The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I serve as Special Judge by gubernatorial appointment for Part II of the Shelby County Chancery Court.

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

I have been licensed to practice law in Tennessee since October 6, 1979. My BPR number is 6683. My license is active.

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.

Tennessee is the only state in which I have been licensed to practice law.

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

No.

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

July 2024 – Present. Special Judge, Shelby County Chancery Court, Part II. Appointed by the Governor to serve during the unavailability of the sitting chancellor.

December 2016 to July 2024 – Special Counsel, Office of the Tennessee Attorney General and Reporter, assigned to the Memphis Office

October 2016 to December 2016) Newsom Conflict Resolutions, LLC (Mediation Practice)

September 2015 – September 2016 – Chancellor, Shelby County Chancery Court, Part III (2015-2016)
Appointed by Governor Haslam in September 2015 to fill a judicial vacancy.

Shelby County Chancery Court (Special Master 2010-2015) (part-time position)

Harris Shelton Hanover Walsh, PLLC (2005-2015)

Hanover, Walsh, Jalenak & Blair, PLLC (1979-2004)

Co-Owner NewSwank Aircraft, LLC (2004-2011) (ownership of private aircraft for son's flight training)

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.

I have been employed continuously since completion of my legal education.

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.

I do not currently practice law.

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

Prior to my governmental service, I had thirty-five years of private trial and litigation practice.

I am admitted to practice in the following courts (with dates of admission):

Tennessee State Courts, October 6, 1979

United States District Court, Western District of Tennessee, April 4, 1980.

United States District Court, Middle District of Tennessee, September 9, 1987.

United States District Court, Eastern District of Tennessee, October 27, 1987.

United States Court of Appeals for the Sixth Circuit, September 15, 1981.

United States Supreme Court, November 15, 1982.

I have been admitted pro hac vice or as otherwise permitted in cases before the United States District Courts for the Eastern District of Michigan, the Eastern District of Arkansas and the Northern District of Mississippi. I have been a Tennessee Certified Rule 31 mediator. I had experience as lead counsel in jury trials in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis and the United States District Court for the Western District of Tennessee.

My private practice focused chiefly on commercial and employment litigation. I represented individuals, corporate clients, including insurance companies, small businesses, not-for-profit corporations, multi-employer pension and welfare trusts, and municipalities. The matters in which I was engaged (with approximate weighting as to each) included breach of contract claims and claims of tortious commercial conduct in state and federal courts and in arbitration (40%); claims for copyright infringement (10%); disputes involving decedents' trusts (10%); provision of advice on ethics matters and transactional matters (10%); and claims for violation of ERISA-related obligations (5%).

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

Cases of interest in which I engaged actively while in private practice included representation of: a United States Congressman in defense of a defamation action filed by James Earl Ray; Memphis firefighters in *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984), an employment case regarding seniority rights of public employees and in *Fulenwider v. Firefighters Local Union No. 1784,* 649 S.W.2d 268 (Tenn. 1982), an action against a firefighters' union for damages based on an allegedly inadequate response to a fire after firefighters illegally went on strike; appeals from administrative determinations of governmental entities in regard to liquor distribution and environmental matters, including *Profill Development, Inc. v. Dills,* 960 S.W.2d 17 (Tenn. Ct. App. 1997) which was a declaratory judgment action addressing the validity and applicability of a portion of the Tennessee Solid Waste Disposal Act allowing local

governments to obtain approval authority for landfill disposal; defense of management of retirement communities from claims of self-dealing, including the Tennessee Supreme Court's consideration whether modification of a protective order to permit Tennessee Public Records Act-related disclosure of previously sealed documents was an abuse of discretion in *Ballard v. Herzke,* 924 S.W.2d 652 (Tenn. 1996); representation of a hierarchical church entity in regard to disposition of church-related assets; representation of spouses in regard to division of marital estate assets; defense of a conveyor manufacturer against construction delay claims related to installation of conveyer systems in automobile manufacturing plants in southeast Michigan; the Receiver of Forest Hill Cemeteries of Memphis to restore trust funds that had been stolen by the owners and their associates, placing at risk the pre-need funeral arrangements of over 13,000 local citizens; and a major health insurance carrier in coverage litigation and separately in relation to a contentions that the carrier had violated the Tennessee Any Willing Pharmacy Act codified at Tenn. Code Ann. § 56-7-2359.

Cases of interest in which I served as leading counsel during time as Special Counsel for the Office of the Tennessee Attorney General included representation of: the Commissioner of the Tennessee Department of Correction and his Medical Director in at trial in 42 U.S.C. § 1983 litigation regarding the administration of direct-acting antiviral medication to inmates infected with Hepatitis C in the United States District Court for the Middle District of Tennessee and on appeal to the Sixth Circuit Court of Appeals (*Atkins v. Parker*, 412 F. Supp. 3d 761 (M.D. Tenn., 2019), *aff'd,* 972 F.3d 734 (6th Cir. 2020); a local governmental task force in district court and on appeal in defense of a Fair Labor Standards Act claim by a former officer for alleged unpaid wages (*Rhea v. West Tennessee Violent Crime & Drug Task Force, et al.,* 825 F. App'x 272 (6th Cir. 2020); the Governor of Tennessee in actions brought in the Western and Middle Districts of Tennessee claiming that an Executive Order that allowed parents to opt-out of COVID-related facial masking requirements in public schools violated the Americans with Disabilities Act (*G.S., et al. v. Lee*, 560 F. Supp. 3d 1113 (W.D. Tenn. 2021); *R.K., et al. v. Lee*, 568 F. Supp. 3d 895 (M.D. Tenn. 2021)); the Governor of Tennessee and the Tennessee Commissioner of Education in the United States District Court for the Middle District of Tennessee and on appeal to the Sixth Circuit Court of Appeals in an ADA challenge to state COVID legislation regulating school masking requirements (*R.K., et al. v. Lee, et al.*, 575 F.Supp.3d 957 (M.D. Tenn. 2021), *rev'd,* 53 F.4th 995 (6th Cir. 2022)); the Governor of Tennessee, the Tennessee Department of Education and others defending a constitutional challenge to the Tennessee Education Savings Account Pilot Program by governmental entities on grounds that the Program violated the Tennessee Home Rule Amendment, Tenn. Const. art. XI, § 9 at trial and on appeal (*Metro. Gov't of Nashville and Davidson Cnty., et al. v. Tennessee Dep't of Educ.,* No. M2020-00683-COA-R9-CV, 2020 WL 5807636 (Tenn. Ct. App. Sept. 29, 2020), *rev'd,* 645 S.W.3d 141 (Tenn. 2022) (Solicitor General Blumstein argued to the Tennessee Supreme Court); and the Shelby County District Attorney in a federal action relating to the mitigation of drug trafficking at a large apartment complex in the Whitehaven community in Memphis (*TESCO Properties, Inc., et al. v. Weirich, et al.,* W.D. Tenn. Case No. 2:21-cv-02743-JTF-atc).

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.

Item 5 above contains a summary of my service as an appointed judicial officer in the Chancery Court of Shelby County.

The chancery court hears a vast range of cases, including adoptions, petitions for the termination of parental rights, administrative appeals from employee discipline and termination from municipal, county, and state governmental entities, breach of contract actions, breach of fiduciary duties, dissolution of partnerships, LLCs, and trusts, petitions for orders of protection, domestic matters involving divorce, child custody, support, and visitation, spousal support, property interests, including suits to quiet title, partition, enforcement of judgments, tax sales and redemption of property interests, discrimination and employment, constitutional challenges, and petitions for civil and criminal contempt for violation of court orders. I keep in mind that all cases are noteworthy to the parties and those whose interests are affected thereby.

I should not comment on decisions that I have made in cases that I have heard since my appointment in July, most of which are still subject to potential appellate review.

Among the cases that I presided over during my previous appointment was an unprecedented joint petition by the Director of the Tennessee Bureau of Investigation and the Shelby County District Attorney to release to public view a TBI investigative file. The TBI had investigated the officer-involved fatal shooting of a young black man by a Memphis Police officer in the summer of 2015 and produced an investigative report into the incident. While TBI investigative files are normally not subject to public disclosure under the Tennessee Public Records Act, the statute at issue provided that the information contained in TBI records "shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." Tenn. Code Ann. § 10-7-504(a)(2)(A).

I initially undertook a detailed *in camera* review of the TBI file. I found that its contents revealed much about what motivated the actions of the young man and the officer on the tragic evening in question. Following my review, I carefully evaluated whether the parties before the Court had standing to seek judicial relief, *see In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007* (*State ex rel. Weirich, et al. v. Schilling*); Memorandum and Order re: Standing and Intervention (Shelby Chancery No. CH-15-1472, Nov. 30, 2015) (Attachment A). I then entered an order evaluating the law and directing public disclosure of the TBI investigative file, which later was posted to the District Attorney's website for public view. *See In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007* (*State ex rel. Weirich, et al. v. Schilling*); Order Directing Disclosure of TBI

Investigative File Pursuant to Tenn. Code Ann. § 10-7-504(a)(2)(A) (Shelby Chancery No. CH-15-1472, Dec. 8, 2015) (Attachment B). While correlation is never proof of causation, it is my view that the governmental transparency resulting from this litigation played a role in lessening the tension that the original incident had caused. No appeal was taken from my rulings.

I also granted summary judgment in favor of a loan servicer in an action brought by a family who defaulted on their mortgage. The plaintiffs brought claims for breach of contract, intentional misrepresentation, promissory estoppel, and breach of the covenant of good faith and fair dealing. On the loan servicer's motion for summary judgment, applying *Rye*, I ruled that plaintiffs had failed to demonstrate that there were genuine issues of material fact that precluded summary judgment in favor of the loan servicer. *See L.J. Jackson, et ux. v. CitiMortgage, Inc.*; Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (Shelby Chancery No. CH-14-1217, Jan. 5, 2016) (Attachment C). The Court of Appeals affirmed the judgment in all respects. *Jackson v. CitiMortgage, Inc.,* No. W2016-00701-COA-R3-CV, 2017 WL 2365007 (May 31, 2017).

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

None

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

One of the chief joys of my legal career has been the opportunity I have had to encourage the professional development of younger colleagues. It is of lasting benefit for a lawyer to examine a witness in open court for the first time or to make an argument before a trial or appellate court. The best judges encourage experienced counsel to offer their fellows such opportunities. Appellate judges in particular are able to develop an office culture of collaboration and mentorship in relation to their law clerks so as to better prepare them for later practice. A judge can set a tone of mutual respect, pursuit of excellence, and good humor that will make chambers an interesting and exciting place to work.

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

I applied for the vacancy in Part III of Shelby County Chancery Court resulting from the appointment of the Honorable Kenny W. Armstrong to the Tennessee Court of Appeals. The Governor's Council met on September 10, 2014 to consider all applications for that position. The Governor's Council submitted my name to the Governor as a nominee.

I applied for the vacancy in Part III of Shelby County Chancery Court resulting from the passing of Chancellor Oscar C. Carr III. The Governor's Council met on June 17, 2015 to consider all applications for that position. The Governor's Council submitted my name to the Governor as a nominee.

I applied for the vacancy in the Tennessee Court of Appeals for the Western Section previously held by Judge Brandon Gibson. The Governor's Council met on March 11, 2019 to consider all applications for that position. The Governor's Council did not submit my name to the Governor as a nominee.

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.

Vanderbilt School of Law, J.D. 1979
(Dates of attendance: 1976-1979)
Vanderbilt Law Review (1977-1979)

Rhodes College, B.A. 1976 (joint degree in Economics and Political Science)
(Dates of attendance: 1972-1976)
Phi Beta Kappa (Rhodes College)
Omicron Delta Kappa Honor Society (Rhodes College)

PERSONAL INFORMATION

15. State your age and date of birth.

[redacted]

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

Since birth

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

Since birth (except when attending Vanderbilt University School of Law).

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

Shelby County

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

I did not serve in the military.

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

No

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

No

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

I know of no formal complaints filed against me.

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

No.

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

No.

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

I was a defendant in *Cook v. Trimble, et al.,* a federal lawsuit filed by Theodore G. Cook in the United States District Court for the Western District of Tennessee in 1988. Mr. Cook had been a defendant in a lawsuit in which J. Alan Hanover and I represented William F. Trimble in the Chancery Court in Shelby County in the mid-1980s. After Mr. Cook lost that lawsuit, he filed suit against Mr. Trimble; Mr. Hanover; Harry Flemming; Sonitrol Corporation; former Chancellor D.J. Allisandratos; James W. McDonell; Glenn G. Reid; J. Keith McCormic; Aaron B. Parker; Mark Varder Bruegge, Jr., and me. Then-United States District Judge Julia Gibbons dismissed all claims asserted by Mr. Cook as frivolous pursuant to 28 U.S.C. 1915(d) and declined to exercise jurisdiction over collateral state claims asserted by Mr. Cook. The Sixth Circuit Court of Appeals affirmed. *See Cook v. Trimble, et al.*, 1989 WL 16189, 869 F.2d 1489 (6th Cir. 1989) (Table Case).

In the mid-1980s, I filed a civil action in General Sessions Court in Shelby County against a driver who backed into my car in a commercial parking lot, causing damage to the vehicle. The driver left the scene of the accident after refusing to provide insurance information. I do not recall the docket number of the case or the name of the defendant. I obtained a civil judgment in the approximate amount of $400.00.

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.

Riveroaks Reformed Presbyterian Church (Presbyterian Church of America)
Ruling Elder, 2011 to 2017; 2021 to present
Trustee, January 2014 to present.

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

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

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

No.

ACHIEVEMENTS

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

Fellow, Tennessee Bar Foundation (2018 to present)
Fellow, American Bar Foundation (2017 to present)
Fellow, Memphis Bar Foundation (2016 to present)
Memphis Bar Association (1979 to 2020 and 2022-2023); Director (2017 - 2019)
Tennessee Bar Association (1979 to 2022, 2023-2024)
American Bar Association (1979 to 2005; 2009 to 2017)
The Federalist Society (2015 to 2018)

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.

William M. Leech, Jr. Award, Office of the Tennessee Attorney General and Reporter (2021)
AV Rating Martindale Hubbell
Best Lawyers in America; Commercial Litigation Super Lawyers

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

Case Comment, Constitutional Law—Confrontation Clause—Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Guarantee Despite Lack of Cross-Examination, 31 VAND. L. REV. 682 (1978)

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.

The Work of the Office of the Tennessee Attorney General (1 hour live CLE, Memphis Chapter of the Federalist Society, 2018)

Faculty, National Attorneys General Training & Research Institute (NAGTRI)— Advanced Litigation Techniques, Mobile Training for Oregon Department of Justice (Salem, Oregon,

2018)

CLE presentation re: Practice Before the Chancery Court of Shelby County (1 hour live CLE, Memphis Bar Association, 2016)

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.

Chancellor of Part II of the Chancery Court of Shelby County (2014); candidate in 2014 general election.

Chancellor of Part III of the Chancery Court of Shelby County, successful applicant for gubernatorial appointment (2015); unsuccessful candidate to complete unexpired term in 2016 general election.

Special Judge by gubernatorial appointment in Part II of the Chancery Court of Shelby County (2024 to present).

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

No.

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

- *In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007 (State ex rel. Weirich, et al. v. Schilling)*; Memorandum and Order re: Standing and Intervention (Shelby Chancery No. CH-15-1472-3, Nov. 30, 2015) (Attachment A)

- *In re: Investigative File Tennessee Bureau of Investigation, Investigative File: ME-76C-000007 (State ex rel. Weirich, et al. v. Schilling)*; Order Directing Disclosure of TBI Investigative File Pursuant to Tenn. Code Ann. § 10-7-504(a)(2)(A) (Shelby Chancery No. CH-15-1472-3, Dec. 8, 2015) (Attachment B)

- *Jackson, et ux. v. CitiMortgage, Inc.*, Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (Shelby Chancery No. CH-141217-3, Jan. 5, 2016) (Attachment C)

Each of these writings reflect my own effort (aided by parties' briefing in *Jackson* only).

ESSAYS/PERSONAL STATEMENTS

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

In most instances the Court of Appeals is the appellate court of last resort. It is vital that parties who appear before the Court have confidence that their matters will be carefully considered by impartial appellate judges who are keen to apply the policy determinations of the General Assembly (provided they are constitutional) with due consideration of binding precedent. The judges of the Court must bring their varied experience and legal acumen to bear for the resolution of difficult legal issues. My decision to seek this position is not made lightly. Having given the question deep consideration, I am convinced that I possess the requisite skills and temperament to carry out the challenging tasks entrusted to a judge of the Court. In that light, I submit this application with humility.

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)***

While in private practice I participated in the Saturday Legal Clinic sponsored by the MBA. We provided legal advice to who lacked the resources to retain counsel to address their legal problems.

As Special Master for the Chancery Court, I sought to give measured consideration to cases that frequently involved intra-family legal disputes concerning such matters as partition suits to reduce the cost of such proceedings.

As a judicial officer, it is my duty to understand that many pro se litigants have no legal training and little familiarity with the judicial system. I am vigilant to see that pro se parties receive fair and equal treatment before the court, while being mindful of the boundary between fairness to a pro se litigant, who are required to comply with substantive and procedural law, and unfairness to the adversary.

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

I seek a position on the Tennessee Court of Appeals, a statewide unitary court with jurisdiction over the vast majority of civil appeals from final (and sometimes interlocutory) rulings of the trial courts. The twelve judges of the Court usually sit in panels of three to hear appeals from final and interlocutory rulings of the trial courts. Four judges are appointed from each Grand Division of the State. If I were selected to serve on the Court, I would hear cases before the Court in Jackson, Nashville, and Knoxville.

I will strive to render decisions that foster public confidence in the integrity and impartiality of the Judiciary. I will accept criticism with humility. I will pursue excellence and will assist the Court in all respects.

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)***

Much of my current community involvement is through my church. I am a ruling elder and sit at least monthly to oversee the varied activities and ministry of the church to its members, to the community, and needs throughout the country and the world at large. I also participate in counseling, training, and teaching through the church. My wife and I are active in our community group, which allows us to know each other better, and to better understand and assist with each other's needs. Ours is a growing church body which has attracted persons of differing backgrounds and ethnicities to worship and live together in peace and harmony.

If appointed to the Tennessee Court of Appeals, I would continue my current community involvement to the extent permitted by the Code of Judicial Conduct. I would also seek opportunities to promote interest in the law among the young and to inform others of the importance of a fair and impartial Judiciary.

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

I seek this appointment having a refined appreciation for excellence in advocacy and judging. I have had 35+ years of private practice experience working with and in opposition to many of the best private lawyers in the State, and seven more years of practice in federal and state courts alongside outstanding attorneys in the best public law firm in the nation. Now I have had the privilege of serving two stents as a Chancery Court judge—presiding over cases argued by gifted counsel in challenging cases. I have sought to be diligent in judicial preparation and to maintain a considered judicial demeanor while attempting to manage and efficiently adjudicate cases in the face of a considerable case backlog. In this I have benefited from the advice of judicial colleagues—for which I am grateful. While my judicial record might not go unblemished by error, I seek daily to uphold the reputation of the courts as firm, but fair.

As a judge, I am aided especially by *State v. Bristol,* 624 S.W.3d 917, 923-25 (Tenn. 2022). It expounds the "principle of party presentation," as a defining feature of our adversarial justice system. That principle promotes impartiality and fairness, recognizes the need for the court's "detachment," aids its truth-finding function, and helps preserves the separation of powers. I frequently cite *Bristol* from the bench to encourage improved advocacy before our courts.

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. If appointed to serve on the Court of Appeals, my role would be to apply the law as it is enacted by the General Assembly. I would not seek to fashion the result of a particular case to my personal liking, but would follow the law to the result that it requires. If the resulting decision illustrates a defect in the law, it would then be for the Legislature to consider whether

a change is needed. So too, a judge of the Court of Appeals, at times, may employ a well-reasoned dissent to alert the High Court to the need for closer examination of the caselaw. In either event, the law maintains a dynamic character that permits change when needed.

To illustrate from my experience, during the COVID era Governor Lee issued an executive order (EO) that permitted parents to opt their children out of locally-imposed masking requirements in public schools. My team was assigned to advocate that the EO was lawful. All three district courts who considered challenges to the EO disagreed. My own view was that the courts had been wrong. But we advised that the State should comply with the rulings. The General Assembly later refined the law, and one of the district courts conducted a trial on a challenge to the new statute—with a similar outcome to that of the earlier cases. The State appealed, and I successfully argued the case in the Sixth Circuit, achieving a reversal of the judgment below.

REFERENCES

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

A. Matt Rice, Tennessee Solicitor General, Office of the Tennessee Attorney General and Reporter, [redacted]

B. Lacey Mase, Chief Deputy, Office of the Tennessee Attorney General and Reporter, P.O. [redacted]

C. John Dudas, Belz Enterprises, [redacted]

D. Rev. Tommy Lee, Teaching Elder, Riveroaks Reformed Presbyterian Church, PCA, [redacted]

E. Allen S. Blair, Blair Mediation, PLLC, [redacted]

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: October 23, 2024.

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

James R. Newsom III

James R. Newsom III

Signature

October 23, 2024

TN BPR # 6683

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

None

Attachment A

CH-15-1472-3

In Re: Investigative File Tennessee Bureau of Investigation, Investigative File

State of Tennessee et al

Vs

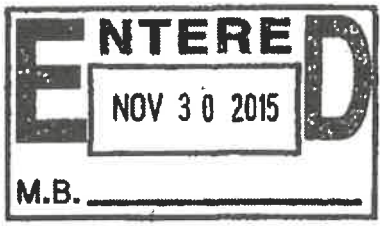
Connor Schilling

Memorandum Opinion and Order Re: Standing and Intervention

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

IN RE: INVESTIGATIVE FILE TENNESSEE BUREAU OF INVESTIGATION, INVESTIGATIVE FILE: ME-76C-000007	]]]]]	No. CH-15-1472-3 Part III

STATE OF TENNESSEE ex rel. AMY P. WEIRICH, District Attorney General for the Thirtieth Judicial District and MARK GWYN, Director of the Tennessee Bureau of Investigation,	]]]]]]
Plaintiff,	]]
v.	]]
CONNOR SCHILLING,	]]
Defendant.	]



MEMORANDUM OPINION AND ORDER RE: STANDING AND INTERVENTION

I. STATEMENT OF THE CASE

A. The State's Petition.

The State of Tennessee by and through Amy P. Weirich, District Attorney General for the Thirtieth Judicial District (the "District Attorney") and Mark Gwyn, Director of the Tennessee Bureau of Investigation ("TBI") (together the "State") filed

the Petition to Release Tennessee Bureau of Investigation Investigative File (the "Petition") in this court on November 3, 2015. The State's Petition prayed for an order of this court permitting the release to the public of TBI Investigative File ME-76C-000007 (the "TBI File") on the authority of TENN. CODE ANN. § 10-7-504(a)(2)(A).

The TBI File is the TBI's investigative file regarding the July 17, 2015 incident which resulted in the death of Mr. Darrius Stewart, who was shot and killed by Memphis Police Officer Connor Schilling ("Mr. Schilling"). Petition at ¶ 1. The District Attorney exercised her authority pursuant to TENN. CODE ANN. § 38-6-102 to request that the TBI conduct the investigation into the death of Mr. Darrius Stewart.[1] Petition at ¶ 2. The District Attorney later requested that the Grand Jury indict Mr. Schilling for the criminal offenses of Voluntary Manslaughter and Employing a Firearm During the Commission of a Dangerous Felony. Petition at ¶ 3. On November 3, 2015, a TBI agent presented the case to the Shelby County Grand Jury. Petition at ¶ 3. Pursuant to the Grand Jury's statutory authority, the Grand Jury

[1] TENN. CODE ANN. § 38-6-102 permits the Director of the TBI, upon the request of the district attorney general of any judicial district, to assign TBI criminal investigators to aid that district attorney general in the investigation of any crime committed in the district attorney general's judicial district, but only when the district attorney general requests such aid. When detailed by the Director to aid the district attorney general, the criminal investigators have full power to issue subpoenas for witnesses, to serve the subpoenas, to administer oaths to witnesses as they may summon, to take written statements from them and, to have the same powers with reference to the execution of criminal process, making arrests, and the like, as does the sheriff of the county in which the investigators are at work.

returned a no true bill. Petition at ¶ 4. The Petition asserts that there can now be no prosecution of Mr. Schilling. Petition at ¶ 4.

The State asserts that it is in the best interest of the public that the TBI File be made available to the public immediately. Petition at ¶ 7. The State seeks court permission to make the TBI File, less identifying and personal information (to be redacted prior to publication); available to the public through the District Attorney's website. Petition at ¶¶ 6-8.

B. The Motions to Intervene

Pursuant to the court's authority under TENN. R. CIV. P. 16.01(1), the court entered an Initial Scheduling Order on November 5, 2015, ruling that it was appropriate, in the circumstances of this case, to set November 10, 2015 as the deadline for any person or entity to seek intervention herein pursuant to TENN. R. CIV. P. 24.

On November 5, Mary Stewart and Henry Williams, the parents of Mr. Darrius Stewart (the "Parents") filed a Motion to Intervene and Postpone the Release of the Tennessee Bureau of Investigation's Investigative File. The Parents' motion sought the postponement of the release of the TBI File to the public "in order to prevent the unwarranted dissemination of extremely private and sensitive information ... in regard to the manner and details" of the death of Mr. Darrius Stewart. *Id.* at 1-2. The Parents asserted that they would "suffer irreparable emotional harm if the Investigative File is released without [their] opportunity to review the file prior to its

availability for public consumption." *Id.* at 2. The Parents sought permissive intervention pursuant to TENN. R. CIV. P. 24.02, contending that otherwise their interests and that of Mr. Darrius Stewart's Estate would be impaired. *Id.* at 2-3.

On November 10, Mr. Schilling filed a TENN. R. CIV. P. 24 Motion to Intervene. Mr. Schilling asserted that he claims an interest in the subject matter of this action, that he is so situated that the disposition of this action may impair his ability to protect his interests and that none of the existing parties will adequately protect his interests. *Id.* at 1. Mr. Schilling asserted that counsel for the Parents and others publicly had requested that the United States Department of Justice (the "USDOJ") look into the circumstances of Mr. Darrius Stewart's death "with the idea of prosecuting" Mr. Schilling. *Id.* at 1-2. Mr. Schilling contended that the release of the TBI File would create publicity "which would impair Schilling's ability to have a fair trial [by an impartial jury] in the United States District Court, in the unlikely event that the federal government should decide to prosecute the matter" in derogation of his Sixth Amendment rights. *Id.* at 2.

Mr. Schilling's Motion to Intervene was accompanied by "a pleading setting forth the claim or defense for which intervention is sought" in conformity to TENN. R. CIV. P. 24.03. In his proposed response, Mr. Schilling states that he has no objection to the release of the TBI File, but asks that the court impose certain terms and conditions of said release: (1) that the TBI File not be released until the USDOJ has reached a decision as to whether it will pursue an indictment; (2) that because he

is entitled to have the public records of the matter expunged, "that these records be made available to the public for a certain period of time to be determined by the Court to satisfy the 'public interest', but that, thereafter, all public records be expunged;" and (3) "that if this court determines that the investigative file should be released to the public, that it set fair and equitable conditions of what, if any, material will be redacted from the investigative file." *Id.* at 1-2. Among other affirmative defenses which relate to his right to a potential trial before an impartial federal jury (*id.* at 4-5), Mr. Schilling seeks to assert that the State lacked standing to present the Petition. *Id.* at 2.

The court set a hearing for November 13, 2015 to hear argument on the Motions to Intervene. Shortly before the hearing, the Parents filed "Plaintiff's Withdrawal of Motion to Postpone the Release of the Tennessee Bureau of Investigation's Investigative File," stating that they withdraw their previous motion to intervene, having elected to have the TBI File published. *Id.* at 2. The Parents expressed their "full confidence that the public's interest [in disclosure] is paramount to their own and do not wish to effectuate further delay." *Id.* at 2.

At the hearing, the court queried the State whether there was a precedent for the TBI making a direct request to a Tennessee court of record to disclose the contents of a TBI investigative file, and was advised that this is the first such instance. The District Attorney advised the court that the TBI File remains in her possession – it has not been filed with the Clerk and Master of the Chancery Court. Also, because

the Shelby County Grand Jury did not return a true bill against Mr. Schilling, there is no criminal proceeding in the Criminal Court of Shelby County to which the TBI File relates. Further, the District Attorney informed the court that, in the "unlikely" event that the USDOJ determined that a criminal investigation of Mr. Schilling was in order, the USDOJ would not rely upon the TBI File. The USDOJ would instead instruct the Federal Bureau of Investigation to pursue an independent investigation of the matter. Finally, the court advised counsel of two recent Tennessee appellate opinions of potential relevance, ***State of Tennessee ex rel. Johnson v. Gwyn*** ("***Johnson***"), No. M2013–02640–COA–R3–CV, 2015 WL 7061327 (Tenn. Ct. App. Nov. 10, 2015) and ***State of Tennessee v. Cobbins*** ("***Cobbins***"), No. E2013-02726-CCA-WR-CO (Tenn. Crim. App. Feb. 4, 2015) and directed the State and Mr. Schilling to brief two issues on an expedited basis: (1) standing and (2) intervention. The court received a set of legal memoranda from the State and Mr. Schilling on November 18 and a second set of rebuttal briefs on November 23.

II. STANDING

a. Applicable Principles of Standing Under Tennessee Law

Given the circumstances of this action, the court must first consider threshold questions pertaining to justiciability. *See* ***City of Memphis v. Hargett*** ("***Hargett***"), 414 S.W.3d 88, 96 (Tenn. 2013) (justiciability is a threshold inquiry). Tennessee courts have long recognized that " 'the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions,' " ***Norma Faye Pyles Lynch Family***

Purpose LLC v. Putnam Cnty., 301 S.W.3d 196, 203 (Tenn. 2009) (quoting ***State v. Wilson***, 70 Tenn. 204, 210 (1879)). Thus, Tennessee courts decide only " 'legal controversies,' " *id.* (quoting ***White v. Kelton***, 144 Tenn. 327, 232 S.W. 668, 670 (1921)), and a legal controversy exists "when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between parties with real and adverse interests." *id.* (citations omitted).

As our Supreme Court recently recognized in ***West v. Schofield***, 468 S.W.3d 482, 490 (Tenn. 2015) ("***West II***"), to determine whether a particular case involves a legal controversy, Tennessee courts use justiciability doctrines that "mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts." *Id.* (citations omitted). Without justiciability doctrines, " 'the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.' " ***Am. Civil Liberties Union of Tenn. v. Darnell***, 195 S.W.3d 612, 620 (Tenn. 2006) (quoting ***Warth v. Seldin***, 422 U.S. 490, 500 (1975)).

The Court has reaffirmed the necessity and importance of justicability doctrines in ***West v. Schofield***, 460 S.W.3d 113, 129-30 (Tenn. 2015) ("***West I***"), stating:

> *[A] declaratory judgment action cannot be used by a court to decide a theoretical question*, render an advisory opinion which may help a party in another transaction, *or allay fears as to what may occur in the future* [.] Thus, in order to maintain an action for a declaratory judgment[,] a justiciable controversy must exist. For a controversy to be justiciable, *a real question rather than a*

> *theoretical one must be presented and a legally protectable interest must be at stake. If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable.* If the rule were otherwise, the courts might well be projected into the limitless field of advisory opinions.

Id., 460 S.W.3d at 129-30 (emphasis by the Court) (citations omitted) (quoting ***State v. Brown & Williamson Tobacco Corp.*** ("***Brown & Williamson***") 18 S.W.3d 186, 193 (Tenn. 2000)) (internal quotation marks omitted).

Justiciability doctrines "include: (1) the prohibition against advisory opinions, (2) standing, (3) ripeness, (4) mootness, (5) the political question doctrine, and (6) exhaustion of administrative remedies." ***West II,*** 468 S.W.3d at 490. Standing is the justiciability doctrine at issue in this matter. In ***Hargett,*** our Supreme Court considered the doctrine of standing in depth:

> Courts use the doctrine of standing to determine whether a litigant is entitled to pursue judicial relief as to a particular issue or cause of action. ***ACLU of Tenn. v. Darnell,*** 195 S.W.3d 612, 619 (Tenn. 2006); ***Knierim v. Leatherwood,*** 542 S.W.2d 806, 808 (Tenn. 1976). The proper focus of a determination of standing is a party's right to bring a cause of action, and the likelihood of success on the merits does not factor into such an inquiry. ***Darnell,*** 195 S.W.3d at 620; ***Petty v. Daimler/Chrysler Corp.***, 91 S.W.3d 765, 767–68 (Tenn. Ct. App. 2002). Every standing inquiry requires a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." ***Allen v. Wright,*** 468 U.S. 737, 752 (1984).
>
> Our jurisprudence recognizes two categories of standing that govern who may bring a civil cause of action: non-constitutional standing and constitutional standing. Non-constitutional standing focuses on considerations of judicial restraint, such as whether a complaint raises generalized questions more properly addressed by another branch of the government, and questions of statutory interpretation, such as whether a

> statute designates who may bring a cause of action or creates a limited zone of interests. *See* ***In re Estate of Smallman***, 398 S.W.3d 134, 148-49 (Tenn. 2013); ***State v. Harrison***, 270 S.W.3d 21, 28 (Tenn. 2008); *see also* ***Ditto v. Del. Sav. Bank***, No. E2006-01439-COA-R3-CV, 2007 WL 471146, at *3 (Tenn. Ct. App. Feb. 14, 2007) (discussing prudential considerations relevant to non-constitutional standing). Constitutional standing, the issue in this case, is one of the "irreducible ... minimum" requirements that a party must meet in order to present a justiciable controversy. ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560 (1992); *see also* ***City of Chattanooga v. Davis***, 54 S.W.3d 248, 280 (Tenn. 2001); ***Norma Faye Pyles Lynch Family Purpose LLC*** [***v. Putnam Cnty.***], 301 S.W.3d at 202–03 (noting that Tennessee courts' adoption of the various justiciability doctrines, including standing, has a basis in the separation of powers required under article II, sections 1 and 2 of the Tennessee Constitution).
>
> To establish constitutional standing, a plaintiff must satisfy "three 'indispensable' elements." ***Darnell***, 195 S.W.3d at 620 (quoting ***Petty***, 91 S.W.3d at 767). First, a party must show an injury that is "distinct and palpable"; injuries that are conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general citizenry are insufficient in this regard. ***Id.*** Second, a party must demonstrate a causal connection between the alleged injury and the challenged conduct. ***Id.*** (citing ***Mayhew v. Wilder***, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001)). While the causation element is not onerous, it does require a showing that the injury to a plaintiff is "fairly traceable" to the conduct of the adverse party. ***Id.*** (quoting ***DaimlerChrysler Corp. v. Cuno***, 547 U.S. 332, 342 (2006)). The third and final element is that the injury must be capable of being redressed by a favorable decision of the court. ***Id.***; see also ***Davis***, 54 S.W.3d at 280 (noting that the third standing element requires an injury that "is apt to be redressed by a remedy that the court is prepared to give" (quoting ***Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty.***, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992))).

Hargett, *supra*, 414 S.W.3d at 97-98 (footnote omitted).

Mr. Schilling urges the court to find that the State lacks standing, and for that threshold reason, the Petition must be dismissed. He makes a three-pronged

argument: (1) the State lacks standing to request a release of the TBI File; (2) the court lacks jurisdiction over the TBI File; and (3) the public interest argument has already been rejected by the Tennessee courts.[2] The court will address these issues below.

b. Standing of the State

Mr. Schilling points out that the TBI and the District Attorney already have a copy of the TBI File, and for that reason they lack standing, having suffered no injury. Citing ***Hargett***, 414 S.W.3d at 98, Mr. Schilling argues that the State (the TBI and the District Attorney) has not suffered an injury, even if the state officials purport to be acting on behalf of the public.

As to standing, the State observes that the Tennessee Public Records Act (the "TPRA"), as codified at TENN. CODE ANN. §§ 10-7-101, *et seq.*, grants full access of all governmental records to the public "unless otherwise provided by state law." TENN. CODE ANN. § 10-7-503(a). It notes that TENN. CODE ANN. § 10-7-504 enumerates a list of exemptions to the general standard of disclosure, which records are to remain confidential under Tennessee law, including all investigative records of the TBI, which are to be treated as confidential and shall not be open to inspection by members of the public. TENN. CODE ANN. § 10-7-504(a)(2)(A). The State points out that the confidential nature of TBI investigative files is not absolute in that the legislative

[2] While denominated by Mr. Schilling as "standing" arguments, the latter two arguments address whether the State has stated a claim on which relief may be granted and whether the State is entitled to the relief requested. For sake of organization, the court will address the latter arguments in the order addressed by Mr. Schilling.

languages states: "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record...." *Id.*

The State poses two alternative arguments in support of the release of the TBI File by which the State seeks to establish standing. In the first, the State argues that the TPRA provides for one, but not the only, proper procedure for obtaining access to TBI investigative files via TENN. CODE ANN. § 10-7-505(a). That section states:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

Asserting that the District Attorney and the Director of the TBI are themselves "citizens of Tennessee," they, under the "unique circumstances" of this case are entitled to seek disclosure of the records to the public pursuant to TENN. CODE ANN. § 10-7-505(a).[3]

In the second alternative argument, the State acknowledges that in this circumstance no one has denied a "citizen" access to a file as contemplated by the language of TENN. CODE ANN. § 10-7-505(a). Instead, the State argues that the language of TENN. CODE ANN. § 10-7-504(a)(2)(A) by its own operation entitles the

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[3] In summarizing this argument, the State concludes "Following the procedures set forth in section 10-7-505, a citizen is to file a petition in the chancery court or circuit court for the county in which the county or municipal records sought are situated. Again, the District Attorney and TBI Director, as citizens of Tennessee, have rightfully and lawfully petitioned this Honorable Court to do just that. The Act confers standing on each as citizens of the state of Tennessee." State's Memorandum at 4.

TBI and the District Attorney to seek public disclosure to members of the public who ordinarily cannot inspect a TBI investigative file because of its confidential nature. Thus, that section provides a "path for release" of the TBI File through a subpoena or an order of a court of record. State's Supplemental Memorandum at 2.

Elaborating on their roles in petitioning for public disclosure, the State argues that the District Attorney requests the release of the TBI File pursuant to her "prosecutorial function attendant to the Grand Jury's decision" conferring standing on her office to seek the release of the TBI File to the public. *Id.* at 2. As to the TBI, the State asserts that as the entity which can claim confidentiality pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), its consent to disclosure is necessary for disclosure to occur. *See id.*

The court concludes that the State has standing to request the public disclosure of the TBI File. The court reaches this conclusion with a measure of judicial humility, finding itself in uncharted legal waters. This matter requires a decision which is neither easy nor self-evident, but is in accordance with the guiding principles pronounced by our appellate courts as set forth above.

The court reasons that the Petition is not brought to seek advice from the court or to obtain an abstract opinion, but in order to settle a legal controversy in which the disputed issues are real and existing, involving parties with real and adverse interests. *See* ***Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.***, 301 S.W.3d at 203.

On a foundational level, the court recognizes that in our system of state government there is a separation of powers among the co-ordinate branches of state government. As our Supreme Court explained in ***State v. McCoy***, 459 S.W.3d 1, 9 (Tenn. 2014):

> The Tennessee Constitution includes two explicit provisions establishing the separation of powers among the three branches of government. Article II, section 1 provides, "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Article II, section 2 elaborates, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." While there are no precise lines of demarcation in the respective roles of our three branches of government, the traditional rule is that "the legislative [branch has] the authority to make, order, and repeal [the laws], the executive ... to administer and enforce, and the judicial ... to interpret and apply." ***Underwood v. State***, 529 S.W.2d 45, 47 (Tenn. 1975) (quoting ***Richardson v. Young***, 122 Tenn. 471, 125 S.W. 664, 668 (1910)).

In this instance, our Legislature, setting policy, has provided in TENN. CODE ANN. § 10-7-504(a)(2)(A) that it is the norm that TBI investigative files and the certain files of five other departments or agencies of state government identified by name therein[4] "shall be treated as confidential and shall not be open to inspection by members of the public." *Id.* The plain language of TENN. CODE ANN. § 10-7-504(a)(2)(A) adds, however, that "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." The

[4] Those being the Office of Inspector General, the Department of Agriculture, the Department of Environment and Conservation, the Department of Safety and the Alcoholic Beverage Commission. *See* TENN. CODE ANN. § 10-7-504(a)(2)(A).

General Assembly has determined as a matter of policy that our "courts of record" are uniquely suited to be those "governmental institutions ... [that are] competent to address" the question of whether such public disclosure of TBI investigative files should be made, and if so, in what circumstances, under what conditions, and under what constraints. ***See Darnell***, *supra,* 195 S.W.3d at 620.

In contrast to a declaratory judgment action which cannot be used to decide a theoretical question or allay fears as to what may occur in the future, the State's Petition presents real questions and legally protectable interests are at stake. *Cf. West I,* 460 S.W.3d at 129-30. While Mr. Schilling has expressed concerns as to what may occur in the future if the contents of the TBI File were to be disclosed to the public, *i.e.,* in the "unlikely" event of his federal prosecution, the contingent nature of these events should not obscure the State's present assertion that "It is in the best interest of the public that [the TBI File] be made available immediately ... to the public" over Mr. Schilling's opposition. *See* Petition at 2, ¶¶ 7, 8.

The fact that the TBI, the Office of Inspector General, the Department of Agriculture, the Department of Environment and Conservation, the Department of Safety and the Alcoholic Beverage Commission have not previously sought court approval for the public disclosure of records made confidential pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A) does not demonstrate that they are precluded from doing so via the exception from nondisclosure provided by the General Assembly. The proper focus of a determination of standing is a party's right to bring a cause of

action, and the likelihood of success on the merits does not factor into such an inquiry. *See* ***Hargett****, supra,* 414 S.W.3d at 97. The court determines based on a careful judicial examination that the State is entitled to an adjudication of the particular claims asserted in the Petition. *See* ***id.***

As to principles of non-constitutional standing, considerations of judicial restraint would counsel that if the Petition had raised generalized questions more properly addressed by a branch of the government other than the judiciary – such prudential concerns would cause the court to go no further. As discussed above, the General Assembly has directed such questions as presented by the Petition to the courts for resolution. Judicial restraint in this circumstance would be tantamount to an abdication of judicial responsibility in the face of Legislative assignment of duty. The court concludes that "non-constitutional standing" is present.

Concerning principles of constitutional standing, as discussed above, the executive department of the State is charged with administering and enforcing the laws. Public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law. ***West II****, supra,* 468 S.W.3d at 493. The State's Petition asserts that in the absence of public disclosure of the TBI File an injury would occur in derogation of "the best interest of the public." *See* Petition at 2, ¶ 7. While reasonable minds might differ as to how the public interest would best be served, the court presumes that the State and its executive officials on whose relation the Petition is filed, the District Attorney and the Director of the TBI, have a good faith basis for

their assertion that in the absence of public disclosure, injuries that are "distinct and palpable" would occur, injuries that they, due to their positions, experience and due to information available to them, are well-placed to perceive and address. *See* ***Hargett,*** *supra,* 414 S.W.3d at 98. Second, again based on the State's assertions, the challenged conduct, in this instance, non-disclosure, would have a causal connection that is fairly traceable to the alleged injury. *See* ***id.*** Finally, the asserted injury that would result from non-disclosure is clearly capable of being redressed by a favorable decision of the court. *See* ***id.*** The court concludes that "constitutional standing" is present. For these reasons, the court finds that the State has standing to bring the Petition.

c. Jurisdiction of the Court

Mr. Schilling, like the State, has infused his "standing" argument with additional arguments. Those arguments go to whether the State has stated a claim on which relief can be granted or whether the State should be granted the requested relief. He contends that "for the court to even consider permitting disclosure – for the court to have jurisdiction over the TBI file – the TBI File must have been filed with the court in a case and be part of the judicial record." Schilling Memorandum at 4. Otherwise, he asserts, there is no case that has reached the court. *Id.* The State does not address this argument in the memoranda submitted to the court.

The court observes that the State could rectify this alleged deficiency by tendering the TBI File for filing in this court. However, there is nothing in the TPRA, or more specifically in TENN. CODE ANN. § 10-7-504(a)(2)(A) that requires that a TBI

investigative file must be filed of record with the court as a prerequisite for public disclosure. The trial court in ***Johnson***, 2015 WL 7061327 at *2, ruled that it lacked jurisdiction under the doctrine of *in custodia legis*. In ***Johnson*** the Knox County Criminal Court already had jurisdiction over the TBI investigative file at issue therein. That ruling, which was not addressed by the Court of Appeals in ***Johnson***, does not control herein. In any event, this case is distinguishable from ***Johnson*** in that the Shelby County Criminal Court *does not* have jurisdiction over the TBI File because the Grand Jury did not return a true bill, and there was no criminal case thereafter. Thus the fact that the TBI File is not resident in the Chancery Court Clerk's Office does not deprive this court of jurisdiction.

Considerations of judicial economy suggest that the best course of action is for the District Attorney to retain possession of the TBI File at this juncture. Should the court order disclosure of the TBI File, yet require the State to make further redactions in addition to those already made to ensure the non-disclosure of extraneous confidential information, that process would likely be impeded, rather than advanced, by returning the TBI File from the court clerk to the office of the District Attorney for such processing. However, the court retains the discretion to examine the TBI File if it later finds such examination necessary to adjudicate this lawsuit.

d. The Public Interest

Mr. Schilling finally argues that the public policy of the State requires the confidentiality of the TBI File. In the cited cases, ***Cobbins***, ***Abernathy v. Whitley***,

838 S.W.2d 211 (Tenn. Ct. App. 1992) ("***Abernathy***") and ***Higgins v. Gwyn***, No. M2011-00553-COA-R3-CV, 2012 WL 214829 (Tenn. Ct. App. Jan. 23, 2012) ("***Higgins***"), the TBI resisted the disclosure of the TBI investigative files at issue. Those cases do not establish that disclosure of a TBI investigative file may not be ordered by a court of record if disclosure would serve the public interest.

Having concluded that the court has standing over this lawsuit, the court next considers whether Mr. Schilling should be allowed to intervene, and if so, under what conditions.

III. INTERVENTION

Mr. Schilling moves to intervene pursuant to TENN. R. CIV. P. 24.01 and 24.02. The State opposes Mr. Schilling's intervention. Rule 24.01 provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; or (3) by stipulation of all the parties.

Mr. Schilling does not contend that there is a statute which confers an unconditional right to intervene. The State has not stipulated that Mr. Schilling may intervene. Thus the court must determine if Mr. Schilling "claims an interest relating to the property or transaction which is the subject of the action and ... is so situated that the disposition of the action may as a practical matter impair or impede the [his] ability to

protect that interest, unless [his] interest is adequately represented by existing parties." TENN. R. CIV. P. 24.01(2).

A party seeking to intervene as of right under Rule 24.01 must establish that (1) the application for intervention was timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the pending litigation; (3) the proposed intervenor's ability to protect that interest is impaired; and (4) the parties to the underlying suit cannot adequately represent the intervenor's interests. The prospective intervenor has the burden of establishing all four of these elements or else the motion to intervene as of right will be denied. ***Brown & Williamson,*** *supra,* 18 S.W.3d at 190-91. While the precise nature of the interest required to intervene as of right has eluded exact definition, it is clear that the right does not include a mere contingent, remote, or conjectural possibility of being affected as a result of the suit, but must involve a direct claim on the subject matter of the suit such that the intervenor will either gain or lose by direct operation of the judgment." ***Id.*** at 192. The court considers whether Mr. Schilling has met his burden of establishing the elements identified above.

Mr. Schilling's Motion to Intervene was filed within the time set by the court, that is, within seven days of the filing of the Petition. The State does not contend that the motion was untimely. The remaining elements are interconnected. The court must consider whether Mr. Schilling has a substantial legal interest in the subject matter of the pending litigation, that being the State's Petition to this court for an order

permitting the immediate disclosure of the TBI File to the public; whether in his absence from the lawsuit, Mr. Schilling's ability to protect that interest is impaired; and whether the State alone, the only original party to the lawsuit, cannot adequately represent Mr. Schilling's interests.

Mr. Schilling claims a substantial legal interest in the subject matter of this litigation. His proposed response to the State's Petition (the "Proposed Response") states that he has no objection to the release of the TBI File, but urges the court to rule that conditions be placed by the court upon the timing, duration and contents of that release in order to protect his interests.

The State's Petition observes that, as a result of the Grand Jury's no true bill, there can be no prosecution of Mr. Schilling. Certainly this is true as to a criminal prosecution by the State. Mr. Schilling counters that he remains subject to a potential federal investigation and prosecution in connection with the death of Mr. Darrius Stewart. Mr. Schilling's Proposed Response asserts that he has reason to believe that counsel for the Parents and a United States Congressman have made separate requests to the USDOJ to initiate an investigation into Mr. Schilling's actions on the night of July 17. Mr. Schilling expresses concern that the public release of the TBI File would compromise his right to a prospective federal trial on criminal charges before an impartial jury and that certain contents of the TBI File would not be admissible in a court proceeding. The State argues that, if a federal investigation did result, the

Federal Bureau of Investigation would be expected to conduct its own investigation without reference to the TBI File.

The court concludes that the matter which is the subject of this action is whether the TBI File should be released to the public. Apart from the potential that Mr. Schilling may be the target of a federal investigation and prosecution, the court reasons that Mr. Schilling at least has a substantial interest in the timing, duration and contents of that release. The disposition of this lawsuit "may as a practical matter impair or impede [his] ability to protect [his] interest" – which interest is not adequately represented by the State. For example, Mr. Schilling argues (without elaboration) in his Proposed Response that he is entitled to have the public records of the matter expunged (presumably at some point in time by the Criminal Court). Proposed Response at 2. In view of that interest he asks "that these records be made available to the public for a certain period of time to be determined by the Court to satisfy the 'public interest', but that, thereafter, all public records be expunged." *Id.* The State has not responded to this contention on the part of Mr. Schilling.

It is not necessary for this court to engage in conjecture as to what may happen in the event that the TBI File is disclosed to determine whether, in its discretion, Mr. Schilling should be permitted to intervene pursuant to TENN. R. CIV. P. 24.01(2). Mr. Schilling has demonstrated a substantial legal interest in the subject matter of the pending litigation. Moreover, Mr. Schilling is so situated that, in his absence, his ability to protect that interest is impaired. Finally, as the State is the only party to the

Petition, Mr. Schilling's interests would not be adequately represented if his application to intervene is denied. The court finds that Mr. Schilling's Motion to Intervene pursuant to TENN. R. CIV. P. 24.01 should be and therefore is **GRANTED**, and that he be aligned as a party defendant.[5] Mr. Schilling is granted leave to file his Proposed Response within five (5) days of the entry of this Memorandum Opinion and Order.

This finding does not end the court's inquiry. It is unquestioned that "virtually any condition" may be attached by a trial court to a grant of permissive intervention pursuant to TENN. R. CIV. P. 24.02. ***Manufacturers Consolidation Serv., Inc. v. Rodell***, 42 S.W.3d 846, 863 (Tenn. Ct. App. 2000) (relying on federal authorities applying FED. R. CIV. P. 24(b)). For the reasons that follow, the court rules that it may impose conditions on the intervention of Mr. Schilling pursuant to TENN. R. CIV. P. 24.01.

In pertinent part, TENN. R. CIV. P. 24.01 and FED. R. CIV. P. 24(a) are identical. Tennessee courts have found that decisions of federal courts construing rules that are substantially similar to our own are "highly persuasive." ***McGinnis v. Cox***, 465 S.W.3d 157, 164 (Tenn. Ct. App. 2014). Federal authorites hold that once a court grants intervention, whether of right or by permission, the intervenor is treated as if

[5] In the alternative, for the reasons stated above, the court would also have granted Mr. Schilling's motion for permissive intervention pursuant to TENN. R. CIV. P. 24.02, as the Petition and the defenses raised in his Proposed Response have "question[s] of law or fact in common." *See* TENN. R. CIV. P. 24.02(2).

he was an original party and has equal standing with the original parties. ***In re Bayshore Ford Truck Sales, Inc.*** (***Westgate Class v. Ford Motor Co.***), 471 F.3d 1233, 1246 (11th Cir. 2006). Toward that end, FED. R. CIV. P. 24(a) requires the prospective intervenor to anchor his request in the matter giving rise to the pending lawsuit, as Mr. Schilling has done.

However, "an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." ***Vinson v. Washington Gas Light Co.***, 321 U.S. 489, 498 (1944). In this regard, "conditions can be imposed even when a party intervenes as a matter of right under [FED. R. CIV. P.] 24(a)(2)." ***Southern v. Plumb Tools***, 696 F.2d 1321, 1322 (11th Cir. 1983).

Like TENN. R. CIV. P. 24.01, Rule 24(a) itself does not mention conditions or restrictions. The Advisory Committee Note to the 1966 Amendment of Rule 24(a), however, provides: "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." There apparently were no decided cases which provided explicit authority for this assertion on the part of the Advisory Committee. Even so, several federal courts have followed the lead of the Advisory Committee and have imposed restrictions on an intervenor of right. *See, e.g.*, ***Southern***, 696 F.2d at 1322 (citing 7A **C. Wright & A. Miller, *Federal Practice and Procedure***, § 1922 at 624-25 (1972)).

The Tennessee Rules of Civil Procedure were adopted in 1972. *See* ***Sneed v. City of Red Bank,*** 459 S.W.3d 17, 31 (Tenn. 2014). The Advisory Committee Note to the 1966 Amendment of Rule 24(a) was available to the drafters of the Tennessee Rules, which incorporated the pertinent language into TENN. R. CIV. P. 24.01 without modification. The court reasons that it may impose conditions on the intervention of Mr. Schilling due to the requirements of the efficient conduct of the instant proceeding. *See also* TENN. R. CIV. P. 1 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.")

In granting Mr. Schilling's application to intervene pursuant to TENN. R. CIV. P. 24.01, the court does not lose sight of the State's contention that the best interest of the public is served by the public disclosure of the contents of the TBI File. Mr. Schilling does not take issue with the State's primary contention in this regard. He disputes secondary issues regarding the timing, duration and contents of that release. These jurisprudential considerations guide the court in establishing the conditions on Mr. Schilling's intervention that follow:

1. Mr. Schilling may not assert new or additional claims, cross-claims, counterclaims, and third-party claims in this case.

2. Mr. Schilling may not, without leave of court file any motion not expressly allowed by this order, with the exception of motions requesting leave to file a motion. This shall not restrict Mr. Schilling from seeking any relief available under the Tennessee Rules of Appellate Procedure.

3. If an issue arises about the scope of Mr. Schilling's intervention and the parties are unable to resolve the issue, the parties may seek clarification from the court.

4. The court reserves discretion to impose additional conditions on Mr. Schilling's intervention.

IT IS SO ORDERED.

This 30th day of November, 2015.

JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2015, a true and correct copy of the foregoing Order has been mailed, United States Mail, First Class Postage prepaid to:

Amy P. Weirich
District Attorney General
30th Judicial District
201 Poplar Avenue, 3rd Floor
Memphis, TN 38103

Arthur E. Quinn
62 North Main Street
Suite 401
Memphis, TN 38103

Deputy Clerk

Attachment B

CH-15-1472-3

In Re: Investigative File Tennessee Bureau of Investigation, Investigative File

State of Tennessee et al

Vs

Connor Schilling

Order Directing Disclosure of TBI Investigative File Pursuant to TENN. CODE. ANN. §10-7-504(a)(2)(A)

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

IN RE: INVESTIGATIVE FILE TENNESSEE BUREAU OF INVESTIGATION, INVESTIGATIVE FILE: ME-76C-000007	]]]]]	No. CH-15-1472-3 Part III

STATE OF TENNESSEE ex rel. AMY P. WEIRICH, District Attorney General for the Thirtieth Judicial District and MARK GWYN, Director of the Tennessee Bureau of Investigation,	]]]]]
Plaintiff,	]
v.	]
CONNOR SCHILLING,	]
Defendant.	]

ENTERED
DEC 8 - 2015
M.B. _____

ORDER DIRECTING DISCLOSURE OF TBI INVESTIGATIVE FILE PURSUANT TO TENN. CODE ANN. § 10-7-504(a)(2)(A)

The court finds that, under the particular circumstances of this case, disclosure of the TBI File at issue is authorized and should be ordered pursuant to the statutory authority set forth at TENN. CODE ANN. § 10-7-504(a)(2)(A).

CASE STATUS

As recounted in the court's November 30, 2015 Memorandum Opinion and Order Re: Standing and Intervention, the State of Tennessee by and through Amy P. Weirich, District Attorney General for the Thirtieth Judicial District (the "District Attorney") and Mark Gwyn, Director of the Tennessee Bureau of Investigation ("TBI") (together the "State") filed a Petition to Release Tennessee Bureau of Investigation Investigative File (the "Petition") in this court on November 3, 2015. The State's Petition prayed for an order of this court permitting the release to the public of TBI Investigative File ME-76C-000007 (the "TBI File") on the authority of TENN. CODE ANN. § 10-7-504(a)(2)(A).

The TBI File is the TBI's investigative file regarding the July 17, 2015 incident which resulted in the death of Mr. Darrius Stewart, who was shot and killed by Memphis Police Officer Connor Schilling ("Mr. Schilling"). Petition at ¶ 1. The District Attorney exercised her authority pursuant to TENN. CODE ANN. § 38-6-102 to request that the TBI conduct the investigation into the death of Mr. Darrius Stewart.[1] Petition at ¶ 2. The District Attorney later requested that the Grand Jury

[1] TENN. CODE ANN. § 38-6-102 permits the Director of the TBI, upon the request of the district attorney general of any judicial district, to assign TBI criminal investigators to aid that district attorney general in the investigation of any crime committed in the district attorney general's judicial district, but only when the district attorney general requests such aid. When detailed by the Director to aid the district attorney general, the criminal investigators have full power to issue subpoenas for witnesses, to serve the subpoenas, to administer oaths to witnesses as they may summon, to take written statements from them and, to have the same powers with reference to the execution of criminal process, making arrests, and the like, as does the sheriff of the county in which the investigators are at work.

indict Mr. Schilling for the criminal offenses of Voluntary Manslaughter and Employing a Firearm During the Commission of a Dangerous Felony. Petition at ¶ 3. On November 3, 2015, a TBI agent presented the case to the Shelby County Grand Jury. Petition at ¶ 3. Pursuant to the Grand Jury's statutory authority, the Grand Jury returned a no true bill. Petition at ¶ 4. The Petition states that there can now be no prosecution of Mr. Schilling. Petition at ¶ 4.

The State asserts that it is in the best interest of the public that the TBI File be made available to the public immediately. Petition at ¶ 7. The State seeks court permission to make the TBI File, less identifying and personal information (to be redacted prior to publication), available to the public through the District Attorney's website. Petition at ¶¶ 6-8. Mr. Stewart's parents and next of kin, Mary Stewart and Henry Williams (the "Parents"), have withdrawn their motion to intervene, expressing their "full confidence that the public's interest [in disclosure] is paramount to their own and do not wish to effectuate further delay." Plaintiff's Withdrawal of Motion to Postpone the Release of the Tennessee Bureau of Investigation's Investigative File ("Parents' Withdrawal") at 2.

On November 30, 2015 the court ruled that this lawsuit is a justiciable controversy in that the State has constitutional and non-constitutional standing to litigate this case. This threshold determination is a necessary prerequisite for the court to consider the merits of the State's claim. Also, the court determined that Mr. Schilling should be allowed to intervene in this lawsuit as a matter of right pursuant to

TENN. R. CIV. P. 24.01(2) as he claims an interest in the subject matter of this lawsuit and is so situated that the disposition of the lawsuit may, as a practical matter, impair or impede his ability to protect that interest. Mr. Schilling has filed his Response to the Petition as directed by the court. With that predicate, and in the interests of justice, the court reaches the merits.

THE TENNESSEE PUBLIC RECORDS ACT

The State has advised the court that there is no precedent for the TBI making a direct request to a Tennessee court of record to disclose the contents of a TBI investigative file. This being an issue of first impression, the court seeks to discern and follow the legislative intent.

The Tennessee Public Records Act (the "TPRA") as codified at TENN. CODE ANN. §§ 10-7-101, *et seq.*, provides citizens of Tennessee with broad access to records of Tennessee governmental agencies. ***Gautreaux v. Internal Med. Educ. Found.***, 336 S.W.3d 526, 529 (Tenn. 2011). The purpose of the TPRA is to facilitate "access to governmental records [which] promotes public awareness and knowledge of governmental actions and encourages public officials and agencies to remain accountable to the citizens of Tennessee. ***Schneider v. City of Jackson***, 226 S.W.3d 332, 339 (Tenn. 2007). The TPRA is a statutory codification of the common law public access doctrine that established the "public's right to examine governmental records." ***Id.*** Because the statute has supplanted the common law right, the

provisions of the Public Records Act are the sole basis for public access to government records in Tennessee. *See* ***id.*** The Act requires disclosure of public records not specifically exempted from disclosure. TENN. CODE ANN. § 10-7-503(a)(2)(B).

The TPRA defines "public records" or "state record or records" as:

> all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency[.]

TENN. CODE ANN. § 10-7-301(6). The TPRA defines a "confidential public record" as:

> any public record which has been designated confidential by statute and includes information or matters or records considered to be privileged and any aspect of which access by the general public has been generally denied[.]

TENN. CODE ANN. § 10-7-301(2).

The TPRA also provides:

> All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, ***unless otherwise provided by state law.***

TENN. CODE ANN. § 10-7-503(a)(2)(A) (emphasis added).

The Tennessee Supreme Court has characterized the TPRA as "an all encompassing legislative attempt to cover all printed matter created or received by

government in its official capacity." ***Griffin v. City of Knoxville***, 821 S.W.2d 921, 923 (Tenn. 1991). It has opined that the TPRA's broad legislative mandate "require[s] disclosure of government records even when there are significant countervailing considerations." ***Gautreaux***, 336 S.W.3d at 529. The TPRA requires the courts to construe the statute broadly "so as to give the fullest possible public access to public records." TENN. CODE ANN. § 10-7-505(d). Accordingly, there is a "presumption of openness" under the TPRA, "favoring disclosure of governmental records." ***Schneider***, 226 S.W.3d at 340.

Notwithstanding the presumption of openness, in the interest of public policy the General Assembly has provided specific exemptions from disclosure contained in the TPRA itself. It has also "acknowledged and validated both explicit and implicit exceptions from disclosure found elsewhere in state law." ***Swift v. Campbell***, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004). The TPRA's general requirement of disclosure is not intended to trump the specific confidential designation by the General Assembly regarding investigative files of the TBI. "As a matter of statutory construction, a specific statutory provision will control over a more general statutory provision." ***State v. Cauthern***, 967 S.W.2d 726, 735 (Tenn. 1998).

The State filed the Petition in reliance on TENN. CODE ANN. § 10-7-504(a)(2)(A). The prohibition of disclosure of TBI investigative files is not absolute. *See* State's Memorandum of Law in Support of Petition to Release Tennessee Bureau

of Investigation Investigative File ("State's Initial Memo.") at 2. The statutory language establishes one such exception to the disclosure mandate of the TPRA:

> ***All investigative records of the Tennessee bureau of investigation***, the office of inspector general, all criminal investigative files of the department of agriculture and the department of environment and conservation, all criminal investigative files of the motor vehicle enforcement division of the department of safety relating to stolen vehicles or parts, all criminal investigative files and records of the Tennessee alcoholic beverage commission and all files of the handgun carry permit and driver license issuance divisions of the department of safety relating to bogus handgun carry permits and bogus driver licenses issued to undercover law enforcement agents ***shall be treated as confidential and shall not be open to inspection by members of the public. The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record***; provided, however, that such investigative records of the Tennessee bureau of investigation shall be open to inspection by elected members of the general assembly if such inspection is directed by a duly adopted resolution of either house or of a standing or joint committee of either house. Records shall not be available to any member of the executive branch except to the governor and to those directly involved in the investigation in the specified agencies.

(emphasis added). The section contemplates that disclosure of TBI investigative files "to the public" may occur "only in compliance with a subpoena or an order of a court of record."

The State poses two alternative arguments in support of the release of the TBI File based on the TPRA. In the first, the State argues that the TPRA provides for a procedural method for obtaining access to TBI investigative files via TENN. CODE ANN. § 10-7-505(a). State's Initial Memo. at 2. That section states:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

Emphasizing the phrase "any citizen," the District Attorney and the Director of the TBI posit that they are themselves "citizens of Tennessee," who, under the "unique circumstances" of this case, are entitled to seek disclosure of the records to the public pursuant to TENN. CODE ANN. § 10-7-505(a).[2] State's Initial Memo. at 2-3.

As pointed out by Mr. Schilling, the State's first argument for disclosure must fail. *See generally* Rebuttal Memorandum of Connor Schilling to the State's Memorandum of Law ("Schilling Rebuttal Memo."). While the court does not adopt Mr. Schilling's argument in its entirety, the court agrees that the statute confers no right on the District Attorney and the Director of the TBI superior to that of any other citizen of the State to utilize the procedure set forth in TENN. CODE ANN. § 10-7-505 to obtain disclosure of TBI investigative records.

As noted above, TENN. CODE ANN. § 10-7-505(a)(2)(A) provides that:

> All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any

[2] In summarizing this argument, the State concludes "Following the procedures set forth in section 10-7-505, a citizen is to file a petition in the chancery court or circuit court for the county in which the county or municipal records sought are situated. Again, the District Attorney and TBI Director, as citizens of Tennessee, have rightfully and lawfully petitioned this Honorable Court to do just that. The Act confers standing on each as citizens of the state of Tennessee." State's Initial Memo. at 4.

> citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, ***unless otherwise provided by state law.***

(emphasis added). TENN. CODE ANN. § 10-7-504(a)(2)(A) provides that TBI investigative files are one exception to the general posture of the TPRA of openness.

Further, the State's first argument would effectively seek to have the court so read TENN. CODE ANN. § 10-7-505(a) as to ***add*** the language appearing in bold and brackets below:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503 [**and § 10-7-504(a)(2)(A)**], and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

"When the statutory language is clear and unambiguous, [Tennessee courts] must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." ***Eastman Chem. Co. v. Johnson***, 151 S.W.3d 503, 507 (Tenn. 2004). If the statutory language is clear and unambiguous, the court's "obligation is to enforce the written language without reference to the broader statutory intent, the history of the legislation, or other sources." ***Chattanooga–Hamilton Cnty. Hosp. Auth. v. Bradley Cnty.***, 249 S.W.3d 361, 366 (Tenn. 2008). The court cannot, in keeping with basic tenants of statutory construction, read the statutory language of TENN. CODE ANN. § 10-7-505(a) in the manner that the State suggests. The court finds that the statutory

procedure set forth in TENN. CODE ANN. § 10-7-505 is not an available method by which public disclosure of a TBI investigative file may be obtained, whether by a member of the public or by the State. The State's first alternative argument fails.

In its second alternative argument, the State argues that the language of TENN. CODE ANN. § 10-7-504(a)(2)(A), by its own operation, entitles the TBI and the District Attorney to seek public disclosure to members of the public who ordinarily cannot inspect a TBI investigative file because of its confidential nature. The State contends that section provides a "path for release" of the TBI File through a subpoena or an order of a court of record. State's Supplemental Memorandum in Support of Petition to Release TBI Investigative File ("State's Supp. Memo.") at 2.

Elaborating on their roles in petitioning for public disclosure, the State argues that the District Attorney requests the release of the TBI File pursuant to her "prosecutorial function attendant to the Grand Jury's decision" conferring standing on her office to seek the release of the TBI File to the public. *Id.* at 2. It is clear, under the circumstances of this case, that the District Attorney's "prosecutional function" has come to an end as to Mr. Schilling. The grand jury's historic role is one of a "protective bulwark" on behalf of the ordinary citizen. *See, e.g.,* ***United States v. Dionisio***, 410 U.S. 1, 17 (1973). As the Grand Jury returned a "no true bill" as to Mr. Schilling, he is protected from further prosecution by the District Attorney, a fact acknowledged in the State's Petition. *See* Petition at ¶ 4. However, having first requested the aid of the TBI in the investigation pursuant to Tenn. Code Ann. § 38-6-

102, the District Attorney retains custody of the TBI File and requests disclosure in that capacity. *See* Petition at ¶ 2. As to the TBI, the State asserts that as the entity which can claim confidentiality pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), the TBI's consent to disclosure is necessary for disclosure to occur. *See* State's Supp. Memo. at 2.

As discussed in the court's previous Memorandum Opinion and Order, on a foundational level, there is a separation of powers among the co-ordinate branches of state government. As our Supreme Court explained in ***State v. McCoy***, 459 S.W.3d 1, 9 (Tenn. 2014):

> The Tennessee Constitution includes two explicit provisions establishing the separation of powers among the three branches of government. Article II, section 1 provides, "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial." Article II, section 2 elaborates, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." While there are no precise lines of demarcation in the respective roles of our three branches of government, the traditional rule is that "the legislative [branch has] the authority to make, order, and repeal [the laws], the executive ... to administer and enforce, and the judicial ... to interpret and apply." ***Underwood v. State***, 529 S.W.2d 45, 47 (Tenn. 1975) (quoting ***Richardson v. Young***, 122 Tenn. 471, 125 S.W. 664, 668 (1910)).

In this instance, our Legislature, setting policy, has provided in TENN. CODE ANN. § 10-7-504(a)(2)(A) that TBI investigative files and the certain files of five other

departments or agencies of state government identified by name therein[3] "shall be treated as confidential and shall not be open to inspection by members of the public." *Id.* The plain language of TENN. CODE ANN. § 10-7-504(a)(2)(A) adds, however, that "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record." The General Assembly has determined as a matter of policy that our "courts of record" are uniquely suited to be those "governmental institutions ... competent to address" the question of whether such public disclosure of TBI investigative files should be made, and if so, in what circumstances, under what conditions, and under what constraints. ***See Am. Civil Liberties Union of Tenn. v. Darnell***, 195 S.W.3d 612, 620 (Tenn. 2006) (quoting ***Warth v. Seldin***, 422 U.S. 490, 500 (1975)).

The court's research discloses that the earliest public records act in Tennessee was enacted by the General Assembly in 1957. Tenn. Public Acts of 1957, Pub. Ch. No. 285. That legislation provided in part that medical records of patients in State hospitals and medical facilities were confidential and not open for inspection by members of the public except in compliance "with a subpoena or an order of the court." *Id.* In 1976, the General Assembly replaced the quoted language as follows "with a subpoena or an order of a court of record." Tenn. Public Acts of 1976, Pub. Ch. No. 777. The above phraseology has been a portion of portion of the legislative

[3] Those being the Office of Inspector General, the Department of Agriculture, the Department of Environment and Conservation, the Department of Safety and the Alcoholic Beverage Commission. *See* TENN. CODE ANN. § 10-7-504(a)(2)(A).

language has remained intact in subsequent revisions of what is now enacted as TENN. CODE ANN. § 10-7-504(a)(2)(A) since that time. The records of the TBI were made explicitly exempt from public disclosure in 1999. Tenn. Pub. Acts of 1999, Pub. Ch. 199.

The fact that the TBI has not previously sought court approval for the public disclosure of records made confidential pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A) does not demonstrate that it is precluded from doing so via the exception from nondisclosure provided by the statute. The General Assembly has directed such questions as presented by the Petition to the courts for resolution. As the court earlier recognized, the executive department of the State is charged with administering and enforcing the laws. Public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law. ***West v. Schofield***, 468 S.W.3d 482, 493 (Tenn. 2015) ("***West II***"). The State's Petition asserts that in the absence of public disclosure of the TBI File, an injury would occur in derogation of "the best interest of the public." *See* Petition at 2, ¶ 7. While reasonable minds might differ as to how the public interest would best be served, the court presumes that the State and its executive officials on whose relation the Petition is filed, the District Attorney and the Director of the TBI, have a good faith basis for their assertion that in the absence of public disclosure, injuries that are "distinct and palpable" would occur, injuries that they, due to their positions, experience and due to information available to them, are well-placed to perceive and address.

The bare language of TENN. CODE ANN. § 10-7-504(a)(2)(A), which sets forth that: "The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record ...." does not provide guidance to the court as to the factors to be considered in permitting such public disclosure of TBI investigative files. The court in this instance finds aid in the TBI's own administrative rules, which articulate its policy regarding production of documents and testimony. While not bound by administrative rules as authoritative, "[c]ourts may take judicial notice of the rules and regulations of state administrative agencies which have been promulgated by authority of law, have statewide application and are easily ascertainable." ***Acuff v. Comm'r of Tenn. Dept. of Labor***, 554 S.W.2d 627, 631 (Tenn. 1977).

TBI Administrative Rule 1395-1-6-.02(1) (the "TBI Administrative Rule") states in part that:

> Due to the inherently intrusive nature of criminal investigations and the sensitive nature of material contained in bureau records, access by the public to records of the bureau is extremely limited and subject to several considerations.

Here, the court notes, the District Attorney and the Director of the TBI, that is, the State, have asserted in good faith that disclosure of the TBI File is in the public interest. The Parents have expressed their "full confidence that the public's interest [in disclosure] is paramount to their own and do not wish to effectuate further delay." Parents' Withdrawal at 2. Mr. Schilling states that he has no objection to the public

disclosure of the TBI File, but asks the court to place conditions on the timing, duration and contents of that release. Response of Connor Schilling to Petition to Release Tennessee Bureau of Investigation Investigative File at 1-2.

Mr. Schilling, commenting on TENN. CODE ANN. § 10-7-504(a)(2)(A), points out that the "confidentiality of the TBI File is absolute, ***unless a court orders otherwise.***" Memorandum of Connor Schilling in Support of Motion to Intervene ("Schilling Initial Memo.") at 4 (emphasis added). Mr. Schilling relies on ***State v. Cobbins***, No. E2013-02726-CCA-WR-CO, slip op. at 13 (Tenn. Crim. App. Feb. 4, 2015) to argue that the statutory language does not permit a balancing test to take into account an asserted public interest in disclosure.

In ***Cobbins,*** the parents of the victims in the underlying criminal proceedings filed a petition seeking to intervene in the criminal cases to seek access to the portions of a TBI file that had been filed in the criminal court under seal during the hearing on motions for a new trial. The criminal court released for public view all information in the TBI file on which it relied in adjudicating the criminal defendants' motions for new trial. The TBI filed a response opposing the petition to intervene and the petitioners' right to access the TBI file. The criminal court granted intervention but denied the petitioners' request that the TBI file be unsealed. On appeal, the Court of Criminal Appeals affirmed, concluding that the petitioners had no statutory or constitutional right to intervene in the criminal proceeding, preserving the redacted and sealed portions of the TBI file at issue. *See also* ***State of Tennessee ex rel.***

Johnson v. Gwyn, No. M2013-02640-COA-R3-CV, 2015 WL 7061327 (Tenn. Ct. App. Nov. 10, 2015) (holding that *res judicata* served to bar the claims of the same petitioners in a collateral civil action).

This action presents the converse of the circumstance in ***Cobbins***. In ***Cobbins*** the private citizen petitioners sought to overcome the statutory exemption from disclosure granted to TBI investigative files. In such an instance, as ***Cobbins*** teaches, there can be no balancing between the interests of the private petitioners in public disclosure, and that of the State in continued confidentiality. Herein, however, the State, in a case of first impression, seeks, pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), to obtain "an order of a court of record" to release the TBI File. While the language of the statute previously may not have been used by the TBI to seek disclosure, the statute has been previously held to be clear and unambiguous: "the only disclosure of TBI investigative records permitted ... is pursuant to a subpoena or court order." ***Higgins v. Gwyn,*** No. M2011-00553-COA-R3-CV, 2012 WL 214829 (Tenn. Ct. App. Jan. 23, 2012).

In certain circumstances, a trial court might find that the TBI and the District Attorney lacked justification for public disclosure of an investigative file following the refusal of a grand jury to return a true bill. Here, however, the State asserts that disclosure of the TBI File is in the best interest of the public, with identifying and personal information to be redacted by the District Attorney General's office. The Parents do not object to the public disclosure of the TBI File. Mr. Schilling, however,

while not objecting to the public disclosure in principle, asks the court to place conditions on the timing, duration and contents of that release. Response of Connor Schilling to Petition to Release Tennessee Bureau of Investigation Investigative File at 1-2. In the unique circumstances of this case, for the reasons stated herein, the court finds that the State has shown good cause for the disclosure of the TBI File pursuant to TENN. CODE ANN. § 10-7-504(a)(2)(A), and imposes, by way of the Protective Order that follows, conditions on the timing, duration and contents of that release.

PROTECTIVE ORDER

Having found aid in the TBI Administrative Rule quoted above, the court considers whether a protective order should be entered regarding the public disclosure of the TBI File. TBI Administrative Rule 1395-1-6-.02(2), states in part as follows:

> Pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-504(a)(2), investigative records of the bureau "shall be treated as confidential and shall not be open to inspection by members of the public." Access to investigative records may be gained only in compliance with process from a court of record, including either a subpoena or a court order. ... Accordingly, the director ...
>
> (b) opposes any access to investigative records in the absence of a protective order limiting the use of those records, even if records are released pursuant to a court of record's subpoena or order....

The court accepts the Director's counsel and considers, as requested by Mr. Schilling, whether the public disclosure of the TBI File should be (a) postponed until after the United States Department of Justice has reached a decision as to whether it will pursue an indictment against Mr. Schilling; (b) made available to the public for a

limited time, but thereafter expunged; and (c) redacted based on guidelines established by the court.

While Mr. Schilling has expressed concerns as to what may occur in the future if the contents of the TBI File were to be disclosed to the public, *i.e.*, in the "unlikely" event of his federal prosecution, the court repeats its observation that the contingent nature of these events should not obscure the State's present assertion that "It is in the best interest of the public that [the TBI File] be made available ***immediately*** ... to the public" over Mr. Schilling's opposition. *See* Petition at 2, ¶¶ 7, 8 (emphasis added). Therefore, the court finds that the requested public disclosure of the TBI File should occur immediately, and should be disseminated to the public through the District Attorney's internet site, www.scdag.com, as prayed for in the Petition. Petition at ¶ 8.

Next, the court considers whether the TBI File should be made available to the public for a limited time. The court notes that while the public interest that has been identified by the State in the public disclosure of the TBI File is keen at the present time, that interest is likely to abate following the initial disclosure. The court instructs the State to monitor the activity on the District Attorney's website and sets a status conference on February 8, 2016 at 2:00 p.m. to determine whether continued public access to the TBI File through the District Attorney's internet site would continue to serve the public interest after that time.

The court now considers whether the TBI File should be redacted, and if so, to what extent. The court first notes that, in its disclosure, the State shall adhere to the General Assembly's requirements set forth in TENN. CODE ANN. § 10-7-504(f)(1) which provide that the following records or information of any municipal employee or former employee "shall be treated as confidential and shall not be open for inspection by members of the public" and must therefore be redacted from the TBI File before disclosure. In addition such records or information relating to members of the public who may have cooperated with the TBI's investigation should be similarly redacted. The information to be redacted includes: (A) Home telephone and personal cell phone numbers; (B) Bank account and individual health savings account, retirement account and pension account information; (C) Social security number; (D)Residential information, including the street address, city, state and zip code; (E) Driver license information (and photographs); (F) Emergency contact information; (G) Personal, nongovernment issued, email addresses; and (H) like information of immediate family members, whether or not the immediate family member resides with the person involved.

Again, the court also finds the TBI Administrative Rule provides guidance as to additional matters which must be redacted prior to public disclosure. As set forth in TBI Administrative Rule 1395-1-6-.02(3), TBI records are subject to specific restrictions on their release as "otherwise provided by state [and Federal] law." In this regard, the Director must redact material that is specifically confidential and

privileged. For example, the State is to redact (a) Social Security Numbers, pursuant to 5 U.S.C. § 552a Note, Disclosure of Social Security Numbers; (b) information protected by the holding in ***Kallstrom v. City of Columbus***, 136 F.3d 1055, 1066 (6th Cir. 1998); (c) medical information protected by the holding in ***Stenson v. City of Knoxville***, E.D. Tenn. No. 3:98-cv-142 (Memorandum and Order, R. 27, August 26, 1998); (d) information protected by the informer's privilege; and (e) information protected by the attorney work product doctrine. TENN. R. CRIM. P. 16. The materials produced shall be attested to by the custodian of records.

The court observes that this is not a final order for purposes of TENN. R. APP. P. 3(a) from which an appeal as of right might be taken. TENN. R. APP. P. 9(b) permits a party to seek an interlocutory appeal by filing and serving a motion requesting such relief within 30 days after the date of entry of the order from which interlocutory review is sought. In view of the foregoing, the operation of this order is stayed until December 15, 2015, within which time the adversely affected party should advise the court of his intention to request a further stay pending application for permission to appeal.

IT IS SO ORDERED.

This 8th day of December, 2015.

James R. Newsom III

JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2015, a true and correct copy of the foregoing Order has been mailed, United States Mail, First Class Postage prepaid and delivered by electronic mail to:

Amy P. Weirich
District Attorney General
30th Judicial District
201 Poplar Avenue, 3rd Floor
Memphis, TN 38103

Arthur E. Quinn
62 North Main Street
Suite 401
Memphis, TN 38103

Deputy Clerk

Attachment C

CH-14-1217-3

L.J. JACKSON and BRENDA JACKSON

Vs

CITIMORTGAGE INC.

Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

L.J. JACKSON and BRENDA JACKSON Plaintiffs, vs. CITIMORTGAGE, INC. Defendant.	]]]]]]]]]	No. CH-14-1217-3

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause came to be heard before the Honorable James R. Newsom III, Chancellor of Part III of the Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis on September 16, 2015 upon the Motion for Summary Judgment pursuant to TENN. R. CIV. P. 56.02 filed by Defendant CitiMortgage, Inc. ("Citi") as to the claims asserted in this cause by Plaintiffs L.J. Jackson and Brenda Jackson (together "Plaintiffs" or the "Jacksons"), the statements of material facts (the "SMFs") filed by Citi[1] and Plaintiffs pursuant to TENN. R. CIV. P. 56.03, the affidavits filed by Citi and Plaintiffs in support of and in opposition to the motion, upon receipt

[1] The court notes that the numbering "system" contained in Citi's Statement of Undisputed Facts in Support of Defendant's Motion for Summary Judgment filed on July 6, 2015 sowed confusion into the record by haphazard numbering which omitted 3, 4 and 9, and repeated 11, 12 and 13 in no particular order.

of proposed findings of fact and conclusions of law (the "PFFCL") filed of record by Citi and Plaintiffs and upon the entire record in this cause.

Citi seeks summary judgment dismissing Plaintiffs' claims for breach of contract and promissory estoppel, for breach of the covenant of good faith and fair dealing, for violation of TENN. CODE ANN. § 35-5-107, for violation of Regulation Z of the Truth-In-Lending Act, and for negligent and intentional representation. Plaintiffs also seek summary judgment finding that the foreclosure sale was valid pursuant to Tennessee law and the Deed of Trust. Citi further asserts, in regard to its counterclaim, that it has presented *prima facie* evidence of title to the property at issue and that Citi has a greater right to possession of that property. Citi contends that it is entitled to an award of its attorney fees. Plaintiffs contend that genuine issues of material fact are present which preclude summary judgment for Citi.

Based on the record and the arguments of counsel for Citi and for Plaintiffs, the court makes the following findings of fact and conclusions of law:

MATERIAL FACTS

Taking the facts in the light most favorable to Plaintiffs, the following material facts ("MF") are undisputed for the purpose of summary judgment:

1. At all times material hereto, Plaintiffs have been the owners of the property commonly known as 4776 Ross Creek Drive, Memphis, TN 38141 (the

"Property"). Affidavit of Brenda Jackson ("Jackson Aff.") at ¶ 3. *See also* Plaintiffs' Amended Response to Undisputed Material Facts ("Plaintiffs' Amended Response") at ¶ 1.

2. On or about May 26, 2005, Plaintiffs refinanced their purchase money mortgage on the Property. In connection with the refinancing, Plaintiffs executed a thirty-year Adjustable Rate Note in the principal amount of $118,750.00 (the "Note") payable to Argent Mortgage Company, LLC ("Lender"). Plaintiffs' PFFCL at ¶ 1; Jackson Aff. at ¶¶ 4-5; Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 1, ¶¶ 1-2.[2] *See also* Citi's Proposed Order Granting Motion for Summary Judgment (hereafter "Citi PFFCL") at p. 1, ¶ 1.

3. In connection with the refinancing, Plaintiffs executed a Deed of Trust ("DOT") which was recorded in the Office of the Shelby County Register of Deeds (the "Shelby County Register") on June 10, 2005 as Instrument 05090896 (filed of record in this cause on July 6, 2015) in favor of Argent, conveying a security interest in the Property to Argent. Plaintiffs' Amended Response at p. 1, ¶ 1; Jackson Aff. at p. 1, ¶ 4; DOT.

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[2] Plaintiffs' Statement of Additional Undisputed Facts requests that Citi agree that the Note contained an "artificially low teaser rate with a first payment change date about three years after they had made the loan." *Id.* at p. 1, ¶ 2, citing Jackson Aff. at ¶¶ 5-6. As the Note speaks for itself, Plaintiffs' conclusory characterizations of the Note as containing an "artificially low teaser rate" (*id.*) and referring to increases in monthly payments due under the Note (*id.* at p. 1-2, ¶¶ 3, 5; *see also* Plaintiffs' PFFCL at p. 1, ¶ 2; Jackson Aff. at p. 2, ¶ 6) do not inject disputed issues of material fact into the record which preclude summary judgment in favor of Citi.

4. The Note at p. 1, ¶ 1 provides that Plaintiffs "understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" Further the Note provides: "I will make my payments at: 505 City Parkway West, Suite 100, Orange, CA 92868 or at a different place if required by the Note Holder." *Id.* at p. 1, ¶ 3(A). Also, the Note states in part:

> Oral agreements, promises or commitments to lend money, extend credit, or forbear from enforcing repayment of a debt, including promises to extend, modify, renew or waive such debt, are not enforceable. This written agreement contains all the terms the Borrower(s) and the Lender have agreed to. Any subsequent agreement between us regarding this Note or the instrument which secures this Note, must be in a signed writing to be legally enforceable.

Plaintiffs' PFFCL at ¶ 1; Citi's PFFCL at p. 1, ¶ 2; First Affidavit of Travis Nurse at ¶ 5, Exh. A at p. 3.[3]

5. The DOT and the Note do not contain any other provisions regarding future loan modifications or the right of Plaintiffs to be considered for a loan modification. Citi PFFCL at ¶ 2. *See* First Nurse Aff. at p. 2, ¶ 5, Exh. A; DOT.

6. Effective July 1, 2008 the servicing of Plaintiffs' mortgage account was transferred to Citi. First Nurse Aff. at p. 2, ¶ 5, Exh. B; *see also* Plaintiffs' Amended

[3] The court notes that Citi filed two documents under the undifferentiated title "Affidavit of Travis Nurse." The first was filed on July 6, 2015 ("First Nurse Aff."). The second was filed on September 14, 2015 ("Second Nurse Aff."). The court reminds counsel that "judges are not like pigs, hunting for truffles" that may be buried in the record, ***Flowers v. Bd. of Professional Responsibility***, 314 S.W.3d 882, 899 n.35 (Tenn. 2010) (citation omitted), and that unnecessary "archeological digs" are no more enjoyed by trial judges than by appellate judges.

Response at p. 1, ¶ 2; Jackson Aff. at p. 2, ¶ 7. Notice of that fact was provided to Plaintiffs on or about June 11, 2008. *Id.* That notice stated that "the servicing of your mortgage account will be transferred to [Citi]…. You are hereby notified that the servicing of your mortgage loan, that is, the right to collect payments from you, is being assigned, sold or transferred from CitiFinancialMortage Corporation to ["Citi"]….The assignment, sale or transfer of the servicing of your mortgage loan does not affect any terms or conditions of the mortgage instruments, other than the terms directly related to the servicing of your loan." First Nurse Aff. at p. 2, ¶ 5, Exh. B at pp. 1-2; Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at ¶ 4.[4]

7. The DOT and the Note permit the lender, in the event of default, to enforce its security interest by acceleration of the debt and by sale of the Property at foreclosure. Citi's PFFCL at ¶ 6; First Nurse Aff. at p. 2, ¶ 5, Exh. A at p. 2, ¶ 7, p. 3, ¶ 11; DOT at p. 13, ¶ 22.

8. Plaintiffs began to have trouble making their mortgage payments, largely because of the payment increases from the adjustable rate mortgage, but also because their family income declined because of the downturn in the economy. Citi's

[4] Plaintiffs dispute Citi's contention that the DOT and the Note were assigned to Citi and that notice of the assignment was provided to Plaintiffs. *See* Plaintiffs' Amended Response at p. 1, ¶ 2. The First Affidavit of Travis Nurse asserts that the DOT and the Note were transferred to Citi and notice of same was provided to Plaintiffs. First Nurse Aff. at p. 2, ¶ 5. The materials on which Citi rely contain neither an assignment of the DOT and the Note to Citi, nor any other proof to show that the DOT and the Note, as distinct from the servicing rights, were transferred to Citi. However, it is undisputed that the servicing rights were transferred to Citi. *See* Plaintiffs' PFFCL at p. 1, ¶ 3.

Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶ 5; Jackson Aff. at ¶¶ 8, 9.

9. Plaintiffs failed to make scheduled payments under the DOT and the Note as required by their terms from and after October 1, 2008. Citi PFFCL at p. 2, ¶ 5; Plaintiffs' Amended Response at ¶ 3;[5] First Nurse Aff. at p. 2, ¶ 6; Second Nurse Aff. at p. 2, ¶ 6, Exh. A (billing history); Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶ 5; Jackson Aff. at p. 2, ¶¶ 8, 9, 13.

10. When Plaintiffs had fallen as much as three months behind on their mortgage payments, Citi stopped accepting payments for anything less than the full amount of past due payments to cure the arrearage. Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 3, ¶ 12; Jackson Aff. at p. 3, ¶ 16; First Nurse Aff. at p. 2, ¶ 7, Exh. C.

11. After default, Plaintiffs were given notice by Citi that failure to cure the default by January 10, 2011 would result in acceleration of the maturity of the unpaid balance in accordance with the terms of the Note and the DOT. Plaintiffs' Amended

[5] Plaintiffs do not dispute the fact that they stopped making their scheduled note payments, but contend that they were counseled to do so by an unnamed Citi representative from Citi's Loss Mitigation Department "to make them qualify for a HAMP loan modification" or "to stop making [their] regular payments until the loan modification application was processed." Plaintiffs' Amended Response at pp. 1-2, ¶ 3; Jackson Aff. at p. 2, ¶ 13. Plaintiffs also assert that they were not in default on their mortgage at the time they started the loan modification process, a contention that Citi denies. *See* Citi Response to Plaintiffs' Statement of Additional Undisputed Facts at pp. 2-3. ¶ 8; Jackson Aff. at p 2, ¶ 12. Plaintiffs' assertions are not material to the claims at issue.

Response at ¶ 4; First Nurse Aff. at p. 2, ¶ 7, Exh. C (letter dated December 10, 2010); DOT.

12. Plaintiffs failed to make the required payment to cure the default, and, as a result, the maturity of the unpaid balance was accelerated. Citi PFFCL at p. 2, ¶ 7; Plaintiffs' Amended Response at ¶ 5;[6] First Nurse Aff. at p. 2, ¶ 8.

13. Plaintiffs had heard about the Home Affordable Modification Program ("HAMP") and other programs that offered help in terms of reduced monthly mortgage payments to struggling consumers like themselves. Plaintiffs' PFFCL at p. 1, ¶ 4; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶¶ 10; Jackson Aff. at p. 2, ¶ 10.

14. Plaintiffs contacted Citi (at a time that Plaintiff and Citi fail to specify)[7] to seek reduction in their monthly mortgage payments through HAMP, "but felt like they were making no progress." Plaintiffs' PFFCL at p. 1, ¶ 5; Citi's Response to

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[6] Plaintiffs do not deny that they failed to cure the default (Plaintiffs' Amended Response at p. 2, ¶ 5), but assert as well that "they were in the process of applying for a loan modification at the time and their ability to make cure would have been incompatable [sic] with their eligibility for a HAMP loan modification." *Id.* These assertions are not material to the claims at issue.

[7] Citi submits a letter from Citi's Bankruptcy Department addressed to Earnest Fiveash, Attorney dated June 30, 2011 denying a HAMP loan modification request made on behalf of Plaintiffs. *See* Second Nurse Aff. at p. 2, ¶ 7, Exh. B. That letter informed Mr. Fiveash provisionally that Citi was unable to offer Plaintiffs a "Home Affordable Modification" at that time because Plaintiffs' current monthly housing expense was then less than or equal to 31% of their gross monthly income of $4,014.00. The letter does not indicate when Plaintiffs' HAMP loan modification request was made. However, Citi had notified Plaintiffs that their Note was in default as of January 10, 2011. Similar HAMP denials (or denial of other loss mitigation options) are reflected in Citi's correspondence to Plaintiffs dated November 25, 2013 and June 5, 2014. Second Nurse Aff. at p. 2, ¶ 7, Exh. B. Another such HAMP denial (or denial of other loss mitigation options) is reflected in Citi's correspondence to Mr. Fiveash dated June 16, 2014. *Id.*

Plaintiffs' Statement of Additional Undisputed Material Facts at p. 2, ¶ 7; Jackson Aff. at p. 2, ¶ 11.

15. On or about March 28, 2014, Brock & Scott, PLLC ("Brock & Scott") sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid, advising Plaintiffs of the initiation of foreclosure proceedings upon the Property, and provided certain other information pursuant to the Federal Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.* Plaintiffs' Amended Response at p. 2, ¶ 10; Affidavit of Mary Coleman ("Coleman Aff.") at p. 2, ¶ 6, Exh. A.

16. In accordance with the terms of the DOT, Citi appointed Brock & Scott as Substitute Trustee for the purpose of conducting foreclosure proceedings on the Property on or about April 8, 2014. Citi PFFCL at p. 2, ¶ 7; Plaintiffs' Amended Response at p. 2, ¶ 8; Appointment of Successor Trustee filed with the Shelby County Register on April 11, 2014 as Instrument No. 14038873 (filed of record in this cause on July 6, 2015) at p. 13, ¶ 22.

17. On or about April 29, 2014, Brock & Scott sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid and by certified mail, return receipt requested, advising Plaintiffs of a foreclosure sale of the Property scheduled for May 27, 2014. Citi PFFCL at p. 2, ¶ 8; Plaintiffs' PFFCL at p. 2, ¶ 7; Plaintiffs' Amended Response at p. 3, ¶ 11; Coleman Aff. at p. 2, ¶ 7, Exh. B.

18. Notice of such foreclosure sale was published in the *Memphis Daily News* on May 1, 2014, May 8, 2014, and May 15, 2014. Citi PFFCL at p. 2, ¶ 9; Plaintiffs' Amended Response at p. 3, ¶ 11; Coleman Aff. at p. 2, ¶ 8, Exh. C.

19. Because of their frustrations in trying to get a modification, the Jacksons eventually hired Chris Mitchell of Everything Financial Company in Collierville, Tennessee to assist them in pursuing a loan modification from Citi. Plaintiffs' PFFCL at pp. 1-2, ¶ 6; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 3, ¶ 9; Jackson Aff. at p. 2, ¶ 11; First Nurse Aff. at p. 2, ¶ 9, Exh. D.

20. There were e-mail exchanges between Ms. Mitchell and Stephen Ortwerth, a Making Homes Affordable Executive Response Unit Specialist for Citi regarding the status of Plaintiffs' loan modification application. Plaintiffs' PFFCL at p. 2, ¶ 12. Copies of those e-mail exchanges are attached to the First Affidavit of Travis Nurse as Exhibit D. First Nurse Aff. at p. 2, ¶ 9, Exh. D.

21. With the help of Ms. Mitchell, Plaintiffs submitted documentation in support of their loan modification application. Plaintiffs' PFFCL at p. 2, ¶ 8; Plaintiffs' Amended Response at pp. 3-4, ¶ 13; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 14.

22. Ms. Mitchell was able to get the sale scheduled for May 27, 2014 postponed because of the loan modification process. Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 14; Jackson Aff. at p. 3, ¶

18; *see also* First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Fri., May 23, 2014 @ 8:01 a.m.).

23. On May 27, 2014, the scheduled foreclosure sale was postponed by announcement until June 24, 2014. Citi PFFCL at p. 2, ¶ 10; Coleman Aff. at p. 2, ¶ 9.

24. Brock & Scott sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid, dated May 28, 2014, advising of the postponement and the new sale date of June 24, 2014. Plaintiffs' PFFCL at p. 2, ¶ 10; *See* Citi PFFCL at p. 2, ¶ 12; Plaintiffs' Amended Response at p. 3, ¶ 12; Coleman Aff. at p. 2, ¶ 11, Exh. D; Citi's Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 3, ¶ 13; Jackson Aff. at p. 3, ¶ 17.

25. On June 24, 2014, the scheduled foreclosure sale was postponed by announcement until July 29, 2014. Plaintiffs' PFFCL at p. 2, ¶ 11; Citi PFFCL at p. 2, ¶ 11; Coleman Aff. at p. 2, ¶ 9.

26. Brock & Scott sent each of the Plaintiffs a notice via United States First Class mail, postage prepaid, dated June 25, 2014, advising of the postponement and the new sale date of July 29, 2014. Plaintiffs' PFFCL at p. 2, ¶ 11; *see* Citi PFFCL at p. 2, ¶ 12; Plaintiffs' Amended Response at p. 3, ¶ 12; Coleman Aff. at p. 2, ¶ 11, Exh. D.

27. After the foreclosure sale had been postponed, Ms. Mitchell informed Plaintiffs that the sale was scheduled again for July 29, 2014. Citi Response to

Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 16; Jackson Aff. at p. 3, ¶ 20.

28. On July 21, 2014 at 7:41 p.m., Ms. Mitchell sent an e-mail message to Mr. Ortwerth expressing concern about the pending foreclosure sale date of July 29, 2014 and the fact that she had not heard from him in the previous twelve days and asking if other information was needed from Plaintiffs. Plaintiffs' PFFCL at p. 2, ¶ 13; Plaintiffs' Amended Response at pp. 3-4, ¶ 11; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 5, ¶ 19; First Nurse Aff. at p. 2, ¶ 9, Exh. D (Ms. Mitchell's e-mail to Mr. Ortwerth dated Mon., Jul. 21, 2014 @ 7:41 p.m.).

29. Mr. Ortwerth, whose offices were located in O'Fallon, Missouri, promptly responded the next morning, July 22, 2014 at 7:39 a.m., requesting additional information from Plaintiffs in support of their application for loan modification in an e-mail message which stated:

> Good morning, Ms. Mitchell.
>
> I hope you're well. Our Underwriter has requested some additional information from your client to complete their review file.
>
> - provide supporting documents for L.J's new employment position
> - 2014 year-to-date profile (sic) and loss statement for Brenda
> - most recent statement (all pages) for Orion Federal Credit Union showing schedule C income
> - provide three months of proof of boarder income bank statements and copies of cancelled rent checks.

> You may reply by email using HOST.Citilinkdocs@citi.com or fax using 1-866-940-8125 and please inscribe your client's full name and mortgage account number on each document. I need this information as soon as possible and will follow up to confirm receipt or check progress by 07/29/14. Please call with any questions. Thank you for your patience and cooperation. Have a great day!
>
> Remember, during any point of your treatment review you can reach me at 877-791-1328, EXT 0475534, Monday-Friday 7:00 a.m.-6:00 p.m. or email me atstephenortwerth@citi.com. I look forward to working with you.

Plaintiffs' PFFCL at pp. 2-3, ¶¶ 14, 15; Citi PFFCL at p. 3, ¶ 15; Plaintiffs' Amended Response at pp. 3-4, ¶ 13; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at pp. 3, 4, ¶¶ 11, 18, 19; Jackson Aff. at p. 3, ¶ 2; First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Tue., Jul. 22, 2014 @ 7:39 a.m.).

30. Mr. Ortwerth's e-mail to Ms. Mitchell does not contain any promise regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Citi PFFCL at p. 2, ¶ 13; First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Tue., Jul. 22, 2014 @ 7:39 a.m.).

31. Ms. Mitchell told Plaintiffs that the sale had been postponed again[8] and that Citi was asking for a number of new documents, such as verification of Mr.

[8] Plaintiff's Amended Response to Undisputed Material Facts states in part: "The Plaintiffs contend that Mr. Ortwerth told Ms. Mitchell, their representative, that the [foreclosure] sale [scheduled for July 29, 2014] was being postponed …." Plaintiffs' Amended Response at p. 4, ¶ 13. This statement is unsupported in the record. Mr. Ortwerth's e-mail message to Ms. Mitchell of July 22, 2014 does not so state. *See* First Nurse Aff. at p. 2, ¶ 9, Exh. D (Mr. Ortwerth's e-mail to Ms. Mitchell dated Tue., Jul. 22, 2014 @ 7:39 a.m.). The Affidavit of Brenda Jackson states that "[Ms. Mitchell] later

Jackson's new employment, a profit and loss statement from Mrs. Jackson's self-employment and documentation of rent payments from Plaintiffs' daughter. Plaintiffs' PFFCL at p. 3, ¶ 16; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 4, ¶ 17; Jackson Aff. at p. 3, ¶ 21.

32. The Affidavit of Brenda Jackson does not contain any statements of personal knowledge on her part indicating that a promise was made regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Citi PFFCL at p. 3, ¶ 14; Jackson Aff. at p. 3, ¶ 21.

33. Plaintiffs gathered this information and submitted it to Ms. Mitchell. Plaintiffs' PFFCL at p. 3, ¶ 17; Citi Response to Plaintiffs' Statement of Additional Undisputed Material Facts at p. 5, ¶ 20; Jackson Aff. at p. 3, ¶ 22.[9]

34. The information and documents were not received by Citi. Citi PFFCL at p. 3, ¶ 16; First Nurse Aff. at p. 2, ¶ 10.

35. On July 29, 2014, the Property was sold at foreclosure to Citi. Citi PFFCL at p. 3, ¶ 17; Plaintiffs' Amended Response at p. 4, ¶ 13; First Nurse Aff. at p.

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told us that [the sale] had been postponed again ...." (Jackson Aff. at p. 3, ¶ 21), but does not attribute a statement to Mr. Ortwerth. Taking the evidence in the light most favorable to Plaintiffs, the court credits Ms. Jackson's statement at the summary judgment stage that Ms. Mitchell told her that the sale scheduled for July 29, 2014 had been postponed. However, Ms. Mitchell's statement to Plaintiffs is inadmissible hearsay. There is no evidence in the record regarding Mr. Ortwerth's statement to Ms. Mitchell or of Ms. Mitchell's account of her communications with Mr. Ortwerth apart from their e-mail correspondence.

[9] There is no evidence in the record at the summary judgment stage which demonstrates that Ms. Mitchell forwarded the additional information received from Plaintiffs to Citi. The record does not contain an affidavit or deposition testimony by Ms. Mitchell. Ms. Jackson's Affidavit states that Ms. Mitchell died in November 2014. Jackson Aff. at p. 4, ¶ 26.

2, ¶ 10; Coleman Aff. at p. 3, ¶ 12; Substitute Trustee's Deed recorded with the Shelby County Register on August 21, 2014 as Instrument 14085885 (filed of record in this cause on July 6, 2015).

36. Having never received information concerning a decision made by Citi on their loan modification application, Plaintiffs, to their knowledge, were still waiting on a decision on their loan modification application when Plaintiffs were contacted by a real estate agent who said he represented Citi, who informed them that their house had been sold at a foreclosure sale, and that he would be trying to sell their house. Plaintiffs' PFFCL at pp. 3-4, ¶¶ 18, 19; Jackson Aff. at pp. 3-4, ¶ 23.

37. On May 6, 2015, the court entered an Agreed Order Regarding Occupancy of Property and Payments into Court During Pendency of Case. Citi agreed that it would not proceed with any attempt to evict Plaintiffs from the Property until further order of the court. Plaintiffs agreed to make monthly payments of $800.00 into the court's Registry during the pendency of the proceedings beginning on May 15, 2015.

CONCLUSIONS OF LAW

Based upon the above findings and a review of the relevant statutory authority and case law, the court makes the following conclusions of law:

I. Summary Judgment Standard

For actions initiated on or after July 1, 2011, such as the one at bar, the standard of review for summary judgment delineated in TENN. CODE ANN. § 20-16-101 applies. *See* ***Rye v. Women's Care Center of Memphis, MPLLC***, ___ S.W.3d ___, ___, 2015 WL 6457768, at *11 (Tenn. Oct. 26, 2015). The statute provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. ***Town of Crossville Hous. Auth. v. Murphy***, 465 S.W.3d 574, 578 (Tenn. Ct. App. 2014) (citing ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993)). "If the moving party makes a properly supported

motion for summary judgment, the burden of production shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact requiring trial." *Id.* (citing ***Byrd***, 847 S.W.2d at 215).

When the moving party does not bear the burden of proof at trial, the moving party may make the required showing and shift the burden of production either "(1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." *See* ***Rye,*** 2015 WL 6457768, at *22. However, "a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis." *Id.* Rule 56.03 requires that the moving party support its motion with "a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial." TENN. R. CIV. P. 56.03. Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record. *Id.* If the moving party fails to meet its initial burden of production, the nonmoving party's burden is not triggered, and the court should deny the motion for summary judgment. ***Town of Crossville Hous. Auth.***, 465 S.W.3d at 578-79 (citing ***Martin v. Norfolk S. Ry. Co.***, 271 S.W.3d 76, 83 (Tenn. 2008)).

If the moving party does satisfy its initial burden of production, "the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading,'"

but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, set forth specific facts at the summary judgment stage "'showing that there is a genuine issue for trial.'" *See* ***Rye***, 2015 WL 6457768, at *22 (quoting TENN. R. CIV. P. 56.06). The nonmoving party must demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of the nonmoving party. *Id.* If adequate time for discovery has been provided and the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial, then the motion for summary judgment should be granted. *Id.* (emphasis by the Court). Thus, even where the determinative issue is ordinarily a question of fact for the trier of fact, summary judgment is still appropriate if the evidence is uncontroverted and the facts and inferences to be drawn therefrom make it clear that reasonable persons must agree on the proper outcome or draw only one conclusion. ***White v. Lawrence***, 975 S.W.2d 525, 529-30 (Tenn. 1998).

The burden-shifting analysis differs if the moving party bears the burden of proof at trial. "For example, a plaintiff who files a motion for partial summary judgment for an element of his or her claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the plaintiff to summary judgment as a matter of law." ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d 696, 702 (Tenn. Ct. App. 2012) (citations omitted). "Similarly, a defendant asserting an affirmative defense ... shifts the burden of production by alleging undisputed facts that show the existence of the affirmative defense." *Id.* (citations omitted).

TENN. R. CIV. P. 56.04 requires that a trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment. *See* TENN. R. CIV. P. 56.04 (emphasis added). Rule 56.04 provides that the trial court must determine whether any genuine issue of material facts exist that would preclude the grant of summary judgment. *Id.* If such a genuine issue of material fact exists, the court is to deny the motion. *Id.* Rule 56.04 does not therefore require that a trial court enter findings of fact in its order granting or denying summary judgment. *See id.*; TENN. R. CIV. P. 52.01 ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 . . . ."). ***In re Estate of Kysor***, No. E2014-02143-COA-R3-CV, Slip op. at 7 (Tenn. Ct. App. Dec. 28, 2015).

II. Breach of Contract

Plaintiffs seek to enforce an "alleged contract [agreed to by Citi] to process their loan modification application to completion and honor agreements to postpone foreclosure pending a decision." Plaintiffs' PFFCL at p. 4, ¶ 1. Plaintiffs contend that neither the Tennessee Statute of Frauds, codified at TENN. CODE ANN. § 29-2-101, nor Paragraph 22 of the DOT require a signed writing for the "alleged contract" to be enforceable. Plaintiffs' PFFCL at p. 4, ¶ 1. Plaintiffs deny that their breach of contract claim is based upon an alleged enforceable promise made by Citi to modify the terms of the Note or the DOT. *Id.* Citi responds that the terms of the Note require any agreement or promise between the parties regarding postponement or cancellation of

the foreclosure sale scheduled for July 29, 2014 to have been in a writing signed by Citi. Citi PFFCL at p. 3, ¶ 1.

In order to plead a valid breach of contract claim under Tennessee law, a plaintiff must allege the existence of an enforceable contract, a breach of that contract, and damages resulting from the breach. ***ARC LifeMed, Inc. v. AMC-Tennessee, Inc.***, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005). "A mortgage, or a deed of trust, in its legal aspect is a conveyance of an estate or an interest in land and as such [is] within the meaning of the Statute of Frauds." ***Lambert v. Home Federal Sav. & Loan Ass'n,*** 481 S.W.2d 770, 772-73 (Tenn. 1972) (citing 49 Am. Jur., *Statute of Frauds*, §197, a "mortgage or deed of trust of land cannot be made by parol.").

Under Tennessee's Statute of Frauds, TENN. CODE ANN. § 29-2-101, contracts "to alter, amend, renew, extend or otherwise modify or supplement any written promise, agreement or commitment to lend money or extend credit" must be in writing and signed by the lender or creditor to be enforceable." TENN. CODE ANN. § 29-2-101(b)(1). However, the lender or creditor need not sign such a contract if the "promise or commitment is in the form of a promissory note or other writing that describes the credit or loan" and the terms of the writing indicate that only the debtor must sign the writing, the debtor has signed the writing, and delivery of the writing has been accepted by the lender or creditor. TENN. CODE ANN. § 29-2-101(b)(2).

Citi has both affirmatively negated an essential element of Plaintiffs' breach of contract claim and demonstrated that Plaintiffs' evidence at the summary judgment

stage is insufficient to establish Plaintiffs' breach of contract claim. Plaintiffs rely on Paragraph 22 of the DOT. However, that paragraph does not indicate that only the debtor must sign the writing for it to be binding on Citi. The court, therefore, must examine the Note to determine if TENN. CODE ANN. § 29-2-101(b)(2) is applicable. The Note states in part:

> Oral agreements, promises or commitments to lend money, extend credit, or forbear from enforcing repayment of a debt, including promises to extend, modify, renew or waive such debt, are not enforceable. This written agreement contains all the terms the Borrower(s) and the Lender have agreed to. Any subsequent agreement between us regarding this Note or the instrument which secures this Note, must be in a signed writing to be legally enforceable.

This provision of the Note explicitly excludes the applicability of TENN. CODE ANN. § 29-2-101(b)(2), because the terms of the writing do not indicate only the debtor must sign the writing. Also, the court peruses the record in vain for a writing signed by the Plaintiffs and delivered to Citi memorializing an agreement that Citi would process their loan modification application to completion and honor agreements to postpone foreclosure pending a decision. *See* TENN. CODE ANN. § 29-2-101(b)(2).

As Citi has satisfied its initial burden of production, Plaintiffs must demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of Plaintiffs on their breach of contract claim. Taking the facts in the light most favorable to Plaintiffs, the "alleged contract [agreed to by Citi] to process their loan modification application to completion and honor agreements to postpone foreclosure pending a decision" (Plaintiffs' PFFCL at p. 4, ¶ 1.) – is not in

writing. Because this alleged agreement is a "promise or commitment to … modify or supplement [a] written promise … to lend money or extend credit," Plaintiffs' claim must fail under the Statute of Frauds because Plaintiffs have not alleged that such an agreement was put into writing and signed by Citi, or that it falls into the exception for such a requirement. *See* TENN. CODE ANN. § 29-2-101(b)(2). *See also* ***Vaughter v. BAC Home Loans Serv., LP***, No. 3:11-cv-00776, 2012 WL 162398, at *7 (M.D. Tenn. Jan. 19, 2012) (applying Tennessee law); *see also* ***Elias v. A & C Distributing Company, Inc.***, 588 S.W.2d 768, 771 (Tenn. Ct. App. 1979) ("While the decisions of [f]ederal … [c]ourts are not binding authority upon this Court and other State Courts in Tennessee, yet from time to time we find the reasoning in the decisions of a Federal District Court to be useful and persuasive.").

III. Promissory Estoppel

Plaintiffs seek to proceed on a promissory estoppel theory, asserting that Citi agreed "that [Citi] would not proceed with a foreclosure sale of their home while their loan modification application was pending, that the promises were unambiguous; that the Plaintiffs reasonably relied on these promise; and that in reliance on its promises, Plaintiffs failed to take other actions to save their home and have suffered substantial damages." Plaintiffs' PFFCL at p. 4, ¶ 2. Plaintiffs deny that their promissory estoppel claim is based upon a claim that they were given an enforceable promise to modify the terms of their Note or DOT. *Id.* Citi responds that Plaintiffs' promissory estoppel claim fails because it is barred by the Tennessee Statute of Frauds and for the

additional reason that neither the e-mail chain between Ms. Mitchell and Mr. Ortwerth nor the Affidavit of Brenda Jackson contain an unambiguous promise on the part of Citi regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Citi PFFCL at p. 4, ¶ 2.

The Tennessee Supreme Court has approved a definition of promissory estoppel as "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance." ***Alden v. Presley***, 637 S.W.2d 862, 864 (Tenn. 1982) (quoting Restatement of Contracts § 90). Such promise "is binding if injustice can be avoided only by enforcement of the promise." *Id.* The court in ***Alden*** defined the following limits of the theory: "(1) the detriment suffered in reliance must be substantial in an economic sense; (2) the substantial loss to the promisee in acting in reliance must have been foreseeable by the promisor; (3) the promisee must have acted reasonably in justifiable reliance on the promise as made." *Id.* (quoting Simpson, Law of Contracts § 61 (2d ed. 1965)). The doctrine of promissory estoppel is also known as "detrimental reliance" because the plaintiff must show not only that a promise was made, but also that the plaintiff reasonably relied on the promise to his detriment. ***Calabro v. Calabron***, 15 S.W.3d 873, 879 (Tenn. Ct. App. 1999). Tennessee does not liberally apply the doctrine of promissory estoppel. Rather, the doctrine is available only in exceptional cases where the circumstances border on actual fraud. ***Baliles v. Cities Serv. Co.***, 578 S.W.2d 621 (Tenn. 1979);

Shedd v. Gaylord Entm't Co., 118 S.W.3d 695, 700 (Tenn. Ct. App. 2003) (limiting the application to "exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud").

The key element in finding promissory estoppel is the promise. ***Amacher v. Brown-Foreman Corp.***, 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991). It is the key because the court must know what induced the plaintiff's action or forbearance; only then would the court be able to prevent the injustice resulting from a failure to keep the promise. *Id.* Regardless of how one arrives at a conclusion that a promise has been made, however, the resulting promise must be unambiguous and not unenforceably vague. *Id.*

Citi has both affirmatively negated an essential element of Plaintiffs' promissory estoppel claim and demonstrated that Plaintiffs' evidence at the summary judgment stage is insufficient to establish Plaintiffs' promissory estoppel claim. Citi contends that there is no evidence in the record that Citi made a promise that it would not proceed with a foreclosure sale of Plaintiffs' home while Plaintiffs' application for a loan modification was pending. This is an essential element of Plaintiffs' promissory estoppel claim. Without it, Plaintiffs' evidence at the summary judgment stage is insufficient to establish their promissory estoppel claim. Citi having satisfied its initial burden of production, Plaintiffs must demonstrate the existence of specific facts in the record at the summary judgment stage that could lead a rational trier of fact to find in favor of Plaintiffs on their promissory estoppel claim. This Plaintiffs fail to do.

Taking the facts in the light most favorable to Plaintiffs, the crucial events occurred between the postponement of the foreclosure sale that had been scheduled for June 24, 2014 and the foreclosure sale that went forward on July 29, 2014. *See* MF 25-34. On the evening of July 21, 2014, Ms. Mitchell inquired of Mr. Ortwerth by e-mail if additional information was needed from Plaintiffs regarding the application for loan modification. MF 28. Mr. Ortwerth responded by e-mail early the next morning that additional information was needed, and specified in detail what his underwriter had requested. MF 29. Mr. Ortwerth stated "I need this information as soon as possible and will follow up to confirm receipt or check progress by 07/29/14" and provided various ways in which Ms. Mitchell could communicate with him, including telephone, fax and e-mail. *Id.*

Mr. Ortwerth's e-mail to Ms. Mitchell does not contain any promise regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 30. Ms. Mitchell informed Plaintiffs concerning the specific information requested by Citi and told Plaintiffs that the sale had been postponed again. MF 31. While Ms. Mitchell may have advised Plaintiffs that the sale had been postponed, the evidence in the record at the summary judgment stage does not support Plaintiffs' contention that Citi, through Mr. Ortwerth or otherwise, communicated any such promise to Ms. Mitchell. *Id. See also* MF 31, n. 8.

Having been confronted with Citi's evidence that the Plaintiffs' evidence at the summary judgment stage is insufficient to support Plaintiffs' claim, to survive

summary judgment, Plaintiffs "may not rest upon the mere allegations or denials of [their] pleading," but are required to respond, and by affidavits or one of the other means provided in TENN. R. CIV. P. 56, "set forth specific facts" at the summary judgment stage "showing that there is a genuine issue for trial." TENN. R. CIV. P. 56.04, 56.06. The Affidavit of Brenda Jackson does not set forth specific facts demonstrating that a promise was made by Citi on which Plaintiffs could rely regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 32.

Even taking the facts in a light most favorable to Plaintiffs, Plaintiffs have failed to demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of Plaintiffs on an essential element of their promissory estoppel claim, that a promise was made by Citi regarding postponement or cancellation of the July 29, 2014 foreclosure sale. Plaintiffs' promissory estoppel claim fails.

Having found on other grounds that there is no evidence at the summary judgment stage to support Plaintiffs' promissory estoppel claim, the court declines to consider whether Plaintiffs' promissory estoppel claim fails on the additional ground that it is barred by the Tennessee Statute of Frauds.

IV. Breach of Covenant of Good Faith and Fair Dealing

Plaintiffs assert that a "legitimate" issue of material fact exists as to whether Citi carried out its duty of good faith and fair dealing in carrying out its contractual responsibilities vis-à-vis Citi's relationship with Plaintiffs as the servicer of their

mortgage loan. Plaintiffs' PFFCL at pp. 4-5, ¶ 3. Plaintiffs argue that this duty extended to the handling of Plaintiffs' request for a loan modification, which Citi undertook as part of its servicing role. *Id.* Citi argues that the alleged breach, that is, Citi's proceeding with the foreclosure sale before giving Plaintiffs a decision on their loan modification is an attempt to create new contractual rights or obligations and circumvent or alter the specific terms of the parties' agreement.

The Tennessee Court of Appeals recently had occasion to analyze a similar covenant of good faith and fair dealing claim in ***Cadence Bank, N.A. v. The Alpha Trust,*** ___ S.W.3d ___, No. W2014-01151-COA-R3-CV, 2015 WL 867452 (Tenn. Ct. App. Feb. 25, 2015), perm. app. denied (Tenn. June 11, 2015). As the court observed: It is well-settled in Tennessee that " 'the common law imposes a duty of good faith in the performance of contracts.' " ***Dick Broad. Co. v. Oak Ridge FM, Inc.***, 395 S.W.3d 653, 660 (Tenn. 2013) (quoting ***Wallace v. Nat'l Bank of Commerce***, 938 S.W.2d 684, 686 (Tenn. 1996)). The duty of good faith, however, does not extend beyond the terms of the contract and the reasonable expectations of the parties under the contract. ***Wallace***, 938 S.W.2d at 687. The obligation of good faith and fair dealing does not create additional contractual rights or obligations, and it cannot be used to avoid or alter the terms of an agreement. ***Lamar Advet. Co. v. By–Pass Partners***, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009). The purpose of the implied duty is "(1) to honor the reasonable expectations of the contracting parties

and (2) to protect the rights of the parties to receive the benefits of the agreement into which they entered." *Id.* (citations omitted).

The duty of good faith is not specifically defined by our courts. As explained in the Tennessee Practice Series:

> The term "good faith" resists an exact definition ... because it arises in various contexts and its meaning will vary accordingly. Indeed, "good faith" is "a term frequently defined in the negative," i.e., it represents the absence of bad faith. Another authority makes these helpful observations about the "good faith" concept:
>
> > [G]ood faith is an "excluder." It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogenous forms of bad faith. In a particular context the phrase takes on specific meaning, but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically ruled out.
>
> Notwithstanding this uncertainty over the exact nature of "good faith," parties are presumed to know the law and that the contract contains this implied duty.
>
> The implied covenant of good faith and fair dealing is not limited to the specific contract terms but is a method of effectuating the parties' intent in unforeseen circumstances. Further, a party may violate the covenant when it interprets the contract purposely in a way to prevent the other party from performing in a timely fashion or when a party conjures up a pretended dispute with its interpretation.

21 *Tenn. Prac. Contract Law & Practice* § 8:33 (2014) (footnotes and internal citations omitted).

Because Citi is the moving party on the motion for summary judgment, the court must first analyze whether it met its burden by showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* TENN.

R. CIV. P. 56.04. Regarding Plaintiffs' claim that Citi violated the implied duty of good faith and fair dealing, the thrust of the claim arises out of their allegations that Citi improperly handled Plaintiffs' request for a loan modification, proceeding with the scheduled foreclosure sale without communicating Citi's decision on their request. However, while Citi concedes for purposes of summary judgment that Plaintiffs provided Ms. Mitchell with the documents requested by Mr. Ortwerth, the record is devoid of evidence that Ms. Mitchell delivered those documents to Citi or otherwise communicated with Citi between the time of Mr. Ortwerth's request and the scheduled date and time of the sale. Thus, the "evidence is insufficient to establish an essential element of the nonmoving party's claim." ***Rye***, 2015 WL 6457768, at *22. Having submitted evidence demonstrating that Mr. Ortwerth was open to the timely receipt of the requested information from Plaintiffs, Citi met its burden under the summary judgment standard. Accordingly, the court now must consider whether Plaintiffs met their burden to establish a material factual dispute regarding this issue.

Once the moving party has met its burden, the burden of production shifts to the nonmoving party to show that a genuine issue of material fact exists. ***Byrd***, 847 S.W.2d at 215. The nonmoving party, here, Plaintiffs, may accomplish meeting their own burden by:

> (1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an

affidavit explaining the necessity for further discovery pursuant to TENN. R. CIV. P., Rule 56.06.

Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 84 (Tenn. 2008) (citations omitted).

The court begins with the actual language in the written contract between the parties, the Note and the DOT. In its motion for summary judgment, Citi argued that Appellants "failed to point to any specific contractual provision that had been breached," as the loan documents do not contain any representations regarding Plaintiffs' alleged right to a loan modification or even a loan modification consideration. A thorough review of the record indicates that Plaintiffs point to no specific provision in the Note and the DOT that Citi failed to perform in good faith.

Appellants were clearly obligated to pay the balance due on the Note, but the Note does not obligate Citi to grant a loan modification at some later date. The Note and the DOT do not include a modification provision that allows either party to unilaterally modify the terms of the loan. Because there is nothing in the parties' written contract that indicates that Citi had a duty to modify the loan on different terms than those agreed, it cannot be said that Citi failed to perform its duties under the written contract by allegedly failing to modify the debt. *See* ***Wallace***, 938 S.W.2d at 687 ("the duty ... does not extend beyond the agreed upon terms of the contract"). The court cannot impose the implied duty of good faith and fair dealing in such a way as to add new obligations. ***Barnes & Robinson Co. v. OneSource Facility Svcs., Inc.***, 195 S.W.3d 637, 643 (Tenn. Ct. App. 2006). Further, to hold that Citi's alleged

actions in failing to modify the loan were in violation of the duty of good faith and fair dealing implied in the written contract would "circumvent or alter the specific terms of the parties' agreement." ***Dick Broad. Co.***, 395 S.W.3d at 665; *see also* ***Solomon v. First Am. Nat'l Bank of Nashville***, 774 S.W.2d 935, 945 (Tenn. Ct. App. 1989) (noting that without an underlying breach of contract, a breach of good faith is not an "actionable" claim); ***Duke v. Browning-Ferris Indus. of Tenn., Inc.***, No. W2005–00146–COA–R3–CV, 2006 WL 1491547, at *9 (Tenn. Ct. App. May 31, 2006), perm. app. denied (Tenn. Nov. 13, 2006) (holding that a breach of the duty of good faith is merely an element of a claim for "recognized torts, or breaches of contracts"). Accordingly, summary judgment is appropriate with respect to Plaintiffs' claim that Citi violated the implied duty of good faith and fair dealing, as such duty may not create independent rights and obligations on the part of Citi that do not exist under the specific terms of the Note and DOT.

Plaintiffs argue, however, that despite the lack of modification terms in the parties' written agreement, they submitted considerable information to Citi through Ms. Mitchell in furtherance of their efforts to obtain a loan modification that would reduce their monthly payments and, perhaps, their loan balance. According to Plaintiffs' allegations, they got no clear response to their request for modification and, instead, their home was foreclosed upon without Citi communicating a decision to Plaintiffs. Again, however, Plaintiffs can point to no evidence in the record that

establishes that Ms. Mitchell provided the requested information to Citi in advance of the scheduled foreclosure sale.

The parties' discussions concerning a potential loan modification do not constitute either an oral modification of the contract or a new agreement upon which a breach of the duty of good faith could be found. As noted above, the Note excludes the possibility of an enforceable oral agreement that would modify the terms of the Note. Compare ***Cadence Bank, N.A.***, 2015 WL 867452, at *11 n. 8 (noting therein the lack of any provision in the note or other underlying agreements that prohibited the parties from entering into subsequent oral agreements). "The determination of whether a contract has been formed is a question of law." ***German v. Ford***, 300 S.W.3d 692, 701 (Tenn. Ct. App. 2009) (citations omitted). Taking the evidence in the light most favorable to the nonmoving party, summary judgment is appropriate. Without a contract, Plaintiffs cannot sustain a claim for breach of the implied duty of good faith and fair dealing.

Plaintiffs allege that Citi breached the covenant of good faith and fair dealing inherent in every contract "by encouraging the Plaintiffs to engage in a protracted loan modification process and invest substantial time, effort, and money in submitting documents and information over a considerable period." (Plaintiff's Second Amended Petition to Set Aside Foreclosure Sale and Complaint for Damages, ¶ 44). Additionally, Plaintiffs allege that this covenant was breached when Citi "forg[ed]

ahead with foreclosure proceedings while Plaintiff's loan modification request was pending." *Id.*

Here, as Plaintiffs have not raised a valid breach of contract claim, there is no cause of action for breach of implied covenant of good faith and fair dealing. Since Plaintiffs failed to properly state a breach of contract claim, Plaintiffs' claim for breach of the implied duty of good faith and fair dealing claim must fail.

V. Violation of TENN. CODE ANN. § 35-5-107

Plaintiffs allege that Citi is liable under TENN. CODE ANN. § 35-5-107 for its failure to inform them of the new dates of the foreclosure sales. TENN. CODE ANN. § 35-5-101(f)(3) sets forth the requirements for notification to a borrower of the postponement of a foreclosure sale and stipulates that:

> If the postponement or adjournment is for more than thirty (30) days, notice of the new date, time, and location must be mailed no less than (10) calendar days prior to the sale date via regular mail to the debtor and co-debtor...

Citi has satisfied its burden of production by affirmatively negating the essential element of the Plaintiffs' claim – lack of compliance by Citi with the statutory notice requirements of TENN. CODE ANN. § 35-5-101. Following notice of the foreclosure sale (MF 17-18), the foreclosure sale scheduled for May 27, 2014 was postponed by Citi at Plaintiffs' request to June 24, 2014, a postponement of less than thirty (30) days. MF 22-24. Citi was not required to provide notice of the first postponement pursuant to TENN. CODE ANN. § 35-5-101(f)(3), but did so regardless. MF 24.

On June 24, 2014, the foreclosure sale was again postponed to July 29, 2014, a postponement of more than thirty (30) days. MF 25. Citi satisfied the statutory requirement in that instance by providing notice to Plaintiffs through a letter dated June 25, 2014. MF 26. Plaintiffs' evidence (such as it is) at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial. Taking the facts in a light most favorable to Plaintiffs, Plaintiffs' claim against Citi under TENN. CODE ANN. § 35-5-107 for failure to inform Plaintiffs of the new dates of the foreclosure sales lacks merit and must fail.

VI. Truth-In-Lending Act Violation

Plaintiffs assert a claim under the Truth In Lending Act, 15 U.S.C. §§ 1601, *et seq.* ("TILA"). Taking the facts in a light most favorable to Plaintiffs, CitiFinancial Mortgage Corporation gave notice of the change in *servicing* of Plaintiffs' mortgage account to Plaintiffs on or about June 11, 2008. MF 6. Plaintiffs contend that correspondence failed to provide notice of change of ownership of the mortgage account to Citi. Plaintiffs assert that Citi violated TILA and Regulation Z, 12 C.F.R. § 226.39 by failing to notify Plaintiffs of the change in ownership of their mortgage. Plaintiffs' PFFCL at pp. 5-6, ¶ 5. Citi responds that 15 U.S.C. § 1640(e) requires Plaintiffs' claim to have been brought within one year of the occurrence of the violation, arguing that the statute began to run no later than November 1, 2008. Citi PFFCL at p. 4, ¶ 4.

15 U.S.C. § 1640(a) provides that:

> any creditor who fails to comply with any requirement under this chapter ... including any requirement under ... subsection (f) or (g) of section 131 [15 U.S.C. § 1641] ... with respect to any person is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure; (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction; ... or (2)(A)(iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000.

15 U.S.C. § 1640(a).

"On its face, the statute provides that if a creditor violates the § 1640(g) notice requirement as to a mortgage loan, it is liable to the consumer in the amount equal to the sum of the consumer's actual damages ... and statutory damages of double the finance charge, subject to lower and upper limits of $400 and $4000." *See* ***Brown v. CitiMortgage, Inc.***, 817 F.Supp.2d 1328, 1330–31 (S.D. Ala. 2011). The "right of a TILA plaintiff to recover statutory damages, irrespective of the presence or absence of actual damages, is firmly entrenched in the case law." *Id.*; *see also, e.g.,* ***Purtle v. Eldridge Auto Sales***, 91 F.3d 797, 800 (6th Cir. 1996) ("The purpose of the statutory recovery is to encourage lawsuits by individual consumers as a means of enforcing creditor compliance with the Act.... A plaintiff in a TILA case need not prove that he or she suffered actual monetary damages in order to recover the statutory damages and attorney's fees." (internal citations omitted)).

Citi has failed to affirmatively negate an essential element of Plaintiffs' TILA claim. 15 U.S.C. § 1641(g), the statutory parallel to Regulation Z, states that:

> In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including—(A) the identity, address, telephone number of the new creditor; (B) the date of transfer; (C) how to reach an agent or party having authority to act on behalf of the new creditor; (D) the location of the place where transfer of ownership of the debt is recorded; and (E) any other relevant information regarding the new creditor.

15 U.S.C. § 1641(g). Citi has failed to demonstrate that it gave notice to Plaintiffs of the transfer or assignment of their loan to Citi. Citi assumes that the July 11, 2008 notice of transfer of servicing rights equates to a notice of transfer of the assignment of the debt as well for purposes of 15 U.S.C. § 1641(g). This does not follow. A necessary inference need not be drawn from the fact that notice is given of transfer of servicing rights, that the ownership of the loan also has been assigned or transferred. Taking the facts in a light most favorable to Plaintiffs, the court finds that there is a genuine issue of material fact requiring trial on the issue of violation of the TILA and denies Citi's motion for summary judgment on the TILA issue.

VII. Misrepresentation Claims

Plaintiffs base their misrepresentation claim on the allegation that "their representative, [Chris Mitchell], had been assured by Mr. Ortwerth on July 22, 2014 that the sale scheduled for July 29, 2014 would not go forward but would be rescheduled pending the loan modification decision." *See* Plaintiffs PFFCL at p. 5, ¶ 4. Citi responds that Plaintiffs' misrepresentation claim is deficient because Tennessee

law requires that the false statement consist of statements of [present] or past fact. Citi PFFCL at p. 4, ¶ 5. The alleged misrepresentation, Citi contends, relates to postponement of a pending foreclosure sale – a statement of a future event. *Id.* Plaintiffs respond that "the alleged false statement ... is based upon pertains to a present event and is not speculative or conjectur[al]." Plaintiffs' PFFCL at p. 5, ¶ 4.

In ***Hodge v. Craig***, 382 S.W.3d 325, 342-43 (Tenn. 2012), the Tennessee Supreme Court explained that the terms "intentional misrepresentation," "fraudulent misrepresentation," and "fraud" all refer to the same tort, and expressed its preference for the term "intentional misrepresentation." A claim for intentional misrepresentation is comprised of six elements:

> 1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damage as a result of the misrepresentation.

Town of Crossville Housing Authority v. Murphy, 465 S.W.3d 574, 582 (Tenn. Ct. App. 2014); *see* ***Walker v. Sunrise Pontiac–GMC Truck, Inc.***, 249 S.W.3d 301, 311 (Tenn. 2008). Tennessee courts require that the false information consist of statements of material past or present fact, rendering statements of future intent inactionable. ***McElroy v. Boise Cascade Corp.***, 682 S.W.2d 127, 130 (Tenn. Ct. App. 1982).

Plaintiffs assert alternatively that Citi is liable for negligent misrepresentation. "[T]o succeed on a claim for negligent misrepresentation, a plaintiff must establish 'that the defendant supplied information to the plaintiff; the information was false; the defendant did not exercise reasonable care in obtaining or communicating the information and the plaintiffs justifiably relied on the information.'" ***Walker***, 249 S.W.3d at 311 (quoting ***Williams v. Berube & Assocs.***, 26 S.W.3d 640, 645 (Tenn. Ct. App. 2000)). "Tennessee has adopted Section 552 of the Restatement (Second) of Torts 'as the guiding principle in negligent misrepresentation actions against ... professionals and business persons.'" ***Robinson v. Omer***, 952 S.W.2d 423, 427 (Tenn. 1997) (quoting ***Bethlehem Steel Corp. v. Ernst & Whinney***, 822 S.W.2d 592, 595 (Tenn. 1991)). The Restatement (Second) provides as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977).

Citi has both affirmatively negated an essential element of Plaintiffs' misrepresentation claims and demonstrated that Plaintiffs' evidence at the summary judgment stage is insufficient to establish Plaintiffs' claims for intentional and negligent misrepresentation. Citi contends that there is no evidence in the record that Citi made a false or negligent representation that it would not proceed with a

foreclosure sale of Plaintiffs' home while Plaintiffs' application for a loan modification was pending. These are essential elements of Plaintiffs' misrepresentation claims. Without them, Plaintiffs' evidence at the summary judgment stage is insufficient to establish their misrepresentation claims. Citi having satisfied its initial burden of production, Plaintiffs must demonstrate the existence of specific facts in the record at the summary judgment stage that could lead a rational trier of fact to find in favor of Plaintiffs on their misrepresentation claims. This Plaintiffs fail to do.

Taking the facts in the light most favorable to Plaintiffs, the crucial events occurred between the postponement of the foreclosure sale that had been scheduled for June 24, 2014 and the foreclosure sale that went forward on July 29, 2014. *See* MF 25-34. Ms. Mitchell inquired of Mr. Ortwerth by e-mail on the evening of July 21 if additional information was needed from Plaintiffs regarding the application for loan modification. MF 28. Mr. Ortwerth responded by e-mail early the next morning that additional information was needed, and specified in detail what his underwriter had requested. MF 29. Mr. Ortwerth stated "I need this information as soon as possible and will follow up to confirm receipt or check progress by 07/29/14" and provided various ways in which Ms. Mitchell could communicate with him, including telephone, fax and e-mail. *Id.*

Mr. Ortwerth's e-mail to Ms. Mitchell does not contain any representation or information that was false regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 30. Ms. Mitchell informed Plaintiffs concerning the specific

information requested by Citi and told Plaintiffs that the sale had been postponed again. MF 31. While Ms. Mitchell may have advised Plaintiffs that the sale had been postponed, the evidence in the record at the summary judgment stage does not support Plaintiffs' contention that Citi, through Mr. Ortwerth or otherwise, communicated any such promise to Ms. Mitchell. *Id. See also* MF 29, 31, n. 8.

Having been confronted with Citi's evidence that the Plaintiffs' evidence at the summary judgment stage is insufficient to support Plaintiffs' claim, to survive summary judgment, Plaintiffs "may not rest upon the mere allegations or denials of [their] pleading," but are required to respond, and by affidavits or one of the other means provided in TENN. R. CIV. P. 56, "set forth specific facts" at the summary judgment stage "showing that there is a genuine issue for trial." TENN. R. CIV. P. 56.04, 56.06. The Affidavit of Brenda Jackson does not set forth specific facts demonstrating that a false representation was made by Citi or that false information was supplied by Citi regarding postponement or cancellation of the July 29, 2014 foreclosure sale. MF 32.

Even taking the facts in a light most favorable to Plaintiffs, Plaintiffs have failed to demonstrate the existence of specific facts in the record that could lead a rational trier of fact to find in favor of Plaintiffs on an essential element of their intentional or negligent misrepresentation claims. Plaintiffs' intentional and negligent misrepresentation claims fail.

VIII. Validity of Notice of the Foreclosure Sale

A defendant asserting an affirmative defense shifts the burden of production by alleging undisputed facts that show the existence of the affirmative defense. ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d at 702. Citi's Answer and Counterclaim asserted as an affirmative defense that it and its agents administered all foreclosure proceedings in conformity with all applicable state and federal laws. Answer and Counterclaim at p. 5, ¶ 3.

Pursuant to TENN. CODE ANN. § 35-5-101(a), "[i]n 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 orders or process, advertisement of the sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made." The first publication must occur at least twenty days prior to the sale. TENN. CODE ANN. § 35-5-101(b). Additionally, a trustee's failure to comply with statutory requirements does not render the foreclosure sale void or even voidable. ***CitiFinancial Mortgage Co., Inc. v. Beasley***, No. W2006-00386-COA-R3-CV, 2007 WL 77289, at *6 (Tenn. Ct. App. Jan.11, 2007) (citing TENN. CODE ANN. § 35-5-106; ***Doty v. Fed. Land Bank of Louisville***, 169 Tenn. 496, 89 S.W.2d 337 (Tenn. 1936); ***Williams v. Williams***, 25 Tenn.App. 290, 156 S.W.2d 363, 369 (Tenn. Ct. App. 1941)).

Citi has presented undisputed evidence that it satisfied the advertisement requirements within TENN. CODE ANN. § 35-5-101(a) by advertising the sale three

times on May 1, 2014, May 8, 2014, and May 15, 2014 in the *Memphis Daily News*, with the first publication more than twenty days before the original advertised sale date of May 27, 2014 and twenty days before the actual sale date of July 29, 2014. MF 18. Plaintiffs produce no evidence disputing the material facts. Considering the record as a whole, Citi is entitled to summary judgment as to its compliance with Tennessee law regarding the validity of notice of the foreclosure sale.

IX. Validity of the Foreclosure Sale Pursuant to the Terms of the DOT.

A defendant asserting an affirmative defense shifts the burden of production by alleging undisputed facts that show the existence of the affirmative defense. Citi's Answer and Counterclaim asserted as an affirmative defense that all proper notice requirements were provided to Plaintiffs in conformity with the terms of the Note, the DOT, and all applicable state and federal laws. Answer and Counterclaim at p. 5, ¶ 4.

A counter-plaintiff, such as Citi, which files a motion for summary judgment for an element of its claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the counter-plaintiff to summary judgment as a matter of law. ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d at 702.

Under Tennessee law, a foreclosure sale may be set aside where the trustee fails to comply with the notice requirements of the deed of trust. The Tennessee Supreme Court long ago held that

> When, by the terms of the deed, the trustee is required before making sale to give notice to the bargainor of the time and place of sale, the giving of such notice is in the nature of a condition precedent, and, if not complied with, the sale is unauthorized and void and will communicate no title to the purchaser. And if the requirement be that personal notice shall be given, the trustee cannot substitute notice by advertisement in a newspaper, or at some public place or places, because not within the scope of his authority and also because such a departure on the part of the trustee might be made to defeat the very object of the requirement by enabling him to sell the property without the knowledge of the party making the deed.

Henderson v. Galloway, 27 Tenn. 692, 695-96 (Tenn. 1848). In the instant case, DOT provides that "prior to acceleration," the lender shall send notice to the borrower which specifies:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than thirty days from the date of the notice by which the default must be cured; and (d) that failure to cure the default may result in acceleration of the sums secured by the security instrument and sale of the property.

Paragraph 22 also sets out that the notice shall inform the borrower of the "right to reinstate after acceleration and the right to bring a court action to assert the non-existence of default or any other defense to acceleration and sale." Additionally, DOT Paragraph 15 stipulates that all notices given by the borrower or lender in connection with the DOT must be in writing and are deemed to have been given to the borrower when mailed by the lender. DOT Paragraph 24 provides that the Lender may remove the Trustee and appoint a successor, or Substitute Trustee. Citi appointed Brock & Scott as Substitute Trustee pursuant to the terms of DOT Paragraph 24. MF 16.

Citi sent Plaintiffs a notice dated December 10, 2010 after they defaulted on their mortgage payments and prior to acceleration with all of the required information. MF 11. This letter was in compliance with DOT Paragraph 22, which provides that, prior to acceleration, the lender shall send a notice to the borrower specifying (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default may result in acceleration of the sums secured by the DOT and sale of the Property. MF 11. On or about April 29, 2014, the Substitute Trustee, Brock & Scott, published a notice of sale and mailed notices to Plaintiffs properly notifying them of the foreclosure and published a notice of sale. MF 17, 18.

Citi has presented undisputed evidence that it satisfied the contractual terms of the DOT. Plaintiffs produced no evidence disputing the material facts. Considering the record as a whole, Citi is entitled to summary judgment as to the validity of the foreclosure sale as per the terms of the DOT.

X. Title to and Possession of the Property

A counter-plaintiff, such as Citi, which files a motion for summary judgment for an element of its claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the counter-plaintiff to summary judgment as a matter of law. ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d at 702.

Prima facie evidence is that which, standing alone and uncontradicted, is sufficient to establish a fact, and, if not rebutted, remains sufficient for that purpose. ***Macon Cnty. v. Dixon,*** 100 S.W.2d 5, 20 Tenn App. 425 (1936). Pursuant to TENN. CODE ANN. § 24-5-101, a trustee's deed is *prima facie* evidence of its recitals. ***Williams v. Williams***, 25 Tenn.App. 290, 156 S.W.2d 363 (1941).

TENN. CODE ANN. § 24-5-101 provides:

> All instruments of conveyance executed in official capacity by any public officer of this state or by any person occupying a position of trust or acting in a fiduciary relation shall be admitted, held, and construed by the courts as prima facie evidence of the facts in such instruments recited, insofar as such facts relate to the execution of the power of such office or trust. All such instruments now of record shall be admitted, held, and construed in accordance with this section.

DOT Paragraph 22 provides that if the Property is sold, the Trustee shall deliver a deed to the purchaser conveying title, and that "[t]he recitals in the Trustee's Deed shall be *prima facie* evidence of the truth of the statements made therein." DOT Paragraph 22 further provides that if the Property is sold at foreclosure, the borrower shall immediately surrender possession.

The Substitute Trustee's Deed is *prima facie* evidence of Citi's title to and superior right of possession of the Property. MF 35. By signing the DOT, Plaintiffs agreed that the recitals in the Substitute Trustee's Deed are *prima facie* evidence of the truth of the statements contained within, and they agreed to immediately surrender possession to the purchaser at the sale. Citi is entitled to title to and possession of the Property.

Citi has presented undisputed evidence that it is the owner of the Property and that Plaintiffs are contractually bound to immediately surrender possession of the Property. Considering the record as a whole, Citi is entitled to summary judgment as to its ownership of the Property and its entitlement to immediate possession of the Property.

XI. Attorney's Fees

A counter-plaintiff, such as Citi, which files a motion for summary judgment for an element of its claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the counter-plaintiff to summary judgment as a matter of law. ***Brown v. Mapco Exp., Inc.***, 393 S.W.3d at 702.

DOT Paragraph 14 of the DOT states that:

> Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorney's fees . . .

Plaintiffs have instituted this litigation to set aside a proper and valid foreclosure sale. Plaintiffs agreed when signing the DOT, that Citi would be entitled to charge its attorney's fees to Plaintiffs. Therefore, Citi is awarded its reasonable attorney's fees and costs.

Citi has presented undisputed evidence that it is entitled to an award of its attorney's fees. Considering the record as a whole, Citi is entitled to summary judgment as to its entitlement to attorney's fees. Citi is directed to submit proof of its

entitlement to an award of reasonable attorney's fees in conformity to Tenn. Sup. Ct. Rule 8, Chap. 1, Rule 1.5 and relate Tennessee law within fifteen (15) days of the entry of this order. Plaintiffs shall have fifteen (15) days of the filing of Citi's proof to file rebuttal proof. The court retains the option to set the application for hearing.

CONCLUSION

The court **GRANTS** Citi's motion for summary judgment on Plaintiffs' claims for breach of contract; for promissory estoppel; for breach of covenant of good faith and fair dealing; for violation of TENN. CODE ANN. § 35-5-107; for intentional and negligent misrepresentation; regarding the validity of the foreclosure sale; and regarding Citi's title to and right of possession of the Property. The court **DENIES** Citi's motion for summary judgment for violation of the Truth-In-Lending Act.

IT IS SO ORDERED.

This the 5th day of January, 2016.

James R. Newsom III

JAMES R. NEWSOM III
CHANCELLOR

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, United States Mail, First Class Postage Prepaid to:

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Webb A. Brewer, Esq.
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this 5th day of January 2016.

Deputy Clerk