The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Jeffrey C. Smith

Office Address: (including county) 7776 Farmington Blvd, # 381586, Germantown, TN 38183 - 0278 (Shelby County)

Office Phone: 901 - 288 - 1683 Facsimile: Not applicable

Email Address: [redacted]

Home Address: (including county) [redacted], Memphis, TN 38120 (Shelby County)

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

INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Partner - Holland & Knight LLP (Memphis/Nashville)

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

I obtained my Tennessee license to practice law in November 1993. My TN BPR number is 016295.

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 - TN BPR no. 016295 (1993 - active)

Arkansas - AR bar no. 2010114 (2010 - 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).

Holland & Knight LLP - Partner, (March 2023 - present) Memphis/Nashville

Waller Lansden Dortch & Davis, LLP - Partner, (February 2016 - February 2023) - Memphis/Nashville

Adams & Reese, LLP - Partner (May 2006 - February 2016) - Memphis (partner-in-charge of Memphis office January 2009 - December 2013)

Armstrong Allen, PLLC - Associate/Partner (January 2001 - April 2006) Memphis

Borod & Kramer, P.C. - Associate (January 1996 - December 2000) Memphis

Kirkpatrick, Moore & Westbrook, P.A. - Associate (January 1995 - December 1995) Memphis

Roney & Westbrook, P.A. - Clerk/Associate (September 1993 - December 1994) Memphis

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

Not applicable.

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

My practice primarily involves dispute resolution, usually between business entities. For twenty-five years or so, I also did some general counsel work for a handful of clients. Over the past 15 years, I have litigated dealer-manufacturer disputes, construction project disputes, class action pharmaceutical disputes (as local counsel), employment law disputes, business tort disputes, shareholder/ownership disputes, and disputes involving interpretation of Tennessee and federal statutes. I litigate and try cases in trial courts and before arbitration panels and I prosecute appeals, writing briefs and delivering oral arguments.

Presently, construction law disputes comprise roughly 60% of my practice and litigation involving business disputes, torts (including mass torts) and other general litigation make up 30%, while serving as an outside general counsel for a local forklift distributor amounts to about 10%.

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.

My legal career began with drafting jury instructions for an employment matter. For the next two years, I worked on employment matters on the employee side, drafting complaints, responding to summary judgment motions, conducting discovery. At this early juncture, I also wrote first-drafts of parts of appellate briefs, usually the course of proceedings and statement of facts. I defended personal injury claims made against a local bus company. For these personal injury cases, I investigated the facts, responded to complaints, drafted memoranda analyzing the claims for the client and the senior attorney, and negotiated settlements. During this time, I delivered oral arguments on various types of motions, including dispositive motions. I worked on mostly employment matters during this period, but also represented a small business in a contentious dispute. I was also appointed at least a couple of times by the probate court to represent individuals in conservatorship proceedings.

When I moved to the Borod & Kramer firm, my practice shifted more towards business disputes, though I continued litigating employment disputes, including violation of non-compete agreements and breach of employment contracts. The business disputes ranged from representing a public company in lawsuits filed by five C-suite executives for enhanced termination benefits following a $1.2 billion merger to representing two minority shareholders of a closely-held family corporation in an oppression of minority shareholder dispute, alleging the majority owner dissipated company assets among other things. In addition, I litigated some antitrust actions (one involving major bookseller chains; another involving a claim that an auto parts manufacturer overcharged a small, rural auto repair business); environmental matters (one, involved my drafting the first draft of an appeal brief on the statute of limitations and discovery of action in the Tennessee court of appeals; another, concerned indemnification claims by competing, succeeding landowners for certain environmental clean-up costs on industrial land on President's Island). For these business disputes, I drafted most of the pleadings, motions, supporting memoranda, dispositive motions, and dispositive motion responses.

For the $1.2 billion merger severance benefits case, I researched and drafted internal analysis and strategy memoranda, first drafts of responsive pleadings, dispositive motions, responses to dispositive motions, as well as other motions and motion responses in a pretty vibrant motion practice. When this case went to trial, I served as second chair counsel. The local press covered the trial of this case to some degree as it involved a large Memphis company.

In another case garnering local media attention, I served as the drafter of motions and motion responses for the trial team in a federal bank fraud case, charging some 13 counts of bank fraud. The bulk, if not totality, of my criminal law experience began and ended with this case.

But in a number of civil cases by investors seeking to recover investments in what turned

out to be just a Ponzi scheme, I had to unravel a true, convicted criminal's fraudulent scheme. I interviewed investors, the Ponzi scheme fraudster, and drafted complaints on behalf of the investors. As these cases progressed, an S.E.C. receiver, appointed in similar cases involving the same Ponzi scheme, joined the fray and I worked alongside the receiver.

Each of the business disputes, the bank fraud case and the Ponzi scheme case noted above required intensive document review and legal research to understand the facts, to judge the positions, and to craft legal arguments with the clients, co-counsel and the senior supervising attorney.

In addition, I worked on a will dispute involving a will drafted in German. For that, I handled discovery and drafting motions. Along the same lines, I worked on a matter involving interpretation of a trust and claims of dissipation of the trust assets.

I likewise continued appellate work, both in state and federal appeals courts. As mentioned above, I drafted the first draft of a brief for the Tennessee appeals court in an environmental case in which the statute of limitations was the controlling issue. On that appeal, I continued to work on revisions to the brief until finalized under the supervision of the senior partner. In a matter involving a dispute between a natural gas customer of the local utility, I drafted the appeal brief and made the oral argument on behalf of the manufacturing company. And when the $1.2 billion enhanced severance benefits case was appealed, I worked with renowned national appellate counsel to draft the appellate briefs, principally drafting the statement of facts and course of proceedings sections, then making substantive comments to the argument sections.

During the Armstrong Allen and Adams and Reese period, I continued my business dispute practice. During this period, I represented a number of different nursing home management companies in disputes with suppliers, battles for control over certain nursing homes, employment claims by former employees, trademark infringement claims against a competing company, a civil RICO claim by the seller of a healthcare business (who was serving time for healthcare fraud) alleging certain fraudulent acts on the part of the buyer to lower the price, and a $500 million claim by an individual against the nursing home, the State of Tennessee and a host of others for various claimed torts. In each of these matters, I now served as first chair counsel, but continued performing the bulk of factual investigation, document review, and legal analysis. I likewise continued as the principal drafter of briefs, pleadings, motions, dispositive motions, and responses to dispositive motions. In addition to those business disputes, I led the team that represented a nursing home holding company in multiple lawsuits stemming from nursing care provided by its wholly-owned subsidiaries.

This period also marked the beginning of years of litigating dealer termination lawsuits in which I developed deep understanding of state dealer relationship statutes. I led the team that obtained an injunction after an evidentiary injunction hearing barring a manufacturer from terminating a dealer, relying on certain Tennessee statutes. I led the team that briefed and argued the appeals in the federal court of appeals that affirmed that result. I led the team that obtained dismissal of a trademark infringement complaint by that same

manufacturer, also upheld on appeal. For these cases, I continued as the principal drafter of pleadings, motions, responses and appellate briefs, but also began overseeing other attorneys who generated initial drafts of pleadings, motions, responses and parts of appellate briefs.

It was also in this period that my construction practice blossomed. The construction cases I handled, much like the business disputes described above, all involved review of extensive documents -- some construction contracts ran well into the hundreds of pages -- and legal analysis. I stepped in to help a national general contractor finally settle delay claims against the city, and then litigated follow-on claims by subcontractors and insurors, all arising out of a botched demolition of a convention center. From there, I represented a general contractor against delay claims by a subcontractor on a nuclear power plant project (involving certain work to the existing plant).

Near the end of this period and on into the Waller period of my career, I oversaw a team that defended a national construction design firm in a number of personal injury cases in which drivers on Interstate 40 complained the design and construction of the newly widened highway caused certain automobile accidents. Here, I drafted responsive pleadings seeking dismissal of the complaints by relying on Tennessee statutory protections. These cases involved review and analysis of the construction agreement with Tennessee's department of transportation, the specifications for the project, federal highway construction guidelines, and similar construction technical documents. They also required analysis of comparative fault issues as to the plaintiffs and co-defendants.

I also served as local counsel for a general contractor in a long running dispute with a subcontractor involving fraud claims asserted by the subcontractor. I had previously secured summary judgment dismissing those fraud claims. In doing so, I reviewed the project files, the contract, previous discovery, took additional discovery and led the summary judgment drafting. I argued the summary judgment motion. The appeals court reversed the dismissal of the fraud claims at summary judgment. At retrial, I was part of the trial team, collaborating with co-counsel from Iowa. I participated extensively in pre-trial and post-trial briefing and have likewise played key roles in the appellate briefing. This dispute ended up in the Tennessee Supreme Court with that court releasing its opinion fairly recently.

I have served on other multi-lawyer, multi-firm representations, collaborating with counsel on briefing and oral argument. For example, I represented an industrial development board in an action brought by certain taxpayers to enjoin a municipality and the industrial development board from issuing bonds to fund construction of a high school. I also have served as local counsel with national counsel teams on the defense of mass torts involving different types of pharmaceutical drugs. Those litigations involve analysis of Tennessee procedural and substantive law, and reviewing and revising briefing, pleadings and motions to be filed in Tennessee courts.

I also was part of a team representing an oil pipeline company in litigation concerning its condemnation of properties for an oil pipeline through parts of Memphis. That case

garnered media attention locally and nationally.

The matters discussed above highlight the types of matters and my own personal involvement and activities in those matters.

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

Reported Decisions

- *Commercial Painting v. The Weitz Company, LLC*, 676 S.W.3d 527 (Tenn. 2023) (limited application of economic loss doctrine to products liability cases, overruling court of appeals).
- *Dunaway v. Purdue Pharma LP*, 391 F.Supp. 3d 802 (M.D. Tenn. 2019) (remand of distributor defendant's removal of opioids case).
- *Nacco Materials Handling Group, Inc. v. The Lilly Company*, 278 F.R.D. 395 (W.D. Tenn. 2011) (discovery dispute over Rule 30(b)(6) deposition in suit by manufacturer against former dealer)
- *JIT Concepts, Inc. v. Shelby County Healthcare Corp.*, 358 F.Supp. 2d 678 (W.D. Tenn. 2005) (breach of contract and intentional inducement of breach of contract claims among medical equipment manufacturers and hospital).
- *Nacco Materials Handling Group, Inc. v. Toyota Materials Handling USA, Inc.*, 366 F. Supp. 2d 597 (W.D. Tenn. 2004) (preliminary injunction under Tennessee statute, preventing manufacturer's termination of dealer agreement).
- *Rome Healthcare LLC v. Peach Healthcare System, Inc.*, 590 S.E.2d 235 (Ga. App. 2003) (breach of contract claims between operator of five skilled nursing facilities and management company).
- *Campbell v. Potash Corp. of Saskatchewan, Inc.*, 238 F.3d 792 (6th Cir. 2001) (suit by former executives of company acquired in $1.23 billion merger for "golden parachute" benefits).
- *Manufacturers Consolidation Service, Inc. v. Rodell*, 42 S.W.3d 846 (Tenn. Ct. App. 2000) (suit by company against former shareholder and executives who set up competing business, holding court had jurisdiction over out-of-state executives under conspiracy theory of jurisdiction).

Notable Unreported Decisions

- *Relyant Global, LLC v. Contrack Watts, Inc.,* International Chamber of Commerce International Court of Arbitration no. 24891/MK/PDP (August 22, 2023) (general contractor awarded $3.45 million in delay damages caused by subcontractor's abandonment of the munitions clearance scope of work on naval base in Guam).

- *Melton v. City of Lakeland*, 2019 WL 2375431 (Tenn. Ct. App. June 5, 2019) (taxpayer suit against city and industrial development board seeking advisory opinion over abandoned $60 million bond financing for high school construction project; this case involved interpretation of Tennessee tax statutes and industrial development board statutes).

- *SJR Ltd. Partnership v. Christie's, Inc.*, 2014 WL 869743 (Tenn. Ct. App. 2014) (claims by owners of William Eggleston works against auction house for cancellation of auction over provenance questions).

- *Citizens Choice Home Care Services, Inc., v. United American. Health Care Corp.,* 2010 WL 4939994 (December 6, 2010) (contract interpretation of non-emergency medical transportation agreement).

- *Construction Crane & Tractor, Inc. v. Wirtgen America, Inc.*, 2010 WL 1172224 (Tenn. Ct. App. March 24, 2010) (construction equipment dealer sought protection under Tennessee statute to prevent termination of dealer agreement).

- *Wansley v. Refined Metals Corp.*, 1996 WL 502497 (Tenn. Ct. App. Sept. 6, 1996) (plaintiff's claims of injury due to toxic emissions from defendant's battery recycling lead melting facility held to be barred by statute of limitations).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

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

Early in my career, I worked on two matters in Probate Court in which I served as counsel for the person in connection with proceedings to establish a conservatorship. I have also been listed as a trustee on deeds of trust for real estate parcels from time to time.

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

From time to time in my outside general counsel role for clients, I negotiated, documented and closed asset purchase agreements, real estate transactions, and corporate reorganizations.

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.

This is my first application for judgeship to the Governor's Council for Judicial Appointments.

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 Mississippi -- Bachelors of Business Administration -- Banking/Finance and Management Finance (double major), attended August 1986 to May 1990 (cum laude)

-- Chancellor's Honor Roll (5 semesters); Dean's Honor Roll (2 semesters)

University of Mississippi School of Law -- Juris Doctorate, attended August 1990 to May 1993

-- Heidelberg & Woodliff Award -- highest grade in Oil & Gas (1993)

-- Moot Court national competition team (1993)

-- Law School Student Body Treasurer (1993)

PERSONAL INFORMATION

15. State your age and date of birth.

I was born on [redacted] 1967 and am fifty-six years old.

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

Other than the time I lived in Oxford, Mississippi while a student, both undergraduate and law school, I have lived in Tennessee my entire life.

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

Other than the time I lived in Oxford, Mississippi while a student, both undergraduate and law school, I have lived in Shelby County my entire life.

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

Shelby County.

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

I have not served in the military.

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

No.

21. To your knowledge, are you now under federal, state or local investigation for possible

violation of a criminal statute or disciplinary rule? If so, give details.

No.

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

None.

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

None.

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 The 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.

No.

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.

The Federalist Society - Memphis Chapter

Saint Michael's Catholic Church - Memphis -- Lector

YMCA of Memphis

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

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

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

No.

ACHIEVEMENTS

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

Tennessee Bar Association -- (2013 through 2023) Litigation, Appellate Practice, and Construction Law sections (2018 or so through 2023)

Tennessee Association of Construction Counsel (2015 - 2018 or so)

American Health Lawyers Association (2018 - 2023)

American Bar Association -- Litigation Section and Forum on Construction Law (2016 - 2023)

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 -- Construction Law (2021 - 2024); Commercial Litigation (2021 - 2024); Litigation - Labor and Employment (2023 - 2024); and Health Care Law (2023 - 2024).

Memphis Business Quarterly -- Power Player - Employment Law (2011 - 2023).

Tennessee Justice Center -- Pro Bono Attorney of the Year (2011)

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

CMS Reverses its Ban on Arbitration Agreements, with Jeffery D. Parrish and LoriBeth Westbrook, published on Wallerlaw.com blog "Wallerblog" (June 13, 2017)

The Supreme Court Still Favors Arbitration, with Jeffery D. Parrish, published on Wallerlaw.com blog "Wallerblog" (May 24, 2017)

Answering the Call, published in the Tennessee Volunteer Attorney (August 1, 2011)

Health Care Law: Cost Savings Arrangements: The Latest Guidance, Memphis Medical Society Quarterly (April 2, 2008)

Health Care Law: Tennessee Supreme Court Rules Parent Corporation Liable for Interfering with Affiliate's Subsidiary Hospital Contracts, with Lisa A. Moore, Memphis Medical Society Quarterly (April 2, 2007)

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.

None in the last five years.

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.

None.

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.

Writing Sample 1 is the memorandum in support of a motion to dismiss personal injury claims against a construction design firm based on specific Tennessee statutory provisions. I drafted over ninety percent of it.

Writing Sample 2 is a supplemental brief filed in the Tennessee Court of Appeals as to the effect, if any, of the Tennessee Supreme Court's application of the economic loss doctrine in *Milan Supply Chain Sols., Inc. v. Navistar, Inc.*, 627 S.W.3d 125 (Tenn. 2021) had on the issues

then before the court of appeals. I drafted most of the supplemental brief. I drafted over ninety percent of the brief through section II.C., and for the rest made comments and suggested revisions to the work of others.

ESSAYS/PERSONAL STATEMENTS

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

At this stage of my life and career, I am moved more and more to serve my community. There are many needs in and challenges facing Tennessee. Rather than stand back, I feel called to enter the arena and see how I might help. I have amassed broad experience litigating cases over the past 29 years, in federal and state courts in Tennessee and in other jurisdictions and courts. I believe my experience and skillset may be beneficial to the court and to litigants before it.

I will work hard and dig deep to make timely rulings that are faithful to applicable existing legal authority. I will treat all who come before the court with fairness and respect and do all that I may to timely and efficiently resolve the issues brought before the court.

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)***

I have taken a number of TennCare benefits appeals. Moved by the experience my mother had in navigating Medicare care protocols for my Dad after a major hip surgery, I worked with Tennessee Justice Center and the University of Memphis to establish an administrative law clinic focused on TennCare appeals.

Though the clinic I worked to establish was short-lived, the need remains for resources for people who need to access the TennCare or other similar benefits. To my mind, the byzantine administrative law regime for elderly or otherwise needy people to obtain promised benefits during times of extreme need remains a challenge in the "equal justice under the law" sense.

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

I am applying for the vacancy on the Tennessee Supreme Court.

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)***

For many years, I have been active in judging high school mock trial competitions in Memphis. I have also frequently judged University of Memphis law school mock trial competitions, national law school mock trial competitions held in Memphis, appellate moot court competitions at University of Memphis law school, ABA law school appellate moot court competitions, and a national law school mock trial competition held at Ole Miss Law School.

More recently, I have been volunteering as a coach for a high school mock trial team in Memphis. Over the past four years, the team has won the Memphis district every year and competed well in the state competition in Nashville. This year, the mock trial team competed in a national invitational tournament in Chicago for the first time. The team performed well with several individual students being recognized for their performances.

If appointed to the Tennessee Supreme Court, I expect that I will need to give up coaching the high school mock trial team. But I also anticipate I would volunteer to serve as a judge for the state finals or other rounds as needed.

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

I have loved the law for many years now. I eagerly read new appellate opinions in all areas of law, even those bearing very little relevance to my practice. I focus my continuing legal education on trial practice and appellate advocacy issues, learning best practices from some of the best attorneys in the nation.

My parents moved to Memphis from rural west Tennessee and Mississippi. They came seeking opportunities not available to them in their respective rural communities. Each of their respective parents farmed to provide for their families. My father, maternal grandfather, uncles on both sides, many cousins, and my brother (and brothers-in-law) served this country through their military service.

I attended and graduated public schools. I am the first one in my family to attend law school and become an attorney.

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. My dad, who had served in the military, and who had a brother killed in action in Italy during World War II, did not agree with flag burning. I remember discussing the U.S. Supreme Court flag burning cases and Justice Scalia's remarks that he had voted with the

majority that flag burning was expressive conduct protected under the First Amendment even though he personally disagreed with the result with my father at some point early in my career. I explained the ruling and told him I admired the fact that Justice Scalia felt honor-bound to follow the law even though he disagreed with the outcome.

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. Jeffery D. Parrish, State Counsel and Field Office Director, United States Senator Marsha Blackburn, [redacted]
B. Robert D. Boon II, Senior Counsel, Legal Environmental, Bridgestone Americas, Inc. [redacted]
C. Hon. Mark E. Davidson, District 25 District Attorney General, [redacted]
D. Ken Verheeck, PwC, Audit Partner, [redacted]
E. Ed Gillentine, Managing Principal, Gillentine Group, [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 Supreme Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

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

Dated: December 8, 2023.

Signature

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

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

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

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

WAIVER OF CONFIDENTIALITY

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

Jeffrey C. Smith

Signature

December 8, 2023
Date

016295
BPR #

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

Arkansas - 2010114

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JAMES D. CRUCE, MORRIS ALVEY, and DEBBIE ALVEY, individually and as parents/grandparents and next of kin of MICHAEL CRUCE, MONICA CRUCE, JOSHUA CRUCE and STEPHEN CRUCE, deceased,	)	
Plaintiffs,	)	
vs.	)	Case No: 3:15-CV-682
CHASE FAKES; DANNY W. SELLARS; EDGAR CONLEY; ROBERT CONLEY; ZHAO YITING; DONALD SCOTT FAKES; LANE CONSTRUCTION CORPORATION (THE); AECOM C&E, INC.; AECOM SERVICES, INC.; AECOM TECHNICAL SERVICES, INC.; and AECOM USA, INC.	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
AECOM DEFENDANTS' JOINT MOTION TO DISMISS CLAIMS
AGAINST AECOM DEFENDANTS IN THE THIRD AMENDED COMPLAINT

Zhao Yiting's rear-end collision with Edgar Conley, started a chain reaction of crashes involving six vehicles on Interstate 40. Now her bald claim that AECOM Technical Services, Inc., AECOM Services, Inc., AECOM C&E, INC., and AECOM USA, Inc. (the "AECOM Defendants") negligently designed Interstate 40 at mile marker 232 through 233 has started a chain reaction of other parties copying those claims for comparative fault purposes. The Cruces' mirror-image claim suffers the same infirmities as Ms. Zhao's – an absence of any

"factual enhancement" to support the "naked assertions" of negligent design. And, by statute, the AECOM Defendants are presumed to have acted with the degree of care and skill ordinarily exercised in the preparation of plans for construction of highways and with due regard for acceptable engineering standards and principles.

Without any factual allegations establishing any grounds for their bald assertion of negligent design, combined with the presumption that the AECOM Defendants acted with due care, the Cruces cannot establish a breach of duty by the AECOM Defendants. They, therefore, cannot state a plausible negligence claim against the AECOM Defendants, and their claims against the AECOM Defendants should be dismissed as a matter of law.

INTRODUCTION

According to the Third Amended Complaint, on October 3, 2014, traffic was backed up and slowed to a standstill on Interstate 40 at or near mile marker 231.6 in Wilson County at the time of the multi-vehicle collision at issue in this case. In that standstill, Ms. Zhao's car hit the car in front of her when that car suddenly slowed and stopped. After this rear-end collision, neither driver moved their cars from the interstate. And then, both drivers got out of their cars and stood waiting in the middle of the interstate.

The Cruce Family was killed when a truck driven by Chase Fakes slammed into the car driven by Ms. Cruce as it approached the two cars sitting and the two drivers standing in the interstate. According to the Third Amended Complaint, Mr. Fakes was driving "at a high rate of speed while intoxicated or under the influence of drugs."

After Ms. Zhao raised an affirmative defense asserting a negligent design theory against the AECOM Defendants, the Cruces now copy that negligence claim against the

AECOM Defendants in their Third Amended Complaint. Without any factual predicate, the Cruce Family contends the AECOM Defendants designed the section of Interstate 40 near mile marker 232 to 233 with a "dangerous and defective bottleneck transition area" in which four lanes of interstate traffic reduced to three lanes and then to two lanes without adequate transition zone distance, signage, warnings or speed reductions. But an assumption that a traffic jam results from negligent design -- as opposed to heavy traffic volume -- is insufficient to state a claim.

Moreover, by statute, the AECOM Defendants are presumed to have designed that section of Interstate 40 with the degree of skill and care ordinarily exercised by others in the field under similar conditions and in similar localities and with due regard for acceptable design standards and principles in all cases involving personal injury, property damage or death. With that statutory presumption, the Cruces cannot establish a breach of duty by the AECOM Defendants.

As a result, the Cruces cannot state a plausible negligence claim against the AECOM Defendants for negligent design of the section of Interstate 40 at mile markers 232 to 233.

STATEMENT OF FACTS

The "facts" set forth in this motion to dismiss are factual allegations from the Third Amended Complaint. By referencing them here, the AECOM Defendants do not admit or adopt them for any purpose. Rather, the AECOM Defendants simply point out that even if the factual allegations were true, the Cruces still cannot state a plausible negligence claim against them.

1. Lane Construction Corporation ("Lane Construction") designed and built the portion of Interstate 40 from west of State Route 171 to east of State Route 109 under a "design-build" contract[1] with the State of Tennessee, Department of Transportation for the Project: I-40, Widening from Central Pike to East of SR-109, Wilson County-Tennessee, Project Identification Number (PIN 114169.00), Project Number IM-40-5(140); 95100-0105-44, DB Contract No. DB1101 (the "I-40 Widening Project Contract"). (Third Amended Complaint (DE #39), ¶ 13).

2. The AECOM Defendants were responsible under a contract with the Tennessee Department of Transportation or Lane Construction for the design component of the I-40 Widening Project Contract. (Third Amended Complaint (DE #39), ¶ 8).

3. On October 3, 2014, Friday afternoon and evening traffic on Interstate 40 "was backed up and slowed to a standstill" near mile marker 232 in Wilson County, Tennessee. (Third Amended Complaint (DE #39), ¶¶ 23-24).

4. At or near mile marker 232, Interstate 40 reduced from four eastbound lanes to three and then to two. (Third Amended Complaint (DE #39), ¶ 23).

5. Around 6:46 p.m., in that Friday afternoon traffic backup, Ms. Zhao was unable to stop her car from crashing into the rear of a vehicle driven by Edgar Conley as it slowed and stopped ahead of her. (Third Amended Complaint (DE #39), ¶ 24).

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[1] The Tennessee Department of Transportation defines "design-build contract" as an agreement that provides for the design and construction of a project under a single contract. Rules of the Tennessee Department of Transportation, Construction Division ("TDOT, Construction Div. Rules"), 1680-5-4-.02(11). A "design-builder" is defined as any entity or joint venture contractually responsible for delivery of the project design and construction. TDOT, Construction Div. Rules, 1680-5-4-.02(13).

6. Neither Mr. Conley nor Ms. Zhao moved their cars from the interstate after the collision. According to a passing motorist, neither Mr. Conley's vehicle nor Ms. Zhao's had their hazard lights on. (Third Amended Complaint (DE #39), ¶¶ 25-26).

7. Both Mr. Conley and Ms. Zhao then stood outside their vehicle in the middle of the interstate. (Third Amended Complaint (DE #39), ¶¶ 25-26).

8. Traffic approaching Mr. Conley's and Ms. Zhao's vehicles in the interstate slowed to maneuver to the other lane. But as Ms. Cruce approached, her car was slammed from the rear by a truck driven by Chase Fakes, crushing the car and killing all four occupants. According to the Cruces, Mr. Fakes was driving at a "high rate of speed" and under the influence of alcohol or drugs. (Third Amended Complaint (DE #39), ¶¶ 29-30).

* * *

The Cruces baldly claim the AECOM Defendants negligently designed the section of Interstate 40 where the crashes occurred. With threadbare and conclusory allegations without the benefit of any factual enhancement, they assert that the AECOM Defendants designed the reduction of eastbound interstate lanes from four to three and then to two without adequate transition zone distance, signage, warnings or speed reductions. (Third Amended Complaint (DE #39), ¶¶ 18, 23-24, 73).

The Cruces do not support their speculative and conclusory allegations with any factual content in several key areas. They do not set forth the distance of the "transition zone" at the site of the crash nor the standard for "transition zones" for interstate highways. Likewise, they do not identify the extent of warnings or signage in the area

concerning the lane reductions. Nor do they set forth the standard for warnings or signs for interstate highways to advise drivers of impending lane and speed reductions.

Under federal pleading standards, the Cruces, conclusory allegations that the AECOM Defendants negligently designed the section of Interstate 40 near mile marker 232-233 are not entitled to the assumption of truth.

LAW AND ARGUMENT

1. <u>The motion to dismiss standard</u>.

More than an unadorned "the-defendant-unlawfully-harmed-me accusation" is required to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). The factual allegations in a complaint must state a plausible claim for relief to survive a motion to dismiss. *Id.* at 679; 129 S.Ct. at 1950. Though a court is required to accept all factual allegations as true, allegations that are "no more than conclusions are not entitled to the assumption of truth." *Id.* Mere "labels and conclusions" or "formulaic recitation of the elements of a cause of action will not do." *Id.* at 678; 129 S.Ct. at 1949. The factual content must identify the grounds. Naked assertions devoid of further factual enhancement do not suffice. *Id.*

Where the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not stated a claim for relief. *Id.* at 679; 129 S.Ct. at 1950. The factual content in a complaint must show more than a "sheer possibility that a defendant has acted unlawfully" and more than that the defendant's acts are "merely consistent with" liability. *Id.* at678; 129 S.Ct. at 1949.

Courts may use a two pronged approach to deciding motions to dismiss. Third, the court can identify pleadings not entitled to the assumption of truth because they are no more than mere conclusions. *Id.* at 1950. Next, the court should assume the truth of the well-pleaded factual allegations and then determine whether they "plausibly give rise to an entitlement to relief." *Id.*

As shown below, the factual allegations in the Cruces' Third Amended Complaint do not plausibly give rise to an entitlement to relief.

2. <u>The Cruces' claim against the AECOM Defendants for negligent design of Interstate 40 is barred by statute</u>.

Under Tennessee Code Annotated ("T.C.A.") § 54-5-145(c)(1), an entity that contracts to prepare engineering plans for the construction of a highway for the department of transportation:

> . . . shall be presumed to have prepared such plans using the degree of care and skill ordinarily exercised by other engineers in the field under similar circumstances and in similar localities and with due regard for acceptable engineering standards and principles . . .

The AECOM Defendants contracted to design the I-40 Widening Project (Third Amended Complaint, 8, ¶ 14). The I-40 Widening Project Contract (referenced, but not attached, by the Cruces) contemplated the design-builder would provide engineering services, and as the lead designer, the AECOM Defendants proposed performed that service. No allegation has been made that "designing" the I-40 Widening Project does not encompass preparation of engineering plans. The § 54-5-145(c)(1) presumption can only be overcome by a showing of "gross negligence in the preparation of the engineering plans". T.C.A. § 54-5-145(c)(2). The statute does not define "gross negligence."

But the Tennessee courts have. Gross negligence is a negligent act performed with an utter lack of concern for the safety of others, or one taken with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law. *Leatherwood v. Wadley*, 121 S.W.3d 682, 694 (Tenn. Ct. App. 2003), *perm. app. den.* (2003) (negligence and gross negligence claims for failure to design and construct barriers at drag speedway and failure to post adequate signage warning of dangers were properly dismissed as a matter of law).

The Third Amended Complaint does not make any factual allegations of negligence, much less gross negligence, on the part of the AECOM Defendants.[2] The Third Amended Complaint likewise does not contain any factual allegations warranting an inference that the AECOM Defendants acted with an utter lack of concern for the safety of others or that it acted with reckless disregard for the rights of others.

As a result, the Cruces cannot state a plausible negligent design claim against the AECOM Defendants. By statute, the AECOM Defendants are presumed to have designed the section of Interstate 40 at issue "using the degree of care and skill ordinarily exercised by other engineers in the field under similar circumstances and in similar localities and with due regard for acceptable engineering standards and principles." T.C.A. § 54-5-145(c)(1). This statutory presumption prevents the Cruces from plausibly alleging a breach of duty by the AECOM Defendants.

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[2] Even if only one of the AECOM Defendants contracted for the design/engineering for the I-40 Widening Project Contract, the lack of factual allegations alone warrants dismissal of the negligence claim against all other AECOM Defendants.

On top of that, the Cruces do not identify the exact highway design standards applicable to the design for the section of Interstate 40 at mile marker 232-233. Nor do they specify how, if at all, the design deviates from governing highway design standards. They do not allege the distance of the "transition zone" at the crash site nor the standard for "transition zones" for freeways. They do not allege any facts regarding the extent of signage and actual placement of that signage in the area leading up to the "transition zone" and they do not set forth the standard for signage on freeways for warning drivers of lane and speed reductions.

The court in *Leatherwood* observed that the plaintiffs in that case appeared to rely on the general assumption that if there had been an adequate design and construction of safety barriers, then they would not have been injured and since they were injured, the design and construction of the safety barriers could not have been in compliance with acceptable safety norms. *Leatherwood*, 121 S.W.3d at 697. But the court held such an "assumption, unsupported by statutory or regulatory authority, is insufficient" to state a negligence or gross negligence claim for inadequate design and construction. *Id.*

So it is here. The factual allegations in the Third Amended Complaint simply do not permit the court to infer even the possibility of misconduct. And the Cruces' apparent adoption of Ms. Zhao's assumptions that an adequate design would have prevented the Friday afternoon traffic jam on Interstate 40 east of Nashville and thereby prevented Ms. Zhao from colliding into Mr. Conley's vehicle is insufficient to establish a deviation by the AECOM Defendants from the governing standards and principles of highway design.

3. **Because the AECOM Defendants are statutorily immune from liability for the Cruces' claims, they should not be on a jury verdict form and no fault should be attributed to them by the fact-finder.**

Under T.C.A. § 54-5-145(d), if engineers, consultants, contractors are rendered immune from liability under T.C.A. § 54-5-145, then "they may not be named on the jury verdict form or be found at fault or responsible for the injury, death, or damage that gave rise to the damages." Therefore, if the court grants the AECOM Defendants' Motion to Dismiss, then the AECOM Defendants should not be named on any jury verdict form and no percentage of fault should be assessed against them.

CONCLUSION

By statute, the AECOM Defendants are presumed to have prepared the design for the pertinent section of Interstate 40 with the degree of care and skill ordinarily exercised by other engineers in the field under similar conditions and in similar localities and with due regard for acceptable engineering standards and principles.

The Cruces Third Amended Complaint is bereft of any factual allegations that overcome the statutory presumption. Accordingly, the Cruces have not stated a plausible claim for relief against the AECOM Defendants.

Their claim against the AECOM Defendants should be dismissed as a matter of law. And the AECOM Defendants should not be named on the jury verdict form and the fact-finder should not find them at fault in any percentage in the death of the Cruces or for any property damage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of October, 2015, I electronically filed a true and correct copy of the foregoing Memorandum in Support of the AECOM Motion to Dismiss with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following counsel of record:

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IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

COMMERCIAL PAINTING COMPANY, INC.,	) No. W2019-02089-COA-R3-CV
Plaintiff/Appellee,	) Appeal from) Shelby County Chancery Court
v.	) Docket No. CH-06-1573-3
THE WEITZ COMPANY, LLC; FEDERAL INSURANCE COMPANY; and ST. PAUL FIRE & MARINE INSURANCE CO.,	) Chancellor JoeDae L. Jenkins
Defendants/Appellants.	)

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I. INTRODUCTION AND SUMMARY

This Court reversed a jury's $10 million compensatory damages award and $20 million punitive damages award in *Milan Supply Chain Solutions, Inc. v. Navistar Inc.*, W2018-00084-COA-R3-CV, 2019 WL 3812483 (Tenn. App. August 14, 2019) because the fraud claim was "without legal merit". *Id.* at *9. After a comprehensive review and analysis of economic loss doctrine cases involving sales of goods or defective products from Tennessee and across the country, this Court dismissed the Plaintiff's fraud claim in the *Milan* case based upon the conclusion that a tort claim seeking recovery solely for economic losses (as opposed to personal injuries or property damage) is "barred by the economic loss doctrine," leaving the parties to look to the governing contract(s) to determine the relief available. *Id.* at *8.

On August 2, 2021, the Tennessee Supreme Court unanimously affirmed this Court's holding in that case, and agreed that this Court's application of the economic loss doctrine was correct. In so doing, the Tennessee Supreme Court, like this Court, applied the economic loss doctrine to bar the fraudulent inducement claims asserted in the *Milan*

case. *Milan Supply Chain Solutions, Inc. v. Navistar, Inc.*, W2018-00084-SC-R11-CV, 2021 WL 3283067, at *22-*23 (Tenn. August 2, 2021).

Briefing in this case was completed before the Tennessee Supreme Court issued the *Milan* decision. In their briefs, Weitz and the Sureties cited this Court's 2019 *Milan* opinion as authority for applying the economic loss doctrine to bar CP's fraud claim that arose out of the very grounds alleged as a basis for CP's breach of contract claim—and for which only contract-based damages were sought. Initial Brief at 59-61. Acknowledging that *Milan* involved contracts for the sale of trucks between sophisticated, commercial parties, Weitz and the Sureties argued that the fundamental policies identified by this Court as the bases of the economic loss doctrine also supported the doctrine's application to the commercial construction subcontract (for the furnishing of labor, *materials*, and services) between sophisticated, commercial parties at the heart of this case, particularly given that CP did not plead or prove that it suffered any damages different in kind or amount from its alleged breach of contract damages. Initial Brief at 59-60.

CP, on the other hand, asserted in its brief that the economic loss doctrine is limited to products liability cases ***and*** has no application to

intentional torts. CP's Brief at 56. CP also advanced the position that "fraudulent inducement claims are universally recognized as exceptions to the Economic Loss Doctrine" as the main distinction between the *Milan* case and this case[1], CP Brief at 61, and then purported to reframe its post-contract fraud claim as one for fraudulent inducement to fit that argument, notwithstanding the fact that CP's fraud claim sought to recover the exact same post-contract damages alleged in CP's breach of contract claim.

By order entered on August 4, 2021, this Court directed the parties to submit "supplemental briefing as to [the] effect, if any, of the Tennessee Supreme Court's opinion on the issues of this case." The economic loss doctrine's applicability to fraud claims is the main issue to which the Supreme Court's *Milan* opinion applies and this supplemental brief addresses only that issue, as directed by the Court. But while application of the economic loss doctrine to this case is dispositive of CP's fraud claims and its punitive damages award, the other grounds raised

[1] Inexplicably, CP did not understand Milan Supply Chain Solutions' claim to be a fraudulent inducement claim. CP's Brief at 58-59.

in Appellants' Initial Brief and Reply Brief likewise support reversal of the judgment below.

In *Milan*, the Supreme Court declined to "announce a broad rule either extending the economic loss rule to all fraud claims or exempting all fraud claims from the economic loss rule", but the Supreme Court's reasoning, analysis of economic loss doctrine cases from Tennessee and other jurisdictions, and reliance on a Utah Supreme Court opinion strongly support the application of the economic loss doctrine in this case also. And like *Milan*, such an application of the economic loss doctrine compels dismissal of CP's fraud claims as a matter of law and reversal of the fraud compensatory and punitive damages awarded to CP below.

This Court remanded the case to give CP a chance to prove an independent tort—one not based on the Subcontract and with distinct damages different in kind and amount from its contract claim. CP failed to prove a claim not barred by the economic loss doctrine. Rather, all CP proved in the second trial was the same breach of contract claim it presented in the first trial. Therefore, due to the numerous errors described in Weitz's Initial and Reply Briefs, the judgment resulting from

the second trial should be vacated and the final judgment from the first trial should be reinstated.

II. EFFECT OF SUPREME COURT'S DECISION IN *MILAN*

A. The Supreme Court's *Milan* decision confirms that CP's fraud claims are barred by the economic loss doctrine.

This Court's *Milan* 2019 opinion comprehensively surveyed the landscape of economic loss doctrine decisions, both within and outside the State of Tennessee. This survey focused primarily on cases involving the sale of goods in which one party claimed the goods were defective or did not perform as represented because that was the type of case before it—a claim by Milan Supply Chain Solutions that it had been induced to purchase trucks known by defendant to be defective through false statements by the defendant about the quality of the trucks.

Two of the defective products cases relied upon by this Court in its 2019 *Milan* opinion–*Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 220 (Wis. 2005) and *Huron Tool & Eng'g Co., v. Precision Consulting Services, Inc.*, 532 N.W.2d 541, 545 (Mich. 1995)–for its articulation of the narrow or limited fraud exception to the economic loss doctrine were included and discussed in the Supreme Court's opinion. *Compare Milan*,

2021 WL 3283067 at *17-*18 (Supreme Court's treatment of *Huron Tool* and *Kaloti*) with *Milan*, 2019 WL 3812483 at *6-*7 (Court of Appeals' analysis of *Huron Tool* and *Kaloti*). This Court found the *Huron Tool* and *Kaloti* "approach consistent with Tennessee law". *Milan*, 2019 WL 3812483 at *7. The Supreme Court agreed generally with this Court's analysis of and reliance on the *Huron Tool* and *Kaloti* cases.

But the Tennessee Supreme Court went farther. For its discussion of current trends in economic loss doctrine cases, it selected a 2018 opinion of the Utah Supreme Court–not cited in the 2019 *Milan* opinion–that had applied the economic loss rule to bar fraud claims in a contract-based dispute not involving the sale of goods or a defective product. *Milan*, 2021 WL 3283067 at *18-*19, *22-*23 (discussing *HealthBanc Int'l LLC v. Synergy Worldwide, Inc.*, 435 P.3d 193 (Utah 2018)). In that Utah case, the plaintiff claimed it was fraudulently induced to enter a royalty agreement by a contractual representation and warranty concerning ownership and the right to assign use of a drink formula. As evidenced by the extensive quotation from the *HealthBanc* opinion, the Tennessee Supreme Court made it a main focus in its economic loss doctrine analysis, and then ultimately adopted its reasoning. *Id.* The

Supreme Court's selection of and reliance on the *HealthBanc* decision is noteworthy because it could have just as easily affirmed this Court's 2019 decision without looking to and adopting the reasoning of a decision in which the economic loss doctrine was applied in a case in which there was no sale of goods or claims that a product was defective or damaged itself at issue.

In its recent *Milan* opinion, the Tennessee Supreme Court held that, for situations "involving a contract between sophisticated commercial business entities and a fraudulent inducement claim seeking recovery of economic losses only," the economic loss doctrine applies where the alleged misrepresentations concern the subject of the parties' contract. *Id.* at *22. Again, the *Milan* case involved alleged misrepresentations as to the quality or character of the Navistar trucks sold to the plaintiff. And so, the Supreme Court ruled that when "the alleged fraud concerns pre-contractual misrepresentations and nondisclosures about the quality, reliability, and character of the goods that are the subject of the contract between sophisticated business entities, Tennessee's interest in freedom of contracts prevails, and the economic loss doctrine applies." *Id.* Several aspects of the Supreme

Court's opinion confirm that CP's fraud claims in this case—which CP has now attempted to recharacterize as fraudulent inducement claims—are barred by the economic loss doctrine.

B. The economic loss doctrine applies to this case because the Supreme Court's citation of, and reliance on, *HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.* supports application of the economic loss doctrine to any type of commercial contract between sophisticated parties, not just contracts for the sale of goods.

The Supreme Court's opinion generally tracked and approved this Court's analysis of the state of economic loss doctrine decisions from Tennessee and other jurisdictions. Then the Tennessee Supreme Court quoted extensively from the Utah Supreme Court's 2018 *HealthBanc* decision and in making its ruling, the Supreme Court expressly stated that it was "persuaded by the reasoning articulated by the Utah Supreme Court." *Milan*, 2021 WL 3283067 at *23. As quoted in the *Milan* decision, the Utah Supreme Court's reasoning that the Tennessee Supreme Court found persuasive included the Utah court's observation that:

> Contract law seems sufficient to make wronged parties whole. When the contract terms contain the grounds for the tort claim, we see no reason to conclude that recovery under contract law is insufficient--"when a party is merely suing to recover the benefit of its contractual bargain, there

> is no inherent unfairness in limiting that party to a breach-of-contract claim.

Id. [2]

That portion of the Utah Supreme Court opinion went on to state that, if the parties to a contract are concerned about the sufficiency of traditional contract damages like expectation damages, they can bargain for other damages, like liquidated damages. *Id.* But when "they fail to do so it seems problematic for a court to make a better contract for them than the one they negotiated–by importing tort remedies into the deal." *Milan*, 2021 WL 3283067 at *23.

Elsewhere in the *Milan* opinion, the Tennessee Supreme Court quoted other portions of the Utah Supreme Court's *HealthBanc* decision, noting the Utah Court's "discussion provides guidance on the issue generally" even if the court declined to announce a broad rule (as the Tennessee Supreme Court also declined to do). For example, the Tennessee Supreme Court recognized the Utah court's conclusion that, for purposes of applying the economic loss doctrine to bar fraud claims,

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[2] CP left this part (and additional parts of the excerpted quote above) of the Supreme Court's opinion out of its lengthy block quote in its Rule 27(d) notice of supplementary authority, written and served within hours of the opinion's release.

there is no functional distinction between "failure to perform a contract and promises that induce a party to enter a contract" ***when*** "the subject matter of the inducing promises [is] later negotiated for and included in the contract." *Milan*, 2021 WL 3283067 at *18. The Tennessee Supreme Court then went on to quote the Utah Supreme Court's reasoning that:

> [i]ntentional bad acts are insufficient by themselves to justify an exception to the economic loss rule. ***If the "bad acts" (even intentional ones) are covered by a contract, they remain in the realm of contract law.*** And contract law remains sufficient to "punish" the breaching party.

Id. at *19. (Emphasis added.)

These quotes from the Supreme Court's *Milan* decision are especially apt in this case. It should not be forgotten that this case began and was litigated for three years without any tort and punitive damages claims. *See* Initial Brief at 16 and 30-31. At trial, CP introduced virtually the same evidence it had as at the first trial, which did not include any tort or punitive damages claims. *Id.* at 35-36. And on appeal, CP admits it offered the same compensatory damages calculation for its contract and extra-contractual claims. CP Brief at 38; Appellants' Reply Brief at 16. That damages model comprised Ex. 350, a one-page chart,

entitled "**Commercial Painting Company's Subcontract Reconciliation**". Appellants' Initial Brief at 43; 59 Ex 350 at 174.[3] As the title suggests, all amounts listed represent money CP claimed to be due under the Subcontract.

C. The economic loss doctrine applies to bar intentional tort claims, including fraud, and is not limited to "products liability cases" or contracts for the sale of goods.

The Supreme Court's application of the economic loss doctrine to bar the fraudulent inducement claims asserted in *Milan* plainly overrules those previous Tennessee decisions suggesting the economic loss doctrine never applies to fraud claims. Though the Supreme Court stopped short of establishing that as a broad rule, it is now clear that the economic loss doctrine bars fraud claims where sophisticated business entities have entered commercial contracts. And by its selection of *HealthBanc* as the

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[3] Here, as in its other briefs, Appellants use the following record citation system: The general format of the citations to the Appeal Record is: [Appeal Record Vol. #] [Record Type: TR, Tr or Ex] [if Ex, then trial exhibit #] at [Appeal Record page #]. Any citation to the Appeal Record containing the Technical Record is cited as "TR." Any citation to the Appeal Record containing the Transcripts is cited as "Tr." Any citation to the Appeal Record containing the Trial Exhibits is cited as "Ex." The Appeal Record page number for the "Ex" is the Adobe file page number. For example, the citation to Trial Exhibit 218 found in Volume 58 of the Appeal Record on page 415 of 475 of the Adobe file is: 58 Ex 218 at 415.

central focus of its reasoning, it is equally clear that the economic loss doctrine is not limited to contracts for the sale of goods or for claims involving defective products that did not work as intended or that damaged themselves.

In recounting the development of the economic loss doctrine in Tennessee, the Tennessee Supreme Court acknowledged it "has never applied the economic loss doctrine outside the products liability context, in which it originated." *See, e.g., id.* at *21. As made plain in the *Milan* opinion, the term "products liability" refers to cases in which the product sold did not work as intended or damaged itself in some way. [4] *Id.* at *20

[4] As used in the economic loss doctrine context, the phrase "product liability" seems a misnomer. For example, the Supreme Court, in the *Milan* case itself cites to the Tennessee Products Liability Act. T.C.A. § 29-28-102. That Act expressly defines a "product liability action," for purposes of that Chapter of the Tennessee Code, as "all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product." T.C.A. § 29-28-102(6). Thus, the *Milan* case would not be considered a "product liability action" for purposes of the Tennessee Products Liability Act. Black's Law Dictionary similarly defines "products liability action" as "[a] lawsuit brought against a manufacturer, seller, or lessor of a product . . . for personal injury, death, or property damage caused by the manufacture, construction, design, formulation, installation,

(discussing *Ritter v. Custom Chemicides, Inc.*, 819 S.W. 2d 128 (Tenn. 1995) (pesticide did not work as represented or intended) and *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.,* 293 S.W.3d 487 (Tenn. 2005) (product damaged itself)). Other courts interpreting and applying Tennessee law have applied the economic loss doctrine outside a defective product claim context and the Supreme Court's *Milan* decision can only logically be read as affirming that line of cases.

The Tennessee cases recognizing the applicability of the economic loss doctrine outside a products liability or sale of commercial goods context include the following:

- *United Textile Workers of Am., AFL-CIO v. Lear Siegler Seating Corp.*, 825 S.W.2d 83 (Tenn. Ct. App. 1990) (applying the economic loss doctrine outside the products liability arena to disallow recovery for purely economic losses by workers seeking lost wages).
- *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 430 (Tenn. 1991) (applying the doctrine to a negligent

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preparation, or assembly of a product." Garner, Black's Law Dictionary (11th Ed. 2019).

misrepresentation claim filed against a construction manager for supplying misleading information, finding that "economic loss may be recoverable by parties not in privity upon a showing of 'negligence, misrepresentation, and justifiable reliance.'").

- *Ladd Landing, LLC v. Tennessee Valley Authority*, 874 F. Supp. 2d 727, 731 (E.D. Tenn. 2012) (finding that the doctrine extends beyond product liability context and barred tort claims from three plaintiffs who brought action against the TVA seeking damages arising from a dike failure and coal ash spill).
- *Tipton v. CSX Transportation, Inc.*, No. 3:15-CV-311-TAV-CCS, 2017 WL 10398182 (E.D. Tenn. Oct. 25, 2017) (applying the doctrine to bar plaintiff's claim for lost business income arising out of a train derailment and chemical fire).

In the Supreme Court's *Milan* decision, the Court notes in the first paragraph of its discussion of the economic loss doctrine in Tennessee, that the Tennessee Supreme Court "first mentioned the economic loss doctrine thirty years ago in *John Martin Co. v. Morse/Diesel Inc.,* 819

S.W.2d 428 (Tenn. 1991)." *Id.* at *30. Even though the *John Martin* case is of that line of cases applying the economic loss doctrine in which there is no privity of contract, it is noteworthy that the *John Martin* case did not involve a products liability claim or a sale of commercial goods– rather, it involved a construction services contract.

The *Milan* case involved the sale of commercial trucks between two sophisticated parties which entered into a series of negotiated contracts; this case involves the sale of commercial construction *materials*, labor, and services between two experienced commercial contractors which negotiated a subcontract. It would be illogical to hold that a different rule of law should apply in this case than the rule of law applied by the Tennessee Supreme Court in the *Milan* case. That conclusion is only reinforced by the Supreme Court's heavy focus on and adoption of the reasoning in *HealthBanc*.

Nothing in the reasoning of the Utah Supreme Court relied upon by the Tennessee Supreme Court suggests the application of the economic loss doctrine should be limited to products liability cases or cases involving contracts for the sale of goods. In fact, the contract at issue in the *HealthBanc* case itself was ***not*** a contract for the sale of

goods, and the case did ***not*** involve products that failed to work as intended or that damaged themselves (sometimes referred to in economic loss doctrine cases as a products liability claim).[5] Rather, the Utah Supreme Court confronted a claimed misrepresentation as to ownership of a health drink formula or recipe in connection with a royalty agreement. *HealthBanc*, 435 P.3d at 194-95. In that case, one party claimed it had been fraudulently induced to enter the royalty agreement because the other party misrepresented that it had the exclusive right to use, assign or sell the formula and the associated intellectual property

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[5] The Tennessee Supreme Court also noted at least one other case in which a state supreme court applied the economic loss doctrine to bar intentional tort claims outside the products liability or sale of goods context. In *Digicorp, Inc. v. Ameritech Corp.*, 662 N.W.2d 652 (Wis. 2003) (applying the economic loss doctrine to bar a fraud in the inducement claim in connection with a distribution agreement for telephone calling services), the Wisconsin Supreme Court reversed a jury award for intentional misrepresentation and for punitive damages by holding that the economic loss doctrine barred the fraud claim because it was interwoven with the contract in that it involved risks and responsibilities addressed in the contract. *Id.* at 665. In that case, the misrepresentations concerned matters related to the performance of the contract itself and for matters in which the parties had clearly allocated the risks and responsibilities through the use of contract terms. *Id.* The same is true in this case.

rights. *Id.* at 195. The royalty agreement included a written representation and warranty as to that very subject also.

The Utah Supreme Court held that there is no fraud exception to the economic loss doctrine where the alleged fraudulent inducement arises out of the very grounds alleged as a basis for the breach of contract claim. *HealthBanc*, 435 P.3d at 194. As the Utah court saw it, the fraudulent inducement claim in that case (as in this case) arose out of the same central allegations as the breach of contract claim. *Id.* Because the fraudulent inducement claim overlapped completely with a contract claim, in that the alleged fraudulent inducement was also an alleged breach of the contract, the Utah Supreme Court held there was no fraud exception to the economic loss doctrine and the tort claim was therefore barred. *Id.* at 196. On those facts, the Utah Supreme Court determined that the economic loss doctrine barred the tort claim without a need to "resolv[e] the broad question whether there may ever be a fraudulent inducement exception to the economic loss rule." *Id.* at 194.

In its recent *Milan* decision, the Tennessee Supreme Court likewise stopped short of resolving the broader question of whether there can ever be a fraudulent inducement exception to the economic loss doctrine in

Tennessee. But nothing in the opinion limits application of the economic loss doctrine to sale of goods or products liability cases or precludes its application in this case. The Supreme Court's reliance on and extensive quotation of the *HealthBanc* decision, in and of itself, logically suggests that the ***economic loss doctrine should apply*** to all types of commercial contracts between sophisticated business entities. This is particularly true when the alleged fraudulent inducement claim arises out of the very grounds and the exact same facts and alleged damages asserted as the basis for a breach of contract claim, as in this case.

Clearly, the Subcontract at issue in this case is the basis of both CP's breach of contract claim and CP's intentional misrepresentation claims. CP's jury verdict form makes it clear that CP based its intentional misrepresentation claim solely on representations *in the Subcontract* regarding the length of time CP would have to perform its work and regarding the amount of work it would be allowed and required to perform. 13 TR at 001842. These topics were comprehensively addressed in the Subcontract itself. The Subcontract allocated the risks and responsibilities between the parties with regard to CP's performing work within established durations and in compliance with Weitz's project

schedule—which Weitz had the contractual power to adjust. 56 Ex. 94 at 353-54 (Subcontract. at 39-40). The Subcontract likewise contemplated the prospect that CP might be required to perform extra work, and expressly detailed the process for authorization of and payment for such extra work. *Id.* Lastly, the Subcontract expressly permitted Weitz to supplement CP's forces—with or without a subcontractor default. 56 Ex 94 at 351, 354, and 360 (Trial Ex 94 at 38, 40 and 46), (Subcontract Exhibit D §§ 5.3 and 7.3) (supplementation without default); (Subcontract Exhibit D §11.1 (supplementation with default).

CP's tort claims rest upon an "illusory" distinction between a failure to perform a contract and alleged promises that induce a party to enter a contract when those promises are later included in the contract as they were here. *Milan*, 2021 WL 3283067 at*18-19, *quoting HealthBanc,* 435 P.3d at 197. "When the alleged fraud concerns pre-contractual misrepresentations or nondisclosures about matters that are the subject of a contract between sophisticated business entities, Tennessee's interest in freedom of contract prevails and the economic loss doctrine applies." *Id.* at *22.

That illusory distinction is amplified in this case, where all of CP's claimed damages were contract damages. As previously pointed out, the only damages evidence presented to the jury by CP was Exhibit 350. That exhibit made plain that CP was seeking recovery for the "remaining subcontract balance (includes retainage)" and for "change order requests for extra work (line items 103-168)." 59 Ex 350 at 174 (Trial Exhibit 350). CP admits as much in its brief. CP's Brief at 38 (attempting to justify recovery of contract-based damages under non-contractual theories). Combined, the grounds for CP's fraud claims are rooted in the terms of the Subcontract and so are its claimed compensatory damages. Under these circumstances, CP's tort claims overlap, or are interwoven with, CP's breach of contract claim. *See Milan*, 2021 WL 3283067 at *17, *quoting Huron Tool & Eng'g Co. v. Precision Consulting Services, Inc.,* 532 N.W.2d 541, 546 (Mich. App. 1995). And under these circumstances, the Tennessee Supreme Court's opinion reinforces the conclusion that CP's fraud claims and punitive damages award must be dismissed.

D. Similarities in several key factual underpinnings of the Milan fraud claim and in CP's fraud claim support application of the economic loss doctrine in this case.

Although the *Milan* case involved contracts for the sale of Navistar trucks and this case involves a commercial construction Subcontract (for the furnishing of construction *materials*, labor, and services), there are some very significant similarities between the key factors that led the Tennessee Supreme Court to apply the economic loss doctrine in that case and the facts of this case. Those similarities support application of the economic loss doctrine in this case to bar CP's tort claims and its recovery of punitive damages.

In *Milan*, the parties could have, and actually did, address, in their contracts, the representations upon which the plaintiff's fraudulent inducement claim was based–the quality and reliability of the trucks sold. *Id.* at *22. As noted above, Weitz and CP also expressly addressed in their Subcontract, and allocated the risks and responsibilities regarding, the project schedule, CP's work durations, Weitz's right to reschedule and re-sequence construction activities on the project, Weitz's right to supplement CP's forces (with or without default), the process governing CP's performance of and compensation for extra work, and the

claims and payment procedure to be followed on the project. In short, any representations or nondisclosures about "the length of time" CP would have to do its work and "the amount of work" it would be required to perform were addressed in and governed by various express terms of the written Subcontract that CP and Weitz freely negotiated.

In *Milan*, both contracting parties were sophisticated business entities, experienced in their fields of business. *Id.* Here, both Weitz and Commercial Painting were experienced and sophisticated construction contractors, very experienced in building commercial construction projects. *See* 25 Tr 262:10-21 (CP described as experienced business that had hung "millions upon millions of square feet of drywall"); 48 Tr 2437:9-11 (jury asked to credit CP's extra work charges because "Mr. Koch with decades of experience came up with that as an appropriate charge for that work").

In *Milan*, Milan knew Navistar had chosen an emissions technology not used by other manufacturers and had tested the trucks before purchase. *Id.* Here, CP claims that the schedule attached to the Subcontract was out-of-date and the project was seriously behind schedule, but CP's owner and principal, Mark Koch, also testified that he

knew that when he elected to sign the Subcontract. Mark Koch had personally attended weekly meetings at the construction site for at least a month before he signed the Subcontract and was clearly able to observe the actual status of the work. 29 Tr at 691:17-693:6 (M. Koch's trial testimony).

As the Tennessee Supreme Court made clear in its recent decision in *Milan,* applying the economic loss doctrine in circumstances such as those also present in the case at bar "is consistent with its historical underpinnings and with its central purpose of preserving the boundary line between tort and contract law." *Id.* at *22. The Tennessee Supreme Court's opinion also harmonizes with the long-standing Tennessee law regarding rescission–under which continued performance under a contract with knowledge of the alleged deceit waives a party's right to maintain an action for fraud damages. *Derryberry v. Hill*, 745 S.W.2d 287, 291 (Tenn. App. 1987). Mr. Koch testified at trial that CP "knew what was going on out there and what Weitz was trying to do to us. And [CP] overcame that." 26 Tr at 418:8-14 (Trial Transcript Vol. 4). He also testified that, during the project, CP knew specifically about Weitz's desire to accelerate the work in an effort to achieve an early completion

bonus. 26 Tr at 407:1-4 (Trial Transcript Vol. 4). Yet, CP continued to perform under the Subcontract. As addressed in Appellants' Reply Brief, that fact alone bars CP's "fraudulent inducement claim".

Read in conjunction with long-standing Tennessee precedents on the rescission of contracts, the Tennessee Supreme Court's *Milan* opinion reinforces the well-settled principle that, under these circumstances, CP is "bound by the express terms of the contract, and if [it] fails to recover on that, [it] cannot recover at all." *Wells v. Holley*, 235 S.W. 430, 433 (Tenn. 1921).

E. Limiting the parties' rights and responsibilities in this case to what they agreed to in their Subcontract by applying the economic loss doctrine does not in any way promote or condone fraud.

In CP's August 2, 2021 letter to this Court (submitted "[p]ursuant to Rule 27(d) of the Tennessee Rules of Appellate Procedure"), CP quotes extensively, yet selectively, from the Supreme Court's decision in *Milan*, highlighting the Supreme Court's pronouncement that "[o]ur ruling strikes a careful balance of two concepts crucial to Tennessee law – freedom of contract and abhorrence of fraud." Weitz and its Sureties agree that: (1) this balance should be struck, and (2) the Tennessee

Supreme Court's ruling in *Milan* properly did so. Weitz and its Sureties further respectfully submit that the only way to strike that appropriate balance in ***this case*** is to apply the economic loss doctrine here as well.

Weitz and its Sureties do not condone or support fraud, and do not ask this Court to do so either. To the contrary, only by ***applying the economic loss doctrine to this case*** can this Court serve both legitimate objectives. All of Weitz's alleged "bad acts" in this case related to requiring CP to do something CP allegedly did not undertake to do under the Subcontract or not allowing CP to do something the Subcontract allegedly allowed CP to do.

If this Court were to rule that a party to a commercial contract can sign a contract, rely on the contract, receive the benefits of the contract, make a substantial profit in doing so, recover damages based upon an alleged breach of the contract, ***and then*** selectively disavow the parts of the contract it does not like to go on to seek recovery of punitive damages barred by the contract based upon the same underlying facts and the same alleged compensable damages—as CP asks this Court to let it do—it is difficult to imagine how every breach of contract claim would not soon be turned into a tort claim by litigants seeking to cash in on the

lottery. *See HealthBanc*, 435 P.3d at 197 (recognizing prospect that written contracts could easily be voided after the fact simply by affidavit). That, of course, would cause great "chaos and uncertainty in commercial transactions." *Id.*

This case–a 15-year odyssey that started out, as it should have, as a breach of contract action–is a prime example of the wisdom of the Supreme Court's quotes from *HealthBanc* that "[c]ontract law seems sufficient to make wronged parties whole" and how problematic it is "for a court to make a better contract for them than the one they negotiated–by importing tort remedies into the deal." *Milan*, 2021 WL 3283067 at *23.

In this regard, Weitz and its Sureties respectfully refer the Court to the Brief of A*mici Curiae* the Associated General Contractors of America and Associated General Contractors of Tennessee, Inc. filed with this Court on or about December 14, 2020. As noted in that brief, jointly submitted by both a leading national construction trade association and its Tennessee chapter, comprising both general contractors and subcontractors alike, as well as construction suppliers and service providers:

> AGC does not support or condone fraud or deceptive business practices. In fact, AGC is dedicated to promoting its core principles of skill, integrity, and responsibility in the construction industry. But, it does not appear to the *Amici* that any fraud occurred here. Rather, this case bears the hallmarks of a simple contract dispute, much like the majority of other disputes that, unfortunately and invariably, occur from time to time in the construction process, despite the best intentions of the parties.
>
> If this Court does not reverse the Trial Court's decision in this case, the resulting precedent will deprive contracting parties and other participants in the construction process of the confidence and certainty they require in their contractual arrangements and change Tennessee law. Affirming the Trial Court would deprive construction contractors of an essential tool absolutely required to allocate risk in a fair, predictable, and efficient way: their contracts. The unintended consequences could well include great harm to AGC's and AGC-TN's members, to the construction industry they serve, to commerce in this state, and to the State of Tennessee as a whole. Affirming the Trial Court would also leave contractors wondering what they can and should do to manage their risks, assuming they elected to continue to pursue and perform work in Tennessee. At a minimum, it is reasonable to assume that such a legal precedent would increase construction, financing, and bonding costs in Tennessee and make it more difficult for small subcontractors to obtain work in the future.

Amici Brief at 10 & 11.

Both this Court and the Tennessee Supreme Court struck an appropriate balance between freedom of contract and the abhorrence of fraud in the *Milan* case. Weitz and its Sureties now ask this Court to follow suit by striking the same appropriate balance in this case by reversing the decision of the Shelby County Chancery Court.

III. SUMMARY AND CONCLUSION

The Tennessee Supreme Court's *Milan* opinion makes it clear that when a sophisticated business party is merely suing to recover the benefit of the contractual bargain, Tennessee law requires limiting that party to a breach of contract claim. That is logically so for any type of contract between sophisticated business parties and is not limited to cases involving sales of goods or claims that products did not work as represented.

CP is suing to recover the benefit of the contractual bargain. But its pursuit of fraud claims and punitive damages has prolonged a pretty typical commercial construction contract dispute into a 15–year tort claim odyssey. Application of the economic loss doctrine to this case is appropriate under the *Milan* decision and, just like the *Milan* case, does

not require this Court to decide broader questions about whether the economic loss doctrine bars all fraud claims or not. This case fits within existing law as reinforced by the Tennessee Supreme Court's *Milan* opinion.

The Court should, therefore, dismiss CP's fraud claims as a matter of law and vacate the monetary judgments awarded to CP in the court below. This Court remanded the case to give CP a chance to prove an independent tort—one not based on the Subcontract and with distinct damages different in kind and amount from its contract claim. CP failed to prove a claim not barred by the economic loss doctrine. Rather, all CP proved in the second trial was the same breach of contract claim it presented in the first trial. Therefore, due to the numerous errors described in Weitz's Initial and Reply Briefs, the judgment resulting from the second trial should be vacated and the final judgment from the first trial should be reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellants' Supplemental Reply Brief complies with the requirements set forth in Section 3, Rule 3.02 of Supreme Court Rule 46. The number of words contained in the brief is 5985.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of August, 2021, a true and correct copy of the foregoing was electronically filed via TrueFiling and was served by electronic mail to:

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