustee's interpretation, in contrast, ignores both the text of § 66-22-114(b) and its legislative history.

3. Alternatively, TCA § 66-26-113 Incorporates the Standard Set in TCA § 66-22-114(b).

TCA § 66-26-113 provides as follows:

> The unintentional omission by the clerk or other officer of any words in a certificate of an acknowledgment, or probate of any deed or other instrument, shall in nowise vitiate the validity of such deed, but the same shall be good and valid to all intents and purposes, if the substance of the authentication required by law is in the certificate.

(Emphasis added.)

Section 66-26-113 expressly refers to "the substance of the authentication required by law." In turn, this would incorporate the language of TCA § 66-22-114(b), which sets forth what is "required by law." Thus, TCA § 66-26-113 is subordinate to and dependent upon the standard affirmatively set forth in TCA § 66-22-114(b). The standard is set, in the first instance, in TCA § 66-22-114(b). Therefore, TCA §§ 66-26-113 and 66-22-114(b) would not be two alternative standards, but rather, the standard set in TCA § 66-22-114(b) would be engrafted upon TCA § 66-26-113. This comports with the rule of construction set forth in TCA § 1-3-103.

F. The "Substantial Compliance" Test is No Longer the Exclusive Test.

The one result that could not possibly obtain is that the "substantial compliance" test is the only standard in effect, i.e., that TCA § 66-26-113 sets forth the sole standard for judging the validity of certificates. That would make no sense at all, when in 1987 the Legislature very consciously repealed the "substantial compliance" test contained in the 1986 version of TCA § 66-22-114(b). It consciously intended to repeal a requirement of any specific form or any specific wording, and consciously intended to overrule cases such as David Leonard Assocs. v. Airport-81 Nursing Care, Inc., supra at 10, so there would be no similar ruling in the future.

Since the passage of the 1987 amendment, some cases have continued to refer to the "substantial compliance" test. For example, the U. S. Bankruptcy Court and District Court for the Eastern District of Tennessee did so in Jahn v. Regions Bank (In re Hendon), Case No. 99-14584, Adversary Proceeding No. 99-1272 (Bankr. E.D. Tenn. 2000), aff'd, Docket No. 1:00-cv-155 (E.D. Tenn. 2000), copies of which are attached as **Exhibits H** and **I**. In that case, the courts considered whether an irregular notarization constituted substantial compliance with TCA § 66-22-107, but did refer to TCA §§ 66-22-114(b) and 66-26-113. In validating the certificate of acknowledgment, whose blanks were filled in with check marks instead of names, the District

Court observed,

> As the bankruptcy court cogently explains in its April 14, 2000, memorandum opinion, Tennessee law does not insist upon exactness and absolute precision as a precondition to the validity of a certificate of acknowledgment in a deed of trust. When a notary public makes an omission or inadvertent mistake in stating a phrase or name, Tennessee courts look to the substance of the certificate and uphold the certificate's validity if it substantially complies with the law.

Dist. Ct. op. at 4. See also, Walker v. Midland Mortgage Co. (In re Medlin), 201 B.R. 188, 193 (Bankr. E.D. Tenn. 1996); Limor v. Fleet Mortgage Group (In re Marsh), 12 S.W.3d 449, 453 (Tenn. 2000); Schaad's Do-It Center v. Walker, supra at 16.

However, the issue currently before this Court – whether the Legislature intended to repeal the "substantial compliance" test by TCA § 66-22-114(b), or, in the alternative, set up two permissible tests for determining the validity of certificates of acknowledgment, or, in the alternative, meant for the standard of TCA § 66-22-114(b) to be read into TCA § 66-26-113 – has never been decided by a court. Thus, the cases decided either before or after the 1987 amendment, mentioning the "substantial compliance" test – or assuming without analysis that it still applies -- cannot be cited for the proposition that that test continues to be the standard for determining the validity of certificates of acknowledgment.

CTB respectfully contends that courts that have utilized the "substantial compliance" test since 1987 have not focused on this aspect of the statutes as they now stand. The Trustee's reliance upon cases decided before the 1987 amendment is misplaced.

G. Public Policy Supports the Proposition that the Certificate of Acknowledgment is Valid.

Another factor that courts can consider in interpreting a statute is as follows: "If necessary to a determination of the meaning of a statute, however, recourse may be had to considerations of public policy and to the established policy of the Legislature as evidenced by a general course of legislation. Woodroof v. City of Nashville, 183 Tenn. 483, 192 S.W.2d 1013,

1015 (Tenn. 1946)." Frye v. Blue Ridge Neuroscience Center, P.C., supra at 15.

Like the workers' compensation statute construed by this Court in Watt v. Lumbermens Mutual Casualty Ins. Co., 62 S.W.3d 123 (Tenn. 2001), TCA § 66-22-114(b) should be given an equitable construction and should be "'rationally but liberally construed,'" so that the purposes of the statute, which are remedial, can be carried out. Id. at 128, citing Lindsey v. Smith & Johnson, Inc., 601 S.W.2d 923, 926 (Tenn. 1980).

As pointed out above, the public policy consideration that gave impetus to the 1987 statute was the validation of instruments with no taint of fraud or irregularity, in order to avoid court rulings that nullified deeds of trust based on overly technical considerations. The interpretation of TCA § 66-22-114(b) asserted by CTB is consistent with that policy. If the Trustee prevails in this case, it will be in contravention of the public policy and of the legislative intent so clearly articulated by Senator Henry.

H. The Certificate of Acknowledgment Meets the "Intent" Test of TCA § 66-22-114(b).

The "intent" test requires a court to determine whether the certificate on its face clearly evidences an "intent to authenticate, acknowledge, or verify" the document.

Does the certificate of acknowledgment of Ronald Akins' signature clearly show that the notary public intended to ensure that the document was duly executed and that the signature was freely done?[9]

The answer is clearly "yes."

It is important to remember that the acts of a notary, a public official, are clothed with a powerful presumption of correctness. "This court is strongly committed to the rule of

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[9] See Limor v. Fleet Mortgage Group, supra, 12 S.W.3d at 454, stating that the acknowledgment "authenticates the due execution of a document and is the formal statement of the person signing the document that his (or her) signature was freely done"; D. T. McCall & Sons v. Seagraves, 796 S.W.2d 457, 463 (Tenn. App. 1990).

presumption that a sworn public official has acted lawfully." Manis v. Farmers Bank of Sullivan County, 98 S.W.2d 313, 314 (Tenn. 1936). This Court must resolve any ambiguity as to Ronald Akins' intent in favor of the regularity of the notary's act and the validity of the certificate of acknowledgment. See, also, Jahn v. Regions Bank (In re Hendon), Docket No. 1:00-cv-155 at 5 (E.D. Tenn. 2000), supra at 17-18, and cases cited therein.

Here, the notary certified that the mortgagor personally appeared before her and acknowledged the due execution of the instrument. This is a classic hallmark of authentication. Moreover, the notary signed the certificate and affixed her seal, an action that has been held to be an indispensable requisite of authentication. See In re Marsh, supra at 18. The acknowledgment is unequivocal; it is a "certificate clearly evidencing intent to authenticate, acknowledge, or verify a document."

Meanwhile, under TCA §§ 66-22-115 and 66-22-103, the certificate of acknowledgement on the Deed of Trust would be upheld in Tennessee if it had been taken by a notary public in any other state in which the language would be considered valid.

This case is distinguishable from D. T. McCall & Sons v. Seagraves, supra at 19. In D. T. McCall, the certificate used was the wrong kind of certificate—an acknowledgment was used, instead of a verification. It was not a mere variation of the language of a permissible certificate, as in the case at bar.

The Trustee contends that the notary on CTB's Deed of Trust did not let the world know she had ascertained that Ron Akins was who he said he was. However, she in fact did this when she certified that Ronald Akins came before her. This could not be any more clear a statement that he was identified to her. Further, as part of the same transaction, she took an acknowledgment of the same signature on a related document, the Assignment of Rents, in a

form that is stipulated to be valid.

Hence, the Deed of Trust suffices to be self-authenticating and admissible into evidence, eligible for recording, and valid and enforceable in all respects.[10]

I. The Certificate of Acknowledgment Also Meets the "Substantial Compliance" Test.

While the "intent" test provides a sufficient basis for this Court to conclude that the certificate is valid, CTB also contends that it satisfies the "substantial compliance" test. Although it does not expressly contain the "with whom I am personally acquainted" language, this omission is immaterial because of the effect of the term "certify," which is included therein.

The notary public stated, "I . . . do hereby certify that Ronald L. Akins, unmarried, personally appeared before me this day and acknowledged the execution of the foregoing instrument." The notary could not have made a more unequivocal statement than that. It could not be more clear that the grantor under the Deed of Trust acknowledged before her was indeed Ronald Akins.

According to Black's Law Dictionary, the term "certify" means "to testify in writing; to make known or establish as a fact. . . . To vouch for a thing in writing. . . . To give a certificate, or to make a declaration about a writing. . . ." BLACK'S LAW DICTIONARY 287 (4th ed. 1968). Thus, when a notary public "certifies" that a grantor appeared before him or her and

[10] A document can be notarized in regular form and still be the product of fraud or simply erroneous conduct, but with all statutory requirements having been complied with on the face of the document. That is not the issue here. CTB does not argue that the courts should abandon all standards. It is not arguing, as the Trustee suggests, that "anything will do." CTB does not assert that TCA § 66-22-114(b) is a "sweeping reform" of the acknowledgment laws. TCA § 66-22-114(b) still says "clearly evidencing . . . ." The Legislature simply allowed for the use of common sense, so that hypertechnical form is no longer elevated over substance. The acknowledgment before this Court does "clearly evidence" the requisite intent. One cannot read the acknowledgment on the Deed of Trust without concluding that Ronald Akins was identified to the notary.

acknowledged the execution of a particular instrument, the notary is officially declaring – pursuant to the duties of the office – that the grantor is actually who he or she purports to be.

This conclusion is of paramount importance for purposes of the "substantial compliance" test. In Morrow v. Bobbitt, 943 S.W.2d 384, 389 (Tenn. Ct. App. 1996), the Tennessee Court of Appeals stated that substantial compliance is "actual compliance in respect to the substance essential in every reasonable objective of the statute." A fundamental objective of an acknowledgment – and of the acknowledgment statutes – is to prevent fraud by providing sufficient assurance that the grantor is who he or she purports to be, and thus to allow a document to be self-authenticating and admissible. In this case, by "certifying" that Ronald Akins personally appeared before her and acknowledged the execution of the instrument, the notary warranted or established as a fact that the grantor was actually Ronald Akins. Such a statement clearly satisfies the "substantial compliance" test as defined in Morrow v. Bobbitt, supra. To require anything more would be to elevate form over substance and ignore the Legislature's clear intent in revising the law in this area.

Thus, the acknowledgement on the Deed of Trust should be deemed to constitute substantial compliance with the statutory language approved for acknowledgments, especially under the wording of TCA § 66-22-114(b) eliminating the requirement not only for any specific language, but also for any specific form.

II. The Valid Acknowledgment on the Assignment of Rents, Which is Recorded Adjacent to the Deed of Trust and is Part of the Same Transaction, Serves to Provide a Valid Acknowledgment Under the Deed of Trust, Especially Since the Face of the Recorded Deed of Trust Refers to the Recorded Assignment of Rents.

Tennessee law has long held that an omission in a certificate of acknowledgment may be cured by reading the certificate in conjunction with the instrument that it authenticates. Manis, supra at 19-20. The courts will look to the four corners of the acknowledged document in order to supply missing wording or rectify an error. Jahn v. Regions Bank, supra at 17, Docket No.

1:00-cv-155 (E.D. Tenn. 2000) at 5-7, and cases cited therein.

Likewise, a reference to other related documents that comprise the transaction as a whole should be deemed to remedy a defect in a particular certificate of acknowledgment. In this case, in addition to the Deed of Trust, Ronald Akins executed the Assignment of Rents. The certificate of acknowledgment on this assignment is valid. (See Stipulations, **Appendix 5**, page 3, Paragraph 6.) It is recorded adjacent to the Deed of Trust.

This acknowledgment on the Assignment of Rents clearly demonstrates that the notary knew that the grantor was actually Ronald Akins, the same grantor named in the Deed of Trust. Both documents bear the same date. They refer to the same indebtedness. They describe the same parcel of real property, the Restaurant. The signatures of Ronald Akins and the notary are the same. The Assignment of Rents is of record at Book 82, Pages 197-200, ROMCT. The Deed of Trust is of record at Book 82, Pages 191-196, ROMCT. Both documents recite that the Register of Deeds was Janie Steiner. Both documents are part of the same transaction.[11]

Therefore, the valid acknowledgment in the Assignment of Rents cures any defect in the acknowledgment of the Deed of Trust. A fortiori, this is true because the Register of Deeds herself wrote a legend on the Deed of Trust: "See Assignment in Trust Bk 82, pages 197-200. 4-24-00 Janie Steiner." This effectively incorporates the two documents into one another.

CONCLUSION

For the foregoing reasons, CTB respectfully prays as follows:

1. That the Court hold that the certificate of acknowledgment of the signature of the Debtor, Ronald L. Akins, Sr. on the April 12, 2000 Deed of Trust is valid under Tennessee law.

2. That the Court hold that the if the certificate of acknowledgement on the Deed of Trust is not valid, the admittedly valid acknowledgment on the Assignment of Rents cures the

[11] The Assignment of Rents covers only one of the two properties described in the Deed of Trust.

defective acknowledgement on the Deed of Trust under the circumstances of this case.

3. That the Court hold that the lien of Community Trust and Banking Company against Ronald Akins' interest in the 69 Acres is valid, perfected and unavoidable.

4. That the Court grant Community Trust and Banking Company such other, further and general relief as is just.

____

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615-244-4994

CERTIFICATE OF SERVICE

I certify that I caused a true copy of the foregoing document and attachments to be served by first class mail, postage prepaid, upon the following, this ___ day of March, 2002.

Mr. Richard P. Jahn, Jr.
Gearhiser, Peters, Lockaby & Tallant, PLLC
320 McCallie AV
Chattanooga, TN 37402

____

Linda W. Knight

However, this does not matter, because the issue is the acknowledgment of the instrument.

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

AXA EQUITABLE LIFE INSURANCE COMPANY,	)	
Plaintiff	)	Case No. 11-__________
	)	Judge ___________________
v.	)	Magistrate Judge _________
JASON A. GRISSOM, DANIEL B. GRISSOM, JOSHUA S. GRISSOM, JASON A. GRISSOM IN HIS CAPACITY AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF DANIEL M. GRISSOM, AND LOLITA ELAINE CAMP,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This Memorandum is filed in support of the Motion of Plaintiff, AXA Equitable Life Insurance Company ("AXA"), for a Temporary Restraining Order and a Preliminary Injunction. In support thereof, AXA respectfully states as follows:

I. FACTS

The facts in support of AXA's prayer for a Temporary Restraining Order and Preliminary Injunction are alleged in detail in its Verified Complaint and are incorporated herein by reference.

To summarize the facts very simply, AXA issued an EQUI-VEST Variable Annuity Contract, as a Simplified Employee Pension Plan (the "Contract") to Mr. Daniel Grissom in 1989. Mr. Grissom named his wife, Peggy Grissom, the beneficiary of the Contract in the event of Mr. Grissom's death (the "Death Benefit"). No other beneficiary was ever named.

An endorsement to the Contract was issued in 2001 (the "Endorsement"). The Endorsement provided that in the event of the insured's death, if there was no designated

beneficiary living at the time of the annuitant's death, the decedent's surviving spouse would receive the Death Benefit.

Peggy Grissom died before her husband. A claim for the Death Benefit (the "Claim") was submitted to AXA by each of Mr. Grissom's sons, Jason, Daniel and Joshua (the "Sons"). The Claim included a death certificate for Peggy Grissom and Daniel Grissom. Although Mr. Grissom's death certificate identified a surviving spouse, AXA did not notice this information and processed the death claim and paid the Death Benefit in March 2011 to the Sons under the mistaken belief that there was no surviving spouse. The sons elected the beneficiary continuation option pursuant to which an Account was established for each Son in an amount equal to 1/3 of the Death Benefit. Daniel and Joshua have since withdrawn $40,000.00 and $80,000.00, respectively. Subsequent to processing the claim, AXA learned (via fax from Elaine. Camp's lawyer) that Mr. Grissom was recently remarried to Ms. Camp. Thus, when Mr. Grissom passed away in 2010, he had a surviving spouse. Contractually, Ms. Camp is entitled to the Death Benefit.

Mr. Grissom also had an AXA life insurance policy. Although Peggy Grissom was the designated beneficiary for this Policy, Mr. Grissom also designated his Sons as contingent beneficiaries, so the Sons correctly received the life insurance death benefit.

In early June 2011, Ms. Camp's attorney contacted AXA, stating that the death benefit for the Contract and Life Policy should not have been paid to the Sons. AXA notified him that the Sons were the correct recipients of the life insurance policy death benefit. However, the attorney's communication caused AXA to realize that the surviving spouse, Ms. Camp, was contractually entitled to the Death Benefit.

The Sons' attorney has demanded that AXA allow the Sons to withdraw additional moneys from the Accounts. AXA has explained to him that there are now competing claims to

the Death Benefit and the Sons may never have been entitled to the money that is now in the Accounts. The Sons' attorney has threatened to sue AXA.

Because it appears that AXA mistakenly paid the Death Benefit to incorrect parties and is exposed to having to pay the Death Benefit a second time to Ms. Camp, with no means of recovering the amounts it mistakenly paid to the Sons, it has been necessary for AXA to file this action in order to obtain a declaratory judgment as to whether the Sons, on the one hand, or Ms. Camp, on the other hand, is ultimately entitled to the Death Benefit; and to obtain additional relief if the Court rules in favor of Ms. Camp.

If the Sons are notified that AXA is seeking this relief, there would be sufficient time between the giving of notice and the issuance of a TRO for the Executor to make transfers from Mr. Grissom's estate and/or by Daniel and Joshua of all or part of the $120,000.00 or moneys or accounts that are proceeds thereof. Therefore, AXA respectfully asserts that the TRO that it prays for be issued without notice.

II. AXA'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION MEETS THE CRITERIA

The purpose of a temporary restraining order is to preserve the *status quo* pending the hearing on a motion for preliminary injunction. *Granny Goose Foods. Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974) (discussing *ex parte* restraining orders); *Corbin v. Texaco, Inc.*, 690 F.2d 104 (6th Cir. 1982). In deciding whether a moving party is entitled to the relief, pursuant to Fed. R. Civ. P. 65(a), the Court considers "(1) the plaintiffs' likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest." *Dixie Fuel Co. v. Comm'r of Social Security*, 171 F.3d 1052

(6th Cir. 1999)[1]. *Golden v. Kelsey-Hayes Co.*, 73 F. 3d 648, 653 (6th Cir. 1996), *In re De Lorean Motor Co.*, 755 F.2d 1228 (6th Cir. 1985). This consideration is a balancing of the factors rather than a strict application of any single factor. *Golden, supra* at 653.

These criteria are discussed below. AXA respectfully asserts that it easily meets the criteria.

1. AXA is likely to prevail on the merits.

AXA has asked the Court to grant declaratory relief and determine whether the Sons or Ms. Camp is entitled to the Death Benefit; and if the Court rules that Ms. Camp is ultimately entitled to receive the Death Benefit, that the Court fashion appropriate relief, including turnover of the moneys in the Accounts to Ms. Camp, an accounting for the approximately $120,000.00 that the Sons have withdrawn from the Accounts, return the $120,000.00 or all moneys or accounts that are proceeds thereof so that Ms. Camp receives the full amount to which she is entitled without AXA's having to make any double payment of benefits and engage in further litigation with no recovery in the end.

AXA has every expectation that the Court will grant this relief, whether it rules that the Sons are entitled to the Death Benefit, or Ms. Camp is entitled to the Death Benefit. In either event, AXA will prevail, because that is the relief that it seeks.

AXA further respectfully asserts that, if the Court rules in favor of Ms. Camp, the Court will fashion relief such that Ms. Camp will receive the Death Benefit, and AXA will be protected from having to pay the Death Benefit twice, with the Sons never having been entitled to the moneys that AXA mistakenly paid to them and thereby being unjustly enriched.

2. Absent a restraining order, Plaintiff is likely to suffer irreparable harm and damage.

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[1] Overruled on grounds not related to injunctions, *Barnhart, Comm'r of Social Security v. Bellaire Corp.*, 537 U.S. 149, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2003).

The Sons have demanded that AXA allow them to withdraw moneys from the Accounts. Their attorney has threatened to sue AXA. If such moneys are withdrawn, and the Court rules that Ms. Camp is entitled to the Death Benefit, AXA has no reason to believe that it would ever be able to recover any amount if the Court determines that Ms. Camp is entitled to receive the Death Benefit. The Accounts should remain intact and, if the Court rules in favor of Ms. Camp, the moneys would be available to be transferred to her without delay and at no loss to AXA.

Daniel and Joshua have withdrawn $120,000.00 of the moneys from their Accounts.

It would be manifestly inequitable for AXA to have to pay the Death Benefit, or any portion thereof, twice. If it is required to pay the Death Benefit to Ms. Camp, and is without any means of recovering the entire $120,000.00 previously paid out, and/or any of the moneys presently in the Accounts, AXA will certainly have been harmed, and such harm will be irreparable, because it will have no way of being made whole.

The solution to this manifest inequity is to keep the Accounts in the custody of AXA; to prohibit Jason, as Executor, from making distributions from the Estate to the Sons (or from or through them), and to require the Sons to account for and restore the $120,000.00 or any moneys or accounts that are proceeds thereof.

If the Sons were allowed to withdraw additional moneys from the Accounts, there is no reason to believe that the funds would be recoverable if AXA had to sue them sometime in the future to recover a double payment of the Death Benefit.

Likewise, $120,000.00 of the Death Benefit is already gone, and AXA does not know what has been done with it. Therefore, the sons who withdrew those moneys should immediately be restrained and enjoined from in any way spending, transferring, encumbering, dissipating or otherwise impairing or reducing the amount that AXA might recover, or that might be available for them to pay and transfer over to Ms. Camp if the Court rules that she is entitled to the Death Benefit.

To the extent that Mr. Grissom's Estate contains sufficient assets or moneys to replenish the $120,000.00, the Executor, Defendant Jason Grissom, should immediately be restrained and enjoined from distributing any assets of the Estate that might be distributable to the Sons or anyone claiming from or through them. If the Court rules in favor of Ms. Camp, the Estate would constitute a readily available source from which to pay Ms. Camp the full amount to which she is entitled, and AXA would not be required to pay this portion of the Death Benefit without being able to recover that amount from the Sons, who incorrectly received the money.

AXA has no reason to believe that the Sons would cooperate in resolving this dispute, and expects they will object to AXA's efforts to preserve the *status quo*. AXA does not know how much of the $120,000.00 remains in Daniel's and Joshua's possession, or what has been done with any amount that has been spent. In the time that would elapse between the giving of notice that this Verified Complaint and the accompanying Motion for a temporary restraining order and preliminary injunction have been filed, and the holding of a hearing and issuance of a TRO, Daniel and Joshua could easily transfer any remaining funds and any moneys or accounts that have been acquired with the proceeds; and Jason, as Executor, could make a distribution to the Sons from Mr. Grissom's estate. Such actions would place those moneys and assets beyond reach of AXA as a source from which to recover the $120,000.00. The Sons should not have the opportunity to take such actions and thereby defeat the purpose of this lawsuit.

3. In balancing the equities, the Sons will suffer no substantial harm from the issuance of the restraining orders.

If the Court determines that the Sons are not ultimately entitled to retain the Death Benefit, that will mean that they were never entitled to receive any of it, and it would be grossly unjust to allow them to continue to control the moneys with the risk that it could not be recovered from them.

Thus, by definition, the Sons can suffer no harm if the Court rules in favor of Ms. Camp.

On the other hand, if the Court rules in favor of the Sons, they will get back every penny of the Death Benefit. All of the moneys in the Accounts will be subject to their control. Whatever disposition Daniel and Joshua have made of the $120,000.00 will no longer be a matter before this court. The assets of Mr. Grissom's estate distributable to the Sons or from or through the Sons will be available for distribution as soon as this Court's order becomes final.

AXA believes that this action can be determined promptly and that the Accounts and other moneys that are paid into Court or prohibited from being distributed will not be withheld for an unduly long time. AXA is prepared to cooperate fully in reaching a final resolution of this matter, and of course does not have control over whatever issues may exist between the Sons and Ms. Camp and how long those issues will take to resolve.

AXA therefore believes that the Sons will not be unfairly prejudiced by being required to wait for this Court to determine whether or not they are entitled to the Death Benefit, because however the Court rules on the merits, the Sons will have no loss or damage. By issuing the Temporary Restraining Order and Preliminary Injunction, the Court would not be "'alter[ing] the prior status of the parties fundamentally.'" *Corbin v. Texaco, Inc.*, *supra* at 105 (citation omitted).

4. <u>The public interest will be served by issuing the restraining orders.</u>

The public interest lies in assuring that insurance contracts are honored, that insurance companies do not have to pay death benefits twice.

The public interest lies in assuring that if a party asserts a wrongful or incorrect death claim, even though it was not done in bad faith, any moneys mistakenly paid out can be recovered from them and they will not unjustly benefit from a mistake or be unjustly enriched.

The public interest lies in assuring that the correct party ultimately receives the Death Benefit.

Issuance of the Temporary Restraining Order and Preliminary Injunction that AXA seeks will simply keep Ms. Camp's and AXA's positions in the *status quo*, so that they do not deteriorate pending the adjudication of the dispositive issues in this litigation, and so that the conflicting claims to the Death Benefit can be adjudicated between the claimants without involving or exposing AXA to unrecoverable damages, all of which is in the public interest.

III. <u>CONCLUSION</u>

For the foregoing reasons, AXA respectfully requests:

1. That the Court enter a temporary restraining order against the Sons without notice or a hearing.

2. That such temporary restraining order provide as follows:

A. Restrain and enjoin Daniel and Joshua from spending, transferring, encumbering, dissipating, spending, using, dissipating or in any way disposing of the sums of $40,000.00 and $80,000.00, respectively, that they withdrew from the Accounts.

B. Restrain and enjoin Daniel and Joshua from spending, transferring, encumbering, spending, using, dissipating or in any way disposing of, or causing or allowing the same, with respect to any moneys or accounts that are proceeds of said $40,000.00 and $80,000.00.

C. Restrain and enjoin Jason, as Executor of Mr. Grissom's Estate, from distributing the Estate's assets to Daniel and Joshua to the extent of their withdrawals from the Accounts, or to anyone whose rights are derived from or through Daniel and Joshua, so that if the Court rules that Ms. Camp is entitled to the Death Benefit, the $120,000.00 that Daniel and Joshua withdrew from the Accounts can be paid to Ms. Camp out of their share of the Estate if those funds have already been dissipated.

D. Restrain and enjoin the Sons from withdrawing any additional moneys from the Accounts.

6. That, after a hearing, the Court enter a preliminary injunction to the same effect as set forth above, to remain in effect until the Court's ruling as to who is entitled to the Death Benefit, Accounts, $120,000.00 and moneys or accounts that are proceeds has become final.

7. That the Court not require AXA to provide security under Fed. R. Civ. P. 65.

8. That any injunctive relief granted bind not only the Sons, but also any persons in active concert or participation with them.

9. That the Court grant AXA such other, further and general relief as is just.

/s/ Linda W. Knight
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2011, a true and exact copy of the foregoing has been served via certified mail, return receipt requested on the following:

Ms. Lolita Elaine Camp
115 Holloway Square
Smyrna, TN 37167-5204

Mr. Daniel B. Grissom
2943 Runnymeade Drive
Murfreesboro, TN 37127

Mr. Jason A. Grissom
103 Lancaster Gate
Murfreesboro, TN 37128

Mr. Jason A. Grissom
Executor of the Estate of Daniel Grissom, Deceased
103 Lancaster Gate
Murfreesboro, TN 37128

Mr. Joshua S. Grissom
2624 Dakota Way
Murfreesboro, TN 37130

Mr. G. Christopher Holder
503 N. Maple St.
Murfreesboro, TN 37130

Mr. Harold H. Parker
Unit 240
745 S. Church St.
Murfreesboro, TN 37130

/s/ Linda W. Knight
Linda W. Knight, BPR #9205

EXHIBIT C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

In re:	)	
MARK RICHARD LANG and CHANEL LEANN LANG,	)	Case No. 11-00081-MH3-7
Debtors.	)	
DAVID G. ROGERS, TRUSTEE,	)	
Plaintiff,	)	
v.	)	
CHANEL LEANN LANG, ARTHUR G. LESMEZ, BERNARD WARE, THE LAW FIRM OF ARTHUR G. LESMEZ, P.C., and PAMELA EVANS,	)	Adversary Proceeding No. 3:12-90215
Defendants.	)	
PAMELA EVANS,	)	
Cross-Claimant and Cross-Defendant,	)	
v.	)	
THE LESMEZ DEFENDANTS,	)	
Cross-Defendants and Cross-Claimants.	)	

Objection Deadline:	October 29, 2012
Hearing:	November 20, 2012, 9:00 A.M., Courtroom Three, Customs House, 701 Broadway, Nashville, TN 37203

PAMELA EVANS' OBJECTION TO SETTLEMENT WITH LESMEZ DEFENDANTS

Comes the Defendant and Cross-Claimant, Pamela Evans ("Mrs. Evans"), and files this Objection to the Trustee/Plaintiff's Motion to Approve Compromise and Settlement with Lesmez Defendants (the "Motion"). As grounds therefor, Mrs. Evans respectfully states as follows:

1. On January 5, 2011, Debtors filed a voluntary petition under Title 11, Chapter 7, United States Code, in this Court. David G. Rogers was appointed, and is acting, as the Trustee.

2. On April 18, 2012, the Trustee filed this adversary proceeding. On July 19, 2012, Mrs. Evans filed an Answer, combined with a Crossclaim against the Lesmez Defendants (Docket No. 30). On August 16, 2012, the Lesmez Defendants filed their Answer to Mrs. Evans' Crossclaim, and Crossclaim against her (Docket No. 39). On August 20, 2012, the parties (except for Ms. Lang) filed their Joint Pretrial Statement. On August 22, 2012, Mrs. Evans filed her Answer to the Lesmez Defendants' Crossclaim (Docket No. 41).

3. On October 8, 2012, the Trustee filed the Motion for approval of a proposed settlement with the Lesmez Defendants (Docket No. 42).[1] As is more fully detailed in the Settlement Agreement that is attached to the Motion, Paragraphs 4 through 7 of the Motion explain the essential terms:

A. The settlement is in full *satisfaction* of the Trustee's claims in the adversary proceeding.

B. The Lesmez Defendants will pay the Trustee $55,000.00 in full *satisfaction* of all claims in the Lawsuit, including the Trustee's claims against Ms. Lang and Mrs. Evans, and when the Order approving the settlement becomes final, the Trustee will dismiss the adversary proceeding.

C. The Trustee will assign to the Lesmez Defendants the estate's interest in the wrongful death claim by quitclaim.

D. The various claims in the adversary proceeding will be released except that the settlement will not affect the Crossclaims between Mrs. Evans and the Lesmez Defendants, and will not be affected by whether the Court retains or dismisses the Crossclaims.

[1] Defendants The Betty Ford Center and the physician were dismissed from the adversary proceeding by consent. Chanel Lang has not filed any Answer or other document in the adversary proceeding.

4. In summary, Mrs. Evans' objection to the proposed settlement is that the Lesmez Defendants' payment to the Trustee should not be treated as a purchase of the estate's interest and should not impair any right that Mrs. Evans has against the Lesmez Defendants in this Court, including under Fed. R. Bankr. P. 7013 and 11 U.S.C. § 362(k)(1). If the Trustee and the Lesmez Defendants agree to a payment to the Trustee in exchange for the dismissal of the Trustee's claims against Mrs. Evans, that is of no consequence to Mrs. Evans. However, it is extremely prejudicial to Mrs. Evans to hand to the Lesmez Defendants the open invitation to sue her for half of the settlement proceeds that they pressured her under duress to accept, upon the premise that the entire cause of action belonged to her, and/or to use their ownership of the estate's [alleged] interest in the cause of action as a defense or setoff against Mrs. Evans' claims against them. Furthermore, Mrs. Evans is prejudiced if she loses her rights under Fed. R. Bankr. P. 7013 and 11 U.S.C. § 362(k)(1) not only to recover actual damages, but also to recover punitive damages. If there was ever a claim for punitive damages, it is this.

5. Furthermore, the Lesmez Defendants' acquisition the estate's alleged interest in the wrongful death action and being in a position to use it as a weapon against Mrs. Evans -- either affirmatively or as a defense to their own malpractice and wrongful and willful actions -- would violate the California Rules of Professional Conduct that govern the Lesmez Defendants as well as certain California statutes. Additionally, on information and belief, this settlement has been negotiated on behalf of the Lesmez Defendants by their malpractice insurance attorneys, presumably in California, and to encourage or countenance an acquisition of the estate's interest in the claim also places the malpractice insurance attorneys in violation of the Rules of Professional Conduct. This Court should not approve an agreement that causes or allows attorneys to violate the Rules of Professional Conduct. The Lesmez Defendants have already

violated those Rules numerous times, putting Mrs. Evans in the position she is now in, and they should not be allowed to compound those violations by violating them again.

6. Furthermore, Mrs. Evans asserts that assigning the estate's interest in the settlement and giving the Lesmez Defendants the opportunity to sue or countersue Mrs. Evans results in Mrs. Evans' having a claim against the estate in this case for her damages, costs and expenses in defending against such a suit or countersuit. The fact that the settlement documents provide that there is no representation that the estate's interest has any value affords Mrs. Evans no protection and is useless to her.

7. In further support of this Objection, Mrs. Evans respectfully states to the Court as follows:

A. Mrs. Evans is the stepmother of Debtor Chanel Lang. Mrs. Evans' late husband was Ms. Lang's father.

B. In 2008, Mrs. Evans' husband died in California as the result of medical malpractice. Mrs. Evans promptly sought counsel to bring a wrongful death lawsuit and engaged Arthur G. Lesmez and his law firm, The Law Firm of Arthur G. Lesmez, P.C., of which Bernard Ware is an attorney employee to represent her. Mrs. Evans entered into an engagement letter for this representation.

C. Shortly after the Lesmez Defendants were engaged, Mr. Lesmez strongly advised and encouraged, and prevailed upon, Mrs. Evans to add Chanel Lang as a co-plaintiff in the wrongful death action. Mr. Lesmez assured Mrs. Evans that Ms. Lang would have no actual interest in the cause of action, the lawsuit, or any recovery in the lawsuit. Instead, Mrs. Evans (and Ms. Lang) were persuaded that Ms. Lang would be a co-plaintiff in name only, in order to present a united front to the Defendants.

D. Mrs. Evans now believes that the Lesmez Defendants committed malpractice when Mr. Lesmez persuaded her to include Ms. Lang as a co-plaintiff in her wrongful death lawsuit. Mrs. Evans was never advised that Ms. Lang had the right under California law to be a co-plaintiff or had a financial claim to the cause of action or any recovery. Mrs. Evans had no idea or knowledge that merely listing Ms. Lang as a co-plaintiff -- on the express premise (engendered by their counsel) that Ms. Lang had no financial interest in the cause of action, the lawsuit or any recovery, and would not receive any money or any portion of any recovery -- could instead result in her losing her entitlement to some portion of the recovery. If Mrs. Evans had been the sole plaintiff in the lawsuit, the entire recovery would unequivocally have been hers.

E. Shortly after Mr. Evans died, the wrongful death lawsuit was filed in the Superior Court of Riverside, California, styled *Pamela Evans and Chanel Lang v. Betty Ford Center at Eisenhower; Scott M. Davis, M.D.; Melissa Evans; Brandon Evans; and Does 1 through 50, Inclusive,* Riverside Superior Court Case No. INC 083059.

F. The litigation proceeded, and was still proceeding as of the petition date of this Chapter 7.

G. As far as formal notice of this Chapter 7 case was concerned, Mrs. Evans was not scheduled as a creditor. Consequently, of course, no documents or notices pertaining to the case were served upon her; she received no formal notice of the case.

H. As far as informal notice of this Chapter 7 case was concerned, neither Ms. Lang, the Lesmez Defendants, nor anyone else informed Mrs. Evans that Ms. Lang and her husband had filed bankruptcy. Mrs. Evans received no informal notice of the case.

I. Mrs. Evans first became aware of this case on October 14, 2011, when she received a letter from the Lesmez Defendants, dated October 12, 2011, notifying her and advising her to procure bankruptcy counsel.

J. Mrs. Evans learned after October 14, 2011, that Ms. Lang listed a one-half interest in the wrongful death cause of action on her Schedule of Property and valued *her interest* at $125,000.00.

K. In the Complaint in this adversary proceeding, the Trustee alleged that he questioned Ms. Lang about this purported "asset" at her meeting of creditors. However, Mrs. Evans is without knowledge as to what the Trustee was informed, either at the meeting of creditors or on any other occasion, by Ms. Lang, her then-attorney, or anyone else.

L. Since October 14, 2011, Mrs. Evans has further learned that on many occasions, commencing on or about February 9, 2011, the Trustee communicated with and notified the Lesmez Defendants about bankruptcy case and his inquiry about the cause of action, in which it appeared to him the estate had a financial interest. Thus, from February 2011 onward, the Lesmez Defendants had actual knowledge of the bankruptcy case and that the Trustee was either seeking information or making a claim to an interest. Any ethical attorney should and would have notified Mrs. Evans immediately so that she could communicate with the Trustee, protect her interests, and hopefully avoid litigation.

M. The Lesmez Defendants, despite the fact that they not only knew that Ms. Lang had filed bankruptcy and that the Trustee was seeking information about the wrongful death action, failed to disclose this information to Mrs. Evans; indeed, one can only conclude that they actively concealed from Mrs. Evans the existence of the case and the Trustee's communications. Thus, long after the Lesmez Defendants had actual knowledge of the

bankruptcy case, they concealed the information from Mrs. Evans, and she continued to be unaware of the case or the listing of the cause of action as an asset, let alone an asset with value.

N. With full knowledge of this case and the Trustee's efforts to communicate with the Lesmez Defendants about the wrongful death action, the Lesmez Defendants engineered a settlement of the lawsuit and persuaded Mrs. Evans to accept it. It was settled as the result of a mediation in or about March 2011, in the midst of the Trustee's communications and notifications to the Lesmez Defendants. Mr. Lesmez would not allow Ms. Lang to participate in the mediation. In Mrs. Evans' view at the time, this was consistent with the agreement that Ms. Lang had no actual interest and was not entitled to any of the recovery. In retrospect, Mrs. Evans concludes and respectfully contends that the Lesmez Defendants were concerned that the existence of the bankruptcy case would be revealed if Ms. Lang attended, and keeping her away was in furtherance of the Lesmez Defendants' intentional concealment of the case.

O. Consistent with the express agreement between Mrs. Evans and Ms. Lang, which had been brought about by the Lesmez Defendants, at the time of the settlement, there was no discussion of Ms. Lang having any interest in the proceeds.

P. The wrongful death suit was settled for the total sum of $425,000.00. Mr. Lesmez and his firm's fees and expenses were deducted from the total sum, in the amount of approximately $155,000.00, leaving a net settlement of approximately $270,000.00. Consistent with the express agreement between Mrs. Evans and Ms. Lang, Mrs. Evans received the entire net proceeds of the settlement. The Lesmez Defendants captured approximately 57% of the amount that Mrs. Evans received.

Q. Mrs. Evans had no idea but that the entire net settlement, after legal expenses, belonged to her, and she agreed to the settlement upon that premise. If she had had any idea that she would be exposed to a subsequent adjudication that half, or any other portion,

of the proceeds belonged to someone else, or that the Lesmez Defendants had an ulterior motive at play, or that she was going to have to spend thousands of additional dollars in legal fees to defend her interest in the cause of action, the lawsuit and the recovery, she would never have settled the lawsuit, or would not have settled except for a much larger amount. She certainly would have insisted that proper procedures be followed in dealing with the Trustee, including satisfying him that Ms. Lang had no interest in the cause of action, the lawsuit or the settlement, pecuniary or otherwise.

R. In retrospect, Mrs. Evans believes that it is significant that during the negotiations that led to the settlement, Mr. Lesmez strongly pressured Mrs. Evans to accept it. He represented to her that the prospects of settling on a favorable basis were rapidly disappearing, and repeatedly said to her, "The house is on fire." Devastated by the loss of her husband, Mrs. Evans was in a fragile emotional state and heavily trusted and relied upon the Lesmez Defendants' legal advice. The Lesmez Defendants put her under duress. In retrospect, Mrs. Evans believes that the Lesmez Defendants' insistence on settling was driven by the desire to settle, collect their fee, conceal the settlement from the Trustee, and conceal the existence o the bankruptcy case from Mrs. Evans.

S. Failure to inform Mrs. Evans of the bankruptcy case, of the Trustee's communications to him, and of Ms. Lang's listing of a one-half interest in the cause of action on her Schedule of Property, and pressuring her to accept a settlement in light of the knowledge he was concealing from Mrs. Evans, were additional acts of legal malpractice on the part of the Lesmez Defendants.

T. If Mrs. Evans had known of the bankruptcy case and Ms. Lang's listing of the wrongful death claim as an asset, she could have engaged bankruptcy counsel much sooner and demonstrated that Ms. Lang had no interest and was not entitled to any recovery. The

Lesmez Defendants' silence has cost Mrs. Evans the opportunity to dispose of the Trustee's inquiries without litigation and has cost her tens of thousands of dollars in legal fees thus far, with thousands more to be incurred in the future.

U. Long after the fact, Mrs. Evans also learned that in late May 2011, Ms. Lang had executed a certain document regarding the wrongful death lawsuit and settlement (the "Declaration"). When he learned of the Declaration, the Trustee filed an adversary proceeding to set aside Ms. Lang's discharge, and obtained a default judgment when she failed to defend it or offer any justification as to why she had given such a statement. A true copy of the Declaration is attached as Exhibit A. It reads:

> I, Chanel Lang, declare that I am a Plaintiff in the complaint filed against Betty Ford Center at Eisenhower and Scott M. Davis, M.D., Riverside Superior Court Case No. INC 083059, and hereby acknowledge that said action has been settled as against Betty Ford Center at Eisenhower and Scott M. Davis M.D. in the amounts of $175,000.00 and $250,000.00 respectively.
>
> I also acknowledge that Plaintiff Pamela Evans advanced all costs and fees related to the prosecution of said lawsuit.
>
> I further *acknowledge that Plaintiff Pamela Evans is entitled to recover all of the proceeds from the settlements* reached with Betty Ford Center at Eisenhower and Scott M. Davis M.D.
>
> Therefore, I direct my counsel, the Law Offices of Arthur G. Lesmez, P.C. to forward the entirety of the proceeds from the settlement, minus attorney's fees and related expenses, payable to Pamela Evans forthwith.

[Emphasis added.]

V. Paragraph 21 of the Complaint alleges that Ms. Lang "released" her interest in the wrongful death action. However, the Declaration did not release anything; rather, it acknowledged that Mrs. Evans was entitled to the entire recovery. The Declaration is an *admission* that Ms. Lang was not entitled to any of the proceeds of the settlement. She did not *release* any interest; rather, she had no interest in the first place.

W. In any event, the Declaration is consistent with Mrs. Evans' and Ms. Lang's original agreement that Ms. Lang would be a nominal co-plaintiff only and had no actual interest in the cause of action or the recovery.

X. It is Mrs. Evans' understanding that the Lesmez Defendants engineered the Declaration, to substantiate that Ms. Lang owned or claimed no financial interest in the wrongful death cause of action, and was not entitled to any of the proceeds, consistent with the Defendants' express agreement, engineered by the Lesmez Defendants, at the time the Lesmez Defendants were engaged.

Y. If Mrs. Evans' understanding of how the Declaration came about is correct, this is another act of malpractice by the Lesmez Defendants, both with respect to providing the Trustee grounds to set aside Ms. Lang's discharge, giving the Trustee ammunition to pursue the adversary against Mrs. Evans, and attempting to conceal their ongoing wrongdoing.

8. Mrs. Evans' position in the Adversary Proceeding is (1) that she is entitled to damages, including indemnification, from the Lesmez Defendants, under Fed. R. Bankr. P. 7013(g), to be reimbursed by the Lesmez Defendants as the true perpetrators of the violations alleged in the Complaint, and (2) that she is entitled to actual damages, including costs and attorney fees, and punitive damages, due to the Lesmez Defendants' willful violations of the automatic stay of 11 U.S.C. § 362, by virtue of 11 U.S.C. § 362(k)(1).

9. At about the same time the Motion was filed, Mrs. Evans filed a malpractice lawsuit against the Lesmez Defendants in California for their outrageous, deceitful, fraudulent and negligent representation of Mrs. Evans in the Wrongful Death Action, prior to and following the bankruptcy filing by Ms. Lang.

10. If the settlement is consummated as proposed, the result will be that the Lesmez Defendants will have the right to pursue Mrs. Evans either in this Court or in California, for a

full one-half of the amount of the net settlement proceeds. If they succeeded, the Lesmez Defendants would receive not only the $155,000.00 fee that they received out of the gross settlement proceeds, but an additional half of the net proceeds.

11. Of course, Mrs. Evans would vigorously defend against such a claim by the Lesmez Defendants, asserts that such claim would be utterly without merit, and does not believe that they would recover from her. Even so, her defense would cost her many thousands of dollars and much delay, and there is a theoretical possibility that they could recover.

12. The pursuit of an assignment of the estate's interest in the wrongful death proceeds is a willful and deliberate effort and scheme to damage Mrs. Evans and cause her harm and detriment. Her former attorney is attempting to acquire an interest in her own cause of action and protect himself from the consequences of his own malpractice and wrongful acts, which have merely been summarized herein. The Lesmez Defendants are seeking to position themselves to use Mrs. Evans' own cause of action, and confidential privileged information they acquired in the course of their representation of her, as a weapon against her. Given the Lesmez Defendants' conduct throughout this ordeal, there is no reason to believe the Lesmez Defendants would not use this against her.

13. This cannot be allowed to happen.

14. Mrs. Evans and the Lesmez Defendants were in the process of responding to discovery in the Adversary Proceeding when Mrs. Evans was notified, through counsel, that this settlement was pending. Discovery was halted. Consequently, Mrs. Evans has not had the opportunity to respond to discovery or obtain discovery from the Lesmez Defendants. She believes that the settlement was negotiated because of what would have been revealed by discovery responses from Mrs. Evans and the Lesmez Defendants, because it occurred to someone that the Lesmez Defendants could use the assignment against Mrs. Evans, and because

this would reduce the possibility of Mrs. Evans' recovering punitive damages against the Lesmez Defendants under 11 U.S.C. § 362(k)(1).

15. Because Mrs. Evans is now having to object to the proposed settlement with respect to the assignment in order to keep the Lesmez Defendants from seeking to share in the settlement proceeds and to protect her claim to punitive damages, her legal fees are going to increase, as are the legal expenses for the estate and even for the Lesmez Defendants.

16. To the extent that the Lesmez Defendants' ownership of an interest in the wrongful death proceeds causes Mrs. Evans any damages, impedes her recovery for the Lesmez Defendants' malpractice and other wrongful acts against her, and causes her additional legal expenses, Mrs. Evans has a claim against the estate in this case for indemnification, reimbursement, and damages. Therefore, the settlement is not in the best interests of the estate.

17. Upon the filing of this Chapter 7 case and Ms. Lang's scheduling of an interest in the wrongful death cause of action, her interest became adverse to that of Mrs. Evans. The Lesmez Defendants continued to represent both parties while, as aforesaid, concealing the conflict and the reason for the conflict. The Lesmez Defendants now intend to acquire the interest of the party who became adverse to Mrs. Evans.

18. To be assigned the estate's interest in the cause of action might or would violate the California Rules of Professional Conduct as to both the Lesmez Defendants and their malpractice insurance attorneys, including but not limited to the following:

A. Rule 1-120: A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

B. Rule 3-100(A): A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent or the client, or as provided in paragraph (B) of this rule [not applicable].

C. Rule 3-200: A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) to bring an action, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.

D. Rule 3-300: Avoiding Interests Adverse to a Client:

> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:
> (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted to the client in a manner which should reasonably have been understood by the client; and
> (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
> (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

E. Rule 3-310: Avoiding the Representation of Adverse Interests

> (A) For purposes of this rule,
>
> (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
>
> (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;
>
> (3) "Written" means any writing as defined in Evidence Code section 250.
>
> . . .
>
> (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

A true copy of the relevant portion of the Rules is attached hereto as Exhibit B.

19. Mrs. Evans also asserts that the assignment would place the Lesmez Defendants and their malpractice attorneys in violation of §§ 6077[2], 6068(g)[3], 6128[4], and 6129[5] of the California Business and Professional Code.

20. In *Styles v. Mumbert*, 164 Cal. App. 4th 1163, 79 Cal. Rptr. 3d 880 (Cal. App. 2008), Styles obtained a judgment against Mumbert. Mumbert was represented by Pagkas. Mumbert appealed the judgment and had a malpractice lawsuit against Pagkas. Pagkas then took an assignment of Styles's judgment against Mumbert and sought to substitute himself for Styles as the appellee in the appeal of the judgment. Mumbert protested Pagkas's purported acquisition of the judgment against him by his former lawyer, asserting that Pagkas had violated Rules of

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[2] 6077. The rules of professional eonduet adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.
For a wilful breach of any of these rules, the board has power to diseipline members of the State Bar by reproval, publie or private, or to recommend to the Supreme Court the suspension from practiee for a period not exeeeding three years of members of the State Bar.
http://www.leginfo.ea.gov/egi-bin/displaycode?section=bpe&group=06001-07000&file=6075-6088

[3] 6068. It is the duty of an attorney to do all of the following:

. . .

(g) Not to encourage either the commencement or tbe continuance of an action or proceeding from any corrupt motive of passion or interest.
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=06001-07000&file=6060-6069

[4] 6128. Every attorney is guilty of a misdemeanor who either:

(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.

(b) Willfully delays his client's suit with a view to his own gain.

(e) Willfully reecives any money or allowance for or on account of any money which he has not laid out or become answerable for.

Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.
http://www.leginfo.ca.gov/cgi-bin/displaycode?seetion=bpc&group=06001-07000&file=6125-6133

[5] 6129. Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor.

Any violation of the provisions of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.
http://www.lcginfo.ca.gov/egi-bin/displayeode?section=bpc&group=06001-07000&file=6125-6133

Professional Conduct 3-200 (prohibited objectives of employment), 3-300 (obtaining a pecuniary interest adverse to a client), 3-310 (representation of adverse interests), 3-100 (confidential information of a client), as well as California Business and Professions Code §§ 6077, 6068(g), 6128, and 6129.

21. The court sustained Mumbert's objection. It stated:

> Therefore, even though Pagkas no longer represents Mumbert, he continues to owe Mumbert the duty to protect their prior confidential relationship. Where a substantial legal and factual relationship exists between a former representation and the attorney's current position, a presumption arises that the attorney possesses confidential information about the former client which would be compromised if an attorney were allowed to take an adverse position after the representation ended. (Citations omitted.) Typically, this becomes an issue where an attorney seeks to represent multiple adverse parties in successive representations. In those cases, the former client can step in and prevent the attorney from representing his adversary in order to safeguard his confidences. (Citations omitted.) Here, Pagkas is not only attempting to represent the opposing side, his is trying to *be* the opposing side in the very same litigation in which he represented Mumbert. There is more than merely a "substantial" legal and factual relationship between the prior representation and the current appeal. (Citation omitted.) Since the appeal is from the judgment in which Pagkas represented Mumbert, it is the *same* case. Under any analysis, this scenario not only raises the presumption, but establishes for a certainty that Pagkas possesses confidential information adverse to Mumbert, which would be compromised if his motion were granted. Therefore, by objecting, Mumbert can prevent Pagkas from stepping into the shoes of his adversary in order to safeguard his confidences. The duty of confidentiality of client information involves public policies of paramount importance. (Citation omitted.) The preservation of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. (Rule 3-100, Discussion, § 1.) Pagkas may not reveal or use confidential information, gained through his prior representation of Mumbert, in this appeal because it would be contrary to public policy and would undermine the very nature of the attorney client relationship.

Id. at 1167-1168, 79 Cal. Rptr. 3d at 883-884 [emphasis in original].

22. The court concluded:

> Pagkas's actions make a mockery of the Rules of Professional Conduct. We cannot conceive of, and the case law is devoid of, a scenario which could do more violence to the attorney-client relationship and the public trust in the legal system, than what Pagkas and his firm have done and seeks to do. Despite the well-founded opposition to the motion, citing to the relevant Rules of Professional Conduct and supporting case law, Pagkas and his attorney continue to urge that

> we grant the motion without cogent argument or citation to relevant supporting authority. Under these circumstances, sanctions are appropriate. Sanctions are awarded in the amount of $5,260 to appellant Mumbert against Pagkas and his attorney, ...

Id. at 1169-1170, 79 Cal. Rptr. 3d at 885.

23. Mrs. Evans respectfully contends that attorney Pagkas's violations of the Rules of Professional Conduct pale in comparison to the egregiousness of the Lesmez Defendants' wrongdoing. She contends that the Lesmez Defendants have violated many additional Rules.

24. Not only would the assignment violate the formal Rules of Professional Conduct, but also the proposed assignment continues to demonstrate the Lesmez Defendants' unethical, immoral, ruthless and deceitful conduct. It is unjust and inequitable and should shock the conscience of the Court.

25. The Motion asserts that the proposed assignment satisfies the criteria described therein for a Bankruptcy Court to approve a compromise and settlement under Fed. R. Bankr. P. 9019(a), and cites various cases. Mrs. Evans reserves the right to file a separate memorandum of law in support of her objection to the assignment feature of the settlement and the preservation of her rights against the Lesmez Defendants. However, at this time, she would simply note that many of the factors listed in the Motion support the proposition that the assignment should not be approved. These include, but are not limited to:

A. The statement in Paragraph 9 that the decision is within the discretion of the trial judge.

B. The statement in Paragraph 9 that the court must exercise its discretion in an informed and reasoned manner:

> When invoked as a guide to judicial action [discretion] means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, *but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.*

C. The list of guiding principles in Paragraph 10, including the following:

. . .

e. whether the settlement is collusive;

f. whether the . . . litigation has been a "fair fight;"

g. whether there has been sufficient discovery of the underlying facts and claims to enable counsel and the parties to act intelligently;

h. the number of objecting parties and their relative interests;

i. the paramount interest of creditors *with a proper preference for their reasonable views;* and

j. *all other factors bearing on the wisdom of the compromise.*

[Emphasis added.] Obviously, the naked number of dollars that would be brought into the estate, or the potential dividend to creditors, is not the sole factor that the Court must consider. The Court must consider the entire context of the litigation and what is just and fair to all parties concerned.

26. Although the Motion alleges that the recovery in the Adversary is the primary asset of the estate, it is also true that if the estate's interest is assigned to the Lesmez Defendants, Mrs. Evans' resulting claim back against the estate will dwarf all the other claims of third parties.

27. A dividend to Mr. and Mrs. Lang's other creditors should not be at her expense. If the "asset" had not been listed, or had been listed as a nominal asset with zero value, and if Mrs. Evans had had the opportunity to demonstrate to the Trustee that Ms. Lang had no interest of value in the cause of action before the Adversary was filed, the creditors would have received nothing anyway. If this settlement is disapproved in its entirety, the other creditors will get only what they should rightfully have gotten.

28. For the foregoing reasons, Mrs. Evans beseeches the Court not to countenance the Lesmez Defendants' perfidy, to disapprove the assignment as a component of the proposed

settlement, and to fashion a remedy to protect Mrs. Evans' ability to recover, particularly under 11 U.S.C. § 362(k)(1).

WHEREFORE, Mrs. Evans respectfully prays:

1. That the Court deny the Motion and disapprove the proposed settlement.

2. Alternatively, that the Court disapprove the assignment aspect of the settlement, forbid the Trustee to assign the estate's interest in the wrongful death claim, the wrongful death action, or the proceeds of settlement, and forbid the Lesmez Defendants to receive, take or accept such an assignment.

3. That the Court fashion a remedy such that Mrs. Evans retains all of her rights under Fed. R. Bankr. P. 7013 and 11 U.S.C. § 362(k)(1) against the Lesmez Defendants.

4. That the Court grant Mrs. Evans such other, further and general relief as is just.

/s/ Linda W. Knight
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Attorneys for Pamela Evans,
Defendant and Cross-Claimant

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, a true and correct copy of the foregoing document was filed electronically. 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. Parties may access this filing through the Court's electronic filing system.

/s/ Linda W. Knight
Linda W. Knight

EXHIBIT D

RECEIVED
APR 10 2013
Dav. Co. Chancery Court

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

BANK OF AMERICA, N.A.,	)	
	)	
Plaintiff,	)	N.F
	)	Docket No. 12-490-II
v.	)	
	)	
NASHVILLE COMMONS, L.P.,	)	
	)	
Defendant.	)	

FILED
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MEMORANDUM OPINION DENYING MOTIONS OF LOJAC ENTERPRISES, INC. (I) TO INTERVENE UNDER TENN. R. CIV. P. 24.01 OR ALTERNATIVELY UNDER TENN. R. CIV. P. 24.02 AND (II) TO ALTER OR AMEND ORDER OF FEBRUARY 21, 2013

This matter came on for hearing at 9:00 A.M. on Friday, April 5, 2013, on the Motions of LoJac Enterprises, Inc. ("LoJac") (I) to intervene in this Receivership under Tenn. R. Civ. P. ("TRCP") 24.01 or, alternatively, 24.02, and (II) to alter or amend, pursuant to TRCP 59 or 60, the Agreed Order Granting Joint Motion for Approval of Compromise and Settlement of Lawsuit, among the Receiver, Bank of America ("BofA") and Nashville Commons, L.P. ("Nashville Commons"), entered February 21, 2013 (the "Settlement Order"). At the hearing, the following appearances were made: Mr. David Smythe, counsel for LoJac; Mr. G. Rhea Bucy, Ms. Linda W. Knight and Mr. Gareth S. Aden, counsel for the Receiver; and Messrs. David W. Houston, IV and Faisal Delawalla, counsel for BofA.

The Court has fully considered LoJac's Motions, Replies, Memorandum of Law, Affidavit and Exhibits, and the Responses, Memoranda of Law, Affidavits and Exhibits filed, respectively, by the Receiver and BofA. The Court has also considered the statements and arguments of counsel at the hearing, and the entire record in this Receivership. Based upon all the foregoing, and for reasons stated in open court at the hearing, and recorded, which statements are incorporated herein by reference, and for the reasons set forth below, the Court finds and concludes that the Motions should be denied.

I. Motion to Intervene as of Right

Tenn. R. Civ. P. ("TRCP") 24.01 governs intervention as of right. LoJac claims that it has a right to intervene in this Receivership pursuant to Rule 24.01(2).

A. The Motion to Intervene Is Not Timely

Rule 24.01 expressly provides that an application to intervene must be timely. The Court holds that LoJac's Motion to Intervene was not timely. This Receivership is completed. All that remains to be done is the submission of appropriate papers that will discharge the Receiver and terminate the proceeding.

LoJac has known since May 2012 of the content of this Court's Order Appointing Receiver, as entered herein March 30, 2012, and that the Receiver was taking steps to gain possession of the proceeds of the BofA Letter of Credit that Lowe's Home Centers, Inc. ("Lowe's") drew. LoJac had billed Nashville Commons in 2010 for a substantial portion of the amount it now seeks. LoJac could have asserted its unliquidated claims against Nashville Commons long ago in the so-called "Thomas Lawsuit," or otherwise. Instead, LoJac waited until the Receiver had recovered the proceeds of the Letter of Credit by means of a settlement that was approved by this Court by the Settlement Order. After entry of the Settlement Order, there remained no questions of law or fact to be determined in this Receivership.

B. LoJac Does Not Meet the Requirements of Rule 24.01(2).

LoJac may "claim an interest," but does not have a plausible claim to an interest in the property or transaction which is the subject of this Receivership, and is not so situated that its disposition may as a practical matter impair or impede its ability to protect that interest.

This Receivership is not a general creditors' bill or equity receivership commenced for the benefit of all general, unsecured creditors. The duties of a receiver in such a receivership are diametrically inconsistent with the duties of the Receiver as set forth in the Order Appointing

Receiver. This Receivership is limited in scope to assets of Nashville Commons which are subject to liens or security interests claimed by BofA. Tenn. Code Ann. § 29-1-103 is a statute of general application and is not limited or unique to general creditors bills or equity receiverships; it does not confer any rights upon LoJac either to become a party to this Receivership, or against the proceeds of the Letter of Credit that are in the Receiver's custody. LoJac does not have an "unconditional" statutory right to intervene under TRCP 24.01(1), by virtue of § 29-1-103, or otherwise.

The Order Appointing Receiver specifies that this Receivership was commenced by BofA pursuant to its contractual right to a receiver to enforce its default remedies under its deeds of trust and related loan documents with Nashville Commons. Among other things, said Order authorizes the Receiver to bring an action against Lowe's to enforce the Site Development Agreement ("SDA") between Nashville Commons and Lowe's. The right that was enforceable under the SDA related to Lowe's alleged breach of its warranty under Tenn. Code Ann. § 47-5-110(a)(2), that Lowe's draw of the letter of credit did not violate the SDA. BofA claims that it was subrogated to this right under Tenn. Code Ann. § 47-5-117(a). It was the SDA that required Nashville Commons to provide a Letter of Credit for Lowe's. LoJac is not a third party beneficiary of the SDA; furthermore, BofA claims that the SDA was assigned to it for purposes of security.

Under the various letter of credit documents, and under Tenn. Code Ann. §§ 47-5-101, *et seq.*, the contract under which Lowe's drew the Letter of Credit was between Lowe's and BofA. The Letter of Credit was to protect Lowe's from having to pay more for the site preparation of its store than it was obligated to pay under the SDA. Under the Settlement Order, Lowe's draw upon the Letter of Credit was effectively reversed to the extent of the funds that Lowe's

relinquished, but Nashville Commons, or its "estate" in the Receivership, acquired no interest in the funds by virtue thereof. The funds revert to their original owner, BofA.

LoJac has claims against Nashville Commons, even though such claims are largely unliquidated, not reduced to judgment, and Nashville Commons may dispute some or all of the claims and/or the amounts asserted by LoJac. However, having such claims against Nashville Commons does not give LoJac the right to intervene in this Receivership, nor translate into LoJac's having rights in, to and against the funds recovered from Lowe's. LoJac's assertion that the nature of the proceeds was transformed by virtue of the settlement into an asset of Nashville Commons, or its "estate" in the Receivership, is without merit.

The disposition of this Receivership without LoJac as a party will not as a practical matter impair or impede LoJac's ability to protect its interests. Nothing that has occurred or will occur in this Receivership, including the entry of the Settlement Order, as a practical matter limits LoJac's ability to seek a judgment against Nashville Commons, and to seek to enforce any judgment, in a separate proceeding, after the moneys that the Receiver has recovered are transmitted to BofA.

II. Motion for Discretionary Intervention

In the alternative, LoJac asserts that the Court should grant it permissive intervention under TRCP 24.02. The Court holds that it is not appropriate for the Court to exercise its equitable jurisdiction or its discretion to grant permissive intervention, nor is LoJac entitled to permissive intervention.

A. The Motion to Intervene Is Not Timely

As under TRCP 24.01, a motion for permissive intervention must be timely. For the reasons summarized above, the Court holds that the Motion was not timely.

B. The Requirements of Rule 24.01(1) and (2) Are Not Met

No statute, including Tenn. Code Ann. § 29-1-103, confers upon LoJac a conditional right to intervene. LoJac's claims and the Receivership do not have a question or law or fact in common. There is no question of law or fact that remains to be determined in this Receivership.

C. Intervention Will Unduly Delay or Prejudice the Adjudication of the Original Parties' Rights

The Order Appointing Receiver provides that the Receivership shall terminate upon BofA's filing of a Notice of Termination. All that remains is for the Receiver to transfer possession of any Property and documents, and to submit a final report and accounting, unless such final report and accounting are waived, whereupon the Receiver will be discharged and his bond will be exonerated. It would both the Order Appointing Receiver and the Settlement Order for the Court to allow LoJac to intervene and seek to alter or amend the Settlement Order, then to hold the Receivership open while LoJac seeks to liquidate its alleged claims against Nashville Commons, and pursue a dubious "priority claim" against this "*res*." This certainly constitutes undue delay or prejudice.

III. Motion to Alter or Amend

Having denied the Motion to Intervene, the Court need not reach the Motion to Alter or Amend the Settlement Order under TRCP 59 or 60. The Motion to Alter or Amend is moot. Furthermore, the Settlement Order was not intended to be an adjudication of any of LoJac's claims or priorities, and does not preclude LoJac's assertion of same in an appropriate forum and proceeding. Thus, LoJac's belief that it needs an alteration or amendment of the Settlement Order to preserve its claims is mistaken.

A. The Requirements of TRCP 59 Are Not Met

Motions to alter or amend are addressed under TRCP 59.04. LoJac articulated no valid grounds under Rule 59.04, or otherwise, to alter or amend the Settlement Order.

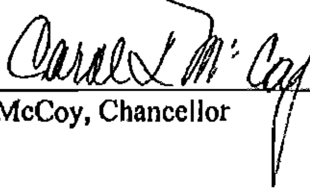
TRCP 59.01 states that the listed motions "are the only motions contemplated in these rules for extending the time for taking steps in the regular appellate process." The "appellate process" presumes that the movant is a party to the underlying litigation. LoJac is not entitled to be a party to this Receivership. For all of the grounds summarized in Sections I and II above, there are no grounds for the Court to entertain or grant a Motion by a nonparty to alter or amend.

B. The Requirements of TRCP 60 Are Not Met

Since a motion to alter or amend is addressed by Rule 59.04, the Court cannot consider TRCP 60 as a basis for addressing the Motion to Alter or Amend. Further, LoJac has not alleged any grounds for this Court to grant relief under Rule 60.

IV. CONCLUSION

For the foregoing reasons, the Court will enter a separate Order denying both of LoJac's Motions, as provided by TRCP 52.01, *nunc pro tunc* to 12:00 Noon, April 5, 2013.



Carol L. McCoy, Chancellor

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CERTIFICATE OF SERVICE

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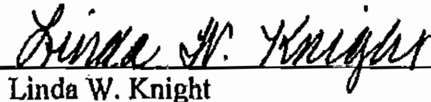

Linda W. Knight

COPIES TO ATTORNEYS AND PRO SE LITIGANTS
AT THE ABOVE ADDRESSES
DATE 4-15-13 CLERK TL.

EXHIBIT E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

KIMBERLY JO WOOSLEY,	)	
	)	
Plaintiff-Appellee,	)	
	)	Docket No. 3:09-cv-0910
v.	)	Judge Aleta A. Trauger
	)	
JAY SHERMAN WOOSLEY,	)	
	)	
Debtor-Appellant.	)	

PLAINTIFF/APPELLEE'S BRIEF

Pursuant to Fed. R. Bankr. P. 8009(a)(2), Plaintiff/Appellee, Kimberly J. Woosley ("Ms. Woosley") respectfully files this Brief in the above-captioned appeal from a ruling of the United States Bankruptcy Court for the Middle District of Tennessee, granting Ms. Woosley a partial summary judgment.

This 4th day of January, 2009.

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IV. STATEMENT OF THE CASE

The facts described in Debtor's Statement of the Case barely resemble the actual facts.

A few of the salient facts are as follows:

Ms. Woosley's father started Tennessee Lawn Maintenance (the "Company") in the 1970's and built it into a successful, profitable business. It was a landscape, landscape maintenance and irrigation company. Ms. Woosley was intimately familiar with the Company from having grown up hearing about it and from working there while she was in school. She is trained as an accountant and performed internal accounting services for both the Company and another company owned by her mother, Williams Home Place. Both of her parents were intimately involved with the operations of both companies. (R. 14 and R.38, Affidavits of Ms. Woosley; R. 20, Affidavit of Gary D. Mendl, Ms. Woosley's father.)

After Mr. Mendl transferred ownership of the Company to the Woosleys, Mr. Woosley did not own 100% of the business; he owned 99% and Ms. Woosley owned 1%. (R. 14, Affidavit of Ms. Woosley, Items 17, 18, 19, Company tax returns and K-1's for 2004, 2005 and 2006.) Mr. Mendl would not have transferred the Company to the Woosleys except for Ms. Woosley, so that she and her family would have an adequate source of household income. (R. 38, Affidavit of Ms. Woosley.)

Ms. Woosley did not work full time at Williams Home Place. She was paid $31,200.00 per year at Williams. She worked part time there, and part time at the Company. Her and Mr. Woosley's incomes at the Company increased over time and in early 2007, she was making about $1,100.00 twice a month and Mr. Woosley was making about $1,821.75, net, twice a month. (R. 14 and R. 38, Affidavits of Ms. Woosley.)

Mr. Woosley started working as an employee at the Company before he and Ms. Woosley married. He learned the business and knew what was needed in order to run it

successfully. They communicated frequently and made decisions together. (R. 14, Affidavit of Ms. Woosley; R.22, Affidavit of Jodi Ervin .)

When the parties divorced, Ms. Woosley expected to continue to work for the Company, and in the MDA she gave up alimony in expectation that she would have her earnings in the future. She believed that that would be a steady source of income for her. (R. 14, Affidavit of Ms. Woosley; R. 21, Affidavit of Patricia McDade.)

Almost immediately after the divorce, Mr. Woosley started harassing Ms. Woosley and making it very difficult for her to do her work for the Company. (R. 14, Affidavit of Ms. Woosley; R. 15, history of some of the communications between Mr. and Ms. Woosley; R. 22, Affidavit of Jodi Ervin.) Mr. Woosley made it impossible for them to work together in the business, and Mr. Woosleyh stated that he no longer wanted her to work for the Company and that he was hiring someone else. (R. 38, Affidavit of Ms. Woosley.)

The parties negotiated vigorously over weeks and eventually agreed that Ms. Woosley would leave the Company and they negotiated a compromise, as a result of which Ms. Woosley would receive $1,500.00 per month for a defined period of 10 years, approximately the time their youngest child reached 18, would give up her $2,200.00 per month income, would lose the rent from the Company, and would give up her ownership interest in the Company all of which she had the expectation of owning and receiving into the indefinite future. (R. 14 and 38, Affidavits of Ms. Woosley.) There were discussions about the Company's finances, in which Mr. Mendl participated, and Mr. Woosley was fully familiar with the Company's finances. (R. 14, R.38, Affidavits of Ms. Woosley. R. 20, Affidavit of Gary D. Mendl.) Mr. Woosley had not devoted adequate time and effort to the business, was offending customers, was displaying outbursts of temper, all of which was damaging the Company, and he went SCUBA diving in the Pacific instead of working for the benefit of the Company. (R. 14, Affidavit of Ms. Woosley.)

Ms. Woosley never skimmed money from the Company or received anything but her proper compensation. Mr. Mendl never received anything from the Company after he turned it over to the Woosleys. Nor was any third party ever paid out of Company money on behalf of Ms. Woosley or Mr. Mendl. (R. 14, R. 38, R.47, Affidavits of Ms. Woosley; R. 20, Affidavit of Gary D. Mendl, R. 53, bank statements of Ms. Woosley's personal checking account.) She did not mismanage the Company and had no incentive to do so; she had managed the Company for years, loved it, and needed it for her livelihood. Her motive was for the Company to survive. (R.38, Affidavit of Ms. Woosley.) She paid the Company's bills as best she could given that Mr. Woosley was not working as he should and was alienating customers. (R.38, Affidavit of Ms. Woosley.) She did forget to file the Company's 2nd quarter 2007 employment tax return, because it was due on the date the divorce was final and she was quite upset, but she had paid a substantial amount of the periodic deposits, and filed the return in September 2007. The 3rd Quarter return was not due until after Ms. Woosley ceased working for the Company, so she had no responsibility for filing that tax return. (R. 47, Affidavit of Ms. Woosley.)

Mr. Woosley knew what his and Ms. Woosley's finances were before and in the course of the divorce. The Parenting Plan, with the child support figures, was calculated using the Tennessee child support guidelines based on their earnings. (R. 21, Affidavit of Patricia McDade.) Ms. McDade, an experienced lawyer who practices in the area of domestic relations, took care to advise Mr. Woosley that he could get an attorney and to elicit a confirmation from him that he did not wish to have an attorney and understood the MDA and divorce documents. (*Id.*)

Mr. Woosley knew what the Company's finances were before signing the November Agreement. Ms. Woosley and Mr. Mendl talked with him a great deal about them. They also worked with the person Mr. Woosley hired to become the Company's bookkeeper after Ms.

Woosley ceased to be employed. Ms. Woosley did not withhold the Company's books and records from Mr. Woosley. (R. 14, R. 38, Affidavits of Ms. Woosley; R. 40, emails to new bookkeeper; R.20, Affidavit of Mr. Mendl.)

After the November Agreement, in or about February 2008, Mr. Woosley approached Ms. Christina Gearheart, whose husband had a landscape company called The Cutting Edge, about going to work for that company. He implied that he had to put the Company out of business and said that he had good customers that he could bring to The Cutting Edge and he asked to come to work for The Cutting Edge. The Gearhearts hired Mr. Woosley thinking that that would help his family. Mr. Woosley was a poor employee, taking 2 SCUBA diving vacations within a few months of coming to work there, and doing a poor job. He left in the summer of 2008 and took former customers of the Company with him. There is reason to believe that he took money from customers for work done by The Cutting Edte. He was a problem employee. (R. 23, Affidavit of Christina Gearheart.)

The Company could have remained in business and done well. Mr. Woosley is capable of running the business and of earning enough money to pay his own living expenses and pay Ms. Woosley the $1,500.00 per month. (R. 47, Affidavit of Ms. Woosley; R. 20, Affidavit of Gary D. Mendl.)

The November Agreement is permeated with references to the divorce decree. The decree is incorporated into the Agreement by its own terms. The obligation relates back to the date of the divorce. It is stated to be construed in accordance with the divorce decree.

V. ARGUMENT

A. History of Nondischargeability of Domestic Obligations

When the Bankruptcy Code was enacted in 1978, there was no 11 U.S.C. § 523(a)(15). The only section making domestic obligations nondischargeable was what is now 11 U.S.C. § 523(a)(5), and was limited to alimony and support obligations.

This produced a result that was harsh in many instances. It limited nondischargeability to obligations that were for support, but allowed a spouse to discharge property settlement obligations, on which the nondebtor spouses frequently depended as a source of assets and support. Debtor spouses were able to take advantage of this loophole in the law and work an extreme hardship on their nondebtor spouses. For example, because property settlements were dischargeable, many spouses were left without property for which they had bargained in reaching their overall divorce agreements, or on the basis of which courts had adjudicated contested divorces. Many debtor spouses were able to discharge debts for which they had agreed to bear full liability and indemnify the nondebtor spouses, leaving nondebtor spouses saddled with debts that they had bargained in their divorces not to have to pay.

In 1994, Congress enacted the Bankruptcy Reform Act of 1994, HR 5116, P.L. 103-394. This significantly broadened and liberalized the nondischargeability provisions and other Code provisions for the protection of debtors' families. A copy of § 304 of that statute, dealing with domestic obligations, is attached hereto as Exhibit A.

In 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), S 256, P.L. 109-8, Congress greatly expanded the protections afforded to families of debtors. A copy of §§ 211-219 of BAPCPA is attached hereto as Exhibit B. This shows that not only were the nondischargeability provisions of §§ 523(a)(5) and 523(a)(15) expanded, but also Congress enhanced the rights, privileges and protections of debtors' families throughout the Code,

from priority in distributions in Chapter 7's to the automatic stay of 11 U.S.C. § 362, to preference avoidance in 11 U.S.C. § 547.

B. The Domestic Exceptions to Dischargeability Should Not Be Construed Narrowly in Favor of the Debtor.

Mr. Woosley posits that the exceptions to dischargeability should be read narrowly to provide a "deserving" or "honest" debtor a fresh start. He cites cases holding that the 523(a)(5) and (a)(15) exceptions to discharge apply only to obligations to a spouse, former spouse or child of the Debtor. These cases are of no help to Mr. Woosley.

In re Olson, 355 B.R. 649 (Bankr. E.D. Tenn. 2006) held that a *business partner* of the Debtor could not obtain a judgment that Debtor's debt to her was nondischargeable under § 523(a)(15). She attempted to use the doctrine of equitable subrogation to the claims of Debtor's former spouse against Debtor. The Bankruptcy Court was entirely correct in holding that a business partner cannot be protected by § 523(a)(15). Judge Stair in *Olson* relied on his previous ruling in *McCracken v. LaRue (In re LaRue)*, 204 B.R. 531 (Bankr. E.D. Tenn. 1997). In *McCracken,* the court held that Debtor could discharge his former spouse's claims for debts to third parties that Debtor was ordered to pay under their divorce decree. The case is obviously distinguishable from the case at bar because the debts in *McCracken* were owed to third parties, and had been entered into with those third parties in the ordinary course. The divorce decree did not require Debtor to indemnify the spouse if she had to pay the debts that she, too, already jointly owed.

In this case, the obligation under the November Sales Agreement is owed directly to Ms. Woosley, besides which the Agreement does contain an indemnification provision.

Furthermore, *McCracken* cited *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983), which held that a divorce decree that ordered Debtor to pay third parties and hold the former spouse harmless can be a support obligation, even if it is not specifically called alimony

or support. (The case contains a great deal of analysis that is now moot because of the enactment of § 523(a)(15), but the overall rationale of the case supports Ms. Woosley's position.)

Debtor also relies on *Hudson v. Hudson (Matter of Hudson)*, 107 F.3d 355 (5th Cir. 1997). However, the actual holding was that an obligation to pay attorneys who protected the children's interest in a paternity/support case *was* nondischargeable as support under § 523(a)(5).[1]

In contrast to Debtor's cases, other cases hold that the public policy of protecting families trumps the public policy of narrow construction to foster a debtor's fresh start.

In *Matter of Crosswhite*, 143 F.3d 879 (7th Cir. 1998), in interpreting 11 U.S.C. § 523(a)(15), which at the time contained a hardship balancing provision, the court stated:

> That policy of protecting and favoring the debtor is tempered, however, when the debt arises from a divorce or separation agreement. *See* 4 Lawrence P. King, *Collier on Bankruptcy* PP 523.05, 523.11[2] (15th ed. rev. 1998) (stating that, with respect to enforcement of obligations for spousal and child support, Congress "has overridden the general bankruptcy policy in which exceptions to discharge are construed narrowly" against a creditor). Bankruptcy law has had a longstanding corresponding policy of protecting a debtor's spouse and children when the debtor's support is required. *See Wetmore v. Markoe, 196 U.S. 68, 77, 49 L. Ed. 390, 25 S. Ct. 172 (1904)* ("The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce."); Shine v. Shine, 802 F.2d 583, 585-86 (1st Cir. 1986) ("The exception from discharge for alimony and payments for maintenance and support has long been an accepted part of bankruptcy law."). This policy is manifest in the Bankruptcy Code's § 523(a)(5); this section declares nondischargeable a marital obligation that was incurred by the debtor for alimony, maintenance or support of

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[1] Strangely, a Bankruptcy Court in the Fifth Circuit held on October 28, 2009, in *In re Densmore*, 2009 Bankr. LEXIS 3416 (2009) that § 101(14A) rendered a debt dischargeable, even though the language of § 101(14A) is broader than that of the former § 523(a)(5) in that it covers a debt "owed to or recoverable by a spouse, former spouse or child." *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 2006 (2006), in which the Court said, "Where judicial interpretations have settled a statutory provision's meaning, repeating the same language in a new statute indicates the intent to incorporate the judicial interpretations as well." *Id.* at 73, 126 S. Ct. at 1505, 164 L. Ed. 2d at 184. Ms. Woosley respectfully asserts that *Densmore* is not a sound decision and in any event does not affect the outcome of this case.

> the debtor's spouse, former spouse or child. This exception therefore expresses Congress' determination to protect former spouses in matters of alimony, maintenance, and support despite the Bankruptcy Code's general policy of providing a debtor with a fresh start. Because of this Congressional determination, a *§ 523(a)(5)* exception from discharge is construed more liberally than other § 523 exceptions. *See* King, *Collier on Bankruptcy P 523.05.*

Id. at 881-882 (footnotes omitted.). The case dealt with the burden of proof in the former balancing test.

In *Shannon v. Strickland*, 207 B.R. 752, 1995 U.S. Dist. LEXIS 21717 (M.D. Fla. 1995), the issue was whether attorney fees relating solely to post-divorce custody litigation were nondischargeable as support under § 523(a)(5). The District Court noted that ". . . while the Bankruptcy Court's decision was consistent with the emphasis on the fresh start goal of the Bankruptcy Code, it fails to consider the Congressional Policy favoring enforcement of obligations for spousal and child support." 1995 U.S. Dist. LEXIS 21717 at *4. It is noted that activity that was not simultaneous with the divorce itself was held to be within the "in the course of or in connection with" language of § 523(a)(5), which bears out Judge Harrison's interpretation of that phrase.

In *Wallace v. Wallace (In re Wallace)*, 2008 Bankr. LEXIS 4308 (D. Ariz. 2008), Judge Marlar held that a payment obligation was for support even though it had indicia of property settlement. Debtor also argued that his former wife had waived her right to the payment. The court held that nothing in the record or the parties' agreement would provide "such a windfall" to Debtor, for his voluntary decision not to pay. Therefore, she could go into the divorce court to hold Debtor in contempt or take any steps to enforce her right to payment – just as Judge Harrison held. *Id.* at *3. The court looked at the totality of the circumstances and held the obligation nondischargeable.

Debtor cited *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365; 127 S. Ct. 1105; 166 L. Ed. 2d 956 (2007) for the proposition that bankruptcy serves to give a fresh start to a deserving debtor. However, the holding in the case was that a debtor who was less than honest did not have the absolute right to convert his Chapter 7 case to one under Chapter 13. Thus, the general principal did not apply in this case relied on by Debtor.

Accord, as to the policy fostering domestic obligations as superior to the public policy generally supporting strict interpretation of the exceptions to discharge, *Cavalli v. Cavalli (In re Cavalli)*, 2009 Bankr LEXIS 819 (N.D. Ga. 2009); *In re Matar*, 2007 Bankr. LEXIS 3416 (N.D. GA 2007); *Nelson, Keys & Keys, P.C. v. Hudson (In re Hudson)*, 2007 Bankr. LEXIS 3943 (C.D. Ill. 2007) ("presumption of nondischargeability"); Fisher v. Valls (In re Valls), 79 B.R. 270 (Bankr. W.D. La. 1987); *Macy v. Macy (In re Macy),* 192 B.R. 802 (Bankr. D. Mass. 1996); *Pleban v. O'Toole (In re O'Toole)*, 194 B.R. 629 (Bankr. E.D. Mo. 1996); *Hayes v. Hayes (In re Hayes)*, 235 B.R. 885 (Bankr. W.D. Tenn. 1999)(discussing Sixth Circuit decisions).

C. Debtor's argument that an agreement such as the November Agreement must literally be contemporaneous with the divorce in order to be "in connection with it" fails.

Debtor seems to argue that the November Agreement cannot be "in connection with" the parties' divorce because it was not "simultaneous with" the divorce. This ignores the realities of divorces, where the parties may return to the divorce court for many years after the entry of the actual divorce decree, for modifications of alimony, child support, custody, property transfers and all other possible kinds of obligations, as well as simply to enforce the existing decree, such as having the other party held in default or contempt of what he or she has previously been ordered to do.

Debtor's position also ignores the fact that the two phrases in the statute are used in the disjunctive. The wording is, "incurred by the debtor in the course of a divorce or separation or

in connection with a separation agreement, divorce decree or other order of a court of record . . ." 11 U.S.C. § 523(a)(15). Even if "in the course of" means "simultaneously with," the phrase "in connection with" has a different meaning and cannot be limited to an obligation that arises "simultaneously" with the divorce decree.

"In connection with" should have the same meaning in both §§ 523(a)(5) and 523(a)(15). And, as used in § 523(a)(5), the Code itself demonstrates that "in connection with" must include subsequent modifications of an original divorce decree, separation agreement, etc. The reason for this is that the automatic stay of 11 U.S.C. § 362 contains a broad exception for *either* the commencement or the continuation of proceedings *either* to establish or to modify a domestic support obligation.

The cases that Debtor cites do not support his position.

Debtor cannot rely on cases holding support obligations dischargeable if they were not in connection with a separation agreement, divorce decree or property agreement. The cases that Debtor cites are completely distinguishable from the case at bar.

In *Parker v. Bruner (In re Bruner)*, 43 B.R. 143 (Bankr. E.D. Mo. 1984), Debtor's support obligation was imposed in a paternity and support proceeding. The same was true in *Fenstermacher v. Irmer (In re Fenstermacher*, 31 B.R. 77 (Bankr. D. Neb. 1983). The parties had never been married, so of course the support obligation was not in connection with a divorce, as is the November Agreement.[2]

[2] In *Cain v. Isenhower (In re Cain)*, 29 B.R. 591 (Bankr. N.D. Inc. 1983), the Bankruptcy Court held that a debt that was imposed by a paternity suit rather than a divorce was nondischargeable on the ground that debts for support had been nondischargeable via case law before they became so by statute, and that the statute says nothing about a divorce. Whether or not that holding is correct is not relevant in this case, because the November Agreement is expressly related to the Woosleys' divorce decree and MDA. In Cain, once again, there had been no marriage and no divorce, so the case is distinguishable except for the public policy discussion that defers to spouses and dependents over the fresh start policy that Debtor espouses as paramount.

In *Petty v. Petty (In re Petty)*, 333 B.R. 472 (Bankr. M.D. Fla. 2005), the obligation that was held not "in connection with" the parties' divorce – and was therefore dischargeable - was credit card debt that had been incurred by Debtor and his new wife, for which the nondebtor former spouse was liable because her name simply had not been taken off the credit card account. The debt certainly did not arise out of a contract between Debtor and the former spouse that related back to and modified their original divorce decree and MDA.

In re De Wakar, 2007 Bankr. LEXIS 4178 (E.D. Va. 2007) cannot support Debtor's position. There, the court held that there was no "domestic support obligation" under § 101(14A) *because there was not even a divorce case pending – no case had ever been filed.* The court did note that "[t]he Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23 ("BAPCPA") significantly enhanced the status of spousal and child support creditors," *id.* at *3, which supports Ms. Woosley's position that the November Agreement is in connection with the parties' divorce and is nondischargeable.

The point of *Sateren v. Sateren (In re Sateren)*, 183 B.R. 576 (Bankr. D..D. 1995), relied on by Debtor, was that, as a pre-523(a)(15) case, the spouse could not use § 523(a)(5) to except a property settlement from discharge. That case is not applicable to the case at bar.

In *Lake County Dept. of Public Welfare v. Marino (In re Marino)*, 29 B.R. 797 (N.D. Ind. 1983), the county had obtained a judgment making the child a ward of the state, and the county sued for nondischargeability of Debtor's support obligation. Obviously, the debt was not in connection with a divorce, even if the obligation in question was for support. Thus, this case is like *Parker* and *Fenstermacher*, and does not support the proposition that the November Agreement between the Woosleys is not "in connection with" the parties' divorce.

Debtor's interpretation of *In re Brown*, 43 B.R. 613 (Bankr. M.D. Tenn. 1984) is incorrect. The point of that case was not, as Debtor argues, that the obligation in question was not simultaneous with a divorce decree, separation agreement, etc. Rather, the point of the case was that the obligation in question was a state court judgment requiring Debtor "to pay medical expenses for the birth of his illegitimate son and to pay attorney's fees incurred by the mother in her successful paternity suit." *Id.* Judge Lundin held that that was simply not an obligation imposed in a divorce proceeding and that the Plaintiff was not a spouse or former spouse. Judge Lundin also commented that the statutory language was unfairly narrow and that Congress was in the process of broadening the language. Since *Brown* was decided, §§ 101(14A), 523(a)(5) and 523(a)(15) have broadened the language far beyond what existed at the time, clearly evidencing Congress's intent that spouses, former spouses and children be protected and that the public policy of protecting and fostering their rights and interests prevails over the public policy of giving the debtor spouse his fresh start.

In *Deemer v. Deemer (In re Deemer)*, 360 B.R. 278 (Bankr. N.D. Iowa 2007), the question was the dischargeability of a debt to a third party. Unlike in this case, the debt was a joint debt to a third party and there was no divorce decree. There had never been an agreement, either simultaneously with a divorce or as a modification, requiring Debtor to pay the joint debts in question. This case does not establish that the November Agreement was not "in connection with" the Woosleys' divorce.

In *Gilman v. Golio (In re Golio)*, 393 B.R. 56 (2008), cited by Debtor, the court held, ":As a result of BAPCPA, a property settlement obligation incurred pursuant to a divorce is unqualifiedly also nondischargeable under section 523(a)(15)." *Id.* at 61. Ms. Woosley observes that "pursuant to" is a good synonym for "in connection with," and that there can be no doubt

that the November Agreement was entered into pursuant to the parties' divorce, the Divorce Decree and the MDA.

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179; 2006 (2006), relied upon by Debtor, a broker brought a class action suit under state law. He argued that Merrill Lynch had violated fiduciary duties and duties of good faith to manipulate stock prices. The basic issue was whether federal law that governed conduct in the purchasing and selling of securities also applied to the "holding" or "owning" of securities. The Supreme Court held that the federal securities law did apply to holding and owning and not narrowly to purchasing or selling. The Court did use the word "coincide" as a synonym for "connection," and obviously the broad, generic meaning that the Court gave to the word "coincide" is directly opposite to the meaning that Debtor urges upon this Court.

Merrill supports Judge Harrison's interpretation of the phrase "in connection with."

Shine v. Shine, 802 F.2d 583 (1st Cir. 1986) (a pre-523(a)(15) case) states that it is the first Circuit Court case to address "the dischargeability of support debts which implicated the scope of the "in connection" clause of § 523(a)(5)." *Id.* at 585. The Shines, a married couple, separated without making a formal agreement for support. Later, Mrs. Shine brought an action for separate maintenance and Mr. Shine was ordered to pay. He went into arrears and Mrs. Shine got a judgment for the arrearage. Mr. Shine filed bankruptcy and Mrs. Shine brought a nondischargeability action under § 523(a)(5). The Bankruptcy Court held that the judgment was dischargeable on grounds somewhat similar to what Debtor argues here – that "it was not created by a 'separation agreement *which itself* embodies an agreed arrangement between the parties for the obligation to make support payments.'" *Id.* at 584. The District Court and Court of Appeals held the debt nondischargeable. The court discussed the countervailing public policies of allowing a debtor a fresh start versus "the long-standing policy of excepting spousal and child

support from discharge in bankruptcy [which] supports a more liberal interpretation." *Id.* at 585. Upon an examination of history and case law, the Court of Appeals held that the broader interpretation fostering family obligations should prevail over the narrow interpretation which would foster a debtor's fresh start. "'[S]ubstance will not give way to form . . . technical considerations will not prevent substantial justice from being done.'" *Id.* at 588 (citations omitted."

D. The November Agreement was a Modification of the MDA

In re Estate of Lang, 2007 Tenn. App. LEXIS 487 (2007) and *Buckles v. Riggs*, 106 S.W.3d (Tenn. App. 2003), the cases relied on by Ms. Woosley and cited with approval by Judge Harrison in granting Ms. Woosley summary judgment under § 523(a)(15), are on point, binding and dispositive.

In *Lang*, the court acknowledged that an agreement between the former husband and wife was a modification of their divorce documents. Debtor cannot distinguish the cases on the ground that the parties' private modification of their MDA occurred a month after the divorce rather than a few months afterward as in this case. For one thing, the discussions and negotiations among Debtor, Ms. Woosley and her father went on for weeks (during part of which Mr. Woosley was on a SCUBA diving trip in the Pacific). For another thing, a divorce decree, MDA, Parenting Plan, or other divorce-related document can be modified years after the divorce decree is originally entered. This is an artificial distinction.

In *Buckles*, the parties tacitly modified payment arrangements described in their divorce documents, and the husband got credit for the payments that were proven to have been made even though they were not made in compliance with the decree. The parties were treated as having voluntarily modified their divorce decree without going back to the court for approval.

Defendant's attempt to characterize the November Agreement as completely superseding the MDA, which was incorporated into their Divorce Decree, is utterly unsuccessful. The express

purpose of the November Agreement was to modify the parties' relationship vis-à-vis the Company. It is abundantly clear that it did not purport to supersede the entire MDA and Divorce Decree. In fact, the Agreement defines itself as including the Divorce Decree, and since the Divorce Decree incorporates the MDA, the MDA itself is part of the Agreement except to the extent that the Agreement specifically modifies and amends the MDA. The November Agreement falls squarely into the language of Debtor's case of *International Business Lists, Inc. v. American Tel. & Tel. Co.*, 147 F.3d 636 (7th Cir. 1998): "A modification of a contract is a change in one or more respects which introduces new elements into the details of the contract and cancels others but leaves the general purpose and effect undisturbed." *Id.* at 641.

Third. the contention that the MDA could not be modified if it was in breach is not correct. Contracts that are in default are modified thousands of times a day. Probably a majority of the loan agreements that embody claims in bankruptcy cases have gone into default and have been modified prepetition. Bankruptcy cases routinely find creditors' claims including a series of amendments, forbearance agreements, restatements, extensions, etc. etc. etc. Outside of bankruptcy, parties to contracts routinely modify breached contracts to restore them to good standing – loan agreements, leases, vendor-vendee agreements, *ad infinitum*. This is a new argument at the appellate level, and it is utterly unfounded.

Fourth, Debtor's argument that the November Agreement itself had to have been approved by the Circuit Court of Williamson County in the divorce case in order to be valid is also fallacious. First, that argument is refuted by the holding in *Lang, supra*. Second, § 523(a)(15) does not say that the agreement itself has to be part of a court order or approved by a court order. The obligation in question merely has to be "in connection with" a divorce decree or other order. The November Agreement certainly meets that criterion. Third, the MDA and the Divorce Decree into which the MDA is incorporated expressly contemplate that the parties can "otherwise agree" as to Ms.

Woosley's employment with the Company. The modification to the MDA that is embodied in the November Agreement does exactly that, as previously noted. The Divorce Decree is incorporated into the Agreement by the Agreement's own terms. The obligation in the Agreement states that it relates back to the date of the Divorce Decree.

Fifth, the argument that the November Agreement supersedes the MDA because of the "merger clause" on page 3 is incorrect. There were weeks of negotiations among Debtor, Ms. Woosley and her father leading up to the execution of the November Agreement. The November Agreement was only intended to accomplish the limited purposes described therein – sever Ms. Woosley's relationship with Tennessee Lawn Maintenance so that she would no longer have the income that had provided a substantial portion of her livelihood and would give up her ownership interest, in exchange for payment of $1,500.00 per month for a limited period of time approximately coinciding with her youngest child's turning 18. What was "merged" into the November Agreement was the weeks of negotiations and arguing that led up to its execution. The contention that the November Agreement superseded the MDA is debunked by the facts that the Divorce Decree is expressly incorporated into the Agreement, and the paragraph containing the vaunted "merger" language ends with the following significant sentence: "Further, that this contract is construed to be entered in compliance with the final divorce decree and its terms and conditions."

Sixth, Debtor cites *Penland v. Penland*, 521 S.W.2d 222 (Tenn. 1975) for the proposition that the state court has continuing authority to modify a divorce decree. Part of the relief that she requested in her Motion for Partial Summary Judgment was a declaration that she may go to the Circuit Court where the parties' divorce case is lodged and seek modification and enforcement of her rights. Judge Harrison held that both parties have that right. That does not undermine Ms. Woosley's position that the parties have agreed to a valid and enforceable modification of the MDA, which is incorporated into their Divorce Decree, and which specifically states that Ms. Woosley was

allowed to continue to be employed at the family business at her then-current pay level, unless the parties otherwise agreed. The MDA and, hence, the Divorce Decree, expressly contemplated that the employment relationship could change, and that is exactly what the parties did – Ms. Woosley gave up her employment, her ownership interest in the business, which could have continued indefinitely, and several hundred dollars per month in rent, in consideration for an agreement to pay her a substantially reduced monthly payment of $1,500.00, approximately equal to her mortgage payment, until about the time the parties' youngest child reached 18. These are discrete, specific modifications of the MDA, the remaining provisions of which remain in full force and effect to this day.

VI. CONCLUSION

Debtor's attempt to posture himself as a "poor but honest" or a "deserving" debtor falls flat. Certainly in this case, Debtor has not shown himself to be such a debtor. He does not merit this Court's sympathy or indulgence. He put himself in his present position by willfully mismanaging and ignoring the Company's business, offending customers, losing business, and then deliberately taking the Company's remaining customers to another lawncare company.

His attempt to argue that Ms. Woosley would receive a "windfall" if his obligations under the November Agreement were held nondischargeable is without merit. Debtor agitated and maneuvered for this agreement. He forced Ms. Woosley out of the company that her father had started and built into a successful business, and that he had given to the Woosleys as a valuable going concern. Ms. Woosley had worked there for years. It meant a great deal to her personally, and was a source of a significant portion of her income, on which she lived and used to support her family.

The Divorce Decree, incorporating the MDA, awarded her a 49% interest in this business. The documents entitled her to work there indefinitely at her current pay level "or as otherwise agreed." Mr. Woosley wanted her to be entirely gone from the business. The November Agreement

accomplished what he wanted. Now, he wants to reap all of the benefits of that and escape paying the consideration that he agreed to, effectively stealing the Company from Ms. Woosley and, indirectly, their children.

Enforcement of this Agreement does not result in an unjustified windfall to Ms. Woosley. Under the original MDA, she had the expectation of continuing to work for her family's business for an indefinite period at not less than $2,200.00 per month. She had the expectation of receiving at least $600.00 per month in rent for the Company's office in her home. She had the expectation of partnership distributions out of profits in addition to her earnings. After weeks of negotiations, she agreed to a significant reduction in the monthly payments to her in exchange for a set payment for a set period of time.[3]

The parties entered into an agreement that is permeated with references to the divorce, marital property, and the Divorce Decree. The Divorce Decree is actually stated to be part of the Agreement, which in turn engrafts the MDA onto the Agreement except to the limited and specific extent that the original MDA is modified. The obligations in the Agreement relate back to the date of the divorce. The Agreement states that it is intended to be "construed to be entered in compliance with the final divorce decree and its terms and conditions." By any standard of document construction, the Agreement is an agreed-upon modification of the MDA, which Tennessee appellate courts have unequivocally held are permissible and valid.

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[3] Debtor's statement that if this were a support obligation, it would require Circuit Court approval of an amendment to the Parenting Plan is not valid. It was Ms. Woosley who earned a salary from the Company that she expected to continue earning, and Ms. Woosley who received rent from the Company. It was she who lost that source of support when Defendant ran the Company into the ground and walked out on what had been and could have continued to be a profitable business on a long-term basis. The obligations under the November Agreement would be support to Ms. Woosley, not to the children. Therefore, she contends that treating the November Agreement as a support obligation would not impact the Parenting Plan, per se. However, modifying the child support obligations under the Parenting Plan is a and separate avenue from modifying or imposing a support obligation in favor of Ms. Woosley herself.

The parties' relative earning power is not at issue here. Relative earning power is not a criterion for holding an obligation nondischargeable under § 523(a)(15). The Bankruptcy Court takes the divorce documents as they are. They were agreed to between the parties. The only inquiry is whether it was agreed to in the course of or in connection with a divorce. The Code does not say that an express modification cannot be "in connection" with a divorce decree, and that cannot be the law, especially when the original divorce documents say that the parties may otherwise agree in the future – an event which could happen months or years in the future.

It would be a windfall to Debtor, and a gross miscarriage of justice, if Debtor's obligations under the November Agreement were discharged, leaving Ms. Woosley without the Company, without the earned income and rent that it produced, without the possibility of receiving distributions out of future profits, and in the end, without even the reduced income for a set period that she agreed to accept in compromise with Mr. Woosley. Such a result is exactly why Congress added 11 U.S.C. § 523(a)(15) to the Code, and why courts have given precedence to the public policy of preserving and protecting nondebtor spouses and children over the policy of giving a debtor a fresh start.

To construe the November Agreement as a separate contract that created a dischargeable obligation would be a gross miscarriage of justice and violation of universally stated public policy.

For the reasons set forth herein, and based on the entire record in this case and the authorities cited by the Bankruptcy Court and by Ms. Woosley, Ms. Woosley respectfully prays:

1. That the Court hold that the November Agreement is a modification of the parties' Marital Dissolution Agreement and is a debt owed by Debtor to his former spouse

> . . . not of the kind described in paragraph 5 [11 U.S.C. § 523(a)(5)] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record.

2. That the Court hold that Debtor's obligations to Ms. Woosley under the November Agreement, as well as the unmodified provisions of the MDA, all as incorporated into the Divorce Decree, are nondischargeable by Debtor.

3. That the Court rule that Debtor's appeal is without merit.

4. That the Court hold that the Bankruptcy Court properly determined, as a matter of law, that Debtor's obligations to Ms. Woosley are nondischargeable under 11 U.S.C. § 523(a)(15) because it represents a modification of a marital dissolution agreement and not a separate and independent post-divorce obligation.

5. That this Court affirm the Bankruptcy Court's judgment of May 27, 2009, granting her partial summary judgment, in all respects.

6. That the Court grant Ms. Woosley such other, further and general relief as is just.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing document has been served electronically through the Court's CM/ECF System and by first class mail, postage prepaid, upon:

Mr. Joseph Rusnak
Tune, Entrekin & White, P.C.
21st Floor AmSouth Center
315 Deaderick ST
Nashville, TN 37238-2100

This 4th day of January, 2010.

/s/ Linda W. Knight
Linda W. Knight

Exhibit F

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MARINER'S POINTE INTERVAL OWNERS ASSOCIATION, INC.,	)	
Movant/Petitioner,	)	Docket No. 01S01-9803-FD-00052
v.	)	
ECON MARKETING, INC.,	)	
Respondent.	)	
In re	)	
MARINER'S POINTE INTERVAL OWNERS ASSOCIATION, INC.,	)	United States Bankruptcy Court for the Middle District of Tennessee Case No. 94-05942-KL2-11
Debtor.	)	
MARINER'S POINTE INTERVAL OWNERS ASSOCIATION, INC.,	)	
Plaintiff,	)	Adversary Proceeding No. 295-0018A
v.	)	
ECON MARKETING, INC.,	)	
Defendant.	)	

ON CERTIFICATION UNDER TENNESSEE SUPREME COURT RULE 23, "CERTIFICATION OF QUESTIONS OF STATE LAW FROM FEDERAL COURT"

BRIEF REGARDING QUESTION CERTIFIED TO THIS COURT BY THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MARINER'S POINTE INTERVAL OWNERS ASSOCIATION, INC.,	)	
Movant/Petitioner	)	Docket No. 01S01-9803-FD-00052
v.	)	**ORAL ARGUMENT REQUESTED**
ECON MARKETING, INC.,	)	
Respondent.	)	

BRIEF REGARDING QUESTION CERTIFIED TO THIS COURT BY THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

MAY IT PLEASE THE COURT:

Mariner's Pointe Interval Owners Association, Inc. files this Brief pursuant to the certification of a question of Tennessee law to this Court by the United States Bankruptcy Court for the Middle District of Tennessee.

JURISDICTIONAL STATEMENT

This matter is before this Court under Tennessee Supreme Court Rule 23, "Certification of Questions of State Law from Federal Court."

STATEMENT OF ISSUES PRESENTED

Whether a judgment lien on real property is extinguished by TENN. CODE ANN. § 25-5-104 (Michie 1980 & Supp. 1995) where the debtor owns both *legal* and *equitable* interests in the property and the creditor fails to file a bill in equity within 30 days of the return of an execution unsatisfied.

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STATEMENT OF THE CASE

On August 31, 1994, Mariner's Pointe filed a voluntary petition under Title 11, Chapter 11, United States Code, commencing Case No. 94-05942-KL2-11 (the "Bankruptcy Case"). No Trustee was appointed in the Bankruptcy Case, and Mariner's Pointe remained in possession of its property and continued to operate its business as a Debtor-in-Possession.[1] Mariner's Pointe is the association of owners of timeshare interests, or "Unit Weeks," at a timeshare community called the Mariner's Pointe Resort Timesharing Condominium, located at Rt. 9, Sparta Hwy., Crossville, Cumberland County, Tennessee. As such, it acts in two capacities: It manages, maintains, etc., the timeshare community on behalf of the Unit Week owners; and it sells unsold Unit Weeks, which it owns, to third party purchasers.

On January 4, 1995, Econ Marketing, Inc. ("Econ") filed a proof of claim in the Bankruptcy Case, asserting a claim, as of the petition date, of $30,385.78.[2] Econ also asserted that its claim was a secured claim by virtue of a Judgment entered in its favor in the Circuit Court of Cumberland County, Tennessee on December 13, 1991, and filed in the Office of the Register of Deeds of Cumberland County on January 2, 1992 (the "Judgment"). The Judgment was against Lake Properties, Inc., and not Mariner's Pointe.[3]

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[1]11 U.S.C. §§ 1101(1), 1107. Normally, a Trustee is not appointed or elected in a Chapter 11 case, unless the Bankruptcy Court determines that there is cause. 11 U.S.C. § 1104. Therefore, as provided in 11 U.S.C. § 1107, the Debtor-in-Possession operates his or its business and carries out the duties of a Trustee, which are set forth in 11 U.S.C. § 1106 and, in turn, 11 U.S.C. § 704.

[2]A copy of the proof of claim is included as Exhibit F to Appendix A.

[3]Therefore, the Judgment is nonrecourse to Mariner's Pointe. That is, Mariner's Pointe is not "personally" liable for the Judgment. It has no liability except to the extent, if any, that its interest in property is encumbered by a valid, perfected and unavoidable lien in favor of Econ.

On January 20, 1995, Mariner's Pointe filed an adversary proceeding (lawsuit) in the Bankruptcy Case against Econ, styled Mariner's Pointe Interval Owners Association, Inc. v. Econ Marketing, Inc., Adversary Proceeding No. 298-0018A, in the Bankruptcy Court.[4] Said adversary proceeding seeks disallowance of Econ's asserted claim in the Bankruptcy Case; avoidance [nullification] of Econ's claimed lien against Mariner's Pointe's interest in real property; and other relief. The Complaint was subsequently amended. Copies of the Complaint (with exhibits attached), the Motion to Amend, and the Order granting the Motion to amend are attached hereto as Appendix A.[5]

Econ filed an Answer to the Complaint, and an Answer to the Amended Complaint, denying that Mariner's Pointe was entitled to the relief sought. Copies of the Answer and the Answer to the Amended Complaint are attached hereto as Appendix B.

Mariner's Pointe filed a Motion for Judgment on the Pleadings on February 15, 1995, a copy of which is attached hereto as Appendix C.

Econ filed a Motion for Summary Judgment on March 21, 1995, a copy of which is attached hereto as Appendix D.

On May 3, 1995, the Bankruptcy Court entered a Pretrial Order, a copy of which is attached hereto as Appendix E. Included in the "Contested Legal Issues" were:

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[4]Some proceedings in Bankruptcy Court are full-blown lawsuits, or "adversary proceedings." Other proceedings are commenced by the filing of a motion, and are referred to as "contested matters." The kinds of proceedings that must be adversary proceedings are listed in Federal Rule of Bankruptcy Procedure 7001, and include actions to avoid liens and to recover money or property. Both of these forms of relief are sought in the Adversary Proceeding. The judgment adjudicating the Adversary Proceeding will be a final order, reviewable on appeal. 28 U.S.C. §§ 157(b), 158(a)(1).

[5]To the best of Mariner's Pointe's knowledge, no portion of the official record in the Bankruptcy Case has been transmitted to this Court. Hence, copies of pertinent documents in the record in the Bankruptcy Case are attached here to as appendices in order to aid the Court in

Whether Econ lost its lien for failure to execute on [Mariner's Pointe's] real property within the three-year statutory period under Tennessee law; . . .

Whether T.C.A. § 25-5-104 is inapplicable to this case, if [Mariner's Pointe] owned both the legal and equitable interests in its real property; and

Whether [Mariner's Pointe] owned both the legal and equitable interests in its real property.

On May 10, 1995, the Bankruptcy Court entered an Order confirming a Chapter 11 Plan of Reorganization proposed by Mariner's Pointe. Copies of the Confirmation Order and Plan are attached hereto as Appendix F.

The Motions for Judgment on the Pleadings and for Summary Judgment remained pending. On April 29, 1996, the parties filed in the Bankruptcy Court a Stipulation, a copy of which is attached hereto as Appendix G. The Stipulation does not contain any stipulation that Mariner's Pointe owned or owns both the legal and equitable title to all of the property conveyed to it by the Internal Revenue Service in 1993, in the sense that the legal and equitable titles to the entire parcel of real estate are merged into full, outright ownership in fee simple absolute.[6]

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determining the issue before it.

[6]The Bankruptcy Court's Certification Order states, at page 3, that Mariner's Pointe purchased LPI's interests in the real property at a sale conducted by the IRS. That statement is correct.

On pages 4 and 5 of the Certification Order, it is stated,

> It is undisputed that Mariner's Pointe acquired full legal and equitable ownership of the real property previously owned by Lake Properties, Inc. at the tax sale in December, 1993. It is stipulated that Lake Properties, Inc. owned both legal and equitable interests in that property at the time Econ recorded its judgment in 1992 and at the time of the executions in 1992, 1993 and 1994.

That statement is only partially correct. Lake Properties owned (1) the fee simple title to the Unit Weeks that it had not sold, which therefore included the entire ownership interest in those Unit Weeks, and (2) naked legal title, or some other sort of naked title, to the underlying real estate and improvements thereon, in its capacity as the Developer of the timeshare project, which it held for the benefit of the owners of the Unit Weeks. LPI, therefore, owned two different "bundles of

By Order entered May 23, 1996, the Bankruptcy Court certified to this Court the question of Tennessee law set forth above.

STATEMENT OF FACTS

In 1981, Boardwalk, Inc. was the fee simple owner of certain real property in Cumberland County, Tennessee. (Stipulation, Appendix G, ¶ 1.)

Beginning in March 1981, Boardwalk, Inc. developed a portion of the property as a timeshare condominium pursuant to the Horizontal Property Act, Tenn. Code Ann. ("TCA") §§ 66-27-101, et seq. (the "Timeshare Property"). Under the timeshare condominium regime, Boardwalk, Inc. sold Unit Weeks to third parties. A total of 2,346 Unit Weeks were available for sale. On a portion of the property contiguous to the Timeshare Property, Boardwalk, Inc. developed "amenities" for the use and benefit of the Unit Week owners (the "Amenities Property.") (Stipulation, Appendix G, ¶ 2.)

In 1983, Boardwalk executed a deed of trust for the benefit of Cumberland County Bank, to secure payment of indebtedness. On August 2, 1985, Cumberland County Bank foreclosed under the deed of trust. The property, with certain exceptions, was sold to LPI. The foreclosure sale did not include the Unit Weeks that Boardwalk, Inc. had previously sold to third parties. (Stipulation, Appendix G, ¶ 3.) A copy of the Trustee's Deed to LPI is attached hereto as Appendix G, Exhibit 3.

After buying the property, LPI sold additional Unit Weeks to third parties. As of the end

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rights" in the timeshare project; and Mariner's Pointe acquired those two separate "bundles of rights" under the sale by the IRS.

In fact, the Pretrial Order, see Appendix D, expressly stated that one of the contested legal issues was whether Mariner's Pointe owned both the legal and equitable interests in its real

of 1992, 453 Unit Weeks remained unsold. (Stipulation, Appendix G, ¶ 4.)

A copy of the "Declaration of Horizontal Property Regime Master Deed" dated March 31, 1981 (the "Declaration"); the "First Amended and Supplemental Declaration of Horizontal Property Regime Master Deed" (the "First Amended Declaration") dated September 24, 1981; the "Second Amended and Supplemental Declaration of Horizontal Property Regime Master Deed" (the "Second Amended Declaration") dated June 15, 1984; and the "Third Amended and Supplemental Declaration of Horizontal Property Regime Master Deed" (the "Third Amended Declaration") dated October 28, 1986, are attached hereto as Collective Exhibit 1 to Appendix G. These are the documents which were in effect and governed the ownership and use of the timeshare project when the Judgment was entered and recorded.[7]

On December 13, 1991, the Judgment was entered by the Circuit Court for Cumberland County, Tennessee, granting Econ a judgment against LPI in the principal amount of $30,923.98, bearing interest at 10% per annum from June 17, 1991 until paid in full, plus costs.

On January 2, 1992, the Judgment was filed for record in the Office of the Register of Deeds of Cumberland County, Tennessee, noted in Note Book 7, Page 195, and recorded in Lien Book 22, Page 395. (Stipulation, Appendix G, ¶ 5; Exhibit B to Appendix A.)

On January 2, 1992, neither the Timeshare Property nor the Amenities Property was subject to a mortgage or deed of trust. (Stipulation, Appendix G, ¶ 5.)

On March 17, 1992, the Internal Revenue Service recorded a tax lien against LPI's property. (Stipulation, Appendix G, ¶ 5.) A copy of the Notice of Tax Lien is attached hereto as Appendix H.

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property.

[7]These documents were admitted into evidence as Exhibits 8, 9, 10 and 11 at the hearing, in the Bankruptcy Case, on confirmation of Mariner's Pointe's Chapter 11 Plan of Reorganization.

On March 30, 1992, an Application for Execution was signed and was filed with the Clerk of the Circuit Court. The Clerk issued the Execution in the amount of $35,075.67. The Execution was returned under date of April 2, 1992. It was signed by Gene White, Deputy Sheriff, and reflected that $2,161.25 had been recovered from First Fidelity Bank on April 2, 1992. The Statement for Judgment Creditor Requesting Garnishment or Execution showed that the last known address of the judgment debtor was Rt. 9, Sparta Hwy., Crossville, TN. Said Statement requested that an Execution be issued, without any limitation as to the nature of property that was to be executed upon. In fact, the writ itself commands the Sheriff "that of the goods and chattels, lands and tenements" of the judgment debtor, he "cause to be made" the sum shown on the writ. A copy of this writ of execution is included as Exhibit C to Appendix A.

Another writ of execution was requested and issued on February 22, 1993 (which was returned no property found) (Exhibit D to Appendix A). A third writ of execution was apparently requested on August 30, 1994. (Exhibit E to Appendix A.)

On December 7, 1993, the Internal Revenue Service sold the Timeshare Property and the Amenities Property, pursuant to its lien. Mariner's Pointe was the successful bidder. After a redemption period, on June 3, 1994, the Internal Revenue Service executed and delivered a quitclaim deed of the Timeshare Property and the Amenities Property to Mariner's Pointe. (Stipulation, Appendix H, ¶ 5.) A copy of the IRS's quitclaim deed to Mariner's Pointe is included in Appendix A, Exhibit A. The quitclaim deed excluded the previously-sold Unit Weeks, and included the unsold Unit Weeks.

On August 31, 1994, Mariner's Pointe filed a voluntary petition under Title 11, Chapter 11, United States Code, commencing Case No. 94-05942-KL2-11 (the "Case"). No Trustee was appointed in the case, and Mariner's Pointe remained in possession of its property and continued

to operate its business.

On January 4, 1995, Econ filed a proof of claim in the Bankruptcy Case, asserting a claim, as of the petition date, of $30,385.78. Econ also asserted that its claim was a secured claim by virtue of the Judgment.

Econ Marketing, Inc. has no claim against Mariner's Pointe, personally, because its judgment is against LPI, not Mariner's Pointe. It only has a claim against Mariner's Pointe to the extent that it has a lien against Mariner's Pointe's real property, which lien is valid, perfected, and which is not avoidable under any provision of the Bankruptcy Code, 11 U.S.C. § 101, et seq.

On January 20, 1995, Mariner's Pointe filed an adversary proceeding (lawsuit) against Econ Marketing, Inc., styled Mariner's Pointe Interval Owners Association, Inc. v. Econ Marketing, Inc., Adversary Proceeding No. 298-0018A, in the Bankruptcy Court. Said adversary proceeding seeks disallowance of Econ's asserted claim in the Chapter 11 case; avoidance [nullification] of Econ's claimed lien against Mariner's Pointe's interest in real property; and other relief.

On May 10, 1995, an Order was entered, confirming a Chapter 11 Plan of Reorganization proposed by Mariner's Pointe (Appendix F).

ARGUMENT

I. MARINER'S POINTE DOES NOT ACTUALLY OWN THE PROJECT IN FEE SIMPLE ABSOLUTE.

Mariner's Pointe owns two "bundles of rights" in connection with the Mariner's Pointe Resort Timesharing Condominium: Naked record title to the underlying real estate in its capacity as the Developer; and fee simple title to its remaining unsold Unit Weeks.

A. MARINER'S POINTE OWNS ONLY THE NAKED RECORD TITLE TO

THE UNDERLYING IMPROVED REAL PROPERTY ON WHICH THE TIMESHARE PROJECT IS LOCATED.

The Timeshare Property and the Amenities Property were conveyed to Mariner's Pointe by the Internal Revenue Service under a quitclaim deed dated June 3, 1994 (Appendix A, Exhibit A; Stipulation, Appendix G). Unit Weeks previously sold were excluded from the quitclaim deed.

Certainly, the underlying real property was, on the date of recordation of the Judgment, and has since that time been, in all respects subject to the terms and conditions of the Declaration (Appendix G, Exhibit 1) and all amendments and modifications thereof (including any amendments recorded after the recordation of the Judgment, since the Declaration expressly provided that it could be amended in the manner described therein).

In 1981, when the real property that had previously been held in common law fee simple absolute, was committed to the horizontal property regime by Boardwalk, Inc., a legal fiction occurred: The property was transformed into a creature of statute called a "condominium" or a "timeshare interval." Although it is assumed for purposes of this Brief that Boardwalk, Inc. and its successors in interest, LPI and Mariner's Pointe, own record legal title to an interest in real property, this is not at all certain.

The "Developer," as defined in the Declaration, is Boardwalk, Inc, its successors and assigns (Declaration, Section I, page 3). The successors to Boardwalk, Inc. have been LPI (by virtue of the foreclosure by Cumberland County Bank) and Mariner's Pointe (by virtue of the IRS's quitclaim deed). LPI was the Developer when the Judgment was entered, and Mariner's Pointe became the Developer thereafter.[8]

Examples contained in the Declaration (Appendix G, Exhibit 1) as to the Developer's

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[8]See also TCA §§ 66-27-102(a)(6), 66-32-102(4).

rights and prerogatives include the following:

1. The Developer can file Supplemental Declarations to add additional units or buildings to the project and selecting the configuration thereof (Declaration, Section V, page 5).

2. The Developer can hold one Unit Week in each Unit for maintenance purposes (Declaration, Section XI, page 8).

3. The Developer can amend the Declaration, as long as it owns more than 25% of the Unit Weeks, if required by a lending institution or public body or to carry out the purposes of the project, with limitations (Declaration, Section XIII, page 9).

4. The Developer can subject other property to the Declaration until January 1, 1988 (Declaration, Section XIV, page 9).

5. The Developer can choose and replace furniture inside Units, and choose exterior colors (Declaration, Section XXI, pages 23-24).

6. The Developer does not have the power to terminate the condominium and cause the ownership to revert to tenancy in common among the Unit Owners (Declaration, Section XXIII, pages 25-27).

7. The Developer can use a portion of the Common Elements to aid in the sale of Units, including parking for prospective purchasers, placing signs etc. (Declaration, Section XXVI, page 31).

All provisions of the Declaration and amendments are covenants running with the land (Declaration, Section XXVI, page 30).

It is clear from reading the Declaration and amendments that, to the extent that the Developer does own any title to the underlying real property, it is held solely for the use and benefit of the Unit Week owners. The Unit Week owners own an undivided interest in the Units

and the Parcels (the Units plus the Common Elements). They are the beneficial owners of the project.

This is borne out by the governing statutes: TCA §§ 66-27-104, which is included in the Horizontal Property Act, under which Mariner's Pointe Resort Timesharing Condominium was created, provides that

> an apartment in [a condominium] may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridic acts intervivos or mortls causa as if it were sole and entirely independent of the other apartments in the building of which they form a part, and the corresponding individual titles and interest shall be recordable.

This must be interpreted in conjunction with TCA § 66-32-103,[9] which directly governs timeshare projects, and which provides:

> (a) A "time-share estate" is an estate in real property and has the character and incidents of an estate in fee simple at common law or estate for years, if a leasehold, except as expressly modified by this chapter. The foregoing shall supersede any contrary rule at common law.
>
> (b) Each time-share estate constitutes for purposes of title a separate estate or interest in property except for real property tax purposes.

The Time-Share Act sets up a comprehensive mechanism to govern the operation of timeshare projects, subject to the authority of the Tennessee Real Estate Commission, for the protection of the public and of the owners of timeshare estates.

The Developer owns no beneficial interest in the property described in its deed, or the improvements thereon. It holds at most the naked legal title. As noted above, it is not certain whether the nature of its interest even rises to the level of being naked legal title. But it is certain that, as Developer, LPI and Mariner's Pointe do not own any beneficial title or interest in the underlying real estate.

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[9]The Time-Share Act, TCA § 66-32-101, et seq.

B. MARINER'S POINTE ALSO OWNS UNSOLD UNIT WEEKS IN THE PROJECT.

The Declaration (Appendix G, Exhibit 1) contains relevant definitions, and describes what interests are owned. A Unit is a unit or apartment in the project (Declaration, Section I, page 3; Section IV, page 5).[10] A Parcel is a Unit, with an undivided share in the common elements appurtenant to the Unit (Declaration, Section I, page 3). The Common Elements are the portions of the property not included in the Units (Declaration, Section I, page 2).[11] The Limited Common Elements are common elements limited to the use of a certain Unit (Declaration, Section I, page 4).[12]

A Unit Week is a period of ownership in a Parcel committed to interval ownership.[13] The definition goes on to describe the period of ownership as being seven days going from 12:00 noon on a Friday until 12:00 noon the following Friday (Declaration, Section I, page 4). An Owner or Unit Owner is the owner of one or more Unit Weeks (Declaration, Section I, page 4).

An interval owner owns an undivided interest in the Common Elements and Limited Common Elements. The fee title to each Parcel shall include both the Unit and the undivided interest in the Common Elements. (Declaration, Section VII, page 6.)

Because Mariner's Pointe is the owner of Unit Weeks which have never been sold to third parties, it owns the aforementioned rights, and is subject to all other provisions of the Declaration and all subsequent amendments and modifications thereof, but only with respect to those Unit Weeks. Obviously, it has no interest whatsoever, legal or equitable, in Unit Weeks which have

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[10] See also TCA §§ 66-27-102(a)(1), 66-32-102(23).

[11] See also TCA § 66-27-102(a)(7).

[12] See also TCA § 66-27-102(a)(8).

[13] See also TCA § 66-32-102(16), (18).

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been sold to third parties.

II. ECON MARKETING, INC. OBTAINED A JUDGMENT LIEN AGAINST THE UNSOLD UNIT WEEKS WHEN IT RECORDED THE JUDGMENT.

It is clear that Econ acquired a judgment lien against LPI's interest in real property by recording the Judgment in the Office of the Register of Deeds of Cumberland County, Tennessee. TCA § 25-5-101(b) provides:

> Judgments and decrees obtained from and after July 1, 1967, in any court of record . . . shall be liens upon the debtor's land from the time a certified copy of the judgment or decree shall be registered in the lien book in the register's office of the county where the land is located. . . .

The issue is whether the judgment lien constituted a valid, perfected and unavoidable lien against Mariner's Pointe's interest in real property on the filing date of the Chapter 11 case, and whether any such lien has since expired or been lost.

III. EVEN IF ECON HAD A VALID, PERFECTED AND UNAVOIDABLE JUDGMENT LIEN ON MARINER'S POINTE'S PETITION DATE, ANY LIEN IN FAVOR OF ECON HAS EXPIRED UNDER WEAVER V. HAMRICK.

Without waiving its assertion that the judgment lien had expired before Mariner's Pointe's Chapter 11 case was filed on August 31, 1994, Mariner's Pointe contends that Econ has lost its lien in any event, under Weaver v. Hamrick, 907 S.W.2d 385 (Tenn. 1995).

That case dealt with the interaction between bankruptcy law and Tennessee judgment lien law. In the case, Mr. and Mrs. Hamrick had owned real property as tenants by the entireties. Mr. Hamrick filed a Chapter 11 bankruptcy case, which was shortly converted to Chapter 7. Mrs. Hamrick did not file bankruptcy. Mr. Hamrick's Chapter 7 Trustee moved to sell the real property free and clear of any liens, claims and interests. Mrs. Hamrick objected, but ultimately the property was sold per Bankruptcy Court order, under an agreement which apportioned Mr. and Mrs. Hamrick's respective entireties interests. The Chapter 7 Trustee distributed Mr.

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Hamrick's share of the sale proceeds as provided in the Bankruptcy Code.

The Trustee filed a state-court interpleader action for a determination of how Mrs. Hamrick's share of the proceeds would be distributed. Mrs. Hamrick had two judgment creditors, which had recorded their judgments against her. The Trustee sought a determination as to the priorities between them. Neither judgment creditor had taken out an execution, but the property was sold within three years after the judgments were rendered. This Court noted, "Upon recording its judgment in the County Register's Office, a judgment creditor acquires a lien against all real property owned by the debtor that is located in the county where the lien is filed. Tenn. Code Ann. § 25-5-101(b) (Supp.1994)." 907 S.W.2d at 387.

It appears from this Court's discussion of the history of the case, that the manner in which the judgment creditors would have enforced their judgments against Mrs. Hamrick, absent the bankruptcy case, was by levy of execution against her entireties interest, and sale thereof.[14] There is no mention in case, of any requirement of filing a bill to subject property in order to enforce the judgment lien against an entireties interest, which of course includes equitable, beneficial rights.

It was concluded that the judgment lienholders were precluded from executing, by the automatic stay in bankruptcy, 11 U.S.C. § 362. The Court then addressed the issue of whether

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> [14] The Court of Appeals found that the bankruptcy proceeding filed by James R. Hamrick did not preclude the levy of execution on Jeannie Hamrick's interest in property owned by them as tenants by the entirety, and First Tennessee's failure to execute on the property within three years resulted in the loss of its priority. The issue, therefore, is not whether Jeannie Hamrick had an interest in the property subject to attachment by her judgment creditors or the extent of that interest. The issue is whether First Tennessee's priority survived the failure to execute and the sale pursuant to the bankruptcy court order.

907 S.W.2d at 388.

the automatic stay tolled the limitation period of three years under TCA § 25-5-105, which provides that the [judgment] lien "will be lost unless an execution is taken out within three (3) years commencing with the date of entry of the judgment."

The Court held that 11 U.S.C. § 362 does not toll the running of TCA § 25-5-105. 907 S.W.2d at 390-391.

The Court then construed 11 U.S.C. § 108(c)[15] as applied to that case. It held that 11 U.S.C. § 108(c) applies to lien enforcement periods as well as statutes of limitations, noting that a "claim against the debtor" includes a claim against property of the estate under 11 U.S.C. § 102(2). 907 S.W.2d at 391.

The upshot was that, since the three (3) year enforcement period of TCA § 25-5-105 continued to run during the effectiveness of the automatic stay of 11 U.S.C. § 362,

> a judgment lien creditor ordinarily would have three options: (1) move the bankruptcy court to lift the stay; (2) execute on the judgment after the bankruptcy proceeding terminates, if the three-year period has not expired; or (3) execute on the judgment during the thirty-day grace period following the lifting of the stay or termination of the bankruptcy proceeding.[16]

> [15] Except as provided in section 524 of this title, if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of --
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . .

11 U.S.C. § 108(c).

[16]The Court held that the only reason why that did not apply in Weaver was that the property had indeed been sold and the liens had attached to the proceeds within the three years allowed by TCA § 25-5-105. 907 S.W.2d at 391.

Under Weaver, supra, any judgment lien that Econ did have on Mariner's Pointe's Chapter 11 petition date has long ago expired.

Mariner's Pointe's Chapter 11 Plan was confirmed May 10, 1995. The statutory effects of confirmation include the following:

1. The property of the estate revests in the reorganized debtor. 11 U.S.C. § 1141(b).

2. Except as provided in 11 U.S.C. § 1141(d)(2) and (d)(3) [which are irrelevant], and except as provided in the plan or in the confirmation order, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors. 11 U.S.C. § 1141(c).

3. Except as provided in 11 U.S.C. § 1141(d) or in the plan or the confirmation order, the plan discharges the debtor from any debt that arose before the date of confirmation. 11 U.S.C. § 1141(d).

Thus, after confirmation of a plan, the property that was formerly property of the estate under 11 U.S.C. § 541 ceases to be property of the estate, because the estate itself terminates; and the Debtor is discharged from all debts that arose before confirmation, except to the extent provided for in the Plan. Consequently, the automatic stay of 11 U.S.C. § 362 ceases and terminates. 11 U.S.C. § 362(c).[17]

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[17][With exceptions which are irrelevant],

(1) The stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of --

(C) if the case is a case . . .under chapter . . . 11 . . . of this title, the time a discharge is granted or denied.

After a debtor is discharged, the automatic stay is replaced by the so-called "discharge injunction" of 11 U.S.C. § 524. Section 524, in turn, is mentioned in 11 U.S.C. § 108(c) (see footnote 15, supra). Generally speaking, this prohibits creditors from taking steps to collect their prepetition debts except to the extent provided for in the Plan, and goes hand in glove with 11 U.S.C. § 1141(d).

Mariner's Pointe's Plan does not contain any provision which would have enhanced Econ's rights, if any, or extended the three-year limitation period of TCA § 25-5-105 beyond thirty days after the expiration of the automatic stay of 11 U.S.C. § 362.[18] (See Appendix F.)

Therefore, the inescapable conclusion is that, even if Econ had a valid judgment lien on the petition date, it expired thirty (30) days after confirmation of the Plan, under 11 U.S.C. § 108(c).[19]

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[18] Article II of the Plan classified Econ's claim as the Class 6 Claim under the Plan. (Appendix F, page 5.)

Article IV of the Plan described the treatment of the Class 6 Claim. The claim, as allowed, was to be satisfied in the form of a note in principal amount equal to its allowed claim. The note was to be unsecured. (Appendix F, pages 8-9.)

Article V of the Plan described the means for execution of the Plan, i.e., how the Plan would be carried out. It provided that Mariner's Pointe would retain its property and use it in the course of its business; and that it would continue to sell Unit Weeks, free and clear of any lien, claim or interest of any other entity. (Appendix F, pages 10-11.)

Article VI of the Plan contained general provisions, including the following: "Notwithstanding any other provision of this Plan, each Claim shall be paid only after it has been allowed in accordance with the Code."

This means that the unsecured note referred to in Article IV would not be executed or take effect if Econ did not have an allowed claim in the case. Since Econ's only possible claim in the case is a claim against property, Econ does not have a claim in the case at all, unless it has a good lien. The only entity personally liable to Econ is LPI, the original judgment debtor.

[19] Even if the automatic stay of 11 U.S.C. § 362 had merely tolled the underlying statute of limitations under TCA § 25-5-105, there were only three months and 13 days remaining out of the 3-year limitations period when Mariner's Pointe filed Chapter 11 on August 31, 1994. Absent bankruptcy, the limitation period would have expired December 13, 1994, three months and 13

IV. ECON DID NOT HAVE A VALID, PERFECTED AND UNAVOIDABLE JUDGMENT LIEN AGAINST MARINER'S POINTE'S INTEREST IN REAL PROPERTY ON ITS CHAPTER 11 PETITION DATE.

A. A JUDGMENT LIEN CANNOT BE ENFORCED AGAINST REAL PROPERTY AS TO WHICH THE JUDGMENT DEBTOR OWNS PURELY RECORD TITLE, EITHER BY EXECUTION OR BY BILL TO SUBJECT PROPERTY; IT IS NOT REACHABLE BY THE JUDGMENT CREDITOR.

Boardwalk, Inc. was the original owner of the real property, in common law fee simple absolute, and committed it to the Horizontal Property Regime under the Declaration in 1981 (Appendix G, Exhibit 1). LPI acquired the project under a Trustee's Deed, on August 2, 1985, when Cumberland County Bank foreclosed its lien. Under the Declaration, LPI became the Developer, as Boardwalk, Inc,'s successor in interest (Declaration, Section I, page 3).

The Judgment was entered against LPI on December 13, 1991, and registered on January 2, 1992, when it was the Developer of the project. As has been shown in Section I, A above, the entity that is the Developer of the Mariner's Pointe Resort Timesharing Condominium owns, at most, only the naked title to the underlying real property, but no beneficial title.

Tennessee law is clear that a judgment lien will not reach, and cannot be enforced against, naked legal title held for the use and benefit of another.

The lien of a judgment will not, in equity, attach upon the mere legal title to land existing in the defendant, when the equitable title is in another person. Fite v. Jennings, 193 Tenn. 250, 246 S.W.2d 1 (1951). Real property held in trust under deed, mortgage or assignment is not subject to levy of execution against the person holding such legal title, for it is valueless in itself.[20]

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days after the filing. Therefore, at the very most, the statute of limitations would have been tolled until three months and 13 days after entry of Mariner's Pointe's Confirmation Order.

[20]By analogy, property of a bankruptcy estate includes all legal and equitable interests of the Debtor in property, 11 U.S.C. § 541(a); but the estate excludes "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." 11 U.S.C. § 541(b)(1). And, of course, any valid spendthrift trust provision remains enforceable in bankruptcy. 11 U.S.C. §

Since, upon the creation of the horizontal property regime on the timeshare project, the Developer's record title to the real estate was at best a naked title, the lien of the Judgment never attached to LPI's interest, as Developer -- whatever that might have been -- in the underlying real estate.[21]

Not only was there no lien against which a writ of execution could be levied and the property sold; but, also, LPI had no equitable title that Econ could reach by filing a bill to subject property under TCA §§ 25-5-102 and 25-5-104. LPI, in its capacity as Developer, was immune to Econ's judgment lien. Econ could not subject LPI's interest in the underlying real property to satisfaction of the Judgment.

Hence, the Judgment was never capable of being enforced against Mariner's Pointe's interest in the underlying real property in its capacity as the Developer. Even if Econ's judgment lien were still viable in the abstract on Mariner's Pointe's Chapter 11 petition date, the lien was not perfected, and was avoidable, with respect to Mariner's Pointe's interest in the property in its capacity as Developer.

B. ECON'S JUDGMENT LIEN HAD EXPIRED, AND WAS UNENFORCEABLE AND VOIDABLE WITH RESPECT TO MARINER'S POINTE'S INTEREST IN ITS UNSOLD UNIT WEEKS.

In Section I, B above, it is concluded that Mariner's Pointe owns an interest in its unsold Unit Weeks. As to the unsold Unit Weeks, Mariner's Pointe owns full beneficial title in fee simple (subject to the limitations that affect all of the Unit Week owners at the timeshare project). Because Unit Weeks are transferrable, and can be encumbered by liens under deeds of trust,

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541(c)(2).

[21]Mariner's Pointe's interest in the underlying property as Developer could also be described as a "conduit or channel" for the transmission of title to the Unit Week owners. It was held in Gordon v. Cox, 110 Tenn. 306, 75 S.W. 925 (1903) that a judgment lien does not attach when the judgment debtor is merely the conduit or channel for the transmission of title.

Mariner's Pointe admits that the Unit Weeks that it owns are capable of being encumbered by a judgment lien. The only issue as to the unsold Unit Weeks is whether or not Econ had a valid, perfected and unavoidable lien against these Unit Weeks on August 31, 1994, Mariner's Pointe's Chapter 11 petition date.

Some cases and writers have made statements that make it seem as if judgment liens are enforced against fee simple absolute title to real property under two separate procedures, by one means (execution, levy and sale) for the legal aspect of the title, and another means (bill to subject property) for the equitable aspect of the property. However, it does not seem that the courts have actually and expressly so held.

1. The Recording of the Judgment Gave Econ a Judgment Lien Against LPI's Unsold Unit Weeks.

TCA § 25-5-101(a) provides that a judgment creditor has a lien against the judgment debtor's real property from the recordation of the judgment in the Office of the Register of Deeds of the county where the real property is located. Therefore, Econ had a judgment lien against the unsold unit weeks of LPI, Mariner's Pointe's predecessor in title, from January 2, 1992, the date on which it filed the Judgment with the Register of Deeds of Cumberland County.

It must be pointed out that judgment liens are creatures of statute and did not exist at common law; they are therefore to be strictly construed. Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 161 Tenn. 298, 30 S.W.2d 253 (1929); Mass. Mutual Ins. Co. v. Taylor Implement & Vehicle Co., 138 Tenn. 28, 195 S.W. 762 (1917); Weaver v. Smith, 102 Tenn. 47, 50 S.W. 771 (1899).

2. If Filing a Bill to Subject Property is the Proper Manner to Enforce a Judgment Lien Against Fee Simple Interest in Property, The Deadline to File the Bill Expired Thirty (30) Days After April 2, 1992.

Certainly, Mariner's Pointe's fee simple ownership of its unsold Unit Weeks contains an

equitable aspect; it is the beneficial owner of those Unit Weeks in fee simple absolute. TCA § 66-32-103. However, the legal and equitable titles to the Unit Weeks have not been severed.

TCA §§ 25-5-102 and 25-5-104 could be considered ambiguous, in that § 25-5-102 refers to "the" equitable interest of a judgment debtor in real property, as if it applied to every interest in property except where the purely naked legal title is all that the judgment debtor owns. The ambiguity is compounded by § 25-5-104, which refers to filing a bill to subject property "in both cases, of realty and personalty." The ambiguity is further compounded by the order in which §§ 25-5-101 through 25-5-105 are arranged in the Tennessee Code Annotated.

However, it appears from Weaver v. Hamrick, 907 S.W.2d 385, discussed at pages 13-18, supra, that execution, levy and sale were presumed to be the proper procedure for realizing upon a creditor's judgment lien against an interest in property when the legal and equitable titles have not been severed.

This interpretation is borne out by the fact that none of the cases found, in which the method of enforcement was filing a bill under TCA § 25-5-104 and its progenitors, dealt with an ownership interest in which the legal and equitable titles had not been severed.

For example, in Weaver v. Smith, 102 Tenn. 47, 50 S.W. 771 (1899), creditors attempted to realize upon land encumbered by the lien of a deed of trust. 102 Tenn. at 48, 50-51. Hence, the legal and equitable titles had been severed. An execution and an alias execution had been issued and returned unsatisfied. The court held that the bill to subject property had to be filed within 30 days after return of the first execution unsatisfied, and the intervention of the alias execution did not extend the time. Id. at 59-60.

In Bodin Apparel, Inc. v. Lowe, 614 S.W.2d 571 (Tenn. App. 1981), it was clear that the court was only dealing with the equitable interest of the judgment debtor, as distinguished from

any legal title. 614 S.W.2d at 573. That case reaffirmed the law that the bill in equity must be filed within thirty days after the return of the execution unsatisfied.

In Kelly v. McLemore, 560 S.W.2d 74 (Tenn. App. 1977), the judgment debtor owned only the equitable title to the real property in question, because it was encumbered by a deed of trust in favor of a bank, which received satisfaction of its indebtedness "off the top" of the proceeds of sale of the land. 560 S.W.2d at 77.

Even assuming arguendo that filing a bill in equity was necessary in order to subject the equitable aspect of Mariner's Pointe's title to the Unit Weeks, no bill in equity was ever filed. A perfectly valid writ of execution was issued in February 1992. It commanded the Sheriff to take the judgment debtor's "goods and chattels" and its "lands and tenements" to satisfy the judgment. The execution was returned April 2, 1992, only three days after issuance. Under the above-cited cases, there would have been an absolute requirement that the bill in equity be filed within thirty (30) days thereafter, i.e., no later than May 2, 1992, if filing a bill in equity was indeed the proper procedure.

3. If the Proper Means of Enforcing the Lien Was Execution, an Execution Was, in Fact, Issued; Since the Land was Not Levied Upon and Sold, the Lien Was Lost.

Cases referring to fact situations in which legal and equitable titles had not been severed, do refer to execution, levy and sale to enforce the judgment lien.

For example, in Weaks v. Gress, 225 Tenn. 592, 474 S.W.2d 424 (1971), it was held that a judgment lien against a husband's entireties interest was valid as against an alienable interest in property. The language in the case is again somewhat ambiguous as to the distinction between legal and equitable interests (225 Tenn. at 596), but the Court relied on and followed several earlier decisions making entireties interests subject to a judgment lien. One of these was Cole

Manufacturing Co. v. Collier, 95 Tenn. 115, 31 S.W. 1000 (1895), in which the entireties interest had been sold at an execution sale. Id. at 598.

In Harrison v. Wade, 43 Tenn. 505 (Tenn. 1866), there were two judgments against Mr. Carney. He had previously deeded real property to third parties, but the deed was defective. The Court held that his sale was ineffective, and that the judgment lien attached to Carney's interest in the real estate. The later correction of the deed did not relate back; the rights of the judgment creditors vested before the deed was corrected. The judgment creditors filed a bill in equity. The Court held that was not proper; the lien had been a lien against the title to the real property which was still vested in Carney. "Upon the rendition of the judgment, the complainant had a lien on the land, . . . ; and unless the land was levied upon by execution and sold from the judgments which were a lien, within twelve months from the rendition of the judgment, the lien is lost." 43 Tenn. at 509-510. By the time of the hearing on the bill to subject property, the legal lien had expired. Id. at 511.

In Fidelity & Deposit Co. of Maryland v. Fulcher Brick Co., 161 Tenn. 298 (1929), a judgment was obtained in April 1922, and recorded July 21, 1923 after it was affirmed on appeal. There was a deed of trust already in place (which, of course, had severed the legal and equitable titles). The deed of trust was released on July 15, 1923 and another deed of trust was recorded July 17, 1923. The July 17 deed of trust was later enforced and the property sold. However, that sale was invalidated, because when the senior deed of trust had been released on July 15, the legal and equitable titles were instantly united, allowing the judgment lien to attach (even though it was not recorded until July 21, after the second deed of trust). Under the lien statute at that time, the judgment lien related back to the date of the rendition of the judgment, and it was capable of attaching to the Debtor's outright ownership interest in the property when the legal and equitable

titles united for two days in July 1922. However, the property was not sold within twelve months, so the lien was lost, and equity would not revive it. 161 Tenn. at 301-305.

In Gardenhire v. King, 97 Tenn. 585 (1896), it was held that the execution had to be issued and the land sold within twelve months, even if there was an agreement between the debtor and creditor allowing an extension. Id. at 588.

Also, the interest of a tenant in common is subject to levy and sale. Earles v. Meadors, 60 Tenn. 248 (1872).

Therefore, based upon the aforementioned cases and Weaver v. Hamrick, 907 S.W.2d 385 (Tenn. 1995), supra, the remainder of this discussion will assume that execution, levy and sale is the proper method to enforce a judgment lien when legal and equitable titles have not been severed.

a. If An Execution Is "Taken Out," And the Property Is Not Levied Upon and Sold, the Lien Is Lost.

The statute of limitations upon enforcement of a lien in this manner is TCA § 25-5-105. It provides that "the lien given by this chapter will be lost unless an execution is taken out within three (3) years commencing with the date of entry of the judgment."

In the lawsuit, Econ did "take out an execution" within three (3) years after the date of the judgment. A writ of execution was issued under which the Unit Weeks belonging to the judgment debtor, LPI, could have been levied upon and sold. Therefore, the lien was lost, and no longer existed when Mariner's Pointe filed Chapter 11.

b. The Sheriff Failed to Carry Out His Duties When he Executed Upon and Returned the Writ of Execution Issued March 30, 1992.

The Sheriff received Econ's writ of execution on or about March 30, 1992. The writ of execution issued in Econ's lawsuit against LPI expressly commanded the Sheriff as follows (using

the words and numbers filled in on the March 30, 1992 writ):

> **To any Lawful Officer to Execute and Return:**
>
> You are hereby commanded, that of the goods and chattels, lands and tenements of Lake Properties, Inc. dba Thunder Hollow and dba Telemark Lodge you cause to be made the sum of $30,923.98 Dollars to satisfy a judgment obtained by Econ Marketing, Inc., Plaintiff against Lake Properties Inc. dba Thunder Hollow and dba Telemark Lodge, Defendant . . . .

[Emphasis added.]

The writ of execution was returned only three (3) days later, on April 2, 1992, along with $2,161.25 collected from a bank.

A writ of execution is valid for thirty (30) days. TCA § 26-1-401. The March 30, 1992 writ did not have to be returned in only three days. The Sheriff clearly made no effort to find any other property, real or personal. There is no other notation of any kind on the writ.

After the writ was returned, it was defunct, or "functus officio." Shannon v. Erwin, 58 Tenn. 337 (1872); Clingman v. Barrett, 25 Tenn. 20 (1845). Thus, it could not be revived.

LPI had owned the timeshare project since it purchased it at Cumberland County Bank's foreclosure sale on August 2, 1985. From the Request for Execution (Appendix A, Exhibit B, it is clear that Econ knew where LPI was located; it knew that LPI owned the project. The Request for execution was filed in blank; it was not limited to any particnlar property. It was, in essence, a directive to find any property, and enforce the rights of Econ as the judgment creditor. The Sheriff had an affirmative duty to find the real property and levy on it, since the personal property found -- the bank account containing $2,161.25 -- was insufficient to satisfy the Judgment.

Furthermore, if Econ itself had been acting diligently, it would have notified the Sheriff of LPI's interest in the real property, and made certain that the Sheriff levied on it if the personal property found was inadequate. However, this did not exonerate the Sheriff from the performance

of his statutory duty.

The Sheriff's statutory duties are set forth at TCA § 8-8-201, and include the following:

> It is the sheriff's duty to:
>
> (1) Execute and return, according to law, the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when delivered to the sheriff for that purpose; . . .
>
> (4) Mark on all process delivered to the sheriff to be executed, the day on which the sheriff received the same; . . .
>
> (5)(A) Execute all writs and other process legally issued and directed to the sheriff, within the county, and make due return thereof, either personally or by a lawful deputy; . . .
>
> (10) Use, in the execution of process, a degree of diligence exceeding that which a prudent person employs in such person's own affairs; . . . .
>
> (13) Levy every writ of execution first on the defendant's goods and chattels, if there are any;
>
> (14) Levy the same upon lands to the amount of the whole debt, or so much of the debt as may exceed the value of the goods and chattels, if there are not, to the best of the sheriff's knowledge, goods and chattels sufficient to answer the plaintiff's demand; . . .
>
> (19) Return the execution, . . . to the tribunal from which it issued, if satisfaction of the execution cannot be had before the return day; . . .
>
> (21) Describe land levied upon by execution or attachment, so as to identify it and distinguish it from other lands; . . .
>
> (22) Serve the defendant in possession of land with twenty (20) days' notice of the levy, and of the time and place of sale; . . .
>
> (23) Advertise the sale of any land levied on by execution, as prescribed in §§ 35-5-101 -- 35-5-104[22]; . . .
>
> (24) Pay the expenses of such advertisement out of the proceeds of the

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[22]These sections govern the conduct of and advertising for "any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial order or process. . . ." TCA § 35-5-101(a) [emphasis added].

sale; . . .

> (25) Return every execution which is delivered to the sheriff, <u>on or before the day of return mentioned therein, with a sufficient response endorsed thereon or attached to it</u>;
>
> (26) Pay to the party entitled to the same, or to the party's agent or attorney, on demand, any moneys collected by the sheriff on any execution from a court of record;
>
> (27) Return with such execution any money collected on such execution;
>
> (28) Make out, if required by the defendant, on levying any debt, damages, or costs by virtue of an execution, a bill of fees due in the case, and set down, under the bill, a true copy of the clerk's and other endorsed fees separately and distinctly, and give a receipt for the same to the defendant in the execution;
>
> (29) Endorse on the execution the amount of the sheriff's own fees taken on the same, to be entered by the clerk on the execution docket; . . .

[Emphasis added.]

As noted, the writ itself commanded the Sheriff to liquidate the judgment debtor's "goods and chattels, land and tenements." This requirement is also contained in the governing statute, TCA § 26-1-104. The writ of execution did not have to contain any additional explicit directive to the Sheriff to levy the execution against the judgment debtor's interest in real property. That was already part of the writ itself. Additional language would have been superfluous and could not have added to or reduced the duties -- or reduced the standard of care -- imposed upon the Sheriff under the above-quoted statute and the printed language of the writ.

The Sheriff, through Deputy Gene White, who executed and returned the March 30, 1992 writ of execution, was negligent in the performance of his duties. He had an affirmative duty to find any other property of LP1 out of which the Judgment could have been satisfied, since the $2,121.65 found at a bank was not sufficient therefor. The writ of execution was returned after

only three (3) days, with twenty-seven (27) days of viability left.[23] TCA § 26-1-401.

A "return" of a writ of execution is the officer's certification of what he has done touching the execution of the writ. The return must be complete in itself, embracing every matter required to be stated. To be "sufficient," the return must show, upon its face, either that the command of the writ had been fully complied with or, if not, the existence of such a state of facts as without fault of negligence on the part of the sheriff prevented a compliance therewith. Hutton v. Campbell, 78 Tenn. 170 (1882); Wingfield v. Crosby, 45 Tenn. 241 (1867); Eaken & Co. v. Boyd, 37 Tenn. 204 (1857); McCrory v. Chaffin, 31 Tenn. 307 (1851); Union Bank v. Barnes, 29 Tenn. 244 (1849).

Deputy White's return of the March 30 writ of execution does not show any state of facts "as without fault or negligence on the part of the sheriff prevented a compliance therewith," i.e., that the Deputy had attempted to find any other personal or real property and that none existed. If the return of the writ had contained a statement that no other property existed, it would have been false.

Not only was there in fact a lack of diligence by the Sheriff, through Deputy White; but also, there was a failure of diligence evident on the face of the purported return of the writ of execution.

[23]See Rowland v. Quarles, 20 Tenn. App. 470, 100 S.W.2d 991 (1936), in which the sheriff carried out a writ of execution twice within thirty (30) days before he returned it, and the second garnishment was held to be effective.

4. LPI's Interest in the Unit Weeks Could Have Been Levied Upon and Sold Under the March 30, 1992 Writ of Execution. TCA § 25-5-105 Does Not Contemplate Alias and Pluries Executions.

LPI's record title to the project, as purchased at the foreclosure sale, constituted notice to the world. The Sheriff could have levied upon the judgment debtor's interest in the unsold Unit Weeks during the life of the March 30, 1992 writ of execution. The Sheriff, through his Deputy, failed to exercise the proper standard of care in carrying out the execution. The standard of care imposed on the Sheriff was higher than the ordinary standard of care that a person would exercise in his own affairs. TCA § 8-8-201(10), supra.

The statutes do not say that land and personalty cannot be levied upon under the same execution; they only say that personalty must be levied on before land. This condition was fulfilled in the March 30, 1992 writ of execution. Deputy White had collected on a bank account by April 2. The interest in the Unit Weeks could have been levied upon after the money was collected, even though both were realized upon in the same execution. See Rowland v. Quarles, footnote 23, supra. There is no prohibition against personal and real property being levied on under the same execution. In fact, cases have held that land and personalty can be levied on under the same execution; there is only a prohibition in the statute against real property's being sold until the judgment debtor's personalty has been liquidated. McGavock v. Schneider, 54 Tenn. 467 (1872); Swingle v. Boyer, 1 Tenn. 226 (1807).

Also, TCA § 25-5-105, the statute of limitations, does not contemplate the issuance of series of executions, alias executions and pluries executions. It says "taken out an execution" [emphasis added]. In Weaver v. Smith, 102 Tenn. 47, 50 S.W. 771 (1899), supra, the court construed the companion statute of limitations for bringing a bill to subject property, now TCA § 25-5-104. In that case, it was argued that the bill had been timely filed, counting from the return

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of an alias execution that was returned unsatisfied. The Court held that the time is counted from the return of the first execution unsatisfied. The Court observed that the purpose of the Legislature was clearly apparent, i.e., to enforce and require prompt action on the part of the judgment creditor (102 Tenn. at 60); "the execution contemplated is one which shall be issued as soon as the creditor may legally cause the issuance." Id. at 62 [citation omitted.]

Certainly, Weaver v. Smith, supra, is highly persuasive that TCA § 25-5-105 should be interpreted consistently therewith -- the judgment lien is lost if an execution is taken out, upon which the judgment lien could be enforced against real property, and the available personal property is insufficient to satisfy the judgment.

There is no purpose to be served in allowing repeated executions, allowing court costs and other fees to continue to increase, allowing a Sheriff to continue to overlook leviable property, and allowing a creditor with actual knowledge of the leviable property to do nothing. As noted above, the statute must be strictly construed; and to construe the statute as expiring if an execution is issued and not properly acted upon, serves the public policies of "requiring prompt action," Weaver v. Smith, 102 Tenn. at 60, and of free alienability of property.

CONCLUSION

For the reasons set forth hereinabove, Mariner's Pointe respectfully prays that this Court rule that:

1. Under Tennessee law, the judgment lien of Econ Marketing, Inc. against any interest of Mariner's Pointe in real property, expired no later than thirty (30) days after the termination of the automatic stay of 11 U.S.C. § 362 and is unenforceable.

2. Under Tennessee law, the judgment lien of Econ Marketing, Inc. against any

interest of Mariner's Pointe in real property, had expired and become unperfected before the date on which Mariner's Pointe's Chapter 11 petition was filed, for failure to file a bill in equity to subject that property to the satisfaction of its lien.

3. Under Tennessee law, the judgment lien of Econ Marketing, Inc. against any interest of Mariner's Pointe in real property, had expired and become unperfected before the date on which Mariner's Pointe's Chapter 11 petition was filed, because an execution was taken out, causing the lien to become unenforceable because no levy and sale took place.

4. Mariner's Pointe have such other, further and general relief as is just.

Respectfully submitted,

____

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615-244-4994

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing document has been served by first class mail, postage prepaid, to Dale Bohannon, Esq., 115 South Dixie Avenue, Cookeville, TN 37501, this ___ day of May, 1998.

____

Linda W. Knight

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EXHIBIT G

IN THE TENNESSEE ETHICS COMMISSION

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BUREAU OF ETHICS & CAMPAIGN FINANCE

In re:	)	
	)	No. C 08-08
COMPLAINT OF MIKHAEL SHOR	)	

MEMORANDUM OPINION AND ORDER

This matter came on before the Tennessee Ethics Commission on the Complaint and supporting Exhibits (collectively, the "Complaint") filed by the Complainant, Mikhael Shor ("Complainant").

The issues before the Commission are as follows: Whether probable cause exists to believe that the Alleged Violators have violated the Tennessee Ethics Commission Act of 2006 (the "Act"), Tenn. Code Ann. ("TCA") § 3-6-101, *et seq.*; and if not, whether or not the Complaint should be referred to the Tennessee Registry of Election Finance (the "Registry") pursuant to Tenn. Code Ann. § 3-6-105(e).

The Commission considered this matter at a confidential meeting at which a quorum was present, and its ruling embodied in this Memorandum Opinion and Order was approved by the requisite majority of Commission members, all as required by TCA §§ 3-6-103(f) and 3-6-202.

The Commission has considered the Complaint, the statements to the Commission at the meeting to determine probable cause, and the entire record in this matter and has viewed the record in the light most favorable to the Complainant.

For the reasons set out below, the Commission holds that probable cause does not exist and that the Complaint must be dismissed, and further holds that the Complaint should not be referred to the Registry of Election Finance.

Any finding of fact herein which should be characterized as a conclusion of law shall be deemed a conclusion of law. Any conclusion of law herein which should be characterized as a finding of fact shall be deemed a finding of fact.

I. PARTIES, ALLEGATIONS AND BACKGROUND

A. Parties

Pursuant to TCA § 3-6-201, *et seq.*, Complainant filed a Complaint on July 11, 2008, appearing to name the following parties as Alleged Violators:

1. Seigenthaler Public Relations ("Seigenthaler"); Executives Elizabeth Seigenthaler Courtney, Chairman and CEO, Amy Seigenthaler Pierce, President, Katherine Seigenthaler, Chief Marketing Officer Executive; and Associated Account Executives Kathy Birchall and Philip McGowan;

2. Wine and Spirit Wholesalers of Tennessee ("Wholesalers"); Executives Thomas Bernard, CEO (President) and Don White, CFO; and Lobbyists Tom Hensley and David McMahon;

3. Tennessee Malt Beverage Association (the "Association"); and Executives Rich Foge, CEO (Executive Director) and Ann Koonce, CFO.

4. Unnamed employers [of lobbyists] unknown to the Complainant; members and financial supporters of the Wine and Spirit Wholesalers of Tennessee and other employers [of lobbyists], if they knew or had reason to know of the contracting of Seigenthaler Public Relations and the failure to register as lobbyists and employers [of lobbyists].

The foregoing are collectively referred to as the "Alleged Violators."

B. Allegations

The gist of the Complaint, in summary, is as follows:

1. Wholesalers and possibly other organizations representing wine and beer distributors engaged and paid Seigenthaler to lobby against pending legislation during the 2008 legislative session, and Seigenthaler and its employers failed to register with the Commission as a lobbyist and as employers of a lobbyist, respectively.

2. Kathy Birchall, listed as an account executive with Seigenthaler, registered a web domain in the name of Seigenthaler. Seigenthaler employees developed a website and initiated a campaign by direct mail, electronic mail and facsimile. The campaign and website intended to oppose legislation. The mail campaign urged citizens to contact their legislators expressing opposition to the legislation and "drove" traffic to the website. The website provided a "utility" for sending prepared statements to legislators. These actions appear to be an attempt to influence legislation through indirect communication with legislators, constituting lobbying.

3. Wholesalers paid Seigenthaler. Seigenthaler was supported by and may also have received payment from the Association. Both organizations opposed the legislation. Other organizations were mentioned as "supporters" of the campaign, but Complainant was not aware of any statements indicating a financial relationship. No registrations of lobbyists, employers of lobbyists or financial disclosures were filed with the Commission.

4. Articles in the media suggest that the failure to register was deliberate and ongoing.

5. Seigenthaler's contract or financial statements would likely identify its employers.

6. TCA § 3-6-302(d) holds partners, associates and employees of lobbyists individually accountable for failing to file in a timely manner.

7. TCA § 3-6-301(8) includes a CEO, CFO or equivalent positions as "employers" of lobbyists.

8. A published account stated that Mr. McGowan admitted receiving financial support from named organizations, suggested that he knew that he had failed to register, and quoted him as saying that he did not consider the activities described to be lobbying. The same account stated that Mr. Hensley, a lobbyist for Wholesalers (but who was named in the Complaint only as an "executive" of Wholesalers, i.e., an employer, not a lobbyist), acknowledged that he had provided funds.

9. Mr. McGowan authored a press release that acknowledged support from Wholesalers, the Association and the Tennessee Wine and Spirits Retailers Association. The press release included quotations from Mr. Bernard, President of Wholesalers, in support of their efforts and acknowledged support from civic and police associations.

10. The website and mailed items contained statements aimed to mislead or which had a reasonable likelihood of misleading citizens and legislators.

A. "Seigenthaler's website" [the website set up for this purpose and not Seigenthaler's own company website] billed itself as a coalition of concerned citizens and masked its lobbying effort as a "We Don't Serve Teens" campaign, which was a national campaign spearheaded by

the Federal Trade Commission ("FTC") to curb underage drinking.

B. The website did not provide "facilities" for visitors to engage in teen drinking prevention activities, but only called on visitors to oppose the direct shipping of alcohol and wine in grocery stores. The FTC's website did not take the same position.

C. The implied endorsement by the FTC was disingenuous.

D. The website was developed in connection with the campaign to oppose the legislation.

E. The campaign included several statements that the Complainant asserted were misrepresentations of age verification provisions in the legislation.

11. TCA § 3-6-304(b) states in part that "no employer of a lobbyist or lobbyist shall knowingly make or cause to be made any false statement or misrepresentation of the facts concerning any matter for which the lobbyist is registered to lobby." Even though Seigenthaler was not registered, Complainant contended that failure to register when required to do so did not excuse making "false statements or misrepresentations."

12. Complainant believed that the decision for Seigenthaler not to register as a lobbyist and for Wholesalers and any others not to register as employers was made in order to misrepresent the lobbying efforts as a grassroots effort.

After the Complaint was filed, the Commission's then-staff attorney, as he was authorized to do at the time, made a determination that the Complaint met the requirements of TCA § 3-6-201 and was factually and legally sufficient. Therefore, pursuant to TCA § 3-6-203(b), the Complaint was referred to the Office of the Attorney General and Reporter ("Attorney General's Office") for investigation.[1]

The Attorney General's Office rendered its report on April 1, 2009. A delay ensued because shortly thereafter, the Commission's senior staff departed. Effective July 1, 2009, the Commission became staffed by the employees of the Bureau of Ethics and Campaign Finance, created by TCA §§ 4-55-101, *et seq.* The newly organized staff consulted with the Commission and with the parties and counsel who wished to participate, to set the meeting for a probable cause determination for a date when all were available. October 15, 2009 was selected.

As noted above, it is now incumbent upon the Commission, as provided in TCA § 3-6-203(b), to determine whether probable cause exists to believe that a violation of any law or rule administered and enforced by the commission occurred. This Memorandum Opinion and Order constitutes the Commission's report, issued pursuant to TCA § 3-6-203(b)(1), finding that no probable cause exists, and dismissing the Complaint.

II. MEETING

The Commission held its confidential meeting to determine probable cause at 9:00 A.M. on October 15, 2009. At such a meeting, both the Complainant and Alleged Violators are entitled to present evidence in support of their positions. TCA § 3-6-203(b).

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[1] At a confidential meeting on August 19, 2008, Mr. McMahon was dismissed without prejudice as an Alleged Violator upon a showing that he was in no way involved in the conduct alleged in the Complaint. No evidence has since come to light that he was involved. He is no longer an Alleged Violator.

Complainant did not submit any additional documents to the Commission before the meeting, and did not attend the meeting in person or through counsel.

The following Alleged Violators, representatives of Alleged Violators and their counsel were present:

Seigenthaler Public Relations, through its officers Alleged Violators Ms. Amy Seigenthaler and Ms. Beth Seigenthaler, represented by counsel, Mr. James Weaver.

Tennessee Wine & Spirits Wholesalers, represented by its counsel, Mr. Henry E. Hildebrand, III.

Tennessee Malt Beverage Association, through Alleged Violator Richard Foge, represented by its counsel, Mr. Brantley Phillips.

Alleged Violators Messrs. Thomas Bernard, Don White and Tom Hensley, also represented by Mr. Hildebrand, and Ms. Ann Koontz, represented by Mr. Phillips, did not attend in person.

According to procedures previously announced, Complainant's presentation and Alleged Violators' combined presentation were limited to one hour each. Because Complainant did not appear, the entire presentation was limited to one hour. Alleged Violators adhered to that limit and stated that they had had sufficient time to make whatever presentation they wished.

All counsel moved orally that the Commission summarily dismiss the Complaint, in light of the Complainant's failure to submit any document prior to the meeting in support of his Complaint, and his failure to attend the meeting.

The Alleged Violators' presentation was on the record. After the Alleged Violators' presentation, the Commission met in private to discuss and deliberate. When the discussions and deliberations were concluded, the Commission voted on the record.

III. ANALYSIS

A. Statutory Requirements for Complaints

The Comprehensive Governmental Ethics Reform Act of 2006 (the "Act") provides, "[a]ny citizen of Tennessee may file a sworn complaint executed on a form prescribed by the Tennessee ethics commission alleging a violation of laws or rules within the jurisdiction of the commission." Tenn. Code Ann. § 3-6-201(a)(1).

Such a complaint must meet criteria that are set forth in the statute. The complaint must include:

(1) The name of the complainant;

(2) The street or mailing address of the complainant;

(3) The name of each alleged violator;

(4) The position or title of each alleged violator;

(5) A short and plain statement of the nature of the violation and the law or rule upon which the commission's jurisdiction over the violations depends; [and]

(6) A statement of the facts constituting the alleged violation and the dates

on which, or period of time in which, the alleged violation occurred; . . . .

> (7) All documents or other material available to the complainant that are relevant to the allegation; a list of all documents or other material within the knowledge of the complainant and available to the complainant that are relevant to the allegation, but that are not in the possession of the complainant, including the location of the documents, if known; and a list of all documents or other material within the knowledge of the complainant that are unavailable to the complainant and that are relevant to the complaint, including the location of the documents, if known.

TCA § 3-6-201(b).

Finally, a complaint must

> . . . be accompanied by an affidavit stating that the information contained in the complaint is either correct or that the complainant has good reason to believe and does believe that the violation occurred. If the complaint is based on information and belief, the complaint shall state the source and basis of the information and belief. The complainant may swear to the facts by oath before a notary public.

TCA § 3-6-201(c).

The Act requires the Commission to determine whether a Complaint, on its face, complies with TCA § 3-6-201. If it does not, the Commission must dismiss the Complaint. TCA § 3-6-203(a). If the Complaint does comply, and is deemed "factually and legally sufficient," the Commission must refer it to the Office of the Attorney General and Reporter for investigation. TCA § 3-6-203(b). When the Complaint was filed, the Commission's Executive Director and its two staff attorneys had authority to make the threshold determination that a Complaint was factually and legally sufficient and refer such a Complaint to the Attorney General's Office. That is what occurred in this instance.

B. Oral Motions to Dismiss Complaint Summarily

As stated above, all counsel moved orally for summary dismissal of the Complaint on the grounds that the Complainant failed to prosecute the Complaint. Other than the Complaint itself, Complainant provided no documents for the Commission to consider in determining probable cause, and he did not appear at the meeting either pro se or through counsel.

The Commission holds that it is obligated to make a probable cause determination regardless of whether or not the Complainant submits any document beyond the Complaint or appears at the Commission meeting to determine probable cause. The Commission will therefore deny that motion and proceed to determine probable cause, or lack thereof, in light of the governing statutes and the record in this case.

C. Additional Facts

The salient facts do not appear to be in dispute.

Seigenthaler is a public relations firm. That is what it is called and how it advertises itself. Seigenthaler does not communicate with legislators and did not do so in this instance. Rather, through a website and such means as direct mail and email, it communicated with the public to urge members of the public who were so inclined to contact their legislators on the subject of the legislation that it had been hired to help oppose. If a member of the public chose to contact a legislator, he or she might construct and send his or her own original message by email, mail, telephone, fax, etc. Alternatively, the citizen

could use the assistance of communication mechanisms available on the website.

Seigenthaler did not register with the Commission as a lobbyist.

Wholesalers and the Association are employers of lobbyists. Therefore, they must register with the Commission and pay registration fees. As employers, they must also file biannual expenditure reports with the Commission. TCA § 3-6-303.

Neither organization listed Seigenthaler as one of its registered lobbyists.

The Commission takes judicial notice that both Wholesalers and the Association filed all required biannual expenditure reports.

TCA § 3-6-303 requires expenditure reports to list expenditures in two categories. The first disclosure, under § 3-6-303(a)(1), is for compensation to lobbyists. The second disclosure, under § 3-6-303(a)(2), is for expenditures for "influencing legislative or administrative action through public opinion or grassroots action," excluding lobbyist compensation.

Each organization's employer expenditure reports listed expenditures in both of these categories.

The Complaint does not clearly allege who paid Seigenthaler, other than Wholesalers. The Complaint raises the possibility that Wholesalers was not Seigenthaler's sole source of payment and that others, such as the Association, Mr. Hensley and perhaps others contributed to the campaign that Seigenthaler conducted. For purposes of this analysis, the Commission will assume that all of Seigenthaler's compensation came from one or more employers of lobbyists, so that the Commission's analysis can focus on the dispositive issues.

As to the Association, Mr. Foge and Ms. Koonce, the Complaint alleges that the Association and perhaps others may have made financial contributions to the coalition named as the sponsor or host of the website that Seigenthaler created. There is no evidence in the record to substantiate that that is so, or to substantiate that these Alleged Violators participated in employing Seigenthaler, participated in the website, or participated in the campaign.

D. The Activities Described in the Complaint Were Not Lobbying

The Complaint asserts that Seigenthaler's activities were lobbying because they were a campaign to generate communications from members of the public to members of the General Assembly in opposition to a pending bill.

A majority of the Commission holds as follows:

It is clear from § 3-6-303(a)(2) that the role played by public relations firms in the process of urging citizens to "Write Your Legislator" is not within the definition of "lobbying," and public relations firms are not "lobbyists."

TCA § 3-6-303(a)(1) requires that an employer expenditure report list:

> The aggregate total amount of *lobbyist compensation*[2] paid by the employer. For purposes of the disclosure, compensation paid to any lobbyist who performs duties for the

[2] TCA § 3-6-301(7) defines "compensation" to include both payment for services rendered and reimbursement of expenses (except where lobbying is incidental to the person's regular employment).

> employer in addition to lobbying and related activities shall be apportioned to reflect the lobbyist's time allocated for lobbying and related activities in this state. The aggregate total amount of such lobbyist compensation shall be reported within one (1) of the following ranges: . . .

[Emphasis added.]

Whatever an employer pays to lobbyists must be disclosed under § 3-6-303(a)(1). But that does not include *all* expenditures that an employer might make for the purpose of influencing legislative or administrative action. In other words, there are other types of expenditures that *are* for influencing legislative or administrative action, but that are *not* for lobbying. Those types of expenditures are described in § 3-6-303(a)(2):

> *Excluding lobbyist compensation*, the aggregate total amount of employer expenditures *incurred for the purpose of influencing legislative or administrative action through public opinion or grassroots action, including, but not necessarily limited to*, any such expenditures for printing, publishing, advertising, broadcasting, paid announcements, audiotapes, videotapes, compact discs, digital video discs, infomercials, rallies, demonstrations, seminars, lectures, conferences, postage, telephone-related costs, *Internet-related services, public relations services*, governmental relations services, polling services, travel expenses, grants to issue groups or grassroots organizations, *or any similar expense*. For purposes of this disclosure, any such expenditure that is made for the purpose of achieving a multistate effect shall be apportioned equally among such states. The aggregate total amount of these employer expenditures shall be reported within one (1) of the following ranges: . . .

[Emphasis added.]

The conclusion is inescapable that payments by employers of lobbyists to the types of providers, vendors and consultants described in § 3-6-303(a)(2) are not payments for lobbying, for the following reasons:

1. Subsections (a)(1) and (a)(2) are mutually exclusive. Subsection (a)(1) is for payments (including reimbursement of expenses) to lobbyists, and subsection (a)(2), by its own terms, excludes payments to lobbyists.

2. Subsection (a)(2) exactly describes what Seigenthaler was doing: "influencing legislative or administrative action through public opinion or grassroots action."

3. The list of kinds of activities and services is very broad and inclusive, besides which the list begins with the phrase "including but not limited to" and ends with the phrase "or any similar expense." Clearly, the General Assembly did not intend for the list in subsection (a)(2) to be exclusive or exhaustive, but merely by way of example.

An employer of a lobbyist's undertaking to influence legislative or administrative action as described in subsection (a)(2) does not make the listed providers, vendors and consultants "lobbyists." On the contrary, it makes them *not* lobbyists. Like the "uncola," or the "undead," they are the "unlobbyists."

The use of the word "indirect" in the definition of "lobbying," TCA § 3-6-301(15), does not transform the types of activities described in TCA § 3-6-303(a)(2) into lobbying. The entire thrust of the subsection is to describe what is *not* lobbying. It would not be proper statutory construction for the Commission to negate the express language of § 3-6-303(a)(2) by implication.

The Commission notes that employers of lobbyists *do* have to disclose what they spend on grassroots public relations efforts to influence administrative and legislative action.

Based on the foregoing, a majority of the Commission holds that a provider, vendor or consultant that is engaged by an employer of a lobbyist to provide the types of goods and services within the broad and nonexclusive description of TCA § 3-6-303(a)(2) is not lobbying. Such provider, vendor or consultant is not required to register with the Commission as a lobbyist, and an employer of a lobbyist is not required to register as the employer of such a provider, vendor or consultant.

Commissioners Brown and Farmer concur in the holding that the activities described in the Complaint were not lobbying because they were within the description of TCA § 3-6-303(a)(2).

Therefore, the Commission unanimously holds that Seigenthaler was not lobbying by engaging in the activities described in the Complaint, and the Complaint does not allege a violation of the Act.

The Commission further unanimously holds that Elizabeth Seigenthaler Courtney, Amy Seigenthaler Pierce, Katherine Seigenthaler, Kathy Birchall and Philip McGowan were not lobbying by engaging in the activities described in the Complaint as employees of Seigenthaler, and they were not required to register as lobbyists.

Since Seigenthaler's activities were not lobbying, the Commission further unanimously holds that the Complaint does not allege any violation of the Act with respect to Wholesalers and its named employees, Thomas Bernard, Don White and Tom Hensley, and with respect to the Association and its named employees, Rich Foge and Ann Koonce. These organizations and individuals did not act as employers of a lobbyist with respect to Seigenthaler, and were under no duty to register with the Commission as such.

On that basis, the Commission unanimously holds that there is no probable cause to believe that the Alleged Violators violated the Act.

E. As an Entity, Seigenthaler Was Not a Lobbyist Under the Act

With respect to Seigenthaler, there is an additional reason to hold that it was not lobbying, which is that, as an entity, it could not be a lobbyist.

The Act defines a "lobbyist" as a "person"[3] who "engages in lobbying for compensation." TCA § 3-6-301(17).

"Lobbying" is defined at TCA § 3-6-301(15)(A) as "to communicate, directly or indirectly, with any official in the legislative branch or executive branch for the purpose of influencing any legislative action or administrative action." "Legislative action" and "administrative action" are defined at TCA § 3-6-301(14) and (1). TCA § 3-6-301(15)(B) through (F) lists many types of activities that, notwithstanding the general definition, are excluded from lobbying. As we have discussed above, TCA § 3-6-303(a)(2) lists additional types of activities that are not lobbying.

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[3] The Act defines a person as "any individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." TCA § 3-6-301(21). However, the phrase that introduces the entire list of definitions in § 3-6-301 is "[a]s used in this part, unless the context otherwise requires." The context in which the word "lobbyist" is used in the Act requires that its meaning be limited to individuals, and that partnerships, committees, associations, corporations, labor organizations, or any other organization or group of persons cannot be lobbyists.

Seigenthaler's campaign sought to influence "legislative action," but, as we held above, its activities were not lobbying.

The following provisions of the Act provide the "context" that leads a majority of the Commission to conclude that only an individual can be a lobbyist, and an entity cannot be a lobbyist:

1. TCA § 3-6-302(a)(3) provides that "Within thirty (30) days after registering, each lobbyist shall provide a current photographic portrait to the ethics commission; however, no lobbyist shall be required to submit more than one (1) portrait during any year." Section 3-6-302(f) provides that "Employer and lobbyist registration statements, as may be amended, as well as lobbyist photographs, shall be promptly posted on the commission's Internet site." Only an individual can provide a photograph of himself or herself; thus, only individuals are within the meaning of "lobbyist."

2. TCA § 3-6-302(a) describes the registration of lobbyists and employers of lobbyists.

A. Section 3-6-302(a)(1) states: "Not later than seven (7) days after becoming an employer of a lobbyist, the employer shall electronically register with the Tennessee ethics commission. Each year thereafter, the employer shall register in the same manner, if the employer continues to employ one (1) or more lobbyists." Each employer must register separately for each lobbyist.

B. Section 3-6-302(a)(2) states: "Not later than seven (7) days after becoming a lobbyist, the lobbyist shall electronically register with the ethics commission. Each year thereafter, the lobbyist shall register in the same manner if the lobbyist continues to engage in lobbying."

The better reading of § 3-6-302(a)(1) and (a)(2), particularly in light of § 3-6-302(a)(3) and (f), is that an employer of a lobbyist is employing an individual, not an entity.

3. TCA § 3-6-301(16) defines the term "lobbying firm." That term "means any firm, corporation, partnership or other business entity that regularly supplies lobbying services to others for compensation." From that definition, it is clear that a company that has lobbyists on staff is a lobbying firm, not a public relations firm. It is also clear that the firm is not a lobbyist, but only the individual employees of the firm who actually perform the lobbying. Lobbying firms – the entities themselves -- do not register as lobbyists. This is borne out by TCA § 3-6-302(d), which provides that

> By rule, the ethics commission shall authorize a lobbying firm to file consolidated lobbyist registration, registration statements, and registration amendments on behalf of all partners, associates and employees within the firm; however, the partners, associates and employees of the firm shall be individually named and shall remain individually accountable for the timeliness and accuracy of the consolidated filing.

Obviously, only the individuals are "lobbyists," and the entity is not a lobbyist.[4]

Based upon the foregoing, a majority of the Commission holds that under the Act, an entity cannot be a lobbyist and that only an individual can be a lobbyist and that for this reason, Seigenthaler

[4] The Complaint alleges, as noted above, that TCA § 3-6-302(d) holds "partners, associates and employees of lobbyists" individually accountable for failing to file in a timely manner. The Complaint misstates the statute. Section 3-6-302(d) holds lobbyists who are partners, associates and employees of *lobbying firms* responsible for the timeliness and accuracy of a consolidated filing by the lobbying firm covering all of the lobbyists within the firm. If no lobbying is involved, this statute does not apply and no registration is required.

was not lobbying in performing the services described in the Complaint.

Commissioners Brown and Farmer concur in the holding that Seigenthaler, as an entity, was not lobbying in performing the services described in the Complaint.

Therefore, the Commission unanimously holds that, as an entity, Seigenthaler was not a lobbyist and did not violate the Act in performing the services described in the Complaint.

On that additional basis, the Commission unanimously holds that there is no probable cause to believe that Seigenthaler violated Act.

E. Allegations of Other Unnamed Violations

The Complaint states that it includes as Alleged Violators unnamed employers [of lobbyists] unknown to the Complainant; members and financial supporters of the Wine and Spirit Wholesalers of Tennessee and other employers [of lobbyists], if they knew or had reason to know of the contracting of Seigenthaler Public Relations and the failure to register as lobbyists and employers [of lobbyists].

Both the Commission and anyone alleged to have violated the statutes over which the Commission has jurisdiction must be informed with reasonable clarity and sufficiency of what the Complainant asserts was illegal. Moreover, when the Commission determines that a complaint is "factually and legally sufficient" to refer to the Office of the Attorney General and Reporter pursuant to Tenn. Code Ann. § 3-6-203(b), the Attorney General and Reporter must be able to discern from the face of the complaint and exhibits what to investigate. The Commission, the Alleged Violator and the Office of the Attorney General and Reporter must be able to read a Complaint and find a comprehensible allegation of facts and law that, if true, would constitute a violation of the statutes over which the Commission has jurisdiction.

Therefore, the Commission holds that the unspecified allegations against unspecified individuals or entities fail to state a cognizable violation of the Act. The Commission unanimously holds that there is no probable cause to believe that any unnamed parties violated the Act.

F. Allegations of General Impropriety

The Complaint alleges that statements by Seigenthaler, described in the Complaint, "if taken individually and out of their proper context, may be defensible as literally not false. Taken together, they clearly paint a misleading picture. This lack of transparency and honesty in public debate is, to my understanding, precisely what the Ethics Commission was empowered to combat."

The Commission is not vested with plenary jurisdiction to govern all conduct, communications, business, endeavors or relationships. It only has jurisdiction to adjudicate allegations that are within the provisions of the statutes that it administers and enforces.

The conduct in question was not lobbying, according to the express terms of the Act. Seigenthaler, as an entity, was not a lobbyist. Seigenthaler and its employees were not required register as a lobbyist. Wholesalers and the Association and their employees were not employers of lobbyists as to Seigenthaler, and were not required to register as such. The Act specifically contemplates that employers of lobbyists will engage in grassroots public relations or advertising campaigns seeking to interest members of the public in communicating with officials in the executive and legislative branches in order to influence their actions. The Act specifically excepts grassroots campaigns from lobbying. Therefore, the Complainant's premise "that the decision not to file registration was made to misrepresent the lobbying efforts as a grassroots effort, as this would likely have a greater impact" was unfounded.

G. Allegations of False and/or Misleading Statements

TCA § 3-6-304(b) provides: "No employer of a lobbyist or lobbyist shall knowingly make or cause to be made any false statement or misrepresentation of the facts concerning any matter for which the lobbyist is registered to lobby to any official in the legislative or executive branch."

The Commission must dismiss the allegations in the Complaint that any Alleged Violators violated § 3-6-304(b) because, as a matter of law, there was no breach of that section. First, no allegedly false or misleading statements were made in the act of lobbying. Second, no such statements were made to any official in the legislative or executive branch. It is undisputed that Seigenthaler did not communicate with any such officials.

Therefore, the Commission does not reach, and makes no finding, on the questions of whether any statement was false or misleading or whether any statement was an expression of opinion rather than a representation of fact. However, since the activities described in the Complaint were not lobbying and Seigenthaler, as an entity, was not a lobbyist, the following allegations are unfounded: (1) That (as suggested in the media) the failure to register was deliberate and ongoing and (2) that the decision for Seigenthaler not to register as a lobbyist and for Wholesalers and any others not to register as employers was made to misrepresent the lobbying efforts as a grassroots effort.

H. Constitutionality

At the meeting, counsel for the Alleged Violators asserted that the website and its implications for citizens' rights to communicate with their elected officials are constitutionally protected activities. They asserted that it would be unconstitutional if the Act were to be deemed to apply to communications with citizens, urging them to communicate with their legislators, or facilitating their doing so.

Since the Commission holds that the website and the campaign were not lobbying and that Seigenthaler, as an entity, was not a lobbyist, there is no need for the Commission to reach the constitutional issues raised by counsel.

I. Referral to Registry

The final task before the Commission is to determine whether the Complaint should be referred to the Registry of Election Finance pursuant to TCA § 3-6-105(e), which provides as follows: "The commission shall refer to the registry of election finance for investigation and appropriate action any complaint filed with the commission that is within the jurisdiction of the registry."

The Commission's jurisdiction is set out at Tenn. Code Ann. § 3-6-105, and provides in part: "(a) The Tennessee ethics commission is vested with jurisdiction to administer and enforce the provisions of this chapter, §§ 2-10-115, and 2-10-122 – 2-10-130, and title 8, chapter 50, part 5.

The Registry's jurisdiction is set forth in three interrelated sections of the Tennessee Code, which state in pertinent part:

> 2-10-101. Short title -- Application -- Administration -- Adoption of more stringent requirements.
>
> (a) This part shall be known and may be cited as the "Campaign Financial Disclosure Act of 1980."
>
> . . . .

(d) The registry of election finance shall have the jurisdiction to administer and enforce the provisions of this part concerning campaign financial disclosure.

2-10-205. Jurisdiction to administer and enforce certain statutes.

The registry has the jurisdiction to administer and enforce the provisions of the following:

(1) The Campaign Financial Disclosure Act, compiled in part 1 of this chapter; and

(2) The Campaign Contribution Limits Act, compiled in part 3 of this chapter.

and

2-10-301. Short title -- Jurisdiction.

(a) This part shall be known and may be cited as the "Campaign Contribution Limits Act of 1995."

(b) The registry of election finance has jurisdiction to administer and enforce the provisions of this part.

There is no allegation anywhere in the Complaint that could constitute a violation of law that is within the jurisdiction of the Registry. The Commission holds that there is no basis to refer the Complaint to the Registry.

ORDER

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The oral motions for summary dismissal, made by counsel at the meeting, be, and hereby are, denied.

2. The Complaint against Elizabeth Seigenthaler Courtney, Amy Seigenthaler Pierce, Katherine Seigenthaler, Kathy Birchall, Philip McGowan, Wine and Spirit Wholesalers of Tennessee, Thomas Bernard, Don White, Tom Hensley, the Tennessee Malt Beverage Association, Rich Foge and Ann Koonce be, and hereby is dismissed because the Complaint fails to allege a violation of the Act in that they were not engaged in lobbying or were not employers of a lobbyist, and were not required to register with the Commission as lobbyists or employers of lobbyists, and therefore there is no probable cause to believe that they violated the Act.

3. The Complaint against Seigenthaler Public Relations be, and hereby is, dismissed because the Complaint fails to allege a violation of the Act in that it was not engaged in lobbying and in that, as an entity, it was not a lobbyist, and therefore there is no probable cause to believe that it violated the Act.

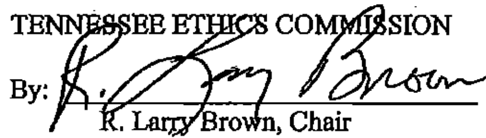
4. The Complaint be, and hereby is, dismissed to the extent that it contains allegations of unspecified conduct against unspecified individuals or entities.

5. The Complaint shall not be referred to the Tennessee Registry of Election Finance.

6. The Executive Director shall cause to be delivered to the Complainant and the Alleged Violators, by certified mail, return receipt requested, a copy of this Memorandum Opinion and Order as issued by the Commission.

7. In accordance with T.C.A. § 3-6-203(b)(1) Complainant may request a hearing as to this determination of no probable cause. If after the hearing the Commission determines that there is no probable cause, the Commission may order the Complainant to reimburse the Alleged Violators for any reasonable costs and reasonable attorney fees the Alleged Violators have incurred.

TENNESSEE ETHICS COMMISSION



By: R. Larry Brown

R. Larry Brown, Chair

Date: March 22, 2010