The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 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 word processing 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 word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the 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.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I presently practice law at The Wade Law Firm.

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

I was licensed to practice law in Tennessee in 2001. My board of professional responsibility number is 021631.

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.

Not applicable. I have not been licensed to practice law in any state other than Tennessee.

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

I have not.

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

August 2001 - August 2002: Judicial law clerk to Honorable John Everett Williams, Tennessee Court of Criminal Appeals, Huntingdon, TN.

September 2002 - August 2004: Associate attorney, Glassman Edwards Wade & Wyatt, Memphis, TN.

August 2004 – Present: Attorney/Partner, The Wade Law Firm, Memphis, TN.

Prior to attending law school, I was licensed as a Tennessee Real Estate Affiliate Broker from October of 1996 through December 31, 1998. My license number was 262400. During that time period, I was employed as a sales associate for Town & Country Inc., Realtors in Jackson, TN. I was also employed as a support manager for Mid-America Apartment Communities in Jackson, TN during that time period.

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

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

My law practice is a civil litigation practice with a concentration on governmental and business litigation matters in all levels of state and federal courts. My law firm regularly represents local governmental entities in a variety of litigation matters, ranging from complex cases involving state and federal constitutional claims and class actions to relatively straight forward land-use and zoning issues. I have also represented both public and private clients in federal employment litigation. A significant number of the litigation cases I handle involve litigation in both the trial court and appellate court(s).

The remainder of my time is devoted to providing legal advice and counsel to business and governmental clients. In recent years, I have also provided advice and performed transactional legal services for non-profit entities, usually on pro-bono basis to community organizations where I volunteer my time.

I estimate that eighty (80) to ninety (90) percent of my practice is devoted to representation of governmental entities in civil litigation; ten (10) to fifteen (15) percent of my practice is devoted to representation of business clients in civil litigation; five percent of my practice is devoted to legal advice and counsel and transactional legal services.

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.

I started my legal career by serving as judicial law clerk to the Honorable John Everett Williams of the Tennessee Court of Criminal Appeals. My duties included research and analysis of legal issues presented by appellants in direct and post-conviction appeals to the Tennessee Court of Criminal Appeals, as well as drafting and editing opinions for Judge Williams. The experience I

gained as a judicial law clerk gave me invaluable insights into the analysis and judgment applied by a seasoned jurist to resolve difficult questions. Though the legal issues were criminal, rather than civil, analysis of those issues has been equally beneficial to me in my civil trial practice.

At the conclusion of my judicial clerkship, I practiced law for two years in a large volume litigation firm engaged in general civil trial practice in courts all over the mid-south, where I gained a great deal of practical litigation experience in a very short time. I appeared in courts in Obion, Carroll, Madison, Henry, Haywood, Hardin, Dyer and Shelby counties in Tennessee. I also appeared in federal district court and before the Tennessee Department of Labor. My practice involved primarily defense of civil claims in the following areas: professional liability, personal injury, products liability, construction law, transportation, and worker's compensation. My responsibilities included all of the basic pretrial aspects of civil ligation in circuit, chancery and federal court including: drafting motions, trial briefs, and legal memoranda; arguing motions; preparing and responding to written discovery; taking and defending depositions of fact witnesses and expert witnesses; representing clients at mediations. I also presented petitions for approval of personal injury claims brought by minors in circuit court; represented clients during Benefit Review Conferences at the Tennessee Department of Labor; obtained commissions to take depositions of witnesses in Florida and Texas relating to matters pending in Shelby County Circuit Court; and tried civil cases in Shelby County General Sessions Court.

Since August of 2004, I have been employed by The Wade Law Firm, which is presently a two lawyer firm. My law firm regularly represents the City of Memphis and the Memphis City Council in a variety of matters. I have also represented Memphis Light Gas & Water, the Shelby County Commission and the Memphis Landmarks Commission. My representation of the City of Memphis frequently involves defending actions taken by the City's legislative body, and therefore, encompasses a diverse array of legal issues. Over the past fourteen (14) plus years, I have represented local governments and private entities in a wide variety of civil actions, which has included claims brought under federal and state constitutions and under state and federal statutes, including alleged violations of the First, Fourth, Fifth and Fourteenth Amendments, 42 U.S.C. §1981, 42 U.S.C. §1983, federal securities act claims and claims involving Article I, section 8 of the Tennessee Constitution, Article XI, section 8 of the Tennessee Constitution, Article XI, section 9 of the Tennessee Constitution, the Federal Telecommunications Act, the Federal False Claims Act, Title VII of the Civil Rights Act of 1964, the Family Medical Leave Act, the Americans with Disabilities Act, as amended, the Tennessee Consumer Protection Act, the Tennessee Public Records Act, the Tennessee Governmental Tort Liability Act, the Tennessee Securities Act, the Tennessee Consumer Protection Act and Tennessee statutes pertaining to municipal utilities, education, annexation, historic properties, and taxation and municipal and county charters and ordinances.

A large percentage of the litigation matters I handle ultimately involve appellate practice, most frequently in the Tennessee appellate courts; but I have also represented clients in appeals before the Sixth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals. Since 2007, I have handled some aspect of twenty-two (22) civil appeals filed in the appellate courts of Tennessee, ten (10) of which have been in the last five years. My personal involvement with two of those twenty-two (22) appeals was limited to relatively minor assistance with drafting the briefs. With respect to the other twenty (20) appeals, I was personally responsible for writing the

briefs. I have also argued numerous appeals; many times I have submitted the appeal on briefs with no oral argument requested.

In addition to my litigation practice, I also provide legal advice and counsel to clients on issues ranging from contract negotiations, compliance with relevant federal, state and local laws pertaining to the client's business, as well as potential and existing litigation matters. I have also drafted corporate governance documents and contracts for corporate and non-profit entities.

The vast majority of the litigation cases I handle involve questions of law, often novel, and few disputed facts. As a result, the cases are frequently resolved on summary judgment, after the relevant facts have been identified or through a bench trial.

Due to the small size of our firm, I am typically involved in every aspect of the representation.

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

I have represented the City of Memphis or Memphis Light Gas & Water in the following cases, which have been addressed in published opinions of the Tennessee Court of Appeals: Thompson v. Memphis Light, Gas & Water Div., 244 S.W.3d 815 (Tenn. Ct. App. 2007); Flautt & Mann v. Council of City of Memphis, 285 S.W.3d 856 (Tenn. Ct. App. 2008); Steppach v. Thomas, 346 S.W.3d 488 (Tenn. Ct. App. 2011); Allen v. City of Memphis, 397 S.W.3d 572 (Tenn. Ct. App. 2012); Thomas v. Shelby Cnty., 416 S.W.3d 389 (Tenn. Ct. App. 2011); Thompson v. Memphis Light, Gas & Water, 416 S.W.3d 402 (Tenn. Ct. App. 2011); Wills v. City of Memphis, 457 S.W.3d 30 (Tenn. Ct. App. 2014); Silliman v. City of Memphis, 449 S.W.3d 440 (Tenn. Ct. App. (2014); City of Memphis v. Shelby County, 469 S.W.3d 531 (Tenn. Ct. App. 2015); O'Shields v. City of Memphis, 545 S.W.3d 436 (Tenn. Ct. App. 2017).

There have also been several instances where I have been required to litigate urgent issues on behalf of the City of Memphis in an expedited manner. The issues tend to involve time sensitive matters such as elections and annexations but have also included litigation relating to the dissolution of the Memphis City School system. Such cases are notable to me because of the public importance of the issues and the unusual demands placed on me as a lawyer. Some examples of the accelerated cases I have litigated are listed below.

City of Memphis v. Shelby Cnty. Election Comm'n, 146 S.W.3d 531 (Tenn. 2004). This case is perhaps my very first case as counsel for the City of Memphis. It involved the Shelby County Election Commission's refusal to place a referendum ordinance duly enacted by the Memphis City Council on the ballot for the November 2004 election. It stands out among all the cases I have worked on because we were able to obtain a favorable decision from the Tennessee Supreme Court less than three weeks after filing the action in Shelby County Chancery Court. The action was filed on August 27, 2004. The trial court held a hearing on September 7 and issued a final order denying the City's requested relief that same day. The City filed a notice of appeal to the Tennessee Court of Appeals on September 8, 2004. On September 10, the City filed a motion, pursuant to Tennessee Code Annotated section 16-3-201, requesting that the Tennessee Supreme Court assume jurisdiction of the appeal and render an expedited decision.

That same day, the Tennessee Supreme Court accepted the City's request to assume jurisdiction on an expedited basis, finding that the case was of "unusual public importance, presenting a special need for expedited decision and involving issues of constitutional law." The City prepared and filed its brief with the Tennessee Supreme Court on September 13, and the Court rendered a decision in the City's favor on September 15, 2004.

Bd. of Educ. of Shelby Cty., Tenn. v. Memphis City Bd. of Educ., 911 F. Supp. 2d 631 (W.D. Tenn. 2012). This federal court litigation ensued following the Memphis City Schools' decision to surrender its charter. The action was initially filed by the Shelby County Schools against the City of Memphis, Memphis City Council, Memphis City Board of Education, Shelby County Board of Commissioners, Tennessee Department of Education, and the Tennessee Commissioner of Education. Thereafter, five individual members of the Shelby County Board of Education and the Memphis Education Association also intervened. A number of complex constitutional and novel statutory construction issues were raised by the thirteen (13) parties of record. An evidentiary hearing was held approximately three months after the complaint was filed, final briefs on all legal issues were filed one month later and the court rendered a decision on all of the legal issues just seven months after the complaint was filed. Following the court's resolution of the significant legal issues, the parties reached a final settlement agreement on the proper remedy for the constitutional representation issue. Several months later, related litigation ensued over an issue that the court originally held was not ripe: the constitutionality of two Tennessee statutes. This issue was also litigated in an expedited manner. A bench trial was held just over a month after the complaint was filed and a decision was rendered a little more than two months later.

Silliman v. City of Memphis, 449 S.W.3d 440, 442 (Tenn. Ct. App. 2014). This action was filed by property owners to modify a consent judgment and to enjoin an annexation by the City of Memphis, less than two weeks from when the annexation was to become effective. I obtained a favorable ruling from the court of appeals, reversing the trial court, less than seven months after the case was filed.

Although the expedited matters are the most challenging in terms of time management, I am personally moved and challenged the most by those cases that involve controversial issues that so often divide our community. In the past five years, I have litigated issues involving budgetary decisions that have impacted the pay, benefits and pensions of city employees and retirees; I have litigated competing priorities relating to community resources with an impact on neighborhoods and communities; and I have litigated issues relating to the competing interests of historical preservation, identity, and racial justice. It is these types of cases that are the most notable to the lawyers and the litigants. The litigants are passionate and often the community takes sides as well. My role as an advocate, however, requires me to set aside my own personal convictions and to vigorously defend my client based on neutral principles of law. I take this role seriously; but I strive to remain mindful of the very personal convictions often held by those on both sides of the issues, as well as the impact of the outcome on all of the litigants. I must also be mindful of the fact that it is typical in these cases for the papers and pleadings and arguments to be publicized and then parsed and scrutinized. It is not unusual for personal attacks to be launched at me or my law partner or my clients in the media, on social media or in person at hearings. I have learned not to allow such criticism to affect my duty to steadfastly represent

the interests of my client no matter how unpopular within certain segments of our community.

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.

Not applicable.

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.

My maternal grandmother was diagnosed with Alzheimer's dementia in 2009. I served as her power of attorney from January of 2009 until her death in December of 2014. In that capacity, I managed all aspects of her physical care and finances. As her attorney in fact, I managed her liquid assets, managed and sold her real and personal property, paid all of her bills and managed her health care. I also applied for and obtained aid and attendance benefits from the Department of Veteran's Affairs (VA) to assist with payment of her care expenses, so that she could reside and receive care at an assisted living facility as long as her health permitted. From 2009 through 2012, I also acted as a limited power of attorney for my grandfather in order to apply for and manage VA benefits for the care of my grandmother and grandfather until my grandfather's death in 2012.

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

My experiences as counsel for the City of Memphis and its legislative body have given me a unique window into the process by which a governmental entity makes decisions, as well as the priorities and reasoning behind the enactment of legislation and administrative decisions. In general, I understand the practical limitations on government in resolving or addressing certain issues and the impossibility of perfection in most situations. I am also keenly aware that the most important objective is to act for the benefits of all citizens and that upholding the laws and limitations on the exercise of authority is necessary for the public's benefit.

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

I submitted an application for a position as judge on the Tennessee Court of Appeals for the Western Section in April of 2014. My application was considered by the Commission for Judicial Appointments on May 16, 2014. My name was not submitted to the Governor as a nominee.

EDUCATION

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

University of Memphis – Cecil C. Humphreys School of Law (1998 – 2001)
Juris Doctor, *Cum Laude,* May 2001
Class Rank: Top 9%
Recipient of Herbert Herff Presidential Scholarship 1998-2001
Law Review Associate Staff, 1999-2000
Law Review Senior Staff, 2000–2001
Moot Court Board, 2000-2001

Murray State University, Murray, KY (1992-1996)
Bachelor of Science, *Magna Cum Laude*, May 1996
Major: Political Science

PERSONAL INFORMATION

15. State your age and date of birth.

I am 44 years old. My date of birth is [redacted] 1974.

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

I have lived in Tennessee most of my life and continuously since August of 2000.

I was born in Tennessee; however, my family briefly relocated to Missouri in 1978. We returned to live in Tennessee in late 1980. I also attended college and lived in Murray, Kentucky from August of 1992 until May of 1996 but maintained Tennessee as my permanent residence and was registered to vote in Henry County, Tennessee during that time. I also temporarily resided in Dallas, Texas during the summer of 2000, while employed as a summer intern at a Dallas law firm.

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

I have lived continuously in Shelby County since September of 2002.

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

I am registered to vote in Shelby 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.

I have not.

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.

Not applicable.

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

No.

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

No.

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

I was Plaintiff in the following divorce proceeding in Madison County Chancery Court: *Paschall v. Paschall*, Docket No. 54894. A final decree of absolute divorce was entered on July 2, 1998.

I was also party to a dispute with my landlord while I was in law school, which was filed in Shelby County General Sessions court sometime in the year 2000. I have been unable to locate the court record; however, the landlord was John D. Martin III and the lawsuit stemmed from a complaint about my two dogs, which I believed was unfounded. The dogs were specifically permitted under the lease agreement. We were able to resolve the case and an agreed order of dismissal was entered.

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.

Church of the Holy Communion, present member (Stewardship Speaker 2016; Annual Shrimp Dinner Co-Chair 2016; Chair 2017)

The Racquet Club of Memphis (MSSL League Representative 2016-2018)

Memphis Summer Swim League, Inc. (Board Member/League Representative 2016; Parliamentarian 2017; Secretary 2018)

St. Mary's Episcopal School Parents Association (Auction Host Committee 2013-2014)

University of Memphis Alumni Association

Murray State University Alumni Association

First Baptist Church, Memphis TN, past (Missions Committee 2011-2012)

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.

Yes. I was a member of Alpha Omicron Pi social sorority in college. Alpha Omicron Pi limits membership to women but otherwise is open to membership without regard to race, religion or national origin.

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.

Leo Bearman, Sr. American Inn of Court: Barrister, 2016 – present; Membership Committee, 2018

Memphis Bar Association (2002- present)

Tennessee Bar Association (2002-present)

Defense Research Institute (2002- 2004; 2007-2009)

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.

Not applicable.

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

Brandy S. Parrish, Note, Walking an Evidentiary Tightrope: The Aftermath of Reeves v. Sanderson Plumbing Products, 31 U. MEM. L. REV. 677 (2001).

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.

Not applicable.

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

I have never been a candidate or applicant for public office.

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.

Both of the attached writing samples are solely the product of my own personal effort.

ESSAYS/PERSONAL STATEMENTS

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

My overriding reason for seeking this position is a desire to serve the public. I value our representative form of government and have great respect for the distinct role of each branch. To be effective, our judicial system depends on qualified and committed judges. I believe that those who have the ability have a duty to serve. My law practice has given me the opportunity to serve the public interest; however, I believe that I have the capacity and capability to offer more. It would be the greatest honor to serve the people of Tennessee by upholding the crucial functions assigned to the judicial branch. I have served as an appellate law clerk and have practiced in the appellate courts. If given the opportunity, I am confident that I would find service as an appellate judge both challenging and rewarding.

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)***

Through the Domestic Violence Clinic operated by the University of Memphis law school, I represented domestic violence victims in petitions to obtain and to continue orders of protection. Throughout my time as a licensed attorney, I have provided pro-bono or reduced rate services to low income clients and clients employed in service related professions, such as teachers or nurses. In recent years, I have regularly provided pro-bono legal services to local non-profit organizations, which has included drafting or amending corporate governance documents and contracts and providing legal advice. In the past year, I also volunteered a significant amount of time to provide pro-bono legal assistance to an applicant for disability benefits.

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

I seek a position as judge on the Tennessee Court of Appeals for the Western Section. The Tennessee Court of Appeals consists of twelve judges, divided into three sections of four judges. The Western Section is composed of four judges residing in West Tennessee. My selection would enable the Western Section to continue to fulfill its duties to hear appeals in a competent and timely manner. Having lived for twenty-four years in rural West Tennessee and for twenty years in Memphis, I believe that my background would contribute to a balanced appellate court that is representative of the people of Tennessee.

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)***

Outside my law practice, my primary focus has been serving my community through my church and other local organizations who serve youth and those in need in the Memphis community. I have volunteered with Streets Ministries, an organization that serves impoverished children in Memphis, by adopting third grade classes at Georgia Avenue Elementary. I have volunteered to serve as an ambassador and participated in fundraisers to benefit the Memphis Child Advocacy Center. I served on the missions committee at my former church, where I participated in community services provided directly by the church, such as tutoring for children, baby showers for new and expectant mothers, and providing recreational activities for families and children. Through its partnership with my church, I tutored students at a local elementary school for many years. For the past several years, I have also volunteered with the Memphis Summer Swim League, a local non-profit organization whose purpose is to develop, promote and regulate a summer league program of competitive swimming for area youth. I have served as a team representative for four years and in that capacity essentially manage the summer swim team and meets. I have also served in various capacities on the MSSL board of directors for four years, most recently as secretary. I have also provided pro-bono legal services to the MSSL board. If appointed, I could not provide legal services but would continue to volunteer in a non-legal capacity with the MSSL. I would also continue my church related community service.

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

I am not a native Memphian. I was born and raised in rural west Tennessee. My parents live in Buchanan, Tennessee and I have a large extended family in Carroll County Tennessee. My maternal grandparents had a small farm in Huntingdon, Tennessee, where I spent most weekends and summers growing up. My parents and grandparents modeled hard work and relentlessly emphasized the importance of education. Because of personal circumstances, I was not able to attend law school immediately following college. After the University of Memphis offered me a full scholarship, I was able to begin law school in the fall of 1998. I did not take that opportunity for granted. Throughout law school and over the course of my career, I have applied my best effort in every assignment, task and matter. I was fortunate enough to serve as an appellate law clerk for a year, which was, for me, an invaluable experience that improved my skills in the crucial areas of legal reasoning and writing. Early on in my career, my writing and research skills earned me the (not so coveted) role as firm brief writer and I was often assigned the task of writing legal memoranda and briefs, even in cases on which I had not previously worked. My current law practice has afforded me the opportunity to handle a significant number of appeals. Over the years, I have discovered that I prefer the more deliberate process of appellate practice.

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 have spent the majority of my legal career representing a local legislative body. The members of that body are diverse and represent a diverse community. As an advocate for the body, my job is not to take sides or to question the wisdom or popularity of the legislative or administrative enactments. It is my duty as a lawyer to defend all lawful actions taken by the body. I believe in the necessity of upholding laws as written and giving deference to each branch of government to exercise the power reserved to it. To be an effective advocate, I believe it is also important that my clients trust me. To that end, it has been my practice not to discuss or publicize my personal opinions on issues so that every member of the legislative body will have confidence in my ability to vigorously defend the enactments of the body. Likewise, if I am appointed judge, I will uphold the law as written, regardless of my personal views.

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. Richard W. Smith, President and CEO, FedEx Logistics
6075 Poplar Avenue, Suite 300, Memphis, TN 38119
[redacted]

B. Jim Strickland, Mayor of City of Memphis 125 North Main, Suite 700, Memphis, TN 38103 [redacted]
C. Sara Hall, Chief Legal Officer and General Counsel, ALSAC 501 St. Jude Place, Memphis, Tennessee, 38105 [redacted]
D. Hon. Joe G. Riley (Ret.) [redacted] Ridgely, TN 38080 [redacted]
E. Worth Morgan, Memphis City Council, District 5 125 North Main Street, Room 514 Memphis, TN 38103 [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court]Court of Appeals, Western Section 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: 2-13, 2019.

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
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ATTACHMENT 1 TO APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

DIETRICH HILL, TOKENS GIFTS, INC. OF TENNESSEE and TOKENS GIFTS, INC. OF OREGON,

Plaintiff/Appellant,

v. No. W2013-02307-COA-R3-CV

CITY OF MEMPHIS, et al.,

Defendants/Appellees,

Tenn. R. App. P. Rule 3 Appeal from
Shelby County Chancery Court
No. CH-12-0184

BRIEF OF APPELLEE – CITY OF MEMPHIS

Respectfully submitted,

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STATEMENT OF THE CASE

Plaintiffs filed a Complaint for Damages, pursuant to 42 U.S.C. § 1983, on February 6, 2012 and a First Amended Complaint for Damages on February 7, 2012 against the City of Memphis, Larry Godwin or Toney Armstrong and Lieutenant Ross, Lieutenant Eaton, Sergeant Atwater and Detective Timothy Goodwin in their individual and official capacities. Vol. 1 R., p. 1, 12. Plaintiffs' claims stem from an undercover investigation by the Memphis Police Department of Plaintiff Dietrich Hill's business, Tokens Gifts, Inc., which was located at 569 South Highland Avenue in Memphis, Tennessee for a possible violation of Tennessee Code Annotated section 39-17-422.[1] Vol. 1 R., p. 16, 45, 48. The City of Memphis timely removed this action to the United States District Court for the Western District of Tennessee; however, the case was remanded to this Court because the district court found that consent of removal by the police officer Defendants, in their individual capacities, was not timely perfected. Vol. 4 R., p. 27.

All of the Defendants moved to dismiss the First Amended Complaint for failure to state a claim upon which relief may be granted. The City's Motion to Dismiss the First Amended Complaint was first filed on March 15, 2012, while this case was pending in federal court. Vol. 2 R., p. 148. Following remand, the City re-filed its Motion to Dismiss and Memorandum in Support of Motion to Dismiss in the chancery court on July 9, 2012. Vol. 1 R., p. 24. Plaintiffs

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[1] This section provides in pertinent part:

> (c) No person shall sell, or offer to sell, or deliver or give away, to any person any tube or other container of glue, paint, gasoline, aerosol, chlorofluorocarbon gas or any other substance containing a solvent having the property of releasing toxic vapors or fumes, if the person has reasonable cause to suspect that the product sold or offered for sale, or delivered or given away, will be used for the purpose set forth in subsection (a).

Tenn. Code Ann. § 39-17-422 (c).

filed a response to the City's motion to dismiss on September 20, 2012, to which the City replied on October 2, 2012. Vol. 1 R., p. 38, 60. Defendants Larry Godwin and Toney Armstrong were dismissed by order entered September 26, 2012, following a hearing on the motions to dismiss filed by Godwin and Armstrong. Vol. 6 R., pp. 3-4. Plaintiffs filed a motion for summary judgment sometime after October 2, 2012.[2] The City responded to Plaintiffs' motion for summary judgment in March of 2013. *See* Vol. 1 R., p. 71. The City also filed a supplemental memorandum in support of its then pending motion to dismiss.[3] On April 15, 2013, Plaintiffs filed a Supplemental Response to the City's motion to dismiss. Vol. 1 R., p. 117. The City's motion to dismiss and Plaintiffs' motion for summary judgment were set for hearing on the same date, April 16, 2013. Vol. 1 R., pp. 136-137. At the conclusion of the hearing, the trial court granted the City's motion to dismiss. Vol. 1 R., p. 137. Upon learning that the claims against the City of Memphis had been dismissed, Plaintiffs apparently terminated their then counsel and retained their present counsel. Vol. 1 R., p. 138. The trial court entered a final Order dismissing all the claims against the City of Memphis on June 7, 2013. Vol. 1 R., p. 138. Plaintiffs filed a motion to alter or amend the trial court's Order dismissing the City on July 8, 2013, which was denied by the trial court on September 9, 2013. Vol. 1 R., pp. 134, 169. Plaintiffs filed a notice of appeal pursuant to Rule 3 of Tennessee Rules of Appellate Procedure on October 8, 2013. Vol. 2 R., p. 171.

After dismissal of the City, the remaining defendants, Officers Atwater, Goodwin and Eaton, filed motions to dismiss the claims brought against them in their individual capacity on

[2] The undersigned counsel for the City of Memphis was not original counsel in this action. Linda Nettles Harris was original counsel for the City of Memphis; however, the case was reassigned to present counsel in late 2012. The October 2, 2012 reply memorandum was the last paper filed by Ms. Harris on behalf of the City.

[3] The City's response in opposition to the motion for summary judgment is expressly adopted and incorporated in its supplemental memorandum in support of its motion to dismiss; however, the response has apparently not been included in the instant record on appeal. Vol. 1 R., p. 71. Because the arguments contained therein, which are relevant to the City's motion to dismiss, are legal, the response is not necessary to resolve the issues in this appeal.

September 6, 2013. Vol. 4 R., p. 24. In response, Plaintiffs filed a response in opposition to the motion to dismiss and also filed a motion to amend the amended complaint as to Officer Atwater only. Vol. 4 R., pp. 44, 80. The trial court heard Plaintiffs motion to amend and the motion to dismiss of Officers Atwater, Goodwin and Eaton on November 19, 2013. Vol. 4 R., p. 86. On December 5, 2013, the trial court entered an Order dismissing the claims against the remaining police officers in their individual capacity and denying Plaintiffs' motion to amend as futile. Vol. 4 R., pp. 86-87. Plaintiffs filed a notice of appeal as to this order on January 2, 2014 pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Vol. 4 R., p. 89. On April 25, 2014, this Court issued a show cause order directing Plaintiffs to obtain entry of a final judgment in the trial court within ten (10) days, based on the Court's observation that the record devoid of any evidence that the claims against three of the Defendants, Ross, Godwin and Armstrong had been resolved. Thereafter, the record was supplemented with the previously entered order dismissing Godwin and Armstrong. Vol. 6 R., pp. 3-5. One of the police officer defendants, Lieutenant Ross, was apparently never served with process, and therefore, a stipulation of dismissal was entered as to Ross. Vol. 6 R., pp. 1-2, 6-8. Upon motion of Plaintiffs, the appeal relating to the claims against Officer Atwater has been consolidated with the appeal involving the claims against the City of Memphis.

STATEMENT OF THE FACTS

The First Amended Complaint for Damages alleges three causes of action against the City of Memphis. First, Plaintiffs claim that the City, by and through the Defendant police officers, selectively prosecuted a criminal action against Plaintiff Hill and selectively enforced a forfeiture action against Plaintiffs Hill and Plaintiffs Tokens Gifts, Inc. of Tennessee and Tokens Gifts, Inc. of Oregon in violation of the Equal Protection Clause of the Fourteenth Amendment

and 42 U.S.C. § 1983. Vol. 1 R., pp. 13, 18-19 (¶¶ 4, 12, 13). Next, Plaintiffs claim that the City, by and through the Defendant police officers, pursued forfeiture of approximately $277,000.00 against Plaintiffs Hill, Tokens Gifts, Inc. of Tennessee and Tokens Gifts, Inc. of Oregon in violation of the excessive fines clause of the Eighth Amendment and 42. U.S.C. § 1983. Vol. 1 R., pp. 13, 18-19 (¶¶ 4, 12, 13). Finally, Plaintiffs appear to assert a claim under the Tennessee Governmental Tort Liability Act against the City for causing the aforementioned civil rights violations by negligently training, hiring, retaining, and supervising the police officers alleged to have committed such violations. Vol. 1 R., p. 21 (¶ 19). Plaintiffs' appeal abandons all of these theories and attempts to assert claims for violation of their Fourth Amendment rights and due process rights under the Fifth and Fourteenth Amendments.

Because the trial court dismissed the claims against the City of Memphis pursuant to Rule 12.02 (6) of the Tennessee Rules of Civil Procedure, the City would ordinarily refer only to facts set forth in the complaint. The instant case, however, is based on a related *In Rem* civil forfeiture action. The court record in the forfeiture proceeding contains public records that are integral to Plaintiffs' claims in this action. At the time this action was filed in the Shelby County Chancery Court, the judicial forfeiture action was still pending in the Shelby County Criminal Court. As such, Plaintiffs had not actually forfeited any property, despite their claim(s) in this action alleging a violation of the excessive fines clause of the Eighth Amendment, based on a grossly disproportionate forfeiture of Plaintiffs' funds. Vol. 1 R. pp. 17, 43-59. In July of 2012, the Shelby County Criminal Court entered a final Order in *State of Tennessee v. Hill* denying the State of Tennessee's petition to forfeit the approximately $277,000.00 in funds that are the basis of Plaintiffs' excessive fine claim in the instant case. Vol. 1 R. pp. 43-59. Plaintiffs apparently

also pursued the Eighth Amendment and Equal Protection claims alleged in this case in the forfeiture action, which the criminal court held were without merit. Vol. 1 R. pp. 52-55.

By the time the judicial forfeiture order was entered, the instant case had been remanded back to Shelby County Chancery Court by the U.S. District Court and the City of Memphis had filed its July 2012 motion to dismiss. Plaintiffs responded to the City's motion to dismiss by relying on the final Order entered in the separate criminal forfeiture action, denying the State of Tennessee's petition to forfeit the approximately $277,000.00 in funds that are the basis of Plaintiffs' excessive fine claim in the instant case. Vol. 1 R., pp. 38-41. Plaintiffs argued that the order in *State of Tennessee v. Hill*, P36037, Criminal Court for the Thirtieth Judicial District at Memphis, Division VI, by Judge John T. Fowlkes finding that "the State failed to prove that the funds contained in the bank accounts were subject to forfeiture" was dispositive of Plaintiffs' claims in this case. Vol. 1 R., p. 39. Plaintiffs reasoned that the City "is collaterally estopped to deny that the funds in the bank accounts were: (1) improperly seized and (2) the seizure constitutes a violation of the excessive fines clause." Vol. 1 R., p. 39. Plaintiffs also attached a copy of the July 20, 2012 order in *State of Tennessee v. Hill*, P36037 as an exhibit to their response to the City's motion to dismiss. Vol. 1 R., pp. 43-58. In October, Plaintiffs filed a motion for summary judgment, which was supported by discovery evidence obtained in the criminal forfeiture action. Vol. 1 R., p. 136; Vol. 2 R. 152.[4]

On April 15, 2013, the day before the hearing on the City's motion to dismiss, Plaintiffs also filed a supplemental response to the City's motion, asserting for the first time that "the

[4] As noted above, Plaintiffs did not designate any of the materials relating to their summary judgment motion for inclusion in the record on appeal. Because the issues raised on appeal relate to the City's motion to dismiss, rather than Plaintiffs' motion for summary judgment, the City has not sought add those documents in the record on appeal. The City has, however, included the entire procedural history of the case in its narrative for purposes of clarity. As such, the City's citations are to portions of the record referencing the documents included in the City's narrative, in order to establish that certain events took place as stated by the City.

City's retention of the bank accounts post-seizure and pre-merits hearing in privity with the State without offering a post-seizure hearing constituted a violation of Plaintiff's procedural and substantive Fourteenth Amendment Due process rights." Vol. 1 R., pp. 120-121. Prior to filing this supplemental response, Plaintiffs had consistently asserted that the City's retention of the bank funds during the pendency of the forfeiture action constituted a violation of the Eighth Amendment. Vol. 1 R., p. 40. Plaintiffs apparently changed their argument after the City pointed out that the criminal court order denying the State of Tennessee's petition for forfeiture as to the bank funds *precluded* an Eighth Amendment claim. The City's motion to dismiss and Plaintiffs' motion for summary judgment were set for a consolidated hearing on April 16, 2013. Although the City attempted to separate its argument in opposition to Plaintiffs' summary judgment motion, which relied on facts and evidence outside the complaint, from its argument in support of its motion to dismiss, the City did not expressly object to the trial court relying on any of the undisputed facts that had been introduced by the Plaintiffs to support their summary judgment motion. The trial court's June 7, 2013 Order granting the City's motion to dismiss does not, however, specifically reference any evidence outside the complaint.

At the summary judgment / motion to dismiss hearing, Plaintiffs' then counsel conceded that Plaintiffs' claim under the Eighth Amendment for excessive fines based on the criminal forfeiture petition filed in Shelby County Criminal Court and the claims under the Fourteenth Amendment for selective prosecution and selective enforcement were barred by the criminal court's disposition of those claims in the final judgment entered July 20, 2012. Vol. 1 R., p. 131. Plaintiffs' then counsel also expressly disavowed any Fourth Amendment claims for unlawful seizure of the bank accounts, acknowledging that warrants had been obtained prior to any search

or seizure of Plaintiffs' property, including the seizure of Plaintiffs' bank funds.[5] Vol. 1 R., pp. 189-190. With respect to the arguments advanced by Plaintiffs in their April 15, 2013 response memorandum that ***retention*** of the bank accounts post-seizure and pre-merits hearing constituted a procedural and substantive Fourteenth Amendment Due process violation, the trial court held that the existence of adequate statutory post-deprivation remedies for recovery of any property seized for forfeiture negated any due process claims under the Fourteenth Amendment.[6]

The trial court initially declined to address whether Plaintiffs had properly pled any claim claims for unlawful seizure and unlawful detention of property. Vol. 1 R., p. 131. After Plaintiffs retained new counsel and filed a motion to alter or amend the trial court's June 7, 2013 order, alleging that the First Amended Complaint asserted Fourth and Fourteenth Amendment or Fourth and Fifth Amendment claims for unreasonable seizure, the trial court expressly ruled that the complaint and amended complaint fail to allege "any Fourth or Fifth Amendment violation." Vol. 1 R., p. 169. In their appeal of the trial court's final order dismissing the City of Memphis, Plaintiffs seek to impose liability against the City of Memphis for violation of the Fourth Amendment to the United States Constitution by unlawfully seizing Plaintiffs' property and for violation of the Fifth Amendment to the United States Constitution by depriving Plaintiffs of their property without due process of law. Plaintiffs claim that there are sufficient facts alleged in the First Amended Complaint concerning the actions of Defendant Atwater to state a claim against the City and Atwater for violation of the Fourth and Fifth Amendments. Plaintiffs do not

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[5] Plaintiffs' present counsel, who did not attend the April 16, 2013 hearing, repeatedly argued that the trial court could not rely on the City's assertion that prior counsel disavowed any Fourth Amendment claim absent an Affidavit or a hearing transcript. This argument ignores the fact that the trial judge was present at the April 16, 2013 hearing and could, therefore, take notice of statements made by Plaintiffs' counsel to the court in open court.

[6] The trial court's finding regarding the adequacy of the statutory post-deprivation remedies is presumably based upon the procedural protections set forth in Tennessee Code Annotated section 39-11-701 *et seq.* Though Plaintiffs' complaint does not specifically reference the forfeiture statute, the July 20, 2012 order in *State of Tennessee v. Hill*, P36037 identifies the applicable forfeiture statute. This order was introduced by Plaintiffs and Plaintiffs do not dispute that the forfeiture was brought pursuant to Tennessee Code Annotated section 39-11-701 *et seq.*

challenged the dismissal of their Eighth Amendment claim or their Fourteenth Amendment Equal Protection claims against the City or dismissal of Lieutenant Eaton and Detective Timothy Goodwin.

The First Amended Complaint contains the following allegations pertaining to the actions of Sergeant Atwater and the City of Memphis relating to the "seizure" of Plaintiffs' property:

> 4. The Defendant, City of Memphis, Tennessee ("Memphis") is a municipal corporation organized and existing under the laws of the State of Tennessee with it principal place of business at 125 North Main Street Memphis, Tennessee 38103. Memphis may be served with process by service on its City Attorney Herman Morris (Room 336) at its principal place of business or by any other method authorized by the Rule 4 of the Federal Rules of Civil Procedure or on its attorney of record pursuant to Rule 5. Memphis is vicariously liable for the actions or omissions of Detective Timothy Goodwin, Sergeant Atwater, Lieutenant Eaton, Lieutenant Ross, and Director Larry Godwin or Toney Armstrong while in the course and scope of their employment or agency via the doctrine of *respondeat superior,* actual or apparent agent-principal, and employee-employer pursuant to the GTLA. Memphis is directly liable for negligently failing to hire, retain, supervise, or retain Goodwin, Atwater, Eaton, Godwin, Ross, or Armstrong pursuant to the GTLA. Memphis is liable for the violation of Hill's constitutional rights because it was pursuant to a policy, custom, ordinance, regulation, decision, edict or act of a policymaker in selectively enforcing a forfeiture action against Dietrich Hill, Tokens Gifts, Inc. of Tennessee, and Tokens Gifts, Inc. of Oregon and selectively prosecuting a criminal action against Dietrich Hill individually in violation of the Equal Protection Clause of the XIV Amend when Memphis did not pursue forfeiture against a similarly-situated Caucasian, Michael Shane Trice. Memphis is also liable for the violation of Hill's constitutional rights because it was pursuant to a policy, custom, ordinance, regulation, decision, edict or act of a policymaker in pursuing a grossly disproportionate forfeiture action against Dietrich Hill, Tokens Gifts, Inc. of Tennessee, and Tokens Gifts, Inc. of Oregon in violation of the Excessive Fines Clause of the VIII Amend when Memphis knew that the forfeiture pursued and the amount of funds retained by Memphis in the sum of approximately $277,000.00 were grossly disproportionate. These policies, customs, ordinances, regulations, decisions, edicts or acts

of the policymaker under the color of state law were the moving force in the injury to Hill.

. . .

8. Defendant, Sergeant Atwater was at all times relevant to this action acting in the course and scope of his or her employment as sergeant supervisor for the Organized Crime Unit (OCU) for Memphis under the color of state law, and in his individual and official capacity as a police Sergeant for Memphis. Atwater may be served with process at 201 Poplar Avenue 12th Floor Memphis, Tennessee 38103.

11. On or about February 9, 2011, Sergeant Atwater authorized the officers of OCU to prepare forfeit paperwork for the entire sum of the funds found in Hill's accounts, approximately TWO HUNDRED AND SEVENTY-SEVENTY THOUSAND DOLLARS ($277,000.00). Sergeant Atwater had no direct or circumstantial evidence to support that the entire sum or even a substantial portion of the funds were the proceeds of the illegal sale of inhalants or were traceable to the illegal sale of inhalants. Additionally, the disposition of the criminal charge against Dietrich Hill, Individually would result in a maximum fine that was many times smaller than or a tiny fraction of $277,000.00. Lieutenant Eaton was aware that Sergeant Atwater had no direct or circumstantial evidence that the entire sum of Hill's funds were not traceable to illegal sale or inhalants or were traceable to the illegal sale of inhalants. Eaton was also aware that the disposition of the criminal charge against Hill individually, resulted in a maximum fine that was small fraction of $277,000.00 Eaton approved this grossly disproportionate forfeiture and approved this grossly disproportionate forfeiture. Eaton implicitly or explicitly approved, authorized or acquiesced in Atwater's unconstitutional conduct which proximately resulted in injuries and damages to the Plaintiff. In the alternative, Atwater was the final policymaker by delegation for the forfeiture of Hill's assets and accounts.

. . .

13. Defendant Memphis, its officers, agents and employees committed the above described actions and omissions under color of law, substantially depriving Plaintiffs of their rights, privileges, and immunities guaranteed to them in violation of 42 USC §1983 and deprived Plaintiff of rights guaranteed to him by the Eighth and Fourteenth Amendments of the United States Constitution including, but not limited to, freedom to grossly disproportionate

forfeiture, selective enforcement of forfeiture law, and selective prosecution for criminal inhalants.

14. Defendants Memphis directly or with deliberate indifference, under the color of law, approved or ratified the unlawful, deliberate, malicious, reckless, and wanton conduct of its employees, by failing to enact proper procedures and policies. Defendants have approved, condoned, and ratified the unlawful conduct of its employees and agents. Specifically, Memphis acted in deliberate indifference to Plaintiffs' Eight [sic] Amendment rights to be free from grossly disproportionate forfeiture by failing to properly train the Sergeant Atwater and Lieutenant Eaton in the requirements of tracing proceeds of illegal inhalants to the actual funds attempted to be forfeited and the proportion of the maximum fine to the attempted forfeiture. The actions of one or more of Memphis' policymakers in their individual capacity or in their official capacity had a highly predictable consequence the grossly disproportionate forfeiture would injure the Plaintiffs. This action constituted a policy of Memphis. Memphis is liable for this policy of inadequate training by its policymakers as this conduct amounts to deliberate indifference which proximately resulted in injuries to the Plaintiff.

. . .

16. Defendant Memphis, its officers, agents and employees committed the above described actions and omissions under color of law, substantially depriving Plaintiffs of their rights, privileges, and immunities guaranteed to them in violation of 42 USC §1983 and deprived Plaintiff of rights guaranteed to him by the Eighth and Fourteenth Amendments of the United States constitution including, but not limited to, freedom to grossly disproportionate forfeiture, selective enforcement of forfeiture law, and selective prosecution for criminal inhalants.

17. Defendants Memphis directly or with deliberate indifference, under the color of law, approved or ratified the unlawful, deliberate, malicious, reckless, and wanton conduct of its employees, by failing to enact proper procedures and policies. Defendants have approved, condoned, and ratified the unlawful conduct of its employees and agents. Specifically, Memphis acted in deliberate indifference to Plaintiffs' XIV Amendment rights to be free from selective enforcement of forfeiture laws and selective prosecution of criminal inhalant law by failing to properly train, supervise, hire, or retain Detective Goodwin and Lieutenant Ross in the requirements equal protection and selective enforcement and

> selective prosecution. The actions of one or more of Memphis' policymakers in their individual capacity or in their official capacity had a highly predictable consequence the selective enforcement and selective prosecution would injure the Plaintiffs. This action constituted a policy of Memphis. Memphis is liable for this policy of inadequate training.
>
> . . .
>
> 19. As direct and proximate result of the Defendants liability including negligence, Monell liability, supervisory liability, selective enforcement of forfeiture proceedings, grossly disproportionate forfeiture all under the color of the law of the State of Tennessee, Hill has incurred past and future loss of the use of their funds and the interest that could have been earned prejudgment and post-judgment.

Amended Complaint at ¶¶ 4, 11, 13-14, 16-17, 19.

The following additional facts, which are found in public records introduced by the Plaintiffs in the trial court and/or Tennessee statutes[7] and remain undisputed by the Plaintiffs, are also relevant to the issue of whether Plaintiffs "can prove any set of facts" to support a claim for unlawful seizure in violation of the Fourth Amendment against the City of Memphis.[8] Other than the order in *State of Tennessee v. Hill*, P36037, the City did not rely on these public records to support its motion to dismiss. The City did, however, reference the public records and the forfeiture statute in response to the motion to alter or amend filed by Plaintiffs' present counsel asserting novel Fourth Amendment claims. Vol. 2 R. pp. 149-150.

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[7] The trial court may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned" without converting a motion to dismiss into one for summary judgment. *Cochran v. City of Memphis*, No. W2012–01346–COA–R3–CV., 2013 WL 1122803, 2 (Tenn.Ct.App. March 19, 2013)(quoting *Indiana State Dist. Council of Laborers v. Brukardt*, No. M2007–02271–COA–R3–CV, 2009 WL 426237, at *8–9 (Tenn.Ct.App. Feb. 19, 2009) discretionary review denied (Tenn. Aug. 24, 2009)).

[8] As discussed herein, Plaintiffs' complaint does not come close to alleging a claim for a violation of the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment; however, Plaintiffs argue that there is some set of facts, as of yet unpled, upon which Plaintiffs could prove such claims. The undisputed facts, acknowledged and introduced by Plaintiffs in this case demonstrate otherwise.

Plaintiffs' personal property was seized by law enforcement officers, acting pursuant to the execution of a lawful search warrant as permitted under Tennessee Code Annotated section 39-11-707 (a). *See* Vol. 4 R., pp. 56, 62-64; Vol. 1 R., p. 55. Upon seizure of Plaintiffs' personal property, the seizing agency delivered a written receipt and notice of seizure to Plaintiffs, in accordance with Tennessee Code Annotated section 39-11-707 (b). *See* Vol. 4 R., p. 58. Moreover, seizure of the bank funds at issue in this case was made pursuant to a forfeiture warrant, which was issued by a Judicial Commissioner upon a finding that probable cause for forfeiture existed and was based on a affidavit made in accordance with Tennessee Code Annotated section 39-11-707 (c). *See* Vol. 4 R., pp. 66-67. Further, the forfeiture proceedings were brought by the State of Tennessee via an "*In Rem* Petition for Forfeiture" filed in the Shelby County Criminal Court by the Shelby County District Attorney. Vol. 4 R., pp. 56-59. Finally, Tennessee's criminal forfeiture statute provides numerous procedural mechanisms through which Plaintiffs could have obtained the return of their property, prior to the criminal court's decision in July of 2012. *See* Tenn. Code Ann. §§ 39-11-707 – 39-11-709.

ARGUMENT

I. Standard of Review

A trial court's ruling on a motion to dismiss is a question of law, which this Court reviews de novo with no presumption of correctness. *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn.2010). A Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss seeks only to determine whether the pleadings state a claim upon which relief can be granted, and such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *Bell ex rel. Snyder v. Icard*, 986 S.W.2d 550, 554 (Tenn.1999). In considering such a

motion, the court should construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. *Cook ex. rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn.1994). The Court is not, however, "required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (citing *Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn.1997)). Tennessee Rule of Civil Procedure 12.02 (6) motions are not designed to correct inartfully drafted pleadings. *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn.Ct.App. 1992). There is no duty on the part of the court to create a claim that the pleader does not spell out in his complaint. *Utter v. Sherrod*, 132 S.W.3d 344 (Tenn. Ct. App. 2003), perm. app. denied (Tenn. March 8, 2004). To be sufficient and survive a motion to dismiss, a complaint must not be entirely devoid of factual allegations. Tennessee courts have long interpreted Tennessee Rule of Civil Procedure 8.01 to require a plaintiff to state "'the facts upon which a claim for relief is founded.'" *Millen v. Shelby Cnty. Dist. Attorney Office*, W2011-00303-COA-R3CV, 2011 WL 3246000 (Tenn. Ct. App. July 29, 2011)(quoting *Smith v. Lincoln Brass Works, Inc.*, 712 S .W.2d 470, 471 (Tenn.1986)). A complaint "need not contain detailed allegations of all the facts giving rise to the claim," but it "must contain sufficient factual allegations to articulate a claim for relief." *Abshure v. Methodist Healthcare-Memphis Hospitals*, 325 S.W.3d 98, 103-04 (Tenn. 2010)

Whenever a claim relies on a written instrument, other than a policy of insurance, a copy of that instrument shall be attached to the pleading as an exhibit unless it is a matter of public record or in the possession of the adverse party or inaccessible to the pleader or is of such nature that it would be unnecessary or impracticable. *See* Tenn. R. Civ. Pro. 10.03. Every exhibit

attached to the complaint and instruments or matters of public record referred to in the complaint are a part of the pleading for all purposes. *See* Tenn. R. Civ .Pro. 10.03.

If matters outside the pleadings are considered by the trial court in deciding a motion to dismiss, ordinarily the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Tenn. R. Civ. Pro. 12.02. This Court also reviews a trial court's grant of summary judgment *de novo* with no presumption of correctness. *Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn.1997). Summary judgment under Rule 56 is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. Pro. 56.04.

Turning to the instant case, the First Amended Complaint for Damages refers to and relies on the service of a nuisance complaint against Plaintiff Dietrich Hill, the arrest of Plaintiff Hill, the search of Plaintiff Hill, the preparation of "forfeit paperwork" for the sum of $277,000.00, the criminal prosecution of Plaintiff Hill individually and against Hill for forfeiture of assets and accounts. Plaintiffs did not attach copies of the nuisance complaint, arrest warrant, forfeiture warrant, forfeiture notice, forfeiture petition or criminal complaint to the complaint in this matter. Though Plaintiffs did not state as such in the complaint, the foregoing documents are part of the public record in the related criminal forfeiture action and were accessible by the Defendants. Most, if not all of documents were ultimately filed in the record in this case. Because Plaintiffs' claims were dependant on the documents and records pertaining to the execution of a nuisance complaint on Plaintiff Hill's business, the search of Hill and his business, the arrest and prosecution of Hill and the prosecution of a criminal forfeiture action against Plaintiffs' bank funds, the trial court could properly consider the nuisance complaint,

arrest warrant, forfeiture warrant, forfeiture notice, forfeiture petition, criminal complaint and final Order in the forfeiture proceeding without converting the City's motion to dismiss to a motion for summary judgment. *See Cherokee Country Club, Inc. v. City of Knoxville,* 152 S.W.3d 466, 478 (Tenn. 2004).

II. The First Amended Complaint fails to state a claim against the City of Memphis for a constitutional violation because Plaintiffs do not allege sufficient facts to support a claim for municipal liability under 42 U.S.C. § 1983.

A municipality cannot be held liable pursuant to 42 U.S.C. § 1983 for constitutional torts committed by its employees and agents based on the principles of respondeat superior or vicarious liability. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 394–95 (1978). In order for the City to be liable under § 1983, Plaintiffs must establish (1) agents of the City of Memphis, while acting under the color of state law, (2) violated Plaintiffs' constitutional rights, and (3) the City of Memphis' policy or policy of inaction was the moving force behind the violation. *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 905 (6th Cir.2004) (citing *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)). The City of Memphis can be liable under § 1983 if it has an unconstitutional policy or if its failure to adequately train its employees amounts to "deliberate indifference." *City of Canton*, 489 U.S. at 389.

The following paragraphs contain allegations pertaining to Memphis' liability for the acts of the individual officers.

> 4. . . . . Memphis is liable for the violation of Hill's constitutional rights because it was pursuant to a policy, custom, ordinance, regulation, decision, edict or act of a policymaker in selectively enforcing a forfeiture action against Dietrich Hill, Tokens Gifts, Inc. of Tennessee, and Tokens Gifts, Inc. of Oregon and selectively prosecuting a criminal action against Dietrich Hill individually in violation of the Equal Protection Clause of the XIV Amend when

Memphis did not pursue forfeiture against a similarly-situated Caucasian, Michael Shane Trice. Memphis is also liable for the violation of Hill's constitutional rights because it was pursuant to a policy, custom, ordinance, regulation, decision, edict or act of a policymaker in pursuing a grossly disproportionate forfeiture action against Dietrich Hill, Tokens Gifts, Inc. of Tennessee, and Tokens Gifts, Inc. of Oregon in violation of the Excessive Fines Clause of the VIII Amendment when Memphis knew that the forfeiture pursued and the amount of funds retained by Memphis in the sum of approximately $277,000.00 were grossly disproportionate. These policies, customs, ordinances, regulations, decisions, edicts or acts of the policymaker under the color of state law were the moving force in the injury to Hill.

8. Defendant, Sergeant Atwater was at all times relevant to this action acting in the course and scope of his or her employment as sergeant supervisor for the Organized Crime Unit (OCU) for Memphis under the color of state law, and in his individual and official capacity as a police sergeant for Memphis. Atwater may be served with process at 201 Poplar Avenue 12th Floor Memphis, Tennessee 38103.

11. . . . . In the alternative, Atwater was the final policymaker by delegation for the forfeiture of Hill's assets and accounts.

14. Defendants Memphis directly or with deliberate indifference, under the color of law, approved or ratified the unlawful, deliberate, malicious, reckless, and wanton conduct of its employees, by failing to enact proper procedures and policies. Defendants have approved, condoned, and ratified the unlawful conduct of its employees and agents. Specifically, Memphis acted in deliberate indifference to Plaintiffs' Eight Amendment rights to be free from grossly disproportionate forfeiture by failing to properly train the Sergeant Atwater and Lieutenant Eaton in the requirements of tracing proceeds of illegal inhalants to the actual funds attempted to be forfeited and the proportion of the maximum fine to the attempted forfeiture. The actions of one or more of Memphis' policymakers in their individual capacity or in their official capacity had a highly predictable consequence the grossly disproportionate forfeiture would injure the Plaintiffs. This action constituted a policy of Memphis. Memphis is liable for this policy of inadequate training by its policymakers as this conduct amounts to deliberate indifference which proximately resulted in injuries to the Plaintiff.

. . .

> 17. Defendants Memphis directly or with deliberate indifference, under the color of law, approved or ratified the unlawful, deliberate, malicious, reckless, and wanton conduct of its employees, by failing to enact proper procedures and policies. Defendants have approved, condoned, and ratified the unlawful conduct of its employees and agents. Specifically, Memphis acted in deliberate indifference to Plaintiffs' XIV Amendment rights to be free from selective enforcement of forfeiture laws and selective prosecution of criminal inhalant law by failing to properly train, supervise, hire, or retain Detective Goodwin and Lieutenant Ross in the requirements equal protection and selective enforcement and selective prosecution. The actions of one or more of Memphis' policymakers in their individual capacity or in their official capacity had a highly predictable consequence the selective enforcement and selective prosecution would injure the Plaintiffs. This action constituted a policy of Memphis. Memphis is liable for this policy of inadequate training by its policymakers as this conduct amounts to deliberate indifference which proximately resulted in injuries to the Plaintiff.

Vol. 1 R., pp. 12-23.

These allegations fail to state a claim against the City of Memphis under 42 U.S.C. § 1983. As noted above, Plaintiffs have abandoned their claims for selective prosecution and selective enforcement under the Equal Protection Clause of the Fourteenth Amendment and for excessive fines under the Eighth Amendment, as well as their claims against all of the individual defendants except for Sergeant Althea Atwater. On appeal, Plaintiffs only address dismissal of alleged claims against the City of Memphis and Atwater for violation of the Fourth Amendment, Fifth Amendment and violation of the Due Process Clause of the Fourteenth Amendment. As such, the only complaint allegations that are relevant to the claim(s) now advanced by Plaintiffs are that Sergeant Atwater was acting in the course and scope of her employment as sergeant supervisor for the Organized Crime Unit (OCU) for Memphis under the color of state law, in her official capacity as a police sergeant for Memphis, and that "Atwater was the final policymaker by delegation for the forfeiture of Hill's assets and accounts." Vol. 1 R., pp. 16, 18. Though

Plaintiffs repeatedly allege that "Memphis is liable for violation of Hill's constitutional rights because it was pursuant to a policy, custom, ordinance, regulation, decision, edict or act of a policymaker in pursuing a grossly disproportionate forfeiture action against [Plaintiffs]", no specific facts are alleged to support these broad conclusions. Moreover, these conclusory allegations pertain to the pled claims for selective prosecution/enforcement and violation of the Eighth Amendment, which are no longer being advanced against the City. Consequently, there are not even conclusory allegations to support municipal liability for the un-pled Fourth, Fifth and Fourteenth Amendment claims.

The only allegations against the City of Memphis are blanket conclusions that Memphis is liable under every conceivable theory of municipal liability with no facts to support any theory of liability. Such allegations are entirely insufficient to state a claim against the City of Memphis. Plaintiffs are required to demonstrate that the City, through its deliberate conduct, was the "moving force" behind the alleged deprivation of his federal constitutional rights and injury. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 1389, 137 L. Ed. 2d 626 (1997); *Gregory v. Shelby Cnty., Tenn.*, 220 F.3d 433, 442 (6th Cir. 2000). Hill must also show there is a direct causal link between the policy or custom and the deprivation of his federal constitutional rights. Hill is required to prove that his particular injury was incurred because of the execution of the policy or custom. *Brown,* 520 U.S. at 405; *Gregory,* 220 F.3d at 442; *Doe v. Claiborne Cnty., Tenn. By & Through Claiborne Cnty. Bd. of Educ.*, 103 F.3d 495, 507 (6th Cir. 1996); *Garner v. Memphis Police Dep't,* 8 F.3d 358, 364 (6th Cir.1993). This is necessary to avoid *de facto respondeat superior* liability which is explicitly prohibited by *Monell. Claiborne County,* 103 F.3d at 508. A "custom" must "be so permanent and well settled as to constitute a custom or usage with the force of law." *Monell,* 436 U.S. at 691; *Claiborne*

County, 103 F.3d at 507. Municipal liability attaches only when "a deliberate choice to follow a course of action is made from among various alternatives" by city or county policymakers. *City of Canton*, 489 U.S. at 389 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)).

There are several basic means by which Plaintiffs may seek to establish a government policy or custom for purposes of § 1983. First, there can be an official policy promulgated and formally adopted by the City of Memphis government's lawmakers with the intention of governing the future conduct of its employees and agents. *Monell*, 436 U.S. at 690. The First Amended Complaint does not point to any ordinance or regulation of the City of Memphis providing for unreasonable seizure or detention of property for forfeiture.

Second, there can be a pervasive custom or practice of which the county lawmakers either know or reasonably should know. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791 (1985). An act performed pursuant to a custom or practice that has not been formally approved by an appropriate government decision maker or policy maker may fairly subject the City of Memphis to § 1983 liability on the theory that the custom or practice is so widespread and commonly accepted as to in effect have the force of law. *Brown*, 520 U.S. at 404; *Monell*, 436 U.S. at 690–91; *Gregory*, 220 F.3d at 441–42; *Claiborne County*, 103 F.3d at 507–08; *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir.1994). Plaintiffs do not allege any facts to establish or even hint that the City of Memphis or its police department has a custom or policy of seizing and retaining property for forfeiture without probable cause to believe that the property is subject to forfeiture. Indeed, Plaintiffs do not even plead that the bank funds at issue herein were seized and retained without probable cause to believe that the funds were subject to forfeiture. The claims advanced by Plaintiffs in this appeal

depend on a single allegation of fact, *to wit*: "Sergeant Atwater authorized the officers of OCU to prepare forfeit paperwork for the entire sum of the funds found in Hill's accounts . . . [though] Sergeant Atwater had no direct or circumstantial evidence to support that the entire sum or even a substantial portion of the funds were the proceeds of the illegal sale of inhalants or were traceable to the illegal sale of inhalants. . . ." Vol. 1 R., p. 17.

Plaintiffs cannot establish a civil rights violation against the City from isolated acts relating to seizure of Plaintiffs' bank funds. Proof of random acts or isolated events are insufficient to establish custom, policy or practice. *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1444 (9th Cir.1989). "Only if a plaintiff shows that his injury resulted from a "permanent and well-settled" practice may liability attach for injury resulting from a local government custom." *Id.* at 1444 ("the district court properly dismissed this portion of Thompson's § 1983 action as he alleged no facts which suggested that the alleged constitutional deprivation occurred as the result of County policy or custom.")

Third, there can be a single act taken by a county official who, as a matter of state law, has final policymaking authority with respect to the particular subject matter or area in which the action was taken. *City of St. Louis v. Paprotnik,* 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Pembauer v. City of Cincinnati,* 475 U.S. 469, 480–81, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)("Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law.") Plaintiffs allege no facts to support a claim that there has been a "decision, edict or act of a policymaker" providing for or authorizing unreasonable seizure of property for forfeiture. Plaintiffs merely allege that Atwater is a "sergeant supervisor for the Organized Crime Unit (OCU)" and, in the alternative, that Atwater

was the "final policymaker by delegation for the forfeiture of Hill's assets and accounts." These conclusory allegations are insufficient to allege or even infer that Atwater possessed final authority, as a matter of state law, with respect to the City of Memphis' Police Department's seizure and retention of property for forfeiture. "[A] 'policy' giving rise to liability cannot be established merely by identifying a policymaker's conduct that is properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Brown,* 520 U.S. at 397. Further, the "fact that a particular official—even a policymaking official—has *discretion* in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-83, 106 S. Ct. 1292, 1299-300, 89 L. Ed. 2d 452 (1986) (emphasis supplied); *see also Praprotnik*, 485 U.S. at 126 ("If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability.") Instead, an "official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Id.*

As discussed in greater detail in the succeeding sections, seizure and retention of Plaintiffs' property for forfeiture was authorized by state law. The forfeiture warrant indicates that it was based on probable cause to believe that the bank funds were subject to forfeiture under Tennessee Code Annotated section 53-11-451 (a)(6)(A).[9] Under this statute, "all moneys . . . used or intended to be used, to facilitate any violation of the Tennessee Drug Control Act" are forfeitable in addition to all "proceeds traceable to the exchange". The procedure for seizure and

[9] After Plaintiff Hill pled guilty to a lesser charge, than the one for which he was originally arrested, the State of Tennessee elected to pursue forfeiture under a different statute, Tennessee Code Annotated section 39-12-101. *See Infra* at page 40-42.

forfeiture under this statute is provided in Tennessee Code Annotated section 40-33-201 *et seq.*[10] As such, the City of Memphis' authority to seize property for forfeiture arises from state law, rather than any ordinance or regulation of the City or determination by Sergeant Atwater. State law also establishes a mandatory procedure for seizure of property for forfeiture. As such, even if Atwater deviated from the procedure provided by state law, she cannot be said to possess final policymaking authority for any such deviation, where such authority is not provided for in the statute governing the procedure for forfeiture. Thus, in order to demonstrate that the City of Memphis is liable for any actions taken by Atwater, Plaintiffs must demonstrate that the City of Memphis had a custom or policy of deviating from the forfeiture procedures required by state law or of failing to train its police officers adequately on the procedures required by state law. As noted above, this custom or policy must be so widespread and commonly accepted as to in effect have the force of law. Moreover, the "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388–89, 109 S.Ct. at 1204–05.

The First Amended Complaint does not allege any facts to support a claim that the City had a widespread and commonly accepted policy or custom of deviating from the forfeiture procedures required by state law. Specifically missing, is any allegation that there have been any other instances where the City of Memphis or its police officers have seized property for forfeiture or taken steps to pursue forfeiture without any cause to believe that the property was forfeitable under applicable Tennessee statutes and/or without following the mandatory procedure

[10] At the time Plaintiffs' property was seized, the procedure relating to notice of seizure and issuance of a forfeiture warrant found in this section and in Tennessee Code Annotated section 39-11-707 was substantively the same. The legislature recently amended Tennessee Code Annotated sections 40-33-203 and 40-33-204, effective January 1, 2014.

provided in the applicable Tennessee statutes. The First Amended Complaint also falls well short of alleging facts, as opposed to conclusions, regarding the inadequacy of police training with respect to the seizure of property for forfeiture. In paragraph 14, Plaintiffs allege as follows:

> Memphis acted in deliberate indifference to Plaintiffs' Eighth Amendment rights to be free from grossly disproportionate forfeiture by failing to properly train Sergeant Atwater and Lieutenant Eaton in the requirements of tracing proceeds of illegal inhalants to the actual funds attempted to be forfeited and the proportion of the maximum fine to the attempted forfeiture. The actions of one or more of Memphis' policymakers in their individual capacity or in their official capacity had a highly predictable consequence the grossly disproportionate forfeiture would injure the Plaintiffs.

Vol. 1 R., p. 19. To show deliberate indifference, Plaintiff must show prior instances of unconstitutional conduct demonstrating that the City has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury. *Thompson v. City of Memphis*, 10-2475-STA-TMP, 2011 WL 5553719 at *3 (W.D. Tenn. Nov. 15, 2011). The instant Plaintiffs' allegations do not even refer to unlawful seizure or deprivation without due process of law, much less offer any specific facts on the training provided by the City of Memphis to Sergeant Atwater. Further, Tennessee law provides the basis for determining whether property is subject to forfeiture, as well as procedures providing for the ultimate decision to be made by a court or hearing officer.[11] As such, there is no need to train a police sergeant to make a determination on the ultimate issue of whether the property should be forfeited.

Similar to the complaint allegations in *Thompson v. City of Memphis*, Plaintiffs' claims regarding Defendant City of Memphis' custom, policy or practice, training and delegation of authority related to "the right to be free from grossly disproportionate forfeiture" or "the

[11] *Compare* Tenn. Code Ann. § 40-33-401, *with* Tenn. Code Ann. § 39-11-708.

requirements of tracing proceeds of illegal inhalants to the actual funds attempted to be forfeited", "amount to legal conclusions without additional factual assertions of any kind." *Thompson*, 2011 WL 5553719 at *4. Because Plaintiffs' allegations are nothing more than "formulaic recitations of the element of a § 1983 claim", Plaintiffs' claims against the City of Memphis were properly dismissed. *Id.*

III. The First Amended Complaint fails to state a claim against Althea Atwater for violation of the Fourth Amendment to the United States Constitution.

Plaintiffs' claims against the City are dependent upon the existence of a constitutional violation by one or more of its officers. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); *Scott v. Clay County, Tenn.*, 205 F.3d 867, 879 (6th Cir.2000) ("[O]ur conclusion that no officer-defendant had deprived the plaintiff of any constitutional right *a fortiori* defeats the claim against the County as well."); *Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 554 (6th Cir.1992) ("Heller simply reaffirmed that a determinative issue in § 1983 claims against municipalities is whether the plaintiff has suffered a deprivation of his constitutional rights."). Because Plaintiffs have failed to state a claim upon which relief may be granted against Sergeant Atwater for violation of their constitutional rights, their claims against the City of Memphis also fail.

Although Plaintiffs' First Amended Complaint brings claim against the City of Memphis and six City of Memphis' police officers, Plaintiffs have not challenged the dismissal of the claims against five of the officers.[12] On appeal, Plaintiffs only advance claims against Defendant Althea Atwater and the City of Memphis for alleged violations of the Fourth, Fifth and

[12] Like the First Amended Complaint, Plaintiffs' brief on appeal is not a model of clarity with respect to the claims being advanced. With respect to the other Defendants, Plaintiffs' only reference in its brief is in footnote 2, which notes that the only remaining party defendants are Atwater and the City of Memphis.

Fourteenth Amendments to the United States Constitution.[13] In reliance on the argument advanced by Plaintiffs in their brief, the City has limited its argument on appeal to Plaintiffs claim that the First Amended Complaint alleges causes of action against the City of Memphis, based only on the actions of Althea Atwater, for unlawful seizure of their bank funds in violation of the Fourth Amendment and for unlawful detention of their bank funds in violation of their due process rights under the Fifth and Fourteenth Amendment.

Tennessee Rule of Civil Procedure 8.01 requires that a pleading which sets forth a claim for relief "shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded." Tenn. R. Civ. Pro. 8.01. Rule 8.05 requires each averment of a pleading shall be simple, concise and direct. Tenn. R. Civ. Pro. 8.05. "Although a complaint 'need not contain in minute detail the facts that give rise to the claim,' the complaint must at least 'contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.' "*Trau–Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 704 (Tenn.2002) (quoting *Donaldson v. Donaldson*, 557 S.W.2d 60, 61 (Tenn.1977)). As discussed herein, Plaintiffs' First Amended Complaint does not expressly make a claim for unlawful seizure of Plaintiffs' bank funds in violation of the Fourth Amendment. Further, the First Amended Complaint does not set forth sufficient facts to state a claim for unlawful seizure of Plaintiffs' bank funds in violation of the Fourth Amendment(s).

[13] The First Amended Complaint asserts claims against the City of Memphis for violation of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Those claims are based in whole or in part on alleged actions of the dismissed officers. Plaintiffs fail to expressly acknowledge abandonment of those claims against the City of Memphis in their brief on appeal; however, Plaintiffs failure to include any argument or authority on those claims in their brief constitutes a waiver. *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 401 (Tenn.Ct.App.2006).

A. The First Amended Complaint does not assert a constitutional claim predicated on the "seizure" of Plaintiffs' bank funds.

In their brief on appeal, Plaintiffs assert that the starting point for the analysis that should be applied "is that the Fourth Amendment protects the people from unreasonable seizures, the Fifth Amendment provides that no person should be deprived of property without due process of law and that these protection are extended to the states by virtue of the incorporation clause of the Fourteenth Amendment." Brief of Appellant, p. 14. On a motion to dismiss for failure to state a claim upon which relief may be granted; however, the starting point is the complaint. The instant complaint expressly alleges claims under the excessive fines clause of the Eighth Amendment, based on an allegedly "grossly disproportionate forfeiture", and under the equal protection clause of the Fourteenth Amendment, based on alleged "selective enforcement of the forfeiture laws and selective prosecution for inhalants." Vol. 1 R., pp. 17-18. Plaintiffs' First Amended Complaint, does not contain a claim for an unconstitutional "séizure" of funds, which would be a claim under the Fourth Amendment (rather than the Eighth Amendment). The First Amended Complaint does not contain a single reference to the "Fourth Amendment" or the due process clause of the Fourteenth Amendment. Nor does the word "seize" or "seizure" appear within the First Amended Complaint. Throughout the First Amended Complaint, Plaintiffs refer only to the Excessive Fines clause of the Eighth Amendment and allege that forfeiture of "approximately $277,000.00" was "grossly disproportionate." Vol. 1 R., pp. 13-21 (Amended Complaint at ¶¶ 4, 5, 11, 14, 16 and 20). Indeed, the allegations of the First Amended Complaint, taken alone, would lead any reasonable person to believe that the funds had actually been forfeited. The complaint alleges that Sergeant Atwater authorized the preparation of "forfeit paperwork" and that Lieutenant Eaton approved "this grossly disproportionate forfeiture." Vol. 1 R., p. 17. There is nothing in the complaint to indicate that a criminal

forfeiture petition was (1) brought by the State of Tennessee, rather than by the City of Memphis, and (2) still pending at the time the complaint in this case was filed. Moreover, once the order was entered denying the request for forfeiture, Plaintiffs continued to advance an Eighth Amendment claim by arguing that the criminal court's denial of the petition to forfeit conclusively established that the forfeiture was disproportionate in violation of the Eighth Amendment. It was only after the City pointed out that the order denying the forfeiture and the subsequent return of Plaintiffs' funds negated any Eighth Amendment claim for a disproportionate forfeiture, that Plaintiffs asserted a Fourteenth Amendment claim for unlawful retention of the funds during the pendency of the criminal forfeiture action. Vol. 1 R., p. 120. Specifically, Plaintiffs argued in a response filed the day before the hearing on the City's motion to dismiss that "the City's retention of the bank accounts post-seizure and pre-merits hearing in privity with the State without offering a post-seizure hearing constituted a violation of Plaintiff's procedural and substantive Fourteenth Amendment Due process rights." Vol. 1 R., p. 120. The substance of Plaintiffs' argument was addressed and rejected by the trial court in its June 7, 2013 Order. Plaintiffs never advanced any argument based upon an alleged Fourth Amendment violation, which is distinguishable from a due process violation, prior to the Court's entry of the June 7, 2013 order dismissing the claims against the City of Memphis. *See* Vol. 1 R., pp. 38-42; 121-124. Instead, counsel for Plaintiffs informed the trial court, in open court, that Plaintiffs were not asserting Fourth Amendment claims because warrants were obtained prior to any searches or seizures. Vol. 1 R., p. 152.

The first time Plaintiffs attempted to assert a Fourth Amendment claim based on an alleged unlawful seizure was in their Rule 59.04 Motion to Alter or Amend the trial court's June

7, 2013 Order.[14] This Court has consistently held, however, that a "Rule 59 motion should not be used to raise or present new, previously untried or unasserted theories or legal arguments." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005).

B. The First Amended Complaint does not allege any facts to support a constitutional violation against Althea Atwater predicated on the "seizure" of Plaintiffs' bank funds.

In the First Amended Complaint, Plaintiffs provide no facts to support any constitutional claim for violation of the Fourth Amendment as a result of the "seizure" of Plaintiffs' bank funds. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." U.S. Const. amend. IV. "To determine whether the [defendants] conducted the seizure in violation of the fourth amendment, [the Court] must examine the facts and circumstances surrounding the [seizure of property]. Such an inquiry does not require a determination of whether there was in fact a need for the [defendants] to [seize the property]; instead we are required to determine whether the [defendants'] decision to [seize the property] was reasonable under the circumstances." *Collins v. Nagle,* 892 F.2d 489, 493 (6th Cir.1989) (citations omitted). Moreover, the Fourth Amendment reasonableness standard does not turn on the availability of less intrusive alternatives. *See Illinois v. LaFayette,* 462 U.S. 640, 647, 103

[14] Notably, the motion was brought by new counsel, hired to resurrect Plaintiffs' claims after Plaintiffs apparently terminated their prior counsel. Unlike Plaintiffs' former counsel, who had defended Plaintiffs in the criminal forfeiture action and had engaged in extensive discovery and a trial in that case, Plaintiffs' new counsel appeared unfamiliar with the undisputed facts pertaining the execution of a nuisance complaint on Plaintiff Hill's business, the search of Hill and his business, the arrest and prosecution of Hill and the prosecution of a criminal forfeiture action against Plaintiffs' bank funds. Vol. 1 R., pp. 152-153. For example, Plaintiffs argue in the motion to alter or amend that Atwater was the final policy maker responsible for the forfeiture action and that the City retained the $277,000.00 despite the lack of evidence that the funds were traceable to the illegal sale of inhalants. Vol. 1 R., pp. 142-143. The undisputed facts, which Plaintiffs' current counsel has now conceded, reveal that the funds were seized pursuant to a warrant issued by a Judicial Commissioner, based on an affidavit and appearance by an officer other than Atwater and that the State of Tennessee was responsible for instituting the forfeiture action. See Brief of Appellant, pp. 12-13.

S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983) ("[T]he real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps.... The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means.")

Turning to the instant case, Plaintiffs primary argument that the "seizure" was unconstitutional is based on the criminal forfeiture court's finding that the State of Tennessee failed to present sufficient evidence that the bank funds were traceable to Plaintiffs' illegal conduct. Vol. 1 R., pp 118-120; Brief of Appellant at p. 24. The State's failure to satisfy its burden of proof in the forfeiture action is irrelevant to the reasonableness of the initial seizure by Memphis police officers; otherwise every arrest (seizure of a person) would be unconstitutional where the defendant is later acquitted of the crime for which he or she was arrested. *See Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988). Moreover, the complaint allegations and related public records demonstrate that the seizure was reasonable.

In support of their Fourth Amendment argument, Plaintiffs rely primarily on the allegations of paragraphs 4 and 11 of the First Amended Complaint, which allege as follows:

> 11. On or about February 9, 2011, Sergeant Atwater authorized the officers of OCU to prepare forfeit paperwork for the entire sum of the funds found in Hill's accounts, approximately TWO HUNDRED AND SEVENTY-SEVENTY THOUSAND DOLLARS ($277,000.00). Sergeant Atwater had no direct or circumstantial evidence to support that the entire sum or even a substantial portion of the funds were the proceeds of the illegal sale of inhalants or were traceable to the illegal sale of inhalants. Additionally, the disposition of the criminal charge against Dietrich Hill, Individually would result in a maximum fine that was many times smaller than or a tiny fraction of $277,000.00. Lieutenant Eaton was aware that Sergeant Atwater had no direct or circumstantial evidence that the entire sum of Hill's funds were not traceable to illegal sale or inhalants or were traceable to the illegal sale of inhalants. Eaton was also aware that the disposition of the criminal charge against Hill individually, resulted in a maximum fine that was small fraction

> of $277,000.00 Eaton approved this grossly disproportionate forfeiture and approved this grossly disproportionate forfeiture. Eaton implicitly or explicitly approved, authorized or acquiesced in Atwater's unconstitutional conduct which proximately resulted in injuries and damages to the Plaintiff. In the alternative, Atwater was the final policymaker by delegation for the forfeiture of Hill's assets and accounts.

Vol. 1 R., pp. 17-18 (¶ 11).[15]

In their brief on appeal, Plaintiffs assert that these allegations are sufficient to infer that "Atwater, acting without probable cause and as the policymaker for the City, caused the unlawful seizure of $277,000 of the Plaintiffs; money and a subsequent unlawful detention of those funds in violation of the Plaintiffs' Fourth and Fifth Amendment rights . . . ." Brief of Appellants at p. 23. The City respectfully disagrees. Though the court is required to construe allegations in a plaintiff's favor and accept factual allegations as true, it is not required to take as true inferences drawn from the facts. *Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997). The "facts" identified by Plaintiffs, however, require the Court to draw inferences that are unreasonable and contradicted by the public record incorporated by reference in the complaint and integral to Plaintiffs' claims.[16]

The Fourth Amendment, as applicable to the states through the Fourteenth Amendment, grants persons the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), the Supreme Court held that a Fourth Amendment seizure of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." Although typically raised in the context of criminal investigations, the Fourth Amendment's protection against unreasonable government

[15] The City repeats this excerpt for ease of reference.
[16] The inferences advanced by Plaintiffs conflict with otherwise undisputed facts found in the forfeiture warrant, criminal forfeiture petition and the legal rights provided to Plaintiffs in Tennessee's forfeiture statute.

seizures also applies in the civil context. *Soldal v. Cook County*, 506 U.S. 56, 67, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). Further, the Fourth Amendment's protection against seizures of property applies even "in a context in which privacy or liberty interests are not implicated." *Bonds v. Cox*, 20 F.3d at 702. "In order to be actionable, however, a seizure of property must be objectively unreasonable." *Luster v. City of Gallatin*, 50 F. App'x 189, 191-92 (6th Cir. 2002)(relying on *Soldal v. Cook Co.*, 506 U.S. at 71.) Where the seizure is pursuant to a judicial order or warrant, the burden in demonstrating the unreasonableness of the seizure actions is substantial. *Id.*

In reliance on the allegations found in paragraph eleven of the First Amended Complaint, Plaintiffs assert that "Atwater initiated civil forfeiture proceedings against Plaintiffs that led to seizure of $277,000 of their bank account funds without evidence that any of the seized funds were proceeds of, or traceable to, the illegal sales of $220 worth of nitrous oxide that were made to undercover agents of the Organized Crime Unit in December, 2010 through January, 2011." Brief of Appellant, pp. 16-17. Plaintiffs also assert in their brief that "Atwater, acting without probable cause and as the policymaker for the City, caused the unlawful seizure of $277,000 of the Plaintiffs' money and a subsequent detention of those funds in violation of the Plaintiffs' Fourth and Fifth Amendment rights." Brief of Appellant, pp.22-23. Paragraph 11 of the First Amended Complaint alleges that "Sergeant Atwater authorized the officers of OCU to prepare forfeit (sic) paperwork for the entire sum of the funds found in Hill's accounts", not that Sergeant Atwater caused the unlawful seizure of $277,000 without probable cause. Plaintiffs' argument that Atwater "initiated civil forfeiture proceedings against Plaintiffs" is not supported by the complaint allegations, which only assert that Atwater authorized the officers of OCU to prepare forfeit paperwork for the entire sum. It cannot be disputed that the State of Tennessee, by and

through the attorney general initiated the forfeiture proceedings. See Tenn. Code Ann. § 39-11-708 (a). Moreover, authorizing other officers to "prepare forfeit (sic) paperwork" is not the same as "initiating civil forfeiture proceedings". Authorizing other officers to "prepare forfeit (sic) paperwork" also falls well short of "causing an unlawful seizure". Further, the complaint allegation that "Sergeant Atwater had no direct or circumstantial evidence to support that . . . the funds were the proceeds of the illegal sale of inhalants or were traceable to the illegal sale of inhalants" does not lead reasonably imply that seizure of the funds was unlawful or lacked probable cause, where, as here, the seizure was authorized by a forfeiture warrant issued by a judicial commissioner and based on the affidavit of someone other than Atwater.[17] Plaintiffs do not allege that the funds were seized without probable cause to believe they were forfeitable. Plaintiffs do not any facts that would establish that the funds were seized without probable cause. Atwater's' lack of direct or circumstantial support that the entire sum or even a substantial portion of the funds were the proceeds of or traceable to the illegal sale of inhalants, is insufficient, without more to allege that the forfeiture warrant was issued without probable cause. The forfeiture warrant indicates that it was based on probable cause. Vol. 4 R., pp. 66-67. In fact, the forfeiture warrant, which was incorporated by the Plaintiffs' reference to "forfeit paperwork" unequivocally establishes that Atwater did not provide the affidavit in support of the forfeiture warrant and did not appear before the judicial commissioner to obtain the warrant. Vol. 4 R., pp. 66-67. The forfeiture warrant reveals that proof by affidavit was made by an Officer Trentham, of the Memphis Police Department, that probable cause exists to believe that $54,795.28 in a Bank of America account and $221,873.40 in BanCorp South account is subject

[17] The "forfeit paperwork" referenced by Plaintiffs in the complaint is, in fact, a forfeiture warrant, which was filed in this case and the court can consider as part of the complaint. *See* Rule 10.03 TENN. R. CIV. PRO.

to forfeiture pursuant to Tennessee Code Annotated section 53-11-451 (a)(6)(A).[18] Vol. 4 R. pp. 66-67. The affidavit in support of the forfeiture warrant was executed by "N. Trentham" and contains a statement that "this hearsay warrant" is based on facts obtained from "the Officers report". Vol. 4 R. p. 67. Hearsay warrants are permissible. *United States v. Hensley*, 469 U.S. 221, 232-33, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) ("When officers are in communication regarding a suspect, one officer's knowledge is imputed to the others under the collective knowledge doctrine."); *see also State v. Echols*, 382 S.W.3d 266, 280 (Tenn. 2012). Thus, Atwater's' lack of evidence is irrelevant to the probable cause determination.

Plaintiffs' allegation that "Sergeant Atwater had no direct or circumstantial evidence to support that . . . the funds were the proceeds of the illegal sale of inhalants or were traceable to the illegal sale of inhalants" is not sufficient to infer that the warrant issued by the Judicial Commissioner in this case, based on the hearsay Affidavit of Trentham, not Atwater, lacked probable cause to believe that $54,795.28 in a Bank of America account and $221,873.40 in BanCorp South account was subject to forfeiture pursuant to Tennessee Code Annotated section 53-11-451 (a)(6)(A). Section 53-11-451 provides for forfeiture of: "(6)(A) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance or controlled substance analogue in violation of the Tennessee Drug Control Act of 1989, compiled in part 3 of this chapter, this part and title 39, chapter 17, part 4, all proceeds traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of the Tennessee Drug Control Act." Tenn. Code Ann. § 53-11-451 (a)(6)(A). Thus, under this statute, "all moneys . . . used or intended to be used, to facilitate any violation of the Tennessee Drug Control Act" are forfeitable in addition to all traceable proceeds. *Id.*

Plaintiff Hill was arrested and charged with a violation of Tennessee Code Annotated section 39-17-422 (c); however, he later pled guilty to criminal attempt on April 8. 2011. *See* Vol. 1 R., p. 49.; Vol. 4 R., p. 58. The original charge permits forfeiture under Tennessee Code Annotated section 53-11-451 (a)(6)(A), as provided for in the forfeiture warrant. The attempt conviction, however, does not constitute a violation of the Tennessee Drug Control Act but instead is a violation of Tennessee Code Annotated section 39-12-107. On May 9, 2011, after accepting Hill's guilty plea to a lesser charge, the Shelby County Attorney General filed a petition pursuing forfeiture of the bank funds under Tennessee Code Annotated section 39-11-703. Vol. 4 R., p. 58. Notably, section 39-11-703 limits forfeiture to personal property acquired or received in violation of any statute or traceable as proceeds from the violation of any statute, unlike the provisions of Tennessee Code Annotated section 53-11-451 (a)(6)(A), which also provides for forfeiture of moneys used or intended to be used to facilitate a violation of the Tennessee Drug Control Act. At the time the *In Rem* Petition for Forfeiture was filed, the bank funds had already been lawfully seized pursuant to the Forfeiture Warrant on probable cause that they were forfeitable as proceeds **and/or** *moneys used or intended to be used to facilitate a violation of the Tennessee Drug Control Act.*

Plaintiffs have never even alleged that Atwater lacked direct or circumstance evidence that entire sum or substantial portion of the seized funds were used or intended to be used to facilitate a violation of Tennessee Code Annotated section 39-17-422 (c)[19]. The complaint allegations in Paragraph 10 establish that Goodwin and other officers of the OCU raided the premises of Tokens Gifts, Inc., executed a search of the premises and served a nuisance complaint. During this search, "officers of the OCU obtained information regarding the bank

[19] This section is part of the Tennessee Drug Control Act. Tenn. Code Ann. § 39-17-401.

accounts and other information for [Hill] personally and for Tokens Gifts, Inc. of Tennessee and Tokens Gifts, Inc. of Oregon." Vol. 1 R. pp. 16-17. The criminal court order filed by Plaintiffs reveals that the bank account information seized consisted of "photographs of bank account deposit slips, blank checks and credit cards." Vol. 1, R. p. 58. The complaint does not include any facts identifying the owners of the bank accounts, the number of bank accounts, the amount of undercover sales made to the OCU officers or whether nitrous oxide inventory was seized and the amount of the inventory. The criminal court order, which the Plaintiffs want to rely on piecemeal, reveals that approximately 10,000 nitrous oxide canisters were seized by law enforcement officers. Vol. 1, R. p. 58. A reasonable inference would be that the blank checks and credit cards found in Plaintiffs' business along with 10,000 nitrous oxide canisters were used to purchase the nitrous oxide and that the deposit slips were used to deposit proceeds from sales of nitrous oxide and that officers, such as Goodwin who executed the raid possessed probable cause to believe the bank funds were forfeitable on that basis. Notably, the criminal court order indicates that Hill's testimony in the forfeiture proceeding lacked credibility, with Hill attempting to feign lack of knowledge and understanding about financial documents and transactions. Vol. 1, R. p. 50.

Under the circumstances, the allegation pertaining to *Atwater's* lack of direct or circumstantial evidence that the bank funds were the proceeds of the illegal sale of inhalants or were traceable to the illegal sale of inhalants does not lead to a reasonable inference that the Forfeiture Warrant issued by the Judicial Commissioner lacked probable cause. There is no allegation that the Forfeiture Warrant issued by the Judicial Commissioner lacked probable cause. In addition, there is no allegation that the seizure of the banks funds failed to comply with the forfeiture statute or that the forfeiture statute is unconstitutional. Instead, the complaint

allegations and related public records demonstrate that the seizure fully complied with the requirements of the forfeiture statute. Plaintiffs' personal property was seized by law enforcement officers, acting pursuant to the execution of a lawful search warrant as permitted under Tennessee Code Annotated section 39-11-707 (a). *See* Vol. 4 R., pp. 57 (¶¶ 8, 14), 62, 64.[20] Upon seizure of Plaintiffs' personal property, the seizing agency delivered a written receipt and notice of seizure to Plaintiffs, in accordance with Tennessee Code Annotated section 39-11-707 (b). *See* Vol. 4 R., p. 57 (¶ 19). Moreover, seizure of the bank funds at issue in this case was made pursuant to a forfeiture warrant, which was issued by a Judicial Commissioner upon a finding that probable cause for forfeiture existed and was based on a affidavit made in accordance with Tennessee Code Annotated section 39-11-707 (c), by Officer Trentham. *See* Vol. 4 R., pp. 66-67.

For all of the above reasons, the trial court correctly found that the First Amended Complaint fails to allege a Fourth Amendment claim against the City of Memphis based on unlawful seizure of Plaintiffs' funds for forfeiture. The City requests this Court to affirm the judgment of the trial court dismissing the First Amended Complaint against the City of Memphis

IV. The trial court correctly held that the existence of adequate statutory post deprivation remedies precludes any claim for a Fifth or Fourteenth Amendment Due Process violation.

In addition to advancing a novel claim for unlawful seizure of their bank funds under the Fourth Amendment, Plaintiffs also claim that seizure and/or retention of the bank funds during the pendency of the forfeiture action violated Plaintiffs' due process rights under the Fifth and Fourteenth Amendments. Like, their Fourth Amendment claim, Plaintiffs do not expressly allege or infer any deprivation of their due process rights as a result of the seizure or retention of

[20] The actual warrants were filed in the trial court as Exhibits 1 and 2 to Deposition of Goodwin but apparently have not been included in the record on appeal.

their funds in the First Amended Complaint. Vol. 1 R., p. 145. Plaintiffs first argued that the City's retention of the Plaintiffs' bank funds, post seizure and pre-merits hearing, violated their due process rights in the supplemental response to the City's motion to dismiss filed on April 15, 2013. Vol. 1 R., p.120. Without deciding the issue of whether Plaintiffs had properly pled such a claim, the trial court ruled that existence of adequate post-deprivation remedies for recovery of Plaintiffs' property precluded any due process claim. Plaintiffs, by and through new counsel, moved to alter or amend the trial court's order asserting for the first time that Plaintiffs were entitled to a pre-seizure hearing or in the alternative that the post-deprivation procedures or remedies were inadequate under the instant facts. Vol. 1 R., pp. 139-142.

In their Motion to Alter or Amend and brief on appeal, Plaintiffs assert that the Court committed a clear error of law in holding that the existence of statutory post deprivation remedies for return of Plaintiffs' funds precludes any claims for a due process violation. Plaintiffs initially relied on *United States v. James Daniel Good Real Property*, 510 U.S. 43, 59, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), asserting that the trial court's analysis is contrary to and inconsistent with a plain reading of the Supreme Court's holding. On appeal, Plaintiffs cite *James Daniel Good* and also rely on *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to posit that the due process requirement for an opportunity to be heard at a meaningful time and in a meaningful manner requires pre-deprivation notice and hearing in the instant case. Brief of Appellant, pp. 17-18. Further, Plaintiffs assert that the "mere existence of post deprivation remedies" is not dispositive of Fifth Amendment due process claims. Brief of Appellant, p. 17.

Plaintiffs' argument ignores key facts; the most notable is that the trial court's ruling was a specific pronouncement on the Plaintiffs' due process argument under the facts of this case.

The trial court never held that the existence of post-deprivation remedies always negates a due process claim as a matter of law. Instead, the trial court held that the Plaintiffs in this case could not, as a matter of law, state a claim for a due process violation as a result of the post-seizure retention of their bank funds, because of the existence of statutory post deprivation remedies for recovery of any property seized for forfeiture. On this point, the trial court was correct.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *See* U.S. Const. amend. V; U.S. Const. amend. XIV. The Fifth and Fourteenth Amendments guarantee that in all cases where an individual stands to be deprived of life, liberty or property by the government, he is entitled to due process of law. *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (citing *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). Referred to as procedural due process, the Supreme Court has generally held that this aspect of the Fourteenth Amendment requires the State to provide individuals with notice and an opportunity to be heard before the State effects a deprivation. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 51, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); *Parratt v. Taylor,* 451 U.S. 527, 543–44, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

In *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Supreme Court held that where there has been an unauthorized or negligent deprivation of property without due process, a plaintiff bringing a section 1983 claim must allege that the state's post-deprivation procedures are inadequate to remedy the deprivation. *Id.*; *see also*

Hudson v. Palmer, 468 U.S. 517, 531, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (holding that the *unauthorized intentional deprivation of property* by a state employee does not constitute a violation of the Due Process Clause if a meaningful post-deprivation remedy for the loss is available) (emphasis added). The Tennessee forfeiture statute applicable to the attempted forfeiture of Plaintiffs' property, contains a mandatory requirement that the seizing agency obtain an ex parte forfeiture warrant from a judge authorized to issue a search warrant, after finding that probable cause for forfeiture exists based upon proof by affidavit that there is probable cause that the owner's interest in the seized property is subject to forfeiture. To the extent that Plaintiffs assert that the forfeiture warrant was obtained without probable cause that Plaintiffs' interest in the bank funds was subject to forfeiture, the seizure of Plaintiffs' funds pursuant to the forfeiture warrant would constitute an unauthorized intentional deprivation of property, subject to the holding in *Parratt.* Thus, in order to prevail on such a theory, Plaintiffs would be required to allege that Tennessee's post-deprivation procedures are inadequate to remedy the deprivation in order state a procedural due process claim. *Vicory v. Walton*, 721 F.2d 1062, 1065-66 (6th Cir. 1983)(plaintiff must plead and prove that state remedies for redressing the wrong are inadequate). There is no such allegation in First Amended Complaint.

Considering that Plaintiffs have failed to allege that the forfeiture warrant was obtained without probable cause or any facts from which a reasonable inference could be made that the forfeiture warrant was obtained without probable cause, the City will address whether adequate post-deprivation remedies are sufficient where the deprivation is authorized by established state procedures. Where state law provides for a deprivation, (as opposed to an authorized random act) the Fourteenth Amendment requires an opportunity granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case. *See Logan v.*

Zimmerman Brush Co., 455 U.S. 422, 437, 102 S. Ct. 1148, 1158-59, 71 L. Ed. 2d 265 (1982). In some cases, takings of property by the State require pre-deprivation notice and a hearing. *Parratt v. Taylor*, 451 U.S. at 538, 101 S.Ct. 1908.[11] But where the State must take quick action, or where it is impractical to provide meaningful pre-deprivation process, due process will be satisfied by a meaningful post deprivation remedy. *Id.* at 539, 101 S.Ct. 1908.

In the context of civil forfeiture actions, courts have uniformly recognized that adequate post-deprivation remedies will satisfy due process requirements in situations where extraordinary circumstances warrant seizure of personal property without pre-deprivation notice and an opportunity to be heard. In *Calero–Toledo,* the United States Supreme Court recognized that "immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible ... [where] the seizure has been directly necessary to secure an important governmental or general public interest." *Calero–Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). "Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Id.* As discussed in the next section, the City's seizure of Plaintiffs' bank funds satisfies the requirements for dispensing with the usual requirement for pre-seizure notice and an opportunity to be heard.

Turning to the adequacy of the procedures provided in Tennessee's judicial forfeiture statute, this Court has previously addressed the issue of whether "a delay between the seizure of property and the forfeiture hearing violated a claimant's right to a hearing at a meaningful time under the Fifth and Fourteenth Amendments to the United States Constitution." *Jones v. Greene*,

946 S.W.2d 817, 826 (Tenn. Ct. App. 1996). The forfeiture action in *Greene* was governed by the procedure provided for in Tennessee Code Annotated section 40-33-201 *et seq* (1996), which contained provisions substantively the same as the procedure applicable to the instant case.[21] *Id.* at 822-823; *see also* Tenn. Code Ann. § 39-11-707. The *Greene* plaintiff asserted that a 41–month delay between the seizure of more than $45,000.00 of his money and the hearing on his claim violated his due process rights to a hearing at a meaningful time. *Greene*, 946 S.W.2d at 826. The court held that "forfeiture delay claims require an examination of the facts of each case in light of the following four factors: (1) the length of the delay, (2) the reason for the delay, (3) the claimant's assertion of his or her rights, and (4) the prejudice to the claimant caused by the delay." *Id.* (*citing United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency,* 461 U.S. 555, 564, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143 (1983). Applying these factors, the court found that the 41 month delay did not deprive the plaintiff in *Greene* of his due process right to a meaningful hearing at a meaningful time. Notably, Judge Koch utilized the analysis employed by the Court in *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*. In *$8,850*, customs officials seized $8,850 from the

[21] For example, the version of Tennessee Code Annotated section 40-33-201 *et seq* applicable to the *Greene* case, provided that all personal property subject to forfeiture under the provisions of Tennessee Code Annotated, Sections 39–14–307, 47–25–1105, 53–11–451, 55–10–403(k), 57–3–411, 57–5–409, 57–9–201, 67–4–1020 and 70–6–202, shall be seized and forfeited. The procedure for seizure and forfeiture requires the seizing officer to prepare a notice of seizure, describing the property seized and identifying the date of seizure and the date notice of seizure was provided to the person in possession of the seized property. The officer making seizure is required to apply for an ex parte forfeiture warrant within five (5) working days following the seizure, which must be issued by judge who is authorized to issue a search warrant. No forfeiture action may be brought unless the forfeiture warrant is issued, upon a finding of probable cause to believe that the property is subject to forfeiture. Probable cause must be established upon proof by affidavit and shall have attached to it a copy of the notice of seizure. Any person asserting a claim to any property seized may file with the seizing agency a written claim requesting a hearing and stating the person's interest in the seized property, within thirty (30) days of being notified that a forfeiture warrant has issued. Within thirty (30) days from the day the claim is filed, the applicable agency shall establish a hearing date and set such case on the docket; however, the hearing is not required to be conducted within such thirty (30) day period. The state is required to prove by a preponderance of evidence that the seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture and the owner or co-owner of the property knew that such property was of a nature making its possession illegal or was being used in a manner making it subject to forfeiture. Tenn. Code Ann. §§ 40-33-201; -203; -204; -206; 210 (1996).

claimant when she failed to declare the currency upon entry into this country. *Id.* at 558-559. The claimant's currency was seized on September 10, 1975, and eight days later the customs service formally notified her by mail that the seized property was subject to forfeiture and that she had a right to petition for remission or mitigation. A week later, the claimant filed a petition for remission or mitigation, stating that the violation was unintentional because she had believed that she was only required to declare funds that had been obtained in another country and that she had brought the seized funds with her from the United States at the start of her trip. Thereafter, the Customs officer assigned to the case delayed filing the report of the seizure with the United States Attorney for seven months while the officer investigated the case. Claimant was eventually indicted on charges of making false statements to a Customs officer and of transporting currency into the United States without filing the required report. Disposition of the remission petition was then held pending the resolution of the criminal trial. In March 1977, some 18 months after the currency was seized, the United States Attorney filed a civil complaint seeking forfeiture of the currency. Claimant raised an affirmative defense to the suit, asserting that the government's "'dilatory processing' of her petition for remission or mitigation and 'dilatory' commencement of the civil forfeiture action violated her" due process right to a hearing at a meaningful time. *$8,850,* 461 U.S. at 560–61, 103 S.Ct. 2005.

The Supreme Court in *$8,850* framed the question before it as when does a post-seizure delay "become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time." *Id.* at 562–63, 103 S.Ct. 2005. The Court then found that the question of when the government's delay in commencing the forfeiture suit violates the due process right to a hearing is analogous to the issue of when the government's delay violates the right to a speedy trial. *Id.* at 564, 103 S.Ct. 2005. Using that analogy, the Court then adopted

the test it developed in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), to resolve speedy-trial issues. *$8,850,* 461 U.S. at 564, 103 S.Ct. 2005. The *Barker* test calls for the weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *$8,850,* 461 U.S. at 564, 103 S.Ct. 2005 (citing *Barker,* 407 U.S. at 530, 92 S.Ct. 2182). After applying the *Barker* test, the Court concluded that the 18–month delay in initiating the forfeiture suit did not violate claimant's due process right to a "meaningful hearing at a meaningful time," and that the delay in filing the suit was reasonable. *Id.* at 563–69, 92 S.Ct. 2182. Three years later in *United States v. Von Neumann,* 474 U.S. 242, 106 S.Ct. 610, 88 L.Ed.2d 587 (1986), the Supreme Court expressly held that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that *the forfeiture proceeding, without more, provides the postseizure hearing required by due process* to protect [claimant's] property interest in the car." (Emphasis added.) 474 U.S. at 249, 106 S.Ct. 610. Later in the opinion, the Court again underscored this precept by stating, "[W]e have already noted that [claimant's] right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car . . . ." *Von Neumann,* 474 U.S. at 251, 106 S.Ct. 610.

Notably, the federal statutory and regulatory scheme in effect at the time *$8,850* was decided, provided far fewer post-deprivation remedies than Tennessee's forfeiture statute. In *$8,850,* Customs was required by federal regulation to notify any person who appeared to have an interest in the seized property of the property's liability to forfeiture and of the claimant's right to petition the Secretary of the Treasury for remission or mitigation of forfeiture. 19 C.F.R. § 162.31(a) (1982). Another federal provision also gave the Secretary discretion to "remit any forfeiture or penalty . . . in whole or in part upon such terms and conditions as he deems reasonable and just." 31 U.S.C. § 1104. The regulations required the claimant to file a remission

petition within 60 days of notification. 19 C.F.R. § 171.12(b) (1982). If the claimant did not file a petition, or if the decision on the petition made legal proceedings appear unnecessary, Customs was required to prepare a full report of the seizure for the United States Attorney. 19 U.S.C. § 1603 (1982). At the time of the seizure in *$8,850,* the federal scheme did not contain a time limit or a requirement of a prompt report by Customs to the United States Attorney for purposes of instituting forfeiture proceedings. *$8,850,* 461 U.S. at 558 n. 3, 103 S.Ct. 2005. Upon receipt of the report, however, the United States Attorney was required " 'immediately to inquire into the facts' " and if it appears probable that a forfeiture has been incurred, " 'forthwith to cause the proper proceedings to be commenced and prosecuted, without delay.' " *$8,850,* 461 U.S. at 558, 103 S.Ct. 2005 (quoting 19 U.S.C. § 1604). There was, however, no strict time limit within which the forfeiture proceeding had to be concluded. Finally, the statute provided that once a case is reported to the United States Attorney for legal proceedings no administrative action may be taken on any petition for remission or mitigation. 19 C.F.R. § 171.2(a) (1982).

In contrast, the provisions of Tennessee Code Annotated sections 39-11-701 et seq, contains statutory protections, both pre and post deprivation, sufficient to comply with the due process requirements of the Fifth and Fourteenth Amendment. Tennessee Code Annotated section 39-11-701 *et seq.*, contains the following procedural safeguards providing for return of the property seized, prior to a merits hearing on the forfeiture:

1. Delivery of a written receipt and notice of seizure to the possessor, owner and interest holder and describing generally the property seized, the agency or official responsible for the seizure stating the procedure for obtaining return of the property;

2. Issuance of an *ex parte* forfeiture warrant within five (5) days of seizure by judge authorized to issue a search warrant, only upon a finding that probable cause for forfeiture exists based upon proof by affidavit that there is probable cause that the owner's interest in the seized property is subject to forfeiture;

3. Immediate return of any property seized in the event a forfeiture warrant is not issued;

4. Right of owner to petition the chancery court in the judicial district where the seizure occurred for return of the property seized, if no administrative or civil forfeiture action has been initiated after thirty (30) days from the date of the seizure of the property;

5. Where petition for return of property is filed, chancery court is required to order return of the property if no if no administrative or civil forfeiture action is commenced within thirty (30) days after the petition is served;

6. Return of the property at the direction of the attorney general upon a determination that forfeiture proceedings would be without merit;

7. Service of the forfeiture complaint by registered mail at the last known address of the owner, or the person in possession at the time of seizure;

8. Right to file a motion with the court in which the forfeiture action is pending for the state to show cause why the property, or any portion of the property, should not be returned, which must be heard within twenty-one (21) days from the date such motion is filed and requires the court to order return of any property that the state fails to prove a probability of success on the merits of the forfeiture action; and

9. A hearing and determination of the issue of forfeiture as soon as practicable with the burden on the state to prove by a preponderance of the evidence that the property is subject to forfeiture.

See Tenn. Code Ann. §§ 39-11-707 – 39-11-709.

Turning to the facts alleged in the complaint and found in the supporting public records, viewed in the light most favorable to Plaintiffs' purported due process claim, Plaintiffs have failed to state a claim for inadequate post-deprivation remedies to obtain return of the bank funds. Instead, Plaintiffs merely point to the fact that "Plaintiffs had nine bank accounts with almost $277,000 in assets seized without a pre-deprivation hearing" as evidence that the private interest affected by the governmental taking under the *Mathews* test would seem to be of paramount importance in the present case.[22] Brief of Appellant, p. 19. According to Plaintiffs, this "fact" somehow equates to a failure on the part of Defendants to demonstrate that Plaintiffs

[22] The City cannot find any allegation or evidence in the complaint or the public records relating to Plaintiffs' claims to establish the number of bank accounts or the owner(s) of such accounts.

can prove no set of facts in support of their Fifth Amendment claim that would entitle them to relief. Respectfully, it is the Plaintiffs who were required to allege some facts sufficient for the trial court to conclude that there is some plausible basis for relief. Plaintiffs have failed to plead any facts to distinguish the seizure of their bank funds from the seizures analyzed by the Supreme Court and held to satisfy due process. Plaintiffs have not alleged any deviation from the procedure provided for in Tennessee's judicial forfeiture statute. Plaintiffs have not claimed that Tennessee's judicial forfeiture statute is unconstitutional or given notice to the Attorney General that their complaint challenges the constitutionality of Tennessee's forfeiture scheme. Indeed, Plaintiffs' only complaint about the post deprivation remedies provided by the Tennessee statute is the fact that Plaintiffs' right to initiate a motion to recover his seized property is not immediate. Brief of Appellant, p. 18. Plaintiffs cite to no authority for the proposition that the Fifth Amendment requires the post-deprivation remedy to provide for an immediate right to initiate recovery of seized property.

Indeed, even *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), which represents a departure from the reasoning of the Supreme Court in *Von Neumann* and *$8,850*, does not go so far as to require an immediate post-deprivation hearing. Applying the three-part test of *Mathews v. Eldridge,*[23] to a New York City ordinance authorizing forfeiture of motor vehicles seized as instrumentalities of crime, the court in *Krimstock* held that due process required that claimants be given an "early" or "prompt" opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure, and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City. *Krimstock v. Kelly*, 306 F.3d at pp. 68-69. The court found that, at a minimum, the hearing must enable claimants to test the probable validity of continued deprivation of their vehicles, including the City's probable

[23] 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

cause for the initial warrantless seizure, and release of the vehicle in the absence of either probable cause for the seizure or post-seizure evidence supporting the probable validity of continued deprivation. *Id.* While not defining prompt, the court referenced several cases where claimants had not been provided *any* post seizure opportunity to challenge the seizure or retention of their vehicle eight (8) and ten (10) months later.

In contrast to the ordinance at issue in *Krimstock*, which provided for entirely warrantless seizure and no post-deprivation remedy prior to resolution of the forfeiture action, Tennessee's statute provides numerous timely mechanisms for immediate return of seized property, beginning five (5) days after property is seized. The seizing agency is required to apply for an ex parte forfeiture warrant within five (5) days and the property must be immediately returned if a forfeiture warrant is not issued. Tenn. Code Ann. § 39-11-707 (c). In the event a forfeiture warrant is issued, a claimant may file a petition in chancery court if no forfeiture action has been initiated. In the instant case, the funds were seized on February 9, 2011. Thus, Plaintiffs could have filed a petition in chancery court on March 11, 2011. If no forfeiture action was initiated by the State within thirty days, the chancery court was required to order return of the funds. Tenn. Code Ann. § 39-11-709 (b). The Shelby County Attorney General did not file a petition pursuing forfeiture of the bank funds under Tennessee Code Annotated section 39-11-703 until May 9, 2011, well more than thirty days after March 11, 2011. Vol. 4 R., p. 58. Thus, under the facts of this case, Plaintiffs could have obtained an order requiring return of their funds on or around April 10, 2011, approximately sixty (60) days after the funds were seized. Even assuming that a forfeiture action would have been filed within thirty (30) days, if Plaintiffs had actually filed a chancery court petition, Plaintiffs could still have immediately filed a motion to show cause why the property should not be returned, which the forfeiture court must conduct a

hearing on within twenty one (21) days. Tenn. Code Ann. § 39-11-709 (d). Thus, Plaintiffs could have obtained return of their property or a hearing requiring the State to prove probability of success on the merits of the forfeiture petition within eighty-one (81) days, at the latest. Plaintiffs' failure to utilize the procedures available to them to obtain return of their property does not amount to a due process violation on the part of the City of Memphis or Sergeant Atwater.

V. Plaintiffs were not entitled to a pre-seizure hearing.

Plaintiffs rely on the holding in *James Daniel Good* to assert that pre-deprivation notice and hearing was constitutionally required; however, *James Daniel Good* is not relevant to the facts of this case. In *James Daniel Good*, the Supreme Court held that in the absence of exigent circumstances, due process requires the government to give notice and an opportunity to be heard before seizing **real property** subject to civil forfeiture. The Court distinguished *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 676-80, 94 S.Ct. 2080, 2088-90, 40 L.Ed.2d 452 (1974) which upheld the seizure of a yacht without a prior hearing, on two grounds: first, because such personal property may be moved, immediate seizure is necessary in order to establish the court's *in rem* jurisdiction over the property, and second, it is possible that such property could disappear easily if the government had to give advance warning of the forfeiture action. *See James Daniel Good Real Property*, 510 U.S. at 57, 114 S.Ct. 492. "The Supreme Court's holding in *James Daniel Good* requiring that notice and a hearing be provided in forfeiture actions involving **real property** does not apply to forfeiture actions involving easily movable personal property." *United States v. Any & All Radio Station Transmission Equip., Radio Frequency Power Amplifiers, Radio Frequency Test Equip. & Any Other Equip. Associated With or Used in Connection with the Transmissions Within the FM Broad. Band,*

Located at 9613 Madison Ave., Cleveland, Ohio, 44102, 218 F.3d 543, 550 (6th Cir. 2000)(emphasis supplied); *see also United States v. $129, 727.00 U.S. Currency*, 129 F.3d 486, 493 (9th Cir.1997) cert. denied, 523 U.S. 1065, 118 S.Ct. 1399, 140 L.Ed.2d 657 (1998); *Madewell v. Downs*, 68 F.3d 1030, 1038 (8th Cir.1995); *United States v. One Parcel of Real Prop. Described as Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1392 (10th Cir. 1997).

The Supreme Court has consistently held that the government need not provide a pre-deprivation hearing before seizing personal property pursuant to customs or drug forfeiture provisions. *Madewell v. Downs*, 68 F.3d 1030, 1038 (8th Cir.1995); *United States v. One Parcel of Real Prop. Described as Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1392 (10th Cir. 1997); see also *United States v. $8,850 in United States Currency,* 461 U.S. 555, 562 & n. 12, 103 S.Ct. 2005, 2011 & n. 12, 76 L.Ed.2d 143 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 676-80, 94 S.Ct. 2080, 2088-90, 40 L.Ed.2d 452 (1974)). Although the Supreme Court reached a contrary result with respect to real property in *James Daniel Good,* the Court was very careful in that case to limit its holding to real property.[24] Furthermore, the Court was very careful in *James Daniel Good* not to overrule its prior precedent relating to the seizure of personal property.

Although the First Amended Complaint is plainly short on facts, it clearly alleges that property at issue in the instant case is personal property that is easily movable, *i.e.*, approximately $277,000.00 "found in Hill's [bank] accounts." Vol. 1 R., p. 17 (¶ 11). *See* Amended Complaint at ¶ 11. Thus, the property possesses attributes of liquidity and mobility that would make the possibility of disposition substantial, and therefore, the considerations that justified the seizure of the yacht in [*Calero-Toledo v. Pearson Yacht Leasing Co.*], would also

[24] Notably, Tennessee's forfeiture statute also requires pre-deprivation notice and opportunity to be heard for real property. Tenn. Code Ann. § 39-11-707 (g).

permit initial seizure on an ex parte basis here. Further, the funds were seized following a raid (pursuant a search warrant) on the premises of Plaintiffs' business and arrest of Plaintiff Hill for the criminal sale of inhalants and service of a nuisance complaint against Hill. *See* Amended Complaint at ¶ 10. The Order issued by the Shelby County Criminal Court in the forfeiture action reveals that the action for forfeiture of the bank funds was brought pursuant to Tennessee Code Annotated section 39-11-701 *et seq*, which provides for the judicial forfeiture of real or personal property "directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from such violation." Tenn. Code Ann. § 39-11-703(a). *See* Order Granting in Part and Denying in Part Petition for Forfeiture, State of Tennessee v. Hill, P36037, at p. 12. The intent of the judicial forfeiture statute is to deter criminal acts committed for financial gain. Tenn. Code Ann. § 39-11-701. Thus, a legitimate governmental interest is at stake, which justifies the State of Tennessee's enactment of Tennessee Code Annotated section 39-11-701 *et seq* and the City of Memphis' seizure of Plaintiffs' funds pursuant thereto. *See also State v. A Tract of Land Known as 141 Belle Forest Circle*, M200001827CCAR3CD, 2001 WL 1517028 at *2 (Tenn. Crim. App. Nov. 29, 2001) summarizing the history of the forfeiture statute utilized in the forfeiture proceedings against Plaintiffs).[25] As set forth in the preceding section, the Tennessee forfeiture statute

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> Part 7 of Chapter 11, Title 39 of the Official Tennessee Code (hereinafter the 1998 Disposition of Forfeited Property Act, the 1998 Act, or the Act), provides for the judicial forfeiture of real or personal property "directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from such violation." See Tenn.Code Ann. § 39-11-703(a). The 1998 Act replaced Tenn. Code Ann. § 39-11-116 and was intended to supplement "any other statute or law relating to forfeiture of property and may be used in conjunction with administrative forfeiture laws." Tenn.Code Ann. § 39-11-717; cf., e.g., Tenn.Code Ann. § 39-14-307 (1997); Tenn.Code Ann. § 40-33-101 through -214 (1997 & 2000 Supp.); Tenn.Code Ann. § 53-11-451 & -452 (1991); Tenn.Code Ann. § 55-10-403(k) (2001 Supp.).

State v. A Tract of Land Known as 141 Belle Forest Circle, 2001 WL 1517028 at *2.

provided adequate post-deprivation remedies for prompt return of Plaintiffs' property. Under the facts of this case and established federal case law, the existence of adequate post-deprivation statutory remedies for recovery of Plaintiffs' seized property precludes Plaintiffs' due process arguments.

CONCLUSION

For all of the reasons explained herein, the City of Memphis requests this Court to affirm the judgment of the trial court, dismissing the First Amended Complaint in its entirety as to the City of Memphis on the basis that it fails to state a claim upon which relief may be granted against the City. The First Amended Complaint does not assert a constitutional claim predicated on the Fourth or Fifth Amendment relating to the "seizure" or "retention" of Plaintiffs' bank funds or a due process claim based on the lack of pre-deprivation hearing or inadequate post-deprivation remedies. Nor does the First Amended Complaint allege any facts to support a constitutional claim predicated on the Fourth or Fifth Amendment arising from the "seizure" or "retention" of Plaintiffs' bank funds. Further, Plaintiffs fail to offer any facts whatsoever to support their conclusory recitations that the City of Memphis is liable for the alleged action(s) of Atwater, or any other officer.

Respectfully submitted,

ALLAN J. WADE, PLLC

By: _____

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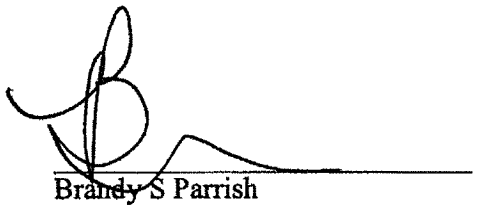
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed postage prepaid on this 31st day of July, 2014 to the following:

Betsy McKinney
50 North Front Street, Suite 800
Memphis, TN 38103

August C. Winter
Two Brentwood Commons, Suite 150
750 Old Hickory Blvd
Brentwood, TN 37027



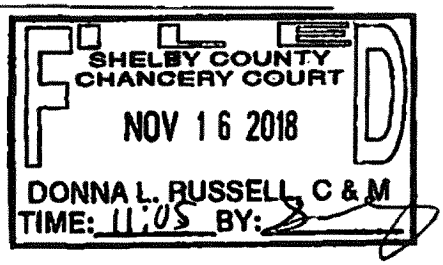
Brandy S Parrish

ATTACHMENT 2 TO APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDCIAL DISTRICT AT MEMPHIS

HOTEL MEMPHIS OPCO, L.P. and
HOTEL MEMPHIS, L.P.

Petitioners,



v.

No. CH-18-1529-3

CITY OF MEMPHIS, TENNESSEE and
MEMPHIS CITY COUNCIL,

Respondents.

MOTION OF THE MEMPHIS CITY COUNCIL TO DISMISS PETITION FOR WRIT OF CERTIORARI AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Defendant, the Memphis City Council (the "City Council"), pursuant to Tennessee Rule of Civil Procedure 12.06 and move to dismiss the Verified Petition for Writ of Certiorari and would state as follows:

INTRODUCTION

This action is a common law writ of certiorari action brought pursuant to Tennessee Code Annotated section 27-8-101 *et seq.*, which governs the extraordinary remedy of common law writ of certiorari, and § 27-9-101 *et. seq.*, which sets forth the procedures for review, by writ of certiorari, of decisions by boards and commissions. Petitioners challenge an August 28, 2018 Resolution of the Memphis City Council (the "Resolution") on the grounds that the Resolution is allegedly arbitrary, capricious and illegal. According to their complaint, Petitioners are the owners and operators of the Sheraton Memphis Downtown Hotel. Petition, ¶ 4. The August 28,

2018 Resolution (hereinafter "Resolution") was adopted by the Memphis City Council to enable the City of Memphis to seek modification of an existing Tourism Development Zone, pursuant to the Convention Center and Tourism Development Financing Act of 1998, Tenn. Code Ann. §§ 7-88-101 *et seq.* (the "TDZ Act"). Petition, Exhibit A. Specifically, the Council approved a proposed five hundred (500) room downtown hotel (the "Hotel") to be developed by Loews Hotels LLC and Townhouse Management Company as an additional "qualified public use facility" within the existing Downtown Tourism Development Zone ("Downtown TDZ"). Petition, Exhibit A. The Resolution authorizes the City Administration to prepare a supplement to the Downtown TDZ master plan and to file same with the Tennessee Department of Finance and Administration, seeking certification and approval of the addition of the Hotel as a qualified public use facility within the Downtown TDZ. Petition, Exhibit A. The TDZ Act is essentially a financing mechanism for the development of convention centers and other similar "public use facilities" in municipalities throughout Tennessee, which allows the municipality to use tax increment financing for the development of qualified use facilities.

The TDZ Act was amended effective April 27, 2018 to allow the City of Memphis, and other municipalities, to obtain approval of an additional tourism development zone, including a modification to an existing TDZ, if it is approved by the state building commission no later than December 31, 2018. Tenn. Code Ann. § 7-88-114. The amendment expressly provides that "[s]hould an application not be approved by the state building commission by December 31, 2018, whether or not it is filed pursuant to a letter of intent filed by June 26, 2007, the application and letter of intent shall be null and void." *Id.* As such, the City of Memphis has a finite window of time, within which to obtain approval of the Hotel as an additional qualified public use facility within the Downtown TDZ.

As demonstrated herein, the instant Petition borders on frivolous and appears calculated to improperly delay the City's application for approval by the state building commission in order to eliminate potential downtown hotel competition against the Sheraton Downtown Hotel. Notably, Petitioners were not even present during any of the City Council's hearings on the matter. The City Council respectfully requests this Court to dismiss the Petition in its entirety because it fails to state a claim upon which relief may be granted as a matter of law.

STANDARD OF REVIEW

A Rule 12.02(6) motion under the Tennessee Rules of Civil Procedure seeks to determine whether the pleadings state a claim upon which relief may be granted. *Edwards v. Allen,* 216 S.W.3d 278, 284 (Tenn. 2007). Such a motion tests only the legal sufficiency of the complaint, not the strength of the factual allegations in the complaint. *Trau–Med of America, Inc. v. Allstate, Ins.,* 71 S.W.3d 691, 696 (Tenn. 2002). The resolution of the motion is determined by an examination of the pleadings alone. *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.,* 878 S.W.2d 934, 938 (Tenn.1994) (citing *Wolcotts Fin. Servs., Inc. v. McReynolds,* 807 S.W.2d 708, 710 (Tenn.Ct.App.1990)). Courts are not required, however, to accept as true assertions that are merely legal arguments or "legal conclusions" couched as facts. *Riggs v. Burson,* 941 S.W.2d 44, 47–48 (Tenn. 1997).

"[S]tanding is a legal conclusion and not a fact." *State ex rel. Watson v. Waters*, No. E200901753COAR3CV, 2010 WL 3294109, at *4 (Tenn. Ct. App. Aug. 20, 2010). Therefore, court is not required to accept as true Plaintiffs' allegations of standing. *Id.* Moreover, "[s]tatutory construction is a question of law." *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009).

ARGUMENT AND AUTHORITIES

The Petitioners bring a writ of certiorari action to challenge the following discretionary legislative decisions of the City Council, which are summarized below:

1. Approval of a Hotel as a Qualified Use Facility with the City of Memphis' Downtown TDZ (Tourist Development Zone);
2. Authorization for the Mayor to prepare a Master Plan Supplement to the Downtown TDZ and advance approval of the Master Plan Supplement to be prepared by the Mayor;
3. Authorization for the Mayor to file a request with the Tennessee Department of Finance and Administration for certification and approval of the Master Plan Supplement adding the Hotel as a qualified public use facility within the Downtown TDZ;
4. Approval of the Minority Owned Business Participation Plan;
5. Authorization and request for the State of Tennessee to direct all future payments of the Hotel TDZ Revenues generated by the Hotel to the Memphis Center City Revenue Finance Corporation ("CCRFC") to be used to pay the indebtedness CCRFC incurs pursuant to the TDZ Act related to the Hotel;
6. Authorization for CCRFC to take all steps necessary to enact the Tourist Surcharge, subject only to further authorizations of the City Council as may be required by law;
7. Ratification and approval of all actions taken by the Mayor in furtherance of the intent of the Resolution and of all documents authorized by the Resolution;
8. Authorizations for the Mayor to enter into such agreements, execute such certificates or other documents or take other actions as may be necessary and appropriate to carry of the intent of the Resolution.

See Resolution, Exhibit A to Petition.

Specifically, Petitioners allege that the Memphis City Council's action was illegal, arbitrary and capricious because the Council failed to conduct an analysis of the economic feasibility of the proposed qualified public use facility, in this case the Hotel, and failed to find that the Hotel is "economically feasible and in the best interest of the state." Petition, ¶¶ 14, 31-34. The sole legal basis for Petitioners' claim is Tennessee Code Annotated section 7-88-114.

Taking as true Petitioners' factual allegation that the Council did not conduct an economic feasibility analysis; their claim still fails as a matter of law. Petitioners' claim is simply not supported by the statute upon which they rely, construction of which is a question of law that is properly considered by this Court on a motion to dismiss. Furthermore, these Petitioners have not made sufficient allegations to establish standing to make their claims in the first place.

I. The proper procedure to challenge a legislative decision of the Memphis City Council is through an action for declaratory judgment.

As a preliminary matter, the City Council submits that Petitioners improperly bring a common law writ of certiorari action, pursuant to Tenn. Code Ann. § 27-8-101 *et seq.*, which governs the extraordinary remedy of common law writ of certiorari, and § 27-9-101 *et. seq.*, providing the procedures for review by writ of certiorari.[1] The common law writ of certiorari provides an avenue for a court to review an ***administrative*** decision, but not a legislative decision. Tenn. Code Ann. § 27–8–101; *Fallin v. Knox County Board of Commissioners*, 656 S.W.2d 338 (Tenn.1983).

In the case of *Fallin v. Knox County Board of Commissioners*, 656 S.W.2d 338 (Tenn.1983), the Tennessee Supreme Court considered the alternative procedures available for the judicial review of actions taken by either county or municipal authorities. The threshold question was whether the inferior tribunal, board or officer exercised a legislative or an administrative function. The term administrative is used interchangeably with judicial or quasi-judicial. *Id.* at 341; s*ee also Nance v. Council of City of Memphis,* 672 S.W.2d 208, 211 (Tenn.

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[1] The City Council incorporates, in this Motion, its arguments in the Verified Emergency Application to Dissolve, Quash and Vacate Writ of Certiorari and for Injunctive Relief previously filed in this Cause.

Ct. App.1983); *see* 8A E. McQuillin, *The Law of Municipal Corporations,* § 25.230, at 191 (3rd ed. 1986). The *Fallin* court held that the common law writ of certiorari is the proper method to review an administrative decision; whereas "an action for declaratory judgment, as provided by Tenn. Code Ann. §§ 29–14–101—29–14–113, . . . is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other [local governmental] legislative action." *Fallin*, 656 S.W.2d at 342; *see also McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990). In both *Fallin* and *McCallen*, however, the Tennessee Supreme Court recognized that a trial court could treat an action improperly brought as a petition for writ of certiorari as an action for declaratory judgment or vice versa. *Fallin*, 656 S.W.2d at 342; *McCallen*, 786 S.W.2d at 640; Therefore, where, as here, Petitioners mistakenly employ the remedy of certiorari this Court may treat the action as one for declaratory judgment and proceed accordingly, rather than dismiss the action. *Steppach v. Thomas*, 346 S.W.3d 488, 498 (Tenn. Ct. App. 2011).

Turning to the instant case, the Resolution constitutes a legislative action of the Memphis City Council and should be considered pursuant to the declaratory judgment act, rather than the common law writ procedure. Thus, the Writ of Certiorari issued by the Court should be quashed in its entirety and the Court should apply the standard of judicial review for analyzing a legislative decision in deciding the Council's motion to dismiss for failure to state a claim upon which relief may be granted. As a legislative body acting in its legislative capacity, the Council is not subject to the Writ of Certiorari *See McFarland v. Pemberton*, 530 S.W.3d 76, 103 (Tenn. 2017).[2]

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[2] *See* City Council's Verified Emergency Application to Dissolve, Quash And Vacate Writ Of Certiorari And For Injunctive Relief previously filed in this cause, which is incorporated herein by reference.

In determining whether an action is legislative or administrative, "[t]he nature of the question to be decided and the necessary procedure for making such a decision are the determinative factors, rather than the procedure which was selected for the particular decision." *Davis Grp. (MC), Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 912 S.W.2d 178, 182 (Tenn. Ct. App. 1995). The Resolution at issue in this case is adopted pursuant to the legislative authority of the Memphis City Council set forth in its Charter and recognized in the TDZ Act.

The Memphis City Council was acting in its legislative capacity and not in a quasi-judicial capacity when it adopted the Resolution. Under the City's Charter, the City Council possesses all legislative powers of the City, including the power to approve all budgets and appropriate all tax revenues properly belonging to the City. *See* City Referendum Ordinance No. 1852 §§1 and 12; MEMPHIS CHARTER §§ 331-337. The City Council possesses the sole legislative authority of the City to adopt resolutions and ordinances, especially those that appropriate or expend revenues belonging to the City. Thus, adoption of the Resolution was unquestionably a legislative act of the City Council not subject to review by writ of certiorari.

By state law, municipalities are authorized to pledge sales tax proceeds they receive directly for the punctual payment of principal of and interest on bonds, notes or other evidence of indebtedness issued by such municipalities or municipalities may by resolution cause such tax proceeds to be distributed directly to local sports authorities or local industrial development corporations to finance sports facilities or qualified public use facilities in tourism development zones. *See* Tenn. Code Ann. § 67-6-712(c) (1) (A); Tenn. Code Ann. § 67-6-712(d). In *Ragsdale v. City of Memphis*, 70 S.W.3d 56 (Tenn. Ct. App. 2001) the court held that resolutions of the Memphis City Council, the City's legislative body, authorizing the execution of the necessary legal documents to accomplish the building, use, and operation of the NBA arena, including

pledging tax revenues as security for Sports Authority bonds, was a legislative action entitled to great deference by the courts. *Ragsdale v. City of Memphis*, 70 S.W.3d 56 at 68. As in the instant action, no allocation of state sales tax revenues to support bonds issued by the Sports Authority for the new arena project could occur without approval from the City's legislative body.

In this case, no TDZ revenues, otherwise due the City, can be allocated and distributed to the CCRFC for financing a TDZ Hotel without approval of the City's legislative body by resolution. *See* Tenn. Code Ann. § 7-88-106. The Memphis City Council, as the City's legislative body, possesses the sole authority to adopt any resolutions required by the TDZ Act. As in *Ragsdale*, the resolution of the Memphis City Council authorizing the Mayor to take all necessary steps to obtain state approval of the modification to the Downtown Tourism Development Zone Master Plan ("TDZ") and requesting the state to distribute TDZ Revenues generated by the new TDZ Hotel, which would otherwise be distributed to the City, to the Center City Revenue Finance Corporation was purely a legislative action by the City Council. As such, this Court is without jurisdiction to review that legislative action by writ of certiorari.

II. The Petition fails to state a claim upon which relief may be granted under the Declaratory Judgment Act.

As set forth hereinabove, if not dismissed, the instant Petition must be considered under the standard applicable to review of legislative decisions. Tenn. Code Ann. § 29-14-101 *et seq.*; *McCallen v. City of Memphis*, 786 S.W.2d at 640; *Fallin v. Knox County Bd. of Commissioners*, 656 S.W.2d at 342; *Nance v. City of Memphis*, 672 S.W.2d 208, 210 (Tenn. Ct. App.1983). As demonstrated herein, the Petition fails to state a claim for which relief may be granted as a matter

of law because the Resolution was a valid exercise of the Council's legislative discretion, for which there was a rational basis. Further, Petitioners lack standing to challenge the Resolution.

A. The Resolution was a valid exercise of the Council's legislative discretion.

"When the act of a local governmental body is legislative, judicial review is limited to 'whether any rational basis exists for the legislative action and, if the issue is fairly debatable, it must be permitted to stand as valid legislation.'" *McCallen v. City of Memphis,* 786 S.W.2d at 640 (*citing Keeton v. City of Gatlinburg,* 684 S.W.2d 97, 98 (Tenn.Ct.App.1984)); *see also McCarver v. Insurance Co. of State of Pennsylvania,* 208 S.W.3d 380, 385 (Tenn.2006); *Fallin v. Knox County Bd. of Commissioners,* 656 S.W.2d at 342; *Stalcup v. City of Gatlinburg,* 577 S.W.2d 439, 442 (Tenn.1978). Thus, this Court's review of the Resolution is limited to whether any rational basis exists for the legislative action.

Petitioners challenge the Resolution on the theory that the City Council was required to consider and find that the proposed Qualified Public Use Facility, the Hotel, is "economically feasible and in the best interest of the state." Petition, ¶ 14. Respectfully, that is the province of the state building commission, not the Memphis City Council. Assuming for the purposes of the instant motion that the City Council was not presented with any information pertaining to the economic feasibility of the Hotel, the Council's approval of the Hotel, as a qualified public use facility, is supported by a rational basis and fully complies with the TDZ Act.

The Resolution was adopted by the Council pursuant to the Convention Center and Tourism Development Financing Act of 1998, Tenn. Code Ann. §§ 7-88-101 *et seq.*, which "provid[es] a financing mechanism for the development of convention centers and other similar public use facilities" in municipalities throughout Tennessee, for the purpose of "increas[ing] state tourism and related economic development". Tenn. Code Ann. § 7-88-102; *see also* the

Resolution, Exhibit A to Petition. Pursuant to the TDZ Act, a portion of the state and local sales and use tax revenue distributed to a municipality that has "financed, constructed, leased, equipped, renovated or acquired a qualified public use facility within a tourism development zone" shall be used "for payment of the cost of the public use facility, including interest and debt service on any indebtedness related to the public use facility, or the lease payments with respect to any public use facility." Tenn. Code Ann. §§ 7-88-106(a) and (b) and -108 (Supp. 2009). The definition of "qualified public use facility" includes public convention centers and associated ancillary structures or facilities, including "hotel accommodations", all of which must have a minimum amount of investment. Tenn. Code Ann. § 7-88-103(7) (A) (i) and (b) (iv). "Tourism development zone" is defined as "an area in a municipality designated by ordinance or resolution of such municipality in which a qualified public use facility is located or planned, that is determined by the department of finance and administration to be a beneficially impacted area in accordance with the requirements of the [TDZ Act] and that is certified as a tourism development zone by the department." Tenn. Code Ann. § 7-88-103 (10).

As set forth in the Resolution, the City of Memphis previously submitted an application for certification of the Downtown Tourism Development Zone ("Downtown TDZ"), which was approved by the Tennessee State Building Commission. *See* Resolution, Exhibit A to Petition. The purpose of the Resolution was to supplement the prior application for certification of the Downtown TDZ to include a "high quality convention hotel . . . in the vicinity of the Memphis Cook Convention Center" as an additional qualified public use facility. Resolution, Exhibit A to Petition. As set forth in the Resolution, the City of Memphis has determined that there is a need for an additional hotel with at least five hundred (500) rooms and has identified Loews Hotels LLC and Townhouse Management Company as the best qualified party to assist with the

development of the Hotel. *Id.* As such, the Memphis City Council approved the proposed hotel, to be developed by Loews Hotels LLC, as an additional qualified public use facility in the Downtown TDZ, pursuant to the TDZ Act and authorized the Mayor to take the necessary steps to seek certification from the Tennessee Department of Finance and Administration of the Hotel as a supplement to the previously approved Downtown TDZ. *Id.* In other words, the City seeks to modify the Downtown TDZ to add a new qualified public use facility, pursuant to Tennessee Code Annotated section 7-88-114. *See* Tenn. Code Ann. § 7-88-103 ("modification" means any change in a tourism development zone, including, but not limited to, adding new qualified public use facilities; adding qualified associated developments or ancillary structures or facilities; or adding any use of property tax revenue pursuant to § 7-88-113).

The Resolution itself contains sufficient facts to establish that it has a rational basis. As discussed herein above, a court's review of a legislative action is limited to whether there is a rational basis for the City's decision, as distinguished from whether the decision is wise or correct. *Steppach v. Thomas*, 346 S.W.3d 488, 515 (Tenn. Ct. App. 2011) (citing *Lynn v. Polk,* 76 Tenn. 121, 1881 WL 4428 (Tenn.1881). With respect to the basis for the Resolution, the preface provides as follows:

> WHEREAS, the City of Memphis has determined that there is a need for an additional, high quality convention hotel with at least five hundred (500) rooms, with related meeting space, retail, amenities and parking (the "Hotel"), in the vicinity of the Memphis Cook Convention Center; and
>
> WHEREAS, after a proposal process, the Mayor of the City of Memphis has identified Loews Hotels, LLC and Townhouse Management Company, or one or more of their respective affiliates (the "Developer"), as the best qualified party to assist with the development of the Hotel; and

> WHEREAS, the success of the Hotel will have a significant impact on the tourism industry and other related industries in the city of Memphis; and
>
> WHEREAS, the Convention Center and Tourism Development Financing Act of 1998, which is codified at TCA §7-88-101 et seq., (the "TDZ Act"), was enacted to provide a financing mechanism for the development of convention centers, tourist attractions, and other similar public use facilities that would attract and serve as major tourism destinations, thereby fostering economic benefits to the state, as well as to the hosting cities and counties; and
>
> WHEREAS, the City of Memphis submitted its Application for Certification of the Downtown Tourism Development Zone (the "Application") to the Tennessee Department of Finance and Administration, the Application was approved by the Tennessee State Building Commission and the Downtown Tourism Development Zone (the "Downtown TDZ") was established; and
>
> WHEREAS, it is proposed that the Application be supplemented pursuant to that certain Supplement to Application for Certification (the "Supplement") to include the Hotel as a "Qualified Public Use Facility" within the meaning of the TDZ Act; and

Resolution, Exhibit A to Petition. As reflected in the Resolution text, the City has determined that there is a need for an additional, high quality convention hotel with at least five hundred (500) rooms, with related meeting space, retail, amenities and parking, in the vicinity of the Memphis Cook Convention Center and that the success of such a hotel will have a significant impact on the tourism industry and other related industries in the City of Memphis. Therefore, in order to assist with the development of such a hotel, the City desires to apply for the approval of the hotel as a "Qualified Public Use Facility" within the meaning of the TDZ Act. The Resolution is a necessary enactment to permit the City to obtain the required approval from the State of Tennessee

and is rationally related to the City's interest in enhancing the tourism industry and other related industries in the City of Memphis.

Contrary to the Petitioners' argument, the TDZ Act does not require the Council to conduct any particular analysis prior to adoption of a resolution designating a qualified public use facility within a tourism development zone. Specifically, the TDZ Act does not require the City to make any feasibility analysis or certification to the Tennessee Department of Finance and Administration and the State Building Commission and no such obligation can be reasonably inferred from the statutory scheme employed in the TDZ Act. Instead, the TDZ merely requires that City "file with the department of finance and administration an application seeking certification of the tourism development zone and the planned public use facility as a qualified public use facility." Tenn. Code Ann. § 7-88-108. "The application shall include a master development plan for the proposed tourism development zone, containing such information as may be reasonably required by the department." Tenn. Code Ann. § 7-88-108. As noted hereinabove, a tourism development zone must be designated by ordinance or resolution of the municipality; thus, adoption of a resolution designating the area in which a qualified public use facility is located or planned is a prerequisite to obtaining certification of the tourism development zone and the planned public use facility as a qualified public use facility. *See* Tenn. Code Ann. § 7-88-103. Nowhere does the TDZ Act set forth any criteria to be considered by the City prior to adoption of a resolution designating the area in which a qualified public use facility is located or planned.

Indeed, the TDZ Act makes it clear that the Tennessee Department of Finance and Administration and the State Building Commission are charged with making a final and independent determination of whether the proposed public use facility is qualified under the

requirements of the TDZ Act, whether it will be located within a qualified tourism development zone, whether the proposed boundaries of the proposed tourism development zone reflect a beneficially impacted area and whether the proposed use is economically feasible and in the best interest of the state. *See* Tenn. Code Ann. § 7-88-108 (a); § 7-88-108 (b); and § 7-88-114 (e) (1). The City has no authority under the TDZ Act to make any final decisions that would bind the state building commission regarding whether a proposed use is economically feasible and in the best interest of the state. Consequently, the Tennessee Department of Finance and Administration and the State Building Commission are required to make their own independent feasibility determination, whether or not an applicant has done so. As such, an applicant may or may not choose to provide its own feasibility analysis of the proposed use, upon which the State Building Commission could, in its discretion, choose to rely or not consider at all.

When courts are called upon to construe a statute, their goal is to give full effect to the General Assembly's purpose, stopping just short of exceeding its intended scope. *Larsen–Ball v. Ball,* 301 S.W.3d 228, 232 (Tenn.2010); *In re Estate of Tanner,* 295 S.W.3d 610, 613 (Tenn.2009). Because the legislative purpose is reflected in a statute's language, the courts must always begin with the words that the General Assembly has chosen. *Waldschmidt v. Reassure Am. Life Ins. Co.,* 271 S.W.3d 173, 176 (Tenn.2008). Courts must give these words their natural and ordinary meaning. *Hayes v. Gibson County,* 288 S.W.3d 334, 337 (Tenn.2009). And because these words are known by the company they keep, courts must also construe these words in the context in which they appear in the statute and in light of the statute's general purpose. *State v. Flemming,* 19 S.W.3d 195, 197 (Tenn.2000); *State ex rel. Comm'r of Transp. v. Medicine Bird *527 Black Bear White Eagle,* 63 S.W.3d 734, 754–55 (Tenn.Ct.App.2001). When a statute's text is clear and unambiguous, the courts need not look beyond the statute itself to ascertain its

meaning. *Green v. Green,* 293 S.W.3d 493, 507 (Tenn.2009); *State v. Strode,* 232 S.W.3d 1, 9–10 (Tenn. 2007).

Turning to the instant statute, the TDZ Act as a whole establishes a process by which a municipality may apply for permission to utilize increased state and local sales and use tax revenues within a tourism development zone in order to finance, build, or acquire a qualified public use facility within that tourism development zone. The final decision whether to approve or disapprove an application for a tourism development zone or to certify a tourism development zone and a planned public use facility as a qualified public use facility is vested entirely in the Tennessee Department of Finance and Administration and the State Building Commission. The language relied on by Petitioners is consistent with this statutory scheme. It provides that the State Building Commission may "deny a modification relative to the use of the tourism development zone funds if it determines that any proposed use is not economically feasible or not in the best interest of the state. Tenn. Code Ann. § 7-88-114. Thus, it is the State Building Commission, rather than the City of Memphis that must consider and determine the economically feasibility of the proposed use and whether it is in the best interest of the state. This is consistent with the building commission's role as the decision maker and the City's role as applicant.

As applicant, the City provides information required and requested by the Department of Finance and Administration and the State Building Commission. To the extent that such information is not provided or is deficient, the application may be denied by those entities or deferred until the applicant provides additional information requested by the approving bodies. Because the TDZ Act contains express mandatory application requirements, it is clear that the legislature knew how to include such requirements. *See* Tenn. Code Ann. § 7-88-110. As

previously indicated, the TDZ Act contains no express requirement that a municipal legislative body determine the economic feasibility of a project before approving it as a qualified public use facility. Had the legislature intended to impose such a requirement, it would have included language to that effect in the TDZ Act. Moreover, the suggestion that the Memphis City Council is in a position to determine whether a proposed use is "in the best interest of the state" [as a whole] borders on absurd. Petitioners' interpretation of the statute would impermissibly and illogically add to the plain language of the Act.

B. Petitioners lack standing to challenge the Resolution

Viewed as generously as possible, the Petition contains insufficient allegations to establish that Petitioners have standing to challenge the Council's Resolution. The doctrine of standing is used to determine whether a particular plaintiff is entitled to judicial relief. *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn.1976); *Garrison v. Stamps*, 109 S.W.3d 374, 377 (Tenn.Ct.App.2003). It requires the court to determine whether the plaintiff has alleged a sufficiently personal stake in the outcome of the litigation to warrant a judicial resolution of the dispute. *SunTrust Bank v. Johnson*, 46 S.W.3d 216, 222 (Tenn.Ct.App.2000); *Browning–Ferris Indus. of Tennessee, Inc. v. City of Oak Ridge*, 644 S.W.2d 400, 402 (Tenn.Ct.App.1982). To establish standing, a plaintiff must show: (1) that it has sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is one that can be addressed by a remedy that the court is empowered to give. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn.2001); In re Youngblood, 895 S.W.2d 322, 326 (Tenn.1995); *Metropolitan Air Research Testing Auth., Inc. v. Metropolitan Gov't*, 842 S.W.2d 611, 615 (Tenn.Ct.App.1992). The primary focus of a standing inquiry is on the party, not on the merits of the claim. *Valley Forge Christian Coll. v. Americans United for Separation of Church &*

State, Inc., 454 U.S. 464, 484 (1982); *Petty v. Daimler/Chrysler Corp.*, 91 S.W.3d 765, 767 (Tenn.Ct.App.2002). Thus, a party's standing does not depend on the likelihood of success of its claim on the merits. *Watson v. Waters*, 375 S.W.3d 282, 289 (Tenn. Ct. App. 2012) (rejecting Plaintiffs' argument that they have standing predicated upon the "meritorious" nature of their claims); *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001); *Metropolitan Air Research Testing Auth., Inc. v. Metropolitan* Gov't, 842 S.W.2d at 615.

The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest. In *American Civil Liberties Union of Tennessee v. Darnell*, the Tennessee Supreme Court offered the following guidance concerning how to assess whether a particular plaintiff has alleged an injury sufficient to confer standing: "[s]pecifically, courts should inquire: Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Darnell*, 195 S.W.3d at 620-21 (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

Turning to the Petition, claimants aver that they own and operate the Sheraton Memphis Downtown Hotel ("Sheraton"), which is attached to and directly across the street from the Memphis Cook Convention Center. Petition, ¶ 4. The Sheraton provides food and beverage concessions to the Convention Center and has certain booking rights with respect to the Convention Center. Petition, ¶¶ 1, 4. Petitioners further allege that the City Council "approved the resolution without substantive discussion, without consideration of its economic feasibility, and without any analysis by any non-interested party."[3] Petition, ¶ 2. Petitioners conclude

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[3] Notably, Petitioners do not offer any legal authority or allegation that the City Council was required to have substantive discussion or analysis by a non-interested party. Instead, Petitioners assert only that the City Council

without facts or further elaboration that the City Council's action will "hurt not only the Sheraton but other downtown hotels." Petition, ¶ 2. The only other allegations pertinent to the issue of standing are conclusory allegations that Petitioners "have and will suffer damages and injury from the City of Memphis' illegal, arbitrary and capricious action in approving the August 28, 2018 Resolution" and that the "City Council's action has caused and continues to cause immediate harm and injury to Petitioners". Petition, ¶¶ 9, 35.

On these scant facts, it is difficult to even conceive of a potential injury to these Petitioners. To begin with, the City Council's Resolution is a mere preliminary step in the ultimate approval of the proposed Loews Hotel as qualified public use facility within the Downtown TDZ. As discussed hereinabove, the final decision whether to approve a planned public use facility as a qualified public use facility is vested entirely in the Tennessee Department of Finance and Administration and the State Building Commission, which has not yet occurred. Thus, even assuming that the Petitioners were somehow injured by the approval of the Loews Hotel project as qualified public use facility in the Downtown TDZ, there is no causal connection between the City Council's Resolution and the ultimate approval by the Tennessee Department of Finance and Administration and the State Building Commission. Moreover, the alleged illegality is the approval of the Resolution without a determination by the City Council that the project is economically feasible. The TDZ Act makes clear, however, that the State Building Commission has the final authority to deny the requested use of tourism development

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was required to consider the economic feasibility of the project prior to approval. Moreover, the audio-visual record of the committee meeting reflects a substantive and comprehensive presentation and discussion on this matter. *See* http://memphis.granicus.com/MediaPlayer.php?view_id=6&clip_id=6744. This recording is a public record and may be considered on a motion to dismiss. *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016), appeal denied (Apr. 13, 2017) (recognizing that courts resolving a motion to dismiss may consider matters of public record without converting the motion into one for summary judgment)).

zone funds if it finds that the proposed use is not economically feasible or not in the best interest of the state. Under the circumstances, there can be no injury as result of the City Council's failure to determine economic feasibility because the City Council lacks any authority to make a final determination on that issue. Further, the state building commission has yet to consider the issue, calling into questions the ripeness of the Petitioners' complaint that the project has not been vetted as economically feasible.

Without unnecessarily speculating on the nature of the injury contemplated but not actually alleged by the Petitioners, the Council would refer to the decision of the court of appeals in *Massengale v. City of E. Ridge*, 399 S.W.3d 118 (Tenn. Ct. App. 2012). *Massengale* involved a challenge to a statute legalizing the sale of fireworks inside the city limits of East Ridge by businesses selling fireworks outside city limits. With respect to the injury requirement of standing, the plaintiff businesses asserted that they "will be forced to face diminished sales or to expand their business operations into Hamilton County in order to effectively compete." *Massengale v. City of E. Ridge*, 399 S.W.3d at 122. Like those plaintiffs, the instant Petitioners are potential competitors with the proposed Hotel. In deciding that the *Massengale* plaintiffs lacked standing to challenge the statute, the court observed that "the mere fact that a statute authorizes competition does not create an injury in fact that gives rise to standing." *Massengale v. City of E. Ridge*, 399 S.W.3d at 126. The court noted that the East Ridge fireworks market is open to the *Massengale* plaintiffs just as it is to potential competitors. Similarly, the instant Petitioners are not harmed by the mere authorization of competition in the downtown hotel

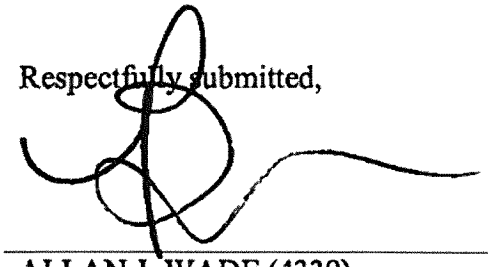
market. Moreover, the City Council Resolution does not even represent a final decision authorizing the proposed Hotel; that decision remains to be made.[4]

Under the circumstances and giving all due deference to the allegations in the Petition, Petitioners averments fall well short of establishing any of the requisite elements of standing.

CONCLUSION

For the reasons stated herein, Defendant, the Memphis City Council requests this Court to quash and vacate the Writ of Certiorari issued in this case and dismiss the Petition for Writ of Certiorari on the basis that the Petitioners lack standing to challenge the City Council's action adopting the Resolution and on the basis that the Petition fails to state a claim upon which relief may be granted as a matter of law.

Respectfully submitted,



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[4] Based on the scant allegations in the Petition and the applicable statutory scheme of the TDZ Act, it appears that Petitioner's claims are not ripe for adjudication, if at all, since there has been no final decision by the State Building Commission on the City's TDZ Modification Application and the Hotel cannot be implemented without it. Moreover, any injury to Petitioners, assuming more competition is a legally cognizable injury, will result from the final decision of the State Building Commission rather than from the City Council's Resolution or the City's TDZ Modification Application.

CERTIFICATE OF SERVICE

I certify that I forwarded a copy of the foregoing document to the following individuals by electronic means of filing with this Court, or for those for whom the Court records show do not receive the electronic transmission, then by U.S. mail, postage prepaid, this the ~~15~~ 16th day of November, 2018:

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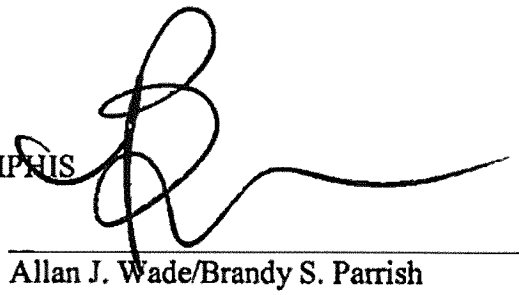

Allan J. Wade/Brandy S. Parrish