The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: **Gadson William Perry**

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Partner, Butler Snow LLP.

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

2011; 030539.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee: BPR No. 030539; November 3, 2011; Active.

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

No.

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

Since Law School:

- ***Partner*, Complex Commercial Litigation & Alternative Dispute Resolution, Butler Snow LLP, Memphis, TN (Oct. 2022-present).**
- ***Chancellor*, Part I, Chancery Court for the Thirtieth Judicial District of Tennessee, Memphis, TN (June 2021-Sept. 2022).**
- ***Adjunct Professor*, Legal Methods, Tennessee Institute for Pre-Law, University of Memphis Cecil C. Humphreys School of Law, Memphis, TN (June 2019-July 2019).**
- ***Partner*, Commercial & Appellate Litigation, Butler Snow LLP, Memphis, TN (Jan. 2019-Aug. 2021).**

- ***Adjunct Professor*, Legal Methods I & II, University of Memphis Cecil C. Humphreys School of Law, Memphis, TN (Aug. 2016-May 2017).**
- ***Associate*, Commercial & Appellate Litigation, Butler Snow LLP, Memphis, TN (Sept. 2014-Dec. 2018).**
- ***Judicial Law Clerk*, the Honorable Bernice Bouie Donald, Circuit Judge, U.S. Court of Appeals for the Sixth Circuit, Memphis, TN (Aug. 2013-Aug. 2014).**
- ***Associate*, Commercial Litigation, Butler Snow LLP, Memphis, TN (Aug. 2011-July 2013).**

<u>Before Law School</u>:

- ***Instructor (Rank: Shodan)*, USA Karate, Bartlett, TN (May 2006-July 2008).**
- ***Teacher*, Eighth Grade Language Arts & Reading, Sherwood Middle School, Memphis City Schools, Memphis, TN (Aug. 2005-July 2008).**

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.

N/A

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.

As a member of Butler Snow's Commercial and Appellate Litigation Practice Groups, I represent businesses, governmental entities, and individuals in civil, and primarily commercial, disputes. Approximately 60-65% of my work are cases in the substantive areas of contracts, fiduciary duties, federal and state constitutional guarantees, consumer protection, business torts, personal and intellectual property, and personal injury. The following are examples of cases from the past two years in which I have served as lead counsel:

- ***Newman v. Harris*, Case No. CH-25-1062-II** (Shelby County Chancery Court).
    - In September 2025, we obtained an Order dismissing with prejudice a salary petition filed by the County Trustee against the County Mayor, once the parties negotiated and agreed on salary raises and other budgetary allocations for the Trustee's office.

- ***Morant Enterprises v. Wing Guru*, Case No. CH-24-1697-I** (Shelby County Chancery Court).
    - In August 2025, we obtained a default judgment in Chancery Court that confirmed arbitration awards from July and August 2024. We prevailed for the plaintiffs, a professional basketball player and a related company, before the American Arbitration Association, winning summary judgment on breach of contract, commercial appropriation, and punitive damages claims and awards of pre-judgment interest, post-judgment interest, attorney fees, and costs.

- ***Rodenhiser v. Donnadieu*, Case No. CT-4740-23-V** (Shelby County Circuit Court).
    - In July 2025, we obtained an Order dismissing negligence claims against a small food-service company and its employee and awarding them attorney fees and costs.

- ***LaGina Scott v. Shelby County Board of Educ.*, No. W2022-00914-COA-R3-CV** (Tenn. Ct. App. Feb. 26, 2025).
    - In February 2025, we prevailed before the Tennessee Court of Appeals after briefing and oral argument, reversing the trial court and restoring the termination of a school counselor under the Teacher Tenure Law; reversing a back-pay award; and affirming the denial of the school counselor's attorney fees.

- ***Austin, et al. v. Camping World RV Sales, LLC*, et al., Case No. 24-5329** (6th Cir.)
    - In January 2025, we prevailed on the briefs before the U.S. Court of Appeals for the Sixth Circuit, affirming the trial court's grant of summary judgment on negligence and breach of contract claims against a national recreational vehicle company.

- ***Parker v. 1st Source Commercial Roofing,* Case No. CT-0477-24-VI** (Shelby County Circuit Court)

- In July and December 2024, we successfully moved to dismiss a breach of contract claim and won an award of attorney fees and costs.

- ***Knowles v. LeMoyne-Owen College,* Case No. 1:23-cv-08904-JGK** (S.D.N.Y.).
  - In April 2024, we obtained a voluntary dismissal with prejudice after settling putative class claims alleging unequal access to Defendant's websites for blind and other visually-impaired people under the Americans with Disabilities Act and the Rehabilitation Act.

As a member of Butler Snow's Alternative Dispute Resolution Group, I spend the remaining 35-40% of my time working on quasi-judicial, and again primarily commercial, matters. I am listed as a Tennessee Supreme Court Rule 31 General Civil Mediator and serve as a third-party neutral with Resolute Systems, LLC. I also serve as a hearing panel member for the Tennessee Board of Professional Responsibility (BPR) in cases that involve attorney discipline.

In 2024, I was appointed an Administrative Law Judge (ALJ) for the City of Memphis and now hear appeals of on-the-job injury and line-of-duty benefit denials on a monthly docket. My Order disposing of one such appeal (*Greene*) is included with this Application as a writing sample in response to Question 34, below.

Similarly, since leaving Chancery Court, I have received appointments to serve as Special Master in several cases before that court—including appointments by my successor in Part I. My Report and Recommendations from one such appointment (*Crews*) is included with this Application as a writing sample in response to Question 34, below. Other examples of such appointments include the following:

- ***Appointed Special Master* (May 2025), *WNC Institutional Tax Credit Fund 43, L.P., et al. v. Gospel Gardens TN Investment, LLC*, Case No. CH-24-1224-III** (Shelby County Chancery Court).
  - This case concerns the alleged mismanagement of three apartment complexes and the ouster of the management companies' general partners. It is ongoing.

- ***Appointed Special Master* (June 2023), *Rasberry, et al. v. Migliara, et al.*, CH-18-06771-I** (Shelby County Chancery Court).
  - This case alleged breaches of promissory notes. My appointment has concluded.

- ***Appointed Special Master* (March 2023), *City of Memphis, et al. v. O'Rane Cornish, Sr., et al.*, Case No. CH-16-0351-III** (Shelby County Chancery Court).
  - This case concerns the construction of a road crossing over a tributary. It is ongoing.

I also have been twice appointed to Special Master teams in complex litigation in federal court. On both occasions I have served as lead counsel to the Special Master:

- ***Appointed Senior Counsel for the Special Master*** **(June 2025)**, ***Bull v. Carter*****, Case No. 3:25-cv-00041-WLC-jsf (**M.D. Tenn.).
    - This case is a putative class action (with three putative classes) against the Tennessee Department of Human Services concerning SNAP benefits. It is ongoing.
- ***Appointed Lead Counsel for the Independent Monitor and Special Master*** **(Dec. 2018),** ***Elaine Blanchard, et al. v. City of Memphis, Tennessee*****, 2:17-cv-02120-MSN-jay** (W.D. Tenn.).
    - This appointment concerns the remedies phase of lawsuit against the Memphis Police Department (MPD) for violations of a 1978 Consent Decree that addresses First Amendment rights. It is ongoing and discussed in greater detail in response to Question 10, below.

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.

In fourteen years as a Tennessee lawyer, I have done only two things: (1) work as a lawyer in private practice; and (2) work as, and for, a judge. I outline my judicial experience in response to Questions 10 and 12, below.

For the first nine of my twelve years in private practice, all of which have been with Butler Snow LLP, I litigated civil, and primarily commercial, disputes that covered the wide range of substantive areas described in the first part of my response to Question 7, above. I have represented businesses, governmental entities, and individuals in litigation, arbitration, and mediation, and I have handled all stages of litigation in federal and state courts across the country, including in New York, New Jersey, Minnesota, Michigan, Washington, and Louisiana as well as in Tennessee and Mississippi. The last three years, since my return to Butler Snow after serving on the Chancery Court, have continued and deepened the experience of the first nine and added the quasi-judicial experience discussed in the second part of my response to Question 7, above.

I have tried cases in Tennessee, Mississippi, and federal district court, and I have briefed and argued cases before the U.S. Court of Appeals for the Sixth Circuit and the Tennessee Court of Appeals. I also have appeared before all eight Divisions of Shelby County Circuit Court; all six Divisions of Shelby County General Sessions Court—Civil; all three Parts of Shelby County Chancery Court; and all four District Judges who currently comprise the U.S. District Court for the Western District of Tennessee, as well as the four Senior Judges who were their predecessors.

I started at Butler Snow as a summer associate in 2009 and 2010 and joined the firm as a full-time associate after graduating from law school in 2011. In July 2013, I left the firm for a term clerkship with Judge Bernice Bouie Donald on the Sixth Circuit—please see my response to Question 12, below—and returned in September 2014. Over the next seven years, I made partner in 2019 and served in several internal leadership roles, including (1) as a contributor to and later editor of the firm's *BizLitNews* Blog (available here); (2) as Memphis Office Chair of the firm-wide Recruiting Committee; and (3) as a member of the Associates Review Committee (ARC). I left the firm a second time after I was appointed to the Chancery Court in June 2021, returned as a partner in October 2022, and resumed my service on the ARC in 2023.

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

I mention matters of note over which I have presided as Chancellor, ALJ, and Special Master in my responses to Questions 7 and 10. Several litigated matters of note—in addition to the seven matters discussed in the first part of my response to Question 7, above (*Newman*, *Morant Enterprises*, *Rodenhiser*, *Scott*, *Austin, Parker*, and *Knowles*)—are as follows:

- ***Bowden v. Sterilization Services of TN, Inc.*, Case No. CT-2768-23-IX** (Shelby County Circuit Court)
    - This is the lead case in 263 individual personal-injury, ethylene oxide (EtO) exposure cases and 1 putative class action,[1] all coordinated before Division IV of Shelby County Circuit Court under Local Rule 28, which governs pre-trial procedures in mass tort actions.
    - A second set of 530+ property-damage cases, which are related to the personal-injury cases, are pending before the court and will be joined in a second coordination.
    - I serve as **lead local counsel** for the three Louis Dreyfus Company (LDC) Defendants in both sets of cases.[2]
    - The cases are ongoing.
- ***Holloway v. Morant*, Case No. CT-3712-22-II** (Shelby County Circuit Court).
    - This case is discussed below, in connection with a brief included with this Application as a writing sample in response to Question 34, but in limited detail because the case is ongoing.
    - The case involves a professional basketball player, has received significant media attention (see examples here and here), and has raised both constitutional questions and questions of first impression.
    - I serve as **second chair** and **lead drafter** of all briefing for the defendants.
    - Recent substantive rulings include the following:
      → **Oct. 29, 2025, Order denying Plaintiff's Application for Interlocutory Appeal.**
      → **Apr. 21, 2025, Order dismissing all claims against Ja Morant** (prevailed after two-day evidentiary hearing with seven witnesses).
      → **Apr. 8, 2024, Order holding Ja Morant presumptively immune to Plaintiff's claims** (prevailed in "fairly raising" self-defense after four-day evidentiary hearing with nine witnesses).
- ***David Sheffield v. International Paper Co.*, Case No. 2:18-cv-02701** (W.D. Tenn.) (2018-20).
    - I defended a global pulp and paper company against personal-injury claims arising from an incident at a paper mill in Louisiana.
    - I started as **second-chair** as a senior associate in 2018 and became **first-chair** after making partner in 2019.

- I coordinated with in-house counsel to manage periodic budgets, pleadings, motions, written discovery, witness preparation, a site inspection, and depositions in Tennessee and Louisiana.
- We successfully resolved the case four days before trial.

- ***Tamarin Lindenberg v. Jackson National Life Ins.*, 912 F.3d 348** (6th Cir. 2018) **/ 919 F.3d 992** (6th Cir. 2019) (denying en banc review) **/ 140 S. Ct. 624 (2019)** (denying certiorari).
  - I served as **lead appellate counsel** before the Sixth Circuit, on brief and at oral argument, for the defendant-appellant insurance company in a case involving the constitutionality of Tennessee's statutory punitive damages limits under the Tennessee Constitution. I was not involved with the case in the state or federal trial courts (the case was removed to federal court).
  - I petitioned for en banc review, which was denied, and assisted in drafting a petition for review by the U.S. Supreme Court, which also was denied, after a divided panel of the Sixth Circuit struck down the statutory limits.
  - The case appears to have been the first time that a federal appellate court held a state statute unconstitutional under the state constitution without precedent on that issue from the state's court of last resort.
  - The following year, in a similar but unrelated case, the Tennessee Supreme Court repudiated ***Lindenberg*** in ***McClay v. Airport Management Services, LLC*, 596 S.W.3d 686 (2020)**, and recommended that, in future, the Sixth Circuit certify such questions to the state's high court before ruling on them.

- ***Malco Stage Road, LLC v. Overton Square, LLC, et al.*, CH-15-0001-I** (Shelby County Chancery Court (Jan. 2018).
  - I represented the plaintiff regional cinema chain in a seven-figure trespass and leasing dispute.
  - I served as **second chair**, delivering the opening statement and examining multiple witnesses in a **five-week bench trial** that settled after the close of proof.

- ***Susan Yeager, DPM, PLLC v. Southern Cardiovascular, PLLC*, Case No. 2016-AC-00057 (**Lafayette County, MS Circuit Court) (Oct. 2017).
  - I successfully defended a medical practice against seven-figure breach of contract claims by a separating physician in a **two-day jury trial**.

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[1] Putative class action: ***Albury v. Sterilization Services of TN, Inc.*,** Case No. CT-3119-23-VI (Shelby County Circuit Court).

[2] National counsel for the LDC Defendants in these cases are Orrick, Herrington & Sutcliffe LLP.

- I served as **second chair**, handling voir dire, delivering the opening statement, examining multiple witnesses, and delivering a portion of the bifurcated closing argument.

- ***Sunnyside Cmty. Hosp'l Ass'n v. Ivan Reveron, M.D.*, Case No. 01-16-0001-0602** (American Arbitration Association) (Sunnyside, WA) (2016-17).
  - I served as **lead litigation counsel** for the plaintiff hospital in prosecuting a breach-of-contract action against a former physician employee.
  - I obtained **summary judgment in arbitration**, enrolled the judgment in Yakima County, Washington, Superior Court, and enforced the judgment in New Mexico after the physician fled Washington State.

- ***In re: Hurricane Sandy Cases*, Case No. 1:14-mc-00041-CLP-GRB-RER** (E.D.N.Y.); ***In re: Hurricane Sandy WYO Carrier Flood Litig.*, Case No. 1:15-mc-800 (JBS)** (D.N.J.) (2014-17).
  - I served as the **handling attorney** for two-dozen first-party cases against write-your-own-insurance (WYO) carriers under the National Flood Insurance Program.
  - I appeared as counsel of record and national counsel in more than a dozen cases.
  - I served as **co-coordinator** for Butler Snow LLP, as National Defense Counsel, and principal contact for FEMA, local counsel, and Plaintiffs' counsel in more than 100 matters resolved through FEMA's Hurricane Sandy Review Process.

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.

On June 11, 2021, one month before my 39th birthday, I became the youngest African American judge and second-youngest judge in Tennessee's largest county. Governor Lee appointed me to serve as the Chancellor of Part I of the Chancery Court for the Thirtieth Judicial District of Tennessee, following the retirement of Chancellor Walter L. Evans.

As Chancellor, I presided over a civil docket of commercial, governmental, tax, and family law cases. I also heard appeals of civil service and state agency decisions, and I was referred commercial cases by the other Chancellors for judicial mediations. I was not successful in the subsequent election and returned to private practice after my term concluded on August 31, 2022.

During my 14 months on the bench, however, my staff and I disposed of more than 1600 cases, establishing the highest clearance rate on both the Chancery and Circuit Courts.

Less than 1% of those 1600+ decisions were appealed. I also was voted "Best Qualified," or endorsed, by ten major organizations, including the Memphis Bar Association, the Ben F. Jones Chapter of the National Bar Association, and both the Republican and Democratic Parties of Shelby County. I received the Chancellor Charles A. Rond Memorial "Judge of the Year" Award from the Memphis Bar Association's Young Lawyers Division in November 2022.

Three matters of note from my time as Chancellor are as follows:

- ***Shelby County Election Commission v. Shelby County, TN*, CH-21-1258-I:**
  - This case involved a petition for a writ of mandamus—an extraordinary writ—and the construction of two statutes: One vested certain authority in the county Election Commission, and the other vested related authority in the County's legislature (the County Commission).
  - At issue was which entity, the Election Commission or the County Commission, had the final say about the election equipment the County would purchase and use.
  - After briefing and oral argument, I denied the petition.
- ***Vickie Alexander, et al., v. Methodist Le Bonheur Healthcare, et al.*, CH-21-1484-I:**
  - In this case, several nurses and other healthcare professionals sued a hospital to challenge employment decisions that were made as a result of the hospital's COVID-19 policies.
  - The case involved questions of (1) privacy and open access to the courts, because the plaintiffs sued anonymously; (2) requests for injunctive relief; and (3) constitutional interpretation.
  - The briefing and oral argument were lengthy and complex.
  - Ultimately, the plaintiffs dismissed their claims, but only after I issued several rulings, including denying the plaintiffs' request for a temporary injunction; granting the defendants' motion to dismiss; denying the defendants' motion to strike; and denying the plaintiffs' motion to proceed under pseudonyms.
- ***Smith v. Smith*, Case No. CH-19-1592-I:**
  - This case is discussed below, in connection with the **Final Divorce Decree** and a supplemental **Order** jointly included with this Application as writing samples in response to Question 34.

I describe the quasi-judicial experience that I have gained in the three years since serving as Chancellor in the second part of my response to Question 7, above, and also identify representative cases over which I presided as ALJ and Special Master. Writing samples from two of those cases are included with this Application and described below in response to Question 34. Given the confidential nature of mediations and disciplinary proceedings before the BPR, I have not discussed any of those matters here. For similar reasons, I also have not discussed any arbitrations over which I presided.

One of the quasi-judicial cases identified above, *Blanchard*, merits additional discussion:

- ***Blanchard*** is a multi-year litigation initiated by individuals but carried forward by Intervenor-Plaintiff ACLU-TN after the claims of the individual plaintiffs were dismissed.
- In that case, I served as **lead counsel** for the court-appointed **Independent Monitor and Special Master** before my appointment, and I have continued to assist the Special Master and the Monitoring Team since returning from the bench.
- In June 2020, I defended and examined expert witnesses during a **fully-virtual**, **four-day** bench trial that culminated in modifications to the Consent Decree at issue. Prior to trial, I also coordinated the Monitoring Team's public-facing efforts, including media appearances (examples here and here), quarterly meetings with activist groups and community members (for examples, please see the Monitoring Team's website, here), weekly meetings with City leadership, and testimony at multiple evidentiary hearings. I was the primary drafter of all Monitoring Team submissions, including quarterly reports and responses to pleadings, motions, and other party submissions.
- The court has retained jurisdiction over this matter since modifying the Consent Decree to ensure that MPD implements new policies and training. The matter is now in a Sustainment Period, during which a new set of subject-matter experts gradually will phase out the Monitoring Team.

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.

N/A

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

I would like to note three additional areas of experience:

- ***First*, I served as a term judicial law clerk for Judge Bernice Bouie Donald on the U.S. Court of Appeals for the Sixth Circuit, from July 2013 to August 2014.**
    - The experience was extraordinary, first and foremost because Judge Donald is so smart, warm, quick-witted, and full of energy. I smile any time I see her name anywhere, and I see it often because she is everywhere, even though she is now retired from the bench.
    - The experience also was instructive, allowing me to prepare, review, and revise bench memoranda, draft opinions, and orders on every conceivable issue and area of law—e.g., constitutional

interpretation, statutory construction, criminal law, immigration law, habeas relief, and healthcare liability.
    - It taught me how to work closely with others—there, the other clerks and the judges—to ensure the most transparent, most accurate, and highest-quality work product.

- ***Second*, during law school, I gained professional legal experience through a prosecutorial externship and several law firm clerkships:**
    - ***Extern*, U.S. Attorney's Office, E.D. Tenn.**, Knoxville, TN (Spr. 2011).
    - ***Summer Associate*, Butler Snow LLP**, Memphis, TN (Aug. 2010, Dec. 2009).
    - ***Summer Associate*, Burch, Porter & Johnson, PLLC**, Memphis, TN (June-Aug. 2010).
    - ***Summer Associate*, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, Memphis, TN (May-June 2010).
    - ***Summer Associate*, Kramer Rayson LLP**, Knoxville, TN (May-Aug. 2009).

- ***Third*, over the years, I have coached several moot court and mock trial teams at the University of Memphis Cecil C. Humphreys School of Law. A moot court team that I coached while on the bench won a regional championship in March 2022 (see news here).**

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.

On two previous occasions, I have submitted an application for a judgeship:

- **In October 2023, I submitted an application to Senators Marsha Blackburn and Bill Hagerty to fill the vacancy created on the U.S. Court of Appeals for the Sixth Circuit when Judge Julia Smith Gibbons took Senior Status. I was interviewed by the Senators' staff, and my name was submitted to the White House, by whose staff I also was interviewed. Ultimately, however, I was not selected to fill the vacancy.**

- **In December 2020, I submitted an application to fill the vacancy created in Part I of the Chancery Court for the Thirtieth Judicial District of Tennessee when Chancellor Evans retired. Because only two candidates timely applied to the Trial Court Vacancy Commission, the Commission did not convene to send three names to the Governor. I therefore applied directly to the Governor. I was selected to fill the vacancy and appointed to the court on June 11, 2021.**

EDUCATION

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

University of Tennessee College of Law:

- Dates of Attendance: **August 2008-May 2011.**
- Degree Awarded: **Doctor of Jurisprudence, concentration in Advocacy & Dispute Resolution.**
- Forms of Recognition:
  - **Five Certificates of Academic Excellence (top course honors):**
    * Legal Research & Writing II
    * Contract Drafting
    * Interviewing and Counseling
    * Law and Literature
    * Prosecutorial Externship
  - **The Order of Barristers.**
  - **American College of Trial Lawyers Justice Louis F. Powell Medal for Excellence in Advocacy.**
  - **Judge James M. Haynes Prize and McClung Medal for Outstanding Achievement in Moot Court.**
  - ***Chair*, Moot Court Executive Board.**
  - ***Member*, National Moot Court Team (National Runner-up, Regional Champion & Best Oral Advocate).**
  - ***Member*, AAJ National Trial Advocacy Team (Regional Champion).**
  - ***Teaching Assistant*, Legal Research & Writing.**
  - ***Staff Editor*, *Transactions: The Tennessee Journal of Business Law*.**

Wake Forest University:

- Dates of Attendance: **August 2000-August 2005.**
- Degrees Awarded:
  - **M.A.Ed., Secondary English (August 2005).**
  - **B.A., English (May 2004).**
- Forms of Recognition:
  - **WFU Graduate Fellow.**
  - **Thomas K. Hearn Scholar.**
  - **Joseph G. Gordon Scholarship Finalist.**
  - **President's Aide.**
  - **Hewlett Student Ambassador.**
  - ***Volunteer*, Mother Teresa's "Misioneras de la Caridad," Mexico City,**

Mexico.
- ***Vice-Polemarch*, Omicron Sigma Chapter, Kappa Alpha Psi Fraternity, Inc.**

PERSONAL INFORMATION

15. State your age and date of birth.

43; [redacted] 1982.

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

20 Years: August 2005-Present.

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

14 Years: August 2011-Present.

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

Shelby County.

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

N/A.

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

No.

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

No.

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

I received one preliminary inquiry from the Consumer Assistance Program of the BPR in 2024. A former client had complained about receiving invoices and reminder emails from my firm's billing department for outstanding fees. The invoices were for work that resulted in a monetary judgment in the client's favor, but the client did not believe he should have to pay for the work. After I responded to the inquiry, the matter was dismissed.

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.

Yes, once: ***Terrell v. City of Memphis Gov., et al.*****, CT-1203-23-IV** (Shelby County Circuit Court).

- **In *Terrell*, a pro se litigant sued me in my official capacity as Chancellor, along with Gov. Lee, Shelby County Sheriff Floyd Bonner, Former Memphis Mayor Jim Strickland, and 40 other government officials, in connection with a matter filed by the plaintiff and pending before me when I served on the Chancery Court. The plaintiff alleges that the defendants conspired to have her hospitalized in a mental health facility to prevent her**

from prosecuting her prior lawsuit.

- **The Tennessee Attorney General's Office is representing me and the other governmental defendants. In November 2023, the court granted a motion by the AG's Office to dismiss the lawsuit on grounds of sovereign and judicial immunity. But the plaintiff since has filed several post-judgment motions that remain pending.**

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.

- Metropolitan Inter-Faith Association (MIFA):
  - ***Co-Chair***, Circle of Hope Campaign (2024).
  - ***Member***, Board of Directors (2023-present).
- ***Workforce Advisory Board***, University High School, University of Memphis (2023-present).
- Facing History & Ourselves:
  - ***Co-Chair***, Southeast Benefit (2023).
  - ***Member,*** Memphis Advisory Board (2016-present).
- ***Alumni Council***, Winston College of Law, University of Tennessee (2021-present).
- REACH Memphis:
  - ***Facilitator***, Law Scholars (2024-present).
  - ***Chair,*** Board of Directors (2019-21).
  - ***Member***, Board of Directors (2014-present).
- ***Life Member*****,** Kappa Alpha Psi Fraternity, Inc. (2017-present).

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

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

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

Kappa Alpha Psi Fraternity, Inc., is an international organization whose membership is limited to men. I was initiated in 2003 when I was in college and became a Life Member in 2017. It is my understanding that resigning or withdrawing will not be necessary should I be nominated or selected for this position.

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.

- Tennessee Board of Professional Responsibility: ***Hearing Panel Member, Disciplinary District IX*** (2023-26).
- Tennessee Board of Law Examiners: ***Character and Fitness Interviewer*** (2023-present).
- Leo Bearman, Sr. American Inn of Court:
  - ***Master*** (2022-23).
  - ***Barrister*** (2020-22, 2023-24).
- Memphis ADR American Inn of Court: ***Master*** (2023-present).
- Lawyers Journal Club of Memphis: ***Member*** (2023-present).
- Local Rules Committee, U.S. District Court for the Western District of Tennessee:
  - ***Chair,*** Civil Rules Subcommittee (2020-21).
  - ***Committee Member*** (2018-21)
- American Bar Association:
  - ***Business Law Section*** (2022-present).
  - ***Litigation Section*** (2022-present).
  - ***Section of Dispute Resolution*** (2022-present).
- National Bar Association: ***Deputy Director, Region VI*** (2020-21).
- Federal Bar Association, Memphis / Mid-South Chapter: ***Board of Directors*** (2019-21).
- Tennessee Bar Association:
  - ***Chair,*** Executive Council, Section of Litigation (2025-26).
  - ***Vice-Chair,*** Executive Council, Section of Litigation (2024-25).
  - ***Member*****,** YLD Fellows (2023-present).
  - ***Member,*** Board of Governors (2021-24).
  - ***Leadership Law*** (2019)
  - ***Mock Trial Committee***, Young Lawyers Division (2016-19)
  - ***West TN Captain,*** Wills-for-Heroes, YLD Board of Directors (2015-16).
- Memphis Bar Association:
  - **Ex-Officio Appointee**, Executive Committee, Board of Directors (2023-present).
  - ***Member,*** Executive Committee, Board of Directors (2020-22).
- Leadership Council on Legal Diversity: ***Fellow*** (2017-18).

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.

- *Best Lawyers in America*®:
  - ***Appellate Practice*** (2025-26).

    - ***Commercial Litigation*** (2024-26).
- ***Fellow* (top 1% of licensed attorneys),** American Bar Foundation (2025).
- *Super Lawyers®:*
    - ***Mid-South Super Lawyer*** (2023).
    - ***Mid-South Rising Star*** (2015-21).
- ***Chancellor Charles A. Rond Memorial "Judge of the Year" Award*,** MBA: Young Lawyers Division (2022).
- ***Fellow* (top 1% of Memphis-area lawyers and judges),** Memphis Bar Foundation (2022).
- ***A.A. Latting Award for Legal Excellence*,** Nat'l Bar Association: Ben F. Jones Chapter (2021).
- ***Sam A. Myar, Jr. Award for "Outstanding Service,"*** Memphis Bar Association (2021).
- ***Mentor of the Year*,** MPDP, University of Memphis Cecil C. Humphreys School of Law (2021).
- UT Knoxville:
    - ***Alumni Promise Award*** (2021).
    - ***Volunteer 40 Under 40*** (2021).
- *Memphis Business Journal:*
    - ***40 Under 40*** (2021).
    - ***Best of the Bar*** (2018).
- New Memphis Institute:
    - ***Host Committee***, Fellows 20th Anniversary Reunion (Sept. 2025)
    - ***Fellow*** (2018-19).
- ***Executive Program*,** Leadership Memphis (2019-20).
- ***IADC Trial Academy***, Stanford Law School (2015).

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

- ***Author*,** "Even Equity has Limits: What a Reversal of Florida Fortunes for Former President Trump Means for Civil Litigants in Tennessee," *BizLitNews* Blog (Dec. 2022) (link here).
- ***Author*,** "Witness & Respair," *Memphis Lawyer* (Nov. 2021, at 19-20) (link here).
- ***Feature*,** *When Called to Serve, the Hon. Gadson William Perry Always Answers*, Memphis Lawyer (Nov. 2021).
- ***Author,*** "Reflections on *McClay* Part II: *Lindenberg* Undone—SCOTN Restores Statutory Limits on Damages Awards in Tennessee," *BizLitNews* Blog (Feb. 2020).
- ***Author,*** "Never Mind Hybridity: Under *Dedmon*, the Collateral Source Rule Says It All," *Memphis Lawyer* (Dec. 2017).
- ***Author*,** "*Dedmon* Decided," *BizLitNews* Blog (Nov. 2017).

- ***Author,*** "*Cherokee* Agency and the Standard for Disclosure of Public Records in Tennessee," *BizLitNews* Blog (Aug. 2017) (link here).
- ***Author,*** "The Curious Evolution of the Executive Order," *BizLitNews* Blog (Feb. 2017).
- ***Author*,** "Temporary Finality? The Fifth Circuit Says, 'No Dice,'" *BizLitNews* Blog (Mar. 2016).
- ***Author,*** "Federalism 'On Fleek' or Fifty Separate Fiefdoms? State Chief Justice Says *Obergefell* is Not the Law in Alabama," *BizLitNews* Blog (Feb. 2016).
- ***Author,*** "*Rye* in Action: Tennessee's New SJ Standard Is Here to Stay and Already Changing the Status Quo," *BizLitNews* Blog (Jan. 2016) (link here).
- ***Author*,** Written CLE Materials, ABA Section of Litigation Civil Rights Panel Plenary, Memphis, TN (Oct. 2015).
- ***Author*,** "Free Speech for All . . . Except Judges?" *BizLitNews* Blog (May 2015) (link here).
- ***Author,*** "Will Rapid Arbitration Jettison Lengthy Litigation in Delaware?" BizLitNews Blog (Apr. 2015) (link here).
- ***Co-Author with Brent E. Siler*,** *Pregnancy Discrimination: An Issue to Watch in 2015*, BLR: Tennessee Employment Law Letter, Vol. 30, No. 1 (Jan. 2015).
- ***Co-Author with the Hon. Bernice Bouie Donald,*** *The Not-So-New Normal of the Legal Profession: Facing and Confounding the Odds*, 23 AM.U.J. Gender Soc. Pol'y & L. 1, 18 (Oct. 2014) (link here).
- ***Contributor*,** *From the Bench: Four Judgeships*, 41 Litig. 1, Fall 2014 (link here).
- ***Author*,** *Tennessee Statute Removes Joint & Several Liability from Product Liability Cases*, 2013 Southeastern Product Liability Update 16, Butler Snow LLP (Aug. 2013).

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.

- ***Panelist***, "The Ethics of Saying No," Exploration CLE Series, Tennessee Bar Association: Young Lawyers Division (Oct. 2025).
- ***Co-Presenter with Judge Kevin Ritz, U.S. Court of Appeals for the Sixth Circuit*,** "Supreme Court Preview (and Review)," Bench Bar Conference 2025, Memphis Bar Association (Oct. 2025).
- ***Co-Presenter with Magistrate Judge Charmiane Claxton, U.S. District Court for the Western District of Tennessee***, "Federal Case Law Update," FedEx In-House CLE (Nov. 2024).

- ***Co-Presenter with Judge Andre Mathis, U.S. Court of Appeals for the Sixth Circuit***, "Federal Caselaw Update: A Survey of Seven Cases from the U.S. Supreme Court's October 2023 Term," Bench / Bar Conference, Memphis Bar Association (Sept. 2024).
- ***Panelist***, "Family Matters: Exploring the Relationship Between Criminal Justice and Other Areas of Law," Tennessee Bar Association / Tennessee Alliance of Black Lawyers Convention (June 2024).
- ***Panelist***, "Effective Use of ADR by Local Governments as a Sword and Shield," 2024 National Organization of Black County Executives (NOBCO) Economic Development Conference, Atlanta, GA (June 2024).
- ***Speaker***, "The End of Affirmative Action: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*," Memphis Lawyers Journal Club (Mar. 2024).
- ***Co-Moderator with Buck Wellford***, "Perspectives from the Bench: A Conversation with Chief Justice Holly Kirby & Justice Dwight Tarwater," TBA Section of Litigation (Mar. 2024).
- ***Faculty Member***, "Critical Trial Skills for Legal Services Attorneys," ABA Section of Litigation / National Institute for Trial Advocacy (Aug. 2023).
- ***Panelist***, "Pitfalls and Pointers: Litigation Involving Closely-Held Businesses and Family Law," TBA: Family Law Section (Aug. 2023).
- ***Panelist***, "Attorney Well Being Inside and Out, TBA Annual Convention (June 2023).
- ***Facilitator***, "The Questionable Status Quo of the Economic Loss Doctrine," Litigation Practice Forum 2023, TBA Section of Litigation (May 2023).
- ***Co-Presenter with La'Toyia Slay***, "'If it ain't broke, don't fix it': The Attorney-Client Privilege after *In re: Grand Jury*," CLE for the MBA Young Lawyers Division (Apr. 2023).
- ***Co-Presenter with La'Toyia Slay***, "From *Upjohn* to *In Re: Grand Jury* and Back Again," CLE for In-House Counsel at Regions Bank (Mar. 2023).
- ***Panelist***, "Soft Skills: Building Relationships (Allies), Conducting Performance Reviews, and Driving Change in Your Law Firm," Prof'l Success Summit, ABA: Section of Litigation (Oct. 2022).
- ***Luncheon Keynote***, Civic Involvement Conference, University of Memphis (June 2022).
- ***Moderator***, "Diversity in Appellate Litigation," TBA: Appellate Law Section (Apr. 2021).
- ***Panelist***, "Non-Economic & Punitive Damages Caps," TBA: Litigation Section (Sept. 2020).

- ***Speaker*,** "Lawyering and Professionalism," UT College of Law (Sept. 2020).

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.

Aside from the judicial applications discussed in response to Question 13, above, I have submitted no applications for public office or otherwise been a candidate for public office.

Aside from the judicial positions discussed above, I have held four public offices:

- ***Commissioner***, Tennessee Higher Education Commission (appointed by Gov. Lee) (2024-29).
- ***Delegate***, 78th Judicial Conference of the U.S. Court of Appeals for the Sixth Circuit (appointed by Circuit Judge Andre B. Mathis) (2025).
- ***Member***, Governor's Council for Judicial Appointments (appointed by Gov. Lee) (2024).
- ***Delegate***, 77th Judicial Conference of the U.S. Court of Appeals for the Sixth Circuit (appointed by Circuit Judge Andre B. Mathis) (2023).

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.

I include with this Application five writing samples, three judicial and quasi-judicial dispositions and two briefs, all within the last five years:

1). ***Smith v. Smith***, **Case No. CH-19-1592-I** (Shelby County Chancery Court):

- **April 27, 2022, Final Decree of Divorce (FDD)** (34 pages); and
- **June 27, 2022, Order Supplementing and Finalizing FDD** (4 pages + exhibits).
- These Orders are my own work from a case over which I presided as Chancellor, though I received proofreading assistance and citation checks from a law clerk or intern. The case concerned the divorce of highly-educated, upper middle class parents with a young child and involved the classification and division of property, the determination of child custody and child support, and the adjudication of criminal contempt charges after a two-day trial. The combination of so many issues, and the importance of the decisions to be made, made this case a great vehicle for learning—

I had no prior experience in family law before being appointed to the bench—as well as a good example of the way that I approach cases. My decision was largely affirmed, but partially vacated and remanded, by the Tennessee Court of Appeals.

2). ***Greene v. City of Memphis*, City No. 4892427** (OJI / LOD Administrative Appeals):

- **April 8, 2025, Hearing Order: Part 2 of 2** (9 pages + exhibits).
- This Order is from a case over which I presided as an ALJ. An associate at my firm prepared an initial draft of the Order based on my instructions, the transcript of an evidentiary hearing over which I presided,* and examples of other Orders that I have written, and I substantially revised the Order before issuing it. The case concerned a police officer's appeal of the denial of line-of-duty pension benefits for the officer's heart condition.

  *The above-referenced transcript is not included with this Application but is available upon request.

3). ***Crews Family Foundation, et al. v. Gullane Capital, LLC., et al.*, Case No. CH-23-0278-III** (Shelby County Chancery Court):

- **September 6, 2023, Final Report and Recommendations of the Special Master** (18 pages + drafted exhibits).
- This Report is from a case over which I was appointed, by the court and at the request of the parties, to serve as Special Master. My appointment concerned 45 books and records requests by investors of a hedge fund, and the requests implicated both an LLC Agreement governed by Delaware law and the Delaware LLC Act. An associate at my firm prepared an initial draft of the Report and its drafted exhibits* based on my instructions, the transcript of an evidentiary hearing over which I presided, and examples of other Orders and Reports that I have written, and I substantially revised the Report and its drafted exhibits before issuing them.

  *Three of the Report's five exhibits were drafted to assist the review of the court and the parties. The remaining two exhibits—Plaintiff's initial demand letter and the above-referenced transcript—are not included with this Application but are available upon request.

4). ***Holloway v. Morant, et al.*, Case No. CT-3712-22-II** (Shelby County Circuit Court):

- **July 7, 2023, Reply in Support of Motion to Dismiss Plaintiff's Claims Under Tennessee's Self-Defense Immunity Statute** (16 pages).
- I was primarily responsible for drafting this brief, though my listed colleagues provided research support and proofread the brief. At its core, this case is a personal-injury action, but it also has involved challenges to the constitutionality of a state statute, intervention by the Tennessee Attorney General, two multi-day evidentiary hearings with a dozen

witnesses, and an application for interlocutory appeal. The case is ongoing.

5). ***Jarratt v. Ford, et al.,*** **Case No. CT-1914-20-III** (Shelby County Circuit Court):

- **November 16, 2020, Partial Motion to Dismiss** (8 pages + drafted exhibits and incorporated earlier briefs).
- I was primarily responsible for drafting this brief, though my listed colleagues proofread the brief and provided feedback. At my direction and under my supervision, the listed associate at my firm prepared an initial draft of the exhibits to this brief and the two earlier briefs that this brief incorporates. I substantially revised both the exhibits and the earlier briefs (one of which is signed by a more senior partner) before they were filed. This case concerned individual and derivative claims between members of an LLC, arising from alleged breaches of the LLC's operating agreement and various duties of LLC members.

ESSAYS/PERSONAL STATEMENTS

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

A framed picture hangs in my office, of my feet propped up on a desk, facing a wall of old reporters and legal treatises. I sent that image to a friend, sometime in the spring of 2022, in response to a text message that read, "What are you doing?" "Working," I said.

I still cannot believe how lucky I was to serve as Chancellor. Whenever someone asks what I liked about the job, I answer that I got to be in court every day and then was locked in a room to read and to write about what I read, all of which are my favorite parts of being a lawyer too.

Probably I will miss being in court every day if I am selected for this job. But as any lawyer who appeared before me will tell you, I will make up for it at oral argument.

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)***

My first professional calling was as a teacher—small wonder as both my late father and my mother were teachers—and, if I might make a small confession, I never really stopped teaching. I was a TA in law school, and I have been an adjunct professor and moot court and mock trial coach since then. When I was on the bench, I once put on a mock trial with a visiting class of middle school students, the subject of which was whether Chick-fil-A's "Polynesian" sauce (the clear choice) or namesake "Chick-fil-A" sauce was the best sauce. (Polynesian sauce won, obviously; I may or may not have received a recusal motion.)

But I digress. I say all this to explain that when I think of equal justice under law and pro bono service, I think first of education and access. I have tried, through my teaching, to

facilitate both.

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)***

This judgeship is on the Western Section of the Tennessee Court of Appeals, which hears appeals in civil cases from Tennessee trial courts, usually in three-judge panels. The court comprises four members from each of Tennessee's three Grand Divisions.

My selection would impact the court by adding a teacher, lawyer, and trial judge in one person, which I discuss in greater detail in response to Question 39, below. It also would make me the second African American Western Section judge in Tennessee history.

I have known several people who were firsts. Judge Donald, for example, was the first African American woman on four different courts. My parents were the first in their families to attend college. I do not have any firsts, as far as I know, but I have several seconds because the firsts held open the door for me. Succeeding Judge Kenny Armstrong would be a signal honor.

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)***

I confessed, in responding to Question 36, that I never really stopped teaching. That confession applies to more than my time as a TA, adjunct professor, and advocacy coach and goes beyond the student visits that I hosted as a judge.

It is instead a through-line for virtually all of my community service work. With REACH Memphis, for example, on whose board I now have served for more than ten years, I teach public speaking and mock law school courses and also mentor students. With Facing History, I see students learn, and learn to educate others, about civics, morality, and courage. I also serve on an advisory board for the University Schools at University of Memphis, working with the schools, university administration, and other local professionals to ensure that today's curricular offerings match the jobs of tomorrow.

MIFA might be the only service organization with which I am involved that does not expressly address students. But what an honor it is to be part of an organization dedicated to fighting homelessness and food insecurity and to taking care of the elderly, all as a matter of faith. I was honored to co-chair MIFA's Circle of Hope campaign last year.

I recognize that, as a judge, fundraising for such organizations would not be my highest and best use. But continuing to work with such organizations and encouraging others to do the same are things I hope to do for the rest of my career.

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)***

Everything about my life has led me here. My training started early because my mother was an English teacher, and my undergraduate and graduate study of English and years teaching English deepened that training.

In law school, I earned the top grade in my section of legal writing, served on a law journal, competed on successful advocacy teams, and worked as one of just ten legal writing TAs. I also was elected Chair of the Moot Court Executive Board and received the Judge James M. Haynes Prize and McClung Medal for my graduating class.

After law school, I spent a year at the elbow of a federal appellate judge and twelve years writing motions and briefs in private practice. Of 100+ lawyers in my firm's Tennessee offices, I am the only lawyer listed in *Best Lawyers in America*® for both commercial and appellate litigation, and I have prevailed before federal and state appellate courts this year. *See Austin*, *et al.* (6th Cir.) and *Scott* (Tenn. Ct. App.) (discussed above in response to Questions 7 and 34.) I also have taught legal writing as an adjunct professor.

And I have another confession: Just as I never stopped teaching, I never stopped being a trial judge. To the 1600+ cases that my staff and I disposed of when I was Chancellor, I have added the quasi-judicial experience of an ALJ, Special Master, arbitrator, mediator, and hearing panel member.

I am ready, willing, and able to do this job and do it well.

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. In Federalist No. 78, Alexander Hamilton famously remarked that the courts "may truly be said to have neither FORCE nor WILL, but merely judgment." In a less well-known passage of that paper, he elaborated that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."

Federalist No. 78 and the other federalist papers concern the U.S. Constitution. But the separation-of-powers principles that the papers espouse are core components of the Tennessee Constitution as well. *See* Article II, § 2 (prohibiting each branch of government from exercising the powers of the others). According to these principles, only the legislature may make or repeal laws. Courts interpret and apply legislative acts—or, as another well-known writer put it, they "say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). And courts may declare laws void if they conflict with federal or state constitutions. But they may not refuse to uphold duly enacted, constitutional laws.

The *Lindenberg* case, mentioned above in my response to Question 9, illustrates these principles. At issue there were perceived conflicts between the Tennessee Constitution, legislative acts limiting punitive damages, and judicial interpretations of both. The case generated a wide array of opinions about the correct balance, as did the Tennessee Supreme Court's subsequent decision in *McClay*, which rejected *Lindenberg*. But all sides

in both cases agreed that the legislature, and not the courts, possesses exclusive authority to make and repeal laws.

REFERENCES

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

A. **The Honorable Tre Hargett**
Tennessee Secretary of State
[redacted]

B. **The Honorable Jonathan T. Skrmetti**
Tennessee Attorney General and Reporter
[redacted]

C. **The Honorable Bernice Bouie Donald (ret.)**
Circuit Judge, U.S. Court of Appeals for the Sixth Circuit
[redacted]

D. **Edward L. Stanton III**
Partner and Executive Committee Member, Butler Snow LLP
[redacted]

E. **Dr. Sally Gates Parish**
Vice Provost and Director of Schools, University of Memphis University Schools
[redacted]

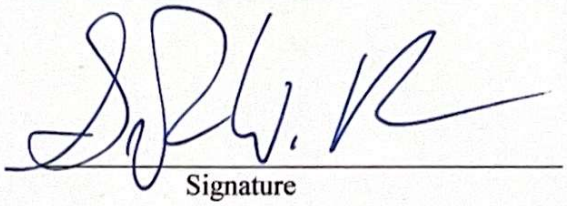
AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: **November 3**, 2025.



Signature

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

Sample 1

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

ANTONIA ANDREANA SMITH,

Petitioner,

CH-19-1592
Part I

v.

ANTHONY KENYATTA SMITH,

Respondent.

FINAL DECREE OF DIVORCE

THIS MATTER came before the Honorable Gadson William Perry, Chancellor of Part One of the Shelby County Chancery Court, on November 1 and 2, 2021, for a contested divorce trial and a hearing on Plaintiff Antonia Andreana Smith (Mother)'s Petition for Criminal Contempt. Mother was represented by Melissa Berry, Esq., and Rebecca Bobo, Esq., and Defendant Anthony Kenyatta Smith (Father) was represented by Tammy Oliver, Esq., and Hillary Samuels, Esq. Based on the parties' pleadings, motions, affidavits, pretrial memoranda, and proposed parenting plans; the testimony offered at trial; admitted exhibits; the arguments of counsel; and the entire record in this matter, the Court states the following:

I.
THRESHOLD MATTERS

A. Stipulations.

The parties made four stipulations. Both parties stipulated to the following three issues at the outset of trial:

- (1) that the value of the marital residence at 3909 Crye Crest Cove is $410,000.00;
- (2) that neither party would seek alimony from the other except for an award of attorney fees; and

- (3) that the parties would consent to a declaration of divorce under Tenn. Code Ann. § 36-4-129 rather than dispute the grounds therefor.

Father made a fourth stipulation to an error in his calculations on the child support worksheet attached to his proposed parenting plan, stating that he inadvertently omitted Mother's expenses related to the property located at 733 North Evergreen.

B. Motions in Limine.

Mother made two motions in limine, and Father made one. ***First,*** Mother moved to exclude three witnesses: (1) Father's brother, Gerald Smith; (2) Father's mentee, Chris Young; and (3) the appraiser of the marital residence, Douglas Abernathy. The parties' stipulation regarding the value of the marital residence **MOOTED** the motion as to the third witness. (*See* Hr'g Tr., Vol. I, at 5:14-6:3.) The motion was **GRANTED IN PART** and **DENIED IN PART** as to the first two witnesses: The Court allowed the witnesses to testify in connection with Mother's Petition for Criminal Contempt only, and only as to relevant, non-hearsay, first-hand knowledge that the witnesses may have had about Father's conduct at issue in the Petition.[1] (*See id.* at 12:15-23.)

Second, Mother moved to strike Father's October 26, 2021, pre-trial brief, on the ground that the brief was, in reality, an unauthorized second memorandum under Local Rule 14(D). The motion was **DENIED** on the grounds that Father had given notice at the parties' pre-trial conference that he intended to file a pre-trial brief and that no objection to the filing was made at that time. (*See id.* at 17:20-18:8.)

Finally, Father moved to allow one of his witnesses to testify via Zoom rather than in person. The motion was **GRANTED**. (*See id.* at 15:1-13.)

[1] Neither witness ultimately testified.

C. Mother's Petition for Criminal Contempt.

On October 1, 2021, Mother filed a Petition for Criminal Contempt. Father filed his response on October 25, 2021. The parties agreed to set the petition for hearing at the trial of this matter and to present the contempt-related issues contemporaneously with the proof about the underlying divorce to avoid unnecessary duplication. (*See id.* at 13:16-14:24.)

II.
GENERALLY APPLICABLE FINDINGS OF FACT

1). Mother and Father were married on October 24, 2015.

2). A little over a year later, they had a son, IMS, who born on January 3, 2017.

3). Mother has not been married before and has no other children.

4). Father has two minor children from a prior marriage: CAS, born on September 9, 2009, and ICS, born July 25, 2012.

5). Mother and Father separated on October 23, 2019, but both remained in the marital residence at 3909 Crye Crest Cove at that time.

6). Mother moved with IMS into an apartment on February 14, 2020, and Father has remained at the marital residence.

III.
SPECIFIC FINDINGS OF FACT & RELATED CONCLUSIONS OF LAW

The parties offered proof at trial concerning six discrete issues: (1) classification of assets; (2) valuation and allocation of marital assets; (3) income and calculation of child support; (4) custody of IMS and school choice; (5) Mother's Petition for Criminal Contempt; and (6) attorney's fees and costs. The Court addresses each issue in turn.

A. Classification of Assets.

Tennessee is a dual property state, which means that it recognizes both marital property and separate property. *Snodgrass v. Snodgrass*, 295 S.W.3d 240, 246 (Tenn. 2009). In divorce actions, courts must equitably divide marital property between the parties according to twelve statutory factors. *See* Tenn. Code Ann. § 36-4-121(a),[2] (c). But because separate property is not part of the marital estate, it is not subject to division. *Larsen-Ball v. Ball*, 301 S.W.3d 228, 231 (Tenn. 2010). Courts must therefore classify all assets and liabilities owned by divorcing parties as marital or separate before they divide the marital property. *Id.*

This Court classifies as separate property the following assets and liabilities of Mother and Father:

FINDINGS	CLASSIFICATION
Mother owns an engagement ring.	**SEPARATE.**
Mother owns a fur coat.	**SEPARATE.**
Mother owns property at 733 North Evergreen, which she purchased in 2004.	**SEPARATE.**[3]

[2] Amended by the General Assembly effective March 31, 2022. 2022 Tennessee Laws Pub. Ch. 762 (S.B. 2385). The amendments do not impact the outcome of this matter.

[3] At trial, the classification and fair market value (FMV) of this property were disputed. In his proposed findings and conclusions, however, Father proposes that Mother be awarded this property in its entirety (at 6). Assets acquired by a spouse during a marriage are presumed to be marital property, and assets acquired before marriage are presumed to be separate property. *E.g., Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at *4 (Tenn. Ct. App. Sept. 1, 2006). Separate property may become marital property through commingling or transmutation. *E.g., Jones v. Jones*, No. M2015-00042-COA-R3-CV, 2016 WL 4750106, at *5 (Tenn. Ct. App. Aug. 12, 2016) (quoting *Snodgrass*, 295 S.W.3d at 256). Commingling occurs when separate property is "inextricably mingled with marital property or with the separate property of the other spouse." *Id.* Transmutation "occurs when separate property is treated in such a way as to give evidence of an intention that it became marital property." *Id.*

Mother purchased the property ten years before the parties married, and thus it is presumed to be her separate property. Father contends that the property became marital property through commingling because Mother used marital funds during the course of the marriage to pay for certain expenses and maintenance of the property. Father identifies fourteen payments, ranging from $50.00 to $232.00, and an additional $600.00 deposit, that Father alleges were made with

Mother has a retirement account with Church Health Center, ending in No. 8664, the balance of which, as of June 2021, was $91,099.00.	**SEPARATE:** $735.00 (balance as of October 24, 2015). **MARITAL:** $90,364.00 + any additional increase since June 2021 (remaining amount).
Mother has a Roth IRA with Fidelity, ending in No. 2256, the balance of which, as of July 2021, was $52, 680.00.	**SEPARATE:** $18,040.50 (balance as of October 24, 2015). **MARITAL:** $34,639.50 + any additional increase since July 2021 (remaining amount).
Mother has stock in AT&T, the value of which, as of July 9, 2021, was $3,315.61.	**SEPARATE.**[4]
Mother has a savings account with Tri-State of America Bank of Memphis, ending No. 0447, the balance of which, as of June 2021, was $1,263.00.	**SEPARATE.**
Mother has a savings account with Capital One, ending No. 5638, the balance of which, as of July 2021, was $1,960.00.	**SEPARATE.**
Mother has a checking account with Capital One, ending No. 9458, the balance of which, as of July 2021, was $109.00.	**SEPARATE.**
Mother has a checking account with Capital One, ending No. 0349, the balance of which, as of July 2021, was $3,890.00.	**SEPARATE.**
Mother has accounts with Orion Federal Credit Union, ending No. 0020, the balance of which, as of September 2021, was $3,244.00.	**SEPARATE.**
Mother has accounts with Orion Federal Credit Union, ending No. 0003, the balance of which, as of September 2021, was $4,210.	**SEPARATE.**

marital funds. The total amount of the payments and deposit appears to be $2,072.00. Mother disputes some of the payments but concedes that $1,790.00 of martial funds were used for the benefit of the property. The Court finds both this amount and the slightly larger amount alleged by Father to be similarly *de minimis* relative to the total value of the property—the competing valuations are $226,700.00 (Mother) / $228,800.00 (Father)—and the alleged commingling of the same to be insufficient to overcome the presumption that the property remained separate. Father offered no proof of transmutation.

The Court therefore classifies this property as Mother's separate property. As a result, the FMV of the property, the dispute as to which, amounting to $2,100.00, also is *de minimis*, is not relevant to the division of the marital estate.

[4] It is not clear from Mother's papers when Mother acquired this stock, and Father's papers make no mention of this stock. The Court therefore deems the stock Mother's separate property, consistent with its treatment of Father's FedEx stock, *see, infra,* note 13 and accompanying text.

Mother has accounts with Orion Federal Credit Union, ending No. 0004, the balance of which, as of September 2021, was $416.00.	**SEPARATE.**
Father owns a 2006 Ford Explorer, purchased before the parties' marriage.[5]	**SEPARATE.**
Father owns property at 5666 Myers Road, purchased before the marriage.[6]	**SEPARATE.**
Father owns property at 3718 Firethorne Drive, purchased before the marriage.[7]	**SEPARATE.**
Father owns property at 5677 Shagbark Drive, purchased before the marriage.[8]	**SEPARATE.**
Father owns a timeshare, purchased before the marriage.[9]	**SEPARATE.**
Father has a 401(k) account with Vanguard ending No. 1111, the balance of which, as of September 2021, was $330,657.00.	**SEPARATE:** $71,448.00 (balance as of October 24, 2015).[10] **MARITAL:** $259,209 + any additional increase since September 2021 (remaining amount).
Father has a Roth IRA with TD Ameritrade ending in No. 2888, the balance of which, as of September 2021, was $37,246.00.	**SEPARATE:** $13,619.00 (balance as of October 24, 2015).[11]

[5] In her proposed findings and conclusions, Mother acknowledges that Father "owned his 2006 Ford Explorer prior to the marriage" and that the truck is therefore separate property (at 8).

[6] There was competing proof as to the FMV of this property at trial. Mother, however, claims no interest in the property. As the Court classifies the property as separate, its FMV is not relevant to the division of the marital estate.

[7] *See, supra,* note 3 and accompanying text.

[8] *See, supra,* note 3 and accompanying text.

[9] Mother's papers mention Father's timeshare but provide no details about it. Father's papers do not mention the timeshare, and there was no testimony about the timeshare at trial. The Court understands from counsel for the parties that Father purchased the timeshare before marrying Mother. The Court therefore classifies the timeshare as Father's separate property. *See, supra,* note 3 and accompanying text.

[10] There was competing proof as to the pre-marital balance of this account. Mother's valuation ($65,129.03), as of the month of the parties' marriage, was slightly lower than Father's. Father's valuation, as of the specific date of the parties' marriage, was the amount reflected above. The Court adopts Father's valuation, which it finds to be most specific and therefore most credible.

[11] There was competing proof as to the pre-marital balance of this account. Mother contends that the entire balance of the account is marital property. The Court finds that the portion of the balance denoted above as separate was the balance of the account as of the date of the parties' marriage and therefore that the denoted portion is Father's separate property.

	MARITAL: $23,627 + any additional increase since September 2021 (remaining amount).
Father has a pension with Federal Express (portable), the balance of which, as of September 2021, was $118, 307.00.[12]	**SEPARATE:** $58,603.74 (balance as of October 24, 2015). **MARITAL:** $59,703.26 + any additional increase since September 2021 (remaining amount).
Father has stock in Federal Express, the value of which, as of October 1, 2021, was $18,643.00.	**SEPARATE.**[13]
Father has a savings account with PNC Bank ending in No. 4406, the balance of which, as of September 2021, was $10,861.00.	**SEPARATE.**
Father has a savings account with Regions Bank, ending No. 9445, the balance of which, as of September 2021, was $1,989.00.	**SEPARATE.**
Father has a savings account with CITI Bank, ending No. 1128, the balance of which, as of September 2021, was $105.00.	**SEPARATE.**
Father has a savings account with CITI Bank Bank, ending No. 2998, the balance of which, as of September 2021, was 0.00.	**SEPARATE.**
Father has a savings account with M1 Finance, ending No. 29-12, the balance of which, as of September 2021, was $6,152.00.	**SEPARATE.**
Father has a savings account with M1 Finance, ending No. 42-15, the balance of which, as of September 2021, was $9,872.00.	**SEPARATE.**
Father has a savings account with M1 Finance, ending No. 60-13, the balance of which, as of September 2021, was $321.00	**SEPARATE.**
Father has a savings account with M1 Spend, ending No. 4646, the balance of which, as of September 2021, was $0.00	**SEPARATE.**
Father has a money-market account with TD Ameritrade, ending No. 1292, the balance of which, as of September 2021, was $1,974.00	**SEPARATE.**

[12] In her proposed findings and conclusions, Mother states that Father has a separate, traditional pension with Federal Express that "accumulated prior to the marriage" and is therefore Father's separate property (at 8). (*Accord* Mother's LR 14 Mem., Ex. A).

[13] In her proposed findings and conclusions, Mother acknowledges that this stock was "awarded to [Father] prior to the marriage" and is therefore Father's separate property (at 8). (*Accord* Mother's LR 14 Mem., Ex. A.)

Father has a checking account with Regions Bank, ending No. 5987, the balance of which, as of September 2021, was 2,370.00	**SEPARATE.**
The parties already have divided home furnishings, décor, and other personal property.	**SEPARATE AS PREVIOUSLY AGREED BY THE PARTIES.**
Mother has credit card debt of $251.00.[14]	**SEPARATE:** The portion of Mother's credit card debt that was incurred, and the related interest that had accumulated on that portion, before the parties' marriage. **MARITAL:** The interest that accumulated on Mother's pre-marital credit card debt after the parties' marriage; the portion of Mother's credit card debt that was incurred during the marriage; and the interest that has accumulated on the portion of Mother's credit card debt that was incurred during the marriage.
Father has credit card debt in excess $28,000.00, of which Mother was unaware during the marriage.[15]	**SEPARATE:** The portion of Husband's credit card debt that was incurred, and the related interest that had accumulated on that portion, before the parties' marriage. **MARITAL:** The interest that accumulated on Husband's pre-marital credit card debt after the

[14] The credit card debt consists of the following account:

- Chase, Account No. 4787, with a balance of $251.00 as of August 24, 2021.

The Court understands from counsel for the parties that the balance of this account was $0.00 at the time of trial and that Mother currently has no credit card debt.

[15] The credit card debt consists of the following accounts:

- AMEX, Account No. 1004, with a balance of $312.01 as of June 24, 2021;
- AMEX, Account No. 2003, with a balance of $734.78 as of June 22, 2021;
- AMEX, Account No. 3003, with a balance of $1.49 as of June 22, 2021;
- Bank of America, Account No. 2081, with a balance of $12, 861.74 as of July 14, 2021;
- Chase, Account No. 2468, with a balance of $12.10 as of November 3, 2020;
- Chase, Account No. 6366, with a balance of 162.44 as of June 20, 2021;
- Chase, Account No. 8435, with a balance of 47.00 as of August 10, 2021;
- CITI, Account No. 0274, with a balance of $773.29 as of August 17, 2021;
- CITI, Account No. 1546, with a balance of $8,336.02 as of August 5, 2021; and
- Mastercard / PayPal, Account No. 6042, with a balance of $4,783.00 as of August 15, 2021.

Additional credit card accounts identified by the parties carried $0.00 balances at the time of trial.

	parties' marriage; the portion of Husband's credit card debt that was incurred during the marriage; and the interest that has accumulated on the portion of Husband's credit card debt that was incurred during the marriage.

B. Valuation & Division of Marital Assets.

Tenn. Code Ann. § 36-4-121(c) contains twelve factors that Tennessee trial courts consider when dividing marital property:

- (1) the duration of the marriage;
- (2) the age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities, and financial needs of each of the parties;
- (3) tangible and intangible contributions to the education, training, or increased earning power of the other party;
- (4) relative ability for future acquisitions of assets and income;
- (5) contributions to the acquisition, preservation, depreciation, or dissipation of the marital or separate property, including contributions to the marriage as a homemaker or wage earner, which should receive equal weight;[16]
- (6) the value of each party's separate property;
- (7) the estate of each party at the time of the marriage;
- (8) the economic circumstances of each party at the time the division of property is to become effective;
- (9) the tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) all relevant evidence in determining the value of an interest in a closely-held business;

[16] Subsection 5(B) defines "dissipation of assets" as "wasteful expenditures which reduce the marital property available for equitable distributions and which are made for a purpose contrary to the marriage either before or after a complaint for divorce or legal separation has been filed."

- (11) the amount of social security benefits available to each spouse; and
- (12) other necessary factors to consider the equities between the parties.

The Court of Appeals has cautioned, however, that "an equitable division of property is not necessarily an equal one." *Batson v. Batson*, 769 S.W.2d 849, 859 (1988). Nor is an equitable division of property "achieved by a mechanical application of the statutory factors." *Id.* Instead, trial courts must consider and weigh "the most relevant factors in light of the unique facts of [each] case." *Id.* Further, "[t]he factors are not listed in order of importance," and, thus, earlier-listed factors do not carry any more weight than later factors. *Bates v. Bates*, No. M2010-02590-COA-R3-CV, 2012 WL 2412447, at *4 (Tenn. Ct. App. June 26, 2012) (quoting *Powell v. Powell*, 124 S.W.3d 100, 108 n.8 (Tenn. Ct. App. 2003)).[17]

Four factors appear to be most relevant in this case: (1) the relatively short duration of the parties' marriage before separation (four years); (2) the parties' comparable relative ability for future acquisitions of assets and income; (3) the estate of each party at the time of the marriage; and (4) the value of each party's separate property. The Court finds that both Mother and Father here are highly-educated, successful, high-earning professionals and were so before their

[17] Importantly, *Bates* and *Batson* reached opposite outcomes. The *Bates* court distinguished *Batson*, holding that the *Batson* court's decision to restore the parties in that case "to their pre-marriage financial condition" rested on considerations unique to those parties: (1) the husband and wife in *Batson* had been married for five years before they separated; (2) the husband's annual income was more than nine times that of the wife's when they married; (3) the parties supported themselves during the marriage primarily on the husband's income; (4) a large part of the marital property consisted of the increase in value of the husband's retirement accounts, which would be diminished if liquidated; and (5) the wife's non-monetary contributions were best considered as part of the award of separate maintenance and support. *Bates*, 2012 WL 2412447, at *4. In *Bates*, different circumstances obtained: (1) the parties were married more than seven years when they were separated and had a child together; (2) the husband's separate property did not increase in value during the marriage; and (3) although the wife earned less than the husband, she earned her degree during the marriage and was able to support herself as a teacher. *Id.* Thus, the *Bates* court concluded that it would *not* be equitable "to place the parties in the same position they would have been in had the marriage never taken place." *Id.* at *5.

marriage.[18] The Court also finds that the parties' respective abilities to acquire assets and income are formidable and have not been diminished or enhanced by the marriage. Similarly, the Court finds that each party brought significant separate property, in the form of rental properties, investments, and retirement accounts, into their marriage. And although Husband earns more than Wife and currently possesses more assets than she does, the Court finds that each party is now, and was before the marriage, fully capable of supporting himself or herself.

On these facts, the equitable allocation of the parties' marital property is straightforward: The Court holds that the parties each should keep what they brought into the marriage—which is consistent with the *Batson* court's decision to restore the parties in that case "to their pre-marriage financial condition"—and that the property to which the parties both contributed should be divided pro rata and inversely based on the parties' respective incomes to account for the fact that Father earns more than Mother and benefits more than Mother from being allowed to keep the martial portions of his pre-marital assets—which aligns with the *Bates* court's holding that a return to the pre-marriage status quo was inequitable for the parties there.[19]

The Court therefore allocates the parties' marital property as follows:

FINDINGS	ALLOCATION
Portions of each party's separate property and debt, classified in § III(A), above, are marital property.	The martial portions of each party's separate assets and liabilities are **ALLOCATED TO THAT PARTY**—e.g., the entirety of Mother's retirement account with Church Health Center is allocated to her, and the entirety of Father's 401(k) account with Vanguard is allocated to him.

[18] *See, infra,* § III(C).

[19] *See, supra,* note 17 and accompanying text.

The parties' total gross annual income is $253,724.52,[20] of which Mother receives 42% and Father 58%. Father's 2020 capital gains based on stock trades equal $27, 150.00, which is 11% of the parties' total gross annual income.	For purposes of dividing the parties' remaining marital property only, the Court assigns Father an additional 11% of the parties' total gross annual income, based on Father's 2020 capital gains on stock trades, and reduces Mother's percentage accordingly. The Court therefore holds that Father receives 69% of the parties' total gross annual income and Mother 31%. The contents of the parties' joint bank account are **ALLOCATED INVERSELY BASED ON EACH PARTY'S PERCENTAGE OF THE TOTAL GROSS ANNUAL INCOME.** In other words, Mother receives 69% of the contents of the joint bank account, and Father receives 31%.[21]
By stipulation, the FMV of the parties' marital residence, at 3909 Crye Crest Cove, is $410,000.00. The parties are jointly obligated on the mortgage, the balance of which, as of August 3, 2021, was $253,062.78. Husband wishes to retain the marital residence, to which Wife does not object.	The net equity in the marital residence is **ALLOCATED INVERSELY BASED ON EACH PARTY'S PERCENTAGE OF THE TOTAL GROSS ANNUAL INCOME,** the parties' respective percentages being as stated above for the reasons stated above. In other words, Mother receives 69% of the net equity, and Father receives 31%. Father is **ORDERED** to refinance the mortgage on the marital residence within ninety (90) days of the entry of this **FINAL DECREE OF DIVORCE**, to thereby remove Mother's responsibility for the same, and to then pay to Mother 69% of the net equity in the marital residence. The net equity shall be determined by taking the FMV of $410,000.00 and deducting from that amount the mortgage balance at the time of the refinance and the closing costs associated with the refinance.
Mother owns a 2012 Nissan Murano, on which Father pays the insurance. Mother is the primary driver of the vehicle. Although the	**TO MOTHER.**

[20] *See* § III(C), *infra*, for the Court's findings that Mother's monthly gross income totals $8,966.512 ($107, 593.44 annually) and that Father's monthly gross income totals 12,177.59 ($146,131.08 annually).

[21] From the papers and the parties' testimony, the Court is aware of only one bank account jointly owned by Mother and Father: a savings account with CITI Bank, ending No. 3891. All other accounts owned by the parties appear to be in their individual names.

vehicle was purchased during the marriage,[22] both parties agree that Mother should have this vehicle.	
Mother has a 529 savings account for IMS, TN Stars College Savings, ending No. 45-01.[23]	**TO MOTHER FOR THE BENEFIT OF IMS.**
Father has a 529 savings account for IMS.[24]	**TO FATHER FOR THE BENEFIT OF IMS.**
Father recently purchased and owns a 2018 Ford Explorer.[25]	**TO FATHER.**

C. Income & Calculation of Child Support.

a. Findings of Fact

1). Mother is forty-one years old; she holds a bachelor's degree in psychology from Louisiana State University and an MBA from Freed Hardeman University.

2). For the past seven years, Mother has been the Director of Clinical Administration at Church Health, a full-time position that requires work on-site each day.

3). Mother's gross salary from Church Health is $8,794.51 per month.

4). Mother also earns net income of $171.61 per month from Mother's sole rental property at 733 North Evergreen.

5). Father is forty-two years old; he holds a bachelor's degree in business and an MBA from Auburn University.

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[22] *See, supra,* note 3 and accompanying text (citing, among other things, the 2006 decision of the Tennessee Court of Appeals in *Fox v. Fox*, 2006 WL 2535407, at *4, for the proposition that assets acquired by a spouse during a marriage are presumed to be marital property).

[23] As with many of their assets, Mother and Father recite different balances for this account: $3,766.00 as of June 30, 2021 (Mother) / $1,291.00 as of June 2021 (Father). The Court allocates the full balance of the account to Mother for the benefit of IMS.

[24] Mother's papers do not state the balance of this account, and Father's papers do not mention this account. The Court allocates the full balance of the account to Father for the benefit of IMS.

[25] Mother is unsure when Father purchased this vehicle but states that it was purchased during the pendency of this divorce and was partially financed. Father's papers do not mention the vehicle. The Court allocates the vehicle and any associated debt to Father, consistent with its treatment of the parties' other assets and liabilities above.

6). For the past twenty years, Father has been an IT manager for FedEx Services, which is a full-time position.

7). Since the onset of the COVID-19 pandemic, Father's position has been remote; currently, there are no plans for Father to return to the onsite office.

8). Father's gross base salary from FedEx Services is $10,955.00 per month.

9). Father also earns an average monthly bonus of $952.59 per month from FedEx Services.[26]

10). Finally, Father earns net income of $270.00 per month from Father's three rental properties.[27]

b. Conclusions of Law

For purposes of child support for IMS, the Court holds that Mother's monthly gross income totals $8,966.12, which includes Mother's salary from Church Health and net income of $171.61 from Mother's sole rental property at 733 North Evergreen.[28] For the same purposes, the Court holds that Father's monthly gross income totals $12,177.59, which includes Father's base salary from FedEx Services, Father's average monthly bonus from FedEx Services, and Father's net income from his three rental properties.[29]

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[26] Father's bonuses are not guaranteed and vary in amount. The above-listed amount represents 1/12 of the four-year average of Father's bonuses from 2021 ($28,928.76), 2020 ($0.00), 2019 ($0.00), and 2018 ($16,795.48).

[27] Mother contends that Father's monthly net rental income is $128.20 more, at $398.20 per month. The Court finds the annual difference of $1,538.40 to be *de minimis* in light of the parties' respective annual incomes and the Court's assignment of additional income to Father for purposes of dividing the parties' marital property.

[28] Father would include an additional $70.00 per month from Mother's brother, but the Court excludes this amount, based on Mother's testimony, as inconsistent from month-to-month and *de minimis*.

[29] Mother would include an additional $27,150.00 to account for Father's 2020 capital gains based on stock trades. But no proof has been adduced as to whether Father realizes such gains regularly, and, if so, in what amounts, such that the Court could make findings as to whether and how any such gains should be included in Father's income. There is therefore no foundation for

Father shall receive an in-home credit for his other minor children, CAS and ICS, and credit of $33.00 per month for IMS's health, dental, and vision insurance. For reasons discussed in greater detail below, *see* § III(D) and n.37, *infra*, Mother shall be solely responsible for IMS's tuition at St. George's from January 2022 through May 2022. The parties are **ORDERED** to prepare and submit new child support worksheets based on these figures and the discussion about custody, immediately below.

D. Custody of IMS & School Choice.

a. Findings of Fact

1). On March 25, 2020, this Court entered a Consent Order on Temporary Parenting Schedule, which provided that Father would have IMS at the following times:[30]

- every other week from Thursday (after school on school days / starting at 9:00 AM otherwise) to Monday (when school starts on school days / until 6:00 PM otherwise); and

- on off weeks, from Wednesday (after school on school days / starting at 9:00 AM otherwise) to Thursday (when school starts on school days / until 6:00 PM otherwise).

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adding $2,262.50—the monthly equivalent of Father's 2020 capital gains—to the calculation of Father's monthly income. The Court nevertheless accounts for Father's 2020 capital gains as an assigned percentage of the parties' total gross income in its division of marital property. *See* § III(B), *supra*. Mother also would include "multiple deposits into [Father's] checking account from lines of credit and credit card advances, as well as from Ticketmaster for the sale of Grizzlies basketball tickets, and from the sale of children's costumes," in Father's income. (Mother's Proposed Findings & Conclusions at 13.) (Father has started a small costume-selling business with CAS and ICS to teach them entrepreneurship.) But the Court finds that the deposits from lines of credit and credit card advances are incurred debt rather than earned or unearned income, and the testimony at trial reflected that the sales of Father's basketball tickets and the children's costumes either resulted in losses or uncertain and inconsistent *de minimis* revenue. The Court therefore declines to include these deposits in Father's income.

[30] The Order also stated that each party would allow the other to speak with or FaceTime IMS at least once every other day when the child is in his or her care and that Belinda Smith, Father's Mother, was not to provide childcare for IMS or to be left alone with IMS as the supervising adult. Ms. Smith has several serious health conditions and is unable to drive; she lives in an assisted living facility.

2). Otherwise, the March 25th Order stated that IMS would be with Mother.

3). The parties have exercised parenting time with IMS consistently with the March 25th Order since it was entered, although Father frequently has sought time with IMS beyond the provisions of the Order.

4). Mother wants this schedule to be made permanent, with a modification to the 9:00 AM exchange times to accommodate Father's schedule,[31] alternating even and odd years for holidays and school breaks, and every Mother's Day for Mother / Father's Day for Father.

5). Mother wants to be the primary residential parent, with a 225 (Mother) / 140 (Father) day split.

6). Father wants to revise the parenting schedule to four days on / four days off, to mirror his existing schedule with CAS and ICS; alternating even and odd years for school breaks and most holidays; every Mother's Day for Mother / Father's Day for Father; and every President's Day for Mother / MLK Day for Father.

7). Father wants to be the primary residential parent but proposes an even split of 182.5 days each for Mother and Father.

8). Both parents want major decisions to be joint, with caveats:

- Mother wants final decision-making authority when no joint decision can be made; and

- Father has five caveats; he wants (1) a good-faith duty to discuss all major decisions and an attempt to reach a joint decision; (2) deference to IMS's pediatrician, dentist, or other medical professional if the parties disagree about non-emergency health care decisions; (3) either parent to be able to take IMS to the church of his or her choice if they cannot agree on IMS's religious upbringing; (4) disagreements about education to be resolved by mediation, if Mother or Father requests it, and by the Court otherwise; and (5) Father to have final decision-making authority

[31] Mother suggests changing all exchange times to 6:00 PM.

about extracurricular activities that start during the months of August-January, and Mother for activities that start from February through July.

9). Mother contends that she is IMS's primary caregiver, scheduling and attending all doctor's appointments, communicating with schools and teachers, scheduling playdates, and enrolling IMS in extracurricular activities.

10). Mother nursed IMS for twenty-six months, takes IMS to school most days, and washes IMS's clothing.

11). Mother claims that Father has limited interest and involvement in IMS's care and upbringing and is more concerned that IMS has a relationship with his brothers, CAS and ICS, than with spending time with IMS individually.

12). Mother also feels that Father uses excessive corporal punishment with CAS and ICS—there is a history of involvement by the Department of Children's Services (DCS) with CAS—that he does not take ICS's fish allergy seriously, and that he does not encourage a relationship between them and their mother.

13). For these reasons and others, Mother feels that more time with her would be best for IMS; Mother specifically does not want corporal punishment for IMS.

14). Father feels that Mother struggles with unhappiness, began questioning their marriage less than a year after it started, and at some point gave up."[32]

15). Father contends that Mother showed no interest in parenting until IMS was born, that she declined to travel with Father and his other two children or to attend dinner, sporting events, and other activities with them.

16). Father feels that Mother insists on performing most tasks for IMS, such as making breakfast, but refuses to do the same for CAS and ICS.

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[32] The parties attended counseling, which ultimately was unsuccessful.

17). At one time, Mother did not have a close relationship with Father's ex-wife; Mother advised Father that his ex-wife was trying to build a case against him.

18). Father and Father's ex-wife have difficulty communicating, have been involved in post-divorce litigation, and have a parenting coordinator.

19). At present, Mother and Father's ex-wife get along well and work to facilitate a positive relationship between their three boys.

20). Before Mother moved out of the marital residence, Mother and Father's ex-wife would get together with all three boys at the ex-wife's home once or twice a month.

21). The relationship between IMS and his brothers is great; they relate to each other as full brothers.

22). Mother and Father's ex-wife agree that all three boys should continue to have a relationship both when IMS is with Mother and when he is with Father.

23). CAS and ICS attend Collierville public schools; both boys are well adjusted, perform well academically, and are involved in extracurricular activities.

24). Mother and Father purchased the marital residence at 3909 Crye Crest Cove in part because it is located in the Germantown Municipal School District.

25). Because IMS is currently too young to attend Germantown's public schools, Mother enrolled him in St. George's Independent School's Little Georgie's program.

26). Previously, however, Mother and Father had agreed that IMS would attend Christ the King, and Mother paid a deposit for the same.

27). Mother's mom later told Father that IMS was instead enrolled at St. George's.

28). Mother did not discuss enrolling IMS at St. George's with Father before doing so.

29). When he becomes eligible for public school enrollment in August 2022, Mother prefers that IMS continue to attend school at St. George's.

30). Father is willing to keep IMS enrolled at St. George's only until IMS becomes eligible for public school in August 2022; at that time, Father prefers IMS to attend school at Germantown's public schools.

31). Mother prefers that IMS continue to attend school at St. George's so strongly that she is willing to pay IMS's tuition at St. George's without assistance from Father, should it come to that; she believes, however, that Father should bear some of the expense.

32). IMS has now been enrolled at St. George's since he was eighteen months old.

33). IMS has done well at St. George's and has many friends there; he is happy, well-adjusted, and healthy.

34). Father is concerned that St. George's is insufficiently diverse and is more expensive than comparable private-school options.

35). Mother feels that Father's concerns lack merit given that Germantown's public schools do not enjoy a reputation for diversity relative to other schools in Memphis and given the many social and extra-curricular offerings at St. George's.

36). Because IMS has been enrolled at St. George's since he was eighteen months old, the tuition for St. George's was included in the child support worksheet, and Father has paid his pro rata share of the tuition since he began paying temporary child support to Mother. (*See* October 28, 2020, Order on Motion Pendente Lite.)

37). Mother and Father both have benefitted from the work-related childcare and summer camp provided by St. George's.

38). Father agrees that aftercare for IMS is important for Mother's and Father's full-time work schedules.

39). Both St. George's and Germantown's public schools offer after-care.

b. Conclusions of Law

The parties have presented to the Court competing proposed permanent parenting plans, consistent with their preferences described above. Tenn. Code Ann. § 36-6-404(a) establishes nine requirements that permanent parenting plans (PPPs) must satisfy:

- (1) provide for the child's changing needs as the child grows and matures so as to limit the need for later modification;
- (2) establish the authority and responsibilities of each parent;
- (3) minimize the child's exposure to harmful parental conflict;
- (4) provide a process for dispute resolution before Court action unless Court action is necessary to protect the welfare of a child or a parent;[33]
- (5) allocate decision-making authority to one or both parents regarding the child's education, health care, extracurricular activities, and religious upbringing;[34]
- (6) state that each parent may make day-to-day decisions regarding the care of the child when the child is with him or her;
- (7) require a good-faith effort on the part of both parents to resolve disputes;
- (8) require annual reporting by the child support obligor to the child support obligee; and
- (9) require each parent to arrange alternative transportation for the child if that parent's driver's license becomes invalid for any reason.

Subsection 404(b), in accordance with these requirements, states that residential parenting schedules must be "consistent with the child's developmental level and the family's social and economic circumstances" and must "encourage each parent to maintain a loving, stable, and

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[33] This provision is part of § 404(a)(4), which includes a passing reference to a second statute (Tenn. Code Ann. § 36-6-406) that addresses abandonment, abuse, and other circumstances that fortunately do not exist here. Subsection 404(a)(4) also establishes specific requirements for the dispute resolution process that PPPs must include.

[34] This provision is part of § 404(a)(5), which also authorizes the parties to agree that either parent may make emergency decisions that affect the health or safety of the child.

nurturing relationship with the child." It then refers the courts to § 36-6-106(a),[35] which sets out sixteen factors for courts to consider when determining what is in the best interests of a child.[36]

In applying the best-interest factors, § 36-6-106(a) directs courts to "order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child" and to "consider all relevant factors." Similarly, the Tennessee Supreme Court observes that "decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors" and, thus, that "determining the details of parenting plans is peculiarly within the broad discretion of the trial judge." *Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (2013) (internal citations and quotation marks omitted).

Section 36-6-106(a)'s best-interest factors, and their application to the facts at issue in this case, are as follows:

- Factor 1: **The strength, nature, and stability of the child's relationship with each parent, including whether one parent has performed the majority of parenting responsibilities relating to the child's daily needs.**

This factor favors **Mother**. There is no question that both parents love IMS and have worked to foster and support a strong, healthy, and stable bond between themselves and IMS. Mother questions whether Father wants time with IMS for himself or to facilitate a positive relationship between all three of his sons. And Father feels that Mother belatedly manifested an interest in parenting and does more for IMS than for his brothers, who are not Mother's children.

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[35] Like § 36-6-404(a), § 36-6-404(b) makes a passing reference to § 36-6-406, which does not apply here. *See, supra*, note 2 and accompanying text.

[36] As the Court of Appeals has explained, "[t]here is little substantive difference between the factors applicable to parenting plans set out in Tenn. Code Ann. § 36-6-404(b), and those applicable to custody determinations, set out in Tenn. Code Ann. § 36-6-106(a), as far as determining comparative fitness and the best interests of the child." *Dobbs v. Dobbs*, No. M2011-01523-COA-R3-CV, 2012 WL 3201938, at *1 n.1 (Tenn. Ct. App. Aug. 7, 2012).

But neither parent questions the love of the other for IMS or the ability of each parent to maintain a strong, positive, and stable relationship with IMS.

Here, however, the record reflects that Mother has been the primary provider of IMS's basic needs. Mother nursed IMS for twenty-six months, takes IMS to school most days, and washes IMS's clothing. Even in his concerns about Mother, Father acknowledges that Mother insists on performing most tasks for IMS. Father also does not dispute that Mother takes the lead on scheduling and attending IMS's doctor's appointments, communicating with schools and teachers, scheduling playdates, and enrolling IMS in extracurricular activities.[37] In fact, Father "admits . . . that this factor weigh[s] slightly in [Mother's] favor[.]" (Father's Trial Mem. at 14.)

- Factor 2: **Each parent's past and potential for future performance of parenting responsibilities, encouraging a continuing parent-child relationship between the child and both of the child's parents, and honoring and facilitating court-ordered parenting arrangements and rights.**

For reasons stated under **Factor 1**,[38] **Factor 2** also favors **Mother**. Mother also consistently has demonstrated her willingness to facilitate a positive relationship between IMS and his brothers, coordinating and collaborating with Father's ex-wife to ensure that all three boys spend time together whether IMS is with Mother or Father.[39]

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[37] The Court recognizes that Mother enrolled IMS at St. George's without consulting with Father and contrary to Mother and Father's prior agreement about Christ the King and does not give that conduct positive weight in assessing this factor. The Court also factors this circumstance into its custody decisions below.

[38] *See, supra*, note 37 and accompanying text.

[39] Mother contends that this factor also favors her because Father repeatedly has demonstrated an unwillingness to follow Court Orders, which the Court addresses in § III(E), *infra*. Father contends that Mother has been inflexible with regard to the temporary parenting schedule and so impeded his parenting of IMS.

- Factor 3: **Refusal to attend a court-ordered parent education seminar.**

  This factor is **neutral**: Both parents have attended the Court-Ordered parenting seminar.[40]

- Factor 4: **The disposition of each parent to provide the child with food, clothing, medical care, education, and other necessary care.**

This factor also is **neutral**. Although Mother has been the primary provider of IMS's basic needs, Father is willing and able to meet IMS's needs. Both parties are highly educated, successful professionals who love and spend time with IMS. Father frequently has requested additional time with IMS since the temporary parenting schedule under the March 25th Order has been in place. And Father's proposed PPP proposes equal time with IMS for himself and for Mother. Mother questions the reason that Father wishes to spend additional time with IMS, feeling that Father is more concerned about facilitating a positive relationship between all of his sons than with spending time individually with IMS. *See* **Factor 1,** *supra*. But Mother also admits that "[b]oth parties are able to adequately provide [IMS] with food, clothing, medical care, education, and other necessary care." (Mother's Proposed Findings & Conclusions at 19.)

- Factor 5: **The degree to which a parent has been the primary caregiver**.

  This factor favors **Mother** for the reasons stated under **Factor 1**, above.

- Factor 6: **The love, affection, and emotional ties existing between each parent and the child**.

This factor is **neutral**. Both parents have fostered, and continue to support, a strong, healthy, and stable bond between themselves and IMS and acknowledge the same about the other.

- Factor 7: **The emotional needs and developmental level of the child**.

This factor favors **Father.** The paramount statutory concern under 36-6-106(a) is "a custody arrangement that permits both parents to enjoy the maximum participation possible in the

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[40] Mother filed on November 22, 2019, a notice that she had completed the parenting seminar on November 20, 2019. Father does not appear to have filed a notice but states that he likewise has completed the parenting seminar. Neither parent has refused to attend the parenting seminar.

life of the child," consistent with the child's best interests. There is no question that both parents love IMS and have worked to foster and support a strong, healthy, and stable bond between themselves and Isaac. *See, e.g.*, **Factors 4** and **6**, *supra*. But Father's proposed PPP proposes equal time with IMS for himself and for Mother, which is important for IMS's emotional needs and developmental level, especially as IMS begins formal schooling this fall.

IMS is happy, well-adjusted, and healthy and enjoys a positive relationship with Father's other sons. *See, e.g.*, **Factor 9**, *infra*. Mother is concerned that the purpose of the schedule proposed by Father—four days on, four days off—has more to do with convenience for him than with IMS's best interest. She points out that Father resisted the imposition of a similar schedule for CAS and ICS in litigation with Father's ex-wife and argues that Father is more interested in the strength of the boys' relationships with each other than in his own relationship with IMS. *See* **Factors 1** and **4**, *supra*. But the record reflects Father's feeling that his proposed schedule will benefit IMS both because it will maximize IMS's time with both parents and his brothers and because Father has seen how that schedule has benefitted his other sons.

- Factor 8: **The moral, physical, mental, and emotional fitness of each parent.**

This factor favors **Mother.**[41] Because the parties have stipulated to a declaration of divorce under Tenn. Code Ann. § 36-4-129 rather than disputed the grounds therefor, the inappropriate marital conduct in which Mother alleges that Father engaged is not at issue here. But Father's difficult relationship with CAS and ICS's mother, the history of DCS involvement with CAS, as well as certain additional conduct by Father, addressed in § III(E), below, gives Mother an advantage under this factor. Father has concerns about Mother's emotional fitness, feeling that she struggles with unhappiness. But to the extent that Mother is unhappy, the testimony at trial and the

[41] Mother, notably, would rate this factor neutral rather than in her favor, stating that "each party is similarly situated as it relates to their fitness to parent [IMS]." (Proposed Findings & Conclusions at 20.)

record reflect that she is unhappy with Father, not with IMS or with being a mother to IMS.[42] To the contrary, Mother appears to delight in parenting IMS.

- Factor 9: **The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities.**

This factor favors **Father**, given Father's two other sons and efforts to facilitate and support a positive relationship between all three boys even though they have different mothers. As mentioned above, *see, e.g.*, **Factors 1, 4** and **7**, *supra*, one of Mother's chief concerns is that Father wants additional time with IMS primarily to enable IMS to spend more time with CAS and ICS rather than with Father. It is clear from the record of this matter that Mother also has made significant efforts to facilitate and support a positive relationship between IMS, CAS, and ICS. But this factor still favors Father because Father's proposed parenting schedule for IMS would align with Father's existing schedule for CAS and ICS. *See* **Factor 7**, *supra*.

- Factor 10: **The importance of continuity in the child's life and the length of time that the child has lived in a stable, satisfactory environment.**

This factor favors **Mother**, both because IMS now has been at St. George's since he was eighteen months old and because the parties have exercised parenting time with IMS consistently with the March 25th Order for more than two years now.[43] IMS has done well at St. George's and has many friends there; he is happy, well-adjusted, and healthy.

- Factor 11: **Evidence of physical or emotional abuse to the child.**

This factor is **not applicable**.

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[42] Father claims that Mother struggles with anxiety as well as unhappiness and that, by her own admission, Mother is selfish and jealous. (Trial Mem. at 16.) But vis-à-vis IMS rather than Father himself, the worst that Father alleges about Mother is that she "seemingly considers [IMS] a confidant, and may have the propensity to involve [IMS] in adult matters by interrogating [him]." (*Id.* (underscore added).) The record does not reflect any evidence of this speculative concern.

[43] *See, supra*, note 37 and accompanying text.

- Factor 12: **The character and behavior of any other person who resides in or frequents the home of a parent and such parent's interactions with the child.**

This factor is **neutral**. IMS has a positive, stable relationship with his brothers, with whom Father has a parenting schedule, and Father does not live with CAS and ICS's mother, with whom Father has a difficult relationship. Father's stated concerns relevant to this factor have nothing to do with Mother but rather with CAS and ICS's mother, with whom Mother has developed a positive relationship.[44]

- Factor 13: **The reasonable preference of the child if twelve (12) years of age or older.**

This factor is **not applicable** because IMS is five years old.

- Factor 14: **Each parent's employment schedule**.

This factor favors **Father**. Mother cites difficulties that Father has had in keeping to the schedule stated in the March 25th Order, but that schedule never was intended to be permanent, and Father frequently has requested additional time with IMS. Now that Father's position at FedEx is remote, his schedule should allow greater flexibility both in terms of the time that he spends with IMS and in transporting IMS to school and otherwise.

- Factor 15: **Any other factors deemed relevant by the Court**.

This factor is **not applicable**. Mother notes that the parties now have been operating under the temporary parenting schedule set by the March 25th Order for two years, but the Court already has taken that fact into consideration under **Factor 10**.

- Factor 16: **Whether a parent has failed to pay Court-ordered child support for three (3) years or more.**

This factor is **not applicable.**

* * *

[44] (*See* Father's Trial Mem. at 18.)

There is no question that more of the best-interest factors favor **Mother** (1, 2, 5, 8, 10) than **Father** (7, 9, 14). For that reason, the Court designates Mother IMS's **PRIMARY RESIDENTIAL PARENT**. Similarly, the Court **ORDERS** that IMS shall remain at St. George's after May 2022 unless otherwise agreed by Mother and Father or Ordered by the Court, given the importance of continuity and stability to IMS's emotional and developmental well-being; the fact that IMS now has attended St. George's for most of his young life;[45] the fact that IMS is happy, healthy, and well-adjusted; the financial ability of both parents to afford St. George's and its many offerings; the fact that IMS will not be in school with his brothers, who attend Collierville's public schools, whether he attends St. George's or Germantown's public schools, as Father prefers; and the fact that the record does not reflect any advantages for Germantown's public schools relative to St. George's that would address Father's concerns about diversity.[46] After May 2022, the parties are **ORDERED** to divide equally tuition and all other costs associated with IMS's attendance at St. George's.

That said, the stability and continuity that favor Mother were partly achieved in derogation of Father's parental rights.[47] Additionally, almost as many best-interest factors as favor Mother are neutral (3, 4, 6, 12), which reflects the fitness of Mother and Father. Mother's concerns about the parenting schedule proposed by Father appear to have more to do with what she suspects are Father's priorities—positive relationships between all of his sons and not individual time for Father with IMS—rather than with potential harm to IMS or inconvenience, in terms of transportation or otherwise, for either parent. Finally, the factors that favor Father all vindicate the paramount

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45 *See, supra*, note 37 and accompanying text.

46 The Court addresses the allocation of costs for St. George's in § III(D), *infra*.

47 *See, supra*, note 37 and accompanying text.

statutory concern that custody arrangements "permit[ ] both parents to enjoy the maximum participation possible in the life of the child." Tenn. Code Ann. § 36-6-106(a).

For these reasons, the Court **ORDERS** that the following four parameters govern the parties' parenting schedule from this point forward: (1) Father's proposed parenting schedule—four-days on / four days off and 182.5 days each; (2) the joint decision-making allocation for major decisions that both parties propose; (3) Mother's proposals for holidays and school breaks (alternating even and odd years and every Mother's Day for Mother / Father's Day for Father); and (4) the five caveats to joint decision-making that Father proposes, *see* § III(D)(8), *supra*.

E. Mother's Petition for Criminal Contempt.

a. Findings of Fact

1). On October 16, 2020, this Court entered a Consent Order that adopted the Parental Bill of Rights in Tenn. Code Ann. § 36-6-101(a)(3)(B)(i)-(ix).

2). Among other things,[48] the October 16th Order expanded the seventh Parental Right, requiring that each parent provide the other with a specific itinerary two days (48 hours) before any travel with IMS that would last more than a day (24 hours):

- planned dates and times of departure and return;
- the intended destination(s);
- the mode(s) of transportation; and
- the address(es) and telephone number(s) at which the traveling parent and IMS could be reached.

3). The October 16th Order also stated that if covered travel took place via plane, train, or boat, then the traveling parent would provide the departure, arrival, connection, and trip number(s) as part of the required itinerary.

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[48] The October 16th Order also "reserved for future determination" Mother's request for attorney fees for the motion that resulted in the Order. *See* § III(F), *infra*.

4). Mother's October 1, 2021, Petition for Criminal Contempt asserts that Father willfully violated the October 16th Order on seven different occasions.

5). In his response of October 25, 2021, and at trial, Father acknowledged five of the infractions but claimed that none of the seven was willful (*E.g.*, Hr'g Tr., Vol. II, at 69:11-16).

6). With respect to Father's trips to Birmingham with IMS on February 7, 2021, and August 27, 2021, Father claimed that the trips did not exceed twenty-four hours, and thus that he did not violate the October 16th Order. (*Id.* at 71: 5-13; 79: 11-14.)

7). With respect to the other five alleged violations, Father testified to various circumstances that he believed demonstrated a lack of willfulness: For example, Father claimed that his trip to Birmingham with IMS on May 7, 2021, was "a last-minute decision" and "wasn't something that [he] knew forty-eight hours in advance." (*Id.* at 72: 15-19.)

8). Father also testified that he thought certain information that was omitted from his itineraries nevertheless was implied.[49]

9). Father testified as well that Mother sometimes traveled with IMS for more than twenty-four hours without providing to Father all of the information required by the October 16th Order. (*Id.* at 78:11-24.)

10). Mother feels that some of Father's testimony was disingenuous:

- For example, on cross-examination about his trip with IMS on May 7, 2021, Father testified that he failed to comply with the October 16th Order because "the way [he] read th[e] order, not an attorney, it said shall provide, versus must provide." (*Id.* at 105:11-106:5.)

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[49] (*See, e.g.*, Hr'g Tr., Vol. II, at 69:24-70:5 ("Yeah, so, I mean, we have always taken trips to Birmingham. Yes, Birmingham has an airport, but I thought it was implied if we were going to Birmingham it would be by car."); 72:24-73:4 (explaining that Father never has traveled to Birmingham except by car); 70:6-11 ("Now, at some point, my father moved. I did not provide that updated address. It wasn't a willful or unwilful thing, but I would think that if [Mother] had an issue or needed to know the address, she would just reach out and say, hey, I need your dad's new address.").)

- Similarly, on cross-examination about his trip with IMS on June 3, 2021, Father testified that he failed to comply with the October 16th Order because it, like the May 7, 2021, trip, "was a last-minute trip" (*id.* at 106:21-107:5), but later admitted that he had booked the trip on June 1, 2021 (*id.* at 107:6-108:6).[50]

b. Conclusions of Law

Tennessee courts possess the power to punish willful disobedience of their orders. *E.g., Konvalinka v. Chattanooga–Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 354 (Tenn. 2008). Once broad and undefined at common law, *see, e.g., Nye v. United States*, 313 U.S. 33, 43-47 (1941), this power is now purely statutory, channeled by the General Assembly "[f]or the effectual exercise of [judicial] powers," Tenn. Code Ann. § 16-1-103, and to "maintain the integrity of [court] orders," *Konvalinka*, 249 S.W.3d at 354. Contempt power remains "essential to the protection and existence of the courts and the proper administration of justice." *Id.* But a person may not be found in criminal contempt unless he receives the notice required by Tennessee Rule of Criminal Procedure 42(b), and his accuser presents "proof beyond a reasonable doubt that [he] ha[s] willfully failed to comply with the court's order." *Long v. McAllister-Long*, 221 S.W.3d 1, 13 (Tenn. Ct. App. 2006).

Mother has met that standard of proof as to five of the seven alleged instances of criminal contempt by Father, to a point: There is no dispute that they occurred. Father maintains, however, that the infractions were not willful. The Tennessee Supreme Court has explained that "acting contrary to a known duty may constitute willfulness for the purpose of a ***civil*** contempt

[50] Father insisted, however, that his failure to give Mother 48-hours' notice of the trip still was not willful because he sometimes purchases refundable tickets for trips that do not happen, and so just because he purchased a ticket on June 1 did not mean that he actually would go on June 3. (Hr'g Tr., Vol. II, at 108:11-23.) (He did go, though. *Id.* at 108:24-109:4.)

proceeding." *Konvalinka*, 249 S.W.3d at 357 (emphasis added). And were that the standard here, there is little doubt that Father's conduct would meet it.

But criminal contempt requires a higher standard of culpability for willfulness. "In the criminal context, a willful act is one undertaken for a bad purpose." *Id.* (quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998), and *State v. Braden*, 867 S.W.2d 750, 761 (Tenn. Crim. App. 1993)). No bad purpose arises from the record of Father's infractions in this case. *Cf. Braden*, 867 S.W.2d at 761 ("An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids.")

To be clear, many of Father's explanations for his conduct are not credible. Like Mother, Father is a highly-educated and successful professional. He understands the meaning of "shall," recognizes that implied understandings do not satisfy the specific requirements for an itinerary under the October 16th Order, and knows that when he buys a ticket two days before a trip with IMS, same-day notice to Mother is insufficient.

Still, the standard for criminal contempt requires more. And on the record of this case, the Court cannot find that it is satisfied. Mother's Petition for Criminal Contempt is therefore **DENIED.**

F. <u>Attorney's Fees & Costs</u>.

a. <u>Findings of Fact</u>

1). Mother has requested attorney fees on several occasions. (*See* March 25th Order, October 16th Order, October 28th Pendente Lite Order.)

2). Father did not pay financial support for IMS or presumptive child support until the October 28th Pendente Lite Order was entered.

3). As part of the October 28th Pendente Lite Order, the Court awarded Mother "a partial payment of attorney fees in the amount of $5,000.00," reserving her request for additional

fees, and stating that Father would be "given credit for the partial fee" if the Court were to grant additional fees.

4). Mother's fee affidavit states that she incurred $10,224.05 in attorney fees for the motion that resulted in the October 28th Pendente Lite Order.

5). Mother's total request for fees and costs related to this action is $30,000.00, $5,000 of which is for Mother's Petition for Criminal Contempt.

b. Conclusions of Law

In divorce cases, Tennessee courts generally characterize an award of attorney fees to an economically disadvantaged spouse as alimony *in solido*. *E.g., Owens v. Owens*, 241 S.W.3d 478, 495 (Tenn. Ct. App. 2007). The General Assembly has stated that courts must consider four factors when determining whether attorney fees and expenses should be awarded as alimony *in solido*:

- (1) the factors in Tenn. Code Ann. § 36-5-121(i);[51]
- (2) the total amount of fees and expenses incurred and paid by each party;
- (3) the reasonableness of the fees under Tennessee Rule of Professional Conduct 1.5; and
- (4) whether the attorney fees and expenses were necessary.

Tenn. Code Ann. § 36-5-121(h)(1)(B).[52] The type and amount of any alimony award rests "within the sound discretion of the trial court in view of the particular circumstances of the case." *Riggs v. Riggs*, 250 S.W.3d 453, 456-57 (Tenn. Ct. App. 2007).

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[51] Amended by the General Assembly, effective March 31, 2022, to add super-subsections (i)(1), (2), and (3). 2022 Tennessee Laws Pub. Ch. 762 (S.B. 2385). The amendments do not impact the outcome of this matter.

[52] Amended by the General Assembly, effective March 31, 2022, to replace former § 36-5-121(h)(1) with super-subsections (h)(1)(A) and (B). 2022 Tennessee Laws Pub. Ch. 762 (S.B. 2385). The amendments do not impact the outcome of this matter.

Having considered the above-referenced factors under both the former and recently amended versions of § 36-5-121,[53] the Court concludes that Mother's attorney fees of $10,224.05 for the motion that resulted in the October 28th Pendente Lite Order were reasonable and necessary and **ORDERS** that Father pay the balance of the fee award, given the $5,000.00 partial payment that the Court previously Ordered, as alimony *in solido* within ninety (90) days of this **ORDER.**

No fees or costs are awarded in connection with the October 16th Order given the Court's **DENIAL** of Mother's Petition for Criminal Contempt.

The Court holds that the remaining fees and costs requested by Mother are, although reasonable and necessary, **DENIED**. Additional fees are not appropriate as an award of alimony *in solido* given the amount of fees incurred by both parties, the respective incomes of both parties, and the Court's division of the marital estate, which accounts for the fact that Father earns more than Mother and allocates to Mother a significantly larger portion of the parties' equity in the marital residence than to Father.

* * *

SO ORDERED, this 27th day of April 2022.

CHANCELLOR GADSON W. PERRY

27 April 2022

DATE

[53] *See, supra*, notes 2, 51, and 52.

CERTIFICATE OF SERVICE

I hereby certify that I have sent the foregoing FINAL DECREE OF DIVORCE by US Mail, postage pre-paid, and/or by electronic means, to the following, on this 28 day of April, 2021.

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

ANTONIA ANDREANA SMITH,

Petitioner,

CH-19-1592
Part I

v.

ANTHONY KENYATTA SMITH,

Respondent.

ORDER SUPPLEMENTING AND FINALIZING FDD

THIS MATTER came before the Honorable Gadson William Perry, Chancellor of Part One of the Shelby County Chancery Court, to supplement the Final Decree of Divorce entered on April 27, 2022, as to five issues:

ISSUE I:
FDD v. AMENDED TPP RE: ALLOCATION OF PARENTING TIME

On March 14, 2022, in anticipation of the Court's entry of the FDD, the parties proposed, and the Court entered, a Consent Order that amended the temporary parenting schedule in effect since March 25, 2020. The parties may continue to abide by the March 14 Consent Order's allocation of parenting time, notwithstanding the FDD's different allocation, for as long as that arrangement works for both parties.

ISSUE II:
OCTOBER 16, 2020, EXPANSION OF THE PARENTAL BILL OF RIGHTS

At a status conference on June 24, 2022, Mother orally moved the Court to make permanent the expansion of the Parental Bill of Rights[1] in the Court's Consent Order of October 16, 2020.

[1] *See* Tenn. Code Ann. § 36-6-101(a)(3)(B)(i)-(ix).

Naturally, Father objected. Alleged violations of the Consent Order formed the basis of Mother's October 1, 2021, Petition for Criminal Contempt against Father.

Having denied Mother's Petition (*see* FDD at 28-31), named Mother Primary Residential Parent (*id.* at 27), and otherwise allocated parenting time between the parties to serve IMS's best interests (*see id.* at 15-28), the Court concludes that the Parental Bill of Rights sufficiently safeguards the statutory interests of the parties and their child without expansion. Mother's oral motion is therefore **DENIED.**

ISSUE III:
PPP FORM § I(J): "OTHER"

The parties' competing proposed parenting plans (PPP) included several different provisions in § I(J): Other. Consistent with the FDD, the parties have submitted a consolidated PPP Order, which is attached to this **ORDER** as **Exhibit A**, with their respective proposals for § I(J) highlighted in pink (Mother) and blue (Father). The Court **ADOPTS both parties'** proposals, with the following caveats:

- The parties equally shall pay the tuition and all other associated costs with IMS's attendance at St. George's Independent School as of June 1, 2022.[2] For reasons detailed in the FDD (*see. e.g.*, pp. 15, 18 (specifically, ¶¶ 24-28), and n. 37), Mother shall be solely responsible for IMS's tuition at St. George's from January 2022 through May 2022;

- With respect to agreed-upon extracurricular activities and summer camps, the parties each shall pay one-half of all associated costs. If the parties cannot agree upon a given activity or camp, then the parent who enrolls IMS in the activity shall be 100% responsible for the costs of the activity or camp and for transporting IMS to and from the activity or camp. Unilateral enrollments must be substantially consistent with the other parent's parenting time; and

- The use of physical discipline for IMS shall be left to the discretion of each parent during that person's parenting time.

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[2] "[O]ther associated costs" include without limitation books, uniforms, meal plans, before- and after-care, required technology, and other required fees.

ISSUE IV:
PPP FORM § III(B): "FEDERAL INCOME TAX EXEMPTION"

The parties disagree about who should be able to claim the tax exemption or credit for IMS under § III(B) of the PPP Order. In light of Mother's designation as the Primary Residential Parent (*see* FDD at 27) and Father's greater comparative income (*compare id.* at 13 (¶¶ 3-4), *with id.* at 14-15 (¶¶ 8-10) and nn. 26-29)), the Court awards **Mother** the right to claim all exemptions, credits, and tax benefits related to IMS each year.

ISSUE V:
PPP FORM § III(D): "HEATH AND DENTAL INSURANCE"

The parties disagree about the relative portions of IMS's uncovered reasonable and necessary medical expenses for which each parent should be responsible under § III(D) of the PPP Order. Mother proposes pro rata coverage, and Father proposes equal coverage. Because the Court has awarded equal time with IMS to each parent and because Father will maintain health and dental insurance for IMS, the Court agrees with **Father** that responsibility for IMS's uncovered reasonable and necessary medical expenses should be equal and **ORDERS** the same.

REMAINING PROVISIONS OF THE PPP ORDER

The PPP Order is otherwise adopted in full and incorporated into this **ORDER.**[3]

***

CONCLUSION

These additional matters having been decided, the FDD of April 27, 2022, is now **FINAL.** All costs other than those allocated in the FDD or above in this **ORDER** are divided equally between the parties.

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[3] At the June 24 status conference, the parties advised the Court that since submitting the PPP Order, the parties have agreed to change both 6:00 PM times for the July 4 holiday in § I(C) to 8:30 AM. The Court **APPROVES** this change. At the same conference, Father asked whether he must complete a separate seminar as required by § VIII of the PPP Order even though he completed a parenting seminar in connection with his prior divorce. The Court answered "yes."

SO ORDERED this 27 day of June 2022.

CHANCELLOR GADSON W. PERRY

DATE: 27 June 2022

CERTIFICATE OF SERVICE

I hereby certify that I have sent the foregoing ORDER SUPPLEMENTING AND FINALIZING FDD by US Mail, postage pre-paid, and/or by electronic means, to the following, on this 16 day of June, 2022.

Melissa Berry, Esq.
Rebecca Bobo, Esq.
5050 Poplar Ave, Suite 918
Memphis, TN 38157

Attorneys for Mother

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Memphis, TN 38117

Attorney for Father

Deputy Clerk & Master

Sample 2

CITY OF MEMPHIS
LINE-OF-DUTY PENSION APPEAL

JOHN R. GREENE,

Claimant,

vs.

Docket No.: 10
City No.: 4892427

CITY OF MEMPHIS,

Respondent.

HEARING ORDER: PART 2 OF 2

THIS MATTER came before the Honorable Gadson W. Perry, Administrative Law Judge (ALJ), under the contested case provisions of the Uniform Administrative Procedures Act (UAPA), Tenn Code Ann. § 4-5-301, *et seq*. Claimant John R. Greene appeals the denial by Respondent City of Memphis of line-of-duty (LOD) pension benefits for Claimant's heart condition. On November 19, 2024, after an evidentiary hearing, the ALJ issued **Part 1** of this **ORDER (PART 1)**,[1] which made the following three **CONCLUSIONS:**

1. Claimant is entitled to the statutory presumption of causation in Tenn Code Ann. § 7-51-201(a);

2. Respondent has "shown . . . competent medical evidence" that rebuts the statutory presumption in § 7-51-201(a); and

3. The burden of proof thus shifts to Claimant to establish the causation of his heart condition by a preponderance of the evidence.[2]

---

[1] *See* **Hearing Order: Part 1 of 2**, entered November 19, 2024, and incorporated by reference as if set forth verbatim, attached hereto as **Exhibit 1**.

[2] *See, e.g., Krick v. City of Lawrenceburg*, 945 S.W.2d 709 (Tenn. 1997).

PART 1 also **ORDERED** Claimant and the City, respectively, to submit any post-hearing briefing on or before Wednesday, December 18, 2024, and Friday, January 17, 2024. Briefing was limited to "the exclusive subject of whether the record enables Claimant to establish the causation of his heart condition by a preponderance of the evidence." Both briefs were timely submitted.

Based on the parties' post-hearing briefing, in addition to the administrative record; the pre-hearing briefs of the parties; the hearing testimony of Claimant's daughter, Holly Greene; and the arguments of counsel, and as more fully set forth in the transcript attached to **PART 1** as Exhibit A**,** the ALJ makes the following **FINDINGS** and **CONCLUSIONS**, which together with **PART 1** constitute the ALJ's **FINAL ORDER**:

I. FINDINGS OF FACT

1. Claimant was a full-time employee of the Memphis Police Department (MPD) starting in August 1993. (Claimant's Pre-Hearing Brief (Claimant's Brief), p. 1; Claimant's Post-Hearing Brief (Claimant's Post), p. 1.)

2. When Claimant joined MPD, he had no history of heart disease or hypertension. (Claimant's Brief, p.1; Claimant's Post, p. 1)

3. In August 1999, Claimant began seeing Dr. David Holloway at Stern Cardiovascular, who diagnosed Claimant with Coronary Artery Disease (CAD) after Claimant experienced pain in his chest, jaw, and neck, as well as tingling in his left arm, while conducting surveillance and running in a marijuana field. (Claimant's Brief, pp. 1-2; Claimant's Post, pp. 1-2; City's Pre-Hearing Brief (City's Brief), p. 3; Claimant's Ex. 2 (City of Memphis Memo); Claimant's Ex. 13 (Initial Outpatient Consultation), pp. 1-2.)

4. Claimant underwent an angioplasty of the right coronary artery and received stents in August 1999. (Claimant's Brief, p. 2; Claimant's Post, p. 2.)

5. Claimant then applied for On-the-Job-Injury (OJI) benefits for his heart condition; the benefits were approved in December 1999 and included backdated coverage to August 1999. (*Id*.)

6. Dr. Holloway subsequently became Claimant's OJI-authorized treating physician. (Claimant's Brief, p. 2; City's Brief, p. 3.)

7. By December 13, 1999, Claimant had returned to work at full duty. (Claimant's Brief, p. 2; Claimant's Post, p. 2.)

8. In June 2003, Claimant suffered an acute myocardial infarction, resulting in a "left heart catheterization, stent placement on the right, and stent placement on the left circumflex." (Claimant's Brief, p. 2; Claimant's Post, p. 2; Claimant's Ex. 13 (Initial Outpatient Consultation), pp. 1-2.)

9. Claimant again returned to work at full duty on July 21, 2003. (Claimant's Brief, p. 2; Claimant's Post, p. 2; Claimant's Ex. 13 (Initial Outpatient Consultation), pp. 1-2.)

10. Two years later, Claimant's symptoms had worsened and were preventing him from performing his job duties. (Claimant's Brief, p. 3; Claimant's Post, p. 2.)

11. Claimant thus applied for a line-of-duty (LOD) disability on November 29, 2005. (Claimant's Brief, p. 3; City's Brief, p. 2.)

12. Following Claimant's LOD application, the City sent Claimant to two internists, Drs. Paul Katz and Barry Siegel, for independent medical evaluations (IMEs) in February 2006. (Claimant's Ex. 3 (Dr. Katz's IME), p. 1; Claimant's Ex. 4 (Dr. Siegel's IME), p. 1)

13. After conducting the IMEs, Drs. Katz and Siegel found that Claimant was permanently and totally disabled from performing his duties as a Memphis Police Officer. (Claimant's Ex. 3 (Dr. Katz's IME), p. 1; Claimant's Ex. 4 (Dr. Siegel's IME), p. 4.)

14. They further found that Claimant's heart condition was not job related. (Claimant's Ex. 3 (Dr. Katz's IME), p. 1; Claimant's Ex. 4 (Dr. Siegel's IME), p. 3.)

15. Specifically, Dr. Siegel found that Claimant's heart condition was caused by family history, high blood pressure, hyperlipidemia, and other genetic and non-work-related causes. (Claimant's Ex. 4 (Dr. Siegel's IME), p. 3.)

16. While Dr. Katz concluded that Claimant's heart condition was not job related, he also noted Claimant's history of hyperlipidemia and found that the exertion required and the stress of Claimant's job as a police officer would be harmful to his health. (Claimant's Ex. 3 (Dr. Katz's IME), p. 1)

17. The Pension Board reviewed the medical evidence provided by Drs. Katz and Siegel and voted to send Claimant to two cardiologists, Dr. Aftib Shaikh and Dr. Richard Gordon, for additional IMEs. (Claimant's Brief, p. 4; City's Brief, p. 2; Claimant's Ex. 5 (Transcript of Pension Board Meeting, February 23, 2006): 30:21-31:15.)

18. Dr. Shaikh found that Claimant was permanently and totally disabled from performing his duties as a Memphis Police Officer. (Claimant's Ex. 6 (Dr. Shaikh's IME and Questionnaire), pp. 1, 3.)

19. Dr. Shaikh also found that Claimant's heart condition was not fully job-related, given that Claimant had a personal history of smoking and a family history of heart problems, but concluded that the heart condition was exacerbated by stress at work. (*Id*.)

20. Dr. Gordon also found that Claimant's heart condition was not caused by his work as a police officer; he concluded instead that risk factors over many years contributed to Claimant's heart condition. (Claimant's Exhibit 7 (Dr. Gordon's Report), p. 3.)

21. After reviewing the additional opinions of Drs. Shaikh and Gordon, the Pension Board met and again denied Claimant's LOD application on July 27, 2006. (Claimant's Exhibit 8 (Transcript to Pension Board Meeting, July 27, 2006), at p. 28.)

22. Claimant then appealed the denial to the Shelby County Chancery Court. (Claimant's Brief, p. 4; City's Brief, p. 3.)

23. On April 14, 2014, the Chancery Court remanded Claimant's application to the Pension Board for further proceedings; the court also instructed the Pension Board to give Claimant the benefit of the statutory presumption under Tenn. Code Ann. § 7-51-201 if the evidence established that Claimant had a pre-employment physical that did not show evidence of CAD. (Claimant's Ex. 9 (Chancery Court Order of Remand).)

24. After reviewing Claimant's application file and the IME opinions provided by Drs. Katz, Siegel, Shaikh, and Gordon, the City Pension Manager issued a determination letter to Claimant again denying his LOD application on September 6, 2016. (Claimant's Ex. 10 (September 6th Determination Letter).)

25. Two days later, Claimant requested a final determination letter. (Claimant's Ex. 10, September 9th Determination Letter.)

26. The Pension Manager issued the final determination letter on September 9, 2016. (*Id*.)

27. Claimant appealed the denial of his LOD application in 2016. (Claimant's Brief, p. 6; City's Brief, p. 3.)[3]

[3] The next procedural events in the record appear to be the depositions of Dr. Katz on August 27, 2024, and Dr. Klemis on August 29, 2024. There is no explanation in the briefs or the record for why there was an eight-year lapse.

28. Following Dr. Holloway's retirement, Dr. James Klemis, a cardiologist at Stern Cardiovascular, became Claimant's treating physician in October 2020. (Claimant's Brief, p. 3; Claimant's Ex. 11 (Deposition of Dr. Klemis): 5:17-20; Claimant's Ex. 15 (Ex. 4 to Deposition of Dr. Klemis).)

29. Dr. Katz and Dr. Klemis were deposed in August 2024. (Claimant's Ex. 11 (Dep. of Dr. Klemis); Claimant's Ex. 16 (Deposition of Dr. Katz).)

30. Dr. Klemis testified that Claimant's risk factors for his heart condition include dyslipidemia, a high stress job, family history, and smoking. (Claimant's Ex. 11 (Dep. of Dr. Klemis): 20:17-14; 46:21-47:24.)

31. Dr. Klemis further testified that he would weigh all of Claimant's risk factors, including his job as a police officer, equally, because they all played a roll. (*Id*. at 30:1-19.)

32. Dr. Klemis also testified that he would expect Claimant to have developed CAD even without his job "at some point, yes, if he had the family history and the cholesterol was untreated." (*Id*. at 51:9-16.)

33. Dr. Katz testified that the most common risk factors for CAD include hypertension, high cholesterol, diabetes, smoking, family history, and being male. (Claimant's Ex. 16 (Dep. of Dr. Katz): 1:11; 7:8-15.)

34. Dr. Katz testified that Claimant's risk factors for CAD included hyperlipidemia, family history, and smoking. (*Id.* at 13:5-18.)

35. Dr. Katz further testified that Claimant's occupation as a police officer was not the cause of his CAD, and that Claimant would have developed CAD even if he never had been a police officer. (*Id*. at 13:19-22.)

36. Dr. Katz additionally testified that stress—whether physical, psychological, or occupational—would not cause heart disease, though it may trigger symptoms in individuals with pre-existing heart disease. (*Id*. at 32:21-34:11; 35:24-36:19.)

37. Claimant passed away in 2023 from causes unrelated to his heart condition. (Claimant's Brief, p. 3; Claimant's Post, p. 2.)

II. LEGAL STANDARD

It is well settled that "once the presumption of causation established by Tenn. Code Ann. § 7-51-201(a) is rebutted by the defendant, it disappears, and the plaintiff must prove, by a preponderance of the evidence, that his condition resulted from an injury by accident arising out of and in the course of his employment." *Kirk v. City of Lawrenceburg*, 945 S.W.2d 709, 713 (1997). An occupational disease, including heart disease, may be an injury by accident. *Id*. "An injury 'arises primarily out of and in the course and scope of employment' only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes." Tenn. Code Ann. § 50-6-102(12)(B). A claimant must therefore prove six elements to establish that his heart disease arose from his employment:

- The disease can be determined to have followed as a natural incident of the work because of the exposure occasioned by the nature of the employment:
- The disease can be fairly traced to the employment as a proximate cause;
- The disease has not originated from a hazard to which the worker would have been equally exposed outside of the employment;
- The disease is incidental to the character of the employment and not independent of the relation of employer and employee;
- The disease originated from a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected prior to its contraction, and

- There is a direct causal connection between the disease and conditions under which the work is performed.

Krick, 945 S.W.2d at 713 (citing Tenn. Code. Ann. § 50-6-301 (2014)). Further, the fact that a law enforcement officer is admitted to a Heart, Hypertension, Lung (HHL) Program under a City's OJI policy, alone, is not sufficient to demonstrate causation between his occupation as a police officer and his heart disease for purposes of LOD benefits. *Pittman v. City of Memphis*, 360 S.W.3d 382, 390 (Tenn. Ct. App. 2011).

III. CONCLUSIONS OF LAW

1. Both parties agree that Drs. Katz, Klemis, Siegel, Shaikh, and Gordon are qualified physicians. (Claimant's Brief, generally; City's Brief, generally; Claimant's Pre-Hearing Reply Brief, generally; Claimant's Post, generally.)[4]

2. Claimant failed to establish by a preponderance of evidence that his heart disease arose out of the course and scope of his employment:

- None of the five qualified physicians testified that Claimant's employment with MPD contributed more than 50% in causing his CAD;

- Three of the physicians—Drs. Katz, Siegel, and Gordon—testified that Claimant's CAD was not caused by his occupation as a police officer; and

- Of the remaining two, Dr. Shaikh testified that Claimant's CAD was exacerbated by stress at work, but not that Claimant's work caused his CAD or contributed more than 50% in causing it; and Dr. Klemis testified that while Claimant's job was a risk factor for CAD, so, too, were dyslipidemia, family history, and smoking, all of which Dr. Klemis would weigh equally; and

[4] Dr. Holloway, Claimant's initial OJI-authorized treating physician, did not give an opinion about whether Claimant was permanently and totally disabled. There also is no indication in the briefs or the record that Dr. Holloway was asked to offer an opinion about whether Claimant's heart condition was job related.

- Drs. Katz and Klemis testified further that Claimant would have developed CAD even if he never had been a police officer.[5]

3. Nor does crediting the testimony of Claimant's daughter, that she never had known her father to smoke, meet Claimant's burden; although it is true that Drs. Katz, Shaikh, and Klemis listed smoking as one of Claimant's risk factors, dyslipidemia and family history also were identified as risk factors for Claimant's CAD.

4. Similarly, testimony that Claimant's dyslipidemia was being controlled by medication does not establish that Claimant's heart disease arose out of the course and scope of his employment given Dr. Klemis's testimony that dyslipidemia nevertheless remained a risk factor for Claimant.

* * *

For these reasons, the denial of Claimant's LOD pension application is **AFFIRMED**.

SO ORDERED, this 8 th day of April 2025,

HON. GADSON W. PERRY
ADMINISTRATIVE LAW JUDGE

[5] Dr. Klemis included a caveat to this testimony: "if . . . [Claimant's] cholesterol was untreated."

Exhibit 1

CITY OF MEMPHIS
LINE-OF-DUTY PENSION APPEAL

JOHN R. GREENE,

Claimant,

vs.

Docket No.: 10
City No.: 4892427

CITY OF MEMPHIS,

Respondent.

HEARING ORDER: PART 1 OF 2

THIS MATTER came before the Honorable Gadson W. Perry, Administrative Law Judge (ALJ), for hearing on Wednesday, November 13, 2024, under the contested case provisions of the Uniform Administrative Procedures Act (UAPA), Tenn Code Ann. § 4-5-301, *et seq*. Claimant John R. Greene appeals the denial by Respondent City of Memphis of line-of-duty (LOD) pension benefits for Claimant's heart condition. Based on the administrative record, the pre-hearing briefs of the parties, the hearing testimony of Claimant's daughter, Holly Greene, and the arguments of counsel, and as more fully set forth in the transcript attached hereto as **Exhibit A** and incorporated by reference as if set forth verbatim,[1] the ALJ **CONCLUDES** as follows:

1. Claimant is entitled to the statutory presumption of causation in Tenn Code Ann. § 7-51-201(a);

2. Respondent has "shown . . . competent medical evidence" that rebuts the statutory presumption in § 7-51-201(a); and

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[1] At the time of entry of this Order: Part 1 of 2, the transcript of proceedings is in the process of being prepared. Immediately and automatically upon its preparation and delivery to the parties and the ALJ, the transcript shall be attached to this Order *nunc pro tunc*.

3. The burden of proof thus shifts to Claimant to establish the causation of his heart condition by a preponderance of the evidence.[2]

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Claimant may submit a post-hearing brief, limited to no more than ten (10) pages, on the exclusive subject of whether the record enables him to establish the causation of his heart condition by a preponderance of the evidence. Claimant's post-hearing brief is due on or before **Wednesday, December 18, 2024**.

IT IS, FURTHER, ORDERED, ADJUDGED, AND DECREED that upon receipt of Claimant's post-hearing brief, Respondent may submit a response in opposition to Claimant's brief, likewise limited to no more than ten (10) pages, on the exclusive subject of whether the record enables Claimant to establish the causation of his heart condition by a preponderance of the evidence. Respondent's post-hearing response brief, should Respondent elect to file such a brief,[3] is due on or before **Friday, January 17, 2025**.

Following receipt of this post-hearing briefing, the ALJ shall take this matter under advisement and shall issue **PART 2** of this **ORDER**, which together with **PART 1** of this **ORDER** shall set forth all findings of fact and conclusions of law required by the UAPA.[4]

SO ORDERED, this 19th day of November 2024,

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[2] *See, e.g., Krick v. City of Lawrenceburg*, 945 S.W.2d 709 (Tenn. 1997).

[3] Respondent already has addressed the post-rebuttal burden of proof in its pre-hearing brief and asserted that Claimant fails to establish causation by a preponderance of the evidence.

[4] **NOTE:** The **CONCLUSIONS** in this **PART 1** of this **ORDER** are final; but this **PART 1**, being a partial adjudication, shall not be construed to trigger any deadlines for seeking reconsideration or appeal, it being the intention of the ALJ and the parties alike that any request for reconsideration or appeal should be initiated and determined only after the entry of **PART 2** of this **ORDER.**

HON. GADSON W. PERRY
ADMINISTRATIVE LAW JUDGE

APPROVED:

GODWIN, MORRIS,
LAURENZI & BLOOMFIELD, P.C.

By: _____
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Counsel for Respondent, City of Memphis

Sample 3

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

CREWS FAMILY FOUNDATION,
HILLIARD CREWS,
MARK PICKENS,
JESSICA BARROSO, and
MAX BARROSO,

Plaintiffs,

v. No. CH-23-0278-III

GULLANE CAPITAL, LLC and
GULLANE CAPITAL PARTNERS, LLC,

Defendants.

FINAL REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

THIS MATTER came before Special Master Gadson W. Perry to determine whether Defendants Gullane Capital, LLC, and Gullane Capital Partners, LLC, must produce certain documents and information requested by Plaintiffs Crews Family Foundation, Hilliard Crews, Mark Pickens, and Jessica and Maximiliano Barroso. (*See* June 8, 2023, **Order of Reference to Special Master** and July 13, 2023, **Amended Scheduling Order**.) Based upon Plaintiffs' June 9, 2023, Submission to the Special Master; Defendants' June 9, 2023, Brief to the Special Master; Plaintiffs' June 27, 2023, Submission to the Special Master; Defendants' June 27, 2023, Response to Plaintiffs' Brief to the Special Master; the arguments of counsel at the July 13, 2023, hearing before the Special Master, the transcript of which is incorporated into this **FINAL REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER** and attached as **EXHIBIT A**; and Defendants' letter of July 28, 2023, the Special Master **RECOMMENDS** the following findings of fact and conclusions of law:

I.
FINDINGS OF FACT

1. Defendant Gullane Capital Partners, LLC, is a Delaware limited liability company with a principal place of business in Memphis, TN; it is also a hedge fund (Fund). (*See* Defs.' Apr. 11, 2023, Resp. in Opposition to Pls.' Req. for a Mandatory Injunction, pg. 2.)

2. Defendant Gullane Capital, LLC, is the investment advisor and Member Manager of the Fund. (*Id*.)

3. Currently, the Fund is governed by the Fifth Amended and Restated Limited Liability Company Agreement (LLC Agreement). (*See* Pls.' Feb. 28, 2023, Compl., Ex. A.)

4. The LLC Agreement, in turn, is governed by Delaware law. (*Id.* § 10.10.)

5. Plaintiffs Crews Family Foundation, Hilliard Crews, Mark Pickens, and Jessica and Maximiliano Barroso are investors in the Fund. (*See* Defs.' Apr. 11, 2023, Resp. in Opposition to Pls.' Req. for a Mandatory Injunction, pg. 5.)

6. On January 20, 2023, Plaintiffs sent a letter to the Fund requesting certain books and records (January Demand). (*See* Defs.' June 27th Resp., Ex. 1.)

7. Plaintiffs' January Demand consisted of 45 requests, which are summarized for ease of reference in the chart attached as **EXHIBIT B**.[1]

8. On February 28, 2023, Plaintiffs sued Defendants to enforce the January Demand. (*See generally* Pls.' Compl.)

9. After filing the lawsuit, Plaintiffs narrowed the January Demand to 22 of its original 45 requests. (*See* Defs.' June 27th Resp., Ex. 2.)

[1] The full January Demand is attached as **EXHIBIT B-1**. *See also infra* note 8 and accompanying text.

10. But Plaintiffs later restored 13 of the omitted requests, for a total of 35. (*See id.* at Ex. 5.)

11. Defendants contend that the January Demand's 45 requests were thus permanently reduced to 35. (Defs.' June 9th Br. at 2.)

12. Plaintiffs respond that the reductions only were intended to be, and were understood as, temporary measures and that, with one caveat,[2] Plaintiffs never relinquished any of the 45 requests. (Pls.' June 27th Br. at 3.)

13. On April 22, 2023, Defendants responded to Plaintiffs' first set of 22 narrowed requests, either agreeing to produce the requested information or explaining why Defendants could not or would not produce the information. (*See* Defs.' June 27th Br., Ex. 4.)

14. On June 1, 2023, Defendants responded similarly to the 13 restored requests. (*See id.*, Ex. 6.)

15. To date, Defendants have produced requested books and records identified in the chart attached as **EXHIBIT C**.

16. To date, Defendants have ***not*** produced requested books and records identified in the chart attached as **EXHIBIT D**.

II.
RELEVANT PROCEDURAL HISTORY

Plaintiffs and Defendants appeared before the Court for a status conference on April 24, 2023. At that time, the Court determined to appoint a Special Master to make recommendations

[2] At the hearing on July 13, 2023, Plaintiffs' counsel admitted that "[o]n Page 6 of our January 20 letter of the information E, 4 is a request for information regarding Dr. Foley, and that one we withdrew." (Hr'g Tr. at 83:1-4.) Plaintiffs withdrew Request E(4) because a prior investor, Dr. Kevin Foley, had withdrawn from the Fund. (*See id.* at 82:11-84:11.)

regarding Plaintiffs' January Demand.[3] The Court appointed the undersigned Special Master on June 8, 2023. (*See* **Order of Reference to Special Master**.)

On June 20, 2023, the Special Master held an initial conference with the parties to set a schedule regarding his role in this matter. With the parties' consent, the Special Master set deadlines for additional briefing,[4] which the parties submitted on June 27, 2023, and oral argument, which occurred on July 13, 2023. (*See* July 13, 2023, **Preliminary Report & Recommendation of the Special Master**.) The Special Master also proposed an Amended Scheduling Order,[5] which the Court adopted on July 13, 2023. (*See* **Amended Scheduling Order**.)

On July 28, 2023, Defendants sent Plaintiffs a letter to address an additional matter that was raised during oral argument. With that letter and the oral argument transcripts, also provided on July 28th, this matter was submitted to the Special Master for **FINAL REPORT AND RECOMMENDATIONS.**

III.
LEGAL STANDARD

As a threshold matter, the parties agree that the LLC Agreement, specifically § 10.2,[6] governs this dispute. (Hr'g Tr. at 41:22-42:2.) The parties also agree that, to the extent that the LLC Agreement is silent, the Delaware LLC Act, 6 Del. C. §§ 18-101, *et seq.*, controls. This

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[3] The Court denied Plaintiffs' request for a mandatory temporary injunction to enforce the January Demand, "find[ing] that Plaintiffs ha[d] failed to establish irreparable harm to justify injunctive relief." (Apr. 24, 2023, **Order Denying Plaintiffs' Request for a Temporary Injunction**, at 2.) The Court concluded instead that it could "determine whether or not the Plaintiffs are entitled to the requested documents and information without granting extraordinary relief" and ultimately appointed a Special Master to "make a recommendation to the Court regarding the dispute." (*Id.* at 2-3.)

[4] The parties already had submitted initial briefing on June 9, 2023.

[5] The parties submitted their own proposed Amended Scheduling Orders but could not agree on any of the dates. (*See* **Preliminary Report & Recommendation of the Special Master** at 1.)

[6] *See infra* note 9 and accompanying text.

understanding accords with Delaware law, which governs the LLC Agreement (*see* § 10.10) and treats such agreements as contracts. *E.g.*, *Mickman v. Am. Int'l Proc., L.L.C.*, No. 3869-VCP, 2009 WL 2244608, at *2 (Del. Ch. July 28, 2009) ("LLC agreements are creatures of contract, which should be construed like other contracts."). The LLC Act thus "provide[s] [LLC] members with broad discretion in drafting the [LLC] agreement and . . . furnish[es] default provisions when the members' agreement is silent." *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290-91 (Del. 1999).

Requests by LLC members to inspect books and records that fall under the LLC Act, rather than the members' agreement, must satisfy the Act's standard to be enforceable. The LLC Act requires such requests to be both "reasonable" and made "for a[] purpose reasonably related to the [requesting] member's interest." 6 Del. C. § 18-305(a). This Court's Delaware counterpart has explained that a proper purpose for a books and records request under the LLC Act must be "establish[ed] by a preponderance of the evidence." *Riker v. Teucrium Trading, LLC*, No. 2019-0314-AGB, 2020 WL 2393340, at *4 (Del. Ch. May 12, 2020) (quoting *Sanders v. Ohmite Hldgs.*, *LLC*, 17 A.3d 1186, 1193 (Del. Ch. 2011)). If a proper purpose is sufficiently established, then the scope of the ensuing inspection is limited to "such information as is necessary and essential to achieving that purpose."[7] 6 Del. C. § 18-305(g); *accord Riker*, 2020 WL 2393340, at *4 (quoting *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002)).

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[7] Information potentially available under the LLC Act includes the following:

> (1) True and full information regarding the status of the business and financial condition of the limited liability company;
>
> (2) Promptly after becoming available, a copy of the limited liability company's federal, state and local income tax returns for each year;
>
> (3) A current list of the name and last known business, residence or mailing address of each member and manager;

Requesting LLC members must identify "with rifled precision . . . the documents sought," *Riker*, 2020 WL 2393340, at *4 (quoting *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000)), and the burden of proof "is always" on the requesting member(s) "to establish that each category of the books and records requested is essential and sufficient to [that party's] stated purpose," *id.* (quoting *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1035 (Del. 1996)). The scope of a books and records request is thus narrower than that of available discovery under the rules of civil procedure. *See Sec. First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 570 (Del. 1997) (explaining that "[t]he two procedures are not the same and should not be confused."). This Court possesses "wide latitude in determining the proper scope of inspection." *Id.* at 569.

IV.
CONCLUSIONS OF LAW

Plaintiffs' January Demand is organized into five categories, (A)-(E).[8] (*See generally* **Exs. B & B-1**.) Defendants have responded to some requests—which are catalogued in **Exhibit C**—and failed or refused to respond, or to respond fully, to others—which are catalogued in **Exhibit**

> (4) A copy of any written limited liability company agreement and certificate of formation and all amendments thereto, together with executed copies of any written powers of attorney pursuant to which the limited liability company agreement and any certificate and all amendments thereto have been executed;
>
> (5) True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and which each member has agreed to contribute in the future, and the date on which each became a member; and
>
> (6) Other information regarding the affairs of the limited liability company as is just and reasonable.

6 Del. C. § 18-305(a).

[8] Category A includes 7 requests; Category B includes 13; Category C includes 3; Category D includes 13; and Category E includes 9.

D. The Special Master makes the following **RECOMMENDATIONS** regarding the outstanding requests in **Exhibit D:**

- **Category A: LLC Agreements and Amendments.**

Requests A(1) and A(2). Plaintiffs' first two requests in this category seek the names and addresses of other Fund members. Plaintiffs concede that "there's no express[] right of access to the [Fund's] investor list under the LLC Agreement."[9] (Hr'g Tr. at 11:8-13.) They nevertheless claim that there is an implied right under the LLC Agreement to inspect the names and addresses of other Fund members. (*Id.* at 9:21-11:18.) Section 3.1 requires the names and addresses of Fund members to be kept as part of the company's books and records,[10] and § 3.5 both authorizes Fund members to call meetings and requires written notice of all such meetings to be delivered personally or mailed to other Fund members.[11] Thus, Plaintiffs say, these sections necessarily imply a right to inspect the names and addresses of other Fund members.

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[9] Section 10.2 of the LLC Agreement, entitled "Books and Records," states as follows:

> The Member Manager shall keep books and records pertaining to the Company's affairs showing all of its assets and liabilities, receipts and disbursements, realized income, profits and losses, Class Members' Capital Accounts and all transactions entered into by the Company. Such books and records of the Company shall be kept at the Company's principal office, and all Class Members and their duly authorized representatives shall at all reasonable times during normal business hours have free access thereto for the purpose of inspecting or copying the same.

[10] Section 3.1 of the LLC Agreement, entitled "Names and Address [*sic*]," states as follows:

> The names and addresses of the Class Members shall be set forth in the books and records of the Company.

[11] Section 3.5 of the LLC Agreement, entitled "Meetings of Class Members," states the following in relevant part:

> Meetings of Class Members shall be held at the request of the Member Manager or a Majority-in-Interest of the Class Members, on such date and at such time and place, within or outside the State of Delaware, as designated from time to time by the Member Manager. Written notice stating the place, date, and time of, and the general nature of the business to be transaction at, a meeting of Class Members

But Plaintiffs cite no legal authority for any such implied right. Nor do Plaintiffs explain why the parties would have included a "Books and Records" provision in § 10.2 that provides "free access" to several categories of documents and information but omits the Fund's investor list if they intended to grant "free access" to that information as well. Plaintiffs also point to no ambiguity in the LLC Agreement that might authorize the Court to go beyond the agreement's plain text. In Delaware, as in Tennessee, courts "assess the parties' reasonable expectations at the time of contracting and [will] not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). There, as here, "background facts cannot be used to alter the language chosen by the parties within the four corners of their agreement." *Symbiont.io, Inc. v. Ipreo Holdings, LLC*, No. CV 2019-0407-JTL, 2021 WL 3575709, at (Del. Ch. Aug. 13, 2021) (quoting *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 820 (Del. 2018)).

Plaintiffs argue alternatively that the LLC Act gives them a right to access the Fund's investor list. Section 6 Del. C. § 18-305(a)(3) of the Act expressly grants access to "[a] current list of the name and last known business, residence or mailing address of each member and manager." But, as explained above, Plaintiffs must establish a proper purpose for this information by a preponderance of the evidence and must show that the "information . . . is necessary and essential to achieving that purpose." 6 Del. C. § 18-305(g).

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shall be given to each Class Member in the manner prescribed by Section 10.1, not less than ten days nor more than sixty days before the date of such meeting.

Section 10.1, in turn, states in relevant part that all notices and demands required by the LLC Agreement either must be delivered personally to Fund members, delivered by courier overnight to Fund members' listed addresses, or sent by registered or certified mail.

Plaintiffs miss the mark on both counts: As Defendants point out, none of the various purposes identified by Plaintiffs is supported by evidence, while Defendants have provided specific evidence about the need to keep the Fund's investor list confidential. (*See, e.g.,* Defs.' June 27th Br. at 11 (citing June 15, 2023, Second Declaration of Richard A. Miller III)). This evidence is consistent with 6 Del. C. § 18-305(c), which authorizes Gullane Capital, as Member Manager of the Fund, "to keep confidential from the members . . . any information . . . the disclosure of which the manager in good faith believes is not in the best interest of the [Fund]." The evidence also is presently unrebutted. Moreover, Plaintiffs cannot show that access to the investor list is "necessary" or "essential" when Gullane Capital easily can contact Fund members on Plaintiffs' behalf if Plaintiffs want to call a meeting.[12]

Requests A(1) and A(2) should therefore be **DENIED** under the LLC Agreement and the LLC Act.

Requests A(3)-A(7). For the time being, these requests, which seek five prior versions of the LLC Agreement[13] and notices and consents related to those prior versions, appear to be moot. Defendants have produced the Second Amended and Restated LLC Agreement (*see* Pls.' June 27th Br., Ex. A); aver that they have "produced what [they] have located to date regarding the Limited Liability Company Agreements" and asked the Fund's prior counsel to look for the other versions and materials (*see* Defs.' July 28, 2023, Letter to Counsel); and have committed to producing the other versions and materials if they are located (*see id*.).

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[12] (*Compare* Hr'g Tr. at 11:19-21 ("You couldn't go to the managing member and say we want to call a meeting, notify the other members?"), *with id.* at 15:9-18 ("If the Court would order that, I mean, that might be something we could live with as long as we're able to access and communicate with them.").

[13] These requests seek (1) the Initial LLC Agreement; (2) the First Amended and Restated LLC Agreement; (3) the Second Amended and Restated LLC Agreement; (4) the Third Amended and Restated LLC Agreement; and (5) the Fourth Amended and Restated LLC Agreement.

Requests A(3)-A(7) should therefore be **DENIED AS MOOT** under the LLC Act.[14]

- **Category B: Members, Memberships, and Capital Accounts.**

Request B(1). This request, which expressly asks for the names and addresses of all Fund members, seeks the same information as requests A(1) and A(2), above. The same analysis applies. Request B(1) should be **DENIED** under the LLC Agreement and the LLC Act.

Request B(2). This request seeks the capital account information and balances for each Fund member. It relies on §§ 5.2 and 10.2 of the LLC Agreement.[15] (*See* Pls.' June 27th Br., Ex. A.) Section 5.2 describes Fund members' capital accounts and explains how account balances will be adjusted but—like § 3.1, discussed in connection with Requests A(1) and A(2), above—provides no right of inspection. Section 10.2, however, expressly includes "Class Members' Capital Accounts" as part of the books and records to which Fund members "shall at all reasonable times during normal business hours have free access."

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[14] Section 10.2 of the LLC Agreement does not include the LLC Agreement, prior versions of the agreement, or related documents as part of the books and records to which Fund members have "free access." But § 6 Del. C. 18-305(a)(4) of the LLC Act expressly mentions such documents. *See supra* note 7 and accompanying text.

[15] Section 5.2 of the LLC Agreement, entitled "Capital Accounts," states the following:

> An individual capital account ("Capital Account") shall be maintained for each Class Member. The Capital Account of each Member shall be adjusted as follows: the Capital Account shall be increased by (a) all Cash Contributions made pursuant to Section 5.1, (b) any Net Profit allocated to such Member pursuant to Section 6.1, and (c) any other items required to be included in the Capital Account of such Member pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv), and decreased by (a) the amount of all cash Distributions made by the Company to such Member pursuant to Section 3.6 or Section 9.2, (b) the fair market value, at the date of Distribution, of any property distributed pursuant to Section 3.6 or Section 9.2 by the Company to such Member (net of any liabilities assumed by such Member in connection with such Distribution or to which such distributed property shall be subject), (c) any Net Loss allocated to such Member pursuant to Section 6.1 and (d) any other items required to be subtracted from the Capital Account of such Member pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv).

See supra note 9 and accompanying text for the language of § 10.2.

In response, Defendants have produced a list of capital account balances as of December 31, 2022. But Plaintiffs say that this production is insufficient. According to Plaintiffs, some of Plaintiffs' capital account balances "reflect '$0.00,'" and Defendants have provided "[n]o explanation . . . as to . . . where the money has gone." (Pls.' June 27th Br. at 10 & Ex. C.) As a result, Plaintiffs seek, in addition to Fund members' capital account balances, allocations of the Fund's net capital appreciation or depreciation, management performance allocation, and other information that Defendants use to "adjust" members' capital account balances. (*Id.* at 16.)

Nothing in § 10.2 limits Plaintiffs' access to information about Fund members' capital accounts to the account balances. To the contrary, § 10.2 requires "free access" to "Class Members' Capital Accounts" within a recitation that includes "all of [the Fund's] assets and liabilities, receipts and disbursements, realized income, profits and losses . . . and all transactions entered into by the Company." Such a broad right of access, coupled with empty accounts and fuzzy explanations, certainly raises questions.

But there is a problem. The additional information that Plaintiffs want may not be part of existing books or records of the Fund. Consider the following exchange with Plaintiffs' counsel at oral argument:

> SPECIAL MASTER: Do you think there's some document or set of documents that [Defendants] are withholding that would disclose that information . . . ? Do you want them to generate that information from the accountant or what is it? How do you want them to get the information to you?
>
> MR. BENNETT: Your Honor, virtually everything is done electronically these days . . . . For instance, we use Quicken at home. We use different accounting software in our law firm, but even at home I have accounting software.
> . . . .

> They may have to do, like you said, an Excel spreadsheet and tell it to print off just for this period[.][16]

Vagaries like these are no obstacle to discovery, where a few well-placed interrogatories or requests for admission may fill gaps left by responses to document requests or help a party better understand which documents are relevant or reasonably calculated to lead to the discovery of admissible evidence. *Cf.* Tenn. R. Civ. P. 26.02(1). But Delaware courts are clear that books and records requests are both distinct from and narrower than discovery "and should not be confused." *Sec. First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 570 (Del. 1997).

Request B(2) appears to be well founded. But a books and records request likely is not the proper mechanism to obtain the additional information that Plaintiffs seek. Request B(2) should be **DENIED** under the LLC Agreement.

Request B(3). This request, which seeks the allocations and profits and losses made on the last business day of each fiscal period for 2020, 2021, and 2022, suffers from a similar problem. It relies on §§ 6.1 and 10.2 of the LLC Agreement.[17] (*See* Pls.' June 27th Br., Ex. A.) Like §§ 5.2 and 3.1, § 6.1 details certain functions that the Fund must perform—here, "determinations and allocations" that the Fund must make for each fiscal period—but provides no right of inspection. And like § 5.2—but *not* § 3.1—the functions that § 6.1 details, such as realized income and profits and losses, are part of the books and records to which Fund members "shall at all reasonable times during normal business hours have free access" under § 10.2.

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[16] (Hr'g Tr. at 95:6-98:8.)

[17] Section 6.1 of the LLC Agreement, entitled "Allocation of Profits and Losses," includes five subsections, (a)-(e), that describe the determinations and allocations that the Fund must make "[a]s of the close of business on the last Business Day of each Fiscal Period." *See supra* note 9 and accompanying text for the language of § 10.2.

In response to this request, Defendants have provided the Fund's tax returns for 2020, 2021, and 2022. But Plaintiffs again want more, stating that they are entitled to the actual allocations and profits and losses for each year. (*See* Pls.' June 27th Br., Ex. A.) To the extent that Defendants have this information in record form, they must provide it to Plaintiffs as required by § 10.2. But this request, like Request B(2), appears to venture beyond books and records and into the realm of discovery. And to the extent that it seeks information and data rather than books and records, it should be **DENIED** under the LLC Agreement.

Request B(4). Plaintiffs cite no specific section of the LLC Agreement for this request,[18] which asks whether any new members were added to the Fund in 2020, 2021, 2022, or 2023. Section 10.2 says nothing about new members. And the LLC Act, which Plaintiffs do not invoke, is similarly silent. Request B(4) should therefore be **DENIED** under both the LLC Agreement and the LLC Act.

Requests B(5) and B(6). The last two requests in this category seek the written notices and the places, dates, and times of all meetings of Fund members in 2020, 2021, and 2022; information about whether any Fund actions were taken in those years without prior notice or a vote; and, if so, the written consent for those actions. (*See* Pls.' June 27th Br., Ex. A.) Both requests invoke §§ 3.5 and 10.2 of the LLC Agreement,[19] but neither section expressly supports them.[20] Section 3.5 describes the circumstances under which meetings of Fund Members shall be held and requires that certain records of those meetings, or the lack thereof, be kept. But as with §§ 3.1, 5.2, and 6.1,

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[18] Plaintiffs' June 27th Brief merely references the "LLC Agreement" in its entirety.

[19] As with Request B(4), Plaintiffs do not invoke the LLC Act in support of Requests B(5) and B(6); the Act is silent as to these requests.

[20] *See supra* note 11 and accompanying text for the language of § 3.5 and note 9 and accompanying text for the language of § 10.2.

discussed above, § 3.5 includes no right of access to this information. And because § 10.2 does not include information about Fund member meetings in the recitation of books and records to which it grants Fund members "free access," it supports Plaintiffs' books and records requests no better than § 3.5.

Requests B(5) and B(6) should therefore be **DENIED** under the LLC Agreement and the LLC Act.[21]

- **Category D: Financial Information.**

Requests D(1) and D(2). With two exceptions, the requests in this category, which seek financial information about the Fund, can be addressed as a group. Those exceptions are Requests D(1) and D(2), which rely, respectively, on §§ 7.3(b) and 7.3(c) of the LLC Agreement.[22] Section

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[21] *See supra* note 19 and accompanying text.

[22] Section 7.3 of the LLC Agreement, entitled "Payment of Taxes by the Member Manager," states the following at subsection (b):

> As promptly as practicable after the end of each Fiscal Period, the Member Manager shall prepare and distribute to the Class Members a report regarding the performance of the Company during such Fiscal Period and including, specifically, (i) a statement of the assets and liabilities of the Company and (ii) a statement of operations setting forth net income and net loss of the Company.

The same section states the following at subsection (c):

> As promptly as practicable after the end of each Fiscal Year, the Member Manager shall cause an examination of the financial statements of the Company as of the end of each such Fiscal Year to be made by a firm of certified public accountants that the Member Manager shall employ at the Company's expense. As soon as practicable thereafter, a copy of a set of financial statements prepared in accordance with generally accepted accounting principles, including the report of such certified public accountants, shall be furnished to each Class Member and shall include, as of the end of such Fiscal Year:
>
> (i) a statement of the assets and liabilities of the Company;
> (ii) a statement of operations setting forth the net income or net loss of the Company; and
> (iii) a statement of the Capital Accounts of the Class Members individually and as a group.

7.3(b) requires Defendants to "prepare and distribute" a report to Fund members regarding the Fund's performance at the end of each fiscal period. Similarly, § 7.3(c) requires the annual production of audited financial statements and a CPA report. Plaintiffs claim that Defendants have failed to produce this information. But Plaintiffs' requests for the information are not books and records demands—they do not even invoke the books and records provision of the LLC Agreement—§ 10.2—likely because that provision makes no mention of any reports or audited financial statements. (*See* Pls.' June 27th Br., Ex. A.) As a result, whatever the merits of the requests may be, in terms of Plaintiffs' rights under the LLC Agreement, they cannot be granted as part of a books and records demand.[23]

Plaintiffs alternatively rely on § 18-305(a)(1) of the LLC Act (*see id.*),[24] but there, too, they fall short. True enough, Plaintiffs likely can state a proper purpose for the requested report. (*See generally* § III, *supra*.) Delaware "law recognizes investigating possible wrongdoing or mismanagement as a 'proper purpose.'" *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010). And the empty capital accounts and fuzzy explanations discussed above easily amount to "some evidence [that] suggest[s] a credible basis from which a court could infer possible mismanagement that would warrant further investigation." *Id.*

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[23] Additionally, Request D(2) may be moot in light of Plaintiffs' admission that Defendants have provided audited financial information for 2021—(*see* Pls.' June 27th Br., Ex. A; *accord* Hr'g Tr. at 24: 7-9 ("We've gotten a summary of tax returns or audited financials that may show what your assets and liabilities are. Okay.")—and Defendants' commitment to provide "K-1s for 2022 once the [Fund's] tax return is completed and . . . audited financial statements from 2022." (Hr'g Tr. at 28:16-18.) It also is not clear that § 7.3(c), on which Request D(2) relies, requires Defendants to produce "any available financial information for year-to-date for 2023." (Pls.' June 27th Br., Ex. A.)

[24] *See supra* note 7 and accompanying text.

But establishing that the reports are "necessary and essential to achieving [Plaintiffs'] purpose," 6 Del. C. § 18-305(g); *accord Riker*, 2020 WL 2393340, at *4 (quoting *Saito,* 806 A.2d at 116), is all but impossible. Section 18-305(a)(1) of the LLC Act requires merely "[t]rue and full information regarding the status of the business and financial condition of the limited liability company," not the production of any specific documents. And Plaintiffs have requested and received other information from Defendants, some of which is discussed below,[25] that enables Plaintiffs to investigate possible wrongdoing or mismanagement.

Requests D(1) and D(2) are thus better framed as discovery requests than as parts of a books and records demand. They should be **DENIED** under both the LLC Agreement and the LLC Act.

Requests D(5)-D(6), D(8)-D(10), and D(12)-D(13). The remaining requests in this category all acknowledge that Defendants have provided some information but seek more. They also all rely on § 10.2 of the LLC Agreement and § 18-305(a)(1) of the LLC Act. For reasons explained above, these requests are more appropriate for discovery requests than a books and records demand, particularly in light of the information that Plaintiffs concede Defendants already have provided and continue to provide.[26] (*See* Pls.' June 27th Br., Ex. A.)

Requests D(5)-D(6), D(8)-D(10), and D(12)-D(13) should be **DENIED** under both the LLC Agreement and the LLC Act.

- **Category E: Company Information and Other Documentation.**

Requests E(1), E(3), and E(9). Plaintiffs' three final requests all must be denied as moot or as improper discovery requests rather proper parts of a books and records demand. Request E(1)

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25 *See also supra* note 23 and accompanying text.

26 *See supra, e.g.,* note 23 and accompanying text.

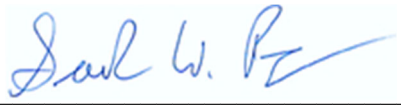
seeks the Fund's minutes from 2020, 2021, and 2022. Request E(3) seeks the Fund's November 2011 Confidential Private Offering Memorandum; the Third Amended and Restated Limited Liability Company Agreement; and Part II Form ADV, as amended to date. And Request E(9) seeks the Company's proxy voting policies and procedures; it also asks whether Gullane Capital, as Member Manager, ever has recognized a conflict of interest regarding proxy voting on behalf of the Fund and, if so, whether investors or a committee representing investors assisted with voting.

Contrary to Plaintiffs' citations, neither § 10.2 of the LLC Agreement nor §§ 18-305(a)(1), (a)(4), and (a)(6) of the LLC Act provide a right of access to any of this information.[27] Section 10.2 says nothing about any of the requests. And to the extent that Plaintiffs have identified a proper purpose for the requests under §§ 18-305(a)(1), (a)(4), or (a)(6)—*see* the discussion of Requests D(1) and D(2), *supra*—the requests either are moot for the same reasons that Requests A(3)-(A)(7), discussed above, are moot; Plaintiffs cannot establish that the requests are necessary or essential to Plaintiffs' purpose, as with Requests D(1) and D(2); or Plaintiffs fail to show that, as § 18-305(a)(6) recites, it is "just and reasonable" for Plaintiffs to access the requested information.

Requests E(1), E(3), and E(9) should be **DENIED** under the LLC Agreement and the LLC Act**.**

***

SO RECOMMENDED, this 6th day of September 2023.



GADSON W. PERRY (BPR No. 030539)
SPECIAL MASTER

[27] *See supra* note 7 and accompanying text.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 6, 2023, this **FINAL REPORT AND RECOMMENDATIONS** was served upon the following parties via United States or electronic mail:

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SPECIAL MASTER

EXHIBIT A
TRANSCRIPT OF JULY 13, 2023, ORAL ARGUMENT

[SUBMITTED CONTEMPORANEOUSLY]

EXHIBIT B
SUMMARY OF BOOKS AND RECORDS REQUESTS FROM JANUARY DEMAND

(Category A) LLC Agreements and Amendments

1. Schedule A to the 5th LLC Agreement.
2. Executed signature pages of all the Members for the 5th LLC Agreement.
3. The following agreements and their schedules and attachments:
    i. Initial LLC Agreement
    ii. First Amended and Restated LLC Agreement
    iii. Second Amended and Restated LLC Agreement
    iv. Third Amended and Restated LLC Agreement
    v. Fourth Amended and Restated LLC Agreement
4. For each version of the LLC Agreement:
    i. All written consents of the Class Members for each amendment requiring at least a Majority-in-Interest of the Class Members.
    ii. All proposed amendments, proposals to amend and other notices to Class Members containing information and/or instructions regarding the amendment proposal to be voted on.
    iii. All other prior written notices of the proposed amendment sent to all the Class Members.
5. If the LLC Agreement was amended under Section 10.3(b) without the consent of the Members, the prior written notice of the proposed amendment sent to all Class Members and, unless stated plainly in the notice, the subsection(s) of Section 10.3(b) the Member Manager relied upon in amending without consent of the Members.
6. If the LLC Agreement amendment falls under 10.3(c), the written consents of each Class Member adversely affected thereby.
7. If the LLC Agreement amendment falls under 10.3(d), the written consents of all of the Class Members.

(Category B) Members, Membership, and Capital Accounts

1. The names and addresses of all the Members of the Fund.
2. The Capital Account information and balance for each Member of the Fund.
3. The allocations and profits and losses made on the last Business Day of each Fiscal Period for each Fiscal Period in 2020, 2021, and 2022.
4. Whether any persons became additional Members of Gullane Partners in 2020, 2021, 2022, or 2023.
5. The written notice and the place, date, and time of any meetings of the Class Members held in 2020, 2021, and 2022.
6. Whether any actions were taken without a meeting in 2020, 2021, and 2022 without prior notice and without a vote and, if so, the written signed consent for such actions.
7. Whether the Member Manager made any distributions or withdrawal payments to any Members or Class Members in 2020, 2021, 2022, or 2023.

8. Whether any portion of a Member's Membership Interest was transferred in 2020, 2021, 2022, or 2023 and where any such Membership Interest was transferred.
9. Whether any Members invested less than the required $500,000 (under Section 5.1(a)) and, if so, the identity of those Members.
10. Whether there are any Members who do not pay or who pay a different Management Fee and/or Performance Allocation Fee than as set forth in the LLC Agreement with an explanation of how this difference does or does not affect the other Members.
11. Whether the Member Manager has, at any time, established, modified, or waived the Management Fee or Performance Allocation payable with respect to any additional class or series of Membership Interests without setting forth such changes in a Subscription Agreement and, if so, all information and/or documentation related to such changes.
12. All Subscription Agreements that were deemed to have modified the terms of the LLC Agreement as it relates to the Management Fee or Performance Allocation payable by any Member, class, or series of Membership Interests.
13. Whether the Member Manager has, at any time, reduced, waived, or calculated differently all or any portion of any Management Fee or Performance Allocation for any Member, without setting forth such changes in a Subscription Agreement and, if so, all information and/or documentation related to such changes.

(Category C) Suspension of Withdrawals

1. Analysis and reasoning under which the Member Manager determined the use of the Suspension Provision under Section 3.6(c) of the LLC Agreement was necessary.
2. Whether there will be any change or suspension of Management Fees or Performance Allocation due to the invocation of the Suspension Provision.
3. Quarterly Fund reviews for 2020, 2021, and 2022 and an explanation regarding whether a review was performed prior to invocation of the Suspension Provision.

(Category D) Financial Information

1. Reports regarding the performance of the Company during all Fiscal Periods in 2020, 2021, and 2022, including, specifically the following:
    i. A statement of the assets and liabilities of the Company; and
    ii. A statement of operations setting forth the net income or net loss of the Company.
2. Copies of the unaudited, or audited if available, financial statements of the Company for 2021 and 2022, and any available year-to-date financial information for 2023.
3. Any information, including email correspondence, between the Company and Warren Averett explaining the delay of the audited 2021 financial statements.
4. Whether the Member Manager is planning to use Warren Averett to prepare the 2022 audited financial statements.

5. Information and documentation relating to "assets and liabilities, receipts and disbursements, realized income, profits and losses, Class Members' Capital Accounts and all transactions entered into by the Company" under Section 10.2.
6. A list, and supporting documentation, of fees and expenses allocated and/or charged to the Members in 2020, 2021, and 2022.
7. Local, state, and federal tax returns for 2019, 2020, and 2021 and Form 1065 and all supporting schedules and statements, including all partner schedule K-1s for 2019, 2020, 2021.
8. Stocks purchased by the Fund in 2020, 2021, 2022, and 2023, including the cost basis and current fair market value of each.
9. Allocated dollar amounts that the accounts for the Investor have invested in any of the stocks purchased by the Fund, and the list of stocks that are included in each of their accounts with the Fund.
10. The Fund's investments in non-publicly traded companies and/or special purpose vehicles/entities ("SPV"), the amounts invested, the sources of the amounts invested, and the current allocation of amounts invested, and a list of those amounts that are included in each of the Investor's accounts with the Fund.
11. Any and all statements from Pershing, the Fund's custodian, received in 2022 and 2023.
12. Any and all statements from Strategic Fund Services, the Fund's administrator, received in 2022 and 2023.
13. Valuation based on Form ADV dated November 2022, which states during the last fiscal year 100% of the private fund's assets were valued by a person, such as an administrator, that is not your related person.

(Category E) Company Information and Other Documentation

1. The Fund's company minutes for 2020, 2021, and 2022.
2. The Private Placement Memorandum, or "Offering Memorandum" as defined in Section 1.1, currently in use by Gullane Partners.
3. The Company's Confidential Private Offering memorandum dated November 2011; the Third Amended and Restated Limited Liability Company Agreement; and Part II of Form ADV, as amended to date.
4. The Company's Confidential Private Offering memorandum dated July 2016.
5. The Code of Ethics of the Fund described in Item 11 of Form ADV Part 2A: Firm Brochure.
6. The Fund's "internal procedures manual" described in Item 11 of Form ADV Part 2A: Firm Brochure.
7. The Fund's "written supervisory procedures" described in Item 11 of Form ADV Part 2A: Firm Brochure and the options for sanctions under Fund policies.
8. The due diligence process and analysis as stated in Item 12 of Form ADV Part 2A: Firm Brochure.
9. The Fund's proxy voting policies and procedures as stated in Item 17 of Form ADV Part 2A: Firm Brochure; whether the Member Manager ever recognized a conflict of interest with respect to the voting of proxies on behalf of the Fund,

and, if so, whether investors or a committee representing investors assisted with voting.

EXHIBIT B-1
JANUARY DEMAND

[SUBMITTED CONTEMPORANEOUSLY]

EXHIBIT C
BOOKS AND RECORDS PRODUCED BY DEFENDANTS

(Category B) Members, Membership, and Capital Accounts

7. Whether the Member Manager made any distributions or withdrawal payments to any Members or Class Members in 2020, 2021, 2022, or 2023.
8. Whether any portion of a Member's Membership Interest was transferred in 2020, 2021, 2022, or 2023 and where any such Membership Interest was transferred.
9. Whether any Members invested less than the required $500,000 (under Section 5.1(a)) and, if so, the identity of those Members.
10. Whether there are any Members who do not pay or who pay a different Management Fee and/or Performance Allocation Fee than as set forth in the LLC Agreement with an explanation of how this difference does or does not affect the other Members.
11. Whether the Members Manager has, at any time, established, modified, or waived the Management Fee or Performance Allocation payable with respect to any additional class or series of Membership Interests without setting forth such changes in a Subscription Agreement and, if so, all information and/or documentation related to such changes.
12. All Subscription Agreements that were deemed to have modified the terms of the LLC Agreement as it relates to the Management Fee or Performance Allocation payable by any Member, class or series of Membership Interests.
13. Whether the Member Manager has, at any tie, reduced, waived, or calculated differently all or any portion of any Management Fee or Performance Allocation for any Member, without setting forth such changes in a Subscription Agreement and, if so, all information and/or documentation related to such changes.

(Category C) Suspension of Withdrawals

1. Analysis and reasoning under which the Member Manager determined the use of the Suspension Provision under Section 3.6(c) of the LLC Agreement was necessary.
2. Whether there will be any change or suspension of Management Fees or Performance Allocation due to the invocation of the Suspension Provision.
3. Quarterly Fund reviews for 2020, 2021, and 2022 and an explanation regarding whether a review was performed prior to invocation of the Suspension Provision.

(Category D) Financial Information

3. Any information, including email correspondence, between the Company and Warren Averett explaining the delay of the audited 2021 financial statements.
4. Whether the Member Manager is planning to use Warren Averett to prepare the 2022 audited financial statements.

7. Local, state, and federal tax returns for 2019, 2020, and 2021 and Form 1065 and all supporting schedules and statements, including all partner schedule K-1s for 2019, 2020, 2021.
11. Any and all statements from Pershing, the Fund's custodian, received in 2022 and 2023.

(Category E) Company Information and Other Documentation

2. The Private Placement Memorandum, or "Offering Memorandum" as defined in Section 1.1, currently in use by Gullane Partners.
4. The Company's Confidential Private Offering memorandum dated July 2016.
5. The Code of Ethics of the Fund described in Item 11 of Form ADV Part 2A: Firm Brochure.
6. The Fund's "internal procedures manual" described in Item 11 of Form ADV Part 2A: Firm Brochure.
7. The Fund's "written supervisory procedures" described in Item 11 of Form ADV Part 2A: Firm Brochure and the options for sanctions under Gullane's policies.
8. The due diligence process and analysis as stated in Item 12 of Form ADV Part 2A: Firm Brochure.

EXHIBIT D
BOOKS AND RECORDS NOT PRODUCED BY DEFENDANTS

(Category A) LLC Agreements and Amendments

1. Schedule A to the 5th LLC Agreement.
2. Executed signature pages of all the Members for the 5th LLC Agreement.
3. The following agreements and their schedules and attachments:
   i. Initial LLC Agreement
   ii. First Amended and Restated LLC Agreement
   iii. Second Amended and Restated LLC Agreement[28]
   iv. Third Amended and Restated LLC Agreement
   v. Fourth Amended and Restated LLC Agreement
4. For each version of the LLC Agreement:
   i. All written consents of the Class Members for each amendment requiring at least a Majority-in-Interest of the Class Members.
   ii. All proposed amendments, proposals to amend and other notices to Class Members containing information and/or instructions regarding the amendment proposal to be voted on.
   iii. All other prior written notices of the proposed amendment sent to all the Class Members.
5. If the LLC Agreement was amended under Section 10.3(b) without the consent of the Members, the prior written notice of the proposed amendment sent to all Class Members and, unless stated plainly in the notice, the subsection(s) of Section 10.3(b) the Member Manager relied upon in amending without consent of the Members.
6. If the LLC Agreement amendment falls under 10.3(c), the written consents of each Class Member adversely affected thereby.
7. If the LLC Agreement amendment falls under 10.3(d), the written consents of all of the Class Members.

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[28] Section 10.2 of the LLC Agreement, entitled "Books and Records," makes no mention of the investor list; it states as follows:

> The Member Manager shall keep books and records pertaining to the Company's affairs showing all of its assets and liabilities, receipts and disbursements, realized income, profits and losses, Class Members' Capital Accounts and all transactions entered into by the Company. Such books and records of the Company shall be kept at the Company's principal office, and all Class Members and their duly authorized representatives shall at all reasonable times during normal business hours have free access thereto for the purpose of inspecting or copying the same.

[28] Defendants have produced the Second Amended and Restated LLC Agreement, but they have not produced the other requested items. (*See* Pls.' June 27th Br., Ex. A.)

(Category B) Members, Membership, and Capital Accounts

1. The names and addresses of all the Members of the Fund.
2. The Capital Account information and balance for each Member of the Fund.[29]
3. The allocations and profits and losses made on the last Business Day of each Fiscal Period for each Fiscal Period in 2020, 2021, and 2022.[30]
4. Whether any persons became additional Members of Gullane Partners in 2020, 2021, 2022, or 2023.
5. The written notice and the place, date, and time of any meetings held of the Class Members in 2020, 2021, and 2022.
6. Whether any actions were taken without a meeting in 2020, 2021, and 2022 without prior notice and without a vote and, if so, the written signed consent for such actions.

(Category D) Financial Information

1. Reports regarding the performance of the Company during all Fiscal Periods in 2020, 2021, and 2022, including, specifically the following:
    i. A statement of the assets and liabilities of the Company; and
    ii. A statement of operations setting forth the net income or net loss of the Company.[31]
2. Copies of the unaudited, or audited if available, financial statements of the Company for 2021 and 2022, and any available year-to-date financial information for 2023.[32]
5. Information and documentation relating to "assets and liabilities, receipts and disbursements, realized income, profits and losses, Class Members' Capital Accounts and all transactions entered into by the Company" under Section 10.2.[33]
6. A list, and supporting documentation, of fees and expenses allocated and/or charged to the Members in 2020, 2021, and 2022.

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[29] Defendants have provided a list of capital account balances as of December 31, 2022, but the parties dispute whether additional information is required under § 5.2 of the LLC Agreement. (*See id.*)

[30] Defendants have provided the 2019, 2020, and 2021 tax returns, but the parties dispute whether additional information is required under § 6.1 of the LLC Agreement. *(See id.*)

[31] The parties dispute whether the requested information has been provided. (*Compare id., with* Defs.' Jun. 27, 2023 Resp., Ex. 4.)

[32] Defendants have provided the 2021 audited financial information, but they have not provided the audited or unaudited financial information for 2022 or year-to-date financial information for 2023. (*Compare* Pls.' June 27th Br., Ex. A*, with* Defs.' Jun. 27, 2023 Resp., Ex. 4.)

[33] Defendants have provided the 2021 audited financial statements; tax returns for 2019, 2020, and 2021; Cowan statements for 2020, 2021, 2022, and January, February, and March of 2023, and a Strategic Fund Services Portfolio Appraisal from November 30, 2022. The parties dispute whether additional information must be provided under § 10.2 of the LLC Agreement. (*Compare* Pls.' June 27th Br., Ex. A*, with* Defs.' Jun. 27, 2023 Resp., Ex. 4.)

8. Stocks purchased by the Fund in 2020, 2021, 2022, and 2023, including the cost basis and current fair market value of each.[34]
9. Allocated dollar amounts that the accounts for the Investor have invested in any of the stocks purchased by the Fund, and the list of stocks that are included in each of their accounts with the Fund.
10. The Fund's investments in non-publicly traded companies and/or special purpose vehicles/entities ("SPV"), the amounts invested, the sources of the amounts invested, and the current allocation of amounts invested, and a list of those amounts that are included in each of the Investor's accounts with the Fund.
12. Any and all statements from Strategic Fund Services, the Fund's administrator, received in 2022 and 2023.[35]
13. Valuation based on Form ADV dated November 2022, which states during the last fiscal year 100% of the private fund's assets were valued by a person, such as an administrator, that is not your related person.

(Category E) Company Information and Other Documentation

1. The Fund's company minutes for 2020, 2021, and 2022.
3. The Company's Confidential Private Offering memorandum dated November 2011; the Third Amended and Restated Limited Liability Company Agreement; and Part II of Form ADV, as amended to date.
9. The Fund's proxy voting policies and procedures as stated in Item 17 of Form ADV Part 2A: Firm Brochure; whether the Member Manager ever recognized a conflict of interest with respect to the voting of proxies on behalf of the Fund, and, if so, whether investors or a committee representing investors assisted with voting.

[34] Defendants have provided Cowan statements for 2020, 2021, 2022 and January, February, and March of 2023, which provide information regarding the publicly traded stocks. Defendants have not provided a complete list of privately held securities for 2020, 2021, 2022, or 2023. (*Compare* Pls.' June 27th Br., Ex. A*, with* Defs.' Jun. 27, 2023 Resp., Ex. 6.)

[35] Defendants have provided a portfolio appraisal dated November 30, 2022, from Strategic Fund Services, but the parties dispute whether additional information must be produced. (*Compare* Pls.' June 27th Br., Ex. A*, with* Defs.' Jun. 27, 2023 Resp., Ex. 6.)

Sample 4

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

JOSHUA ISAIAH HOLLOWAY,

Plaintiff,

vs.

Case No. CT-3712-22
Div. II

TEMETRIUS JAMEL "JA" MORANT
And DAVONTE PACK, individually
and severally,

Defendants.

TEMETRIUS JAMEL "JA" MORANT,

Counter-Plaintiff,

vs.

JOSHUA ISAIAH HOLLOWAY,

Counter-Defendant.

REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S CLAIMS UNDER TENNESSEE'S SELF-DEFENSE IMMUNITY STATUTE

Defendant Temetrius Jamel "Ja" Morant replies in support of his June 26, 2023, motion to dismiss, for mandatory procedural protections, and for mandatory damages under Tennessee's Self-Defense Immunity (SDI) Statute, Tenn. Code Ann. § 39-11-622, stating the following:

I.
INTRODUCTION

Plaintiff's June 28, 2023, initial objections to Mr. Morant's motion to dismiss make no challenges—not one—to the motion's merits.[1] As a result, if Plaintiff's procedural and constitutional challenges fail—and they must—then Plaintiff concedes that every form of relief afforded by the SDI Statute, from the evidentiary hearing, to the stay, to four different categories of damages, is due in full to Mr. Morant.

Plaintiff's objections instead rely on procedural doctrines of waiver and laches,[2] both of which wilt in light of Plaintiff's express and repeated consent to the timing of Mr. Morant's motion to dismiss, and on constitutional challenges to the entirety of the SDI Statute's legislative edifice.[3] But scaling Everest is not the best way to mount a statutory attack. Strong and long-settled presumptions of constitutionality,[4] swelled by the legislature's plenary authority to create, abolish,

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[1] Neither do the new objections filed on July 6, 2023, which are, at 39 pages, almost three times longer than the originals, challenge the merits of Mr. Morant's motion. The new objections do, however, raise new claims, which are the subject of a supplemental brief contemporaneously-filed by Mr. Morant. These new claims were not contemplated when this Court scheduled the hearing on Plaintiff's initial objections for July 10, 2023 (*see* June 30, 2023, Order Setting Hearings and Staying All Aspects of Civil Action), nor are they or Plaintiff's original objections properly presented in a response to Mr. Morant's motion to dismiss rather than in a pleading of their own. Mr. Morant reserves all rights and defenses to which he is entitled in replying to both sets of objections.

[2] (*See* Pl.'s Initial Objs. at 13 ("Defendant Waived the Right to Request an Immunity Hearing and the Doctrine of Laches Applies").)

[3] (*Id.* at 2 ("[T]he statute is facially unconstitutional."); 6 ("History of the 'Stand Your Ground' Statute"); 8 ("Tenn. Code Ann. § 39-11-622 Violates Plaintiff's Right to a Trial by Jury"); 10 ("Tenn. Code Ann. § 39-11-622 Violates Separation of Powers"); and 12 ("Tenn. Code Ann. § 39-11-622 is Unconstitutional Because It Directly Contradicts Tenn. Code Ann. § 39-11-605").)

[4] *See, e.g., Gallaher v. Elam,* 104 S.W.3d 455, 459 (Tenn. 2003) (quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002)). ("We must 'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.'").

and modify legal rights and remedies,[5] make for a difficult climb. Past those cliffs, and despite protestations to the contrary, Plaintiff identifies no injury to his right to a jury trial, no violation of the separation of powers, and no conflicts with other statutes. The SDI Statute is constitutionally sound. Mr. Morant's motion to dismiss should be granted.

II.
PLAINTIFF'S HOLLOW PROCEDURAL CHALLENGES

In the final pages of his initial objections (at 13-15), Plaintiff invokes the procedural doctrines of waiver and laches, claiming that Mr. Morant filed his motion to dismiss too late. Yet only six days before Mr. Morant filed his motion on June 26th, this Court signed a Consent Amended Scheduling Order submitted jointly by the parties. (*See* Consent Amended Scheduling Order of June 20, 2023.) The first page of that Order, entered last month, recites a deadline for motions to dismiss that will not expire until the end of this month: July 31, 2023.

Trial courts may alter deadlines otherwise imposed by the rules of civil procedure. *E.g., Kenyon v. Handal*, 122 S.W.3d 743, 753 (Tenn. Ct. App., MS, 2003). And Plaintiff's consent to the July 31st deadline—Plaintiff's lawyer signed the Order, with permission, for ***both*** sides—hollows out his claim that "lengthy, unreasonable delay" preceded Mr. Morant's motion to dismiss. (Pl.'s Objs. at 14.) What is more, that same July 31st deadline was part of the parties' original Consent Scheduling Order, entered on April 14, 2023. Plaintiff thus consented to the deadline twice.

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[5] *See, e.g., Mills v. Wong*, 155 S.W.3d 916, 923 (Tenn. 2005) ("The Tennessee General Assembly itself has the power to weigh and to balance competing public and private interests in order to place reasonable limitations on rights of action in tort which it also has the power to create or to abolish."); *Heirs of Ellis v. Estate of Ellis*, 71 S.W.3d 705, 712 (Tenn. 2002) ("[T]he General Assembly unquestionably has the constitutional and legislative authority to change the common law of this state").

Putting aside Plaintiff's consent for a moment, Civil Rule 12 specifies which defenses are waived, and which are not, when omitted from a responsive pleading or preliminary motion. Rule 12.08 expressly states that "the defense of failure to state a claim upon which relief can be granted . . . may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits[.]" Perhaps Plaintiff wishes that Mr. Morant's motion were retitled "judgment on the pleadings"? Regardless, even without Plaintiff's consent, the relief sought by Mr. Morant's motion has not been waived or unduly delayed.

One last point: The defenses of failure to state a claim and self-defense ***were***, in fact, part of Mr. Morant's responsive pleadings. Plaintiff's own objections say so (at 2 and 3). Plaintiff then proceeds to call the defenses "vague." (Pl.'s Objs. at 14.) But Tennessee's notice-pleading standard required nothing more.[6] Then, too, the phrase "Tennessee's self-defense laws," which is what Mr. Morant pleaded,[7] is a rather strong indication that a party plans to assert self-defense. Similarly, the phrase "Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted" is not exactly opaque.[8]

At every turn, in his pleadings, under the rules of civil procedure, and by Plaintiff's consent, Mr. Morant properly preserved the defenses asserted in his motion to dismiss. Plaintiff's rote procedural objections based on waiver and laches must therefore fail.

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6 "The essential function of the pleadings is simply to give notice of a claim or defense. History, as Professors Wright and Miller point out, has shown that the pleadings cannot successfully do more." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (citations and internal quotation marks omitted); *accord Tolliver v. Tellico Village Prop. Owners Assoc.*, 579 S.W.3d 8, (Tenn. Ct. App., ES, 2019) (citations and internal quotation marks omitted) ("Tennessee is a notice-pleading state. Technical forms in pleading are not now required.").

7 (Morant's Ans. to Pl.'s Am. Compl., Second Affirmative Defense ("Mr. Morant avers that any actions on his part were reasonable, justifiable, and at all times pursuant to and in accordance with Tennessee's self-defense laws.")

8 (*Id.* at First Affirmative Defense.)

III.
LEGAL STANDARD FOR PLAINTIFF'S CONSTITUTIONAL CHALLENGES

Plaintiff's constitutional objections likewise fail. Courts that evaluate the constitutionality of a statute "start with a strong presumption that acts passed by the legislature are constitutional." *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006). They then "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *Gallaher v. Elam,* 104 S.W.3d 455, 459 (Tenn. 2003) (quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002)). "Th[e] "presumption [of constitutionality] applies with even greater force when, as here, the facial constitutional validity of a statute is challenged."[9] *McClay v. Airport Mgmt. Servs.*, 596 S.W.3d 686, 689 (Tenn. 2020) (quoting *State v. Decosimo*, 555 S.W.3d 494, 506 (Tenn. 2018)). The party attacking the statute "must bear a heavy burden in establishing some constitutional infirmity of the Act in question." *Gallaher,* 104 S.W.3d at 459-60 (quoting *West v. Tenn. Hous. Dev. Agency*, 512 S.W.2d 275, 279 (Tenn. 1974)).

IV.
LAW & ARGUMENT AGAINST PLAINTIFF'S CONSTITUTIONAL CHALLENGES

In his initial objections, Plaintiff asserts three constitutional challenges against the SDI Statute: (1) the statute violates Plaintiff's right to a trial by jury; (2) the statute violates the separation of powers; and (3) the statute directly contradicts another statute, Tenn. Code Ann. § 39-11-605. All three challenges fail.

A. **The SDI Statute respects Plaintiff's right to trial by jury.**

Tennessee's jury-trial guarantee sits in Article I, § 6, of the state constitution, which states that "the right of trial by jury shall remain inviolate[.]" "Although this language is broad," the Tennessee Supreme Court has held, it "does not guarantee the right to a jury trial in every case."

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9 *See, supra*, note 3 and accompanying text.

Young v. City of La Follette, 479 S.W.3d 785, 793 (Tenn. 2015) (citing *Helms v. Tenn. Dep't of Safety*, 987 S.W.2d 545, 547 (Tenn. 1999). Instead, the right to trial by jury in Tennessee exists now "as it existed at common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796." *McClay*, 596 S.W.3d at 689 (citing *Young*, 479 S.W.3d at 793). The right "does not apply to cases that could have been tried without a jury prior to 1796." *Young*, 479 S.W.3d at 793 (citing *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992)).

Plaintiff's first mistake in asserting this right is failing to establish—or even assert—that civil assault, battery, civil conspiracy, or any of the other seven claims pleaded in Plaintiff's Amended Complaint gave rise to a jury-trial guarantee in North Carolina in 1796. (*See generally* Pl.'s Am. Compl.) That argument is nowhere in Plaintiff's objections, nor is any law that supports it. Such an argument is a necessary prerequisite to Plaintiff's jury-trial challenge because of the Tennessee jury-trial guarantee's limited scope. *See id.*

Plaintiff's second mistake is worse: He quotes language from the Tennessee Supreme Court's decision in *McClay v. Airport Management Services*,[10] apparently failing to realize that *McClay* ***rejected*** a constitutional challenge to a statute based on Tennessee's jury-trial guarantee. *See McClay*, 596 S.W.3d at 693 ("[W]e hold that the statutory cap on noneconomic damages in Tennessee Code Annotated section 29-39-102 does not violate the right to trial by jury under the Tennessee Constitution" (underscore added).) In fact, the court went further, admonishing the U.S. Court of Appeals for the Sixth Circuit for striking down a similar statute instead of certifying the constitutional question to Tennessee's highest court.[11]

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[10] (*See* Pl.'s Initial Objs. at 8.)

[11] *McClay*, 596 S.W.3d at 693 n. 6 ("As a preliminary matter, we note that decisions by a federal circuit court of appeals are not binding on this Court. We also find the reasoning of the

Worst of all for Plaintiff, however, is the fact that the Tennessee Supreme Court expressly has upheld, in a case of first impression, a statute in the same part of the state code as the SDI Statute against a jury-trial challenge. In *State v. Perrier*, the court directed the parties to brief the following question: "[W]hether the trial court or the jury decides whether the defendant was engaged in unlawful activity [under Tenn. Code Ann. § 39-11-611]." 536 S.W.3d 388, 392 (2017). It then answered that question as follows: "[T]he trial court should make the threshold determination of whether the defendant was engaged in unlawful activity when he used force in an alleged self-defense situation." *Id.*

The trial judge in *Perrier* erroneously instructed the jury that whether a defendant was engaged in unlawful activity for purposes of the self-defense statute, § 39-11-611, was a question for the jury. *Id.* at 395. In reviewing that instruction, the Supreme Court noted both that the parties disagreed about the answer, *id.* at 398, and that the Tennessee Court of Criminal Appeals "ha[d] been split on the question of whether the trial court or the jury decides if the defendant engaged in unlawful activity," *id.* at 402. The Supreme Court also surveyed statutes and decisions in four other states—Alabama, Arizona, Kentucky, and Louisiana—and determined that in all four states "the trial court is tasked with the threshold determination of whether a defendant was engaged in criminal activity" and that "[t]his method is compatible with the current structure of [Tennessee's] self-defense instruction." *Id.* at 402-03. The court advised that the jury-out proceeding in

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majority in *Lindenberg* [*v. Jackson National Life Insurance Company*, 912 F.3d 348 (6th Cir. 2018)] unpersuasive in this case . . . . We simply point out that the procedure for certifying questions of state law to this Court is designed to promote judicial efficiency and comity, and to protect this State's sovereignty" (internal citations and quotation marks omitted).).

Tennessee Rule of Evidence 404(b) should be used by the trial court to "make[ ] the threshold determination whether to charge the jury with self-defense[.]"[12] *Id.* at 403.

The SDI Statute mimics this protocol. It establishes a jury-out proceeding during which the trial court decides the threshold question of whether the defendant acted in self-defense—or with one of the other five justifications that the SDI Statute identifies—and therefore enjoys civil immunity, before allowing the case to proceed in the ordinary course to the jury. *See* Tenn. Code Ann. §§ 39-11-622(a), (e)(1) and (3)-(5). It sits in the same title, chapter, and part as the self-defense statute at issue in *Perrier*. Under *Perrier*, the SDI Statute thus cannot violate Plaintiff's right to trial by a jury—assuming that he has one.[13]

Plaintiff claims that the SDI Statute improperly asks the trial court, rather than the jury, to answer the following questions:[14]

1). Whether Plaintiff assaulted Mr. Morant;

2). Whether Plaintiff had capacity to assault Mr. Morant;

3). Whether Mr. Morant was in fear of imminent danger; and

4). Whether Mr. Morant's use of force was reasonable given the circumstances.

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[12] TRE 404(b) states in relevant part that the trial court "upon request must hold a hearing outside the jury's presence" to determine whether other-acts evidence is admissible. In referring similarly-situated litigants to TRE 404(b), the *Perrier* court cited *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013), for the proposition that general defenses fairly raised by admissible evidence must be submitted to the jury, but held that "[w]ithin this structure, the trial court makes the threshold determination whether to charge the jury with self-defense." 536 S.W.3d at 403.

[13] *See, e.g., Shorts v. Bartholomew*, 278 S.W.3d 268, 277 (Tenn. 2009) (quoting *Wilson v. Johnson Cnty.*, 879 S.W.2d 807, 810 (Tenn. 1994)) (internal quotation marks omitted) ("[S]tatutes in pari materia—those relating to the same subject or having a common purpose—are to be construed together, and the construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute.")

[14] (*See* Pl.'s Initial Objs. at 9.)

But that claim cannot stand because the plain language of the SDI Statute says that the "sole issue" before the Court in the evidentiary hearing that the statute requires will be whether Mr. Morant acted in self-defense. *See* Tenn. Code Ann. § 39-11-622(e)(3). That sole issue embraces none of the questions above, *see* Tenn. Code Ann. § 39-11-611(b)(1), instead asking only whether Mr. Morant "reasonably believe[d] the force [that he used] [wa]s immediately necessary to protect against [Plaintiff's] use or attempted use of unlawful force." *Id.*

Plaintiff also complains that the SDI Statute will force the Court to "make significant factual determinations without the benefit of full discovery." (Pl.'s Initial Objs. at 9 (emphasis deleted).) But there is no constitutional right to "full" discovery. And if the Court determines that either side has not met its evidentiary burden, then it simply may deny relief. Besides—multiple rounds of written discovery have been exchanged in this case,[15] and Plaintiff already has taken more than seven depositions.[16] What happened last July is no great mystery.

The SDI Statute respects any right to a jury trial that Plaintiff possesses. Plaintiff's jury-trial challenge must therefore fail.

B. **The SDI Statute respects the separation of powers.**

Plaintiff's second constitutional challenge, which asserts that the SDI Statute violates the separation of powers, fares no better than the first. Article II, §§ 1 and 2, of the Tennessee Constitution establishes this principle, stating that "[t]he powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial" and that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." The Tennessee

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15 (*See, e.g.,* Pl.'s May 16, 2023, Sixth Supp. Resp. to Discovery.)

16 (*See, e.g.,* June 22, 2023, June 23, 2023, and June 27, 2023, Notices of Filing Tr.)

Supreme Court has explained that "[i]n general, the legislative power is the authority to make, order, and repeal law[.]" *Bredesen v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419, 434 (Tenn. 2007).

Expressly within this authority is the prerogative "to legislatively alter the common law." *McClay*, 596 S.W.3d at 690.[17] The legislature may "alter[ ] common law causes of action and remedies," create them, or abolish them altogether. *Id.* at 690-91. Consequently, "what causes of action a plaintiff may bring, or what remedies a plaintiff may seek, are matters of law subject to determination by the legislature." *Id.* at 691. This understanding of the legislative power has persisted in Tennessee for more than 150 years. *See, e.g., Collins v. E. Tenn. V. & G. R. Co.*, 56 Tenn. 841, 847 (1874) ("The State has complete control over the remedies of its citizens in the Courts. It may give a new and additional remedy for a right already in existence—or may abolish old and substitute new remedies. It may modify an existing remedy[.]"). There are too many instances to name of the legislature's constitutional exercise of this power.[18]

Also well-settled, however, is the fact that the Tennessee Supreme Court, and not the legislature, possesses "the inherent power to promulgate rules governing the practice and procedure of the courts of this state." *McClay*, 596 S.W.3d at 694. Thus, the General Assembly "oversteps constitutional boundaries in violation of the separation of powers when it exercises its

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17 *Accord, supra*, note 5 and accompanying text.

18 *See McClay*, 596 S.W.3d at 690 (collecting cases including *Hodge v. Craig*, 382 S.W.3d 325, 338 (Tenn. 2012); *Lavin v. Jordon*, 16 S.W.3d 362, 363 (Tenn. 2000); *Hanover v. Ruch*, 809 S.W.2d 893, 895 (Tenn. 1991); and *Dupuis v. Hand*, 814 S.W.2d 340, 346 (Tenn. 1991)); *see also* Tenn. Code Ann. §§ 29-26-121 and 122 (establishing statutory prerequisites for medical malpractice actions); *id.* § 29-39-102 (statutory non-economic damages caps); *id.* § 29-39-104 (statutory punitive damages caps); and *id.* § 37-10-101 to -103 (limiting recovery against parents for certain harms caused by their children).

legislative power in a way that directly contradicts existing procedural rules of the courts. *Id.* (citing *State v. Lowe*, 552 S.W.3d 842, 857 (Tenn. 2018) (underscore in original)). The separation of powers doctrine nevertheless "does not prevent the General Assembly from enacting substantive law." *Id.* (citations omitted). Indeed, even when legislation "touch[es] upon an area within the province of the judiciary," Tennessee courts will defer to the General Assembly as long as "the overriding purpose of the statute at issue is within the authority of the legislature." *Willeford v. Klepper*, 597 S.W.2d 454, 470 (Tenn. 2020) (citations omitted).

Plaintiff claims that the procedural protections of the SDI Statute "directly contradict[ ]" Civil Rule 12.02. (Pl.'s Initial Objs. at 11.) That rule requires motions to dismiss to be treated as motions for summary judgment, under Civil Rule 56, if matters outside the pleadings are considered by the court. But the SDI Statute's procedural protections—an expedited evidentiary hearing and a mandatory stay of the underlying civil litigation, *see* Tenn. Code Ann. § 39-11-622(e)(1)-(2)—are necessarily incidental to the statute's overriding purpose: to cloak with civil immunity those who act in self-defense. *See id.* § 39-11-622(a). In fact, the SDI Statute's conferral of civil immunity predates its procedural protections by almost 15 years: The statute was first enacted in 2007, but the evidentiary hearing and the stay were not added until 2021.[19] The protections provide ***more***, rather than ***fewer***, safeguards for litigants than Civil Rules 12.02 and 56, requiring live proof and dedicated time to prepare it, not a stilted adjudication on a cold record.

That the SDI Statute is a change in the law within the legislature's proper sphere is evidenced by the fact that the statute stands alone neither in the United States[20] nor in its own state:

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[19] *Compare* 2007 Pub. Acts, c. 210, § 3, *with* 2021 Pub. Acts, c. 188, § 1 and 2021 Pub. Acts, c. 387, § 1.)

[20] *See Self-Defense and 'Stand Your Ground,'* Nat'l Conf. of State Legis. (Mar. 1, 2023), https://www.ncsl.org/civil-and-criminal-justice/self-defense-and-stand-your-ground ("[A]t least 23 states . . . provide civil immunity under certain self-defense circumstances.")

- Tenn. Code Ann. § 7-86-320 (providing civil immunity to certain emergency service providers);
- Tenn. Code Ann. § 29-20-201(a) (preserving civil immunity for governmental entities);
- Tenn. Code Ann. § 39-14-909 (providing civil immunity for certain reporters of financial transactions);
- Tenn. Code Ann. § 50-6-108(a) (establishing workers' compensation immunity for employers);
- Tenn. Code Ann. § 56-53-110 (providing civil immunity for certain reporters of fraud and money laundering); and
- Tenn. Code Ann. § 71-6-105 (providing civil and criminal immunity for reporters of elder abuse).

Not one of these statutes has been held unconstitutional.

Plaintiff also makes the incoherent claim that the SDI Statute requires this Court to defy the doctrine of collateral estoppel. (*See* Pl.'s Initial Objs. at 11-12.) But it is not clear ***how***—on Plaintiff's own telling, the doctrine requires both separate litigation and a final judgment—or ***why*** this would be so. You can only cry wolf so many times before the echoes start to fall on deaf ears.

In *McClay*, mentioned above, the Tennessee Supreme Court confronted the question of whether the legislature may limit "the ability of a plaintiff to recover noneconomic damages." 596 S.W.3d at 690. In addition to holding that the statutory limits on non-economic damages in Tenn. Code Ann. § 29-39-102 do not invade the right to trial by jury, 596 S.W.3d at 693, the court concluded that the application of those limits "does not interfere with the judicial power of the courts to interpret and apply law." *Id.* at 695. Just so here with the SDI Statute.

C. **The SDI Statute accords with Tenn. Code Ann. § 39-11-605.**

Plaintiff's final challenge to the SDI Statute is not constitutional despite its label.[21] It asserts only that the SDI Statute conflicts with a different statute, Tenn. Code Ann. § 39-11-605. Such an alleged conflict has no constitutional implications, nor is it accurate.

Section 39-11-605 states that "[t]he fact that conduct is justified under this part does not abolish or impair any remedy for the conduct that is or may be available in a civil suit." According to Plaintiff, this language cannot be squared with the SDI Statute, which cloaks with civil immunity a person who acts in self-defense. *See* Tenn. Code Ann. § 39-11-622(a). But where is the conflict? The first statute says that acting in self-defense does not automatically keep you from being sued. The second statute supplies the remedy—immunity from suit—that otherwise would not exist because of the first. These two statutes are not at odds; they are working together, as the legislature intended.[22] And if they were at odds, then the SDI Statute would prevail because it provides a specific remedy, whereas § 39-11-605 speaks of "any remedy."[23]

Plaintiff relies on *Pragnell v. Franklin*, 2023 WL 2985261 (Tenn. Ct. App., ES, Apr. 18, 2023), for the proposition that Tennessee courts "will review the language of a statute when it contains ambiguity or creates a vague standard." (Pl.'s Initial Objs. at 12.) But *Pragnell* does not say that. Even if it did, Plaintiff has identified no ambiguity in the SDI Statute. This challenge fails like all the others.

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21 (*See* Pl.'s Initial Objs. at 12 ("Tenn. Code Ann. § 39-11-622 is Unconstitutional Because It Directly Contradicts Tenn. Code Ann. § 39-11-605").)

22 *See, supra*, note 13 and accompanying text.

23 *See Shorts*, 278 S.W.3d at 277 ("If a conflict exists, specific statutory provisions will be given effect over conflicting general provisions.")

V.
CONCLUSION

Plaintiff's procedural and constitutional objections to the SDI Statute are uniformly without merit. If making such objections is tantamount to scaling Everest, Plaintiff never crests the first peak. And as Plaintiff offered no objections to Mr. Morant's motion to dismiss on the merits, he has conceded that Mr. Morant is due all forms of relief afforded by the SDI Statute. Mr. Morant's motion should be granted.

* * *

A NOTE ON CIVILITY

Throughout Plaintiff's papers, pertaining both to the scheduled hearing on July 10, 2023, and to other matters, are multiple accusations against both Mr. Morant and the undersigned counsel that are false. These accusations are unsupported by citations to the record or any reasonable suspicion of their truth. One flagrant example, from Page 5 of Plaintiff's initial objections of June 28, 2023, charges that "Defendants and their lawyers have gone to the most extreme lengths including interference with a criminal investigation [and] withholding of critical evidence."

The use of such language without cause sullies the writer and demeans all who read it. It is conduct unbecoming the members of a learned profession. This Court's local rules, which adopt and incorporate both the Memphis Bar Association (MBA)'s Guidelines for Professional Courtesy and Conduct and the Tennessee Rules of Professional Conduct, forbid it. *See, e.g.,* LR 1(F); MBA Guideline 1 ("A lawyer should treat the opponent, the opposing party, the court and the members of the court staff with courtesy and civility, conducting business in a professional manner at all times."); *id.* at 2 ("A lawyer has no right, even when called upon by a client to do so, to abuse or to indulge in offensive conduct towards the opposite party."); *id.* at 3 ("While in adversary

proceedings, clients are litigants, and while ill feelings may exist between them, such ill feeling(s) should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.").

Zealous advocacy is altogether different. It makes us all, and the legal profession itself, better. Tennessee Rule of Professional Conduct 1.3(1) exhorts lawyers to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Lawful and ethical measures may be marked by rhetorical flourishes, which can be more, rather than less, ennobling. The Court may have noticed one or two such flourishes in the pages above.

But under the precepts recited above, counsel must constrain themselves to relevant facts and, always, to the truth. Plaintiff's papers raise a concern that these limits may not be functioning as they should. Mr. Morant and his counsel bring this concern to the Court's attention now in the hope that further intervention will not be necessary.

RESPECTFULLY SUBMITTED,

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The undersigned counsel certifies that on July 7, 2023, a true and correct copy of the foregoing response was served upon counsel of record via electronic mail as follows:

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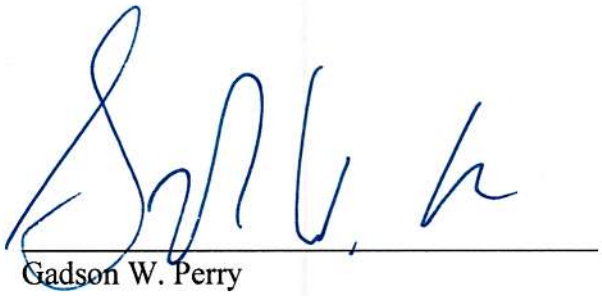

Gadson W. Perry

80230576.v1

Sample 5

**IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

**JOSEPH JARRATT, SR., individually
and derivatively on behalf of
FORD JARRATT REALTY & DEVELOPMENT
COMPANY, LLC,**

Plaintiffs,

VS.

**Case No. CT-1914-20
Div. III**

**PRICE FORD, SR., and CYPRESS
REALTY HOLDINGS III, LLC**

Defendants,

—and—

**FORD JARRATT REALTY & DEVELOPMENT
COMPANY, LLC,**

Nominal Defendant.

DEFENDANTS' MOTION TO DISMISS COUNTS II, V, AND PORTIONS OF COUNTS I, III, AND IV OF PLAINTIFF'S VERIFIED FIRST AMENDED COMPLAINT

Defendants Price Ford, Sr.; Cypress Realty Holdings Company III, LLC (C3); and Ford Jarratt Realty & Development Company, LLC (FJR), move under Tennessee Rule of Civil Procedure 12.02(6) to dismiss Counts II, V, and portions of remaining Counts I, III, and IV of Plaintiff Joseph Jarratt's Verified First Amended Complaint, stating the following:

I.
INTRODUCTION

A brief note to begin: Last week, on November 11, 2020, Plaintiff spilled much ink responding to Mr. Ford's June 29, 2020, motion to dismiss Plaintiff's original complaint. Most of the response was misdirected and wrong, but Plaintiff got one thing right: Now that Plaintiff's amended complaint has been filed, Mr. Ford's first motion is moot.

Here is a new motion, directed to the amended complaint, which the parties discussed with the Court at the October 30, 2020, hearing on Plaintiff's motion to amend. Everyone knew this motion was coming. The Court expressly directed Mr. Ford to file a supplemental motion addressing any problems that persisted from the original to the amended complaint.

Many problems persist. This motion therefore adopts, incorporates, and reasserts the arguments of Mr. Ford's first motion to dismiss as to Counts II and V of the amended complaint and the still-deficient portions of Counts I, III, and IV. (The new complaint drops Count VI.) As a result, and as the Court has agreed, the hearing set for November 18, 2020, on Mr. Ford's first motion to dismiss, may go forward as scheduled on this motion.

* * *

This motion asks the Court to dismiss outright two counts of Plaintiff's amended complaint: Count II, for breach of contract, and Count V, for breach of the obligation of good faith and fair dealing. But deficiencies in Plaintiff's remaining counts—which no longer include Count VI—plague the new pleading as well. Plaintiff made three key changes in his amended complaint: (1) he added a verification; (2) he named two new defendants; and (3) he dropped Count VI, which sought a receivership. But Count I, which requests a declaratory judgment,[1] and Counts III and IV, which assert breaches of fiduciary duties, each consist of multiple claims (as do Counts II and V).[2] Plaintiff's changes redeem some of those claims—for purposes of Rule 12 only—but fail to save others. Thus this motion also asks the Court to restrict Counts I, III, and IV to their adequately pleaded portions and to dismiss the rest.

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[1] Plaintiff added a new basis for declaratory relief in the amended complaint. (*See* ¶ 43; *see also* Chart C: Comparison of Original & Amended Claims, Appendix of Claims, attached as **Exhibit 1**.)

[2] (*See* **Ex. 1** at Chart C: Comparison of Original & Amended Claims.)

II.
FACTUAL BACKGROUND

Mr. Ford adopts, incorporates, and reasserts the fact section of his June 29, 2020, motion to dismiss.[3]

III.
RELEVANT PROCEDURAL BACKGROUND

On May 13, 2020, Plaintiff filed his original complaint, naming Mr. Ford the sole defendant in this action. The complaint had so many deficiencies—in addition to failing to name the proper parties—that Mr. Ford charted them for the Court on Page 2 of his first motion to dismiss.[4]

Plaintiff subsequently moved for leave to amend his complaint.[5] Mr. Ford opposed Plaintiff's motion, arguing that, among other things, amendment would prove futile and unduly prejudicial.[6] After a hearing on October 30, 2020, the Court allowed Plaintiff to file an amended complaint but reserved for later ruling Mr. Ford's request to recover attorney fees.[7] The Court also directed Mr. Ford to file a supplemental motion that addressed any persistent deficiencies in Plaintiff's amended complaint and ordered that the hearing on Mr. Ford's motion would remain scheduled for November 18, 2020.[8]

Plaintiff filed his amended complaint on November 11, 2020.

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3 (*See* **Exhibit 2:** Def.'s Mot. to Dismiss and Mem. of Law, at 2-4.) Mr. Ford also disputes the allegations in note 5 of Plaintiff's response to his first motion to dismiss. Like the response, the allegations are irrelevant to this motion.

4 (*Id.* at 2; *see also* **Ex. 1** at Chart A: Original Counts)

5 In addition to his motion to dismiss, Mr. Ford filed an answer and counterclaim on June 29, 2020, and would not consent to amendment. As a result, Rule 15.01 required Plaintiff to obtain leave of court.

6 (*See generally* **Exhibit 3:** Def.'s Resp. in Opp'n to Pl.'s Mot. to Amend.)

7 (*See* Order, Nov. 9, 2020, attached as **Exhibit 4**.)

8 (*Ibid.*)

IV.
STANDARD OF REVIEW

Mr. Ford adopts, incorporates, and reasserts the standard of review in his first motion.[9]

V.
LAW & ARGUMENT

Plaintiff's amended complaint wisely drops Count VI. But Counts II and V of the new pleading remain deficient, and portions of Counts I, III, and IV fail to state a claim as well. This fractured outcome is possible because despite nominally consisting of only five counts, Plaintiff's amended complaint includes twenty-five separate claims for relief.[10] Some of those claims are adequately pleaded, and others are not.[11] As with all claims in Counts II and V, the deficient claims in Counts I, III, and IV should be dismissed.

A. Counts II & V remain wholly deficient in the Amended Complaint.

Counts II and V are companion claims, the first asserting a breach of contract and the second asserting a breach of the obligation of good faith and fair dealing. (Am. Compl. ¶¶ 47-54, 55-68.) The counts rise or fall together because the obligation of good faith and fair dealing "is not an independent basis for relief." (**Ex. 2** at 20 (quotations omitted).) The obligation instead may be an element of a breach of contract. (*Ibid.*) Thus, if Count II fails, Count V does too.

Count II fails. In the original complaint, Count II consisted of ten claims for relief. Those claims suffered from four deficiencies: (1) none of them identified a contract provision that had been breached (*see* **Ex. 2** at 12-13); (2) Plaintiff lacked standing to assert nine of the claims (*see*

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9 (*See* **Ex. 2** at 4-5.)

10 (*See* **Ex. 1** at Chart C: Comparison of Original & Amended Claims, Appendix of Claims.)

11 (*See ibid.*) The six counts of Plaintiff's original complaint also consisted of multiple claims for relief. (*See* **Ex. 2** at 5-22.) But the deficiencies of that pleading were so pervasive that it was possible to chart them count by count instead of claim by claim. (*See* **Ex. 1**, Charts A & B.)

id. at 13-14); (3) the same nine claims mistakenly asserted torts or statutory violations and failed to plead the necessary elements (*see id.* at 15); and (4) the sole claim for which Plaintiff had standing failed for lack of a necessary defendant (*see id.* at 15-16).

The amended complaint adds two new defendants, C3 and FJR, and so cures the last deficiency. It also omits three of Count II's claims. But as in the original complaint, none of the count's claims in the amended complaint identifies a contract provision that has been breached; Plaintiff lacks standing to assert six of the seven claims; and those same six claims mistakenly assert torts or statutory violations and fail to plead the necessary elements. (*See* **Ex. 1**, Chart C: Comparison of Original & Amended Claims.) Count II should therefore be dismissed in its entirety.

B. Two of Count I's four claims in the Amended Complaint fail as well.

In Plaintiff's original complaint, Count I asserted three separate bases for declaratory relief. They were deficient for three reasons: (1) Plaintiff lacked derivative standing to assert two claims because he failed to satisfy Tenn. Code Ann. § 48-249-801(b) or Rule 23.06 (*see* **Ex. 2** at 6); (2) Plaintiff lacked direct standing to assert those same two claims under Delaware's *Tooley* Standard (*see id.* at 8-9); and (3) all three counts lacked a necessary defendant (*see id.* at 10-11).

Plaintiff's amended complaint adds a verification and names FJR as a defendant. It also adds a fourth basis for declaratory relief. (*See* Am. Compl. ¶ 43.) These changes allow two of Count I's four claims to survive Rule 12. (*See id.* ¶¶ 43, 46.) But Plaintiff still lacks direct standing for the other two claims. (*See id.* ¶¶ 44-45.) And the amended complaint satisfies § 48-249-801(b) and Rule 23.06, which are necessary for derivative claims, no better than the original.[12] (*See* **Ex.**

[12] In addition to verification, § 48-249-801(b) and Rule 23.06 require that the other members of a company refuse to sue before one member may sue on the company's behalf. (*See* **Ex. 2** at 6.)

1, Chart C: Comparison of Original & Amended Claims.) Those two claims therefore fail.

C. Portions of Counts III & IV survive for now.

Counts III and IV of the original complaint failed to state a claim for a simple reason: They were late. (*See* **Ex. 2** at 17-20.) Count III asserted a breach of the fiduciary duty of care, and Count IV a breach of the fiduciary duty of loyalty. To support these claims, Plaintiff's original complaint alleged that Plaintiff "learned of secret meetings" in February 2018 and that Mr. Ford told Plaintiff "that he planned to exclude him from Cypress III all together" in March 2018. (¶¶ 24-25.) But a one-year statute of limitations restricts claims for breaches of fiduciary duty. (*See id.* at 18 (citing the Revised LLC Act).) And Plaintiff did not sue until May 13, 2020.

Plaintiff's amended complaint makes a slight (sleight?) change. It now states that Mr. Ford said in March 2018 "that he may exclude [Plaintiff] from Cypress III" and that it was not until "early 2020" that Mr. Ford "made clear" that he would not include Plaintiff. (Am. Compl. ¶¶ 25, 30.) The word play enables Counts III and IV to survive for now. But it will come back to haunt Plaintiff at summary judgment.

Further, timeliness was not the counts' only problem. Like Counts II and V, Counts III and IV consist of several claims. (*See* Am. Compl. ¶¶ 59-65.) Five of those claims asserted independent causes of action that Plaintiff failed to name, and include elements that he failed to plead, in the original complaint. (*See* **Ex. 2** at 19). Those same failings appear in the amended complaint. (*See* **Ex. 1**: Chart C: Comparison of Original & Amended Claims.) Thus, although the counts themselves survive, those five claims must fail.

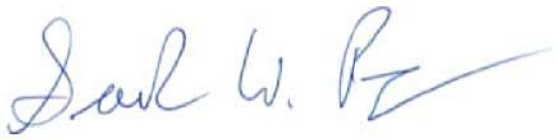
D. The Amended Complaint wisely drops Count VI.

Plaintiff's original complaint sought a receivership in Count VI. The amended complaint does not. Enough said, at least until the Court again takes up Mr. Ford's request for attorney fees.

VI.
CONCLUSION

Count VI has been dropped from the amended complaint. But Counts II and V of the amended complaint should be dismissed in their entirety, and only portions of Counts I, III, and IV should survive. Mr. Ford's motion to dismiss should be granted.

RESPECTFULLY SUBMITTED, this 16th day of November 2020,



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I hereby certify that the foregoing pleading was served via electronic and United States Mail, postage prepaid, on this 16th day of November 2020, upon the following:

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EXHIBIT 1

CHART A: ORIGINAL COUNTS

ORIGINAL COMPLAINT	DEFECTS
Count I: Declaratory Judgment	• Lack of standing • Wrong defendant • Violates Rule 23.06
Count II: Breach of Contract	• Missing elements • Lack of standing • Confusion of tort and contract • Wrong defendant
Count III: Breach of Fiduciary Duty	• Time barred
Count IV: Breach of Duty of Loyalty	• Time barred
Count V: Breach of Duty of Good Faith & Fair Dealing	• Missing elements • Not cognizable
Count VI: Appointment of a Receiver	• Wrong defendant • Violates the Revised LLC Act

CHART B: ORIGINAL CLAIMS DETAILED

ORIGINAL COMPLAINT	DEFECTS BY COUNT	DEFECTS BY CLAIM
Count I: Declaratory Judgment (three claims)	• Lack of standing (L) • Wrong defendant (W) • Violates Rule 23.06 (V)	• Claim 1 (¶ 43): LWV • Claim 2 (¶ 43): W • Claim 3 (¶ 44): LWV
Count II: Breach of Contract (ten claims)	• Missing elements (M) • Lack of standing (L) • Confusion of tort and contract (C) • Wrong defendant (W)	• Claim 1 (¶ 46): MLC • Claim 2 (¶ 47): MLC • Claim 3 (¶ 48): MLC • Claim 4 (¶ 49): MLC • Claim 5 (¶ 50): MLC • Claim 6 (¶ 52): MLC • Claim 7 (¶ 52): MLC • Claim 8 (¶ 52): MLC • Claim 9 (¶ 52): MW • Claim 10 (¶ 52): MLC
Count III: Breach of Fiduciary Duty (eleven claims, single heading with Counts IV & V)	• Time barred (T)	• Claim 1 (¶ 59): T • Claim 2 (¶ 59): T • Claim 3 (¶ 60): T • Claim 4 (¶ 62): T • Claim 5 (¶ 63): T • Claim 6 (¶ 64): T • Claim 7 (¶ 65): T+ • Claim 8 (¶ 65): T+ • Claim 9 (¶ 65): T+ • Claim 10 (¶ 65): T+ • Claim 11 (¶ 65): T+
Count IV: Breach of Duty of Loyalty (eleven claims, single heading with Counts III & V)	• Time barred (T)	• Same claims and defects as Count III
Count V: Breach of Duty of Good Faith & Fair Dealing (eleven claims, single heading with Counts III & IV)	• Missing elements (M) • Not cognizable (N)	• Same claims as Counts III & IV, different defects: MN
Count VI: Appointment of a Receiver (one claim)	• Wrong defendant (W) • Violates the Revised LLC Act (V)	• Only claim: WV

CHART C: COMPARISON OF ORIGINAL & AMENDED CLAIMS:

COUNT	DEFECTS	ORIGINAL CLAIMS	AMENDED CLAIMS
Count I: Declaratory Judgment	Lack of standing (L) Wrong defendant (W) Violates Rule 23.06 (V)	• Claim 1 (¶ 43): LWV • Claim 2 (¶ 43): W • Claim 3 (¶ 44): LWV	• Claim 1 (¶ 45): L~~WV~~ • Claim 2 (¶ 46): ~~W~~ • Claim 3 (¶ 44): L~~WV~~ • New Claim 4 (¶ 43): N/A
Count II: Breach of Contract	Missing elements (M) Lack of standing (L) Confusion of tort and contract (C) Wrong defendant (W)	• Claim 1 (¶ 46): MLC • Claim 2 (¶ 47): MLC • Claim 3 (¶ 48): MLC • Claim 4 (¶ 49): MLC • Claim 5 (¶ 50): MLC • Claim 6 (¶ 52): MLC • Claim 7 (¶ 52): MLC • Claim 8 (¶ 52): MLC • Claim 9 (¶ 52): MW • Claim 10 (¶ 52): MLC	• ~~Claim 1 (¶ 46): dropped~~ • ~~Claim 2 (¶ 47): dropped~~ • ~~Claim 3 (¶ 48): dropped~~ • Claim 4 (¶ 51): MLC • Claim 5 (¶ 49): MLC • Claim 6 (¶ 50): MLC • Claim 7 (¶ 50): MLC • Claim 8 (¶ 50): MLC • Claim 9 (¶ 50): M~~W~~ • Claim 10 (¶ 50): MLC
Count III: Breach of Fiduciary Duty	Time barred (T)	• Claim 1 (¶ 59): T • Claim 2 (¶ 59): T • Claim 3 (¶ 60): T • Claim 4 (¶ 62): T • Claim 5 (¶ 63): T • Claim 6 (¶ 64): T • Claim 7 (¶ 65): T+ • Claim 8 (¶ 65): T+ • Claim 9 (¶ 65): T+ • Claim 10 (¶ 65): T+ • Claim 11 (¶ 65): T+	• Claim 1 (¶ 59): ~~T~~ • Claim 2 (¶ 59): ~~T~~ • Claim 3 (¶ 60): ~~T~~ • Claim 4 (¶ 62): ~~T~~ • Claim 5 (¶ 63): ~~T~~ • Claim 6 (¶ 64): ~~T~~ • Claim 7 (¶ 65): ~~T~~+ • Claim 8 (¶ 65): ~~T~~+ • Claim 9 (¶ 65): ~~T~~+ • Claim 10 (¶ 65): ~~T~~+ • Claim 11 (¶ 65): ~~T~~+
Count IV: Breach of Duty of Loyalty	Time barred (T)	• Same claims and defects as Count III	• Same as above: Six claims adequately pleaded, five still deficient.
Count V: Breach of Duty of Good Faith & Fair Dealing	Missing elements (M) Not cognizable (N)	• Same claims as Counts III & IV, different defects: MN	• Same claims as above, different defects, both defects persist: MN
Count VI: Appointment of a Receiver	Wrong defendant (W) Violates Revised LLC Act (V)	• Only claim: WV	• ~~Only claim: dropped~~

EXHIBIT 2

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**IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

**JOSEPH JARRATT, SR., individually
and derivatively on behalf of
FORD JARRATT REALTY & DEVELOPMENT
COMPANY, LLC,**

Plaintiffs,

VS. **Case No. CT-1914-20
Div. III**

PRICE FORD, SR.,

Defendant.

PRICE FORD, SR.'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Defendant Price Ford, Sr., moves to dismiss Plaintiff Joseph Jarratt, Sr.'s Complaint under Tennessee Rule of Civil Procedure 12.02(6), stating the following:

I.
INTRODUCTION

Joseph Jarratt's Complaint and its six counts are a confused mess. For starters, the Complaint is styled as both an individual and a derivative action, but it pleads none of the legal prerequisites for derivative claims. As a result, Mr. Jarratt lacks standing to assert Counts I and II. Other defects of the Complaint include the fact that Counts I, II, and VI cannot be recovered against Mr. Ford, the sole defendant, but do not name the necessary parties because Mr. Jarratt neglected to sue them. Count I also violates Rule 23.06, Counts III and IV are time barred, and Count VI violates the Revised LLC Act. To make matters worse, Tennessee law does not even recognize Count V as an independent claim.

Perhaps the best way to appreciate these assorted defects is to chart them:

Claim	Defects
Count I: Declaratory Judgment	• Lack of standing • Wrong defendant • Violates Rule 23.06
Count II: Breach of Contract	• Missing elements • Lack of standing • Confusion of tort and contract • Wrong defendant
Count III: Breach of Fiduciary Duty	• Time barred
Count IV: Breach of Duty of Loyalty	• Time barred
Count V: Breach of Duty of Good Faith & Fair Dealing	• Missing elements • Not cognizable
Count VI: Appointment of a Receiver	• Wrong defendant • Violates the Revised LLC Act

But the Court need not waste much time untangling these counts because none of them states a claim upon which relief can be granted. All six counts should be dismissed.

II.
FACTUAL BACKGROUND[1]

In May 2007, Mr. Ford and Mr. Jarratt came together to form Ford Jarratt Realty & Development Company (FJR) (Compl. ¶ 5), a member-managed limited liability company (LLC).[2] They

[1] Mr. Ford relies on the facts of Plaintiff's Complaint solely for purposes of this motion as, under Rule 12.02(6), the motion accepts the Complaint's allegations as true while asserting that they "do not constitute a cause of action." *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).

[2] *See* FJR Articles of Amendment to Articles of Organization (May 1, 2007), *available at* the website of the Tennessee Secretary of State, https://tnbear.tn.gov/Ecommerce/FilingDetail.aspx?CN=036172220135252193132244174110206174019147028071 (last visited June 26,

were the company's only members. (*See ibid.*) The operating agreement that they prepared announced a joint purpose: "[T]o acquire, hold, manage, operate, develop, sell and lease real property[.]" (Operating Agreement § 1.4.)[3] But it also allowed each member to pursue independent projects. Beneath the bolded, ALL-CAPS, and underlined title "**OTHER ACTIVITIES OF MEMBERS**," Article 13 of the operating agreement stated that "Each Member, in its individual capacity or otherwise, shall be free to engage in, to conduct, or to participate in any business or activity whatsoever, without any accountability, liability, or obligation whatsoever to the Company or to any other Member."

The operating agreement also stated that "the Company shall make a guaranteed payment of an amount equal to eighty percent (80%) of the Fee to the Member responsible for originating the Fee or working directly on such project." (§ 6.3.) According to Mr. Jarratt, the members' course of dealing reflects that they decided the fee split should be 50 / 50 shortly after FJR was formed. (Compl. ¶ 9.) But the operating agreement never was amended. (Compl. ¶ 10.)

In December 2017, after developing more than twenty projects together with Mr. Jarratt, Mr. Ford launched a new project on his own. (*See* Compl. ¶¶ 15, 21.) The Wolf River Project, as it was called, was not unusual: During the ten-and-a-half years that preceded it, both members had acted on Article 13's permission to "engage[ ] in independent investments in individual properties[.]" (Compl. ¶ 20.) Mr. Ford formed a new entity, Cypress III, to manage the Wolf River Project. (Compl. ¶ 17). Yet when Mr. Jarratt discovered Cypress III, he accused Mr. Ford of "forming

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2020). This Court may consider the articles and other "items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case . . . without converting the motion into one for summary judgment." *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016) (citing *Haynes v. Bass*, No. W2015-01192-COA-R3-CV, 2016 WL 3351365, at *4 (Tenn. Ct. App. June 9, 2016)).

[3] The Operating Agreement is Exhibit A to Mr. Jarratt's Complaint.

an entity behind [his] back" (Compl. ¶ 18; *see also* ¶¶ 24, 31) and using FJR funds to pay for the legal work necessary to start it (Compl. ¶ 17).

The members spent several months attempting to reach an agreement regarding Cypress III but failed. (Compl. ¶¶ 24-31.) Mr. Jarratt maintains that Cypress III is a successor to Cypress I and II (Compl. ¶ 17), which are managed by FJR (Compl. ¶¶ 11-14), and that he is due 50% of the fees derived from the Wolf River Project (*see* Compl. ¶ 28). But unlike Cypress I and II, Cypress III is not managed by FJR. (*See* Compl. ¶¶ 12-13.) And, as Mr. Jarratt admits, the Wolf River Project concerns property "across the street from the medical office assets held in Cypress II." (Compl. ¶ 21.) In other words, Cypress III has no assets in common with Cypress I or II.

In October 2019, Mr. Jarratt moved out of the FJR offices. (Compl. ¶ 32.) He began to demand that he was owed certain earned fees from Cypress I and II and that Mr. Ford had failed to fulfill several duties to him and to FJR. (Compl. ¶¶ 28, 32-38.) He also claimed that Mr. Ford had used FJR funds to cover personal expenses and expenses of Cypress III. (*Ibid*.)

Eventually, Mr. Jarratt sued for these perceived slights as well as for a slice of Cypress III.

III.
STANDARD OF REVIEW

Mr. Jarratt's Complaint fails to state a claim upon which relief can be granted. *See* Tenn. R. Civ. P. 12.02(6). Rule 8 requires complaints to contain (1) a short and plain statement of each claim for relief and (2) a demand for a judgment that grants the requested relief. Tenn. R. Civ. P. 8.01; *accord Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011). A motion to dismiss under Rule 12.02(6) tests the sufficiency of a complaint, accepting the plaintiff's allegations as true while asserting that they "do not constitute a cause of action." *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).

Tennessee courts "are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Id.* Instead, "[t]he facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level." *Runyon v. Zacharias*, 556 S.W.3d 732, 737 (Tenn. Ct. App. 2018) (quoting *Webb*, 346 S.W.3d at 427). If "the allegations contained in the complaint, considered alone and taken as true, are insufficient to state a claim as a matter of law," then the complaint must be dismissed. *Cook ex rel. Uithoven*, 878 S.W.2d at 938.

IV.
LAW & ARGUMENT

Not one of the six counts of Mr. Jarratt's Complaint states a legal claim. Mr. Jarratt failed to satisfy the legal prerequisites for a derivative action and so lacks standing to assert Counts I and II. He also failed to sue the proper defendants for Counts I, II, and VI, to satisfy Rule 23.06, or to satisfy the Revised LLC Act. Counts III and IV of the Complaint are more than a year late and therefore barred, and Tennessee law does not recognize Count V as a legal claim. The Complaint should be dismissed.

A. Count I fails for lack of standing, does not name necessary defendants, and violates Rule 23.06.

Mr. Jarratt lacks standing to assert two of the three claims that comprise Count I of his Complaint, which seeks a declaratory judgment, because he has not satisfied the legal requirements for derivative actions, and those claims cannot be asserted by him directly. If he had standing to assert those claims, then they still would fail for lack of necessary defendants. The sole claim of Count I for which Mr. Jarratt has standing likewise fails because Mr. Jarratt named the wrong defendant and violated Rule 23.06. Count I should be dismissed.

1. Mr. Jarratt has failed to satisfy the legal prerequisites for derivative claims.

Styling a complaint as both an individual and a derivative action, as Mr. Jarratt has done here, is not enough to state derivative claims. "In Tennessee, derivative actions are governed by both statutory law and the rules of civil procedure." *United Supreme Council AASR SJ v. McWilliams*, 586 S.W.3d 373, 378 (Tenn. Ct. App. 2019). Thus, a plaintiff who wants to assert derivative claims against an LLC must satisfy the requirements of both Tenn. Code Ann. § 48-249-801 and Rule 23.06. *Cf. id.* at 379 (quoting *Walker v. Tri-Cty. Elec. Membership Corp.*, No. 01-A-01-9002-CH00049, 1990 WL 120721, at * 3 (Tenn. Ct. App. Aug. 22, 1990)) (discussing Tenn. Code Ann. § 48-456-401, the statute governing derivative actions brought on behalf of non-profit organizations, and Rule 23.06).

At least three of those requirements are absent from Mr. Jarratt's Complaint. ***First***, because FJR is a member-managed LLC,[4] § 48-249-801(b) allows Mr. Jarratt to sue on behalf of FJR only if (1) the company's "members or other persons with authority" have refused to do so or (2) "an effort to cause those members or other persons to bring the proceeding is not likely to proceed." Similarly, Rule 23.06 requires that derivative actions "allege with particularity the efforts, if any, made by the plaintiff to obtain the action desired from the directors or comparable authority and, if necessary, from the shareholders, or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort." No paragraph of Mr. Jarratt's Complaint mentions any such efforts, refusals, or reasons.

Second, the Complaint fails to name FJR a party to the lawsuit. The Tennessee Supreme Court has explained that a corporation is an indispensable party to a derivative action, while the suing shareholder is a nominal party. *Keller v. Estate of McRedmond*, 495 S.W.3d 852, 868 (Tenn.

[4] *See supra* note 2 and accompanying text.

2016); *accord Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("The corporation is a necessary party to the action; without it the case cannot proceed."). This principle applies equally to LLCs, as the Delaware Court of Chancery has held,[5] because "[t]he derivative suit is a corporate concept grafted onto the limited liability company form." *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 293 (Del. 1999). Thus, "[a]s a general proposition, a limited liability company member does not have standing to sue for a harm that is done to the company but must instead bring a claim as a derivative action on behalf of the LLC." *Barton v. Smith*, No. 3:17-CV-92-TC-HBG, 2019 WL 2278669, at *5 (E.D. Tenn. May 28, 2019) (citing *Keller,* 495 S.W.3d at 869*)*.

Nowhere does Mr. Jarratt's Complaint identify FJR as a party. The caption of the Complaint states that Mr. Jarratt is suing on behalf of FJR but does not state that FJR itself is a party.[6] The caption "does not control who is a party in the action." *Goss v. Hutchins*, 751 S.W.2d 821, 824 (Tenn. 1988). And none of the Complaint's allegations identifies FJR, rather than Mr. Jarratt, as the entity who was harmed or as the beneficiary of the lawsuit's claims.

One request for relief does seek "[t]he appointment of a receiver to properly manage [FJR] and wind up the affairs of [FJR] in an equitable manner." (*Ibid.*) But to be viable, that claim, as explained in § IV(D) below, would have to name FJR, and not Mr. Ford, as a defendant.

Finally, Mr. Jarratt's Complaint is unverified. Rule 23.06 states plainly that a complaint for a derivative action "shall be verified." Mr. Jarratt's Complaint not only lacks a verification but also is unaccompanied by an affidavit or declaration that might substitute for a verification. *See* Tenn. R. Civ. P. 72 ("Whenever these rules require or permit an affidavit or sworn declaration, an

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[5] "[C]ase law governing corporate derivative suits is equally applicable to suits on behalf of an LLC." *Kelly v. Blum*, No. 4516-VCP, 2010 WL 629850, at *9 (Del. Ch. Ct. Feb. 24, 2010) (quoting *VGS, Inc. v. Castiel*, C.A. 17995, 2003 WL 723285, at * 11 (Del. Ch. Ct. Feb. 28, 2003)).

[6] Similarly, the first paragraph of the Complaint states that Mr. Jarratt "is suing individually and derivatively on behalf of [FJR]." (Compl. ¶ 1.)

unsworn declaration made under penalty of perjury may be filed in lieu of an affidavit or sworn declaration.") The Complaint therefore violates this requirement as well.

Because of these failings, § 48-249-801 and Rule 23.06 do not allow Mr. Jarratt to state derivative claims.

2. Mr. Jarratt also lacks standing to assert two of Count I's three claims directly.

Two of the three claims that comprise Count I belong to FJR itself, and not to Mr. Jarratt. Thus, they can be asserted only as derivative claims. Because Mr. Jarratt has failed to satisfy the legal requirements for derivative claims, he lacks standing to take those two claims any further. They must be dismissed.

a. ***Standing for derivative claims***.

The Tennessee Supreme Court has held that "[a] derivative claim belongs to the entity, and an owner has no standing to bring the claim except on behalf of the entity." *Keller*, 495 S.W.3d at 869 (citation and internal quotation marks omitted). "Standing" in the derivative context "does not involve the typical inquiry into whether the plaintiffs suffered a 'distinct and palpable injury.'" *Id.* at 867. "Rather, the issue presented is whether the [plaintiffs] have 'shareholder standing,' that is, whether they have standing to bring a direct claim for their injuries as shareholders or whether their claims are derivative in nature and must be brought on behalf of the corporation." *Ibid.*

To make this determination, Tennessee courts apply Delaware's *Tooley* Standard, which asks two questions about would-be derivative claims: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 875 (quoting and adopting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)); *see also Barton*, 2019 WL 2278669, at *5 (applying *Tooley* and *Keller* to putative LLC derivative

claims). If the plaintiff's alleged injury is "independent of any alleged injury to the corporation," then it is direct. *Tooley*, 845 A.2d at 1039. If, however, the plaintiff cannot prevail "without showing an injury to the corporation," then his claim belongs to the entity and must be asserted derivatively or not at all. *Ibid.*

b. *Under* Tooley*, two of Count I's three claims are derivative*.

Count I asserts three claims for declaratory relief: (1) "that fees derived by any entity from the Wolf River Project" be declared "funds owed to [FJR]" (Compl. ¶ 43); (2) that Mr. Jarratt be declared "entitled to fifty percent (50%) of all fees generated by [FJR] (*ibid.*); and (3) "that Cypress III or any other real estate fund or entity involved in any way with . . . the Wolf River Project be deemed a 'successor' fund to Cypress I and II" (Compl. ¶ 44). But Mr. Jarratt only has standing to assert the second claim.

Putting aside for a moment that Article 13 of the FJR operating agreement expressly allows each member "to engage in, to conduct, or to participate in any business or activity whatsoever, without any accountability, liability, or obligation whatsoever to the Company or to any other Member,"[7] it is plain that the alleged harms in (1) and (3) derive exclusively from Mr. Jarratt's status as a member of FJR. According to Mr. Jarratt, the funds from Wolf River Project should flow <u>through</u> FJR <u>to</u> Mr. Jarratt. According to Mr. Jarratt, Cypress III should be a successor to Cypress I and II, which would bring Cypress III under the control of FJR and entitle FJR—and, by extension, Mr. Jarrett—to Cypress III's fees.

In both cases, it is FJR who has been injured, and FJR who would benefit from a declaratory judgment. Mr. Jarratt's alleged harms flow from his status as a member of FJR; he cannot prevail

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7 *See supra* note 3 and accompanying text.

"without showing an injury to the [company]." *Tooley*, 845 A.2d at 1039. He therefore lacks the standing to assert either claim for declaratory relief directly.

3. The same two claims lack necessary defendants.

Even if Mr. Jarratt had standing to assert those two claims, they would fail for lack of necessary defendants. Tennessee's Declaratory Judgment Statute states that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." Tenn. Code Ann. § 29-14-107(a) (underscore added). The Tennessee Court of Appeals has explained that this language "imposes stricter requirements than those imposed generally by the Tennessee Rules of Civil Procedure requiring the joinder of indispensable parties in all types of cases." *Little v. City of Chattanooga*, No. E2018-00870-COA-R3-CV, 2019 WL 1308264, at *8 (Tenn. Ct. App. Mar. 21, 2019) (quoting *Timmins v. Lindsey*, 310 S.W.3d 834, 839 (Tenn. Ct. App. 2009)). Thus, "[t]he non-joinder of necessary parties is fatal on the question of justiciability, which in a suit for a declaratory judgment, is a necessary condition of judicial relief." *Ibid.* (quoting *Huntsville Util. Dist. of Scott Cnty. Tenn. v. Gen. Tr. Co.*, 839 S.W.2d 397, 400 (Tenn. Ct. App. 1992)).

Mr. Jarratt seeks declarations against "any entity" that derived fees from the Wolf River Project and against "Cypress III or any other real estate fund or entity involved in any way with . . . the Wolf River Project." (Compl. ¶¶ 43-44.) Yet neither Cypress III nor any other "fund or entity" is named as a defendant in this action. Because Cypress III and any other funds or entities involved with the Wolf River Project "have . . . an[ ] interest which would be affected by the declaration" that Mr. Jarratt is seeking, Tenn. Code Ann. § 29-14-107(a), Mr. Jarratt's failure to

join them as parties "is fatal on the question of justiciability," *Little*, 2019 WL 1308264, at *8 (quotation omitted). His claims must be dismissed.

4. Count I's remaining claim also lacks a necessary defendant.

Mr. Jarratt's remaining Count I claim is direct. It asks that Mr. Jarratt be declared "entitled to fifty percent (50%) of all fees generated by [FJR]." (Compl. ¶ 43). Because the question it raises is about the allocation of fees that undisputedly belong to FJR, Mr. Jarratt can show that his alleged injury is "independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039. In other words, Mr. Jarratt is challenging the way that FJR's fees, once received, are divided between Mr. Ford and Mr. Jarratt, not the sources or amounts of the fees that FJR is due or FJR's entitlement to fees, which would be derivative.

But the remaining claim suffers from the same substantive defect as Count I's other two claims: lack of a necessary defendant. FJR's operating agreement states that "the Company shall make a guaranteed payment of an amount equal to eighty percent (80%) of the Fee to the Member responsible for originating the Fee or working directly on such project." (§ 6.3 (underscore added).) If the Court were to declare a 50/50 split as Mr. Jarratt has requested, then FJR would have to "make a [different] guaranteed payment" than the plain language of the operating agreement otherwise requires. Thus, FJR necessarily "ha[s] . . . an[ ] interest which would be affected by the declaration" that Mr. Jarratt is seeking. Tenn. Code Ann. § 29-14-107(a).

Mr. Jarratt's failure to name FJR as a defendant therefore defeats Count I's remaining claim.

B. Count II of the Complaint identifies no breach of the FJR operating agreement, fails for lack of standing, confuses tort and statutory claims with contract claims, and fails for lack of a necessary defendant.

Count II of Mr. Jarratt's Complaint is comprised of ten different claims, each asserting that Mr. Ford has breached the FJR operating agreement in a different way:

(1) "by usurping corporate opportunities by secretly forming Cypress III" (Compl. ¶ 46);

(2) by "us[ing] Company funds to advance his personal interests and us[ing] the Company's lawyer as his personal counsel to exclude Mr. Jarratt from Cypress III" (Compl. ¶ 47);

(3) by "caus[ing] Mr. Jarratt to spend considerable time and effort advancing the Wolf River Project . . . while never truly intending for Mr. Jarratt to be a part of Cypress III" (Compl. ¶ 48);

(4) by "caus[ing] Mr. Jarratt to spend considerable time and effort advancing the Wolf River Project . . . while making it clear that he will not honor [a] 50 / 50 compensation split" (Compl. ¶ 49);

(5) by "caus[ing] Mr. Jarratt to spend considerable time and effort advancing the Wolf River Project . . . while making it clear that he will not honor the plain language of the 2007 Operating Agreement" (Compl. ¶ 50);

(6) "by incurring expenses without approval" (Compl. ¶ 52);

(7) by "misappropriating Company funds for his personal benefit" (*ibid.*);

(8) by "signing agreements binding the Company without approval" (*ibid.*);

(9) by "withholding asset management fees due Mr. Jarratt" (*ibid.*); and

(10) by "taking assets of the Company for his personal use" (*ibid.*).

But none of the ten claims cites a specific provision of the operating agreement. And Mr. Jarratt lacks standing to assert nine of the claims. Those same nine claims assert torts or statutory violations rather than contract claims. And the sole claim for which Mr. Jarratt has standing and

which arises from the FJR operating agreement fails for lack of a necessary defendant. Count II must be dismissed.

1. Not one of the ten claims in Count II cites a specific provision of the FJR operating agreement.

As a threshold matter, Count II cannot state a claim for breach of the FJR operating agreement because none of its allegations identifies a provision of the agreement that has been violated. Only one of Count II's ten claims mentions the "plain language" of the FJR operating agreement (#5), and that claim still does not cite an article or other provision of the agreement that should have prevented the conduct that it alleges was wrongful. Thus, Count II fails to state a claim upon which relief can be granted. *See, e.g., Cadence Bank, N.A. v. The Alpha Trust*, 473 S.W.3d 756, 771 (Tenn. Ct. App. 2015) (observing that "a thorough review of the record indicates that Appellants pointed to no specific provision in the written contract" and affirming the dismissal of Appellants' breach of contract claims).

2. Under *Tooley*, Mr. Jarratt lacks standing to assert nine of Count II's ten claims.

For nine of Count II's ten claims, the answers to *Tooley*'s two questions—(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)—are both FJR. Those claims are thus derivative, and Mr. Jarratt lacks standing to assert them.

a. Claim 1: Alleged usurping of corporate opportunities.

If, Mr. Jarratt alleges, Mr. Ford "usurped corporate opportunities by secretly forming Cypress III" (Compl. ¶ 46), those opportunities necessarily belong to FJR, and not to Mr. Jarratt. Likewise, it is FJR, not Mr. Jarratt, who would receive the benefit of any remedy fashioned by the Court to address this allegation. Mr. Jarratt would be entitled to whatever portion of the remedy

would flow from his membership in FJR. But he cannot show any alleged injury that is "independent of any alleged injury to [FJR]." *Tooley*, 845 A.2d at 1039. This claim is therefore derivative.

b. Claim 2: Alleged personal use of FJR funds and FJR counsel.

The same is true of the claim that Mr. Ford used FJR funds and FJR's legal counsel "to advance his personal interests." (Compl. ¶ 47). The funds and legal counsel's time belong to FJR, not to Mr. Jarratt, and it is FJR, not Mr. Jarratt, who would benefit from any recovery designed to compensation for their alleged personal use by Mr. Ford.

c. Claims 3-5: Cypress III & the Wolf River Project.

The next three claims all assert that Mr. Ford caused Mr. Jarratt to work on the Wolf River Project while preventing him from receiving any fees from the project and excluding him from Cypress III. (*See* Compl. ¶¶ 48-50.) For reasons explained in Section IV(A)(2), above, these claims are derivative.

d. Claims 6-8, 10: Unauthorized use of FJR assets and unapproved actions on FJR's behalf.

Claims 6-8 and 10 all are variations on a common theme: Each claim asserts that Mr. Ford wrongly has taken something that belonged to FJR (Claims 7 and 10) or acted on FJR's behalf without approval (Claims 6 and 8). (*See* Compl. ¶ 52). FJR, and not Mr. Jarratt, sustains any harm caused by these alleged acts, and FJR, not Mr. Jarratt, would benefit from any remedy designed to correct them. Mr. Jarratt is harmed or benefitted only by virtue of his membership in FJR, and only to the extent that his membership entitles him to access the assets or approve the conduct at issue. These claims also are derivative.

3. Those same nine claims (1-8 and 10) assert torts or statutory violations, not breach of contract.

In addition to being derivative, Claims 1-8 and 10 assert torts or statutory violations rather than breaches of the FJR operating agreement. Usurpation of corporate opportunities, for example (Claim 1), is a breach of the statutory duty of loyalty. *See* Tenn. Code Ann. § 48-219-403(b)(1) ("A member's duty of loyalty . . . is limited to the following: . . . including the appropriation of any opportunity of the LLC[.]"). Misappropriation of company assets (Claims 2, 7, and 10), also called "conversion," is a tort. *See, e.g., PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 553 (Tenn. Ct. App. 2012) ("Conversion is an intentional tort[.]") Likewise, intentional and negligent misrepresentation (Claims 3-5) are torts. *See, e.g., id.* at 547-550 (discussing the elements of intentional and negligent misrepresentation). Finally, acting on behalf of a company without approval (Claims 6 and 8) is *ultra vires* conduct with an exclusive statutory remedy. *See* Tenn. Code Ann. § 48-249-105(a) (explaining that "the validity of an LLC's action may not be challenged on the ground that the LLC lacks or lacked the power to act" "[e]xcept as provided in subsection (b)").

Mr. Jarratt's Complaint makes no effort to state claims for misappropriation or misrepresentation: He neither names the claims nor pleads their elements. And to the extent that the Complaint pleads an alleged breach of the duty of loyalty and alleged *ultra vires* conduct by Mr. Ford, the deficiencies of those claims are addressed in Section IV(C), below. Regardless, none of these nine claims warrants relief for breach of contract.

4. Count II's sole direct claim fails for lack of a necessary defendant.

Only one of Count II's claims is both direct and possibly arises from the FJR operating agreement: Claim 9. That claim asserts that Mr. Ford breached the FJR operating agreement by "withholding asset management fees due Mr. Jarratt." (Compl. ¶ 52; *see also* Compl ¶ 33 (same)).

It is unclear whether the claim actually arises from the operating agreement because, like the rest of Count II's claims, Claim 9 cites no article or provision of the agreement. But the claim is direct, as was the second claim of Count I, *see, supra*, § IV(A)(4), because the question that it raises is about the allocation of fees that undisputedly belong to FJR. Mr. Jarrett is asserting that he is entitled to a greater portion of those fees than he has received from FJR. Thus, he can show that his alleged injury is "independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039.

Yet this claim succumbs to a by-now-familiar problem: It lacks a necessary defendant. Mr. Jarratt admits that the fees at issue were "derived from Cypress I & II," were "paid to [FJR]," and "are being held in escrow." (Compl ¶ 33.) Thus, it is FJR, and not Mr. Ford, who must be compelled to distribute any funds due to Mr. Jarratt. But Mr. Jarratt neglected to sue FJR. This claim therefore fails.

C. Counts III, IV, and V of the Complaint fail because they are time barred and inadequately pleaded or not cognizable under Tennessee law.

Counts III, IV, and V of the Complaint are joined beneath a single heading. That combined heading contends that Mr. Ford has breached three separate duties—the fiduciary duty, the duty of loyalty, and the duty of good faith and fair dealing. As a threshold matter, the duties have been misnamed. Tennessee's Revised LLC Act identifies two types of "fiduciary duties" that members owe to "a member-managed LLC and the LLC's other members": (1) the fiduciary duty of care and (2) the fiduciary duty of loyalty. *See* Tenn. Code Ann. § 48-249-403(a).[8] Those duties are exclusive. *Ibid.* Similarly, the Revised LLC Act refers to an "obligation" of good faith rather than

[8] Section § 48-249-403(a) states in relevant part that "[t]he only fiduciary duties a member owes to a member-managed LLC and the LLC's other members and holders are the duty of loyalty and the duty of care imposed by subsections (b) and (c)."

a duty. Thus, this motion addresses the counts as follows: (1) Count III: The fiduciary duty of care; (2) Count IV: The fiduciary duty of loyalty; and (3) Count V: The obligation of good faith and fair dealing.

Before addressing these three claims, the Court should note that Mr. Jarratt likely lacks standing to assert them. The fact that duties in a member-managed LLC run to both the company and its members does not mean that all fiduciary duty claims belong to the members. *See, e.g., Agostino v. Hicks,* 845 A.2d 1110, 1122 n.54 (Del. Ct. Ch. 2004) ("Since the fiduciary duty of officers and directors runs to the corporation and the shareholder, the shareholder will always be able to assert a breach of duty owed to it, but plainly not all fiduciary duty claims are individual claims." (underscore added)). Consequently, "in the context of fiduciary duty claims, the focus should be on the nature of the injury." *Ibid.* The injuries asserted by Mr. Jarratt, detailed below in §IV(C)(1), appear to identify injuries to FJR rather than injuries to Mr. Jarratt, "independent of any alleged injury to the [company]." *Tooley*, 845 A.2d at 1039. Thus, the claims appear to be derivative, which would mean that Mr. Jarratt lacks standing to assert them.

Even if Mr. Jarratt had standing to assert these claims, however, they still would fail.

1. Count III: Mr. Jarratt's claim for breach of the fiduciary duty of care is time barred.

Count III asserts a breach of the fiduciary duty of care that is time barred. Under the Revised LLC Act, that duty requires an LLC member to "refrain[ ] from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." Tenn. Code Ann. § 48-249-403(c). Mr. Jarratt has standing to assert a breach of the duty because the duty runs to him directly as a member of FJR and not derivatively through the company, and a breach of the duty therefore causes injury (or not) "independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039.

But the act also imposes a one-year statute of limitations, which runs either from the date of the breach or from the date of its discovery. *See* Tenn. Code Ann. § 48-249-407.[9] Mr. Jarratt identifies a litany of actions that allegedly breached Mr. Ford's duty of care (or loyalty or good faith and fair dealing):

- Mr. Ford's "secretly forming Cypress III with the intent to exclude Mr. Jarratt from it" (Compl. ¶ 59);
- Mr. Ford's "refusing to provide pertinent information about the Wolf River Project or Cypress III to Mr. Jarratt" (*ibid.*);
- "When Ford stated that he would do the Wolf River Project and Cypress III outside of [FJR]" (Compl. ¶ 60);
- Mr. Ford's "secretly forming Cypress III using [FJR's] lawyer without Mr. Jarratt's knowledge" (Compl. ¶ 62);
- Mr. Ford's "using his exclusion of Mr. Jarratt from Cypress III as leverage to attempt to change the parties' . . . course of dealing from a 50/50 split" (Compl. ¶ 63);
- Mr. Ford's "using his exclusion of Jarratt from Cypress III as leverage to make unreasonable demands upon Mr. Jarratt to change [FJR]'s operating agreement (Compl. ¶ 64);
- Mr. Ford's "incurring expenses without approval" (Compl. ¶ 65);
- Mr. Ford's "misappropriating [FJR] funds for his personal benefit" (*ibid.*);
- Mr. Ford's "signing agreements binding the Company and Mr. Jarratt without approval" (*ibid.*);
- Mr. Ford's "withholding asset management fees due Mr. Jarratt" (*ibid.*); and
- Mr. Ford's "taking assets of the Company for his personal use" (*ibid.*).

But Mr. Ford also admits that he "learned of [the allegedly] secret meetings" in February 2018. (Compl. ¶ 24.) He also alleges that Mr. Ford told "Mr. Jarratt that he planned to exclude him

[9] Section § 48-249-407 states in relevant part that "[a]ny action alleging breach of fiduciary duties by members, managers, directors, or officers . . . must be brought within one (1) year from the date of the breach or violation . . . [or] one (1) year from the date the alleged breach or violation was discovered or reasonably should have been discovered."

from Cypress III all together" in March 2018. (Compl. ¶ 25.) Even assuming that the statute of limitations runs from March 2018 rather than February 2018, Mr. Jarratt's Complaint, filed in May 2020, should have been filed no later than March 2019 and is more than 14 months too late.

Some of the actions that Mr. Jarratt alleges—such as misappropriation of FJR assets, misrepresentation regarding Mr. Ford's purpose, and *ultra vires* actions taken by Mr. Ford on behalf of FJR without authorization—constitute independent causes of action. But Mr. Jarratt neither names those causes of action nor pleads their elements in his Complaint. *See, supra*, § IV(B)(3). At least one cause of action, intentional misrepresentation, must be pleaded with particularity. *See ibid.* (quoting *Bluff City Cmty. Dev. Corp.*, 387 S.W.3d at 555). Others, including the allegedly *ultra vires* conduct that Mr. Jarratt alleges, have exclusive statutory remedies, which Mr. Jarratt has failed to invoke. *See ibid.* (quoting Tenn. Code Ann. § 48-249-105(a) (explaining that "the validity of an LLC's action may not be challenged on the ground that the LLC lacks or lacked the power to act" "[e]xcept as provided in subsection (b)")).

As a result, even if this claim were not time barred, Mr. Jarratt would not have "raise[d] . . . [a] right to relief beyond the speculative level." *Runyon*, 556 S.W.3d at 737 (quoting *Webb*, 346 S.W.3d at 427). This Court is "not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Cook ex rel. Uithoven*, 878 S.W.2d at 938. The claim must fail.

2. Count IV: Mr. Jarratt's claim for breach of the fiduciary duty of loyalty is time barred too.

Mr. Jarratt's claim for breach of the fiduciary duty of loyalty fails for the same reason described above: It is late. The Complaint alleges specifically that Mr. Ford usurped FJR's corporate opportunities by launching the Wolf River Project and forming Cypress III on his own. (*See* Compl. ¶¶ 44, 46.) But the corporate opportunity doctrine is a version of the duty of loyalty. *See,*

supra § IV(B)(3); *see also Mulloy v. Mulloy*, No. M2017-01949-COA-R3-CV, 2019 WL 5078924, at *6 (Tenn. Ct. App. Oct. 10, 2019) (quoting 18B Am. Jur. 2d *Corporations* § 1520). And because, according to Mr. Jarratt, Mr. Ford told him in March 2018 "that he planned to exclude him from Cypress III all together" (Compl. ¶ 25), Mr. Jarratt's claim, no matter what it is called, remains late. It should be dismissed.

3. Count V: Tennessee law does not recognize an alleged breach of the obligation of good faith and fair dealing as an independent claim.

Mr. Jarratt's claim for breach of the obligation of good faith and fair dealing fails for a different reason. Although the Revised LLC Act mentions the obligation, *see* Tenn. Code Ann. § 48-249-105(a),[10] Tennessee courts have explained that a breach of the obligation "is not an independent basis for relief." *Duke v. Browning-Ferris Indus. of Tenn., Inc.*, No. W2005-00146-COA-R3-CV, 2006 WL 1491547, at *9 (Tenn. Ct. App. May 31, 2006) (quoting *Solomon v. First Nat'l Bank*, 774 S.W.2d 935, 945 (Tenn. Ct. App. 1989)). In other words, the obligation "does not create additional contractual rights or obligations, and it cannot be used to avoid or alter the terms of an agreement." *Cadence Bank, N.A.*, 473 S.W.3d at 769. It "may be an element or circumstance of recognized torts, or breaches of contract." *Solomon*, 774 S.W.2d at 945. "[B]ut it does not appear that good faith, or the lack of it is, standing alone, an actionable tort." *Ibid.*

Mr. Jarratt's Complaint asserts no torts, only claims for declaratory judgment; receivership; breaches of the duties of care, loyalty, and good faith; and breach of contract. (*See generally* Compl.) The only contract at issue in this action is the FJR operating agreement. And as is discussed above in § IV(B)(1), not one of the Complaint's ten claims for breach of contract identifies

[10] Section § 48-249-403(d) states in relevant part that "[a] member shall discharge the member's duties to a member-managed LLC and its other members and holders of financial rights under this chapter or under the LLC documents, and shall exercise any rights with respect to the LLC consistently with the obligation of good faith and fair dealing."

a provision of the operating agreement that has been violated. Without such a breach, this claim cannot stand. The Court should dismiss it.

D. Count VI of Mr. Jarratt's Complaint fails for lack of a necessary defendant and violates the Revised LLC Act.

Like the first two counts of Mr. Jarratt's Complaint, Count VI suffers for lack of a necessary defendant. The count "seeks the appointment of a receiver to wind up the affairs of [FJR] in an equitable manner." (Compl. ¶ 69.) And the Revised LLC Act grants Mr. Jarratt standing to assert the claim directly. *See* Tenn. Code Ann. § 48-249-617(a).[11] But because it is FJR, and not Mr. Ford, that would be "wound up" if the requested relief were granted, FJR, and not Mr. Ford, should be named as a defendant. Mr. Jarratt has not sued FJR.

Count VI also suffers a more critical problem: It violates the Revised LLC Act in two different ways. ***First***, Count VI fails to plead the sole statutory basis for a judicial dissolution: that "it is not reasonably practicable to carry on the business in conformity with the LLC documents." *Ibid.* Mr. Jarratt pleads instead that it is necessary to wind up the affairs of FJR simply because Mr. Ford "ha[s] certainly violated applicable Tennessee law, including but not limited to the Tennessee Revised Limited Liability Act, based on his management, and mismanagement of the Company to the detriment of Mr. Jarratt." (Compl. ¶ 68). But alleged violations of the Revised LLC Act are not proper grounds for winding up an LLC.[12]

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[11] Section 48-249-617(a) states in relevant part that "[o]n application by the attorney general and reporter, or by or for a member, the court may decree dissolution, winding up and termination of an LLC whenever it is not reasonably practicable to carry on the business in conformity with the LLC documents" (underscore added).

[12] *See, e.g.,* John Keny, *Judicial Dissolution in Limited Liability Companies: So What's Happening in Tennessee?*, 19 Tenn. J. Bus. L. 165, 169 (2017) ("[B]oth of the dissolution statutes in Tennessee [the LLC Act and the Revised LLC Act] fail to include language for oppressive conduct. Members of a Tennessee LLC will not be able to file for judicial dissolution based on the majority member's oppressive conduct.")

Second, Count VI does not plead the bond that Mr. Jarratt must put up in order to challenge FJR's right to continue to exist. *See* Tenn. Code Ann. § 48-249-618(d). The Revised LLC Act requires a bond "[i]n a proceeding for dissolution, winding up and termination of the existence of an LLC by a member . . . with sufficient surety, to cover the defendant's probable costs, including reasonable attorney fees, in defending the petition." *Ibid.* Count VI does not plead any surety or bond to cover the costs of its request.

Judicial action is one of several ways to dissolve an LLC in Tennessee. *See Owen v. Hutten*, No. M2012-02387-COA-R3-CV, 2013 WL 5459035, at *6 (Tenn. Ct. App. Sept. 27, 2013). A Tennessee LLC also "may be dissolved by agreement of its members or organizers, Tenn. Code Ann. §§ 48-249-602 and 603, [or] by administrative action, Tenn. Code Ann. §§ 48-249-604 and 605[.]" *Ibid.* Having chosen to seek dissolution by judicial action, Mr. Jarratt must abide by the parameters of that choice. Yet he has failed to plead its statutory predicates.

This claim should be dismissed.

V.
CONCLUSION

Mr. Jarratt's Complaint fails to state a claim upon which relief can be granted. Mr. Jarratt lacks standing to assert Counts I and II. Counts I, II, and VI cannot be recovered against Mr. Ford, the sole defendant. Count I also violates Rule 23.06's verification requirement, Counts III and IV are time barred. Count VI twice violates the Revised LLC Act for lack of statutory grounds and a bond, and Count V is non-cognizable. Rule 12.02(6) thus requires that all six counts be dismissed.

RESPECTFULLY SUBMITTED, this 29th day of June 2020,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served via electronic and United States Mail, postage prepaid, on this 29th day of June 2020, upon the following:

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EXHIBIT 3

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CLERK OF COURT

**IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

**JOSEPH JARRATT, SR., individually
and derivatively on behalf of
FORD JARRATT REALTY & DEVELOPMENT
COMPANY, LLC,**

Plaintiff/Counter-Defendant,

vs. **Case No. CT-1914-20
Div. III**

PRICE FORD, SR.,

Defendant/Counter-Claimant.

**DEFENDANT PRICE FORD, SR.'S RESPONSE IN OPPOSITION TO
PLAINTIFF JOSEPH JARRATT, SR.'S MOTION FOR LEAVE TO AMEND**

Defendant Price Ford, Sr., opposes Plaintiff Joseph Jarratt, Sr.'s motion for leave to amend his complaint under Tennessee Rule of Civil Procedure 15, stating the following:

I.
FACTUAL & PROCEDURAL BACKGROUND

On May 13, 2020, Plaintiff sued Mr. Ford for various alleged wrongs arising from the affairs of an LLC that the two men own. The complaint was a hodge-podge, muddled disarrangement: It attempted to raise six claims, but three named the wrong party, two were time barred, and one does not exist in Tennessee. There were other problems too,[1] all of which are charted on the second page of Mr. Ford's pending motion to dismiss. That motion was filed in June.

Also filed in June were Mr. Ford's answer and counterclaim, to which Plaintiff filed a reply in August. Last week, Plaintiff moved for leave to amend his complaint.

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[1] For example, one claim violated Rule 23.06 and another violated the Revised LLC Act.

II.
LAW & ARGUMENT

Unlike the vast majority of cases, leave to amend should be denied here for three reasons: (1) the proposed amended complaint pleads no new facts; (2) amendment would be futile because the new complaint suffers from the same deficiencies as the old one; and (3) amendment would be unduly prejudicial to Mr. Ford, who incurred significant costs in moving to dismiss and will have to do so again. If granted, leave should be conditioned on Plaintiff's payment of Mr. Ford's costs.

A. Plaintiff's proposed amended complaint pleads no new facts.

> **[T]he purpose of liberal leave for amendment is to permit the pleader to supply additional facts to support the position of the pleader rather than to restate the same facts in the former pleading.[2]**

Plaintiff's motion for leave to amend wrongly relies on Rule 15.01. The rule's familiar standard states that "leave shall be freely given when justice so requires." But the purpose of that standard, as the statement above reflects, is "to supply additional facts" to support existing claims. Plaintiff's revised complaint pleads no new facts (although it does revise some old ones). Instead, it drops one claim (Count VI)—thus admitting that claim's deficiency[3]—and names two new defendants. One of those defendants is Plaintiff's own LLC. The other is mentioned more than thirty times in the original complaint. Justice does not require amendment under these circumstances.[4]

B. Amendment would be futile and unduly prejudicial here.

Plaintiff's revised complaint also does not correct the errors of the original. At least two claims, which are time barred, cannot be corrected. Even if they could, forcing Mr. Ford to renew

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2 *Lester v. Walker*, 907 S.W.2d 812, 814 (Tenn. Ct. App. 1995) (emphasis added).

3 Tenn. Code Ann. § 20-12-119 grants attorney fees for successful motions to dismiss.

4 *Cf. Townes v. Sunbeam Oster Co.*, 50 S.W.3d 446, 451 (Tenn. Ct. App. 2001) (holding that Rule 15.03 enables parties to correct mislabeling, not to add "simply overlooked" parties).

a twenty-three-page motion to dismiss and a sixteen-page answer and counterclaim to respond to the same old claims a second time would unduly prejudice him.

Tennessee courts may consider both futility and undue prejudice in denying motions to amend. *See Bowman v. Benouttas*, 519 S.W.3d 586, 602 (Tenn. Ct. App. 2016). Undue prejudice, the primary factor, "entails inquiring into (1) the hardship on the moving party if the amendment is denied; (2) the reasons for the moving party's failure to include the claim, defense, or other matter in its earlier pleading; and (3) the injustice to the opposing party should the motion to amend be granted." *Hardcastle v. Harris*, 170 S.W.3d 67, 81 (Tenn. Ct. App. 2004). Here, where nothing prevented the revised complaint from being the original, and Mr. Ford's motion to dismiss, answer, and counterclaim comprise forty pages of time and effort occasioned by Plaintiff's deficient claims, any hardship on Plaintiff is self-imposed, and undue prejudice to Mr. Ford is plain.

C. At the very least, amendment should be conditioned on the payment of costs.

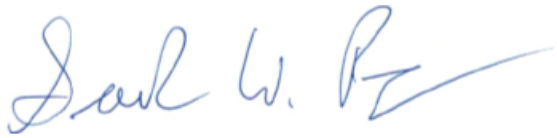
Plaintiff's motion should be denied. But if the Court allows Plaintiff to file a second complaint, then it should require him to pay the fees incurred in responding to the first one. The Tennessee Supreme Court expressly has stated that "conditions may be placed upon the granting of a motion to amend . . . to lessen or avoid whatever prejudice might result to the opposing party." *Gardiner v. Word*, 731 S.W.2d 889, 892 (Tenn. 1987). "The most common condition imposed on an amending party is costs." 6 Wright & Miller, *Federal Practice & Procedure* § 1486 (1986).

III.
CONCLUSION

For all of these reasons—the lack of new facts, futility, and undue prejudice—Plaintiff's motion for leave to amend should be denied. If leave is granted, then the Court should require Plaintiff to pay Mr. Ford's costs.

RESPECTFULLY SUBMITTED, this 7th day of October 2020,

BUTLER SNOW LLP



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing notice was served via electronic and United States Mail, postage prepaid, this 7th day of October 2020, upon the following:

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EXHIBIT 4

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

JOSEPH JARRATT, SR., individually and derivatively on behalf of FORD JARRATT REALTY & DEVELOPMENT COMPANY, LLC,

Plaintiff/Counter-Defendant,

vs.

Case No. CT-1914-20
Div. III

PRICE FORD, SR.,

Defendant/Counter-Claimant.

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND ORIGINAL COMPLAINT

The parties came before the Court on Friday, October 30, 2020, on Plaintiff's motion for leave to amend his original complaint. After consideration of Plaintiff's motion, Defendant's response in opposition, and the arguments of counsel, the Court makes the following findings:

- Plaintiff's motion is well taken and should be **GRANTED**; and
- Defendant's request for attorney fees in connection with responding to Plaintiff's original complaint is **RESERVED** for later disposition

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Plaintiff may file a verified version of the proposed First Amended Complaint that was attached as Exhibit A to Plaintiff's motion, with leave of Court as allowed by Tennessee Rule of Civil Procedure 15.01.

The hearing on Defendant's motion to dismiss Plaintiff's claims remains specially set for **Wednesday, November 18, 2020, at 2:00 P.M.**

SO ORDERED, this 9 th day of November 2020,

CT-1914-20

VALERIE L. SMITH
CIRCUIT COURT JUDGE

Approved as to form:

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