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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY,

CRYOSURGERY, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 15-871-BC**
	)	
ASHLEY RAINS AND COOL RENEWAL, LLC,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER (1) GRANTING DEFENDANT ASHLEY RAINS' MOTION FOR ATTORNEYS FEES AND DEFENDANTS' MOTION FOR DISCRETIONARY COSTS; AND (2) SETTING BRIEFING SCHEDULE TO QUANTIFY FEES

This matter is before the Court on two motions: (1) Defendant Ashley Rains' *Motion For Attorneys' Fees* and (2) *Defendants' Motion For Discretionary Costs*.

The second motion is unopposed and therefore granted. It is ORDERED that pursuant to Rule 54.04 of the Tennessee Rules of Civil Procedure, the Defendants are awarded $3,677.08 for the reasonable and necessary court reporter expenses for the depositions of Ronald McDow and Andy Higgins, and obtaining transcript copies for the depositions Ashley Rains, Lori Moss and Angie Combs.

With respect to the first motion, after considering the arguments of Counsel, the record, and applicable law, it is ORDERED that the *Motion For Attorneys' Fees* is granted, and by August 28, 2017 Counsel for Defendant Rains shall file, in accordance with Davidson County Local Rule § 5.05, an "affidavit setting forth an itemized

statement of the services rendered, the time, a suggestion of the fee to be awarded along with a statement of other pertinent facts including but not limited to that required by Tenn. Sup. Ct. R. 8, RPC 1.5, applicable case law, and such other information" in support of the amount of reasonable attorneys fees. The Plaintiff's response shall be filed by September 5, 2017. Defendant Rains' reply, if any, shall be filed by September 7, 2017. The Court shall then notify Counsel whether oral argument shall be conducted or if the amount of attorneys fees shall be determined on the papers.

The facts of record, law and analysis on which the attorneys fee award is based are provided below.

Tennessee follows the "American Rule" for awarding attorneys fees. *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009). "Under the American rule, a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case." *Id.*[1]

[1] Multiple policy reasons for the American Rule have been advanced.

> First, since litigation is inherently uncertain, a party should not be penalized for merely bringing or defending a lawsuit. Second, the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included paying the fees of their opponent's lawyer. Third, requiring each party to be responsible for their own legal fees promotes settlement. Fourth, the time, expense, and difficulty inherent in litigating the appropriate amount of attorney's fees to award would add another layer to the litigation and burden the courts and the parties with ancillary proceedings. Thus, as a general principle, the American rule reflects the idea that public policy is best served by litigants bearing their own legal fees regardless of the outcome of the case.

Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308–09 (Tenn. 2009) (quoting *House v. Estate of Edmondson*, 245 S.W.3d 372, 377 (Tenn. 2008) (citations omitted)).

In this case Defendant Rains seeks recovery of attorneys fees pursuant to identical contractual provisions contained in two agreements the parties entered into: Section 13(C) of a June 13, 2011 *Sales Representative And Specialty Consultant Agreement* and Section 10(B) of an October 2, 2012 *Independent Contractor Agreement.*[2] The text of these provisions is quoted as follows.

> The prevailing party in any legal action brought by one party against the other and arising out of this Agreement shall be entitled, in addition to any other rights and remedies it may have, to reimbursement for its expenses, including court costs and reasonable attorneys' fees.

In opposition to the *Motion For Attorneys' Fees*, the Plaintiff argues that an award should be denied for two reasons. First, the Plaintiff contends that the June 13, 2011 and October 2, 2012 agreements were merged into the most recent contract between the parties, the May 10, 2013 *Employment Agreement*. It does not include an attorneys fee provision; therefore the May 10, 2013 agreement resulted in the elimination of recovery of attorneys fees. Secondly, even if the attorneys fee provisions referenced by the Defendant were in effect, Defendant Rains can not be considered a "prevailing party" under Tennessee law because she did not succeed on a claim seeking relief or achieve any of the benefits sought in bringing the lawsuit.

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[2] In their *Motion For Summary Judgment*, both Defendant Ashley Rains and Defendant Cool Renewal, LLC sought an award of attorneys fees pursuant to Tennessee Code Annotated section 47-25-1705 based on their position that the Plaintiff's claim of misappropriation of trade secrets under TUTSA was made in bad faith. The Court declined to award attorneys fees under section 47-25-1705 concluding "that the facts of this case do not rise to the level of 'bad faith' prosecution by the Plaintiff on a trade secrets claim to warrant an award of attorneys fees under section 47-25-1705." *Memorandum And Order: (1) Granting Motion For Summary Judgment On Counts 1 And 3 Of Complaint; (2) Denying Summary Judgment On Defendants' Claim For Attorneys' Fees Under T.C.A. § 47-25-1705; (3) Dismissing With Prejudice Counts 4 And 5 Of The Complaint As Moot; And (4) Providing 6/9/17 Deadline For Counsel To File Proposed Order On Process For Return Of Plaintiff's Documents On Defendant Rains' Personal Email Account*, p. 35 (May 17, 2017).

No Merger Occurred

The Plaintiff's argument that the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* and the October 2, 2012 *Independent Contractor Agreement* were merged into the 2013 *Employment Agreement* is dismissed based upon (1) equitable estoppel and (2) that merger is inapplicable because there are no successive, inconsistent terms. Before the legal analysis, the following facts of record, necessary to that analysis, are provided.

Beginning in 2007, Defendant Rains worked as an employee of the Plaintiff. In June of 2011, that relationship changed to one of independent contractor. On May 10, 2013, Defendant Rains transitioned back to full-time employee status with the title of Senior Vice President of Marketing. On February 5, 2014, Defendant Rains resigned from CryoSurgery and founded Defendant Cool Renewal, LLC, which operates in the same industry as the Plaintiff.

During this time, from 2007 through 2013, the Plaintiff entered into a total of five (5) separate agreements with the Plaintiff:

1. April 26, 2007 – Confidentiality Agreement;
2. April 26, 2007 – Employee Non-Compete Agreement;
3. June 13, 2011 – Sales Representative And Specialty Consultant Agreement;
4. October 2, 2012 – Independent Contractor Agreement; and
5. May 10, 2013 – Employment Agreement.

Significant to Defendant Rains' present *Motion For Attorneys' Fees*, based upon the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* and the October 2, 2012 *Independent Contractor Agreement*, is that both agreements contained

provisions that the Confidentiality provision was of unlimited duration, and both agreements provided that the prevailing party in any lawsuit would recovery attorneys fees.

> 9. Confidentiality
>
> Contractor acknowledges that by reason of its relationship to Company hereunder it will have access to certain information and materials concerning Company's business plans, customers, technology, and products that is confidential and of substantial value to Company, which value would be impaired if such information were disclosed to third parties. Contractor agrees that it shall not use in any way for its own account of the account of any third party, nor disclose to any third party, any such confidential information revealed to it by Company. For any of the Products, Contractor shall not publish any technical description of the Products beyond the description of the Products beyond the description published by Company. In the event of termination of this Agreement, there shall be no use or disclosure of any confidential information of Company.
>
> 10. Governing Law
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> ***
>
> B. The prevailing party in any legal action brought by one party against the other and arising out of this Agreement shall be entitled, in addition to any other rights and remedies it may have, to reimbursement for its expenses, including court costs and reasonable attorneys' fees.

Independent Contractor Agreement, p. 4 (Oct. 2, 2012).

The last *Employment Agreement* of the parties, dated May 10, 2013, unlike previous agreements, did not contain a confidentiality provision, a "prevailing party" attorneys fee provision, or a provision stating that it "superseded" any previous agreements.

As to the legal analysis, the first basis on which the Court concludes that merger does not preclude an award of attorneys fees to Defendant Rains is equitable estoppel.

This doctrine prohibits a party from taking inconsistent legal positions in the same litigation. *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 315 (Tenn. 2009) ("In those instances where no oath is involved but the party is attempting to gain an unfair advantage by maintaining inconsistent legal positions, the doctrine of *equitable* estoppel should be applied.").

As noted, in its opposition to the *Motion For Attorneys' Fees*, the Plaintiff argues that the attorneys fees provisions of the June 2011 and October 2012 agreements are no longer in effect due to merger into the most recent contract between the parties, the May 10, 2013 *Employment Agreement,* which does not include an attorneys fee provision.

The *First Amended Complaint* and subsequent statements in response to the Defendants' *Motion For Summary Judgment*, however, included as the basis of the Plaintiff's "Count I: Breach of Contract – Confidentiality Provisions" the agreements the Plaintiff now asserts are not effective to recover fees: the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* and the October 2, 2012 *Independent Contractor Agreement.* Quoted below are excerpts from Plaintiff's First Amended Complaint and opposition to Defendants' motion for summary judgment showing that the Plaintiff previously included these agreements as a basis for its breach of contract claim.

- 9. In April 2007, CryoSurgery hired Defendant Ashley Rains (formerly known as Ashley Lindsey) in a full-time position as a Marketing Assistant. Prior to her employment with CryoSurgery, Rains had no experience in the cryosurgery business. As a condition of her employment, Rains was required to agree to the terms of a **Confidentiality Agreement**. Attached hereto as Exhibit A is a true and correct copy of the Confidentiality Agreement dated April 26,

2007 agreed to by Rains. In the Confidentiality Agreement, Rains acknowledged that she would "receive certain information from CryoSurgery which is proprietary to CryoSurgery ("Confidential Information")." Ex. A. ¶ 2. Rains agreed that the information "is, and shall at all times continue to be, confidential." Ex. A. ¶ 2. She agreed that she would not "disclose, divulge, reveal, report, publish, or transfer the Confidential Information. Ex. A. ¶ 2.

10. Through the Confidentiality Agreement, Rains also agreed that upon the termination of her employment (or the termination of any contractual relationship) with CryoSurgery, she would "return to CryoSurgery all Confidential Information, including any documents containing CryoSurgery Confidential Information, including copies thereof, which CryoSurgery has furnished to [Rains]." Ex. A. ¶ 3.

11. Rains and CryoSurgery also entered into an **Employee Non-Compete Agreement** (the "Non-Compete") dated April 26, 2007. Attached hereto as Exhibit B is a true and correct copy of the Non-Compete agreed to by Rains. The Non-Compete provides as follows:

> During [Rains'] employment by [CryoSurgery] and for a period of eighteen (18) months after [Rains] ceases to be employed by [CryoSurgery], Rains shall not within the United States directly or indirectly, either for [her] own account or as a partner, shareholder (other than shares regularly traded in a recognized market), officer, employee, agent or otherwise, be employed by, connected with, participate in, consult or otherwise associate with any other business, enterprise or venture that is the same as, similar to or competitive with [CryoSurgery]. Ex. B. ¶ 1A.

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13. In June 2011, Rains relocated from the Nashville area to Destin, Florida to move to her husband's location after marriage. In connection with her relocation, Rains ceased to be an employee of the Company but continued to perform services on behalf of the Company as an independent contractor. On or around June 1, 2011, CryoSurgery and Rains entered into a **Sales Representative and Specialty Consultant Agreement** (the "Consulting Agreement"). Attached hereto as Exhibit C is a true and correct copy of the Consulting Agreement. **The Confidentiality Agreement, the Non-**

Compete, and the Consulting Agreement will be collectively referenced as "the Agreements." Through the Consulting Agreement, Rains again acknowledged receipt of Confidential Information from the Company and agreed to keep it confidential. In relevant part, the Consulting Agreement provides as follows:

> [Rains] acknowledges that by reason of [her] relationship to [CryoSurgery] hereunder [she] will have access to certain information and materials concerning [CryoSurgery's] finances, business plans, customers, technology, and Products that is confidential and of substantial value to [CryoSurgery], which value would be impaired if such information were disclosed to third parties. [Rains] agrees that [she] shall not use in any way for [her] own account or the account of any third party, nor disclose to any third party, any such confidential information revealed to [her] by [CryoSurgery]. For any of the Products, [Rains] shall not publish any technical description of the Products beyond the description published by [CryoSurgery]. In the event of termination of this Agreement, there shall be no use or disclosure by [Rains] of any confidential information of [CryoSurgery]."

In January 2012 the Consulting Agreement was terminated and Rains left the cryosurgery industry.

14. In June 2013, Rains returned to Nashville and accepted a position as Senior Vice President of Marketing with CryoSurgery. **Upon her return to the Company, Rains agreed to be bound by the terms of the Confidentiality Agreement and Non-Compete from her previous employment with CryoSurgery.**

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Count 1: Breach of Contract—Confidentiality Provisions (against Rains).

23. Plaintiff incorporates the allegations contained in the preceding paragraphs above as if the same were restated in full herein.

24. **The Agreements are valid and binding** contracts between CryoSurgery, on the one hand, and Rains on the other.

25. **CryoSurgery performed its obligations under the Agreements. Rains, however, has breached the confidentiality provisions of the Agreements by, among other things misappropriating CryoSurgery's Confidential Information.**

26. Accordingly, CryoSurgery seeks relief for Rains' breach of the Confidentiality Agreement that includes, but is not limited to, the return of all Confidential Information belonging to CryoSurgery, a temporary and permanent injunction protecting CryoSurgery from further violations, the disgorgement of any ill-gotten profits, and all actual, special, consequential, and compensatory damages resulting from Rains" breach of the Confidentiality Agreement.

Plaintiff's First Amended Complaint And Application For Temporary Injunction and Permanent Injunction, pp. 3-6, 8-9 (Dec. 7, 2015) (emphasis added).

- 11. CryoSurgery hired Defendant Ashley Rains as a Marketing Assistant in 2007. [Defs.' Appendix – Deposition of Ashley rains ("Rains Depo") at 7-8].

  12. In conjunction with her employment, Rains and CryoSurgery entered into a Confidentiality Agreement (the "2007 Agreement") on or about April 26, 2007. [Defs.' Appendix – Ex. 1 to Rains Depo: *see also* Defendants' Memorandum in Support of Their Motion For Summary Judgment ("MSJ Brief") at 4.]

  13. In the 2007 Agreement, Rains acknowledged that she would receive certain confidential information that is proprietary to CryoSurgery (the "Confidential Information") and would not "disclose, divulge, reveal, report, publish, or transfer the Confidential Information." [Ex. 1 to Rains Depo.]

  14. On or about June 1, 2011, Rains transitioned to an independent contractor role with CryoSurgery and entered into a Sales Representative and Specialty Consulting Agreement ("2011 Agreement"). [Defs.' Appendix – Ex. 3 to Rains Depo.] This

> agreement was later terminated. [Defs.' Appendix – Rains Depo at 31.]
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> **15. In October 2012, CryoSurgery again retained Rains' services as an independent contractor, and the parties executed an Independent Contractor Agreement (the "2012 Agreement"). [Defs.' Appendix – Ex. 4 to Rains Depo.] The 2012 Agreement provided that Rains would receive confidential material relating to CryoSurgery's "finances, business plans, customers, technology, and Products" that cannot be disclosed to third parties. [*Id.*] The 2012 Agreement further provided that "in the event of termination of this Agreement, there shall be no use or disclosure by Contractor of any confidential information of [Rains]." [*Id.*]**
>
> 16. In May 9, 2013, Rains transitioned back to full-time employee status with the title of Senior Vice President of Marketing. [Defs.' Appendix – Ex. 5 to Rains Depo.] This relationship was memorialized in the Employment Agreement (the "2013 Agreement"). [*Id.*]

Plaintiff's Response In Opposition To Defendants' Motion For Summary Judgment, pp. 3-4, ¶¶ 11-16 (April 17, 2017) (emphasis added).

Additionally demonstrating the inconsistency is that, prior to not prevailing in opposition to summary judgment, the Plaintiff sought recovery of its own attorneys fees under the same contracts that it is now claiming prohibit an award of attorneys fees to Defendant Rains. In Count 4 of the *First Amended Complaint*, the Plaintiff requests attorneys fees based on "Tennessee law and **the agreements governing the relationship between Rains and the Company**." Because the May 10, 2013 *Employment Agreement* did not contain an attorneys fee provision and was not attached to the *First Amended Complaint*, the Plaintiff's request for attorneys fees in Count 4 was necessarily included the attorneys fee provisions from previous agreements between the parties.

Under Tennessee law, the Plaintiff is estopped to now claim that agreements, which it asserted in support of its claims, are legally unenforceable and not applicable.

In addition to equitable estoppel, the Plaintiff's merger claim must also fail because the record does not establish the essential elements for merger. Tennessee law provides that "the general rule is that the last agreement concerning the same subject matter that has been signed by all parties supersedes all former agreements, and the last contract is the one that embodies the true agreement." *Magnolia Grp. v. Metro. Dev. & Hous. Agency of Nashville, Davidson Cty.*, 783 S.W.2d 563, 566 (Tenn. Ct. App. 1989).

The purpose of the doctrine of merger is to ensure clarity on what contracts govern a relationship when there are multiple contracts with inconsistent terms.

> The merger doctrine is well-established in Tennessee; the doctrine puts structure to ascertaining the parties' intent where there are successive agreements. *See Dunn v. United Sierra Corp.*, 612 S.W.2d 470, 474 (Tenn.Ct.App.1980); 17A Am.Jur.2d *Contracts* § 539 (2011). Synthesizing the holdings in Tennessee caselaw, the merger doctrine has been summarized as follows: "Under the doctrine of merger, parties to a contract may enter into a subsequent agreement concerning the same subject matter as the prior one; the earlier contract ... merges into the latter contract, and is rescinded or extinguished." Stephen W. Feldman, 22 Tenn. Prac. Series, *Contract Law and Practice* § 10.11 (2011) (citing cases). For merger to apply, the successive contracts must have the same parties, and they generally "must contain inconsistent terms such that they cannot stand together as supplemental agreements." *Id.; see also* Restatement (Second) of Contracts § 279 (Supp.2011). Under these circumstances, the "subsequent contract then stands as the only contract between parties." *M & M Props. v. Maples*, No. 03A01–9705–CH–00171, 1998 WL 29974, at *10 (Tenn. Ct .App. Jan. 12, 1998).

Shree Krishna, LLC v. Broadmoor Inv. Corp., No. W2011-00514-COA-R3CV, 2012 WL 312254, at *14 (Tenn. Ct. App. Feb. 1, 2012) (emphasis added).

Nevertheless, when the circumstances concern the relationship of two separate and distinct contracts, Tennessee law and other jurisdictions require a showing of more than a similarity of subject matter between the two contracts. The requirement, instead, is that the subsequent contract must "completely cover the same subject" and contain terms inconsistent with the previous contract.

> **§ 434. Subsequent inconsistent agreement; Substituted contracts**
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> A contract complete in itself will be conclusively presumed to supersede a prior one between the same parties and concerning the same subject matter where the terms of the two are so inconsistent that they cannot subsist together.
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> If the parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement.... When the parties intend a new contract to replace all the provisions of an earlier contract, the new contract is termed the substituted contract....
>
> However, deviations or changes in a contract do not necessarily abrogate it or imply its abandonment, and where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old the old one is discharged, ***the fact that such was the intention of the parties must clearly appear.***

Robert J. Young Co. v. Nashville Hockey Club Ltd. P'ship, No. M20062511COAR3CV, 2008 WL 820488, at *6 (Tenn. Ct. App. Mar. 26, 2008) (quoting 17B C.J.S. *Contracts* §§ 434 and 435 (1999) (footnotes omitted) (emphasis added)).[3]

[3] This principle of law is consistent with other jurisdictions. *See, e.g., Am. Fruit Growers v. Hawkinson*, 21 Tenn. App. 127, 106 S.W.2d 564, 568 (1937) ("The complainant contends that this second contract superseded the first contract, being a subsequent contract, completely covering the same subject matter, and made with the same parties, but containing terms inconsistent with the former contract, so that the two cannot stand together."); *Performance Contracting Inc. v. DynaSteel Corp.*, 750 F.3d 608, 616 (6th Cir. 2014) (citations omitted) ("When parties enter into a subsequent agreement completely covering the

The doctrine of merger is not applicable to the facts of this case because the terms of the May 2013 *Employment Agreement* are not inconsistent with the terms from either the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* or the October 2, 2012 *Independent Contractor Agreement*. While the contracts do contain different terms, the 2013 *Employment Agreement* does not completely cover the same subject matter of the previous agreements.

For example, the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* and the October 2, 2012 *Independent Contractor Agreement* were contracts for Defendant Rains to serve as an independent contractor for the Plaintiff. In contrast, the 2013 *Employment Agreement* employed Defendant Rains as an employee. This distinction is material because the law recognizes different rights, obligations and duties depending on whether a person is considered an independent contractor or an employee.

Based on the plain terms of the contracts, it can not be said that the different contracts "completely covered the same subject matter" when the different contracts

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same subject matter, but containing inconsistent terms, then the effect is to supersede and rescind the earlier contract. But if the subsequent agreement does not completely cover the same subject matter, then the provisions in the original agreement still control (absent a distinct provision such as a merger clause)."); *Wallace v. Bock*, 279 Ga. 744, 745–46, 620 S.E.2d 820, 822 (2005) ("In that context, applicability of the principle of contractual merger requires a showing of more than a similarity of subject matter. "'An existing contract is superseded and discharged whenever the parties subsequently enter upon *a valid and inconsistent agreement completely covering the subject-matter* embraced by the original contract....' Such a "substituted contract discharges the original duty and [a] breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty." Thus, the principle of merger would extinguish Appellants' right to enforce Bock Homes' contractual obligations under the initial purchase agreement only if the subsequent escrow agreement was both inconsistent with that earlier contract and completely covered the same subject matter."); *S. Texas Land Co. v. Sorensen*, 199 Iowa 699, 202 N.W. 552, 553 (1925) ("When a subsequent contract completely covering the same subject-matter is made by the same parties to an earlier agreement, and the terms thereof are inconsistent with the earlier agreement, and intended to be substituted for it, a merger results, and the later contract becomes the final and only agreement between the parties on the subject.").

created different legal relationships between the parties. The doctrine of merger is inapplicable to merge either the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* or the October 2, 2012 *Independent Contractor Agreement* into the 2013 *Employment Agreement*. Thus, the identical attorneys fees provision of these two agreements remains intact and enforceable. The Plaintiff's defense of merger is dismissed.

Another variant of Plaintiff's claim that the June 13, 2011 and October 2012 agreements are not in effect with respect to recovery of attorneys fees is that it claims the parties' 2007 agreement controls. That agreement does not include a mutual fee recovery provision. The provision is a unilateral one for recovery of attorneys fees by CryoSurgery. The Plaintiff's variant position is that "the cornerstone of Plaintiff's contractual claims is the 2007 confidentiality agreement, which first obligated Defendant Rains to maintain the confidentiality of CryoSurgery materials," and which was "plainly intended to be ongoing and to survive beyond the termination" of the 2007 agreements, *Plaintiff's Sur-Reply To Defendant's Motion For Attorneys' Fees*, p. 2 (July 7, 2017). This position is also unavailing to avoid application of the June 2011 and October 2012 agreements. When the parties entered into the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* containing a separate confidentiality provision and

"superseding" clause, the 2007 confidentiality and attorneys fees provisions were replaced by the confidentiality and attorneys fees provisions of these latter agreements.[4]

Defendant Rains Is A "Prevailing Party" Under Attorneys Fee Provision

As an alternative ground for denying recovery of attorneys fees, the Plaintiff argues that even if the provisions referenced by the Defendant were applicable, she can not be considered a "prevailing party" under Tennessee law because she did not succeed on a claim seeking relief or achieve any of the benefits sought in bringing the lawsuit. For ease of reference, quoted again is the text of the attorneys fees provision.

- Section 13(C) of June 13, 2011 *Sales Representative And Specialty Consultant Agreement*

> 13. Governing Law, Arbitration and Legal Fees
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> * * *
>
> C. The prevailing party in any legal action brought by one party against the other and arising out of this Agreement shall be entitled, in addition to any other rights and remedies it may have, to reimbursement for its expenses, including court costs and reasonable attorneys' fees.

[4] It is true that the October 2, 2012 *Independent Contractor Agreement* contained the same "superseding" clause as the June 13, 2011 *Sales Representative And Specialty Consultant Agreement*. For this reason, the October 2, 2012 *Independent Contractor Agreement* could have arguably superseded the June 13, 2011 *Sales Representative And Specialty Consultant Agreement*. This issue, however, was never addressed by either party throughout the litigation of this case or on summary judgment and therefore it is not properly before the Court for a legal ruling. However, even though it is not properly before the Court, the legal effect of 2011 *Sales Representative And Specialty Consultant Agreement* is irrelevant for purposes of the *Motion For Attorneys' Fees* because it contains the identical confidentiality provision and attorneys fee provision as the October 2, 2012 *Independent Contractor Agreement*. Therefore, regardless of whether the Plaintiff's claims arose out of the confidentiality agreement in the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* or the October 2, 2012 *Independent Contractor Agreement* the result is the same because they both contain the same relevant provisions regarding confidentiality and an award of attorneys fees to the "prevailing party."

- Section 10(B) of the October 2, 2012 *Independent Contractor Agreement*

> 10. Governing Law
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> * * *
>
> B. The prevailing party in any legal action brought by one party against the other and arising out of this Agreement shall be entitled, in addition to any other rights and remedies it may have, to reimbursement for its expenses, including court costs and reasonable attorneys' fees.

In support of the argument that, as one who took a defensive positon in the lawsuit, the Defendant can not be a prevailing party, the Plaintiff relies on the Tennessee Supreme Court case of *Fannon v. City of LaFollette*, 329 S.W.3d 418 (Tenn. 2010). In that case, which did not involve a claim for attorneys fees under a contract, but rather under a statutory provision, the Court concluded that a litigant who successfully obtained a temporary restraining order was a "prevailing party" for purposes of an attorneys fee award under the statute. In discussing the meaning of "prevailing party" the Tennessee Supreme Court analyzed numerous principles from multiple jurisdictions.

> In *Daron v. Department of Correction*, 44 S.W.3d 478, 480 (Tenn.2001), this Court was faced with the question of whether a civil service worker, who after being terminated was reinstated with a ten-day suspension on appeal, qualified as a "successfully appealing employee" under Tennessee Code Annotated section 8–30–328(f) (1998). This Court concluded that "the phrases 'prevailing party' and 'successfully appealing employee' are analogous," and ultimately ruled that "a litigant is a 'successfully appealing employee' if the employee succeeds on a 'significant claim' which affords the employee a substantial measure of the relief sought." *Daron,* 44 S.W.3d at 481; *see also Walker v. Sidney Gilreath & Assocs.,* 40 S.W.3d 66, 71 (Tenn.Ct.App.2000) (finding the plaintiff to be a prevailing party where he was found less at fault than the defendants).

The United States Supreme Court has likewise addressed the meaning of a "prevailing party." For example, in *Texas State Teachers Association v. Garland Independent School District*, the Court observed that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." 489 U.S. 782, 792–93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). Similarly, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* the Court explained that a prevailing party "is one who has been awarded some relief by the court." 532 U.S. 598, 600–04, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), *superseded by statute,* OPEN Government Act of 2007, Pub.L. No. 110–175, 121 Stat. 2524, *as recognized in* *431 *Davis v. United States Dept. of Justice*, 610 F.3d 750, 752 (D.C.Cir.2010).[7] This type of "judicially sanctioned" relief, *id.* at 605, 121 S.Ct. 1835, most often comes in the form of "enforceable judgments on the merits and court-ordered consent decrees." *Id.* at 604, 121 S.Ct. 1835. The Court cited *Black's Law Dictionary* 1145 (7th ed.1999), for the proposition that a "prevailing party" is "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Buckhannon*, 532 U.S. at 603, 121 S.Ct. 1835. The Court has also noted that a party need not attain complete success on the merits of a lawsuit in order to prevail. Rather, a prevailing party is one who has succeeded " 'on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278–79 (1st Cir.1978)).

In the present case, the Plaintiff has cited three recent decisions by our Court of Appeals which apply many of the principles set out above. In *Consolidated Waste Systems, LLC v. Metro Government of Nashville & Davidson County*, Consolidated Waste challenged the constitutionality of ordinances that prevented the development of its proposed landfill. No. M2002–02582–COA–R3–CV, 2005 WL 1541860, at *1 (Tenn.Ct.App. June 30, 2005). While acknowledging that the ordinances were unconstitutional, the trial court enjoined development of the landfill but permitted Metro a period of time to correct the infirmities in the ordinances. *Id.* at *49. The Court of Appeals concluded that Consolidated Waste was a prevailing party:

> *We agree that the injunction mitigated the effect of the declaratory judgment. After careful consideration, however, we do not think it had the effect of rendering [the Plaintiff] a non-prevailing party.* The effect of the declaratory judgment was to render the ordinances unenforceable. That was one of

> the primary benefits sought. The injunction required Metro to adopt ordinances correcting the constitutional infirmities within a specified time. Therefore, the judgment affected [Metro's] behavior toward [the Plaintiff]. If Metro did not act within the deadline established by the court, it could not have prevented [the Plaintiff] from constructing the landfill where it proposed.
>
> *Id.* (emphasis added); *see also Qualls v. Camp*, No. M2005–02822–COA–R3–CV, 2007 WL 2198334, at *6 (Tenn.Ct.App. July 23, 2007) (noting that status as a prevailing party arises when the outcome of litigation "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff"); *C.S.C. v. Knox Cnty. Bd. of Educ.*, No. E2006–01155–COA–R3–CV, 2007 WL 1519543, at *4 (Tenn.Ct.App. May 25, 2007) ("[T]he Plaintiffs obtained sufficiently successful results in the overall litigation to achieve 'prevailing party' status."). Each of these rulings is instructive in our analysis.

Fannon v. City of LaFollette, 329 S.W.3d 418, 430–31 (Tenn. 2010) (emphasis in original) (footnotes omitted).

Under the Plaintiff's interpretation of *Fannon* a "prevailing party can only be one who sought to benefit from bringing claims: a plaintiff, or a possibly a defendant/counter-plaintiff who brings an affirmative counterclaim. A party who merely defends against the claim of another party is not a 'prevailing party' under Tennessee law." *Plaintiff's Response In Opposition To Defendants' Motion For Attorneys' Fees*, p. 7 (June 19, 2017). Contrary to the Plaintiff's interpretation of *Fannon* is a subsequent Court of Appeals decision in which the term "prevailing party" was applied in the context of contractual fee provisions to mean:

> The term "prevailing party" has commonly been defined as "the party to a suit who successfully prosecutes the action **or successfully defends against it**, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or

> verdict is rendered and judgment entered." Black's Law Dictionary 1188 (6th Ed.1990).

Dairy Gold, Inc. v. Thomas, No. E200102463COAR3CV, 2002 WL 1751193, at *4 (Tenn. Ct. App. July 29, 2002) (emphasis added).

The Plaintiff's response to these later decisions is that they rely on and trace back to a "misunderstood and misapplied" previous 2002 Court of Appeals in *Dairy Gold, Inc. v. Thomas*, No. E200102463COAR3CV, 2002 WL 1751193 (Tenn. Ct. App. July 29, 2002) which is not in accord with the Tennessee Supreme Court's decision in *Fannon*. As a result, the Plaintiff argues that "rather than look to a small subset of cases that are in conflict with binding precedent, this Court should rely on Tennessee law as expressed in *Fannon* and deny the attempt of parties not seeking affirmative relief to recover attorneys fees as 'prevailing parties.'"

Based on a more recent Tennessee Supreme Court decision where the Court reiterated its definition of "prevailing party," this Court concludes that the Plaintiff's view of *Fannon* is too narrow on the term "prevailing party." In *Eberbach v. Eberbach*, the Tennessee Supreme Court held that a former wife was a prevailing party under a mandatory attorneys fee provision in a marital dissolution agreement because she had "obtain[ed] a judgment in her favor at the trial court." No. M201401811SCR11CV, 2017 WL 2255582, at *8 (Tenn. May 23, 2017).[5]

[5] In a more recent Court of Appeals decision discussing the Supreme Court's decision in *Eberbach v. Eberbach*, the Court of Appeals reiterated the legal principle that where there is a valid and enforceable attorneys fee contract, parties are contractually entitled to recover their reasonable attorneys fees if they are the "prevailing or successful party."

At no point in discussing the standard for "prevailing party" from *Fannon* did the Tennessee Supreme Court qualify or make its determination contingent on whether the party seeking attorneys fees under the contract was the party prosecuting the claim or defending the claim. Rather, the ultimate decision as to whether the party could recover was that the party (1) obtained a judgment in her favor; (2) achieved the primary benefit sought; and (3) modified the opposing party's behavior in a way that provided a direct benefit to her. *Id.* Additionally, further evidence that affirmative action is not required to be considered a "prevailing party," the Court went on to hold that because the party had obtained the judgment in her favor in the trial court, being forced to defend the judgment on appeal would still fall under the attorneys fee provision.

> Under Tennessee's "prevailing party" standard, Wife clearly was the prevailing party at both the trial and appellate levels. See Fannon v. City of LaFollette, 329 S.W.3d 418, 432 (Tenn. 2010). By obtaining a judgment in her favor at the trial court and having that judgment affirmed by the Court of Appeals, Wife "achieve[d] the primary benefit sought" in the proceedings, and the judgment in her favor "modifi[ed] the opposing party's behavior in a way that provide[d] a direct benefit" to her. *See Fannon*, 329 S.W.3d at 432. Because Husband appealed the trial court's decision, Wife was forced to defend her awards of reimbursement of uncovered medical expenses and attorney's fees in the Court of Appeals. Had she lost her appeal, her judgment would have been reversed and her enforcement of the Parties' MDA thwarted. The defense of Wife's trial court judgment at the Court of Appeals thus qualifies as "prosecuting the action" under a plain reading of the Parties' MDA fee provision. Accordingly, because she was the prevailing party at both the trial and appellate levels, the Parties' MDA

> Tennessee Supreme Court recently held that parties are contractually entitled to recover their reasonable attorney's fees at both the trial and appellate court levels when they have a valid and enforceable marital dissolution agreement that requires an award of attorney's fees to a prevailing or successful party. *Eberbach v. Eberbach*, No. M2014–01811–SC–R11–CV, —– S.W.3d ——–, 2017 WL 2255582, at *6–7 (Tenn. May 23, 2017).

Foster v. Foster, No. M201601749COAR3CV, 2017 WL 2992979, at *5 (Tenn. Ct. App. July 14, 2017).

> entitles her "to a judgment for reasonable expenses, including attorney's fees, incurred in prosecuting the action" in each of the proceedings.

Id.

Moreover, this Court is bound by legal precedent from the Court of Appeals and, despite the Plaintiff's argument that it is in error, this Court is required to apply the superior legal precedent to the facts of this case. *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995) (citation omitted) ("Moreover, '[i]t is a controlling principle that inferior courts must abide the orders, decrees and precedents of higher courts. The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process. There would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions.'").

Furthermore, Plaintiff's reading of *Fannon* has not been implemented by courts following that decision. The precedent, as shown below, has been to follow *Dairy Gold, Inc. v. Thomas*: a party who successfully defends the lawsuit may recover under a contractual attorneys' fee provision.

- When reviewing contractual attorney fee clauses, Tennessee courts have defined the "prevailing party" as "'the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue.... The one in whose favor the decision or verdict is rendered and judgment entered.' " *Clark*, 2004 WL 63476, at *3 (quoting *Dairy Gold, Inc. v. Thomas*, No. E2001–02463–COA–R3–CV, 2002 WL 1751193, at *4 (Tenn. Ct. App. E.S., filed July 29, 2002)). Here, the defendants successfully defended against all of the Barretts' allegations and theories at trial.

  Barrett v. Ocoee Land Holdings, LLC, No. E201500242COAR3CV, 2016 WL 297688, at *6 (Tenn. Ct. App. Jan. 25, 2016).

- Although the *Fannon* holding was premised upon a statutory entitlement to recover attorney's fees, this court has adopted a consistent approach in construing the "prevailing party" in the context of contractual attorney's fees clauses. *See Isaac v. Ctr. for Spine, Joint, & Neuromuscular Rehab., P.C.*, No. M2010–01333–COA–R3–CV, 2011 WL 2176578, at *8 (Tenn. Ct. App. June 1, 2011) (quoting *Dairy Gold, Inc. v. Thomas,* No. E2001–024630–COA–R3–CV, 2002 WL 1751193, at *4 (Tenn. Ct. App. July 29, 2002)) (defining "prevailing party" as "the party to a suit who successfully prosecutes the action or successfully defends against it, *prevailing on the main issue*, even though not necessarily to the extent of his original contention.") (emphasis in original); *see also RCK Joint Venture*, 2014 WL 1632147, at *5 (quoting *Fannon*, 329 S.W.2d at 431) (stating "a prevailing party is one who has succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.").

  Williams v. Williams, No. M2013-01910-COAR3CV, 2015 WL 412985, at *13 (Tenn. Ct. App. Jan. 30, 2015), *appeal denied* (June 12, 2015).[6]

- Tennessee courts have defined "prevailing party" for purposes of attorney's fees clauses in contracts as "the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered." *Dairy Gold, Inc. v. Thomas*, No. E2001–02463–COA–R3–CV, 2002 Tenn. App. LEXIS 548, at *10,2002 WL 1751193 (Tenn. Ct. App. July 29, 2002) (*quoting* Black's Law Dictionary 1188 (6th ed.1990)).

  Meredith v. Weller, No. E2010-02573-COA-R3CV, 2012 WL 219082, at *13 (Tenn. Ct. App. Jan. 25, 2012) (quoting *Clark v. Rhea*, M2002–02717–COA–R3–CV, 2004 WL 63476 at *3 (Tenn. Ct. App. M.S., filed Jan. 13, 2004)).

- The term of art "prevailing party," for the purpose of recovering attorney's fees, applies to a party to whom the court has awarded relief on the merits

[6] In the *Plaintiff's Response In Opposition To Defendants' Motion For Attorneys' Fees*, the Plaintiff argues that the case of *Williams v. Williams*, No. M2013-01910-COAR3CV, 2015 WL 412985 reflects the problem of the Court of Appeals relying on incorrect precedent. In the brief, the Plaintiff points to the dissent in which Judge McBrayer criticized "[t]he formulation of the definition of 'prevailing party' found in *Estate of Burkes*" as "suspect." *Id.* at *15. Contrary to the Plaintiff's inference, the reason Judge McBrayer found the definition suspect had nothing to do with the inclusion of the phrase "or successfully defends against it" in the definition of "prevailing party", rather Judge McBrayer criticized the *Estate of Burkes* decision "because it relies upon cases holding that, to be a prevailing party, the person must obtain a judgment in its favor, not merely a 'material alteration in the legal relationship of the parties.'" *Id.*

of the party's claim. *Consol. Waste Sys., LLC v. Metropolitan Gov't of Nashville & Davidson County,* No. M2002–02582–COA–R3–CV, 2005 WL 1541860, at *46 (Tenn. Ct. App. June 30, 2005)(citing *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources,* 532 U.S. 598, 600, 121 S. Ct. 1835, 183–40, ––L.Ed.2d ––––, –––– (U.S.2001). "[P]revailing party status does not turn on the magnitude of the relief obtained." *Id.* (citing *Farrar v. Hobby,* 506 U.S. 103, 114, 113 S. Ct. 566, 574, 121 L.Ed.2d 494 (1992)). However, a prevailing party is not "a litigant who left the courthouse emptyhanded." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources,* 532 U.S. 598, 614, 121 S. Ct. 1835, 1845, 149 L.Ed.2d 855 (U.S. 2001) (Scalia, J, concurring)). For the purposes of recovering attorney's fees under contractual provisions like the provision at issue in this case, we have defined "prevailing party" as " 'the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.' " *Meredith v. Weller,* No. E2010–02573–COA–R3–CV, 2012 WL 219082, at *13(Tenn. Ct. App. Jan. 25, 2012) (*no perm. app. filed*) (quoting *Dairy Gold, Inc. v. Thomas,* No. E2001–02463–COA–R3–CV, 2002 Tenn. App. LEXIS 548, at *10, 2002 WL 1751193 (Tenn. Ct. App. July 29, 2002) (quoting Black's Law Dictionary 1188 (6th ed.1990))).

Sisco & Close Properties v. C & E P'ship, No. M2012-00400-COA-R3CV, 2012 WL 6757939, at *7 (Tenn. Ct. App. Dec. 28, 2012).

- In the context of attorney fees clauses in contracts, Tennessee courts define "prevailing party" as "the party to a suit who successfully prosecutes the action or successfully defends against it, *prevailing on the main issue,* even though not necessarily to the extent of his original contention." *Dairy Gold, Inc. v. Thomas,* No. E2001–024630COAR3–CV, 2002 WL 1751193, at *4 (Tenn. Ct. App. July 29, 2002). In other words, the "prevailing party" is the party "who obtains some relief on the merits of the case or a material alteration in the legal relationship of the parties." *Estate of Burkes v. St. Peter Villa, Inc.* No. W2006–02497–COA–R3–CV, 2007 WL 2634851, at *4 (Tenn. Ct. App. Sept. 12, 2007).

  Isaac v. Ctr. For Spine, Joint, & Neuromuscular Rehab., P.C., No. M2010-01333-COAR3CV, 2011 WL 2176578, at *8 (Tenn. Ct. App. June 1, 2011).

Thus, the foregoing case law establishes that the "prevailing party" for purposes of recovering reasonable attorneys fees does not have to be the party who initiated the lawsuit or the party who seeks affirmative relief. That Defendant Rains took a defensive posture in this lawsuit does not disqualify her from being a prevailing party.

Lastly there is the Plaintiff's position that an attorneys fee provision can not "create ongoing obligations that continue to govern the parties' relationships even when not included in a subsequent contract" and that the attorneys fee provisions are somehow of "indefinite duration." This interpretation of the text of the attorneys fee provision is not adopted by the Court.

For ease of reference, the text is again quote, "[t]he prevailing party in any legal action brought by one party against the other and ***rising out of this Agreement*** shall be entitled" to its reasonable attorneys fees. The meaning, the Court concludes, is that attorneys fees are recoverable in "any legal action brought by one party against the other" that arises out of the confidentiality provision in either of these agreements.

Applying this meaning to the record, the Court's reasoning is that the ruling in this case on summary judgment was that there were no genuine issues of material fact that Defendant Rains had not breached the confidentiality agreement. As a result, both the allegations in the *First Amended Complaint*, seeking enforcement of the confidentiality provisions, and the ultimate judgment as a matter of law for the Defendant make certain that the facts and circumstances of this case are ones "rising out" of the confidentiality provisions in issue.

In so interpreting the text of the attorneys fees provision, the Court has applied the following legal principles from Tennessee law.

> Courts should enforce provisions in contracts that expressly allow a party to recover its attorney's fees incurred in disputes over the contract. *Pullman Standard, Inc. v. Abex Corp.,* 693 S.W.2d 336, 338 (Tenn. 1985); *Pinney v. Tarpley,* 686 S.W.2d 574, 581 (Tenn. Ct. App. 1984). The entitlement to recover attorney's fees, however, is limited to the situation agreed to by the parties in the contract, and the fee provision is subject to the rules of contract interpretation. *Ingram v. Sohr,* No. M2012–00782–COA–R3–CV, 2013 WL 3968155, at *27 (Tenn. Ct. App. July 31, 2013); *Clark v. Rhea,* No. M2002–02717–COA–R3–CV, 2004 WL 63476, at *2–3 (Tenn. Ct. App. Jan.13, 2004). The interpretation of a contract is a question of law and not of fact. *Id.*; *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). We accordingly review the trial court's conclusions as to the provisions of the MDA, such as paragraphs 3 and 19, de novo, with no presumption of correctness accorded to those conclusions. *See RCK Joint Venture v. Garrison Cove Homeowners Ass'n.,* No. M2013–00630–COA–R3–CV, 2014 WL 1632147, at *4 (Tenn. Ct. App. Apr. 22, 2014) (citing *Epperson,* 284 S.W.3d at 308; *Whaley v. Perkins,* 197 S.W.3d 665, 670 (Tenn. 2006); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993)).

Williams v. Williams, No. M2013-01910-COAR3CV, 2015 WL 412985, at *9 (Tenn. Ct. App. Jan. 30, 2015), *appeal denied* (June 12, 2015).

Additionally, in the context of contractual attorneys fee provisions, the Tennessee Supreme Court has stated that a court lacks discretion and must apply parties' mutually agreed upon contract provisions regarding attorneys fees.

> Our courts long have observed at the trial court level that parties are contractually *entitled* to recover their reasonable attorney's fees when they have an agreement that provides the prevailing party in a litigation is entitled to such fees. *See, e.g, Seals v. Life Inv'rs Ins. Co. of Am.*, No. M2002-01753-COA-R3-CV, 2003 WL 23093844, at *4 (Tenn. Ct. App. Dec. 30, 2003); *Hosier v. Crye–Leike Commercial, Inc.*, No. M2000-01182-COA-R3-CV, 2001 WL 799740, at *6 (Tenn. Ct. App. July 17, 2001). In such cases, the trial court does not have the discretion to set aside the parties' agreement and supplant it with its own judgment. *See Christenberry v. Tipton*, 160 S.W.3d 487, 494 (Tenn. 2005) ("A court

> 'cannot under the guise of construction make a new and different contract for the parties.' ") (quoting *Memphis Furniture Mfg. Co. v. Am. Cas. Co.*, 480 S.W.2d 531, 533 (Tenn. 1972)). The sole discretionary judgment that the trial court may make is to determine the amount of attorney's fees that is reasonable within the circumstances. *See Hosier*, 2001 WL 799740, at *6; *Albright v. Mercer*, 945 S.W.2d 749, 751 (Tenn. Ct. App. 1996); *Airline Constr. Inc. v. Barr*, 807 S.W.2d 247, 270 (Tenn. Ct. App. 1990); *see also Connors v. Connors*, 594 S.W.2d 672, 676 (Tenn. 1980) (setting out the appropriate factors to be used as guides in fixing reasonable attorney's fees); Tenn. Sup. Ct. R. 8, Rule 1.5.
>
> While we hold that our courts do not have discretion to deny an award of fees mandated by a valid and enforceable agreement between the parties, nothing in this decision affects or limits the discretion our courts have in determining the reasonableness and appropriate amount of such awards pursuant to the factors set out in *Connors* and Tennessee Supreme Court Rule 8. *See Connors*, 594 S.W.2d at 676-77; Tenn. Sup. Ct. R. 8, Rule 1.5.

Eberbach v. Eberbach, No. M201401811SCR11CV, 2017 WL 2255582, at *6-7 (Tenn. May 23, 2017).

For all of these reasons, the Court concludes that the identical attorneys' fee provision in the June 13, 2011 *Sales Representative And Specialty Consultant Agreement* and the October 2, 2012 *Independent Contractor Agreement* are applicable to the facts of this case; that Defendant Rains is a "prevailing party" under Tennessee law because she obtained a favorable judgment from the Court dismissing the Plaintiff's claims in their entirety on summary judgment; and that Defendant Rains may recover her attorneys fees under this provision.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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