The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am currently Of Counsel with the law firm of Owings, Wilson & Coleman, 900 South Gay Street, Suite 800, Knoxville, Tennessee 37902.

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

Licensed to Practice: 1979

BPR # 006711

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.

States Licensed In:

Tennessee – October 6, 1979 – Active

Court Admissions:

Tennessee Supreme Court – 1979

United States Supreme Court – 1995

United States Court of Appeals for the Sixth Circuit – 1981

United States District Court, Eastern District of Tennessee – 1980

United States District Court, Eastern District of Virginia, *pro hac vice*, 1998

United States District Court, Middle District of Tennessee, *pro hac vice*, 2021

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).

Practice of Law:
United States Attorney for the Eastern District of Tennessee – Nov. 2017 – Feb. 2021
Partner, Robertson Overbey – April 1982 – Nov. 2017
Associate, Fowler & Robertson – Oct. 1979 – April 1982
Public Service:
Senate Member, Tennessee General Assembly – Nov. 2008 – Nov. 2017
House Member, Tennessee General Assembly – Nov. 2000 – Nov. 2008
Commission Member, Blount County Board of Commissioners – Sept. 1982 – Aug. 1990
Other:
Adjunct Faculty, University of Tennessee College of Law – Aug. 2013 – Dec. 2013
Advisory Board Member, SunTrust Bank, East Tennessee – 2001 – 2017

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

Not Applicable.

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

In April of this year, I returned to my former law firm, Owings, Wilson & Coleman (formerly, Robertson Overbey) in an Of Counsel role. In this role, I consult with the firm's partners and associates on an "as needed" basis and assist with their representation of clients across a wide range of activities, including the clients I represented before going to the U.S. Attorney's Office. Since April, I have been engaged in consulting with various local governmental agencies, including municipalities, utility districts, and school boards, and representing an out-of-state client in federal court proceedings in the Middle District of Tennessee. Prior to being named U.S. Attorney, my legal practice focused on commercial litigation, municipal law, healthcare law, and general corporate practice. Due to my serving in the Tennessee General Assembly, I limited my trial work because of the time commitments during the legislative session. Prior to that, most of my work was in corporate and commercial litigation, including antitrust litigation. A fair approximation of the major areas of my legal practice and their relative percentages before my time as U.S. Attorney would be: municipal law, 35%; healthcare law, 30%; corporate law 20%; and commercial and antitrust litigation, 15%.

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.

During my 42-years in the practice of law, I have primarily represented corporate, commercial, and business clients. This representation has generally been in civil litigation but has also included representing clients in federal grand jury investigations, particularly in connection with antitrust laws. I have also been engaged in public finance and the defense of medical malpractice cases. I have also served as general counsel to a continuing care retirement community and City Attorney for the City of Alcoa. Most recently, I served as the United States Attorney for the Eastern District of Tennessee.

During the early years of my private practice, I was heavily involved in litigation. Most of the litigation was in the civil area of business, corporate, and commercial litigation, including antitrust litigation arising under Sections 1 and 2 of the Sherman Act. An outgrowth of my antitrust practice was the representation of clients under investigation by federal grand juries for

alleged price fixing conspiracies. The representation of clients in antitrust grand jury proceedings led to representing clients in other types of federal investigations, including those brought by the Department of Defense, Department of Housing and Urban Development, and the Department of Justice.

When it was formed in 1982, our firm represented an automobile manufacturer regarding warranty claims. From the early 1980s to the late 1990s, I represented the manufacturer defending alleged breach of warranty claims in courts throughout East Tennessee. Our firm was later retained by a Knoxville automobile dealership for representation in connection with its litigation and other legal needs.

In the mid-1980s, the major provider of medical malpractice insurance in our state asked me to serve on its panel of approved defense counsel. I represented various healthcare providers in professional negligence cases until about 2000, when I entered the General Assembly, and another member of the firm assumed this area of our firm's practice.

While litigation has consistently been a part of my law practice, I developed an office practice as well. In 1984, our senior partner suffered a heart attack, and during his recovery, I took on the legal work for his major client, a continuing care retirement community, that was beginning to expand. After our senior partner unfortunately passed away in 1993, I continued to represent this client, serving as its general counsel. This work led further to representation of other healthcare providers, including the representation of physician practice groups and representation of a large medical center in Knoxville during its acquisition of two community hospitals.

Beginning in the mid-1990s, I also began to work with one of my partners in public finance, eventually gaining sufficient experience to be included in the Red Book of approved bond counsel.

In 2005, I became City Attorney for the City of Alcoa, Tennessee. This involved all aspects of the City's operations. Being City Attorney is akin to serving as general counsel for a company with over 400 employees and a budget of $150 million.

After being elected to the Tennessee General Assembly in 2000, I spent less time in court but remained actively engaged in our firm's litigation practice, particularly business litigation and cases involving antitrust and shareholders' rights.

In 2017, I was nominated by the President of the United States as United States Attorney for the Eastern District of Tennessee and subsequently confirmed by the United States Senate. On November 21, 2017, I was sworn in as U.S. Attorney by the Honorable Thomas A. Varlan, Chief Judge for the Eastern District of Tennessee. In this position, I served as the chief federal law enforcement officer of the Eastern District of Tennessee and supervised a team of approximately 60 attorneys and a like number of support staff.

I believe the broad range of legal experience noted above, as well as my public service and work ethic, have a direct correlation to my selection and confirmation as U.S. Attorney. After 42 years in practice, my energy level remains high and my work ethic strong, and I carry an AV

Preeminent rating from Martindale-Hubble.

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

I would submit the following cases as being of note in that they reflect expansions of law, unique circumstances, or closely watched cases involving issues of local interest, with one case leading to an appellate decision that is often cited as the leading authority regarding the doctrine of piercing the corporate veil. These cases also cover the range of my legal practice from the early 80s to date and listed are from latest to earliest.

Blount County Board of Education and Blount County, Tennessee v. City of Maryville, Tennessee, and the City of Alcoa, Tennessee
Supreme Court of Tennessee
574 S.W. 3d 849
Justices Holly Kirby, Jeffrey S. Bivins, Cornelia A. Clark, Sharon G. Lee, and Roger A. Page
Tennessee Court of Appeals
2017 TN Lexis 831
Judges Thomas R. Frierson, II, D. Michael Swiney, and Richard H. Dinkins
Chancery Court for Blount County, Tennessee
Civil Action No. 2014-453
Chancellor Telford E. Forgety, Jr.
(2014 – 2019)

We served as counsel in this litigation for two municipalities who were sued by the county and the county board of education in a declaratory judgment action seeking the trial court's determination of the rights and obligations of the parties relative to the proper distribution of certain liquor-by-the-drink tax revenues as prescribed by Tenn. Code Ann. Sec. 57-4-306(a)(2)(A). The Chancellor found in favor of the municipalities, affirming tax revenues had been properly divided and distributed since 1992 and dismissed the complaint. The Chancellor's decision was upheld by the Court of Appeals and the Tennessee Supreme Court. Until assuming the position of U.S. Attorney in November 2017, I was engaged in the representation of the two municipalities, including the preparation and filing of the Brief of the Defendants-Appellees in the Court of Appeals. (A copy of this brief is included in the writing samples attached to this Application.)

Flexsys America, L.P, *et al.* v. Process Engineering Associates, LLC, *et al.*
United States District Court, Eastern District of Tennessee
Civil Action No. 3:16-CV-31
U.S. District Judge Harry S. Mattice, Jr.
(2016 – 2017)

We were counsel in this litigation for two of the defendants, a chemical engineering company and its wholly owned, international subsidiary. The plaintiff asserted allegations of misappropriation of trade secrets under state law and threatened misappropriation under federal law. The answer filed on behalf of our clients, in addition to denying the allegations of the

complaint, asserted defenses under the Tennessee Uniform Trade Secrets Act, Tenn. Code Ann. §47-25-1701, the Defend Trade Secrets Act of 2015, 18 U.S.C.A. §1836 (b)(3)(D), and Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§1 and 2. The litigation was discovery intensive involving the production of over ten thousand pages of documents and the taking of depositions in various parts of the country. The litigation required the retention and preparation of experts in a highly technical field and considerable in-depth research into various legal and technical issues. Following intense discovery and negotiations, the litigation was resolved to the mutual satisfaction of the parties.

Efferson v. Efferson, *et al.*
Seventh Judicial District for the State of Tennessee, Chancery Division
Civil Action No. 06 CH 6503
Chancellor William Everett Lantrip
(2006 – 2009)

We represented the plaintiff in this action, who was a former director and officer of a closely held corporation and had been ousted from office by the vote of his two brothers. The case raised issues of corporate action, the rights of a minority shareholder, potential dissolution of the corporation, and the appropriate valuation method for stock of a minority shareholder. The matter was resolved to the mutual satisfaction of the parties after the first two days of an anticipated week-long trial.

Innovative Concept Group, Inc. v. Food Sales East Tennessee, Inc., *et al.*
United States District Court, Eastern District of Tennessee
Civil Action No. 3:03-cv-549
Judge Thomas W. Phillips
(2003 – 2007)

Our firm represented the plaintiff in this private antitrust action brought pursuant to Sections 4 & 16 of the Clayton Act, 15 U.S.C. Secs. 15 & 26. In short, it was the plaintiff's theory that the defendants had engaged in actionable conduct by hiring the employees of the plaintiff *en mass*, causing the plaintiff to lose its customer base and allowing the defendants to monopolize the relevant geographic market for the products involved. There were few, if any, reported decisions involving this theory of recovery. Following extensive discovery and motions practice, the case was referred for mediation. The litigation was resolved through mediation to the mutual satisfaction of the parties. (A copy of plaintiff's amended memorandum of law in support of its response in opposition to defendants' motions for summary judgment is included in the writing samples attached to this Application.)

James Killingsworth, et ux. v. Ted Russell Ford, Inc.
Supreme Court of Tennessee
205 S.W. 3d 406 (Tenn. 2006)
Justices Cornelia A. Clark, William M. Barker, Janice M. Holder, Gary R. Wade, E. Riley Anderson
104 S.W.3d 530 (Tenn. Ct. App. 2002)
Judges Charles D. Susano, Houston M. Goddard, D. Michael Swiney

(2000 – 2006)

This was a case brought under the Tennessee Consumer Protection Act for alleged failure to disclose prior damage to an automobile purchased by the plaintiffs. I represented the automobile dealer. The jury found for the plaintiffs and awarded $2,500 in damages but found the dealer did not act knowingly or willfully and refused to grant punitive or treble damages. The trial court awarded the plaintiffs' attorney fees of $500. Plaintiffs appealed the award of attorney fees but did not ask for attorney fees on appeal. The plaintiffs appealed and the Court of Appeals sent the case back to the trial court on the issue of attorney fees. The trial court on remand awarded attorney fees of $2,000 for the trial and $4,500 for the appeal. Both parties then appealed, and the Court of Appeals reversed the award of attorney fees of $4,500 on the first appeal, agreeing with the dealership that attorney fees should not have been awarded for the first appeal but increasing the award of attorney fees for trial to $6,500. The Supreme Court affirmed the judgment of the Court of Appeals, ruling that attorney fees could be awarded during appeal of a consumer protection act case but the plaintiffs in the instant case had failed to request timely an award of attorney fees in their appellate pleadings.

The State of Tennessee, ex rel. The City Attorney for the City of Alcoa, Tennessee v. Jack Johnson Young *et al.*
Circuit Court for Blount County, Tennessee
Civil Action No. L-14888
Circuit Judge D. Kelly Thomas, Jr.
(2005 – 2006)

This was action brought in my capacity as City Attorney for the City of Alcoa, Tennessee, to abate an alleged public nuisance consisting of a residence to which there was an inordinate number of police calls. The City had not previously pursued public nuisance remedies for the type of conduct in question. After the initial hearing, the City was granted a temporary injunction, the court finding that the residence had for several years been and continued to be a public nuisance within the purview of the state's nuisance statute. The matter was eventually resolved.

Oceanics Schools, Inc. v. Barbour, 112 S.W.3d 135 (Tenn. Ct. App. 2003), *perm. app. den.*
Judges Charles D. Susano, Jr., Houston M. Goddard, Herschel P. Franks
(1999 – 2003)

This is a case in which we represented a client who sought to pierce the corporate veil to enforce a judgment in the amount of $929,815.55, originally obtained by the client in the District Court of Ponta Delgada, Azores, Portugal, and later domesticated in Knox County, Tennessee, against the corporate judgment-debtor's sole shareholder. The trial court found in favor of our client and pierced the corporate veil. In an opinion written by Judge Charles D. Susano, the Court of Appeals affirmed. I believe this opinion remains the leading authority in this state regarding actions to pierce the corporate veil.

Yadon v. East Tennessee Motor Company
Tennessee Court of Appeals, Eastern Section
1988 Tenn. App. LEXIS 183
Judges Clifford E. Sanders, Houston M. Goddard, Herschel P. Franks
(1984 – 1988)

Between 1984 and 1988, we represented an automobile manufacturer in a series of cases where plaintiffs sought revocation of acceptance based on breach of warranty under the Uniform Commercial Code. In each case, we raised the defense of lack of privity, arguing that absent a buyer-seller relationship a purchaser is not entitled to revoke acceptance against a manufacturer. There was not a reported appellate decision on point in Tennessee. In Parks v. Ford Motor Company, Civil Action No. 80324, decided June 20, 1984, Reed v. Ford Motor Company, Civil Action No. 76621, decided April 30, 1985, and Yadon v. East Tennessee Motor Company, Civil Action No. 89537, decided April 6, 1987, different Chancellors of the Chancery Court for Knox County concluded that revocation of acceptance was not among the remedies freed of the privity requirement by *Tennessee Code Annotated,* §29-34-104. The Courts found that revocation of acceptance under *Tennessee Code Annotated,* §47-2-608 was a proper remedy as against the seller of goods but that the manufacturer could not be reached on this theory of liability. The Yadon case was appealed to the Court of Appeals, Eastern Section, and the Court affirmed the trial court's ruling that revocation of acceptance is applicable only against a seller of goods and not a manufacturer who was not the purchaser's immediate seller.

Threadgill v. Threadgill, 740 S.W. 2d 419 (Tenn. Ct. App. 1987), *perm. app. den.*
Judges Sam Lewis, Clifford E. Sanders, E. Riley Anderson
(1985 – 1987)

This is a case in which we represented a plaintiff seeking to recover an arrearage of alimony against her ex-husband. The ex-husband counterclaimed, seeking modifications of the orders relating to alimony, child support, and custody of the parties' minor children. The Court of Appeals agreed with our position that the trial court erred in granting the defendant a retroactive reduction of alimony. The Court held that the statutory factors applicable in the initial granting of support must be taken into consideration in determining whether there has been a change of circumstances requiring a modification in the level of support.

McGann v. United Safari, Inc., 694 S.W. 2d 332 (Tenn. Ct. App. 1985), *perm. app. den.*
Judges William Frank Crawford, Charles Nearn, Hewett Pegues Tomlin, Jr.
(1982 – 1985)

In this matter, we represented at trial and on appeal the original franchisor of a campground franchising business. Our client was one of two defendants in the proceeding. The co-defendant purchased the franchising business from my client. The plaintiff, an assignee of the original franchisee, sued our client, the original franchisor, and the current franchisor for breach of the franchise agreement. The co-defendant filed a counterclaim against the plaintiff and a cross-action against our client. The issues in the case included waiver of contractual conditions, breach of contract, and contractual provisions for liquidated damages. The trial court dismissed the plaintiff's claim against both defendants for breach of contract, the co-defendant's counterclaim

against the plaintiff, and the co-defendant's cross action against our client. On appeal, the trial court's dismissal of the original action and cross action against our client was affirmed.

A.G. Rogers v. Merck & Co., Inc.
498 F. Supp. 5 (E.D. Tenn. 1980), *aff'd per curiam*
Judge Robert L. Taylor
(1979 – 1981)

In this case, we represented the defendant in an antitrust action. The trial court directed a verdict in our client's favor and the plaintiff appealed. I was the principal author of the appellate brief and argued the case before the Sixth Circuit. The District Court held, and the Sixth Circuit affirmed, that proof of complaints to a manufacturer by a dealer's competitors is not sufficient to establish a conspiracy under Section 1 of the Sherman Act.

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.

Although I have not served as mediator or arbitrator, I have been appointed as Special Master by courts of record on two occasions:

In January 2009, I was appointed by Knox County Chancellor Daryl R. Fansler as Special Master to hear a dispute between a bank and its customers following a foreclosure of real property. This matter was resolved following the initial meeting with counsel for the parties.

In July 2008, I was appointed by Blount County Chancellor Telford E. Forgety as Special Master to hear a dispute between a physician and the physician's former group. The matter was resolved prior to the time of the scheduled hearing.

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

I have served as an attorney-in-fact and/or executor for my parents, grandparents, and other relatives. The experience, while important to my family, has been unremarkable other than to make me even more sensitive to what clients go through in dealing with similar situations.

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

There are three areas of legal experience I would like to bring to the Council's attention for consideration. First is my experience as U.S. Attorney. In this position, I served as the chief federal law enforcement officer for the district and was responsible for investigation and prosecution of all violations of federal law, civil defense of matters in which the U.S. was a defendant, and affirmative civil enforcement actions brought in the name of the U.S. government. Serving in this position was similar to being the managing partner of a large law firm, consisting of approximately 60 lawyers and 60 support staff located in three offices across the Eastern District of Tennessee. The task of organizing and managing the U.S Attorney's Office was accomplished through a management committee of about fifteen persons and a senior management team of five persons. I mention this as I believe this work provides an excellent background and experience for service on the Supreme Court, first in terms of setting direction for the work of the judiciary, including establishing priorities and making decisions, and second in terms of providing administrative oversight.

The second area I would bring to the Council's attention is my appointment by two Chief Justices of the State Supreme Court to serve as a member of the Court's Advisory Commission on the Rules of Practice and Procedure, the body that makes recommendations to the Court for revisions to the rules of civil and criminal procedure, the rules of evidence, the juvenile court rules, and the rules of appellate procedure, and my appointment as a Commissioner of the Uniform Law Commission by the Tennessee Lt. Governor/Speaker of the Senate. I believe my appointment to these bodies was in a recognition of my knowledge and experience in the realm of the rules of evidence and procedure and statutory construction and my ability to work collegiately with others toward a shared goal of conveying meaning through model statutes and the rules of procedure and evidence.

The third area I would bring to the Council's attention is my service from 2009 to 2017 as Vice Chairman of the Tennessee Senate Judiciary Committee. Generally, more legislation is referred to the Judiciary Committee than any other legislative committee. The legislation runs the gamut from civil to criminal issues, from juvenile to family law matters, from Second Amendment rights to protecting our elderly and those with disabilities. Since much of the Court's work is statutory construction, I believe my seventeen years of legislative experience, including eight years as a member of the Senate Judiciary Committee, provide an important background in interpreting and construing legislative enactments.

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.

In 1998 I applied to the Tennessee Judicial Selection Commission for consideration for nomination to the Tennessee Supreme Court. I believe the Commission met on February 25, 1998. My name was not submitted to the Governor.

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.

University of Tennessee College of Law, Knoxville, Tennessee; J.D., June 1979, class rank: 1st; Order of the Coif; Graduate of the Year, Roosevelt Inn, Phi Delta Phi; American Jurisprudence Awards in Contracts, Conflicts of Law, and Criminal Law; Dean's Advisory Council, Moot Court Board; Phi Delta Phi

Carson-Newman College, Jefferson City, Tennessee; B.A., *magna cum laude*, May 1976; Who's Who in American Colleges and Universities; President, Student Government Association; Varsity Debate Team; Alpha Chi; Blue Key Honor Society; National Alumni Association President (1984); Board of Advisors (1984 to 1993); Board of Regents (2021 to date); Distinguished Alumnus Award (2013)

Université d'Aix-en-Provence, Summer 1975
No degree (Summer Study of French)

PERSONAL INFORMATION

15. State your age and date of birth.

66 Years of Age; date of birth: [redacted] 1954.

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

I have lived in the State of Tennessee my entire life, except for the Summer Study in Aix-en-Provence, France, in 1975, and while an intern for U.S. Congressman James H. Quillen from January through August 1974.

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

I have lived in Blount County, Tennessee, for 43 years.

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

Blount County, Tennessee

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

Not Applicable.

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

No.

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

No.

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

None.

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.

In Re: Marriage of James Douglas Overbey and Jane Elizabeth (Gilbert) Overbey
Fourth Circuit Court for Knox County, Tennessee; Civil Action No. 62537
Marital Dissolution Agreement and Final Judgment of Divorce Entered August 16, 1993

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.

Carson-Newman University Board of Regents (2021 to date);

American Museum of Science & Energy Foundation (2021 to date);

University of Tennessee, Knoxville, Chancellor's Associates (2019 to date);

East Tennessee Foundation, Member, Board of Directors (2017);

East Tennessee Public Broadcast System, Member, Board of Directors (2017);

Presbyterian Homes of Tennessee, Inc., Member, Board of Directors (2001 to 2007; 2009 to 2017); President (2005 to 2006)

Kiwanis Club of Maryville, Member (1981 to 2019); President (1994 to 1995)

A Secret Safe Place of Newborns of Tennessee, Inc., Member, Board of Directors (2001 to 2017); Co-Founder (2001)

Tennessee Intercollegiate State Legislature Governor's Council (2013 to 2017)

St. Andrew's Episcopal Church (early 1980s to date)

Edisto Island Open Land Trust (2012 (est.) to date)

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.

American Bar Association (1979 (est.) – 2018)
Tennessee Bar Association (1979 (est.) – Present)
Knoxville Bar Association (1979 (est.) – Present)
Knoxville Bar Foundation (2019 – Present)
Blount County Bar Association (1979 (est.) – 2018)
AV Preeminent Rating from Martindale -Hubbell (2001 – Present)
National Conference of Commissioners on Uniform State Laws (also called the Uniform Law Commission) (2017)
Tennessee State Senate Judiciary Committee (2009 – 2017)
Tennessee Supreme Court's Advisory Commission on the Rules of Practice and Procedure (2014 – 2017)
Joint Ad-hoc Tennessee Blue Ribbon Task Force on Juvenile Justice (2017)
Council of State Governments Legal Task Force (2015 – 2017)
U.S. Supreme Court Historical Society (2017 – 2018)
Tennessee Juvenile Justice Realignment Task Force (2016)
Hamilton-Burnett American Inn of Court (2014 – Present; inactive since 2016 (est.))
Tennessee Bar Association House of Delegates (1998 – 2001)

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.

2017 Presidential Award, Tennessee Judicial Conference
2013 President's Award, Tennessee Bar Association
2012 "Top Lawyers in Tennessee," *The National Law Journal*
2009 "Law and Liberty Award," Knoxville Bar Association
2006 Certificate of Appreciation, Tennessee Supreme Court
2010 – 2017 "Top Attorney Award in Antitrust," *Cityview* magazine
2001 – Present AV Preeminent Rating, Martindale-Hubble

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

Not Applicable.

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.

CLE Seminars:

2021 Legislative Update, East Tennessee Lawyers' Association for Women, Aug. 18, 2021

2021 Legislative Update, Knoxville Bar Association, July 8, 2021

"Well-Being Template – Managing Partner Roundtable," Knoxville Bar Association 2019 Wellness Conference, Sept. 13, 2019

"One Lawyer's Journey in Public Service: A Funny Thing Happened on the Way to the Forum (Building)," Knoxville Bar Association, Aug. 27, 2019

"Separation of Powers: Framework for Freedom," Knoxville Bar Association's Law Day Program, May 3, 2018

2017 Legislative Update, Blount County Bar Association, Aug. 2, 2017

2017 Legislative Update, East Tennessee Lawyers' Association for Women, July 19, 2017

2017 Legislative Update, Tennessee Bar Association, 2017 TBA Convention, June 16, 2017

2017 Legislative Update, Knoxville Bar Association, June 8, 2017

2016 Legislative Update, Blount County Bar Association, Aug. 3, 2016

2016 Legislative Update, East Tennessee Lawyers' Association for Women, July 20, 2016

2016 Legislative Update, Tennessee Bar Association, 2016 TBA Convention, June 17, 2016

2016 Legislative Update, Sevier County Bar Association, June 16, 2016

2016 Legislative Update, Knoxville Bar Association, June 9, 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.

Blount County, Tennessee, Board of Commissioners, District 5 – Elected August 1982; re-elected August 1986; term ended September 1990.

Appointed to U.S. Highway 321 Commission by Governor Lamar Alexander, 1987.

Tennessee State Representative, 20th District – August 1994 – second of six candidates in the Republican primary.

Tennessee State Representative, 20th District – Elected November 2000; re-elected November 2002, November 2004, and November 2006; term ended November 2008.

City Attorney, City of Alcoa, TN, appointed by Alcoa Board of City Commissioners, January 2005; appointment continued until appointed U.S. Attorney in 2017.

Tennessee State Senator, 8th District, renumbered in 2012 as the 2nd District – Elected November 2008, re-elected November 2012 and November 2016; resigned in November 2017 to become U.S. Attorney for the Eastern District of Tennessee.

In 2014, I applied to the Tennessee Supreme Court for appointment to the position of Tennessee Attorney General and Reporter.

In 1998, I applied to the Tennessee Judicial Selection Commission for consideration for nomination to the Tennessee Supreme Court.

In 1990, I applied and was one of five finalists for the position of U.S. Magistrate Judge for the Eastern District of Tennessee.

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.

Attached to this application are three writing examples that reflect my personal work; they are as follows:

Brief of Defendants-Appellees in the Court of Appeals for the Eastern Division of Tennessee, at Knoxville, in *Blount County Board of Education and Blount County, Tennessee v. City of Maryville, Tennessee, and the City of Alcoa, Tennessee*, No. E2017-00047-COA-R#-CV.

Plaintiff's Amended Memorandum of Law in Support of Its Response in Opposition to Defendants' Motions for Summary Judgment, in the United States District Court for the Eastern District of Tennessee, Knoxville Division, in *Innovative Concept Group, Inc. v. Food Sales East Tennessee, Inc., et al.,* Civil Action No. 3:03-cv-549.

Keynote speech entitled, "Road to the Right Path," delivered in 2018 at the Third Annual "Garden to Gavel" event in support of the Blount County Youth Court.

The brief and memorandum of law noted above were written collaboratively with other members of our law firm involved in the litigation. They are, nonetheless, reflective of my personal effort in the research, writing, formulation of the issues and outline of the written product, and, as the partner responsible for the case, final editorial approval before filing.

ESSAYS/PERSONAL STATEMENTS

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

I am committed to the law and public service; it would be a great honor to serve as a member of the judiciary. Serving on the Court would allow me to use my education and legal experience to further my commitment to the rule of law, and I believe my life experiences have brought me to this point of continued public service as a member of the Court. The breadth of my practice would assist me in considering matters before the Court. My legislative experience, working with colleagues on both sides of the aisle, will serve me well in working with colleagues on the Bench. My experience as U.S. Attorney, likewise, commends itself to service on the Supreme Court in the performance of its supervisory role. Serving on the Court combines my passion for the law and public service, my respect for the role of the judiciary, and my commitment to the rule of law, and I am prepared to serve.

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)***

As senior partner at Robertson Overbey, I helped to foster an environment that supported pro bono service. Attorneys were encouraged to treat pro bono work on par with billable service. In 2011, the Pro Bono Project awarded Robertson Overbey its Law Firm of the Year Award for service to those in need. I also participated in the Knoxville Bar Association's Mentor for the Moment program.

From 2001 to 2017, I provided legislative updates to the Tennessee Bar Association, the Knoxville Bar Association, the Tennessee Judicial Conference, the East Tennessee Lawyers' Association for Women, the Blount County Bar Association, and the Sevier County Bar Association, among other groups.

As Chancellor of the Episcopal Diocese of East Tennessee for ten years, I served as legal counsel to the Bishop and the Diocese. The resources of our law firm, including my time, were made available to parishes, missions, and other organizations of the Diocese without compensation.

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

I am seeking to serve as a Justice on the Tennessee Supreme Court. According to Article VI of the Tennessee Constitution, the Court is composed of five justices, has only appellate the jurisdiction, and holds court in Knoxville, Nashville, and Jackson. The Court has the inherent power and responsibility to answer questions certified by the federal courts. Through the SCALES project, the Court has sat and heard oral arguments in high schools across the state.

The Court recently lost a valued and respected member, and the addition of a new member will undoubtedly impact the Court. Nonetheless, if nominated, selected, and confirmed, I pledge to work collegiately with and learn from my colleagues on the Court, with each of whom I am acquainted and respect. I believe my background and experience in the legislative branch, the executive branch, and private law practice will complement the backgrounds and experience of those currently on the Bench.

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)***

During my professional career, I have been involved in numerous community service and civic organizations. Upon becoming U.S. Attorney, I was required to step down from various civic and legal activities per Department of Justice policy to minimize potential conflicts of interest, including serving as a Commissioner on the Uniform Codes Commission. Since leaving the U.S Attorney's Office, I have been asked to serve as a member of the board for the American Museum of Science and Energy Foundation and a member of the Board of Regents for my *alma mater,* Carson-Newman University. I would welcome the opportunity to again serve on the Uniform Codes Commission and other community activities, provided such service will be in accordance with Rule 10 of the Code of Judicial Conduct and particularly Canon 3 which provides that a judge must minimize the risk that the judge's personal and extrajudicial activities will conflict with the obligations of the judicial office.

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)***

My interest in serving on the Court comes from my vocation as a lawyer and avocation of public service. I would bring to the Court a background of service in the state legislative branch and the federal executive branch, which has provided a firsthand appreciation for the different functions of each branch of government and the concept of federalism. During my time in state legislature service, I was an advocate for an independent judiciary as an equal branch of government.

I would ask the Council to consider my reputation for collegiality, fairness, and as a person who reflects on what is being said and is mindful of the words used to convey a response. I agree with

these words of U.S. Supreme Chief Justice John Roberts, from his Senate confirmation hearing:

"Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat."

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

Yes, I will uphold the law despite any personal disagreement with the substance of the law. As a former member of the Tennessee General Assembly, I have an appreciation for the role of each branch of government: the legislature enacts the laws, the executive carries out the law, the judiciary applies the law.

The judiciary is not called on to replace the judgment of the legislative branch with its own judgment. Quoting further from Chief Justice Roberts at his Senate confirmation hearing, "Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."

When I was a House member, Judge Houston Goddard wrote me a letter enclosing an opinion he had written for the Court of Appeals. His letter said he followed the law even though he disagreed with the law and thought the outcome of the case was not fair. He requested that I file a bill to amend the law. I admired Judge Goddard for many reasons, not the least of which was his commitment to the rule of law and that he followed the law even though he disagreed with it. He also took it a step further and contact his elected representative requesting the law be changed.

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. The Honorable Charles E. Atchley, Jr. United States District Judge Chattanooga, TN 37402 Ph: Email:
B. Stephanie D. Coleman, Esq. Owings, Wilson & Coleman Knoxville, TN 37902 Ph: Email:
C. Dennis R. McClane, Esq. Woolf, McClane, Bright, Allen & Carpenter Knoxville, TN 37902 Ph: Email:
D. Ms. Trudy M. Hughes Executive Director Arrowmont School of Arts and Crafts Gatlinburg, TN 37738 Ph: Email:
E. Mr. Jim Henry Kingston, TN 37763 Ph: Email:

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 Supreme Court 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: November 16, 2021.

Signature

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

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

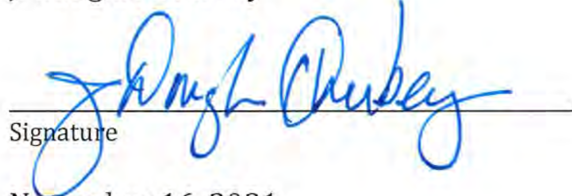
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

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

WAIVER OF CONFIDENTIALITY

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

J. Douglas Overbey



Signature

November 16, 2021

BPR# 006711

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

The Governor's Council for Judicial Appointments

State of Tennessee

Application of J. Douglas Overbey for Nomination to the Tennessee Supreme Court

APPENDIX

QUESTON 34 -- WRITING SAMPLES

1. Brief of Defendants-Appellees in the Court of Appeals for the Eastern Division of Tennessee, at Knoxville, in *Blount County Board of Education and Blount County, Tennessee v. City of Maryville, Tennessee, and the City of Alcoa, Tennessee,* Docket No. E2017-00047-COA-R#-CV..**1**

2. Plaintiff's Amended Memorandum of Law in Support of Its Response in Opposition to Defendants' Motions for Summary Judgment, in the United States District Court for the Eastern District of Tennessee, Knoxville Division, in *Innovative Concept Group, Inc. v. Food Sales East Tennessee, Inc., et al.,* Civil Action No. 3:03-cv-549..................................**30**

3. Keynote speech entitled, "Road to the Right Path," delivered in 2018 at the Third Annual "Garden to Gavel" event in support of the Blount County Youth Court..........................**93**

IN THE COURT OF APPEALS FOR THE EASTERN DIVISION OF TENNESSEE
AT KNOXVILLE

BLOUNT COUNTY BOARD OF EDUCATION, and BLOUNT COUNTY, TENNESSEE Plaintiffs-Appellants,	)	
v.	)	NO. E2017-00047-COA-R3-CV
CITY OF MARYVILLE, TENNESSEE and CITY OF ALCOA, TENNESSEE Defendants-Appellees.	)	On appeal from the Chancery Court for Blount County, Tennessee

---

BRIEF OF DEFENDANTS-APPELLEES

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STATEMENT OF ISSUES

I. THE TRIAL COURT CORRECTLY RULED THAT THE CITIES OF MARYVILLE AND ALCOA ARE ENTITLED TO RETAIN ALL OF THE LIQUOR-BY-THE-DRINK TAX REVENUES DISTRIBUTED DIRECTLY TO EACH OF THEM BY THE STATE OF TENNESSEE IN ACCORDANCE WITH TENN. CODE ANN. § 57-4-306 (2013).

II. THE TRIAL COURT CORRECTLY RULED THAT BLOUNT COUNTY IS REQUIRED TO SPLIT THE LIQUOR-BY-THE-DRINK TAX REVENUES DISTRIBUTED TO IT BY THE STATE OF TENNESSEE WITH THE CITIES OF MARYVILLE AND ALCOA IN ACCORDANCE WITH TENN. CODE ANN. § 57-4-306 (2013).

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STATEMENT OF THE CASE

On May 23, 2014, the Blount County Board of Education ("BCBE") filed a Complaint for Declaratory Judgment in the Chancery Court for Blount County, Tennessee, against the City of Maryville ("COM") and the City of Alcoa ("COA") (collectively, the "Appellees"), seeking the trial court's determination of the rights and obligations of these respective parties relative to the distribution of certain State of Tennessee Liquor-by-the-Drink ("LBTD") tax revenues ("LBTD Revenues"), as prescribed by Tenn. Code Ann. § 57-4-306 (a)(2)(A) (the "Primary Claim"). (Technical Record "TR" Vol. I, pp. 1-6).

COM filed its Answer on August 29, 2014, (TR Vol. I, p. 7), and COA filed its Answer on August 29, 2014. (TR Vol. I, p. 16).

On November 4, 2014, BCBE filed a Motion to amend its Complaint to add Blount County, Tennessee ("BC"), as a party Plaintiff. (TR Vol. I, p. 22). On November 18, 2014, the Appellees filed their responses to BCBE's Motion to Amend Complaint and a joint Tenn. R. Civ. P. 12.02 Motion to Dismiss. (TR Vol. I, pp. 24, 30). Thereafter, BCBE filed an Amended Motion to Amend Complaint on December 29, 2014. (TR Vol. I, p. 86). BCBE's Amended Motion to Amend Complaint was granted by the trial court, the Appellees' Motion to Dismiss was denied, and an Order was entered memorializing these rulings on June 25, 2015 (TR Vol. II, p. 149). BCBE and BC (collectively, the "Appellants") filed their Amended Complaint on June 30, 2015. (TR Vol. III, p. 191).

On June 26, 2015, the Appellees filed a Motion for Summary Judgment asking the Court to deny the Appellants' Primary Claim (TR Vol. II, p. 167), and filed Answers to the Amended Complaint on July 16, 2015. (TR Vol. III, p. 200).

STANDARD OF REVIEW

The construction of a statute and application of the law to the facts is a question of law. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997) (citing *Beare Co. v. Tenn. Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)).

Where the operative facts are not in dispute, the issue before the Court of Appeals becomes a question of law for its determination. *Hamblen Cty. Educ. Ass'n v. Hamblen Cty. Bd. of Educ.*, 892 S.W.2d 428, 431 (Tenn. Ct. App. 1994) (citing *Tenn. Farmers Mut. Ins. Co. v. Am. Mut. Liab. Ins. Co.*, 840 S.W.2d 933, 936 (Tenn. Ct. App. 1992)).

A question of law is reviewed by the Court of Appeals under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower court. *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

On August 26, 2015, the Appellants filed a second Motion to Amend Complaint seeking leave to add an alternative claim for relief. (TR Vol. III, p. 213).

By Order entered November 12, 2015, the Appellants' second Motion to Amend Complaint was granted, and they were allowed to add their alternative claim for relief against the Appellees seeking reimbursement for LBTD Revenues received by the Appellees from the Blount County Trustee from 1992 until 2014 in the amount of $270,572.75 as to COM and $90,602.12 as to COA (the "Alternative Claim").

The Appellants filed a Motion for Partial Summary Judgment on the issue raised in the original Amended Complaint on October 1, 2015. (TR Vol. III, p. 244).

The Appellees' Motion for Summary Judgment and Appellants' Motion for Partial Summary Judgment were then heard by the trial court on December 2, 2015. (TR Vol. V, pp. 402-504).

By Order entered December 22, 2015 (the "December 22, 2015, Judgment"), the Appellees were granted summary judgment in their favor as to all claims then brought by the Appellants in the action, and the Appellants' Motion for Partial Summary Judgment was denied. (TR Vol. IV, p. 380).

On January 19, 2016, the Appellants filed a motion to alter or amend the December 22, 2015, Judgment, contending, among other things, that the Alternative Claim was not properly before the trial court at the time it heard the Appellees' original Motion for Summary Judgment on December 2, 2015. (TR Vol. IV, p. 389).

On June 21, 2016, the trial court granted the Appellants' motion to alter or amend the December 22, 2015, Judgment and the trial court's Order was amended to dismiss only the Appellants' Primary Claim and not their Alternative Claim. (TR Vol. VI, p. 505).

The Appellees filed a Motion for Summary Judgment on the Appellants' Alternative Claim on June 29, 2016. (TR Vol. VI, p. 508). The Appellants filed a cross Motion for Summary Judgment on their Alternative Claim on August 5, 2016. (TR Vol. VI, p. 515).

The Motion and cross Motion for Summary Judgment on the Appellants' Alternative Claim were argued on December 7, 2016, and the Court entered an Order on December 22, 2016, granting the Appellees' Motion for Summary Judgment, denying the Appellants' cross Motion for Summary Judgment, and dismissing the Complaint (the "December 22, 2016, Judgment"). (TR Vol. VI, p. 527).

The Appellants filed their appeal on January 6, 2017. (TR Vol. VI, p. 545).

STATEMENT OF FACTS

The Appellees offer the following Statement of Facts relative to the issues raised in this appeal. As noted by the Appellants, the trial court twice found that the material facts of this case are undisputed.

1. Since 1913 for COM and 1919 for COA, and at all times relevant hereto, the Appellees, as municipalities, have operated city school systems for students from kindergarten through twelfth grade. (TR Vol. II, pp. 174, 179; TR Vol. III., pp. 192-93).

2. The voters of COM approved a referendum authorizing the sale of LBTD within the corporate limits of Maryville in November 1996. (TR Vol. II, p. 179).

3. The voters of COA approved a referendum authorizing the sale of LBTD within the corporate limits of Alcoa on November 2, 2004. (TR Vol. II, p. 174).

4. The State of Tennessee Commissioner of Revenue (the "Commissioner") has distributed to COM and COA one-half of the fifteen (15%) percent LBTD Revenues on LBTD sales occurring within the corporate limits of the Appellees. (TR Vol. I, p. 91-92).

5. The Appellees have kept the entire one-half share of the LBTD Revenues distributed to them by the Commissioner; neither has shared any of these proceeds with BC or BCBE. *Id.*

6. BC voters have not approved any referendum authorizing the sale of LBTD within its jurisdictional boundaries. (TR Vol. II, pp. 174, 179).

7. There is no record of any certified election results from the BC Election Commission indicating that BC voters have passed a referendum authorizing liquor-by-the-drink for consumption on the premises. (TR Vol. II, p. 184).

8. Students residing in the city limits of COM attend schools in the Maryville City School System operated by COM. (TR Vol. II, p. 179).

9. Students residing in the city limits of COA attend schools in the Alcoa City School System operated by COA. (TR Vol. II, p. 174).

10. The Appellees utilize the services of independent auditors who perform audits each year for them. (TR Vol. II, pp. 174, 179).

11. The Tennessee Comptroller of the Treasury reviews these audits and accepts each year's audits as part of the State's records. (TR Vol. II, pp. 174, 179).

12. There has never been a finding, recommendation, deficiency, or even suggestion by the independent auditors or the Tennessee Comptroller of the Treasury that the Appellees have not distributed their respective LBTD Revenues in accordance with Tenn. Code Ann. § 57-4-306(a). (TR Vol. II, pp. 175, 180).

13. The Appellees have acted in good faith and with the belief they were and are acting in accordance with Tennessee law including, specifically, Tenn. Code Ann. § 57-4-306. (TR Vol. II, pp. 175, 180).

14. In addition to relying on the opinions of independent auditors and the Tennessee Comptroller of the Treasury, the Appellees have relied upon the actions of the Commissioner in distributing the LBTD Revenues to COA since 1980 and to COM since 1997, as being in accordance with the law. (TR Vol. II, pp. 175, 180).

15. It was not until 2014, in the months shortly before the initiation of this lawsuit, that the Appellees first received notice that the BCBE had concerns about their receipt of LBTD Revenues. (TR Vol. II, pp. 173, 178-79).

16. Scott Graves is the duly elected and acting Trustee for BC and has held office since September 1, 2000. (TR Vol. III, p. 264).

17. From November 1992 through August 2014, all LBTD Revenues received by BC from the State of Tennessee, less the Trustee's commission allowed by applicable law, have been divided and distributed among BC, COM, and COA in the same manner as the county property tax for schools is distributed based upon the average daily attendance ("ADA") and pursuant to T.C.A. § 57-4-306(a)(2)(A). (TR Vol. III, p. 265).

18. From the LBTD Revenues distributed to BC by the State of Tennessee from November 1992 through August 2014, the BC Trustee's Office paid to COM the total sum of $270,572.75, and paid to COA the total sum of $90,602.12. Neither COM nor COA has remitted to BC any of the monies paid to them as set forth in this paragraph. (TR Vol. III, p. 265).

19. BC has never received any distributions or payments from COM or COA for LBTD Revenues distributed by the State of Tennessee directly to COM or COA. (TR Vol. III, p. 266).

LEGAL ARGUMENT

INTRODUCTION

This case involves the proper distribution of LBTD Revenues for education, pursuant to Tenn. Code Ann. § 57-4-306(a)(2)(A).[1] The trial court correctly held that both the Appellees and BC have been receiving the amounts they are due under this statute for more than 20 years. The trial court also rightly held that, pursuant to Tenn. Code Ann. § 57-4-306(a)(2)(A), BC was required to share its LBTD Revenues with the Appellees. The Appellees disagree with the Appellants that this case must be decided solely by this Court's interpretation of Tenn. Code Ann. § 57-4-306. Rather, while this Court can decide this case by reviewing the language of the statute on its face, an additional and proper basis for the Appellees' position can readily be observed by reading this statute in *pari materia* with Tenn. Code Ann. § 49-3-315(a).

This appeal comes before the Court on two Motions for Summary Judgment, both of which were ruled on in favor of the Appellees. The trial court, through careful examination of the language of the statute, its legislative history, and earlier opinions of the Tennessee Attorney General, correctly interpreted the meaning of Tenn. Code Ann. § 57-4-306(a)(2)(A) and found that (i) the Appellees are entitled to retain all of the LBTD Revenues distributed to them by the Commissioner without being required to remit a portion of these revenues to the Appellants based on ADA and (ii) the Appellees are also entitled to retain those LBTD Revenues they received from the BC Trustee from 1992 to 2014.

While the interpretation of Tenn. Code Ann. § 57-4-306(a)(2)(A) is a matter of first impression for this Court, our Supreme Court has previously interpreted the disputed language here (which is also found verbatim in Tenn. Code Ann. §67-6-712) in *Harriman v. Roane Cty.*,

1 All references to Tenn. Code Ann. § 57-4-306 are to Tenn. Code Ann. 57-4-306 (2013), the version of the statute then in effect at the institution of this action.

553 S.W.2d 904 (Tenn. 1977). As the Appellants have also represented, there are three other cases pending before this Court – *Bradley County School System. v. Cleveland*, No. E2016-01030-R3-CV; *Sullivan County v. Bristol*, No. E2016-02109-R3-CV; and *Washington County School System v. Johnson City*, No. E2016-02583-R9-CV. Similarly, as Appellants have done for the respective counties in those cases, where relevant, the Appellees adopt the arguments of the respective municipalities as contained in their Briefs.

Rather than detailing distinct instances of trial court error, the Appellants have elected to attack the merits of the Appellees' original Motions for Summary Judgment. Therefore, for purposes of this response, the Appellees will respond to the issues raised in the Appellants' brief in similar order and fashion.

I. THE TRIAL COURT CORRECTLY RULED THAT THE CITIES OF MARYVILLE AND ALCOA ARE ENTITLED TO RETAIN ALL OF THE LIQUOR-BY-THE-DRINK TAX REVENUES DISTRIBUTED DIRECTLY TO EACH OF THEM BY THE STATE OF TENNESSEE IN ACCORDANCE WITH TENN. CODE ANN. § 57-4-306.

In accordance with the well-settled rules of statutory construction, the chancellor below found Tenn. Code Ann. § 57-4-306(a)(2)(A) to be ambiguous and ultimately agreed with the Appellees' interpretation of the language. The Appellants erroneously argue this Court should interpret Tenn. Code Ann. § 57-4-306(a)(2)(A) in a manner that is contrary to the plain meaning of the statute, the well-settled rules of statutory construction and interpretation, and legal precedent. The lower court's ruling should be upheld.

The parties argued below that the statute is clear and unambiguous in meaning while disagreeing as to its proper construction (as also stated by the Appellants). The trial court nevertheless declared the statute ambiguous and found in favor of the Appellees' interpretation. (TR Vol. IV, p. 385). As will be shown, whether the statute is ultimately declared clear or

ambiguous, the chancellor's construction of the statute is correct, and the Appellees are entitled to the LBTD Revenues which are the subject of this appeal.

A. Tenn. Code Ann. §57-4-306(a).

The version of Tenn. Code Ann. § 57-4-306(a)[2] at issue here states the following:

> (a) All gross receipt taxes collected under § 57-4-301(c) shall be distributed by the commissioner as follows:
>
> (1) Fifty percent (50%) to the general fund to be earmarked for education purposes; and
>
> (2) Fifty percent (50%) to the local political subdivision as follows:
>
> (A) One half (½) of the proceeds shall be expended and distributed in the same manner as the county property tax for schools is expended and distributed; provided, however, that except in counties having a population of not less than twenty-seven thousand nine hundred (27,900) nor more than twenty-seven thousand nine hundred twenty (27,920), according to the 1980 federal census or any subsequent federal census, any proceeds expended and distributed to municipalities which do not operate their own school systems separate from the county are required to remit one half (½) of their proceeds of the gross receipts liquor-by-the-drink tax to the county school fund; and
>
> (B) The other one half (½) shall be distributed as follows:
>
> (i) Collections of gross receipts collected in unincorporated areas, to the county general fund; and
>
> (ii) Collection of gross receipts in incorporated cities and towns, to the city of town wherein such tax is collected.

Tenn. Code Ann. § 57-4-306(a).

B. Rules of Statutory Construction.

Our courts are guided by the familiar and well-settled rules of statutory construction. *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010). The court's role is to determine legislative intent and effectuate legislative purpose. *Id.* at 526; *In re Estate of Tanner*, 295 S.W.3d

2 The trial court determined that Tenn. Code Ann. § 57-4-306, subsection (a)(2)(B) is not in question (TR Vol. IV, p. 382); however, it is cited here since the Appellants also reference it on appeal.

610, 613 (Tenn. 2009). The text of the statute is of primary importance, and the words must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose. *See Lee Med., Inc.*, 312 S.W.3d at 526; *Hayes v. Gibson Cty.*, 288 S.W.3d 334, 337 (Tenn. 2009); *Waldschmidt v. Reassure Am. Life Ins. Co.*, 271 S.W.3d 173, 176 (Tenn. 2008).

When the language of the statute is clear and unambiguous, courts look no farther to ascertain its meaning. *See Lee Med., Inc.*, 312 S.W.3d at 527; *Green v. Green*, 293 S.W.3d 493, 507 (Tenn. 2009). Ambiguity exists in a statute "where [the] language ... is susceptible of more than one reasonable interpretation...." *State v. Powers*, 101 S.W.3d 383, 393 (Tenn. 2003) (citing *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001) (citing *Carter v. State*, 952 S.W.2d 417, 419 (Tenn. 1997))).

As the trial court stated, "If a statute is ambiguous, reference may be made to the broad statutory scheme, legislative history or other sources." (TR Vol. IV, p. 383 (citing *In re Estate of Davis*, 308 S.W. 3d 832, 837 (Tenn. 2010))). Additionally, the trial court declared, "In trying to ascertain legislative intent, the Courts may apply the rule of '*expressio (or inclusio) unius est exclusio alterius*', which holds that the inclusion by the legislature of one thing in a statute means the exclusion of other things." (TR Vol. IV, p. 383 (citing *Rich v. Tenn. Bd. Med. Exam'rs*, 350 S.W. 3d 919, 927 (Tenn. 2011); *Harman v. Univ. of Tenn.*, 353 S.W. 3d 734, 738-39 (Tenn. 2011))). Finally, the trial court correctly acknowledged opinions of the Tennessee Attorney General may provide guidance (TR Vol. IV, p. 383 (citing *Scott v. Ashland Healthcare Ctr.*, 49 S.W. 3d 281, 287 (Tenn. 2001) and *Ferrell v. Cigna Prop. & Cas. Ins. Co.*, 33 S.W. 3d 731, 738 (Tenn. 2000))), and construction of a statute by enforcement authorities "is entitled to great

weight." (TR Vol. IV, p. 383 (citing *Westate Oil Co. v. Featherstone*, 348 S.W. 2d 299, 301 (Tenn. 1961) and *Illinois Cent. R. Co. v. Memphis*, 110 S.W. 2d 352, 360 (Tenn. Ct. App. 1936))).

C. The Appellants' characterization of the Commissioner's duties is misplaced.

On appeal, the Appellants argue that the Commissioner ignored the provisions of Tenn. Code Ann. § 57-4-306(a)(2)(A) and his statutory obligations thereunder by distributing LBTD Revenues directly to the Appellees in the manner as prescribed by Tenn. Code Ann. § 57-4-306(a)(2)(B) (point of collection). The Appellants contend, Tenn. Code Ann. §57-4-306(a)(2)(A) required the Commissioner to either (1) distribute the LBTD Revenues to the Blount County Trustee first for further distributions to the Appellants and Appellees in amounts based on ADA or (2) distribute the LBTD Revenues directly to the Appellants and Appellees in amounts based on ADA.

The Appellants' argument contradicts the most logical interpretation of the Commissioner's duties under Tenn. Code Ann. § 57-4-306(a)(2), as handed down by the trial court, and results in an absurd reading of the statute. *See Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997) ("Courts must presume that the Legislature did not intend an absurdity.")

It is impossible to square the Appellants' argument with the wording of Tenn. Code Ann. §57-4-306(a)(2). Nowhere does the statute say the Commissioner himself must apply ADA to the LBTD Revenues before he distributes them either directly to the parties or a county trustee for further division. For Tenn. Code Ann. §57-4-306(a)(2) to operate in the manner the Appellants claim, the Legislature would have had to replace the words "local political subdivision" in Tenn. Code Ann. § 57-4-306(a)(2) with the words "county trustee," and insert the words "(average daily attendance)" after the phrase "[...]shall be expended and distributed in the same manner as the county property tax for schools is expended and distributed[...]" in Tenn. Code Ann. § 57-4-

306(a)(2)(A). This, of course, the Legislature did not do. Respectfully submitted, neither should this Court add to or take away from the statute as enacted by the Legislature. *See Green v. Johnson*, 249 S.W.3d 313, 318-19 (Tenn. 2008).

On the other hand, the chancellor's interpretation of the Commissioner's duties in this situation is the most logical and reasonable interpretation of the wording of the statute. According to the chancellor, Tenn. Code Ann. § 57-4-306(a) "is telling the Commissioner of Revenue what he or she must do." (TR Vol. VI, p. 534). The Commissioner "really has got only two things to do. So, 50 percent [goes to] the state general fund and 50 percent to a local political subdivision. Then the Commissioner of Revenue is done with it." *Id.* In short, the Commissioner did not "ignore" any provision of the statute by not distributing LBTD Revenues in accordance with ADA, because he had no obligation to do so under Tenn. Code Ann. § 57-4-306(a). Rather, as rightly recognized by the chancellor, the Commissioner's only job under the statute was to distribute the LBTD Revenues back to the local political subdivision.

D. <u>The trial court correctly analyzed the applicability of the entire language of Tenn. Code Ann. §57-4-306(a)(2)(A).</u>

The Appellants next argue that the proviso language at the end of Tenn. Code Ann. § 57-4-306(a)(2)(A) is inapplicable to this action because the Appellees have city schools; however, as found by the trial court, this particular language is germane. "[T]he context of the entire statute" must also be considered in interpreting a law. *Nat'l Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991). The relevant provision states the following:

> ...provided, however, that...any proceeds expended and distributed to municipalities which do not operate their own school systems separate from the county are required to remit one half (1/2) of their proceeds of the gross receipts liquor-by-the-drink tax to the county school fund.

Tenn. Code Ann. § 57-4-306(a)(2)(A).

This language provides further support for the Appellees' argument in section C of the brief above. On its face, this provision contemplates that the LBTD Revenues are "distributed to municipalities," not just a county trustee. If the "municipalities" do not operate city school systems, the municipalities must "remit" one-half of their proceeds to the county school fund. The General Assembly made it clear that the local share of LBTD Revenues, including those governed by subsection (a)(2)(A), which are collected in cities are "distributed to municipalities."

The trial court also correctly recognized the significance of this language. When coupled with the canon "expressio unius exclusio alterius" *see*, Henry R. Gibson, *Gibson's Suits in Chancery* § 2.31(15) (2016), the court determined that this statutory provision must mean, since the Appellees operate their own schools systems, the Legislature intended that they be excluded from the class of municipalities required to remit LBTD Revenues to a county. (TR Vol. IV, p. 385).

The trial court also relied upon the statute's legislative history, including legislative comments to the statute's 1982 amendment and opinions of the Tennessee Attorney General to bolster its findings and conclusions, specifically finding that, "[the legislative comments by Representative Davis and Senators Albright and Koella to the statute's 1982 amendment] make it clear that it was only cities without school systems that were required to remit LBTD [Revenues] to the county." (TR Vol. IV, pp. 385-86). The trial court further applied its crystal clear reasoning to this language and decided that, "If it is cities without school systems that are required to render LBTD [Revenues] to the county, it is logical to conclude that cities that do operate school systems do not have to do so." *Id.* at 386.

The trial court also rightly relied upon this language a second time in its December 22, 2016, Judgment and determined, "It's clear to me, that the [L]egislature knew there were going to be distributions both to counties and to cities." (TR Vol. VI, p. 536).

E. Tenn. Code Ann. § 1-3-104(c) does not help the Appellants.

The Appellants' reliance on Tenn. Code Ann. § 1-3-104(c) to aid in their appeal is likewise misguided. This provision states as follows: "Singular includes the plural and the plural the singular, ***except when the contrary intention is manifest.***" Tenn. Code Ann. § 1-3-104(c) (Bold emphasis added).

Contrary to the contention of the Appellants, the Commissioner's job was to return each tax dollar to the one and only "local political subdivision" from whence it came. Local political subdivision was singular in the statute and not intended to represent a group.

The only reported decision found on point to address Tenn. Code Ann. § 1-3-104(c), *Royal Jewelers Co. v. Hake*, 205 S.W.2d 963 (Tenn. 1947), is easily distinguishable. Our Supreme Court in *Royal Jewelers*, applied this provision against the Commissioner of the Department of Unemployment Security's attempts to tax three separate corporations owned by a single partnership when it was shown that the commissioner had disregarded the three corporate entities by previously taxing them as a single unit. *Id.* at 965. There is no evidence that the Commissioner treated the parties as one entity for the purposes of distributing LBTD Revenues – in fact, the Commissioner has done just the opposite with the LBTD Revenues over the last three decades without question until the filing of this action. As borne out by the Commissioner's longstanding conduct, it is clear that the entire share of LBTD Revenues under Tenn. Code Ann. § 57-4-306(a)(2)(A) and (B) is to be distributed by the Commissioner to one local political subdivision whether city or county.

F. The Appellants misunderstand how Tenn. Code Ann. § 57-4-306(a)(2)(A) applies differently to cities and counties.

The Appellants' argument that the Appellees' conduct here somehow evidences inconsistent legal positions clearly misunderstands the simple fact that, when applied properly, Tenn. Code Ann. § 57-4-306(a)(2)(A) results in a different outcome depending on whether the recipient local political subdivision is a city or a county.

As noted above, the phrase "local political subdivision" is singular, meaning that LBTD Revenues are distributed by the Commissioner to only one local political subdivision. This then leads to the application of the statutory mandate that "[o]ne half (1/2) of the proceeds shall be expended and distributed in the same manner as the county property tax for schools is expended and distributed..."

The key then to applying this mandate properly is to ask "how is the county property tax for schools expended and distributed?" The answer depends on *which* local political subdivision receives the money. When a *county* receives revenues from county property taxes for school purposes, the county expends and distributes that money by dividing it between the local education agencies ("LEAs") within the county's boundaries on a per pupil basis (*i.e.* ADA). In contrast, however, when a *city* with its own schools receives revenues from county property taxes for school purposes, it expends and distributes all of that money to the city's own LEA (*i.e.* no ADA).

From this analysis it follows that paragraph (a)(2) of Tenn. Code Ann. § 57-4-306 should be applied as follows:

If the point of collection is a county:

> (2) Fifty percent (50%) to the *county* as follows:
>
> (A) One half (1/2) of the proceeds shall be *divided by the county between all LEAs in the county on a per pupil basis for school purposes* in the same manner as the county property tax for schools is *divided by the county between all LEAs in the county on a per pupil basis for school purposes...*

If the point of collection is a city with its own schools:

> (2) Fifty percent (50%) to the *city* as follows:
> (A) One half (1/2) of the proceeds shall be *spent by the city on its LEA for school purposes* in the same manner as the county property tax for schools is *spent by the city on its LEA for school purposes* ...

As stated earlier, the language recognizes that the Commissioner will, at times, send LBTD Revenues to a municipality, because the phrase "local political subdivision" under Tenn. Code Ann. § 57-4-306(a)(2) must refer to the point of collection; otherwise, there would be no reason for the Commissioner to send any LBTD Revenues directly to a municipality, and the drafters of the statute could have used the word "county" instead of "local political subdivision."

G. The fact that Blount County has not passed a LBTD referendum is applicable to this appeal.

The Appellants argue that even though BC has never passed a LBTD referendum authorizing LBTD sales within its borders, Tenn. Code Ann. § 57-4-306(a) nevertheless applies to them. They base this argument on their interpretation of the word "jurisdiction" in Tenn. Code Ann. § 57-4-103(a)(1) which provides:

> This chapter shall be effective in any jurisdiction which authorizes the sale of alcoholic beverages for consumption on the premises in a referendum in the manner prescribed by § 57-3-106;

The Appellants' theory is that since the Appellees are located inside BC's boundaries and the Appellees have authorized LBTD sales by referenda then the word "jurisdiction" in Tenn. Code Ann. § 57-4-103(a)(1) must necessarily be interpreted to mean that LBTD has been authorized in the "jurisdiction" of BC and, in turn, Tenn. Code Ann. § 57-4-306(a) is applicable to BC.

It is undisputed that the jurisdiction of BC has never authorized LBTD. COM and COA may be within BC, but they are not BC. They are separate jurisdictions and BC has not passed a referendum.

II. THE TRIAL COURT CORRECTLY RULED THAT BLOUNT COUNTY IS REQUIRED TO SPLIT THE LIQUOR-BY-THE-DRINK TAX REVENUES DISTRIBUTED TO IT BY THE STATE OF TENNESSEE WITH THE CITIES OF MARYVILLE AND ALCOA IN ACCORDANCE WITH TENN. CODE ANN. § 57-4-306.

As to the second issue on appeal, the Appellants argue that, while Tenn. Code Ann. § 57-4-306(a)(2)(A) provides the manner by which the LBTD Revenues are to be divided, it does not permit the LBTD Revenues received by COM and COA to be treated in a different manner than those received by BC. The point of Appellants' argument here is that this manner of distribution ends in an unfair result to BC. This contention was correctly rejected by the chancellor, who answered the question, "How can this be fair, Judge that the [Appellees] get to keep all [the LBTD Revenues] they collect and [BC] has got to share theirs?" with his response, "Well, again, within constitutional limits, the legislature doesn't necessarily have to be strictly fair. And they did what they did, and it is up to us to live within it." (TR Vol. VI, p. 538).

A. With respect to their Alternative Claim, the Appellants misunderstand how Tenn. Code Ann. § 57-4-306 applies differently to cities as opposed to counties.

The Appellants' argument ignores a crucial point in this action stated earlier, that is, when applied, the same statutory language renders a different result depending on whether the local political subdivision recipient is a city or a county. When the recipient is a county, the statute instructs the county to expend and distribute the LBTD Revenues *in the same manner* as the county expends and distributes county property taxes for school purposes, that is by dividing the LBTD Revenues between the LEA's within the county's boundaries based on ADA the same way it divides other county property taxes for school purposes. By contrast, while the statutory wording remains unchanged if the recipient is a municipality, when a city with its own LEA receives revenues from county property taxes for school purposes, it expends and distributes all of that

money on the city's own LEA without dividing those proceeds with the other LEA's in the county based on ADA.

B. The Appellants' fairness complaint is irrelevant in this appeal.

The Appellants complain that allowing the Appellees to retain all of the LBTD Revenues received from the Commissioner and also those received from the Blount County Trustee "would be to allow the [Appellees] to double dip and would be inequitable." (Appellants Brief, p. 22). To this point, however, the trial court astutely observed that "the citizens of [COA] and [COM] are necessarily also citizens of [BC]. But the reverse is not true at all. [The] citizens of [BC] that live outside [COM] and [COA] are not citizens of [COM] and [COA]." (TR Vol. VI, p. 533) Additionally, the trial court twice correctly addressed the issue of fairness by saying that "within constitutional limits, the legislature does not have to be consistent. [...]And so long as they are within constitutional limits, it doesn't matter[,]" and "within constitutional limits, the legislature doesn't necessarily have to be strictly fair. *Id.* "And they did what they did, and it is up to us to live within it." *Id.* at 538.[3]

C. The Appellants' reliance on Tenn. Code Ann. §§ 49-3-354 and 67-6-712 is flawed.

As an initial matter, Tenn. Code Ann. § 49-3-354, which governs distribution of Basic Education Program ("BEP") funds, requires that the State – not a county trustee – divide BEP funds according to a laid out statutory distribution formula unlike the language at issue here. The BEP statute directs the State to distribute these funds to the LEAs directly – not to the county trustee. The statutory language of Tenn. Code Ann. § 49-3-354 bears absolutely no resemblance to that of Tenn. Code Ann. § 57-4-306(a)(2)(A), and, therefore, is not relevant to its interpretation.

3 The Appellants have not alleged that Tenn. Code Ann. § 57-4-306(a) is unconstitutional and did not give the Attorney General and Reporter notice as required by Tenn. Code Ann. § 29-14-107(b) and Tenn. R. Civ. P. 24.04.

By contrast, the operative language of Tenn. Code Ann. § 67-6-712, which governs the BC Trustee's actions, is exactly the same language found in Tenn. Code Ann. § 57-4-306(a)(2)(A) and supports the Appellees' position. The portion of Tenn. Code Ann. § 67-6-712 relevant here states the following:

> One-half (½) of the proceeds shall be expended and distributed in the same manner as the county property tax for school purposes is expended and distributed;

Tenn. Code Ann. § 67-6-712(a)(1).

While the Appellants take no issue with this operative language nor question the BC Trustee's obligation to distribute Tenn. Code Ann. § 67-6-712 tax revenues to the Appellees based on ADA, they argue that the BC Trustee should not be required to follow the identical language found in Tenn. Code Ann. § 57-4-306(a)(2)(A) simply because the proceeds in question are LBTD Revenues and to require such distribution would be inequitable. As stated previously, our Supreme Court has already interpreted the meaning of this very language in *Harriman v. Roane Cty.*, 553 S.W.2d 904 (Tenn. 1977), when it ruled that the City of Harriman was entitled to tax proceeds generated under the predecessor statute to Tenn. Code Ann. § 67-6-712, and it is the Supreme Court's interpretation that bolsters the Appellees' argument to retain the LBTD Revenues the subject of the Appellants' Alternative Claim.

D. Tenn. Code Ann. § 49-3-315(a) is applicable to this appeal.

The Appellants ask this Court to ignore the applicability of Tenn. Code Ann. § 49-3-315(a) when analyzing this appeal on the basis that this section is a general statue and Tenn. Code Ann. § 57-4-306(a) is a specific statute. In making this request, the Appellants erroneously assume there is a conflict between these statutes. There is no such conflict. Rather, Tenn. Code Ann. § 49-3-315(a) simply operates to define the manner in which a county trustee is to divide the LBTD

Revenues it receives since Tenn. Code Ann. § 57-4-306(a) does not define the manner. In short, the two statutes do not conflict – they operate in tandem.

The reading of Tenn. Code Ann. § 49-3-315(a) and a tax revenue distribution statute in *pari materia* is not a novel concept. This is also exactly what our Supreme Court did in *Harriman v. Roane Cty.*, 553 S.W.2d 904 (Tenn. 1977), when it held that the City of Harriman was entitled to retail sales tax proceeds generated under the predecessor statute to Tenn. Code Ann. § 67-6-712. Chancellor Rambo in his September 29, 2016, Order in the case also now on appeal, *Sullivan Cty. v. Bristol*, No. E2016-02109-R3-CV, applied the same analysis, reached the same conclusion, and found the City of Bristol similarly entitled to the LBTD Revenues it had received.

The plain and unambiguous language of the relevant portion of Tenn. Code Ann. § 49-3-315(a) defines the manner in which BC expends and distributes its county property tax for schools by requiring that "...[a]ll school funds for current operation and maintenance purposes collected by any county...shall be apportioned by the county trustee among the [local education agencies] in the county on the basis of the [weighted full-time equivalent average daily attendance] maintained by each, during the current school year." This statute places a direct obligation squarely upon BC to distribute all school funds[4] for current operation and maintenance purposes collected by BC, regardless of the source, among all three school systems within BC based on daily attendance numbers.

Because the LBTD Revenues in the Alternative Claim were distributed to the BC Trustee, he was duty bound to distribute a portion of the LBTD Revenues received by BC to COM and COA in accordance with ADA. This is exactly what the BC Trustee did from 1992 until 2014,

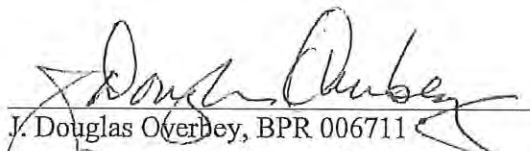
4 Tenn. Code Ann. § 49-3-315(a) makes one exception for certain transportation funds collected under a special tax levy which does not apply to the case at hand.

and COM and COA had no statutory duty or obligation to remit LBTD Revenues distributed to them by the BC Trustee back to BC.

CONCLUSION

Wherefore, based on all the foregoing reasons, the City of Maryville and the City of Alcoa ask this Court of Appeals to affirm the Judgment of the trial court below granting the Appellees' Motions for Summary Judgment, finding entirely in favor of the Appellees, denying Appellants Blount County and Blount County Board of Education's Motions for Summary Judgment, and dismissing the Complaint against the Appellees.

Respectfully submitted this 11th day of May, 2017.



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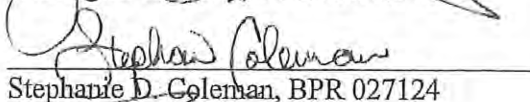

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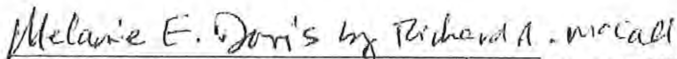

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served upon the following counsel by United States first class mail, postage prepaid and properly affixed this 11th day of May, 2017:

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

INNOVATIVE CONCEPT GROUP, INC., Plaintiff, vs. FOOD SALES EAST TENNESSEE, INC., FOODSALES TENNESSEE, INC., formerly known as Food Sales of Tennessee, Inc., RANDALL SANDERS, individually, DAVID TIMOTHY O'CONNOR, individually. Defendants.	)	Case No. : 3:03-cv-549 JUDGE PHILLIPS MAGISTRATE GUYTON

PLAINTIFF'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiff, Innovative Concept Group, Inc. ("Innovative"), by and through undersigned counsel, submits its Amended Memorandum of Law in Support of Its Response in Opposition to the Motions of Defendants Food Sales East Tennessee, Inc. ("FSE"), Food Sales Tennessee, Inc. ("FST"), Randall Sanders ("Sanders") and David Timothy O'Connor ("O'Connor"), for Summary Judgment. Innovative submits that, as to matters of law and due to the existence of genuine issues of material facts, the Defendants' motions for summary judgment should be denied on all grounds. For ease of record and brevity, Innovative has combined its responses as to all Defendants.

I. INTRODUCTION

Innovative has brought the following claims against all Defendants: conspiracy to monopolize, conspiracy in restraint of trade, violation of Tennessee Trade Practice and Consumer Protection Acts, civil conspiracy, unfair methods of competition, and tortious interference with business relations.

Innovative has additionally brought the following claims against Defendants: attempted monopoly and monopolization.

Innovative has additionally brought the following claim against O'Connor: breach of fiduciary duty.

These claims stem from actions beginning before June 16, 2003, and culminating thereafter whereby FSE and FST, together with Sanders and O'Connor, conspired to and successfully put Innovative out of the institutional food brokerage business in Knoxville, Tennessee, thereby injuring competition in the institutional food brokerage business in the Knoxville/Nashville market.

O'Connor was a key employee for Innovative, managing its Knoxville and Nashville offices. (Plaintiff's Additional Facts, ¶54; Affidavit of William S. Taylor, Jr. ¶¶15-17, 19). O'Connor had been charged by Innovative with recruiting a business in Nashville for acquisition or merger with Innovative, allowing Innovative to grow stronger in its representation of food manufacturers in the Nashville and Knoxville markets. (Plaintiff's Additional Facts, ¶24). Instead, in direct derogation of his duty of loyalty to his employer, O'Connor conspired with Innovative's competitors to hire him and all of his co-workers at Innovative and to seize all of Innovative's manufacturer accounts (also referred to as "lines"). (Plaintiff's Responses to

Defendant David Timothy O'Connor's Statement of Undisputed Material Facts in Support of His Motion for Summary Judgment, ¶ 11, 18, 75; Plaintiff's Additional Facts, ¶¶ 1, 87, 88, 91-96; Affidavit of William S. Taylor, Jr. ¶¶ 18, 20-22). O'Connor's activities were in direct contravention of his employment and duties with Innovative. Needless to say, O'Connor did not inform Innovative of his conspiratorial actions with its competitors.

O'Connor initially approached Sanders, owner of FST and co-owner of FSE, and an officer of FSE and FST (Plaintiff's Additional Facts, ¶59). FST does business in the Nashville brokerage market; FSE, in the Knoxville market (Plaintiff's Responses to Defendant FST's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment, ¶3; Plaintiff's Responses to Defendant FSE's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment Plaintiff's Additional Facts, ¶3, 4). Both businesses share administrative responsibilities. (Plaintiff's Additional Facts, ¶110). They also work with a third, non-party corporation, Food Sales, Kentucky, Inc. ("FSK"), sharing administrative responsibilities. (Plaintiff's Additional Facts, ¶110). The three companies together refer to themselves as Food Sales, Inc., or FSI ("FSI"). (Plaintiff's Additional Facts, ¶7).

These companies work together in an effort to become a regional broker in direct competition with Innovative's business plan given to O'Connor. (Plaintiff's Additional Facts, ¶ 7, 24). After meeting several times with Sanders and Greg Penn ("Penn"), a co-owner of FSE, and numerous phone calls among O'Connor, Sanders and Penn, O'Connor was hired by FSE. (Plaintiff's Additional Facts, ¶¶ 37-44; Plaintiff's Responses to Defendant FSE Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment, ¶19). O'Connor was promised to be made an owner of FSE, but there is no paper stock issued to him in that capacity.

Nonetheless, O'Connor is advertised as a managing owner of FSE. (Plaintiff's Additional Facts, ¶111).

After accepting the management position with FSE but before resigning from Innovative, O'Connor informed several of the Innovative employees that he was going to work at FSE. (Plaintiff's Additional Facts, ¶¶ 64-66). He also stated that the Innovative employees would have jobs at FSE (Plaintiff's Additional Facts, ¶ 63). He instructed at least one employee, Cynthia Jones, to pack up and take with her all documents she would need to service Innovative's lines to be acquired by FSE (Plaintiff's Additional Facts, ¶¶ 63, 60, 62). O'Connor admits to destroying Innovative documents the Saturday before his resignation (Plaintiff's Additional Facts, ¶ 71). Upon O'Connor's departure from Innovative, important files and information for Innovative's business were missing from Innovative's Knoxville office (Plaintiff's Additional Facts, ¶¶ 60, 62, 69, 70-73, 75). Upon their resignation from Innovative, the Innovative employees took with them the FSE important confidential and sensitive business data pertaining to Innovative's Knoxville business, such as customers they called on, lines, new products, dates, focus on increases in sales, and work agenda (Plaintiff's Additional Facts, ¶¶ 79-83).

In accordance with his conspiracy with the other Defendants, O'Connor took with him all of Innovative's Knoxville division staff, leaving Innovative devoid of any employees assigned to the Knoxville division. (Plaintiff's Additional Facts, ¶1; Affidavit of William S. Taylor, Jr. ¶ 22). At the time, FSE did not have the revenues or business to account for hiring these seven new employees. (Plaintiff's Additional Facts, ¶¶ 17-21, 23, 25; Affidavit William P. Mason and Exhibit A attached thereto, Report dated June30, 2006, p.19, Opinion Twelve and Bases & Reasoning; Affidavit of Shelly L. Wilson, ¶9, and Exhibit E thereto FSE004-FSE006)**[EXHIBIT**

E FILED UNDER SEAL]. Yet, with one exception, all of Innovative's employees were hired by FSE for more money than they had been making at Innovative. (Affidavit of Shelly Wilson ¶5, and Composite Exhibits B-1 through B-3 attached thereto)[1]. FSE did not have office space or equipment to account for hiring seven new employees. (Plaintiff's Additional Facts, ¶16). FST hired one of Innovative's Nashville employees and attempted to lure away at least one other Nashville employee. (Plaintiff's Responses to Defendant FST's Statement of Undisputed Material Facts In Support of Its Motion for Summary Judgment, ¶27; Plaintiff's Additional Facts, ¶¶ 45-46). Upon the Nashville employee's departure from Innovative, documents important to Innovative's business were missing from Innovative's Nashville office. (Plaintiff's Additional Facts, ¶74).

Almost immediately upon O'Connor's resignation, Innovative's Knoxville manufacturer customers began sending Innovative notices of termination. (Plaintiff's Additional Facts, ¶¶ 87-88; Affidavit of William S. Taylor, Jr. ¶ 20; Plaintiff's Responses to Defendant FSE's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment, ¶ 24). These manufacturers moved their brokerage business to FSE. (Affidavit of William S. Taylor, Jr. ¶21; Plaintiff's Additional Facts, ¶¶ 87-88). A couple of Innovative's Nashville lines also terminated their business with Innovative and moved their brokerage business to FST. (Plaintiff's Additional Facts, ¶112). Although Innovative attempted to rehire and train new employees, without the

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[1]Table B-3, attached to the Affidavit of Shelly Wilson, evidences, per line 1 from Federal Tax forms W-2 in B-1 and B-2, that all six employees obtained an increase in wages, tips and compensation, upon their employment with FSE, from the wages, tips and compensation previously received from Innovative.

skilled and experienced work force and without major manufacturer accounts, Innovative was forced to close its business in Knoxville. (Plaintiff's Additional Facts, ¶113).

In taking on Innovative's lines, FSE and FST terminated manufacturer lines they had previously represented, leaving those manufacturers without brokerage representation. (Plaintiff's Additional Facts, ¶114). Additionally, as a result of Innovative's going out of business, those manufacturers who were still doing business with Innovative, were forced to look for other brokerage representation. Some manufacturers were left without brokerage representation, shutting them out of the market. (Plaintiff's Additional Facts, ¶¶ 107, 115; Affidavit of Robert Sewall, ¶4).

II. STATEMENT OF FACTS

Each of the Defendants have filed Statements of Undisputed Material Facts with their Motions for Summary Judgment. Innovative herewith files and relies upon its Responses to Defendants' Undisputed Material Facts and submits Plaintiff's Statement of Additional Material Facts of Genuine Issues to be Tried in Opposition of Defendants' Motions for Summary Judgment, all of which is incorporated herein.

III. SUMMARY JUDGMENT STANDARD

The Unites States Supreme Court and the Sixth Circuit are reluctant to dispose of antitrust litigation on motions for summary judgment. In *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir., 1983), the Sixth Circuit set out the law governing motions for summary judgment in antitrust cases, as follows:

Summary Judgment in Antitrust Litigation[2]

[2] As in opinion. *Smith*, 703 F.2d at 947 .

Both the Supreme Court and this Circuit have expressed a clear reluctance to dispose of antitrust litigation on motions for summary judgment. *E.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 284-90, 88 S.Ct. 1575, 1590-93, 20 L.Ed.2d 569 (1968); *Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1197 (6th Cir.1982); *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir.1977); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir.1962). This reluctance to utilize summary judgment dispositions stems from the crucial role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual inference. Thus, the Supreme Court in *Poller* stated that:

> Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

368 U.S. at 473, 82 S.Ct. at 491.

The District Court interpreted language in [*Cities Service*], 391 U.S. at 284-90, 88 S.Ct. at 1590-93, as eliminating the distinction between summary judgment in antitrust cases and other civil litigation. We do not believe it can be read so broadly. Rather, the Court merely re-emphasized that even in an antitrust action the party opposing summary judgment may not rest on its pleadings. *See* Fed. R. Civ. P. 56(e). The adverse party must present sufficient evidence supporting its claims to "require a judge or jury to resolve the parties' differing versions of the truth at trial." [*Cities Service*], 391 U.S. at 286-90, 88 S.Ct. at 1591-93. *See Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 701, 703-04, 89 S.Ct. 1391, 1392, 1393-94, 22 L.Ed. 658 (1968) (per curiam). In [*Cities Service*], summary judgment was found appropriate because the plaintiff's "total failure to produce evidence tending to show [the defendant's] part in a conspiracy" and the adversity of interests among co-conspirators "conclusively showed" that the allegations were "not susceptible" of the interpretation the plaintiff sought. 391 U.S. at 286-90, 88 S.Ct. at 1591-1593.

The lesson learned from *Poller* and [*Cities Service*] is that, although the court should treat antitrust plaintiffs leniently in examining their proofs for issues of fact on a summary judgment motion, those proofs must nonetheless provide some factual basis upon which the conspiracy and intent elements may be reasonably inferred.

Smith, 703 F.2d at 947 - 948.

This Court, likewise, should be reluctant to utilize summary judgment to dispose of Innovative's antitrust claims and should treat Innovative leniently in examining its proofs for issues of fact regarding those claims. *Id.* Furthermore, circumstantial evidence is permissible proof of an antitrust conspiracy. The United States Supreme Court has stated "Circumstantial evidence is the lifeblood of antitrust." *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 at 536 (1973).

IV. LAW AND ARGUMENT

Contrary to Defendants' assertions, Innovative has both direct and circumstantial evidence in support of its claims. Regarding circumstantial evidence, the Sixth Circuit has ruled that an antitrust claim can be built entirely on circumstantial evidence. The Sixth Circuit discussed circumstantial evidence in antitrust cases in *Nurse Midwifery Associates v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), as follows:

> A plaintiff in an antitrust suit need not introduce any direct evidence of an alleged conspiracy. "[B]usiness behavior is admissible circumstantial evidence from which the fact-finder may infer agreement." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954). A conspiracy can be established by showing that business behavior evidenced "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States,* 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946).

This is a case involving motive and intent. Innovative's proof is both direct and circumstantial, on both of which Innovative relies in disputing Defendants' claims.

A. DEFENDANTS' MOTIONS TO DISMISS THE TENNESSEE TRADE PRACTICE ACT MUST BE DENIED.

1. Plaintiff is entitle to a remedy for violation of the Tennessee Trade Practice Act and has sufficiently pled a cause of action.

It is well-settled law in Tennessee that courts carry the burden of providing remedies to those who have been wrongly injured. *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 39 (Tenn.2005). Article 1, Section 17 of the Tennessee Constitution states in pertinent part:

> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.

This provision has been interpreted by the Tennessee Supreme Court to be a "mandate to the judiciary" insuring both open courts and a remedy for injuries. *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn.1978). An injury is said to occur "when there is a loss of a legal right, remedy or interest, or the imposition of a liability," and may occur when a plaintiff is forced to take action or suffer inconvenience as a result of the conduct of a defendant. *Sommer v. Womick*, 2005 WL 1669843, at *3 (Tenn.Ct.App. 2005).

These doctrines provide foundation for the proposition that a plaintiff should prevail when proof of a cognizable injury intersects with the burden of the courts to grant a remedy. This is precisely the scenario in the instant case. Tenn. Code. Ann. § 47-25-101 proscribes "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state. . ."

The Tennessee Trade Practices Act ("TTPA"), Tenn. Code Ann. §47-25-101, prohibits two types of trade restraints: 1) agreements which tend to lessen free competition in the sale of

articles into this state, and 2) arrangements which result in price fixing to the producer or consumer. Defendants violated the first provision; they made an agreement which tends to lessen full and free competition in the sale of manufactured goods in the institutional food brokerage business.

The statute prevents offending price fixers from receiving the full consideration received by the offenders for the affected products. The statute does not provide a specific remedy for violation of the first part of the statute, or, as in this case, those who lessen full and free competition in the sale of manufactured goods in the institutional food brokerage business. Because Defendants engaged in anti-competitive behavior proscribed by the TTPA, Innovative has sustained a cognizable injury and has obtained the right to a remedy for his injury. Because a reasonable jury could legitimately find that the TTPA was violated by the actions of the Defendants, Innovative is entitled to a remedy. Accordingly, Defendants' Motions for Summary Judgment should be denied.

The actions of the Defendants, in shutting down Innovative's Knoxville office. (Plaintiff's Additional Facts, ¶¶ 1, 26, 71-73, 75, 79-83, 85-86, 112, 113) resulted in manufacturers who did not get their products to the marketplace. At least two known food manufacturers lost their business in the market due to Innovative's demise in Knoxville and they were left without brokerage representation. (Plaintiff's Additional Facts ¶ 107; Affidavit of Robert Sewall, ¶ 4).

This harm to competition occurred not only at the institutional food service brokerage level but at the manufacturing level as well, all of which ultimately equates to harm to competition to end-users who no longer have product choices in the market. (Affidavit of Robert

McCormick and Exhibit attached thereto, Report pps. 13-16, ¶¶ 32, 34)[3]. Defendants actions in shutting out its competition resulted in precluding products from the marketplace, a classic example of restraint of trade. The Tennessee Trade Practice Act proscribes Defendants' behavior, and a remedy should be afforded to Innovative for the harm caused by Defendants.

Innovative has pled facts sufficient to sustain a claim for Defendants' violation of the Tennessee Trade Practice Act. Because Defendants engaged in anti-competitive behavior proscribed by the TTPA, Innovative has sustained a cognizable injury and has obtained the right to a relief. Accordingly, Defendants' Motions for Summary Judgment must be denied.

B. FSE AND FST'S MOTIONS TO DISMISS THE VIOLATION OF THE TENNESSEE CONSUMER PROTECTION ACT MUST BE DENIED.

Defendants' motions regarding the Tennessee Trade Practice Act rely only on matters of law. Because Defendants do not provide any citation to the record with respect to a claim of undisputed material facts as to the merits of the claims, their motions must be treated as 12(b)(6) motions under the Federal Rules of Civil Procedure.

"[A] summary judgment motion filed solely on the basis of pleadings is the functional equivalent of a dismissal motion, *Blum v. Morgan Guar. Trust Co.*, 709 F.2d 1463, 1466 (11th Cir. 1983)..." *North Arkansas Medical Center v. W. Barrett*, 962 F.2d 780, 784 (8th Cir. 1992). "A motion for summary judgment may be made solely on the basis of the complaint, in which case the motion is to be treated as the functional equivalent of a motion to dismiss for failure to state a claim under the Fed.R.Civ.P. 12(b)(6). 6 J. Moore, Moore's Federal Practice ¶ 56.11[2]

[3]The Affidavit of Robert McCormick and the Report attached thereto has been filed with the Court contemporaneously herewith pursuant to Plaintiff's Motion to File Certain Documents Under Seal. This is applicable to all citations herein to the Affidavit of Robert McCormick and the Report attached thereto.

(2d ed. 1982). In this posture, the court must construe the complaint liberally in favor of the plaintiff, taking the facts as alleged as true. The motion should be denied if a claim has been pleaded." *Blum v. Morgan Guaranty Trust Company of New York*, 709 F.2d 1463, 1466 (11th Cir. 1983).

Without presentation of undisputed material facts as to the merits of the claim, Defendants' motions for summary judgment must be treated as a Fed.R.Civ.P. 12(b)(6) motion on the pleadings. Innovative has sufficiently plead facts, and, therefore, Defendants' motions must be denied.

The basis of Defendants' motions for summary judgment is that the TCPA only outlaws unfair or deceptive acts and not anticompetitive conduct. In support of their argument, Defendants primarily rely on *Sherwood v. Microsoft Corp.*, 2003 WL 21780975 (Tenn.Ct.App. 2003). Innovative, however, has not alleged anticompetitive conduct in its claims against Defendants for violation of the TCPA. Innovative's allegations of violation of the TCPA are found in paragraphs 61 through 69 of the Third Amended Complaint, none of which allege anticompetitive acts. Rather, Innovative alleges Defendants have engaged in unfair or deceptive acts.

In the present case, unlike *Sherwood*, Innovative has alleged and presented deposition testimony and affidavits to support that the Defendants engaged in unfair and deceptive conduct notwithstanding and apart from any conduct violative of the TTPA. (See Plaintiff's Third Amended Complaint, ¶¶ 62-67).

The two other cases cited by the Defendants, *Bennett v. Visa USA, Inc.*, 2006 WL 770467 (Tenn.Ct.App. 2006), and *Duke v. Browning-Ferris Industries of Tennessee, Inc.*, 2006 WL

1491547 (Tenn.Ct.App. 2006), rely on *Sherwood* for the proposition that "claims based on anticompetitive conduct are not cognizable under the TCPA." In neither of these cases did the Court of Appeals state a rule of law that a plaintiff cannot state a claim under both the TCPA and the TTPA where the unfair or deceptive conduct was not based solely on anticompetitive behavior.

Defendants have essentially asked this Court to enter a ruling that a plaintiff can never establish a claim under the TCPA where the plaintiff is also alleging violations of the TTPA based upon anticompetitive conduct. To make such a ruling would be against public policy and would contravene the legislative intent in enacting both the TTPA and TCPA.

Innovative's evidence in support of its TCPA claims shows that Defendants engaged in unfair and deceptive conduct, and genuine issues of material fact exist with regard to Innovative's claims under the TCPA. The evidence in this case shows that an Gregg Penn and other FSE employees (former Innovative employees) were representing to manufacturers that Food Sales and Innovative had merged. (Plaintiff's Additional Facts, ¶ 55). Given the circumstances of the mass resignation of all of Innovative's Knoxville employees and their concurrent employment by FSE and FST (Plaintiff's Additional Facts, ¶ 1) and the mass resignation of Innovative's lines immediately following thereafter (Plaintiff's Additional Facts, ¶¶ 87-88), a jury could reasonably infer that the same representation was made to other manufacturers within the Knoxville/Nashville market who do business in the institutional food brokerage business. This conduct of Defendants was untruthful, misleading and destructive to Innovative's business, accounting for the ultimate demise of Innovative's Knoxville office. This conduct was in violation of the Tennessee Consumer Practice Act.

Innovative has pled facts sufficient to sustain a claim for violation of the Tennessee Consumer Protection Act based on the unfair or deceptive acts or practices of Defendants. This claim differs from Innovative's claim for violation of TTPA which is based on restraint of trade. Based on the foregoing, Defendants' Motions for Summary Judgment as to the TCPA should be denied.

C. DEFENDANTS' MOTIONS TO DISMISS THE CLAIM OF TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS[4] MUST BE DENIED.

Innovative has pled and herein sets forth facts sufficient to support its claims against Defendants for tortious interference with business relations, thereby requiring a jury to resolve the parties' differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 284-90 (1968).

Innovative has plead the tort of intentional interference with business relations, not a statutory claim for interference with contractual relation under Tennessee Statute §47-50-109. Defendants have missed the point. Defendants fail to understand that Innovative has alleged a tortious interference with business relations, a common law tort recognized by the Tennessee Supreme Court. *Trau-Med of America, Inc. v. Allstate Insurance Co.*, 71 S.W.3d 691, 701 (Tenn. 2002).

1. Innovative's Claims for Tortious Intereference with Business Relations is Not a Statutory Claim, but a Recognized Tort in Tennessee.

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[4]The applicable claim in Innovative's Third Amended Complaint, Tenth Claim for Relief, is entitled: Tortious Interference with Contractual Relations. However, the allegations thereunder make a claim for tortious interference with business relations. A title in a pleading does not limit the pleading as the body of the Complaint dictates the cause being prosecuted. *M. Rubenstein v. United States*, 227 F.2d 638 (10th 1955).

Innovative's claims for tortious interference with business relations are found in the Third Amended Complaint, ¶¶ 87 through 90. Innovative has not alleged that it had a written contractual relationship with O'Connor or its other employees. Innovative's employment agreement with its Knoxville employees was terminable-at-will. Innovative has pled a claim for interference with business relations, a tort which can be proven either through breach of contract or termination of the business relation. Because Innovative's claim involves terminable at-will employment, Innovative must show that the termination of the business relation it had with its employees was due to Defendants' improper motive or means.

The common law claim for tortious interference with contractual relations in the context of terminable at-will contracts is recognized as a common law tort where the tortfeaser is a third party to the employment relationship. *Forrester v. Stockstill, M.D.*, 869 S.W.2d 328, 330 (Tenn. (1994). "Intentional intereference with at-will employment by a third party, without privilege or justification, is actionable." Id, 330.

2. There Are Five Elements to a Claim For Tortious Interference with Business Relations.

The Tennessee Supreme Court, in *Trau-Med of America, Inc v. Allstate Insurance Co.*, 71 S.W.3d 691 (2002), recognized the tort of interference with business relationships upon a plaintiff's demonstration of the following:

> (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendants' knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and finally, (5) damages resulting from the tortious interference. *Id.*, at 701 (footnotes and citation omitted).

There are material disputed facts sufficient to sustain Innovative's claim for intentional interference with business relations in the context of terminable at-will employment. *Trau-Med.*

3. O'Connor and Sanders are Individually Liable Regardless of the Liability of FSE or FST.

O'Connor and Sanders are individually liable for Innovative's tort claims against them, including their tortious intereference with business relations. It is well settled law in Tennessee:

> It is settled law that an agent cannot escape liability for tortious acts, including fraud or misrepresentation, against third persons simply because the agent was acting within the scope of the agency or at the direction of the employer. *Howard v. Haven*, 198 Tenn. 572, 281 S.W.2d 480 (1955); *Scott v. Burton*, 173 Tenn. 147, 114 S.W.2d 956 (1938). Adams made nearly all of the misrepresentations and he is therefore liable.
>
> An officer or director of a corporation who commits or participates in the commission of a tort is likewise liable to third parties regardless of the liability of a corporation. *Cooper v. Cordova Sand and Gravel, Inc.*, 485 S.W.2d 261 (Tenn.App. 1971).

Brungard v. Caprice Records, Inc., 608 S.W.2d 585 (Tenn.App.1980)(cert denied).

Likewise, the 6th Circuit has ruled on this issue. In the case of *A&M Records, Inc., CBS., v. M.V.C. Distributin Corporation*, 574 F.2d 312 (6th Cir. 1978), the court stated at 315, "It is well established that a corporate officer or agent is personally liable for torts committed by him even though he was acting for the benefit of the corporation." (Citations omitted).

Thus, whether acting as agents of FSE or FST or acting in their individual capacities, O'Connor and Sanders are personally liable for their tortious interference with business relations.

4. There are Genuine Issues of Material Fact Which Support Innovative's Claim for Tortious Interference With Business Relations or Tortious Interference with Contractual Relations.

In the Tennessee Supreme Court's decision of *Polk & Sullivan, Inc. v. United Cities Gas Co.,* 783 S.W.2d 538 (Tenn. 1989), the court set forth the general rule that, with respect to

terminable at-will contracts, a competitor who "intentionally causes a third party not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) *the actor does not employ wrongful means* and ©) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other." *Id.*, at 543 (quoting § 781(1) Restatement). (Emphasis added).

O'Connor and Sanders, and FSE and FST, through their agents, employed wrongful means to intentionally cause Innovative's employees to terminate their employment with Innovative. Specifically, FSE and FST, through their agent Sanders, were involved in offering employment to and hiring Innovative employees: Mike Caudill, Kimberly (Graves) Nuchols, Carolyn Green, Mona Underwood, Vanda Porter, Cynthia Jones (all from Innovative's Knoxville office and hired by FSE), Carol Adams (from Innovative's Nashville office and hired by FST), and O'Connor (manager of Innovative's Knoxville and Nashville offices and hired by FSE). (Plaintiff's Additional Facts, ¶ 1, 54, 106; Affidavit of William S. Taylor, Jr. ¶¶ 15-17, 19; Plaintiff's Responses to Defendant FSE's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment, ¶ 19, 29, 31, 39, 42, 48, 54; Plaintiff's Responses to Defendant FST Statement of Undisputed Material Facts In Support of Its Motion for Summary Judgment, ¶ 27).

O'Connor and the Innovative employees discussed with FSE the customers of Innovative they serviced in an effort to find a fit for employment with FSE. (Plaintiff's Additional Facts, ¶¶ 26, 37, 38, 116;). This was information specific to Innovative's business, not within the knowledge of the general public. The former employees used this information in working at

FSE. (Plaintiff's Additional Facts, ¶ 26). All of the Innovative employees were still on Innovative's payroll when they were offered employment for FSE and/or FST. (Affidavit of Debbie Gross, ¶ 7; Plaintiff's Responses to Defendant FSE's Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment, ¶¶ 23, 25, 29, 31, 39, 42, 48, 54; Plaintiff's Additional Facts, ¶ 27, 32-34, 63, 106; Affidavit of Shelly L. Wilson, ¶ 2 and Composite Exhibit A-3 attached thereto - Nestle 000081-000091)**[EXHIBIT A-3 FILED UNDER SEAL]**. Some of the Innovative employees had not resigned their employment with Innovative as of June 19, 2003, yet were shown as FSI employees on the FSI organizational chart given by FSI to Nestle's representatives. (Plaintiff's Additional Facts, ¶ 27-28). When Nestle received the Power Point presentation on June 27, 2003, the photo of FSI personnel provided therein, contained each and every member of Innovative's Knoxville office, including employees who had not yet resigned from Innovative. (Plaintiff's Additional Facts, ¶ 33). This is contrary to Defendant's insinuations that all of Innovative's employees were hired by FSE and FST after they had resigned from Innovative. These facts constitute the improper motive or means used by Defendants in their tortious interference with Innovative's business relations.

Sanders, as the agent of FSE and FST, approved the employment of all of Innovative's employment force in Knoxville. (Plaintiff's Additional Facts, ¶¶ 37, 39; FSE's Statement of Undisputed Material Facts, ¶¶ 7-8.). They were hired at FSE for more money than they had made at Innovative, yet FSE did not have the financial resources or office accommodations to justify their employment. (Plaintiff's Additional Facts, ¶¶ 17-21, 23, 25. Mason Report, p. 19, Opinion 12 and Bases and Reasoning; Affidavit of Shelly L. Wilson, ¶ 5, 9, and Exhibits referenced therein. **[EXHIBIT E FILED UNDER SEAL]**). Further, FSE did not have the business to

justify hiring so many employees at the same time. (Plaintiff's Additional Facts, ¶¶ 17-22, 25; Mason Report, p.19, Opinion 12 and Bases and Reasoning; Affidavit of Shelly L. Wilson, ¶ 9, Composite Exhibit E attached thereto). There is no justification for hiring all of Innovative's employees when FSE was not in the position to pay or accommodate the new employees. These facts also constitute the improper motive or means used by Defendants in their tortious interference with Innovative's business relations.

On the advice of O'Connor, FST sought out two of Innovative's Nashville employees. (Plaintiff's Additional Facts, ¶¶ 45-46, 106). FST employed one of Innovative's Nashville employees, Carol Adams, while she was still on Innovative's payroll. (Plaintiff's Additional Facts, ¶ 106). Following her resignation, three of Innovative's major accounts moved their brokerage representation in Nashville, from Innovative to FST. (Plaintiff's Additional Facts, ¶ 112). While such facts may in isolation appear innocent, in light of the total circumstances, they too constitute the improper motive or means used by Defendants in their tortious interference with Innovative's business relations. The hiring away all of Innovative employees resulted in Innovative's inability to conduct business in Knoxville, eliminating it as a broker in the Knoxville/Nashville market. (Plaintiff's Additional Facts, ¶ 1, 113).

While at FSE, Innovative employees continued calling on Innovative customers (Plaintiff's Additional Facts, ¶ 26). Almost immediately upon the onslaught of resignations, Innovative's Knoxville manufacturer customers began resigning their business with Innovative and moving their brokerage representation to FSE. (Plaintiff's Additional Facts, ¶ 87).
While still at Innovative, but prior to resigning to go to work at FST, Carol Adams, a customer service representative with Innovative's Nashville office, solicited all of Innovative's Nashville

Area Buyers, Marketing and Accounting Departments to continue in their relationship with her at her new brokerage. (Plaintiff's Additional Facts, ¶ 106).

After agreeing to go to work at FSE, but prior to his resignation from Innovative, O'Connor destroyed Innovative documents. (Plaintiff's Additional Facts, ¶ 71). Following O'Connor's exit from Innovative, documents important to Innovative's business were missing. (Plaintiff's Additional Facts, ¶¶ 69-73, 75). O'Connor had deleted the e-mails in his Innovative issued laptop computer. In the e-mail application of the computer, O'Connor had deleted the e-mails contained in the "sent file" and "deleted file." (Affidavit of Josie Belizaire). Similarly, following Ms. Adams' resignation from Innovative's Nashville office, documents important to Innovative's Nashville business were missing. (Plaintiff's Additional Facts, ¶ 74). Additionally, Cynthia Jones was instructed to take with her to FSE the data she would need to service Innovative's manufacturer customers. (Plaintiff's Additional Facts, ¶¶ 60-62). These facts likewise constitute the improper motive or means used by Defendants in their tortious interference with Innovative's business relations.

As a result of the above described wrongful conduct, Innovative lost its ability to do business and eventually, even after attempts to hire and train additional personnel, was forced to close its Knoxville office. (Plaintiff's Additional Facts, ¶ 113).

Genuine issues exist as to material facts regarding Innovative's claims for tortious interference with contractual relations. As a basis for their arguments, the Defendants contend that it is undisputed that the six employees and Carol Adams resigned their employment with Innovative before acquiring employment with FSE. Innovative disputes that all six employees and Ms. Adams resigned from Innovative before being contacted by the Defendants and has

evidence to support its contention that the all of the employees had obtained employment with FSE or FST before resigning from Innovative. (See Plaintiff's Response to Sanders' Statement of Undisputed Facts, ¶¶ 21, 24, 27, 30, 39; Plaintiff's Response to FSE's Statement of Undisputed Facts, ¶¶ 25, 30, 31, 39, 42, 48, 54, 58; Plaintiff's Response to FST's Statement of Undisputed Facts, ¶¶ 9, 12, 13, 15, 16, 18, 20, 22, 24, 27; Plaintiff's Response to O'Connor's Statement of Undisputed Facts, ¶¶ 20, 27, 29, 37, 45, 53, 60, 62, 65, 67).

O'Connor also contends that he "did not solicit or otherwise attempt to interference (*sic*) with their [the six employees] employment relationship." (Memorandum of Law in Support of Defendant O'Connor's Motion for Summary Judgment, p. 11). This fact is also vigorously disputed by Innovative. Prior to his resignation, O'Connor told an Innovative employee that all Innovative employees had jobs with FSE. (See Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶¶ 28, 36, 43, 44, 50, 56, 57, 66; Plaintiff's Additional Facts, ¶¶ 63). Based on the law of tortious intereference with business relations and the existence of disputed material facts in support of Innovative's claim, Defendants' Motions for Summary Judgment must be denied.

D. FSE, FST, AND SANDERS' MOTIONS TO DISMISS THE CLAIM OF MONOPOLIZATION, UNDER 15 USCS §2, MUST BE DENIED.

1. Elements of a Claim of Monopolization

Innovative's claims against FSE, FST and Sanders for monopolization pursuant to 15 U.S.C. §2 are found in its Third Amended Complaint, ¶¶ 44-47. Innovative has pled and herein sets forth facts sufficient to support its claims thereby requiring a jury to resolve the parties'

differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 284-90 (1968).

The law of monopolization is set forth in *United States v. Grinnell Corp*., 384 U.S. 563, 570-571 (1966). To establish a cognizable claim for monopolization, Innovative must show (1) Defendant's possession of monopoly power in the relevant market and (2) Defendant's willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Id.*, 570-571. In this case, Defendants have sought summary judgment only as to the first element and Innovative therefore addresses only that element. Monopoly power has generally been referred to as "the power to control prices or exclude competition" *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and "market strength is often indicated by market share." *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1431 (6th Cir. 1990).

2. FSE, FST and Sanders possessed monopoly power within the relevant markets.

The relevant geographic and product markets are found in the report of Innovative's expert, Dr. Robert McCormick: the relevant geographic markets being Knoxville/Nashville. (See Affidavit of Robert McCormick, and Report attached thereto, p. 5, ¶15), and the relevant product market being the service of institutional food brokers who have facilities in both the Knoxville and Nashville markets. (See Affidavit of Robert McCormick, and Report attached thereto, at p. 10, ¶ 23; See also Affidavit of Bill Mason, and Exhibits A and B attached thereto, Report, pps. 19-20, Opinion 13 and Bases and Reasoning (Exhibit A); letter (Exhibit B)). FSE, FST and Sanders have not disputed, or even identified, through independent expert evidentiary support the

relevant markets which include the business of FST and FSE. FST and FSE operate as a brokerage under the assumed name FSI in the Knoxville/Nashville market. Prior to the demise of its Knoxville office, Innovative operated as a brokerage in the same market (Plaintiff's Additional Facts, ¶¶ 2,4; Plaintiff's Responses to FSE's Statement of Undisputed Material Facts, ¶ 1; Plaintiff's Additional Facts, ¶ 7).

FSE, FST and Sanders, through Affidavit of its attorney, John Quinn, propose that market shares for each company were too low to support a finding of monopoly. However, Quinn's Affidavit offers opinions without independent expert evidentiary support. Quinn's Affidavit fails to define the relevant product and geographic markets and presents no economic justification for splitting the revenues of the Knoxville and Nashville markets. (See Affidavit of Robert McCormick, ¶¶ 6-8).

FSE, FST and Sanders' reliance on cases outside of the 6th Circuit as to the requirement of a dominant market share in a monopoly is misplaced. Monopolization does not require a market share of over 50%. *Re/Max Intern., Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999)*(Re/Max III)*:

> There are two ways to establish the first element, that is, that the defendant holds monopoly power. The first is by presenting direct evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir. 1979). The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market. See *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Co,rp.* 79 F.3d 182, 196-97 (1st Cir. 1996); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). In recent years, parties and courts have increasingly moved toward utilizing the circumstantial method as a "shortcut".

Id., *40. The *Re/Max III* decision resulted in the reversal of summary judgment, the court finding that the plaintiff had presented facts sufficient for a jury to conclude that defendants had the ability to exclude competition.

[The paragraph that otherwise would appear at this point of Innovative's Memorandum of Law has been redacted by counsel for Innovative pursuant to Docket Entry No. 59. A complete page 24 of Innovative's Memorandum of Law is being contemporaneously submitted to the Court with Innovative's Motion to File Certain Documents under Seal.]

Although proof of market share is evidenced in the present case, market share is not the only indication of a monopolization. As stated in this Circuit:

> As we stated: "[T]he simplest way of showing monopoly power is to marshal evidence showing the exercise of actual control over prices or the actual exclusion of competitors." *Id.* at 850.
> This view has been adopted, at least implicitly, in four sister circuits: the First, Eighth, Ninth, and Tenth. *See, e.g., Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.,* 79 F.3d 182, 196-97 (1st Cir.), *cert. denied,* 519 U.S. 927, 117 S.Ct. 294, 136 L.Ed.2d 214 (1996); *Rebel Oil Co. v. Atlantic Richfield Co.,* 51 F.3d 1421, 1434 (9th Cir.1995); *Flegel v. Christian Hosp.,* 4 F.3d 682, 688 (8th Cir.1993); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.,* 899 F.2d 951, 966-67 (10th Cir.1990). As the Eighth Circuit has stated:
> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."
> *Flegel,* 4 F.3d at 688 (quoting *Indiana Fed'n,* 476 U.S. at 461, 106 S.Ct. 2009).

Re/Max Intern., Inc. v. Realty One, Inc. (Re/Max III), 173 F.3d 995, *1018 -1019 (C.A.6 (Ohio),1999).

Barriers to entry are also an important factor to consider under a claim for monopoly. *Re/Max III, *22*. In the instant case, there are high barriers to the entry of the relevant market due to the need for the ability to network and for specialized resources and inputs already within the market. (Affidavit of Robert McCormick, Report attached as Exhibit thereto, pps. 5-6, ¶15). Once Innovative lost its entire work force in Knoxville and all of its major accounts, the barriers to entry precluded its ability to hire and train new employees and further conduct its business. (Plaintiff's Additional Facts, ¶¶ 87-88, 113; Affidavit of William Taylor, Jr., ¶¶ 22, 23).

There has also been harm to competition on more than one level. First, there has been harm to competition on the level of brokers in the Knoxville/Nashville market by Defendants' exclusion of competition. (Affidavit of Robert McCormick, Report attached as Exhibit thereto, pps. 5-6, ¶15). FSE and FST were working as brokers in the Knoxville/Nashville market. (Plaintiff's Additional Facts, ¶ 2,4). Prior to June 16, 2003, Innovative was also a broker in the Knoxville/Nashville market, as were two other brokers, United Food Service and Integrity. (Affidavit of William Taylor, Jr., ¶ 7). Following O'Connor's resignation in June 2003, Innovative was forced to close its Knoxville office and lost its ability to operate as a broker in the Knoxville/Nashville market. (Plaintiff's Additional Facts, ¶ 113). Integrity also closed its business in 2005. (Affidavit of William Taylor, Jr., ¶ 9). There are currently only two competitors in the relevant product market, the Knoxville/Nashville market: FSE/FST and United. (Affidavit of William Taylor, Jr., ¶ 9; See also Affidavit of William P. Mason, and Exhibits A and B attached thereto, Report, pps. 19-20, Opinion 13 and Bases and Reasoning (Exhibit A); letter (Exhibit B)). There has clearly been harm to competition within the relevant market by Defendants' exclusion of competitors.

Harm to competition within the brokerage industry is not the only harm to competition caused by Defendants' actions. There was also harm to competition among manufacturers, which trickles down ultimately to harm consumers. As an example, both Blount Seafood and Peter Pan Seafood manufacturers were left without broker representation following the demise of Innovative's Knoxville office. (See Plaintiff's Additional Facts, ¶ 107; Affidavit of William Taylor, Jr. ¶ 10; Affidavit of Robert Sewall, ¶ 4). Without representation of their products, end users, and ultimately consumers, were left with fewer choices among those product lines. (Affidavit of Robert McCormick, Report attached as Exhibit thereto, p. 14, ¶ 32).

Plaintiff's evidence shows that FSE, FST and Sanders possessed monopoly power in the relevant market and they willfully acquired that power through unlawful means through excluding competition. (Plaintiff's Additional Facts, ¶¶ 1, 38, 40; Affidavit of Robert McCormick, ¶ 8).

3. Sanders Possessed the Power to Control Prices and Exclude Competition.

Sanders, as an agent of FSI and FST signed numerous brokerage contracts (Plaintiff's Additional Facts, ¶ 108) and as such, had the ability to control prices offered for the products offered by the manufacturers he represented. (Affidavit of William Taylor, Jr., ¶ 5). These facts demonstrate Sanders' involvement in the monopoly. (See also, Plaintiff's Responses to Sanders' Statement of Undisputed Facts, ¶¶ 49-50).

Genuine issues exist as to material facts regarding Innovative's claims for monopolization. Specifically, Innovative disputes the market share analysis and calculations performed by the Defendants which are the basis for the Defendants' arguments for dismissal of

Innovative's monopolization claims. (Plaintiff's Response to Defendant, FST's, Statement of Undisputed Facts, ¶¶ 31-33). (Plaintiff's Response to Defendant, FSE's, Statement of Undisputed Facts, ¶ 66). Innovative's evidence shows that FSE, FST and Sanders possessed monopoly power in the relevant market.

Based on the above, both as to matters of law and the existence of disputed material facts, Defendants' Motions for Summary Judgment must be denied.

E. DEFENDANTS' MOTION TO DISMISS ON SUMMARY JUDGMENT THE CLAIM OF ATTEMPTED MONOPOLIZATION MUST BE DENIED.

FSE, FST and Sanders have moved for summary judgment on Innovative's claim of attempted monopolization under 15 U.S.C. §2. To prevail on an attempted monopolization claim, a plaintiff must show that the defendant(s) intended to monopolize a market, engaged in anti-competitive conduct, and possessed a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Innovative has pled and herein sets forth facts sufficient to support its claims thereby requiring a jury to resolve the parties' differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 284-90 (1968).

1. Defendants' actions were predatory and anticompetitive

Innovative's evidence of Defendants' predatory or anticompetitive conduct, specific intent to monopolize, and dangerous probability of achieving monopoly power is sufficient to require a jury to determine the truth. Defendants claim that they cannot be held liable for attempted monopolization on the theory that their actions did not constitute predatory or anticompetitive conduct, but that the actions they took were for legitimate business purposes.

"The concentration of brokers in Knoxville is high by antitrust standards, suggesting that the acts of the defendants led to anti-competitive effects in Knoxville. All of these effects harm institutional food consumers, food manufacturers, and of course the ultimate consumers, those who ate (or did not eat) the products offered (or not offered) for sale." (Affidavit of Robert McCormick, and Report attached as Exhibit, p. 6, ¶ 16).

There is no dispute that Sanders was acting as an agent for both FSE and FST. (Sanders' Statement of Undisputed Material Facts, ¶¶ 5-6). Sanders took certain actions and made certain decisions regarding the hiring of O'Connor and all of Innovative's other Knoxville employees as well as soliciting Innovative's Nashville employees and hiring one. (Plaintiff's Additional Facts, ¶¶ 37, 39). Sanders was acting as an agent for FSE and FST when he solicited business from Innovative, regardless of when he began soliciting the business. (Plaintiff's Additional Facts, ¶ 106; Plaintiff's Responses to FSE's Statement of Undisputed Material Facts, ¶ 59). The important conclusion to be drawn is that FSE and FST solicited Innovative's business - all of Innovative's major manufacturing clients. Additionally, once at FSE and FST, the Innovative employees continued calling on Innovative's end-user customers. The identity of these customers constitutes confidential business information, as argued by Defendants in previous hearings in the instant litigation before this Court.

FSE was not in a financial position to take on seven new employees if, based on Sanders' own testimony, FSE did not know what business it might get that would support the hiring of O'Connor, let alone the six additional employees. (Statement of Undisputed Material Facts in Support of Defendant Food Sales East Tennessee, Inc.'s Motion for Summary Judgment, ¶ 15, 16, specifically Sanders Deposition pp. 124-125 146-148; Plaintiff's Additional Facts, ¶¶ 17-19,

21-23). FSE was undercapitalized (Plaintiff's Additional Facts, ¶¶ 18-19). FSE had borrowed money from Gregg Penn to meet payroll and overhead and had to draw from its line of credit to keep the business afloat. It typically takes minimum commissions in the range of $110,000 to $140,000 for a broker to support employment of a sales representative. (Affidavit of William P. Mason and Report Exhibit A thereto, p.19, Opinion Twelve and Bases & Reasoning). Even taking the lower range of the standard revenues to support the addition of seven employees, FSE did not have the revenues to support hiring seven new employees. (Affidavit of Shelly L. Wilson, ¶ 9, Composite Exhibit E attached thereto (EXHIBIT E FILED UNDER SEAL)). FSE did not have the room to house the new employees. (Plaintiff's Additional Facts, ¶ 16). FSE did not have computers for the new employees. (Plaintiff's Additional Facts, ¶ 16). These facts indicate that FSE and FST's actions were predatory and anticompetitive, taken with the specific intent to prevent its competition, Innovative, from doing business.

The fact offered by Defendants that Innovative's employees did not have non-competes with Innovative is irrelevant to whether FST had the motive and intent to attempt monopolization. The issue is the motive and intent behind the timing of Defendants' actions in hiring away all of Innovative's Knoxville office and pursuing Innovative's employees in Nashville at the same time. The issue is the motive and intent of FSE and FST in acquiring Innovative's lines in both Knoxville and Nashville. It is a material issue of disputed fact whether Defendants' actions were legitimate or were taken with the specific intent to injure competition in the Knoxville/Nashville market. The ultimate issue of material fact is whether Defendants' hiring of all of Innovative's Knoxville employees, without justification or resources to support

the hirings, and aim at Innovative's Nashville employees, constitutes predatory or anticompetitive conduct or legitimate business, and this is a question for the trier of fact.

2. Defendants' had the specific intent to create a monopoly

Defendants rely on the case of *White and White, Inc. v. American Hospital Supply Corp.*, 723F.2d 495 (6th Cir. 1983), for support of its position that the actions they took were in furtherance of legitimate business practices. However, *White* also stated that "intent to monopolize may be inferred from evidence of anticompetitive conduct," *Id.*, 507 (citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953). The above stated material facts are sufficient to conclude that Defendants' actions went beyond the realm of legitimate business purposes but were actually pretextual. This conclusion is supported by Plaintiff's expert, Robert McCormick:

> My review of the deposition testimony and the business document produced in this case demonstrates that many parties involved are aware that the defendants' actions have injured competition because some products no longer get to the market. [Footnote 24]. And because some competitors are denied the advantages of having at least one firm located in both markets. [Footnote 25]. My review of case documents has also led me to believe that the defendants' actions were completely exclusionary. That is, the defendants' hiring of the entire Knoxville office employees was an action aimed at excluding Innovative from the market on a basis other than efficiency. Clearly, the defendants' action were in an effort to "make more money" [Footnote 26] and not to benefit their clients by providing lower prices or by increasing efficiency. [Footnote 27].

(Affidavit of Robert McCormick, and Exhibit thereto, Report p. 16, ¶ 35.)

Defendants' only citation in justification of their actions is a general reference to only hiring seven employees from Innovative Knoxville and one employee from Innovative's Nashville office. FSE and FST go on to argue that O'Connor was hired because of his great reputation. Defendants do not posit an explanation as to why they also needed all of Innovative's

employees. And, they can't. Defendants may state that their actions were taken for legitimate business purposes, but their actions speak louder than their words. Defendants' actions clearly did not make economic sense.

At the time of the egregious acts, FSE was not in a financial position to take on seven new employees if, based on Sanders' own testimony, FSE did not know what business it might get that would support the hiring of O'Connor, let alone the six additional employees. (Statement of Undisputed Material Facts in Support of Defendant Food Sales East Tennessee, Inc.'s Motion for Summary Judgment, ¶¶15, 16, specifically Sanders Deposition pp. 124-125 and 146-148; Plaintiff's Additional Facts, ¶¶ 17-19, 21, 25). FSE was undercapitalized. (Plaintiff's Additional Facts, ¶¶ 17-21). FSE had borrowed money from Gregg Penn to meet payroll and overhead and had to draw from its line of credit to keep the business afloat. It typically takes minimum commissions in the range of $110,000 to $140,000 for a broker to support employment of a sales representative. (Affidavit of William P. Mason and Report attached as Exhibit A thereto, p.19, Opinion Twelve and Bases & Reasoning). Even taking the lower range of the standard revenues to support the addition of seven employees, FSE did not have the revenues to support hiring seven new employees. (Affidavit of Shelly L. Wilson, ¶ 9, Composite Exhibit E attached thereto (Composite Exhibit E FILED UNDER SEAL). FSE did not have the room to house the new employees. (Plaintiff's Additional Facts, ¶ 16). FSE did not have computers for the new employees (Plaintiff's Additional Facts, ¶ 16). These facts indicate that FSE and FST's actions were predatory and anticompetitive, taken with the specific intent to prevent its competition, Innovative, from doing business.

In a previous business transaction, FSE had purchased a brokerage business from Herman Weaver, Weaver Food Service. (Plaintiff's Additional Facts, ¶ 9,10). With the purchase of the business, it was anticipated and agreed that Weaver would assist in bringing all of the business from Weaver Food Service to FSE. (Plaintiff's Additional Facts, ¶ 14). The Weaver Food Service had been bringing in approximately $250,000 commissions annually at the time it sold out to FSE. (Plaintiff's Additional Facts, ¶ 12). In anticipation of the expected business coming from Weaver Food Service to FSE, FSE hired 2 out of 6 of the employees from Weaver Food Service. (Plaintiff's Additional Facts, ¶ 11). Even if FSE had been able to acquire all of the business from Weaver Food Service, FSE did not hire all of Weaver's employees. (Plaintiff's Additional Facts, ¶ 11, 14).

Defendants' previous business conduct with respect to the buy out of Weaver Food Service differs in contrast to the actions they took with respect to hiring Innovative's employees. This difference provides a strong inference that Defendants' actions in hiring all of Innovative's employees were motivated by a predatory intent not by sound business reasons.

FSE hired all of the employees from Innovative's Knoxville office (Plaintiff's Additional Facts, ¶ 1, 40), supposedly without the knowledge of what business they would be able to bring in. FSE did not have the capital to support hiring all of Innovative's employees from its Knoxville office (Plaintiff's Additional Facts, ¶ 17-21; Affidavit of Shelly L. Wilson, ¶ 9, Ex. E [EXHIBIT E FILED UNDER SEAL]). Greg Penn, with FSE, referred to this decision as "investment spending." (Plaintiff's Additional Facts, ¶ 22). Defendants' version of "investment spending" does not make economic sense but rather is indicative of Defendants' specific intent to gain a monopolization of the market and foreclose competition.

Carolyn Green was employed by FSE until March 31, 2004, when she left due to the fact that FSE already had a school representative (Herman Weaver) and that was the job she specialized in. (Plaintiff's Additional Facts, ¶¶ 97-99; FSE's Responses to Plaintiff's First Continuing Interrogatories and Sixth Request for Production of Documents ¶ 13). This is proof that FSE already had an employee in the position that Green was hired for and that in reality her hire from Innovative was for other than legitimate business reasons.

FST's actions of employing Carol Adams, prior to her resignation from Innovative, further demonstrates the coordination among the Defendants, in light of the timing in which she left Innovative - July 10, 2003. (Plaintiff's Additional Facts, ¶ 106; FSE's Statement of Undisputed Material Facts, ¶ 59; Plaintiff's Responses to FSE's Statement of Undisputed Material Facts, ¶ 59). Adams was clearly working with FST in an effort to get Innovative's business to follow her to FST prior to her departure from Innovative. Ms. Adams wrote a memo, on Innovative letterhead, to Innovative customers asking for their continued business from her at her new brokerage (FST). (Plaintiff's Additional Facts, ¶ 106).

Defendants' actions constituted anticompetitive conduct, and their claim of legitimate business purpose is clearly pretextual and without any economic justification.

3. There exists a dangerous probability that Defendants will achieve monopoly power.

Innovative's evidence demonstrates a dangerous probability that Defendants will attain monopoly power in one or more markets for food brokerage services for institutional customers. As of June 2003, in the Knoxville/Nashville market, as defined by Professor McCormick, there were four competitors in the food brokerage business for institutional customers: FSE/FSI,

Innovative, United Food Service ("United") and Integrity ("Integrity"). (Affidavit of Robert McCormick and Exhibit attached thereto, Report pp. 5-6, ¶ 15, p. 10-11, ¶ 23; Affidavit of William S. Taylor, Jr, ¶ 7; Affidavit of William P. Mason, and Exhibits A and B attached thereto, Report, pps. 19-20, Opinion 13 and Bases and Reasoning (Exhibit A); letter (Exhibit B)). After Defendants' actions, there were three competitors in the food brokerage business. (Affidavit of William S. Taylor, Jr. ¶ 8). Integrity, went out of business in 2005. (Affidavit of William S. Taylor, Jr.¶ 9). The relevant market now only has two competitors: FSE/FSI and United. (Affidavit of William S. Taylor, Jr. ¶ 9).

"The greater a firm's market power the greater the probability of successful monopolization." *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982). However, the courts "have recognized that high market share is not the only way to show a dangerous probability that defendant will succeed where other evidence exists." *Compuware Corp. v. International Business Machines*, 259 F.Supp.2d 597, 602 (E.D.Mich.2002)(citing *Tarrant Service Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609, 615-616 (6th Cir.1993)).

Other factors, such as concentration of a market, high barriers to entry, strength of competition, or a consolidation trend in a market can prove that a dangerous possibility of monopolization exists even when the market share of the plaintiff is between 30 and 50 percent. *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F.Supp.2d 1097, 1117 (N.D.Ohio 2004) (citing *Domed Stadium Hotel Inc. v. Holiday Inns*, 732 F.2d 480, 490 (5th Cir.1984). *See, e.g. Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1300-01, 1309 (9th Cir.1982) (attempted monopolization found, being supported by 24% market share plus anti-competitive conduct)).

> There are high barriers to entry into the Knoxville/Nashville market for institutional food brokerage. "In markets where information is the key commodity, network effects and information nodes (discussed in the previous section) are factors which delimit and restrict entry of firms. A potential entrant into the food brokerage industry with no customer list and no previous account service is very unlikely to survive. Current agreements between and among food producers, brokers, and final consumers make entry less likely because these agreements make it more difficult for new firms to obtain contracts. Furthermore, it is very expensive to build new, modern food showrooms and to train specialized food sales employees.

(Affidavit of Robert McCormick and Exhibit attached thereto, Report p. 12, ¶ 28).

Although Innovative has proof that Defendants have a high market share, there is additional evidence showing a dangerous probability that Defendants will succeed in achieving a monopoly and have gained great ground since their actions beginning in 2003. Consolidation has thereby occurred in the relevant market. Innovative closed its Knoxville office in March 2004, thereby eliminating itself as a broker in the Knoxville/Nashville market (Affidavit of William S. Taylor, Jr. ¶ 8). Integrity closed its business in 2005. This leaves only two brokers in the Knoxville/Nashville market: Defendants and United Food Sales. (Affidavit of William S. Taylor, Jr. ¶ 9).

The above facts support Innovative's claims that Defendants' actions were predatory or anticompetitive rather than taken for legitimate business purposes, that Defendants have a specific intent to monopolize the food brokerage business in the relevant market, and that a dangerous probability exists that Defendant has or will attain monopoly power.

The Defendants' purpose and intent in convincing O'Connor and the six other Innovate employees to leave Innovative and work for the FSE is one of the central disputes in this lawsuit. The Defendants, however, in their Memorandums of Law, purport that the fact is undisputed that

the sole purpose of their actions was to improve business. Obviously, Plaintiff vigorously disputes this contention. (See Plaintiff's Response to Defendant, FSE's, Statement of Undisputed Facts, ¶ 68).

The Defendants also claim that there is no dispute as to whether the six other employees were contacted by the Defendants only after resigning from Innovative. This assertion is incorrect. Plaintiff disputes that the six employees resigned from Innovative before being contacted by the Defendants and has evidence to support its contention that the six employees had employment with the FSE before resigning from Innovative. (See Plaintiff's Response to Defendant, FSE's, Statement of Undisputed Facts, ¶¶ 29, 30, 34, 39, 44, 48). Likewise, Plaintiff disputes that Carol Adams, a former employee at Innovative's Nashville office, resigned her position at Innovative before being hired by FST. (See Plaintiff's Response to Defendant, FST's, Statement of Undisputed Facts, ¶ 27).

As evidenced by the foregoing, genuine issues exist as to material facts regarding Plaintiff's claim for attempted monopolization. Defendant's motion for summary judgment must be denied, and the claim of attempted monopoly presented for the trier of fact.

4. Sanders is Individually Liable for Attempted Monopolization.

As stated earlier, the 6th Circuit has ruled on this issue. In the case of *A&M Records, Inc., CBS., v. M.V.C. Distributin Corporation*, 574 F.2d 312 (6th Cir. 1978), the court stated, at 315, "It is well established that a corporate officer or agent is personally liable for torts committed by him even though he was acting for the benefit of the corporation." (Citations omitted). More specifically, an officer of a corporation can be held individually liable for his actions in an

attempted monopoly under 15 U.S.C. §2. *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd*, 467 F.Supp. 841 (1979).

Contrary to Sanders' assertions that he could not be held liable for attempted monopoly because he could not obtain monopoly power, had no contracts himself, and only acted through his business, Sanders can be held personally liable for his actions in furtherance of the attempted monopoly.

> Participation may be found not solely on the basis of direct action but may also consist of knowing approval or ratification of unlawful acts. *E. g., Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3rd Cir. 1978) (corporate officer arranged for the use and copying of materials constituting unfair competition); *Tillman v. Wheaton-Haven Recreation Association*, supra, 517 F.2d 1141 (directors of the association promulgated and enforced a white-only membership policy); *Solo Cup Co. v. Paper Machinery Corp.*, 359 F.2d 754 (7th Cir. 1966) (president of corporation, who arranged for the employment of plaintiff's former engineer and negotiated for the sale of machines in anticipation of the engineer's ability to duplicate plaintiff's machine, was liable to plaintiff for damages based on unfair competition); *Barry v. Legler*, 39 F.2d 297 (8th Cir. 1930) (officer had knowledge of misrepresentations made by agents under his control in connection with the sale of stock yet failed to act); *McCrea v. McClenahan*, 131 App.Div. 247, 115 N.Y.S. 720 (Sup.Ct.1909) (president of corporation personally converted plaintiff's chattels).

Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., Ltd. 467 F.Supp. 841, *852 (D.C.Cal., 1979).

Genuine issues exist as to material facts regarding Innovative's claims for attempted monopolization. The Defendants' purpose and intent in convincing O'Connor and the six other Innovate employees to leave Innovative and work for FSE is one of the central disputes in this lawsuit. Defendant Sanders, however, in his Memorandum of Law, purports that the fact is undisputed that the sole purpose of their actions was to improve business. Obviously, Innovative

vigorously disputes this contention. (See Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶¶ 18, 52).

Sanders also contends that it is undisputed Sanders did not solicit O'Connor to leave his employment with Innovative. This material fact is disputed by Innovative. (See Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶ 16). Additionally, Innovative disputes that Sanders and O'Connor did not discuss O'Connor's relationship with Innovative's end users or manufacturing clients, or what effect O'Connor leaving Innovative would have on those end users and customers. (See Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶¶ 13, 14). Innovative further disputes Sanders contention that he did not speak with any end users or manufacturers in connection with O'Connor's move to FSE. (See Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶ 15).

As evidenced by the foregoing, genuine issues exist as to material facts regarding Innovative's claims for attempted monopolization against FSE, FST and Sanders. Defendants' motion for summary judgment as to the claim of attempted monopolization must be denied.

F. DEFENDANTS' MOTIONS TO DISMISS TENNESSEE STATE LAW CLAIMS FOR CIVIL CONSPIRACY MUST BE DENIED.

Innovative has pled a cause of action against all Defendants for civil conspiracy under Tennessee law. (Third Amended Complaint, ¶¶ 74 through 77). Innovative has pled and herein sets forth facts sufficient to support its claims thereby requiring a jury to resolve the parties' differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 284-90 (1968).

1. Under Tennessee state law, O'Connor civilly conspired with FST, FSE and Sanders.

Defendants argue that they are entitled to summary judgment on Plaintiff's "Eighth Claim for Relief - Civil Conspiracy," a state law claim. They argue that, in light of the so-called intracorporate conspiracy doctrine, they could only conspire with themselves or O'Connor. They then argue that there is no evidence that either one of them conspired with O'Connor or each other. Plaintiff's evidence, however, shows that O'Connor did conspire with FSE and FST, with Sanders acting as their agent.

2. O'Connor can conspire with FSE, FST and Sanders.

Defendants cite a number of federal cases in support of their argument that the intracorporate conspiracy doctrine applies to Innovative's state law conspiracy claim. Three of those cases[5] are federal civil rights cases that do not apply to this state law conspiracy claim. The fourth is an 11th Circuit case that holds that the intracorporate conspiracy doctrine will not shield members of the same corporation who were accused of a criminal conspiracy. *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031 (11th Cir., 2000). It does not have any application to this state law conspiracy claim either.

Nevertheless, Innovative acknowledges that, under Tennessee law, "there can be no actionable claim of conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents, *each acting within the scope of his or her employment*." *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 -704 (Tenn., 2002) (emphasis in original). In *Trau-Med*, the plaintiff

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[5] *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. Of Educ.*, 926 F.2d 505 (6th Cir., 1991), *Doherty v. American Motors Corp.*, 728 F.2d 334 (6th Cir., 1984), *Dooley v. City of Philadelphia*, 153 F. Supp. 2d 628 (U.S.D.C., E.D. Pa., 2001), *on reconsideration on part*, 161 F. Supp. 2d 592 (U.S.D.C., E.D. Pa., 2001).

corporation alleged that the defendant corporation conspired with its officers and agents to defame the plaintiff. *Trau-Med*, 71 S.W.3d at 694 - 697. The court held that "intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim." *Trau-Med*, 71 S.W.3d at 703. However, the court also said:

> It has long been accepted in Tennessee that a corporation is capable of extra-corporate conspiracy; that is, a corporation becomes vicariously liable for the conduct of its agents who conspire with other corporations or with outside third persons.

Id.

The Defendants themselves assert that the intracorporate conspiracy doctrine does not bar the claim that Sanders conspired with O'Connor prior to the time O'Connor was employed by FSE. (Defendant, FSE's, Memorandum of law, ¶ IV(F)(3)). They also argue that Sanders is an agent of FSE and FST. (Defendant, FSE's, Memorandum of law, ¶ IV(F)(2)). FSE and FST are therefore liable for the conduct of Sanders in conspiring with O'Connor prior to the time O'Connor became an employee of FSE. *Id.* FSE, FST and Sanders, as well as O'Connor, are all liable under the Plaintiff's state law conspiracy claim for conduct prior to O'Connor's employment by FSE. *Trau-Med.*

After O'Connor was employed by FSE, he became an agent of FSE who could conspire with FST on behalf of FSE. The intracorporate conspiracy doctrine does not bar a state law conspiracy claim against FSE and FST for civil conspiracy for the time after O'Connor was employed by FSE. *Trau-Med.*

The law governing civil conspiracy is well established in Tennessee:

> In Tennessee, a civil conspiracy is defined as a combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose

> not in itself unlawful by unlawful means. *Dale v. Thomas H. Temple Co.,* 186 Tenn. 69, 208 S.W.2d 344, 347 (1948). Necessary elements for such a claim include common design, concert of action, and an overt act. *Kirksey v. Overton Pub, Inc.,* 739 S.W.2d 230, 237 (Tenn.Ct.App.1987) (citing *Koehler v. Cummings,* 380 F.Supp. 1294 (M.D.Tenn.1971)).

McConkey v. McGhan Medical Corp., 144 F.Supp.2d 958, 965 (U.S.D.C., E.D.Tenn. 2000)[6]

Defendants also argue that Sanders is their agent. (Defendant, FSE's, Memorandum of law, ¶ IV(F)(2)). That being the case, Defendants are therefore liable for the conduct of Sanders in conspiring with O'Connor. *Id.* FSE, FST and Sanders, as well as O'Connor, are all liable under the Plaintiff's state law conspiracy claim for conduct prior to O'Connor's employment by FSE. *Trau-Med.*

Defendants cannot argue that the intracorporate conspiracy doctrine prevents the finding of a state law conspiracy between FSE and FST, because FSE and FST are separate and distinct corporations that could have conspired with each other at any time. *Trau-Med,* 703-704.

3. O'Connor conspired with FSE and FST, with Sanders acting as their agent.

After O'Connor was employed by FSE, he became an agent of FSE who could conspire with FST on behalf of FSE. However, the conspiracy between O'Connor, FSE and FST began prior to O'Connor's employment with FSE, so at that point there was already an ongoing conspiracy. Defendants do not provide any authority for their seeming position that once a conspiracy begins, a party to the conspiracy can simply employ one of its co-conspirators thereby eliminating his or its exposure as a co-conspirator.

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[6] No reported case supports the Defendants' contention that the primary purpose of a civil conspiracy in Tennessee must be to cause injury to another.

The evidence in this case is that O'Connor conspired with FSE and FST prior to his employment by FSE to hire away all of Innovative's employees for the unlawful purpose of eliminating Innovative as a competitor of FSE and FST. (Plaintiff's Additional Facts, ¶ 1, 37-44, 60-68). (The elimination of Innovative as a competitor was an unlawful action under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as discussed *infra*.). He committed overt acts in furtherance of the conspiracy by advising all of the Innovative employees of Innovative that jobs were waiting for them (Plaintiff's Additional Facts, ¶¶ 60-63), information he could only have obtained from Sanders, the agent for FSE and FST. Those employees acted on O'Connor's advice, damaging Innovative. (Plaintiff's Additional Facts, ¶ 1)

The evidence in this case is that FSE and FST continued to conspire with each other for the unlawful purpose of eliminating Innovative as a competitor of FSE and FST after O'Connor was employed by FSE by hiring away from Innovative all of its Knoxville employees, damaging Innovative. (Plaintiff's Additional Facts, ¶ 1)

The evidence is that O'Connor stole and/or destroyed Innovative's personal property, including trade secrets, prior to his employment by FSE, in furtherance of his conspiracy with FSE and FST to accomplish their unlawful purpose to eliminate Innovative as a competitor of FSE and FST. (Plaintiff's Additional Facts, ¶¶ 60, 69-73, 75)

The evidence is that the conspiracy was successful. Having lost the ability to conduct business in Tennessee as a result of the overt acts of O'Connor, FSE and FST in furtherance of their conspiracy, Innovative lost all of its accounts to FSE and FST and was eliminated as a competitor. (Plaintiff's Additional Facts, ¶ 113).

There is evidence of a civil conspiracy between FSE, FST and O'Connor prior to his employment by FSE and overt acts committed in furtherance of that conspiracy. (Plaintiff's Additional Facts, ¶¶ 37-44, 68-73, 75, 85). There is evidence that the civil conspiracy between FSE and FST continued after O'Connor's employment by FSE and overt acts committed in furtherance of that continuing conspiracy. (Plaintiff's Additional Facts, ¶¶ 1, 45, 46, 74, 81-83, 87-88, 106; Affidavit of Shelly L. Wilson, ¶ 2, Composite Exhibit A attached thereto (Composite Exhibits A-3 and A-4 FILED UNDER SEAL); Plaintiff's Responses to FSE's Statement of Undisputed Material Facts, ¶ 59). The conspiracy claims against FSE, FST and O'Connor should not be dismissed. *McConkey*. The claims are not barred by the intracorporate conspiracy doctrine. *Trau-Med.*

Genuine issues exist as to material facts regarding Innovative's claim for civil conspiracy against both FST and FSE. The Defendants contend that the only action taken by FST was to hire Carol Adams. Innovative disputes this contention. (Plaintiff's Response to Defendant, FST's, Statement of Undisputed Facts, ¶ 27).

FSE lists as an additional undisputed fact that O'Connor never discussed what manufacturers might choose to leave Innovative to work with O'Connor at FSE. Innovative has disputed this fact. (Plaintiff's Response to Defendant, FSE's, Statement of Undisputed Facts, ¶ 14). The Defendants also contend that it is undisputed that neither FSE nor O'Connor spoke with any manufacturers or Innovative's end use customers regarding O'Connor leaving Innovative. This material issue is in dispute. (Plaintiff's Response to Defendant, FSE's, Statement of Undisputed Facts, ¶¶ 16, 17). Thus, all of the alleged "undisputed facts" upon which FSE and FST base their arguments are disputed by Innovative.

Genuine issues exist as to material facts regarding Innovative's claims for civil conspiracy against Sanders. Specifically, Sanders lists as an undisputed fact that O'Connor did not discuss with Sanders what business might choose to leave Innovative and retain FSE and/or FST prior to O'Connor resigning from Innovative. This material fact is disputed by Innovative. (Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶ 13). Innovative also disputes that, prior to O'Connor's resignation, neither Sanders nor O'Connor spoke with any manufacturers or any of Innovative's end user customers regarding O'Connor leaving Innovative. (See Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶ 15).

Genuine issues exist as to material facts regarding Plaintiff's claims for civil conspiracy against O'Connor. Disputed material facts include, (1) O'Connor's reasons for leaving Innovative, (2) whether O'Connor discussed with Sanders what business might choose to leave Innovative and retain FSE prior to O'Connor's resignation, (3) whether Sanders and/or O'Connor spoke with any manufacturers or any of Innovative's end user customers regarding O'Connor leaving Innovative, (4) whether O'Connor solicited any of the six employees or Ms. Adams to resign their employment with Innovative, and (5) whether O'Connor stole or destroyed files and confidential information of the Plaintiff. (Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶¶ 11, 13, 28, 36, 44, 50, 57, 66, 74, 75).

The intracorporate conspiracy doctrine does not bar any of the state civil conspiracy claims made by Innovative. As a matter of law and with the existence of material disputed facts, the Defendants' motion for summary judgment on this issue should be denied. *Trau-Med.*

G. DEFENDANTS' MOTIONS TO DISMISS CONSPIRACY TO MONOPOLIZE MUST BE DENIED.

Innovative's claim against all Defendants for monopolization under 15 U.S.C. §2 is in its Third Amended Complaint, ¶¶ 44 through 47. Innovative has pled and herein sets forth facts sufficient to support its claims thereby requiring a jury to resolve the parties' differing versions of the truth at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 284-90 (1968).

Defendants rely on the so-called intracorporate conspiracy doctrine in their motions for summary judgment on Innovative's claims of conspiracy to monopolize and conspiracy on restraint of trade. A conspiracy to monopolize is prohibited by § 2 of the Sherman Act (15 U.S.C. § 2) and a conspiracy in restraint of trade is prohibited by § 1 of the Sherman Act (15 U.S.C. § 1). Defendants argue that, in light of the intracorporate conspiracy doctrine, only Sanders and O'Connor could have conspired with each other and the only time they could have conspired with each other was prior to O'Connor's employment by FSE. They then argue that there is no evidence that Sanders conspired with O'Connor before he was employed by FSE.

1. As a matter of law, FSE and FST can conspire with O'Connor to monopolize.

None of the cases relied upon by the Defendants are authority for their argument that the Plaintiff's claim of conspiracy to monopolize is barred by the intracorporate conspiracy doctrine.[7] Virtually everything that has been argued in regards to the allegations of conspiracy in restraint of trade, below at H, can be said in regards to the allegations of conspiracy to monopolize.

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[7] Defendants do not rely upon *Potters*, the only case with possible application, in their memoranda on the Plaintiff's conspiracy to monopolize claim. They only rely upon *Potters* in their arguments concerning the conspiracy to restrain trade claim.

In an antitrust context, the intracorporate conspiracy doctrine means that a corporation cannot conspire with itself. *Copperweld Corp., v. Independence Tube Corp.,* 467 U.S. 752 (1984). In its Fourth Claim for Relief - Conspiracy to Monopolize, Innovative does not allege that FSE conspired with itself or FST conspired with itself.

Innovative's Fourth Claim for Relief - Conspiracy to Monopolize, alleges that O'Connor conspired with the Sanders Group, which is FSE, FST, and Sanders, to monopolize the Knoxville/Nashville market. As noted, *supra*, the Defendants argue that Sanders is and was an agent of FSE and FST. *Defendants' Memoranda*, ¶ IV(F)(2). The issue, then, is whether **O'Connor** conspired to monopolize with either FSE or FST or both through their agent, Sanders.

As in their other arguments, the Defendants agree that there is no bar to a claim of a conspiracy to monopolize before O'Connor was employed by FSE. (Defendant, FSE's, Memorandum of law, ¶ IV(G)(3); Defendant, FST's, Memorandum of Law, ¶ IV(G)(3).

Contrary to the Defendants' contention, there is no requirement of an overt act in a conspiracy to monopolize case in the Sixth Circuit. *Re/Max I*, 900 F.Supp. at 152 - 153, *see, especially*, 900 F. Supp 153, fn. 13.

2. FSE and FST conspired with O'Connor, through their agent Sanders.

The evidence in this case is that O'Connor conspired with FSE and FST prior to his employment by FSE to hire away all of Innovative's employees for the purpose of eliminating Innovative as a competitor of FSE and FST. (Plaintiff's Additional Facts, ¶¶ 1, 39-40, 47-52, 60, 63, 64-67). The evidence is that O'Connor conspired with FSE and FST to steal or destroy Innovative's personal property and steal its trade secrets prior to his employment by FSE in

furtherance of his conspiracy with FSE and FST to accomplish their purpose to eliminate Innovative as a competitor of FSE and FST. (Plaintiff's Additional Facts, ¶¶ 60, 62, 69-73, 75).

"To prove a conspiracy to monopolize 'it [is] not necessary to show power and intent to exclude all competitors, or to show a conspiracy to exclude all competitors,' because § 2 prohibits efforts to 'monopolize any part of the trade or commerce among the several states····' *Re/Max I*, 900 F.Supp. at 153. Hence, the conspiracy between O'Connor and the other defendants to eliminate a major competitor suffices to state a claim for conspiracy to monopolize.

Since the alleged conspiracy was between O'Connor and FSE and FST that were not his employers at the time the conspiracy was formed, the intracorporate conspiracy doctrine does not apply to bar Innovative's claim and the Defendants' motions for summary judgment on this issue should be denied.

As with the conspiracy to restrain trade claim, none of the foregoing relieves Sanders of his individual liability. A corporation's officers and agents are held individually liable for corporate actions that violate the antitrust laws if they authorize or participate in the unlawful acts, where corporate agents are actively and knowingly engaged in a scheme designed to achieve anticompetitive ends. "To support a determination of liability under this standard, the evidence must demonstrate that a defendant exerted his influence so as to shape corporate intentions." *Brown v. Donco*, 783 F.2d at 646. Thus, Sanders is not relieved of liability for their actions. Sanders was the agent of FSE and FST that conspired with O'Connor, so he actively and knowingly engaged in a scheme designed to achieve anticompetitive ends. The evidence in this case is that Sanders exerted his influence so as to shape the corporate intentions of FSE and FST

to conspire with O'Connor. Sanders is individually liable for the conspiracy to monopolize between O'Connor, FSE and FST. *Brown v. Donco.*

3. There are genuine issues of material fact to support Innovative's claims against the Defendants for conspiracy to monopolize.

Genuine issues exist as to material facts regarding Innovative's claim for conspiracy to monopolize against FSE and FST. As grounds for their arguments in support of summary judgment, the Defendants contend that the sole intention of any actions taken by FSE was to compete vigorously and to advance its legitimate business interests. The Defendants' purpose and intent in convincing O'Connor and the six other Innovate employees to leave Innovative and work for the FSE is one of the central disputes in this lawsuit. The purpose and intent of the Defendants is certainly a disputed issue. (Plaintiff's Response to Defendant, FSE's, Statement of Undisputed Facts, ¶¶ 20, 68). Innovative has set out in this Memorandum numerous examples that Defendants' actions were not for legitimate business reasons.

Defendants further contend that it is undisputed that prior to O'Connor's leaving Innovative, neither Sanders nor O'Connor spoke with any manufacturers or Innovative's customers regarding O'Connor leaving Innovative. This fact is in dispute. (Plaintiff's Response to Defendant, FSE's, Statement of Undisputed Facts, ¶¶ 14, 16, 17).

FST contends that it is undisputed that O'Connor began his position of employment with FSE on the afternoon of June 16, 2003. However, he was still on Innovative's payroll on June 16, 2003, and was paid by Innovative through that date. Additionally, circumstances indicate that O'Connor was working for Defendants prior to June 16, 2003. (Plaintiff's Response to Defendant, FST's, Statement of Undisputed Facts, ¶12). FST contends it is undisputed that

Carol Adams quit Innovative before her employment with FST. This, too, is disputed. (Plaintiff's Response to Defendant, FST's Statement of Undisputed Facts, ¶27).

Genuine issues exist as to material facts regarding Innovative's claims for conspiracy to monopolize against Sanders. Disputed material facts include, (1) O'Connor's reasons for leaving Innovative and Sanders' purpose and intent in hiring O'Connor, (2) whether O'Connor discussed with Sanders what business might choose to leave Innovative and retain FSE prior to O'Connor's resignation, and (3) whether Sanders and/or O'Connor spoke with any manufacturers or any of Innovative's end user customers regarding O'Connor leaving Innovative. (Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶¶ 13, 15, 52).

Genuine issues exist as to material facts regarding Innovative's claims for conspiracy to monopolize against O'Connor. Defendant O'Connor has referenced the same allegedly undisputed facts for Plaintiff's claim for conspiracy to monopolize as he referenced for Innovative's claims for civil conspiracy. As stated *supra*, disputed material facts include, (1) O'Connor's reasons for leaving Innovative, (2) whether O'Connor discussed with Sanders what business might choose to leave Innovative and retain FSE prior to O'Connor's resignation, (3) whether Sanders and/or O'Connor spoke with any manufacturers or any of Innovative's end user customers regarding O'Connor leaving Innovative, (4) whether O'Connor solicited any of the six employees or Ms. Adams to resign their employment with Innovative, and (5) whether O'Connor stole or destroyed files and confidential information of the Plaintiff. (Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶¶ 11, 13, 28, 36, 44, 50, 57, 66, 74, 75).

Additionally, Innovative disputes that the sole intention of any action of O'Connor was to compete vigorously and to advance his legitimate business interests. (Plaintiff's Response to

Defendant, O'Connor's, Statement of Undisputed Facts, ¶ 74). As shown above, genuine issues exist as to material facts regarding Innovative's claims for conspiracy to monopolize.

As evidenced by the foregoing, genuine issues exist as to material facts regarding Innovative's claim for conspiracy to monopolize. Innovative has pled and herein set forth facts sufficient to support its claims thereby requiring a jury to resolve the parties differing reasons of the truth at trial with respect to its claims for conspiracy to monopolize.

H. FSE AND FST, WITH SANDERS AS THEIR AGENT, CONSPIRED WITH O'CONNOR, IN RESTRAINT OF TRADE.

Innovative's claims against FSE and FST for conspiracy in restraint of trade are pled in its Third Amended Complaint, ¶¶ 48 through 51. Defendants have moved in summary judgment to dismiss Innovative's claim that Defendants engaged in restraint of trade pursuant to 15 U.S.C. 1. As a matter of law and due to the existence of disputed material facts, Defendants' motion must be denied.

1. Defendants are wrong as to the law of Plaintiff's burden to defeat Defendants' Motion for Summary Judgment.

The Sixth Circuit thoroughly examined the first case cited by the Defendants, *Cities Service*, and held, in *Smith*, cited *supra*, that a court should be lenient in examining a plaintiff's proofs for issues of fact regarding antitrust claims and reluctant to utilize summary judgment to dispose of antitrust claims. *Smith*. *See also*, *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 572 (6th Cir., 1986).[8]

[8] *Potters* upheld the standard applied in *Smith,* expressly relying upon the *Celotex* trilogy, wherein the Supreme Court revised the standards for a motion for summary judgment in a federal case: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Matsushita Elect. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *Potters*, 800 F.2d at 572. Thus, despite the revision of the standards applicable to

Defendants argue that "allegations of restraint of trade must be supported by **significant** evidence to overcome a motion for summary judgment." (Emphasis as in the original.) They rely on three cases: *First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253 (1968), *Dominion Parking Corp. v. Baltimore & O. R. Co.,* 450 F.Supp. 441 (U.S.D.C., E.D. Va., 1978) and *TV Communications Network, Inc., v. ESPN, Inc.,* 767 F. Supp. 1062 (U.S.D.C., Col., 1991). **They are wrong.** *Dominion Parking Corp.* is a decision by a District Court in the Fourth Circuit that relies upon a decision of the Fourth Circuit. *Dominion*, 450 F. Supp at 442. It does not state Sixth Circuit law. *Smith* is the controlling precedent in the Sixth Circuit. *TV Communications,* is a decision by a District Court in the Tenth Circuit that relies upon a Tenth Circuit opinion. *TV Communications*, 767 F. Supp at 1075. It does not state Sixth Circuit law. *Smith* is the controlling precedent in the Sixth Circuit.

2. As a matter of law, FST, FSE, with Sanders acting as their agent, can conspire with O'Connor.

In arguing the application of the intracorporate conspiracy doctrine to the Plaintiff's restraint of trade claims, the Defendants rely upon cases previously cited in their memoranda. The three cases relied upon by Defendants, *Hull, Doherty* and *Dooley*, all cited *supra*, are the federal civil rights cases that do not apply to antitrust conspiracy claims.

The seminal federal case on the intracorporate conspiracy doctrine in antitrust cases is *United States v. Yellow Cab Co.*, 322 U.S. 218 (1947). In that case, the United States Supreme Court held that entities within a corporation could conspire with each other within the meaning of the Sherman Act (15 U.S.C. §§ 1 and 2). *Yellow Cab*, 322 U.S. 227 - 228. In other words,

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motions for summary judgment on other claims, *Smith* remains the controlling precedent in the Sixth Circuit on summary judgement standards applicable to antitrust claims.

under federal antitrust law, corporations can conspire with each other, contrary to Defendants' assertions. Defendants' referenced case of *Aaron E. Levine* carefully distinguished the case before it from a *Yellow Cab* case, *Aaron E. Levine*, 429 F. Supp. at 1044. While another case cited by Defendants, *Marion County Co-Op,* simply ignored *Yellow Cab.* In any event, neither case is significant authority on any issue in this case, especially since the Supreme Court revisited the intracorporate conspiracy doctrine in *Copperweld Corp., v. Independence Tube Corp.,* 467 U.S. 752 (1984).

It is curious that the Defendants never mention either *Yellow Cab* or *Copperweld* in their memoranda, since these are the leading United States Supreme Court cases on the intracorporate conspiracy doctrine in antitrust cases. The *Copperweld* court, after examining *Yellow Cab*, held that under the doctrine a parent corporation and its wholly owned subsidiary could not conspire among themselves. *Copperweld*, 467 U.S. at 777. Such is not the situation in the case at bar.

Potters Medical Center v. City Hospital Association, 800 F.2d 568, 572 (6th Cir., 1986) is the last case cited by the Defendants in support of their argument on the applicability of the intracorporate conspiracy doctrine to federal antitrust claims. *Potters* is the only applicable authority relied on by the Defendants. However, since the Defendants completely misconstrue the meaning of the intracorporate conspiracy doctrine in the antitrust context, their reliance upon that case does nothing to advance their cause.

Innovative's Third Claim for Relief - Conspiracy in Restraint of Trade alleges that O'Connor, FSE, FST and Sanders, conspired to eliminate Innovative as a competitor in the Knoxville/Nashville market. As noted, *supra*, the Defendants argue that Sanders is and was an agent of FSE and FST. (Defendant, FSE's, Memorandum of Law, ¶ IV(F)(2); Defendant, FST's,

Memorandum of Law, ¶ IV(F)(2)). The issue, then, is whether O'Connor conspired with either FSE or FST or both through their agent, Sanders.

As in their arguments concerning the Plaintiff's state law conspiracy claims, the Defendants agree that there is no bar to a claim of a conspiracy to restrain trade before O'Connor was employed by FSE. (Defendant, FSE's, Memorandum of Law, ¶ IV(H)(4)).

3. FSE and FST, with Sanders acting as their agent, conspired with O'Connor to restrain trade.

The evidence in this case is that O'Connor conspired with FSE and FST prior to his employment by FSE to hire away all of Innovative's employees for the purpose of eliminating Innovative as a competitor of FSE and FST. (Plaintiff's Additional Facts, ¶¶ 1, 39-40, 47-52, 60, 63-67). The evidence is that O'Connor conspired with FSE and FST to steal or destroy Innovative's personal property and steal its trade secrets prior to his employment by FSE, in furtherance of his conspiracy with FSE and FST to accomplish their purpose to eliminate Innovative as a competitor of FSE and FST. (Plaintiff's Additional Facts, ¶¶ 60, 62, 69-73, 75). Contrary to the rule in a state law civil conspiracy action, a conspiracy in antitrust law does not require the doing of any overt act other than the act of conspiring to create liability. *Re/Max International v. Realty One, Inc., (Re/Max I)* 900 F. Supp. 132, 151-152 (U.S.D.C., E.D. Ohio 1995), *affirmed, Re/Max Intern., Inc. v. Realty One, Inc. (Re/Max III)*, 173 F.3d 995 (6th Cir. 1999), relying upon *Nash v. United States*, 229 U.S. 373 (1913), *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940) and *United States v. Shabani*, 513 U.S. 10 (1994). Since the elements of the cause of action against O'Connor and the other Defendants were, under Innovative's evidence, all fulfilled before O'Connor was ever employed by FSE, the

intracorporate conspiracy doctrine has no application to Innovative's claim and the Defendants' motion for summary judgment on this issue should be denied.

None of the foregoing relieves Sanders of his individual liability under Innovative's restraint of trade claim. In the case of *Brown v. Donco Enterprises, Inc.,* 783 F.2d 644 (6th Cir., 1986) the Sixth Circuit was quite clear:

> It is undisputed that a corporation's officers and agents may be held individually liable for corporate actions that violate the antitrust laws if they authorize or participate in the unlawful acts. *United States v. Memphis Retail Package Stores Association,* 334 F.Supp. 686, 689 (W.D.Tenn.1971)...Individual liability under the antitrust laws can be imposed only where corporate agents are actively and knowingly engaged in a scheme designed to achieve anticompetitive ends. To support a determination of liability under this standard, the evidence must demonstrate that a defendant exerted his influence so as to shape corporate intentions.

Id., 783 F.2d at 646.

Sanders was the agent of FSE and FST that conspired with O'Connor, so he actively and knowingly engaged in a scheme designed to achieve anticompetitive ends. The evidence in this case is that Sanders exerted his influence so as to shape the corporate intentions of FSE and FST to conspire with O'Connor. Sanders is individually liable for the conspiracy between O'Connor, FSE and FST. *Brown v. Donco.*

Genuine issues exist as to material facts regarding Innovative's claim for conspiracy in restraint of trade against FSE and FST. Specifically, Innovative disputes that the single action taken by FST in this matter was to hire Carol Adams. (Plaintiff's Response to Defendant, FST's, Statement of Undisputed Facts, ¶¶ 11, 27). While FST did not hire O'Connor or any of the six employees to work at the FST Nashville office, FSE and FST acted in concert in convincing

O'Connor and the six employees to leave Innovative and work for FSE. This is further evidenced by FST's hiring of Ms. Adams.

Genuine issues exist as to material facts regarding Innovative's claims for conspiracy in restraint of trade against O'Connor. O'Connor contends that it is undisputed that he did not interview or have any discussions with FSE. This is disputed by Innovative. O"Connor met with Sanders, an officer and owner of FSE, to discuss possible employment. (Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶¶ 76, 77). O'Connor further lists as an undisputed fact that the only matter discussed by O'Connor and Sanders was O'Connor's potential employment with FSE. This material fact is also disputed by Innovative. (Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶¶ 11, 12).

Based on the foregoing, as a matter of law and due to the existence of disputed material facts, Defendants motions must be denied.

I. DEFENDANTS' MOTIONS TO DISMISS CLAIMS FOR UNFAIR METHODS OF COMPETITION MUST BE DENIED.

Defendants' motions to dismiss claims for unfair methods of competition must be denied.

1. Tennessee law on unfair methods of competition.

Innovative's cause of action against Defendants for unfair methods of competition is found in the Third Amended Complaint at ¶¶ 78-85. Defendants have argued that, as a strict matter of law, Innovative's claim for unfair methods of competition must be denied. Defendants do not support their claims with any citation to the record in the form of undisputed material facts in support of summary judgment. As stated earlier herein, Defendants' motions for

summary judgment must therefore be treated as a Fed.R.Civ.P. 12(b)(6) motion on the pleadings. Innovative has sufficiently plead facts and therefore, Defendants' motions must be denied.

The elements of a prima facie claim of unfair competition in Tennessee are (1) that Defendants engaged in conduct that amounts to a recognized tort and (2) that tort deprived Innovative of customers or other prospects. *B& L Corp. V. Thomas & Thorngren, Inc.* 162 S.W.3d 189, 215 (Tenn. Ct. App. 2005). Innovative has alleged the torts of civil conspiracy and tortious interference with business relations against Defendants.[9]

2. FSE and FST did employ unfair methods of competition.

Specifically, with respect to its claim of civil conspiracy, Innovative has alleged that Sanders, as an agent of corporate defendants FSE and FST, conspired with Defendant O'Connor by hiring away Innovative's key employees, using Innovative's personal property, trade secrets and business techniques, and taking Innovative's accounts, leaving it without the ability to conduct business in the relevant markets. (See Third Amended Complaint, ¶¶ 74- 77). Innovative has also alleged Sanders engaged in tortious interference with business relations by inducing employees he knew to be working for Innovative and knowing the key positions said employees held with Innovative, to leave their employ with Innovative and go to work for Defendants in an effort to interfere with those business relations. Sanders' actions were intended to harm Innovative's business by obtaining Innovative's trade secrets or confidential information from Innovative's employees. (See Third Amended Complaint, ¶¶ 86- 90).

[9]See Innovative's arguments in support of its claim against Sanders for tortious interference with business relations, above.

While Defendants cite Prosser & Keeton on Torts §130 at 12013 (5th ed. 1984), the list of torts set forth therein, as admitted by Defendants and stated therein, is simply an example of torts that constitute unfair methods of competition. Sanders claims that he only met with O'Connor on two occasions after O'Connor inquired about potential employment opportunities at FSE, conveniently leaving out the numerous telephone calls he had with O'Connor during the relevant time period. (See Plaintiff's Additional Facts, ¶¶ 41-44).

3. As a matter of law and due to the existence of material disputed facts, all of Defendants' motions to dismiss must be denied.

Innovative's claims against FSE and FST for unfair methods of competition are pled in its Third Amended Complaint, ¶¶ 78-85. FSE and FST's motions with regard to the claim of unfair methods of competition rely only on matters of law.

Because FSE and FST do not provide any citation to the record with respect to a claim of undisputed material facts as to the merits of the claims, its motion must be treated as a 12(b)(6) motion under the Federal Rules of Civil Procedure. "[A] summary judgment motion filed solely on the basis of pleadings is the functional equivalent of a dismissal motion, *Blum v. Morgan Guar. Trust Co.*, 709 F.2d 1463, 1466 (11th Cir. 1983)..." *North Arkansas Medical Center v. W. Barrett*, 962 F.2d 780, 784 (8th Cir. 1992). "A motion for summary judgment may be made solely on the basis of the complaint, in which case the motion is to be treated as the functional equivalent of a motion to dismiss for failure to state a claim under the Fed.R.Civ.P. 12(b)(6). 6 J. Moore, Moore's Federal Practice ¶ 56.11[2] (2d ed. 1982). In this posture, the court must construe the complaint liberally in favor of the plaintiff, taking the facts as alleged as true. The

motion should be denied if a claim has been pleaded." *Blum v. Morgan Guaranty Trust Company of New York*, 709 F.2d 1463, 1466 (11th Cir. 1983).

Without presentation of undisputed material facts as to the merits of the claim, FSE and FST's motions for summary judgment must be treated as a Fed.R.Civ.P. 12(b)(6) motion on the pleadings. Innovative has sufficiently plead facts and therefore, Defendants FSE and FST's motions must be denied.

Genuine issues exist as to material facts regarding Innovative's claims for unfair methods of competition. Sanders contends that he did not solicit any of Innovative's employees or clients. This material fact is disputed by Innovative. (Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶¶ 14, 15, 16). The number of times O'Connor and Sanders met or communicated regarding potential employment is also disputed between the parties. (Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶ 12). Sanders contends that he merely met with O'Connor on two occasions. Innovative has evidenced numerous other communications between Sanders and O'Connor prior to O'Connor leaving Innovative. (See Plaintiff's Response to Defendant, Sanders', Statement of Undisputed Facts, ¶ 12). The aforementioned material facts being in dispute, summary judgment is not appropriate.

Genuine issues exist as to material facts regarding Innovative's claims for unfair methods of competition against O'Connor. In his argument, O'Connor contends that he did not solicit any of Innovative's employees or clients. This material fact is disputed by Innovative. (Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶¶ 28, 36, 44, 45, 50, 56, 57, 66, 75). The number of times O'Connor and Sanders met or communicated regarding potential employment is also disputed between the parties. O'Connor contends that he merely

met with Sanders on two occasions. Innovative has evidenced numerous other communications between Sanders and O'Connor prior to O'Connor leaving Innovative. (See Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶ 78). Based on the existence of disputed material facts and as a matter of law, Defendants' motions to dismiss Innovative's claims for unfair methods of competition must be denied.

J. O'CONNOR'S MOTION TO DISMISS THE CLAIM OF BREACH OF FIDUCIARY DUTY MUST BE DENIED.

The position of trust held by O'Connor during his employment with Innovative was breached by his actions: in soliciting the Innovative employees to go to work at FSE (Plaintiff's Additional Facts, ¶¶ 1, 60, 63-67); instructing them to take documents from Innovative to work on at FSE (Plaintiff's Additional Facts, ¶¶ 60, 62); soliciting Innovative's distributor and manufacturer customers (Plaintiff's Additional Facts, ¶ 85); destroying or deleting documents from Innovative's files (Plaintiff's Additional Facts, ¶¶ 69, 70-71, 74, 84). O'Connor's actions left Innovative without the ability to conduct business once O'Connor began direct competition with Innovative. All of these actions were not just in preparation of going to work with a competitor, but to in direct competition with Innovative.

While O'Connor denies having solicited any of Innovative's customers prior to his resignation, thereby creating a disputed material fact, O'Connor admits going to one of Innovative's customer distributors the afternoon of June 16, 2003, the last day he was on Innovative's payroll. That visit was with Greg Penn, President and co-owner of FSE. (Plaintiff's Additional Facts, ¶ 85). The immediate onslaught of resignations of Innovative's manufacturing customers upon O'Connor's resignation, based on the industry standards that the process by

which a manufacturer terminates a non-productive broker ranges from 6-24 months, together with fact that O'Connor had already informed one of Innovative's competitors that he was prepared to go to work for them, taking employees and lines, creates a material disputed fact of whether O'Connor had also solicited Innovative's other customers for their business at FSE while he was still on the Innovative payroll. The solicitation of business while still on the Innovative payroll would be enough to find O'Connor guilty of breach of fiduciary duty. *Eaves v. Hillard Co., Inc.*, 1998 WL 49959, *3 (Tenn. Ct. App. May 18, 1988) (cert. denied) (unreported). However, O'Connor's breaches of fiduciary duty did not stop there as set out below.

3. O'Connor had a Duty to Inform Innovative of His Actions in Seeking Ownership or Employment With Sanders, as an Agent of Both FSE and FST

Generally, O'Connor had a duty not to compete with Innovative while he was still so employed, and to report his actions to Innovative based on the direct instructions he had been given by Innovative - to find a competitor broker in the Nashville area which Innovative could acquire or merge with to improve Innovative's representation as a regional broker.

Additionally, the Restatement (Third) of Agency §8.11 *Duty to Provide Information* (2006), states:

> An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when:
> (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
> (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

O'Connor was given an assignment by Bud Taylor, Innovative's President and the person to whom O'Connor directly reported, to seek a competitor in the Nashville market which could be acquired by or merged with Innovative to strengthen its presence in the Nashville/Knoxville market as a regional representative. (Plaintiff's Additional Facts, ¶ 24). Sanders was an owner and officer of both FST and FSE, who were doing business together as FSI. FSI was thus represented as a regional broker in the same markets as Innovative - FST in Nashville, and FSE in Knoxville. (Defendant FSE's Undisputed Material Facts, ¶¶ 3, 4, 5, 6). Thus, contrary to his assignment, O'Connor set out to find a regional broker with which he could join forces, thereby strengthening Innovative's competitor as a regional broker. O'Connor did not inform Innovative of his actions which were in direct competition with his duties to Innovative and, as such, O'Connor breached his fiduciary duty to Innovative.

Genuine issues exist as to material facts regarding Innovative's claims for breach of fiduciary duty. One of the material issues surrounding Innovative's claim for breach of fiduciary duty is whether O'Connor solicited any clients or employees of Innovative prior to resigning his employment. Although O'Connor has included as an undisputed fact that he did not actively solicit any client or employee of Innovative prior to resigning his employment, this material fact is disputed by Innovative. (Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶¶ 28, 36, 44, 45, 50, 56, 57, 66, 75). Innovative also disputes O'Connor's contention that he did not discuss his new employment with any of Innovative's manufacturing clients or end user customers until after he formally resigned his employment with Innovative. (Plaintiff's Response to Defendant, O'Connor's, Statement of Undisputed Facts, ¶ 75).

As further grounds to support his arguments for summary judgment on the breach of fiduciary duty issue, O'Connor contends that he did not misappropriate, delete, destroy, or otherwise take any action regarding any confidential information that was the property of the Plaintiff. This material fact is in dispute. (Plaintiff's Statement of Additional Facts, ¶¶ 60-62, 69-73, 75, 84). As evidenced by the foregoing, genuine issues exist as to material facts regarding Plaintiff's claim for breach of fiduciary duty.

V. CONCLUSION

Based on the foregoing, as to both matters of law and the existence of material disputed facts, all of the Defendants' motions for summary judgment must be denied in their entirety.

Respectfully submitted, this 31st day of July, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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THE ROAD TO THE RIGHT PATH: YOUTH COURT 2018 SPEECH

GOOD EVENING, EVERYONE. IT IS SUCH A PRIVILEGE TO BE HERE WITH YOU TODAY AT THE THIRD ANNUAL GARDEN TO GAVEL EVENT. I AM HONORED TO BE ABLE TO SPEAK ON BEHALF OF THE BLOUNT COUNTY YOUTH COURT. THIS ORGANIZATION HAS HELPED SO MANY TEENS AND YOUNG ADULTS OVER THE YEARS, FROM VOLUNTEERS EAGER TO CONTRIBUTE TO THEIR COMMUNITY THROUGH PUBLIC SERVICE TO OFFENDERS WHO WERE GRANTED RARE OPPORTUNITIES TO GIVE BACK TO THEIR COMMUNITY THROUGH THE BLOUNT COUNTY YOUTH COURT SYSTEM.

THE YOUTH COURT PROGRAM STANDS TODAY AS A SPECIAL ADDITION TO OUR LOCAL JUSTICE SYSTEM. BY EMBRACING ITS METHODS, WE ARE ABLE TO OFFER COUNTLESS OPPORTUNITIES AND SECOND CHANCES TO TEENS THROUGHOUT THE AREA, LEADING THEM BACK TOWARDS THE ROAD TO THE RIGHT PATH.

I'D LIKE TO TELL YOU ABOUT GEORGE, A YOUNG MAN WHO FOUND HIMSELF FOLLOWING THE WRONG CROWD. AT JUST FOURTEEN, HE WAS CAUGHT BY POLICE OUTSIDE AFTER CURFEW, A LIT CIGARETTE IN HIS HAND, AND A GROWING HISTORY OF BAD DECISIONS. HE WAS PROVIDED WITH TWO OPTIONS: STAND BEFORE A JUDGE AND THE BEGINNING OF A CRIMINAL RECORD OR FACE HIS COUNTY'S YOUTH COURT.

THE CHOICE TO HIM WAS OBVIOUS.

HE WAS FRIGHTENED, STANDING IN FRONT OF HIS PEERS FOR JUDGMENT. HE HAD NO IDEA WHAT TO EXPECT AS HE ANSWERED THEIR QUESTIONS AND WAITED FOR THEM TO FINISH DELIBERATION ON HIS CASE. THEIR SENTENCE WASN'T LIGHT, BUT IT WAS FAIR. THE YOUNG MAN WAS GIVEN THREE SANCTIONS: PERFORMING 25 HOURS OF COMMUNITY SERVICE, WRITING AN APOLOGY LETTER TO HIS MOTHER, AND ATTENDING A SMOKING-CESSATION CLASS.

HE SPENT HIS COMMUNITY SERVICE HOURS AT A LOCAL FESTIVAL, PICKING UP TRASH. HE VOWED NEVER TO LITTER AGAIN. HE WROTE AN APOLOGY TO HIS MOM, WHICH OPENED UP NEW LEVEL OF COMMUNICATION WITHIN HIS FAMILY. HE EVEN DID CHORES AROUND THE HOUSE TO RAISE THE $20 HE NEEDED TO ATTEND HIS SMOKING CESSATION SEMINAR. NOW, HE CAN FIRMLY SAY HE NO LONGER HAS A DESIRE TO SMOKE, EVEN WHEN HE COMES OF AGE.

THIS YOUNG MAN LEARNED HIS LESSON, BUT HE ALSO LEARNED A SENSE OF DUTY AND A DESIRE TO HELP OTHERS LIKE HIM. HIS STORY ENDS WITH JOINING THE LOCAL YOUTH COURT IN HIS COUNTY AS A PANEL MEMBER, EAGER TO EXTEND A HELPING HAND TOWARDS THE RIGHT PATH AS IT ONCE HAD BEEN OFFERED TO HIM.

SO WHAT MAKES YOUTH COURT SUCH A SUCCESSFUL TOOL FOR ITS COMMUNITY? ONE ELEMENT IS ITS USE OF STUDENTS, ACTING IN THE ROLES OF JUDGE AND JURY FOR THEIR PEERS. THE AVERAGE TEENAGER APPEARING BEFORE THE YOUTH COURT IS A NON-VIOLENT, FIRST-TIME OFFENDER. RATHER THAN FACING AN ADULT JUDGE, THEY ARE ALLOWED THE UNIQUE OPPORTUNITY TO STAND BEFORE A JURY OF THEIR OWN PEERS, WHOM THEY OFTEN HAVE A BETTER RESPONSE TO, BECAUSE THEY FEEL THEIR FELLOW STUDENTS BETTER UNDERSTAND THE ISSUES AND PRESSURES FACING YOUNG ADULTS TODAY. IT'S TEENS SPEAKING TO TEENS, PUTTING POSITIVE PEER PRESSURE INTO PRACTICE.

ANOTHER SPECIAL ASPECT OF YOUTH COURT IS ITS FOCUS ON RESTORATIVE JUSTICE, EMPHASIZING REPAIRING THE HARM CAUSED BY THE OFFENDER'S BEHAVIOR. THE JURY IS GIVEN THE TASK OF CREATING INDIVIDUALIZED SENTENCES FOR THEIR PEERS, FOCUSING ON HELPING THEM LEARN FROM THEIR BEHAVIOR AND SERVE THE COMMUNITY CONSTRUCTIVELY. INSTEAD OF JAIL TIME, OFFENDERS ARE GIVEN SENTENCES LIKE PROVIDING COMMUNITY SERVICE, WRITING APOLOGY LETTERS TO THEIR PARENTS AND VICTIMS, AND EVEN SERVING ON A YOUTH COURT JURY THEMSELVES.

THE FOCUS HERE IS NOT SIMPLY TO PUNISH BUT TO GUIDE OFFENDERS TO MAKE BETTER DECISIONS IN THE FUTURE BY HOLDING THEM ACCOUNTABLE FOR THEIR ACTIONS. RATHER THAN REMOVING THEM FROM THEIR COMMUNITY, YOUTH COURT TAKES ON THE TASK OF RECONNECTING OFFENDERS, RENEWING THEIR SENSE OF PURPOSE AND IMPROVING THEIR CHANCE TO LIVE A NORMAL LIFE.

BY GIVING THE JUSTICE SYSTEM AN OPTION OTHER THAN INCARCERATION FOR THESE FIRST TIME, NON-VIOLENT OFFENDERS, YOUTH COURT IS ALSO HELPING THE COMMUNITY AT LARGE. 62% OF OUR YOUNG PEOPLE IN CONFINEMENT HAVE COMMITTED NONVIOLENT OFFENSES. THEY ARE OFFENDERS WHO MADE A POOR DECISION AND, AFTER THEIR INCARCERATION, ARE, ACCORDING TO SOME STUDIES, NOW 22 TO 26 % MORE LIKELY TO GO TO JAIL AGAIN IN THEIR LIFETIME. AND, AS ADULTS, THE RATE OF REOFFENDERS NEARLY DOUBLES. ACCORDING TO THE TENNESSEE DEPARTMENT OF CORRECTIONS, IN THE STATE OF TENNESSEE ALONE THE TOTAL RECIDIVISM RATE IS CURRENTLY 47.1%.

THOSE ARE STIFF ODDS TO BEAT, AND IT CAN BE DIFFICULT TO KEEP AT-RISK YOUTH FROM FOLLOWING THE SAME PATH AND BECOMING JUST ANOTHER NUMBER IN A SET OF TRAGIC STATISTICS.

WE ALSO CANNOT IGNORE THE FINANCIAL COSTS INCURRED BY EACH CASE OF INCARCERATION. NATIONALLY, LOCKING UP A JUVENILE OFFENDER CAN COST STATES AN AVERAGE OF $407.58 PER DAY. THAT'S AN AVERAGE OF ALMOST $150,000 PER PERSON PER YEAR. IT'S A STAGGERING COST TO THE TAXPAYER,

AND THESE FIGURES DON'T EVEN TAKE INTO CONSIDERATION THE LOSS OF FUTURE EARNINGS AND TAX REVENUE TO OUR ECONOMY FROM THOSE WHO ARE INCARCERATED, WHICH HAS BEEN ESTIMATED TO WELL OVER 8 BILLION DOLLARS A YEAR.

THIS IS WHERE THE YOUTH COURT COMES IN. IT HAS BEEN PROVEN TIME AND TIME AGAIN THAT THOSE YOUNG OFFENDERS, WHO PASS THROUGH YOUTH COURT, HAVE A SIGNIFICANTLY LOWER CHANCE OF REOFFENDING AND ENDING UP IN JUVENILE DETENTION OR PRISON. ACROSS THE STATE, THE TENNESSEE YOUTH COURTS HAVE AN AVERAGE OF A 4% RECIDIVISM RATE, AND, NOT TO BE TOO BOASTFUL, BUT IN BLOUNT COUNTY THE RATE OF REOFFENDERS IS HALF OF THAT AT LESS THAN 2%, ONE OF THE BEST RECIDIVISM RATES IN ANY COUNTY.

WHILE THE EFFECTIVENESS OF THE YOUTH COURT SYSTEM HAS BEEN STATISTICALLY PROVEN, THE IMPACT OF THE COURT ISN'T JUST ONE OF NUMBERS AND FINANCES. IT IS FILLED WITH REAL PEOPLE, LIKE GEORGE, WHOSE LIVES CAN BE CHANGED BY THEIR EXPERIENCES WITH THE COURT.

GOERGE IS NOT ALONE. A DESIRE TO GIVE BACK TO THE COMMUNITY IS A STRONG TREND IN THE STORIES OF THOSE WHO HAVE PASSED THROUGH YOUTH COURT. AN EIGHTH GRADE GIRL NAMED LAURA FROM ANCHORAGE, ALASKA, STARTED OUT AS A DEFENDANT AND ENDED HER TIME WITH YOUTH COURT AS THE PRESIDENT OF HER LOCAL YOUTH COURT BAR ASSOCIATION. ANOTHER YOUNG MAN FOUND HE HAD A PASSION FOR COMMUNITY SERVICE BY PARTICIPATION IN A PROGRAM HELPING TO PAINT AND FIX PEOPLE'S HOUSES WHO COULDN'T DO SO THEMSELVES. IT'S NOT UNCOMMON FOR YOUNG OFFENDERS TO EVEN SEND THANK YOU NOTES TO THEIR PEER JURORS, GRATEFUL FOR THE LESSONS THEY'VE LEARNED AND THE SECOND CHANCE.

OF COURSE, IT'S NOT ONLY THOSE WHO GO THROUGH THE YOUTH COURT SYSTEM WHO BENEFIT FROM THE PROCESS. THE YOUNG VOLUNTEERS SERVING IMPORTANT ROLES SUCH AS JURY AND JUDGE ALSO BENEFIT. THEY HAVE THE CHANCE TO LEARN ABOUT AND RESPECT THEIR COMMUNITY AND ITS PROBLEMS, TO UNDERSTAND THE VALUE OF COMMUNITY SERVICE, TO DEVELOP ETHICAL SKILLS FOR DECISION MAKING, AND TO PERHAPS FIND A FUTURE CAREER IN THE JUSTICE SYSTEM. THESE VOLUNTEERS ARE GIVEN A SENSE OF PURPOSE AS WELL AS A DEEPER APPRECIATION FOR THEIR CIVIC DUTIES.

THE YOUTH COURT SYSTEM IN BLOUNT COUNTY AND ITS SISTER PROGRAMS ACROSS OUR NATION STAND AS BEACONS OF HOPE AND CIVIC RESPONSIBILITY WITHIN OUR COMMUNITIES. THEY OFFERS THEIR COMMUNITIES HOPE AND ASSISTANCE WITH THEIR DEDICATION TO RESTORATIVE JUSTICE.

IN CLOSING, I WOULD LIKE TO OFFER MY THANKS TO JUDGE KENLYN FOSTER AND EVERYONE INVOLVED IN OUR LOCAL YOUTH COURT. YOUR PASSION, CIVIC-MINDED BEHAVIOR, AND DRIVE MAKE A REAL DIFFERENCE IN OUR COMMUNITY. WITH THE BLOUNT COUNTY YOUTH COURT IN PLACE, I CAN SAY WITH CERTAINTY THOSE WHO PASS THROUGH, BOTH VOLUNTEERS AND YOUNG OFFENDERS, WILL FIND THEMSELVES GUIDED DOWN THE ROAD TO THE RIGHT PATH.