The Governor’s Council for Judicial Appointments  
State of Tennessee  
Application for Nomination to Judicial Office

Name: Stephen H. Biller

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INTRODUCTION

The State of Tennessee Executive Order No. 41 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 questionnaire. For example, when a question asks you to “describe” certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (with ink signature) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.
**PROFESSIONAL BACKGROUND AND WORK EXPERIENCE**

1. State your present employment.

   | The Biller Law Firm |

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

   | 1966, BPR # 007764 |

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.

   | Mississippi, BPR # 103399 |

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).

   | Attorney, National Labor Relations Board, Region 26, Memphis, Tennessee, 1965-1966  
   Goodman, Glazer, Strauch & Schneider, 1966-1979  
   William W. Goodman, Morris Strauch, Harry Schneider, Herbert Glazer, John McQuiston, Harry Goldsmith  
   Assistant County Attorney, Labor Relations – Part Time, 1978-1981  
   Heiskell, Donelson n/k/a Baker Donelson, Bearman & Caldwell, 1979-1997  
   The Bogatin Law Firm, 1997-2011 |
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.

- Labor & Employment Law (EEOC, NLRB, immigration, wage & hour) – 15%
- Civil Litigation – 70%
- Business Transactions, Securities Arbitration – 15%

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

The majority of my clients are businesses. I do have both Plaintiff and Defendant individual and business clients, the majority of which are Defendants.

I spend the majority of my time endeavoring to resolve issues prior to suit. I have had many years of experience in both State (primarily in Chancery) and Federal Court. Being involved in labor/management negotiations has allowed me to gain valuable experience and a prospective of the real diversity of thoughts and viewpoints among those residents who live in Arkansas, Mississippi and Western Tennessee.

100% of the matters I have been involved in are civil matters.

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

See Attachment to Question 9

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

Although I presided solely or jointly as mediator/arbitrator in over 25 cases, there were no cases which I would consider noteworthy or significant.

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

None

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

None

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 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.

Division 4, Circuit Court: withdrew Petition, May 2000
Part II, Chancery Court of Shelby County, Tennessee, August 2002
Magistrate, U.S. District Court, April 2003
Governor’s Commission for Judicial Appointments, January 2004

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.

| Boston University, College of Liberal Arts, A.B. Political Science, 1963 |
| Boston University, School of Law, Juris Doctorate, 1965 |

**PERSONAL INFORMATION**

15. State your age and date of birth.

| Age 75, April 19, 1940 |

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

| 49 years |

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

| 49 years |

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.

| Not applicable |

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

| 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.
22. Please state and provide relevant details regarding any formal complaints 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.

A former client (Cheryl Green) filed a complaint against me with the Board of Professional Responsibility in January 2014 when I refused to seek rescission of the Settlement Agreement which she executed and accepted the initial payment. The Board investigated the matter and dismissed the Complaint.

There is now pending before the BPR a complaint by a former client (Margaret Boaz) in 2014. It is based on my refusal to change the fee arrangements which had been in place for some six years and upon my insistence that she make a significant payment on the very large account receivable before it got much larger in view of the trial preparation then being undertaken. This client lost in the district court, but our appeal to the Sixth Circuit was successful and the matter sent back down for trial. Boaz terminated my services and hired other counsel. *(Boaz v. FedEx)*.

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

No

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

No

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

*The Biller Law Firm v. TW Telecom*, Shelby County Chancery Court, Docket No. CH-14-0712, obtained an injunction to prevent the cut off of technical services, e-mail and computers due to dispute over who was responsible for $3,000.00 plus of hacking charges to a foreign country.
There is now pending an action in Chancery Court (*Green v. Biller*, CH-14-1665) by the client identified in response to Number 22. This lawsuit is not one for malpractice.

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.

See Answer to Number 28

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.

   Memphis and Shelby County Bar Association
   Memphis-Shelby County Bar Foundation
   American Bar Association
   American Bar Foundation
   American Immigration Lawyers Association
   Tennessee Bar Association
   Tennessee Bar Foundation

   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.

Appointed as Chairperson, Leigh Buring Clinic, University of Tennessee at Memphis
Appointed as Chairperson, State Technical Institute Paralegal Program
Appointed as Trustee, Tennessee Bar Foundation
Elected as President, Tennessee Bar Foundation

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


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.

Created and taught in the paralegal program at State Tech

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.

Not applicable

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

No

34. Attach to this questionnaire 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.

See Attachment to Question 34
ESSAYS/PERSONAL STATEMENTS

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

I am confident that I can make a significant contribution to the betterment of the judicial system. For example: (1) make better use of already available Rules of Civil Procedure such as Rule 16; (2) be more readily available to the public and fellow attorneys; (3) set motions concerning complicated issues and/or multi-party matters outside the motion calendar; (4) enforce Rule 11, TRCP; and (5) as an alternative to jury call, require counsel to meet and confer prior to the call, and if possible, advise the Court prior to call as to the date selected.

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 make myself available to those in need of legal services without regard to his/her ability to pay fees for legal services. Over the years, complete strangers seeking legal counsel have stopped me on the street, in my office building and the Courthouse. After determination that no conflict existed, I counseled them for as long as necessary to ensure that they left with an action plan. I participated in the first Memphis/Shelby County Bar-sponsored indigent legal services program, traveling to an old building in South Memphis one day each week to provide legal counsel. I have also participated on the pro bono panel of the U.S. District Court, Western Division, Tennessee, consulting with referrals and/or represented referrals.

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

I seek appointment to Part III of Chancery Court, Memphis. There are two other chancellors. My work ethic is noted infra.

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)

With the responsibility of developing a successful law practice to support my family, my free time was devoted to my wife, Margaret, my children and my grandchildren. However, my children no longer reside in the area, thus permitting me to increase my involvement. Also as Judge, my workday would provide a more scheduled atmosphere, thus permitting me the opportunity to perhaps increase my community involvement and activities. However, I plan to network with the private sector to speak and educate the public regarding the purpose of the judicial system, available courts and its procedures.
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)*

<table>
<thead>
<tr>
<th>Talents/attributes:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Punctual</td>
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<tr>
<td>• Always fully prepared</td>
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<tr>
<td>• Maintain control – setting ground rules for proceedings</td>
</tr>
<tr>
<td>• Courteous, fair and with due consideration in all proceedings regardless of race, national origin, disability, age, gender or sexual orientation (justice is blind)</td>
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<tr>
<td>• No tolerance for bias or abuse of judicial process</td>
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<tr>
<td>• Reasonably accommodative to all parties</td>
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<tr>
<td>• Continually seeking to improve judicial process to educate the constituents of the community and maintain the integrity of the judicial process</td>
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</table>

With 45 years’ experience in the practice of law, I am qualified and willing to serve as Judge.

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)*

It was not so much following a law with which I disagreed. It was a matter of both statutory and common law which was calling for a result which did appear equitable under the peculiar circumstances of the case.

The equities would appear to favor my client (defendant) but nevertheless in the eyes of the law, it was in breach of the contract, it had tortuously interfered with corporate contracts and it had diverted corporate opportunities to another company which it had formed. I therefore strove to and did successfully convince the client that it was best to expose his own “warts” if you will, as opposed to allowing the plaintiff to make much of it and besmirch his overall (credibility) posture in the case as there were some mitigating circumstance which it would want the chancellor to take into consideration at the injunction hearing.
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. J. Fraser Humphries, Esq.,
B. Charles Key, Esq., General Counsel for LifeLinc Corp,
C. Lewis Donelson, Esq.,
D. John Crow,
E. Tom Stanfield,

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Chancery 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 questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire 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: May 15, 2015.

Signature

When completed, return this questionnaire to Debbie Hayes, 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.

Stephan H. Biller
Type or Print Name

Signature

May 15, 2015
Date

007764
BPR #

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

State of Mississippi, Bar Number 103399

Application Questionnaire for Judicial Office Page 12 of 12 February 9, 2015
ATTACHMENT TO QUESTION 9
A. **Chism vs. Mid-South Milling Co.**, 762 S.W. 2d 552 (Tenn. 1988)

This case is the precursor to the enactment of the “Whistle Blower” Act, Tenn. Code Ann. §50-1-304.

I was lead counsel in the Circuit Court; wrote the Appellee’s brief to the Supreme Court of Tennessee. However, I did not orally argue the case.

B. **Peete vs. American Standard Graphic**, 885 F.2d. 331 (6th Cir 1989)

This case established in the Sixth Circuit that the Federal Rules “mail grace” is inapplicable to the 90-day limit (suit must be filed in Court on or before the 90th day from date of receipt of the “Right to Sue” letter from the EEOC. I handled the matter in the District Court and wrote the Appellee’s brief and orally argued the case.

C. **Stein vs. Davidson Hotel**, 945 SW 2nd 714 (Tenn. 1997)

This case established that no mandate of public policy was violated when Appellee dismissed a terminable-at-will employee who tested positive in a random drug test. I was on the brief in both courts, but did not orally argue in either court.


In this matter, Shelby County challenged a subpoena issued for all of its employment records relating to county-wide personnel by the EEOC. Shelby County asserted that the EEOC had exceeded its statutory investigatory powers and further that it had acted arbitrary and
capriciously in claiming at prior administrative petition by Shelby County to revoke said subpoena. The District Court, while granting EEOC’s petition, restricted it to records with which the individual claimant had a connection. The Court invited the EEOC to file additional information if it still required broader-based information. The EEOC submitted additional information, but again, the District Court limited the breadth of the request.

Specially, the District Court ruled in part, "...a very few isolated charges of separate individuals as to racial discrimination in respect to hiring or promotion in a few areas of County Government does not reasonably give a basis for the broad, extremely wide-scale demands for records...as to virtually all areas of County Government..." The Sixth Circuit reversed, allowing enforcement of the subpoena with respect to the entire Shelby County Government. Shelby County sought a Writ of Certiorari on the basis that the Sixth Circuit based its ruling upon erroneous assumptions, and that the Court of Appeals permitted the enforcement without any finding either that the District Court committed clear error in limiting the scope or that the information sought was relevant to the individual charge of discrimination as required by Title VII. At that time in 1979, this was a case of first impression. There were no court decisions clearly delineating the parameters of investigation by the EEOC in the absence of a Title VII judicial complaint.

I handled all court appearances, orally argued and wrote all briefs and the Petition to the Supreme Court of the United States.

E. Muller Optical Company vs. the Equal Employment Opportunity Commission, 743 F.2d 380 (6th Cir 1984)

The Plaintiff sought a temporary restraining order or preliminary injunction prohibiting the EEOC from requiring its President to appear at a deposition and/or to produce documents on the basis that the EEOC lacked authority to investigate the age discrimination charges because the Reorganization Act of 1977, which authorized the transfer of enforcement authority to the EEOC from the Department of Labor, because the Act
contained a one-House legislative veto found unconstitutional by the Supreme Court of the United States.

The Court granted motions on behalf of Chrysler Corporation, ANR Pipeline Company and Natural Gas Pipeline Company of America to file amici curiae.

The Supreme Court had ruled *Immigration and Naturalization Service vs. Chad* (1035.Ct 2764) that the exercise of a one-House veto was unconstitutional because it enabled Congress to act in a legislative capacity without complying with the procedural requirements of Article I. The Sixth Circuit held that the transfer of enforcement authority in the case at bar was consistent with the standards set out in the Reorganization Act. Hence, the order of the District Court (574 F.Supp.946) denying client's motion was affirmed.

I drafted and filed all Court documents, orally argued in the District Court, perfected the Appeal and orally argued the Appeal before the 6th Circuit.

F. *Sullivan vs. Baptist Memorial Hospital*, 995 S.W.2d 569 (Tenn. 1999)

This matter involved bringing of a defamation action against the Defendant because the Plaintiff was compelled to reveal to prospective employers the defamatory reason Defendant terminated her. The Circuit Court granted Summary Judgment.

I appealed to the Court of Appeals, which reversed. Defendant petitioned and was granted a Writ of Certiorari by the Tennessee Supreme Court. The Supreme Court reversed the Court of Appeals ruling that Tennessee does not recognize self-publication as constituting publication for defamation purposes, even when compelled in the employment setting.

The thrust of my argument was the urging for the Court, in the employment setting, to adopt the doctrine of self-publication because it was foreseeable by an employer, that its former employee, when applying
for a new position, would have to reveal the reasons, false or otherwise for
the termination of employment by the previous employer. The Court had
previously considered the doctrine in a non-employment setting, (Sylvis
vs. Miller, 96 Tenn.94 (1896), and in an employment setting that was also
prior to 1900, (Kansas City M.& B.R. vs. Delaney, 52 S.W. 151 (1899).
The thrust of the Sullivan case was to distinguish her facts from Delaney
in that Delaney, the self-publication was voluntary. My case of Stein vs
Davidson Hotel, discussed supra paragraph “C” was cited. 995 S.W.2d at
575 (In Tennessee, an employer has no duty to investigate before
terminating an at-will employee).

The Supreme Court found that to impose a duty on the employer to
carry out a thorough investigation would compromise the principles
encompassed by the at-will employment doctrine.

I prepared and filed the original complaint, collaborated on the brief in
opposition to the Motion for Summary Judgement, orally argued before
the Circuit Court, perfected the Appeal, authored the brief to the Court of
Appeals and argued the matter, co-authored the brief to the Supreme
Court, but did not orally argue thus providing my young associate with the
experience.

**Boaz v. FedEx**, Docket No. 10-63855 (6th Cir. 61411)

This is the first federal circuit of court appeals to hold that a contractual
shorter limitation period than that provided for in the Fair Labor
Standards Act is unenforceable.
ATTACHMENT TO QUESTION 34
Sullivan vs. Baptist Memorial Hospital, 995 S.W.2d 569 (Tenn. 1999)

Authored the attached Brief for Plaintiff/Appellant

NBC Capital Markets Group, Inc. vs. First Bank (not for publication)

Authored the attached Final Brief of Appellee
IN THE TENNESSEE COURT OF APPEALS
FOR THE WESTERN SECTION AT JACKSON

KAREN SULLIVAN, )
) )
) Appellant, ) No. 02AO1-9610-CV-00237
v. )
) BAPTIST MEMORIAL HOSPITAL, )
PATRICIA THOMAS, Individually )
and as Assistant Director of )
Nursing at Baptist Memorial )
Hospital East; and SUSAN )
PARSONS, Individually and in )
her Capacity as Respiratory )
Therapy Manager, )
) Appellees.

BRIEF FOR PLAINTIFF/APPELLANT

STEPHEN H. BILLER (#7764)

Attorney for Plaintiff/Appellant

BAKER, DONELSON, BEARMAN & CALDWELL
2000 First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
Telephone: (901) 526-2000
Facsimile: (901) 577-2303

ORAL ARGUMENT REQUESTED
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ISSUES PRESENTED FOR REVIEW</td>
<td>1</td>
</tr>
<tr>
<td>STATEMENT OF THE CASE</td>
<td>2</td>
</tr>
<tr>
<td>STATEMENT OF FACTS</td>
<td>3</td>
</tr>
<tr>
<td>LAW AND ARGUMENT</td>
<td>6</td>
</tr>
<tr>
<td>A. STANDARD OF REVIEW</td>
<td>6</td>
</tr>
<tr>
<td>B. ANALYSIS OF SELF-PUBLICATION/DEFAMATION</td>
<td>7</td>
</tr>
<tr>
<td>1. ELEMENTS OF DEFAMATION</td>
<td>8</td>
</tr>
<tr>
<td>2. ANALYSIS OF PRIOR SELF-PUBLICATION CASES</td>
<td>12</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>15</td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>CASES</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belcher v. Little, 315 N.W.2d 734 (Iowa 1982)</td>
<td>10</td>
</tr>
<tr>
<td>Bretz v. Mayer, 1 Ohio Misc. 59, 203 N.E.2d 665 (Ct. Common Pl.1963)</td>
<td>11</td>
</tr>
<tr>
<td>Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993)</td>
<td>6</td>
</tr>
<tr>
<td>Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988)</td>
<td>10</td>
</tr>
<tr>
<td>First State Bank of Corpus Christi v. Ike Ake, 606 S.W.2d 696 (Tx. Ct. App. 1980)</td>
<td>14</td>
</tr>
<tr>
<td>Lewis v. Equitable Life Assur. Soc., 389 N.W.2d 876 (Minn. 1986)</td>
<td>10, 11</td>
</tr>
<tr>
<td>McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1st Dist. 1980)</td>
<td>10</td>
</tr>
<tr>
<td>Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978)</td>
<td>8</td>
</tr>
<tr>
<td>Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984)</td>
<td>6</td>
</tr>
</tbody>
</table>
Quality Automobile Parts Co., Inc. v. Bluff City Buick Co.,
876 S.W.2d 818 (Tenn. 1994) ................................................................. 8

Raiteri v. RKO General, Inc.,
Shelby Law # 56 (Tenn. App. W.S. 1989) ........................................... 2, 12, 13, 14

Sylvis v. Miller,
96 Tenn. 94, 33 S.W. 921 (Tenn. 1896) .................................................. 2, 12, 13, 14

Wild v. Rarig,
302 Minn. at 442, 234 N.W.2d at 790 ..................................................... 11

MISCELLANEOUS

BMH Response to Plaintiff’s First Set of Interrogatories
and Second Set of Requests for Production of Documents,
Interrogatory No. 3..................................................................................3
ISSUES PRESENTED FOR REVIEW

WHETHER THE PUBLICATION ELEMENT OF DEFAMATION CAN BE ESTABLISHED BY COMPELLED SELF-PUBLICATION IN THE EMPLOYMENT CONTEXT.
STATEMENT OF THE CASE

On August 3, 1993, the Plaintiff/Appellant, Karen Sullivan (herein after "Sullivan") filed suit against Baptist Memorial Hospital (herein after "BMH"). Sullivan's causes of action against BMH included a cause of action for defamation. In her action against BMH, Sullivan asserted that BMH acted negligently and recklessly in its investigation of an allegation that Sullivan stole hospital property; that BMH's official reason for terminating Sullivan, which was that she stole hospital property, was defamatory; and that the publication element of her defamation claim was met because Sullivan was forced to publish BMH's statements on subsequent job applications. Sullivan further asserted that her claim was distinguishable from the Plaintiff's claim in Sylvis, the case upon which Defendant's argument and the trial court's ruling was based, because, unlike Sylvis, where Plaintiff voluntarily published a personal letter, Sullivan was compelled to repeat BMH's defamatory statements to prospective employers as it was a required part of her job application, and because Sullivan's publication was foreseeable by BMH as it requires its prospective employees to provide similar information.

On January 30, 1996, BMH filed a Motion for Summary Judgment. Oral argument was heard on April 19, 1996. By Order entered April 29, 1996, the Court granted BMH's Summary Judgment Motion. Specifically, the court held that Sullivan's claim for self-publication defamation was not actionable in Tennessee based on the holdings of Raiteri v. RKO General, Inc., Shelby Law #56, opinion at 67 (Tenn. App. W.S. 1989) and Sylvis v. Miller, 96 Tenn. 94, 33 S.W. 921, 922 (Tenn. 1896), the case upon which Raiteri was based.

Sullivan timely filed a Notice of Appeal on May 8, 1996. The issue Sullivan raises before this Court is whether the trial court erred in holding that Sullivan's Complaint failed to state a cause of action upon which relief may be granted because the publication element of
defamation cannot be established by proof of compelled self-publication in the employment context.

STATEMENT OF FACTS

On May 14, 1979, Plaintiff began working at BMH as a full-time staff nurse in the neonatal intensive care unit ("NICU"). (Sullivan Depo., p. 17, ll. 4-7.) In 1982 Sullivan began an eight-year tenure as head nurse in neonatal intensive care. In 1990, Sullivan resigned her position as head nurse in neonatal intensive care and resumed her position as full-time neonatal nurse.

While employed in the NICU at BMH, Plaintiff performed temporary nursing services at St. Francis Hospital through a staffing agency known as "CliniCall" (Sullivan Depo., pp. 97-98). Several other BMH and ICU staff nurses also worked at St. Francis through ClinICall. (Sullivan Depo., pp. 45, 47, 56 & 63-64). These nurses and all the ICU nurses at BMH had access to .24 gauge angiocaths, which were often used to start IVs on the infants in the unit. (BMH Response to Plaintiff's First Set of Interrogatories and Second Set of Requests for Production of Documents, Interrogatory No. 3.)

After fourteen (14) years of service without any disciplinary problems, BMH summarily terminated Sullivan on February 22, 1993, allegedly for misappropriating hospital
property. (Sullivan Depo., p. 54, ll. 18-25.) Specifically, Sullivan was charged with and terminated for allegedly taking angiocaths from BMH to St. Francis to use at St. Francis. (Sullivan Depo., p. 54, ll. 18-28.) BMH decided to terminate Sullivan because Susan Parsons, a co-worker, claimed that Sullivan told her that she (Sullivan) was taking angiocaths to St. Francis. (Sullivan Depo. p. 52, ll. 13-19; p. 53, 16-18.) Sullivan denied making the statements and professed her innocence to her supervisors. (Sullivan Depo. p. 54, ll. 24-25.) To substantiate her story, Parsons told BMH management that a Virginia Shearer, a co-worker of Sullivan and Parsons, also heard the conversation in which Parsons claimed that Sullivan said she took angiocaths to St. Francis. (Sullivan Depo. p. 53, ll. 2-4.) BMH management contacted Shearer, only at Sullivan's request. When BMH through Pat Thomas spoke with Shearer, Shearer refuted Parson's statements and stated that she did not remember Sullivan having a conversation with Parsons on that day. (Sullivan Depo. p. 53, ll. 8-15); Shearer Affidavit, ¶ 3.)

Sullivan was first approached by management regarding Parsons' allegation on February 22, 1993, and was terminated on the same day. (Sullivan Depo., pp. 49-51.) At this meeting, which lasted approximately three hours, BMH decided to terminate Sullivan even after Shearer failed to substantiate Parson's story. (Sullivan Depo. p. 54, ll. 20-25.)

BMH ended Sullivan's 14-year career as a neonatal nurse based on Parson's statement. Yet, no employee claimed to have seen or heard Sullivan say she took the angiocaths other than Parsons and Parson's story was partially refuted by Shearer. (Sullivan Depo. p. 132, ll. 14-25; p. 133, ll. 1-7; Thomas Depo. March 16, 1995, p. 43, ll. 12-25; Thomas Depo. April 5, 1994, P. 22, ll. 1-15; p. 25, ll. 17-25; p. 26, ll. 1-9.) Thomas, one of Sullivan's direct supervisors, admitted that: there was no random questioning done among the nurses on Sullivan's shift or nurses on the day or night shift regarding use of BMH's angiocaths at St. Francis. (Thomas Depo., March 16, 1994, p. 47, ll. 19-24; Thomas Depo., April 5, 1994, P.27 ll. 2-18; p.28, ll. 1-3
there was no inventory taken of the angiocaths at BMH to establish whether any angiocaths were taken or how many angiocaths were taken. (Thomas Depo. March 16, 1994, p. 48, ll. 7-12; Thomas Depo. April 5, 1994, p.24 ll. 15-21); no nurses at St. Francis were asked about the use of BMH's equipment at St. Francis. (Thomas Depo. March 16, 1994, pp. 48-49, ll. 24-33; Thomas Depo. April 5, 1994, p. 26, ll. 2-18); and that Parsons never said she saw Sullivan with any angiocaths. (Thomas Depo. March 16, 1994, p. 48, ll. 13-15; Thomas Depo. April 5, 1994, p. 25, ll. 11-16, p. 27, ll. 2-25). Although Thomas was responsible for the investigation, Thomas further admitted that she did not: (1) know the type of angiocaths St. Francis was using at that time. (Thomas Depo. March 16, 1994, p. 49, ll. 4-7; Thomas Depo. April 5, 1994, p.27 ll. 19-22); (2) know the type of angiocaths Sullivan supposedly took from Baptist and did not contact St. Francis to determine whether it used or stocked the same angiocaths used at BMH. (Thomas Depo. March 16, 1994, p. 48, ll. 20-23; Thomas Depo. April 5, 1994, p. 25, ll. 11-16; p. 26, ll. 2-25).

As a result of Sullivan's improper and summary termination from BMH, Sullivan has had difficulty in obtaining employment. (Sullivan Depo. p. 181, ll. 9-13.) Sullivan was refused a position as a neonatal nurse at both Methodist and Jackson Madison County Hospital. (Sullivan Depo., p. 181, ll. 14-18). Every time Sullivan tried to find a position as a neonatal nurse or any other position, she was compelled to tell her prospective employers that BMH terminated her for stealing hospital property. (Sullivan Depo., p. 185, ll. 8-23.) Sullivan stated: "Any potential employer that I filled out an application with I had to write... I was terminated for misappropriating hospital property." Id.
LAW AND ARGUMENT

A. STANDARD OF REVIEW

In considering Rule 12.02 Motion for Summary Judgment, the trial court is required to take the allegations of the Complaint as true, and to construe the allegation liberally in favor of the Plaintiff. Pemberton v. American Distilled Spirits Co., 664 SW.2d 690 (Tenn. 1984); Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993).

Thus, in this appeal, the allegation of the Complaint that BMH failed to adequately investigate the allegations against Sullivan; ignored her repeated pleas of innocence; summarily terminated her; was negligent or reckless in stating the defamatory reasons for her termination when BMH knew that Sullivan would be compelled to repeat the defamatory reasons for termination each and every time she applied for a job, must be taken as true.

B. ANALYSIS OF SELF-PUBLICATION/DEFAMATION

The issue before this Court is whether the publication element of defamation is met when an employee is compelled to publish on a job application her former employer's official reasons for terminating her. Allowing this compelled self-publication in the employment context to satisfy the publication element is equitable because it prevents employers from using this element of defamation as a shield when they negligently and/or recklessly terminate an employee and it protects employees from being unfairly punished twice by giving them recourse against employers when they are forced to defame themselves on subsequent job applications.
In a growing number of cases, courts have held that a cause of action for defamation exists where employers are negligent or reckless when they state defamatory reasons for an employee's termination when they know or should know that such reasons will become part of the employee's permanent job history and which the employee will be compelled to repeat as true to prospective employers. Indeed, it is unlikely that a prospective employer will believe or hire an applicant who states that she was fired from her previous job for theft of company property, real or imaginary. Yet, an employee falsely accused and falsely terminated for theft has no recourse against her former employer; no way to prove her innocence; and, no way to prevent her future employers from learning of the false and defamatory reasons for her termination. It is important for this Court to recognize the extreme and drastic impact a false and defamatory reason for termination has on an individual's life.

1. ELEMENTS OF DEFAMATION

In Tennessee, "the basis of action for defamation is that the defamation has resulted in an injury to the person's character and reputation." Quality Auto Parts Co., Inc. v. Bluff City Buick Co., 876 S.W.2d 818, 820 (Tenn. 1994). Defamation occurs when one:

publishes a false and defamation communication concerning a private person . . . he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.

Cloyd v. Press, Inc., 629 S.W.2d 24, 26 (Tenn. Ct. App. 1981). In determining whether a defendant is liable for defamation, the Tennessee Supreme Court has held that negligence is the standard. Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978). In Nichols, the Supreme Court ruled:
In determining the issue of liability, the conduct of the defendant is to be measured against what a reasonably prudent person would, or would not, have done under the same or similar circumstances . . . . In our opinion, the appropriate question to be determined from a preponderance of the evidence is whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it. Id.

The only element at issue in this appeal is whether the publication element of defamation is met when an employee is compelled to publish her former employer's official reasons for termination her on a job application. "Publication" occurs when the defamatory statement is communicated to a third person. Quality Auto Parts, 876 S.W.2d at 821. When BMH fired Sullivan for theft of hospital property, it made an official statement regarding Sullivan's personal character and professional conduct that it knew Sullivan would have to repeat. Indeed, BMH requests that its own job applicants relay to them what actions their former employers took against them. It is not fair to deny Sullivan's claim by saying that she, not BMH, is responsible for the publication as BMH made the statements knowing that other employers, like itself, would require Sullivan to repeat it. For the limited purpose, conveying the reasons for her termination, Sullivan was compelled to act as an agent for BMH in stating its reason for terminating her.

Because it was foreseeable to BMH that Sullivan would be forced to repeat the defamatory reasons for her termination to prospective employers, BMH should be held liable for defamation, just as it would be if it had made the statement directly to Sullivan's prospective employers.

BMH should be held liable for its defamatory statements regarding Sullivan's termination as it was negligent and reckless in failing to ascertain the truth of Parsons' allegation that Sullivan said she took the angiocaths before it published the defamatory reasons for Sullivan's
termination. BMH chose to believe Parsons over Sullivan and terminated Sullivan even when Parsons’ story that Shearer heard the conversation was refuted by Shearer. (Sullivan Depo., p. 52, ll. 13-19; p. 53, ll. 16-18.) Shearer stated that she had no memory of the conversation and did not even remember Parsons working closely with them on the day the conversation allegedly took place. (Sullivan Depo., p. 53, ll. 8-15; Shearer Aff’d, ¶ 2.) BMH did not investigate whether St. Francis had angiocaths at that time or whether angiocaths were missing from BMH at the time. BMH did not randomly question nurses at BMH or St. Francis or contact the Unit Managers at St. Francis regarding the angiocaths.

While an employer has the right to fire an employee-at-will for any reason or no reason at all, unless otherwise prohibited by statute or case law, an employer does not have the right to severely hamper or prevent the employee’s prospect of future employment by terminating an employee for alleged criminal conduct (defamatory reasons) without proper investigation. Under the circumstances presented in this case, and as a result of the trial court’s ruling, Sullivan has absolutely no opportunity to erase this aspersion cast on her name and reputation.

An employer who permanently labels one of its employees a thief and in effect forces that employee to repeat to all prospective employers that she was fired for theft of company property, has a duty to investigate whether the employee actually stole the company property before so stating. Other courts agree and have recognized a cause of action for self-publication defamation in the employment context. See McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 797-798, 168 Cal. Rptr. 89 (1st Dist. 1980); Churchev. v. Adolph Coors Co., 759 P.2d 1336, 1343-1345 (Colo. 1988); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306, 307-08 (1946); Belcher v. Little, 315 N.W.2d 734, 737-38 (Iowa 1982) Grist v. Upjohn Company, 16 Mich.App. 452, 168 N.W.2d 389, 405-06 (1969); Lewis v. Equitable Life Assurance Soc., 389 N.W.2d 876, 886-88 (Minn. 1986); Cormier v. B.P. Oil, Inc., Civ. No. 86-0224-BS, 14 (D. Me.)
Recognition of a cause of action for compelled self-publication neither discourages mitigation of damages nor shrinks the employment-at-will doctrine. In recognizing a cause of action for compelled self-publication, the court, in *Lewis v. The Equitable Life Assurance Society of the United States*, 389 N.W. 2d 876 (1986), rejected the defendant's similar arguments against recognition of the doctrine of self-publication and stated:

The company presents two arguments against recognition of the doctrine of compelled self-publication. It argues that such recognition amounts to creating tort liability for wrongful discharge which, it asserts, has been rejected by this court. In *Wild v. Rarig*, 302 Minn. at 442, 234 N.W.2d at 790, we held that bad-faith termination of a contract is not an independent tort of the kind that will permit a tort recovery. The company, however, misreads our holding regarding tort liability for wrongful discharge. We did not hold that the harm resulting from a bad-faith termination of a contract could never give rise to a tort recovery. Indeed, we recognized such a possibility by stating that a plaintiff is limited to contract damages 'except in exceptional cases where the defendant's breach of contract constitutes or is accompanied by an independent tort.' Id. at 440, 234 N.W. 2d at 798. If plaintiff here can establish a cause of action for defamation, the fact that the defamation occurred in the context of employment discharge should not defeat recovery.

The company also argues that recognition of the doctrine of self-publication would discourage plaintiffs from mitigating damages. This concern does not appear to be a problem, however, if liability for self-publication of defamatory statements is imposed only where the plaintiff was in some significant way compelled to repeat the defamatory statement and such compulsion was, or should have been, foreseeable to the defendant. Also, the duty to mitigate can be further protected by requiring plaintiffs when they encounter a situation in which they are compelled to repeat a defamatory statement to take all reasonable steps to attempt to explain the true nature of the situation and to contradict the defamatory statement. In such circumstances, there would be no voluntary act on the part of a plaintiff that would constitute a failure to mitigate. This point is clearly illustrated by the present action. The company points to no reasonable course of conduct that plaintiffs could have taken to mitigate their damages.
The trend of modern authority persuades us that Minnesota law should recognize the doctrine of compelled self-publication.

Id. at 887.

2. **ANALYSIS OF PRIOR SELF-PUBLICATION CASES**

While considering Sullivan's assertion that compelled self-publication in the employment context satisfies the publication element of defamation, this Court must consider the precedential element of two prior Tennessee cases. *Sylvis v. Miller*, 33 S.W. 921 (Tenn. 1896) and *Ratieri v. RKO General*, Shelby Law #56 (Tenn. App. W.S. 1989). The first dealt with the issue of whether voluntary publication a personal letter satisfies the publication element of defamation and the second where the court applied the *Sylvis* to the employment context under markedly differing facts. Sullivan asserts that the trial court erroneously relied on *Sylvis* which is factually different and *Ratieri* which inartfully applied *Sylvis* to it.

In the case at bar, the trial court held that there could be no cause of action for self-publication defamation in Tennessee based on a dicta statement in the case of *Raiteri v. RKO General*. The *Raiteri* court did not fully address the issue of whether compelled self-publication defamation was actionable in Tennessee but rather inaccurately relied upon the 100 year-old case of *Sylvis v. Miller*, 96 Tenn. 94, 33 S.W. 921, 922 (Tenn. 1896). There was no compelled publication in *Sylvis*. *Sylvis* had nothing to do with employment. In *Sylvis*, the Plaintiff voluntarily showed a letter containing defamatory statements to several friends and then sued the author for self-publication defamation. As the *Sylvis* Plaintiff voluntarily published the defamatory statements to his own friends when there was no reason to do so, the court denied his claim for self-publication. Sullivan, unlike the plaintiff in *Sylvis*, was compelled to publish BMH’s statements to prospective employees in order to get a job.
In addition to the trial court's misplaced reliance on *Sylvia*, the *Raiteri* case is factually distinguishable from this case and should not be applied to bar Sullivan's cause of action in this case. In *Raiteri*, the Plaintiff, a journalist, asserted that he was forced to tell future employers on employment applications that he had been fired for preparing a "biased and unbalanced report." The *Raiteri* court never fully addressed the self-publication aspect of Plaintiff's claim because it held that Defendant's statements were not defamatory. The court held that there could be no recovery for defamation where the employer expressed an opinion which did not assert by implication the existence of any underlying defamatory facts and stated:

Therefore, the statement that Raiteri report was 'biased and unbalanced' is not a defamatory factual statement, but it is rather an opinion or characterization based upon the disclosed non-defamatory fact of Raiteri's report itself and is not actionable... Furthermore, since we have found the statement "biased and unbalanced report" to be an opinion, Raiteri cannot maintain an action for republication of a constitutionally protected opinion.

Id. at 6 and 7.

The *Raiteri* case is distinguishable from the case at bar in that BMH's statement regarding Sullivan's termination was allegedly based in fact, and not opinion. Thus, the trial court denied Sullivan's claim based on the dictum in the *Raiteri* case which was based on a case involving voluntary, rather than compelled, self-publication. The *Raiteri* court held:

Although Raiteri cites two cases in other jurisdictions which hold employers liable for republication by the plaintiff under certain circumstances, Raiteri fails to cite any cases in Tennessee on point. In *Sylvia v. Miller*, 33 S.W. 921 (1896), the Tennessee Supreme Court found there was no publication when the Plaintiff received a letter from the Defendant and exhibited this letter to relatives and friends. Therefore, Plaintiff cannot base this cause of action upon his own republication. Id. at 6 and 7. However, assuming arguendo that it is not opinion and it is defamatory, Plaintiff's action would fail for want of publication.
In this case, the trial court failed to make the critical distinction between voluntary and compelled self-publication as did the Raiteri court in applying Sylvis.

As the court held in the case of First State Bank of Corpus Christi v. Ike Ake, 606 S.W.2d 696 (Tx. Ct. App. 1980), the distinction between compelled and voluntary publication is the basis of this exception to the publication element of defamation. In Corpus Christi, the court ruled that voluntary self-publication is not actionable, but compelled self-publication is. The court ruled:

One who communicates a defamatory matter directly to the defamed person, who himself communicates it to a third party, has not published the matter to the third person if there are no other circumstances. If the circumstances indicated that communication to a third party is likely, however, a publication may properly be held to have occurred. Restatement (Second) of Torts § 577, comment m (1977). Likewise, if a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third party, the conduct becomes a negligent communication, which amounts to a publication just as effectively as an intentional communication. Restatement (Second) of Torts § 577, Comment K (1977).

Id. at 701.
CONCLUSION

When an employer fires an employee, the former employee is under strong economic pressure to find another job. In applying for other jobs, it is foreseeable to the employer that the employee will be compelled to state the reasons for termination. In recognizing a cause of action for compelled self-publication defamation, this court would not be jeopardizing or shrinking the employment-at-will doctrine in this state. Recognition of this cause of action is a logical corollary to the cause of action employees already have against employers who defame them to third persons. Recognition of this cause of action will not prevent or limit an employer's ability to fire its employees, it only prevents an employer from firing an employee for defamatory reasons without some good faith investigation as to the truth of the defamatory statements about the employee.

In Tennessee, a person can be held liable for his defamatory statements to another if he tells another something he knows is false, acts recklessly or acts negligently in failing to ascertain the truth of the matter spoken. Therefore, it logically follows that Tennessee courts should also recognize a cause of action for self-publication defamation in the employment context when an employer knows that the employee will be compelled to repeat to prospective employers the defamatory reason for her termination.

When BMH fired Sullivan, it did no investigation, and yet BMH fired Sullivan for theft. Allowing compelled self-publication in the employment context to satisfy the publication element of defamation is equitable because it prevents employers from using this element of defamation as a shield when they negligently and/or recklessly terminate an employee and it protects employees from being unfairly punished twice by giving them recourse against employers when they are forced to defame themselves on subsequent job applications.
Accordingly, Sullivan is respectfully requesting this Court to recognize a very narrowly defined exception to the employment-at-will doctrine based upon self-publication defamation in the employment context, and remand to the trial court for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading has been served upon all counsel of record on this the _____ day of November, 1996.

___________________________________________
STEPHEN H. BILLER
Case No. 00-5276

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NBC CAPITAL MARKETS GROUP, INC.
     Plaintiff-Appellant,

v.

FIRST BANK,
     Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Tennessee
Western Division

FINAL BRIEF OF APPELLEE

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FIRST BANK IS NOT REQUESTING ORAL ARGUMENT
NBC CAPITAL MARKETS GROUP, INC.
*Plaintiff-Appellant,*

v. Case No. 00-5276

FIRST BANK,
*Defendant-Appellee.*

**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, First Bank, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   **ANSWER: YES.** First Banks, Inc. is the parent company of First Bank, and owns one hundred percent (100%) of First Bank’s outstanding stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   **ANSWER: NO.**

[Signature]

Stephen H. Biller  
Counsel for First Bank

[Date]  
July 25, 2000

6CA-1  
12/98
TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST ....................................... i

TABLE OF CONTENTS ........................................ ii

TABLE OF AUTHORITIES ...................................... iv

STATEMENT REGARDING ORAL ARGUMENT ...................... vii

STATEMENT OF THE ISSUE .................................... 1

STATEMENT OF FACTS .......................................... 1

SUMMARY OF ARGUMENT ....................................... 10

ARGUMENT AND AUTHORITIES .................................. 12

I. STANDARD OF REVIEW ................................. 12

II. THE DISTRICT COURT WAS CORRECT IN ITS FINDING THAT THERE WERE NO GENUINE ISSUES AS TO ANY MATERIAL FACTS, AND THAT FIRST BANK WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ............. 14

A. The district court properly determined as a matter of law that First Bank did not agree to sell any portion of the Portfolio at any particular price ....... 19

B. The district court properly determined as a matter of law that Guaranty’s conditional Bid did not constitute an offer to contract with First Bank .......... 22
C. The district court properly concluded as a matter of law that, according to the parties' clear and unambiguous agreement, First Bank could determine not to sell any part of the Portfolio without breaching the Letter of Understanding or the Amendment, and without owing NBC a fee ......................... 25

D. The district court properly concluded as a matter of law that First Bank did not breach its duty to use its best efforts under the Letter of Understanding ......................... 31

CONCLUSION ................................................................. 41

CERTIFICATE OF COMPLIANCE ................................. 44

CERTIFICATE OF SERVICE .......................................... 44

APPELLEE'S DESIGNATION OF ADDITIONAL JOINT APPENDIX CONTENTS .......... 45
# TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>Cases</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Anderson v. Liberty Lobby, Inc.</em>,</td>
<td>13, 14</td>
</tr>
<tr>
<td>477 U.S. 242 (1986)</td>
<td></td>
</tr>
<tr>
<td>732 S.W.2d 601 (Tenn. Ct. App. 1986)</td>
<td></td>
</tr>
<tr>
<td><em>Beraha v. Baxter Health Care Corp.</em>,</td>
<td>33</td>
</tr>
<tr>
<td>956 F.2d 1436 (7th Cir. 1992)</td>
<td></td>
</tr>
<tr>
<td><em>Celotex Corp. v. Catrett</em>,</td>
<td>13</td>
</tr>
<tr>
<td><em>Cloverdale Equip. Co. v. Simon Aerials, Inc.</em>,</td>
<td>13</td>
</tr>
<tr>
<td>869 F.2d 934 (6th Cir. 1989)</td>
<td></td>
</tr>
<tr>
<td><em>ConAgra, Inc. v. Cargill, Inc.</em>,</td>
<td>39</td>
</tr>
<tr>
<td>382 N.W.2d 576 (Neb. 1986)</td>
<td></td>
</tr>
<tr>
<td><em>Cook v. Little Ceasar Enter., Inc.</em>,</td>
<td>12</td>
</tr>
<tr>
<td>210 F.3d 653 (6th Cir. 2000)</td>
<td></td>
</tr>
<tr>
<td><em>Davidson &amp; Jones Dev. Co. v. Elmore Dev. Co., Inc.</em>,</td>
<td>11, 13, 14, 15, 19, 37, 38</td>
</tr>
<tr>
<td>921 F.2d 1343 (6th Cir. 1991)</td>
<td></td>
</tr>
<tr>
<td><em>Educational Placement Serv., Inc. v. Watts</em>,</td>
<td>10, 38</td>
</tr>
<tr>
<td>789 S.W.2d 902 (Tenn. Ct. App. 1989)</td>
<td></td>
</tr>
<tr>
<td><em>EnGenius Entertainment, Inc. v. W.W. Herenton</em>,</td>
<td>35</td>
</tr>
<tr>
<td>971 S.W.2d 12 (Tenn. Ct. App. 1997)</td>
<td></td>
</tr>
<tr>
<td><em>GLS Dev., Inc. v. Wal-Mart Stores, Inc.</em>,</td>
<td>33</td>
</tr>
</tbody>
</table>
Goodman v. Motor Products Corp.,
132 N.E.2d 356 (Ill. App. 1956) ........................... 33

Great W. Producers Coop. v. Great W. United Corp.,
613 P.2d 873 (Colo. 1980) ................................. 39

Hill v. A.O. Smith Corp.,
801 F.2d 217 (6th Cir. 1986) .............................. 12, 14, 15, 19, 22

In re Cambridge Biotech Corp.,
186 F.3d 1356 (D.C. Cir. 1999) ............................ 39

Interroyal Corp. v. Sponseller,
889 F.2d 108 (6th Cir. 1989) ............................... 13

Kraftco Corp. v. Kolbus,
274 N.E.2d 153 (Ill. App. 1971) ............................ 33

Laboratory Corp. of Am., Inc. v. Upstate Testing Lab., Inc.,
967 F. Supp. 295 (N.D. Ill. May 20, 1997) .................. 33

475 U.S. 574 (1986) ........................................ 13

Mocca Lounge, Inc. v. Misak,
462 N.Y.S.2d 704 (N.Y.A.D.2 Dept. May 23, 1983) ........ 33

Permanence Corp. v. Kennametal, Inc.,
908 F.2d 98 (6th Cir. 1990) ................................ 36

Pinnacle Books, Inc. v. Harlequin Enter. Ltd.,

Realty Shop, Inc. v. RR Westminster Holding, Inc.,
7 S.W.3d 581 (Tenn. Ct. App. 1999) ......................... 10, 14
R-G Denver, Ltd. v. First City Holdings of Colo., Inc.
789 F.2d 1469 (10th Cir. 1986) ..................................... 39

Street v. J.C. Bradford & Co.,
886 F.2d 1472 (6th Cir. 1989) ..................................... 14

Terry Barr Sales Agency, Inc. v. All-Lock Co.,
96 F.3d 174 (6th Cir. 1996) ..................................... 14

Union Oil Co. of Cal. v. Service Oil Co., Inc.,
766 F.2d 224 (6th Cir. 1985) ................................. 12, 14, 15, 19, 22

Wood v. Lucy, Lady Duff-Gordon,
118 N.E. 214 (N.Y. 1917) ..................................... 36

Rules and Statutes


Fed. R. Civ. P. 56(c) ............................................. 12

Secondary Sources

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(Rev. ed. 1993) ............................................. 35

Restatement (Second) of Contracts, § 24 (1981) ........................................ 24

Restatement (Second) of Contracts, § 26 (1981) ........................................ 22, 23

Restatement (Second) of Contracts, § 26 cmt. e (1981) ........................................ 23
STATEMENT REGARDING ORAL ARGUMENT

First Bank is not requesting oral argument because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Fed. R. App. P 34(a)(2)(C).
STATEMENT OF THE ISSUE

Whether the district court was correct in its finding that there were no genuine issues as to any material facts, and properly granted First Bank judgment as a matter of law.

STATEMENT OF FACTS

In this appeal, Appellant, NBC Capital Markets Group, Inc. ("NBC") is challenging the validity of the district court's February 2, 2000 Order Denying Plaintiff's Motion for Summary Judgment And Granting Defendant's Cross Motion For Summary Judgment, and the district court's Order of Judgment entered pursuant thereto on February 11, 2000. In the district court, NBC sought an award of $428,796 that it claimed it should have been provided as a fee for marketing services it rendered to First Bank pursuant to a written contractual agreement, as amended.

In or about April 1997, a representative of NBC contacted First Bank's Vice President, Alan Meyer ("Meyer"), and inquired into whether or not First Bank would be interested in selling any of its approximately one hundred seventy million dollar ($170 million) consumer receivable automobile and boat loan portfolio (hereinafter "the Portfolio"). (RE 51 Deposition of Alan Meyer pp. 4-5,14,19-20 (hereinafter "Meyer Dep."); JA at 0573-74, 0583, 0586-87). Shortly thereafter,
NBC's First Vice President Ed Land ("Land") proposed to Meyer that First Bank allow NBC to evaluate and market the Portfolio for the purpose of potentially selling some or all of the Portfolio. (RE 52 Deposition of Edward Land pp. 28-30 (hereinafter "Land Dep."); JA at 0528). On or about April 25, 1997, in order to establish a framework for any pending transaction or transactions, NBC and First Bank entered into an initial Letter of Understanding, in which NBC agreed to “assist[] First Bank in the analysis, evaluation and/or sale of the referenced portfolio . . . to one or more potential investors . . . .” (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exh. 2 p. 1; JA at 0424).

In consideration of NBC’s assistance to First Bank, First Bank granted to NBC the exclusive right to market the Portfolio for a period of one hundred twenty (120) days from the date the parties executed the Letter of Understanding (the “Exclusivity Period”). (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exh. 2 p. 2; JA at 0425). In further consideration of NBC’s assistance, First Bank agreed that it would not

either directly or indirectly, circumvent or attempt to circumvent [NBC] in connection with the purchase and/or sale of [the] Portfolio, with respect to [one or more potential investors] or any agent or assignee of [one or more potential investors], any future transactions involving loans or loan-related products for a period of two years from the date [the parties executed the Letter of Understanding].
The Letter of Understanding further provided that “NBC and/or [one or more potential investors] may provide certain analytical, pricing, market or other information concerning the Portfolio, in connection with [First Bank’s] determination of whether to accept NBC’s or [one or more potential investor’s] offer to purchase the Portfolio. . . .” (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exh. 2 pp. 2-3; JA at 0425-26). In consideration for any such materials being provided to First Bank, First Bank agreed (1) to use the materials solely for the purpose of determining whether to accept an offer to purchase the Portfolio, and for no other purpose; (2) to keep such materials completely and strictly confidential, and to limit their internal disclosure to First Bank’s officers and employees who needed the materials for purposes of evaluating an offer; and (3) to promptly redeliver all such materials to NBC without retaining any copies thereof, and to destroy (except as otherwise required by law) all notes and other writings prepared by any potential investors or NBC, in the event that First Bank chose not to sell the Portfolio. (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exh. 2 p. 3; JA at 0426).
Both NBC and First Bank agreed “to use their best efforts to accomplish the transactions contemplated by [the Letter of Understanding], including gathering information reasonably requested by the other party to [the Letter of Understanding] or by [one or more potential investors].” (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exh. 2 p. 2; JA at 0425). The parties hoped to accomplish a sale of the Portfolio on or before June 30, 1997. (Id.) Any such sale was to be evidenced by one or more purchase and sale agreements, and other documents containing standard representations and warranties (individually or collectively referred to as “Sale Documents”). (Id.)

From the period of approximately April 25, 1997 to approximately July 24, 1997, NBC marketed the Portfolio and solicited bids from a number of potential investors pursuant to an Exclusive Portfolio Offering prepared and distributed by NBC. (RE 48 Affidavit of Edward M. Land p. 3, Attach. A (hereinafter “Land Aff.”); JA at 0141, 0152-0253). The Exclusive Portfolio Offering prepared and distributed by NBC clearly stated in bold print that “Seller reserves the right to reject any or all bids” (boldface type in original). (RE 48 Land Aff. Attach. A p. 7; JA at 0158).
In order that NBC might begin to discuss various bids it had received with First Bank, the parties agreed on July 30, 1997 to amend the Letter of Understanding by a letter dated July 26, 1997 (the “Amendment”). (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exh. 3; JA at 0429). In the Amendment, First Bank agreed to extend the Exclusivity Period “until the later of the [sale of the Portfolio] or October 31, 1997.” (Id.) First Bank also agreed in the Amendment to the fee that it would pay to NBC if any portion of the Portfolio was actually sold to one or more potential investors pursuant to Sale Documents (the “Fee”). (Id.) The Amendment provided that the Fee would be deemed “earned” by NBC and would be payable by First Bank “upon the closing of the sale” to one or more potential investors. (Id.) The Amendment stressed: “Please note that the Fee is payable only in the event that at least one bid is acceptable AND the transaction actually closes” (underlining and capitalization in original). (Id.)

Neither the Letter of Understanding nor the Amendment contains any provision whatsoever concerning a price that would be acceptable to First Bank in order for First Bank to agree to a sale of any portion of the Portfolio. (See RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exhs.
Accordingly, the Exclusive Portfolio Offering prepared and distributed by NBC to potential investors stated that "it is Seller's desire to complete the optimal price/volume transaction to achieve certain targeted liquidity and profit objectives." (RE 48 Land Aff. Attach. A p. 7; JA at 0158).

On or about July 25, 1997, Land sent a fax to First Bank's Executive Vice President Mark Turkcan ("Turkcan"), stating to Turkcan: "I can comfortably say that we have aggressively marketed the portfolio, nationally, and obtained what I believe to be the best possible bid." (RE 48 Land Aff. p. 5, Attach. C; JA at 0143, 0260). On or about July 30, 1997, NBC submitted various bids to First Bank for its consideration, which First Bank reviewed and considered. (RE 50 Deposition of Mark Turkcan pp. 64-65 (hereinafter "Turkcan Dep."); JA at 0654-55). One such bid, which appeared to contain the bid for the highest price and largest portion of the Portfolio was contained in an unsigned Bid Offering dated July 26, 1997, submitted by Guaranty Federal Bank ("Guaranty") pursuant to the Exclusive Portfolio Offering (hereinafter "the Bid"). (RE 50 Turkcan Dep. pp. 64-65; JA at 0654-55; RE 48 Land Aff. Attach. D; JA at 0261).

The Bid contained numerous exceptions, exclusions, and contingencies, as well as quantity and price terms that were adjustable and could fluctuate, subject to
Guaranty’s discretion. (RE 48 Land Aff. Attach. D; JA at 0261). The Bid specifically stated that it was “Subject to approval by Guaranty at its sole discretion,” and was “Subject to [an] acceptable Purchase and Sale Agreement.” (Id.) The Bid also stated that pursuant to any such purchase and sale agreement, First Bank would be required to indemnify Guaranty against any future claims regarding, among other things, “dealer reserves and rebates.” (Id.)

On July 30, 1997, Turkcan discussed with Land the possibility of obtaining an adjustment to the buyup and buydown provisions of the Bid. (RE 50 Turkcan Dep. p. 35; JA at 0625). Based on those discussions, Turkcan signed and accepted the Bid on July 30, 1997 for further consideration and possible negotiation by First Bank. (RE 50 Turkcan Dep. p. 35; JA at 0625; RE 48 Land Aff. Attach. D; JA at 0261). On July 31, 1997, Meyer sent a letter to Guaranty c/o Ed Land, providing authorization for Guaranty to obtain credit bureau scoring information on the Portfolio relative to the Bid. (RE 48 Land Aff. Attach. F; JA at 0263). Also on July 31, 1997, Meyer contacted First Bank’s Ed Kasten (“Kasten”) who oversaw First Bank’s Loan Servicing Department to arrange for Guaranty to be allowed to conduct due diligence on the Portfolio, and to discuss the details of the Bid. (RE 51 Meyer Dep. pp. 6-8, 17; JA at 0575-77, 0584; RE 50 Turkcan Dep. p. 39; JA
at 0629). Kasten informed Meyer that approximately two and one-half million dollars ($2.5 million) in dealer reserves would have to be written off on any sale of the Portfolio based on the Bid. (RE 51 Meyer Dep. pp. 6-8, 17; JA at 0575-77, 0584; RE 50 Turkcan Dep. pp. 37-45; JA at 0627-35). Meyer (who was then in St. Louis, Missouri) immediately contacted Turkcan (who was in Sacramento, California at the time) to continue to discuss and analyze the details of the Bid via teleconference. (RE 51 Meyer Dep. pp. 8-10; JA at 0577-79; RE 50 Turkcan Dep. pp. 36-39; JA at 0626-29). During the teleconference, Meyer and Turkcan determined, after having accounted for the dealer reserves write-off, that any sale of the Portfolio based on the terms of the Bid would result in a loss to First Bank in the amount of approximately five hundred fifty thousand dollars ($550,000.00). (Id.) The Bid was therefore unacceptable. (Id.) Meyer immediately telephoned Land on July 31, 1997 to discuss the problems with the Bid, and instructed Land (and Land agreed) to promptly communicate to Guaranty, that after having considered the Bid, First Bank had made a determination that the Bid was in fact unacceptable. (RE 51 Meyer Dep. pp. 21-22; JA at 0588-89).

Land admitted in his deposition that there was no question that First Bank would have been required to write off the dealer reserves pursuant to the Bid. (R.52
(admitting that any dealer rebates would not have compensated First Bank for having to write off dealer reserves, and that “there’s no question [First Bank] would have had to do that”). After Meyer communicated First Bank’s rejection of the Bid to NBC, NBC submitted no other bids for First Bank’s consideration, and did nothing further to market the Portfolio. (RE 52 Land Dep. pp. 56, 62-63; JA at 0531-32).

Instead, on November 12, 1997, NBC filed this civil action against First Bank, claiming that the conditional Bid amounted to a binding contract between First Bank and Guaranty, and that First Bank somehow breached the conditional Bid by (1) not using its best efforts (pursuant to NBC’s and First Bank’s Letter of Understanding) to close on the conditional Bid, and (2) by not agreeing to negotiate or enter into an acceptable purchase and sale agreement with Guaranty to sell some or all of the Portfolio to Guaranty upon mutually-agreeable terms and conditions. (RE 1 Complaint; JA at 0011-15). NBC further alleged that First Bank’s actions entitle NBC to an award of fees under the Letter of Understanding and the Amendment. (Id.)
SUMMARY OF ARGUMENT

The district court in the case at bar properly granted judgment as a matter of law to First Bank when NBC failed to raise a genuine issue of a material fact for trial. The Letter of Understanding and Amendment thereto were clear and unambiguous, and the district court properly interpreted the meaning of the terms and conditions contained therein, as well as the parties’ obligations thereunder, as a matter of law. See, e.g., Realty Shop, Inc. v. RR Westminster Holding, Inc., 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999) (holding that "Interpretation of a written contract is a matter of law, rather than a matter of fact"); APAC-Tennessee v. J.M. Humphries Constr. Co., 732 S.W.2d 601, 604 (Tenn. Ct. App. 1986) (same); Educational Placement Serv., Inc. v. Watts, 789 S.W.2d 902, 904-05 (Tenn. Ct. App. 1989) (affirming summary judgment in favor of the defendant holding as a matter of law the defendant did not breach its best efforts obligation by failing to obtain adequate financing, which was a condition precedent to a purchase agreement between the plaintiff and the defendant). The plain language of the conditional bid submitted by Guaranty indicates that it did not constitute a binding contract or agreement between First Bank and Guaranty. The district court properly applied the undisputed facts as to the actions taken by First Bank to fulfill its best efforts
obligation under the Letter of Understanding and Amendment thereto, and properly held as a matter of law that First Bank fulfilled its best efforts obligation thereunder.

While NBC painstakingly attempted to raise a factual issue for trial by submitting Land’s and Abby Tidmore’s ("Tidmore") August 2, 1999 affidavits (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment; JA at 0275-0489; RE 48 Land Aff.; JA at 0139-0263; RE 49 Affidavit of Abbie Y. Tidmore (herinafter "Tidmore Aff."); JA at 0264-74), the district court properly rejected the assertions contained therein, both of which directly contradicted Land’s October 7, 1998 deposition testimony (RE 52 Land Dep.; JA at 0525-34). Land’s and Tidmore’s contradictory affidavits were filed after the district court had denied NBC’s December 4, 1998 Motion for Summary Judgment (in which NBC admitted that there were no genuine issues of any material facts in the case at bar), and while the district court was considering First Bank’s Cross-Motion for Summary Judgment. "It is ‘accepted precedence’ that after a motion for summary judgment has been filed, thereby testing the resisting party’s evidence, a factual issue may not be created by filing an affidavit contradicting earlier deposition testimony." Davidson & Jones Dev. Co. v. Elmore Dev. Co., Inc., 921 F.2d 1343, 1352 (6th Cir. 1991). Moreover, Land’s and Tidmore’s affidavits consisted almost entirely
of parol evidence, and a party opposing summary judgment may not attempt to raise a genuine issue of a material fact for trial by presenting parol evidence to contradict the clear and unambiguous terms and conditions of a written agreement. *Union Oil Co. of Cal. v. Service Oil Co., Inc.*, 766 F.2d 224, 227 (6th Cir. 1985); *Hill v. A.O. Smith Corp.*, 801 F.2d 217, 221 (6th Cir. 1986).

After NBC failed to raise a genuine issue of a material fact for trial, the district court properly granted First Bank’s Cross-Motion for Summary Judgment. This Honorable Court should affirm the district court’s judgment in all respects.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

This Court reviews a district court’s grant of summary judgment *de novo*. *Cook v. Little Ceasar Enter., Inc.*, 210 F.3d 653, 655 (6th Cir. 2000) (stating that "In contract actions, summary judgment may be appropriate when the documents and evidence underlying the contract are undisputed and there is no question as to intent"). Summary judgment is appropriate when "the pleadings, depositions, answers, or interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
When confronted with a properly supported motion for summary judgment, the non-moving party may not oppose the motion by mere reliance on the pleadings, but must set forth specific facts which indicate there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The non-moving party must further show that these specific facts are such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In order to establish that a genuine issue of a material fact exists, the party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the non-moving party must present the Court with "concrete evidence supporting its claims." *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989). In short, it is the duty of the party opposing summary judgment to point out specific evidence in the record that would be sufficient to justify a jury verdict in its favor, and it is not the duty of the Court to search for such evidence. *See Interroyal Corp. v. Sponseller*, 889 F.2d 108, 110-11 (6th Cir. 1989). The "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which [a] jury could reasonably find for the plaintiff." *Davidson &
While the evidence presented by the non-moving party should generally be taken as true, *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996), a party opposing summary judgment may not attempt to raise a genuine issue of a material fact for trial by presenting parol evidence to contradict the clear and unambiguous terms and conditions of a written agreement. *Union Oil Co. of Cal. v. Service Oil Co., Inc.*, 766 F.2d 224, 227 (6th Cir. 1985); *Hill v. A.O. Smith Corp.*, 801 F.2d 217, 221 (6th Cir. 1986). Moreover, "it is 'accepted precedence’ that after a motion for summary judgment has been filed, thereby testing the resisting party’s evidence, a factual issue may not be created by filing an affidavit contradicting earlier deposition testimony." *Davidson*, 921 F.2d at 1352.

II. THE DISTRICT COURT WAS CORRECT IN ITS FINDING THAT THERE WERE NO GENUINE ISSUES AS TO ANY MATERIAL FACTS, AND THAT FIRST BANK WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Under Tennessee law, "the interpretation of a written agreement is a matter of law and not of fact." *See, e.g., Realty Shop, Inc. v. RR Westminster Holding*, Inc., 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999) (holding that "Interpretation of a
written contract is a matter of law, rather than a matter of fact"; *APAC-Tennessee v. J.M. Humphries Constr. Co.*, 732 S.W.2d 601, 604 (Tenn. Ct. App. 1986) (same). When a written instrument is unambiguous on its face, parol evidence may not be introduced to contradict that written instrument. *Union Oil Co. of Cal. v. Service Oil Co., Inc.*, 766 F.2d 224, 227 (6th Cir. 1985); *Hill v. A.O. Smith Corp.*, 801 F.2d 217, 221 (6th Cir. 1986). After a motion for summary judgment has been filed, thereby testing the non-moving party’s evidence, neither party may attempt to create a factual issue by filing an affidavit that contradicts prior deposition testimony. *Davidson & Jones Dev. Co. v. Elmore Dev. Co., Inc.*, 921 F.2d 1343, 1352 (6th Cir. 1991).

In the case at bar, after NBC’s December 4, 1998 Motion for Summary Judgment was denied by the district court, NBC tried hard to raise a factual issue for trial by submitting (in opposition to First Bank’s January 5, 1999 Cross-Motion for Summary Judgment) the affidavits of Land and Tidmore (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment; JA at 0275-0489; RE 48 Land Aff.; JA at 0139-0263; RE 49 Tidmore Aff.; JA at 0264-74), which affidavits contradicted Land’s prior deposition testimony (RE 52 Land Dep.; JA at 0525-34), as well as the parties’ clear and unambiguous Letter of Understanding and Amendment thereto. For example, in his October 7, 1998 deposition, when asked
directly by First Bank’s legal counsel if he, Land, believed that once First Bank put the Portfolio in NBC’s hands for marketing, that First Bank was irrevocably committed to the sale of the Portfolio, Land testified: “I think the agreement has to speak for itself as to what their obligations were and are. I will leave it at that.” (RE 52 Land Dep. pp. 61-62; JA at 0532). Also in Land’s deposition, NBC’s legal counsel objected to a question by First Bank’s counsel, stating similarly that “the agreement speaks for itself.” (RE 52 Land Dep. p. 20; JA at 0527).

When Land was directly asked by First Bank’s counsel a question regarding what was the value of the Portfolio’s dealer rebates, Land testified in his deposition: “I don’t know the answer to that question,” and “I just don’t know because [First Bank] wouldn’t talk about it.” (RE 52 Land Dep. pp. 66-67; JA at 0532-33).

Finally, when Land was directly asked by First Bank’s counsel a question regarding Land’s and NBC’s experience in deals such as the one between NBC and First Bank, Land testified in his deposition: “No two deals are alike,” and “As I said before, no two deals are alike and we don’t always do deals on a fee basis.” (RE 52 Land Dep. pp. 57, 59; JA at 0531).

In contradiction to Land’s October 7, 1998 aforesaid deposition testimony, after NBC’s December 4, 1998 Motion for Summary Judgment was denied by the district court, and while the district court was considering First Bank’s January 5,
1999 Cross-Motion for Summary Judgment, NBC filed Land’s and Tidmore’s affidavits. (RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment; JA at 0275-0489; RE 48 Land Aff.; JA at 0139-0263; RE 49 Tidmore Aff.; JA at 0264-74). In his August 2, 1999 affidavit, Land makes the following statements, for example, which contradict his October 7, 1998 deposition testimony that “I think the agreement has to speak for itself as to what their obligations were and are” and “I will leave it at that”:

- "there was no discussion or intention that First Bank (as opposed to the buyer) could refuse to proceed with a transaction and thereby defeat NBC’s entitlement to its fee." (RE 48 Land Aff. p. 5; JA at 0143).

- "The purpose of the best efforts provision was to ensure that NBC would not be put in the position of expending a great deal of its time, effort, and resources . . . only to have First Bank arbitrarily refuse to take all reasonable steps to consummate the transaction." (RE 48 Land Aff. p. 2; JA at 0140).

- "Accepting First Bank at its word about price and about its commitment to sell the Portfolio, NBC proceeded to undertake the analysis and marketing of the Portfolio." (RE 48 Land Aff. p. 2; JA at 0140).

In paragraph 17 of his August 2, 1999 affidavit, Land completely contradicts his earlier October 7, 1998 deposition testimony that he did not know the value of the Portfolio’s dealer rebates because First Bank would not talk to him so that he could determine that. He states in his affidavit: "the value of the dealer rebates .
... could have added as much as $1,000,000 to Guaranty’s bid.” (RE 48 Land Aff. p. 11; JA at 0149).

In paragraphs 18-19 of his August 2, 1999 affidavit, Land completely contradicts his earlier October 7, 1998 deposition testimony that "no two deals are alike," and makes statements about a "standard in the industry." (RE 48 Land Aff. pp. 12-13; JA at 0150-51). Similarly, in paragraph 10 of Tidmore’s August 2, 1999 affidavit, Tidmore makes statements regarding "Guaranty’s experience in the industry [with transactions] similar to the one at issue," and her experience with "the practice in the industry," both of which directly contradict Land’s earlier deposition testimony that "no two deals are alike." (RE 49 Tidmore Aff. p. 7; JA at 0270). Tidmore’s affidavit is also replete with legal conclusions, of which she claims to have personal knowledge. (See, e.g., RE 49 Tidmore Aff. p. 8; JA at 0271, wherein Tidmore states: “I am familiar with the term ‘best efforts’ as it is used in this industry and am of the opinion that First Bank did not use its best efforts . . .”).

In addition, in Land’s October 7, 1998 deposition, when asked directly by First Bank’s legal counsel if he knew what part or percentage of the Portfolio Guaranty was going to purchase, Land testified: “I would rely on [the Bid] for that. I think it was fairly clear.” (RE 52 Land Dep. p. 35; JA at 0529). Yet, Land does not rely on the Bid for this information, and in his August 2, 1999 affidavit, Land
goes into great detail about his personal knowledge of the percentage or portion of
the Portfolio Guaranty had allegedly offered to purchase, directly contradicting his
earlier deposition testimony. (RE 48 Land Aff. pp. 7-8; JA at 0145-46).

The district court properly rejected all of Land's and Tidmore's contradictory
statements, and instead relied solely on the express terms and conditions of the
parties' unambiguous Letter of Understanding and Amendment to determine the
parties' obligations thereunder. See Davidson, 921 F.2d at 1352 (stating that after
a motion for summary judgment has been filed, neither party may attempt to create
a factual issue by filing an affidavit that contradicts prior deposition testimony);
Union Oil, 766 F.2d at 227 (stating that when a written instrument is unambiguous
on its face, parol evidence may not be introduced to contradict that written
instrument); Hill, 801 F.2d at 221 (same).

A. The district court properly determined as a matter of law that First Bank did
not agree to sell any portion of the Portfolio at any particular price.

NBC contends that genuine issues of fact exist as to whether First Bank
agreed to accept "par or something slightly less than par" in a sale of some or all
of the Portfolio, and that the district court erred in making a "credibility
determination" in favor of First Bank on this issue. (RE 48 Land Aff. pp. 2-3; JA
at 0140-41). In support of its contentions on this issue, NBC relies solely on the
contradictory testimony of Land. In his August 2, 1999 affidavit submitted in response to First Bank's Cross-Motion for Summary Judgment, Land claimed that he "made it clear to First Bank that NBC had no intention of expending the time and expense necessary to fulfill its obligations under the agreements without assurance from First Bank that it was willing to accept a reasonable price for the loans," and that "Accepting First Bank at its word about price and its commitment to sell the Portfolio, NBC proceeded to undertake the analysis and marketing of the Portfolio." (Id.)

In support of its contentions that First Bank did not agree to "take par or something slightly less than par," or any other particular price for the Portfolio, First Bank relies upon First Bank's and NBC's clear and unambiguous written Letter of Understanding and Amendment. (RE 57 NBC's Memo. in Opp. to First Bank's Cross-Motion for Summary Judgment Exhs. 2, 3; JA at 0424-29). While the Letter of Understanding does contain a number of terms and conditions to which First Bank agreed to adhere if it determined that it would sell some or all of the Portfolio, significantly, neither of these documents contains any reference as to a price that First Bank would consider acceptable in any such sale. (See id.) If this price term was so important to NBC before it would commit to market the Portfolio, and if the parties had, in fact, agreed to a particular price for the Portfolio, why did NBC fail
to require any such price term in the parties’ written Letter of Understanding or Amendment thereto, both of which NBC itself authored?

Even the Exclusive Portfolio Offering prepared and distributed by NBC to potential investors stated that “it is Seller’s desire to complete the optimal price/volume transaction to achieve certain targeted liquidity and profit objectives.” (RE 48 Land Aff. Attach. A p. 7; JA at 0158). Thus, Land’s affidavit asserting that First Bank agreed to take par or something slightly less than par not only contradicts the express terms and conditions of the Letter of Understanding and the Amendment, but also it contradicts NBC’s own written assessment of First Bank’s position on price. Moreover, as previously stated, Land and NBC’s legal counsel both agree that the terms and conditions of the Letter of Understanding and the Amendment, and the parties’ obligations thereunder are clear and unambiguous, and speak for themselves. (RE 52 Land Dep. pp. 20, 61-62; JA at 0527, 0532).

The district court properly relied upon the parties’ clear and unambiguous Letter of Understanding and Amendment thereto in resolving whether or not First Bank agreed to accept par or something slightly less than par for the Portfolio. In opposing First Bank’s Cross-Motion for Summary Judgment, NBC could not properly attempt to raise a factual issue for trial by presenting Land’s affidavit to contradict his prior deposition testimony and the clear and unambiguous terms and
conditions of the parties' Letter of Understanding and Amendment thereto. *Union Oil*, 766 F.2d at 227; *Hill*, 801 F.2d at 221. Thus, the district court did not weigh evidence or make a credibility determination when it granted summary judgment in favor of First Bank on NBC's promissory estoppel claim, holding that "NBC has failed to submit evidence that First Bank promised to accept any bid containing a price of par or more regardless of the other terms of the bid." (RE 59 Order Denying NBC's Motion for Summary Judgment and Granting First Bank's Cross Motion for Summary Judgment p. 18 (hereinafter "Order Granting First Bank's Cross-Motion for Summary Judgment"); JA at 0040).

B. **The district court properly determined as a matter of law that Guaranty's conditional Bid did not constitute an offer to contract with First Bank.**

The precise language of the Bid indicates that First Bank and Guaranty were engaged in "preliminary negotiations" through NBC when the unsigned Bid was submitted for First Bank's review, and when First Bank signed and accepted the Bid for further consideration and possible negotiation. (RE 48 Land Aff. Attach. D; JA at 0261). The Restatement (Second) of Contracts, § 26 provides as follows:

**Preliminary Negotiations—**

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.
Restatement (Second) of Contracts, § 26 (1981) (emphasis added). Comment e of such Section provides as follows:

Written contract documents. A standard method of making an offer is to submit to the offeree a written agreement signed by the offeror and to invite the offeree to sign on a line provided for that purpose. [citation omitted]. But the signature even in such case is not conclusive if the other party has reason to know that no offer is intended. More common is the use of promissory expressions or words of assent in unsigned documents or letters where the document is intended not as an offer but only as a step in the preliminary negotiation of terms . . . . Reason to know that such is the intention may exist even though the document on its face seems to be clear and unambiguous.

Restatement (Second) of Contracts, § 26 cmt. e (1981) (emphasis added).

The Bid made by Guaranty was subject to numerous exceptions, exclusions, and conditions, including but not limited to: (1) "Seller: Subject to approval by Guaranty at its sole discretion"; and (2) "Agreement: Subject to acceptable Purchase and Sale Agreement," making the entire Bid subject to the further manifestation of assent by Guaranty, and giving First Bank clear and unambiguous "reason to know" that the Bid was not intended as an "offer." (RE 48 Land Aff. Attach. D; JA at 0261). Moreover, the Bid was quite uncertain as to the number of and dollar value of the loans that Guaranty might or might not eventually purchase. (Id.) The purchase price was to fluctuate, and could be adjusted within Guaranty’s sole discretion, based on the loans which Guaranty might or might not
ultimately choose to purchase, if any. (Id.) This clearly indicates that First Bank and Guaranty were engaged in "preliminary negotiations," which were conditioned upon and subject to First Bank’s and Guaranty’s further express assent. Significant and material terms and conditions had yet to be negotiated.

Accordingly, First Bank’s acceptance of the Bid for further consideration and possible negotiation was not an acceptance of an "offer," which would have resulted in the formation of a binding contract or agreement between First Bank and Guaranty. (RE 59 Order Granting First Bank’s Cross-Motion for Summary Judgment pp. 12-13; JA at 0034-35). The Restatement (Second) of Contracts, § 24 defines an "offer" as follows:

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Restatement (Second) of Contracts, § 24 (1981).

All of the exclusions, exceptions, conditions, fluctuating and adjustable terms and conditions, and "subject to" language appearing on the face of the Bid gave First Bank no justification for believing that if it assented to the Bid, a contract would be concluded without more specific information on all of the essential terms and conditions, and without further assent from Guaranty. Thus, the district court appropriately held as a matter of law that "the plain language of the [Bid] suggests
that the parties had not yet arrived at a complete agreement on all essential terms." (RE 59 Order Granting First Bank’s Cross-Motion for Summary Judgment p. 8; JA at 0030).

If First Bank’s acceptance of Guaranty’s Bid for further consideration and possible negotiation is of any significance at all, it is indicative of First Bank’s "good faith" and affirmative attempts to use its "best efforts" under the Letter of Understanding and the Amendment to find a bid that would meet First Bank’s liquidity and profitability objectives. (RE 59 Order Granting First Bank’s Cross-Motion for Summary Judgment p. 16; JA at 0038). As discussed below, if First Bank wanted to avoid exercising its "best efforts" obligation under the Letter of Understanding and the Amendment, First Bank could have simply rejected Guaranty’s Bid immediately, without giving it any serious consideration, and could have informed NBC that First Bank had decided not to sell any portion of the Portfolio without breaching the Letter of Understanding or the Amendment.

C. The district court properly concluded as a matter of law that, according to the parties’ clear and unambiguous agreement, First Bank could determine not to sell any part of the Portfolio without breaching the Letter of Understanding or the Amendment, and without owing NBC a fee.

NBC contends that factual issues exist as to whether First Bank breached its duty to use its best efforts to consummate the sale of the Portfolio. In support of its
contentions, NBC relies heavily on the assumption that First Bank agreed to accept par or something slightly less than par for the Portfolio, which is, as discussed above, a faulty assumption. NBC further relies on the assumption that, under the Letter of Understanding and the Amendment, First Bank absolutely and unconditionally promised that it would sell some or all of the Portfolio, regardless of the terms and conditions of the bids submitted by NBC for First Bank's consideration. However, such an assumption ignores and contradicts the express terms and conditions of the parties' clear and unambiguous Letter of Understanding and Amendment thereto.

In support of its contentions that First Bank did not absolutely and unconditionally promise that it would sell any portion of the Portfolio, regardless of the terms and conditions of the bids submitted to First Bank by NBC, First Bank again relies on the parties' clear and unambiguous written Letter of Understanding and Amendment thereto. (RE 57 NBC's Memo. in Opp. to First Bank's Cross-Motion for Summary Judgment Exhs. 2, 3; JA at 0424-29). Pursuant to the Letter of Understanding, NBC agreed to assist First Bank in the “analysis, evaluation and/or sale of the referenced portfolio.” (RE 57 NBC's Memo. in Opp. to First Bank's Cross-Motion for Summary Judgment Exh. 2 p.1; JA at 0424) (emphasis in the word "or" added). The fact that the parties used the word "or" prior to the word
"sale" indicates that the parties agreed that NBC might only assist First Bank in the analysis and evaluation of the Portfolio, and that a sale of the Portfolio was only a possibility under the terms and conditions of the Letter of Understanding.

The Letter of Understanding also provided that First Bank would promptly redeliver all materials provided to First Bank by NBC or a potential investor, without retaining any copies thereof, and that First Bank would destroy (except as otherwise required by law) all notes and other writings prepared by any potential investor or NBC, "if [First Bank] determines that it will not sell the Portfolio" (RE 57 NBC's Memo. in Opp. to First Bank's Cross-Motion for Summary Judgment Exh. 2 p. 3; JA at 0426) (emphasis added). The fact that the Letter of Understanding included a provision dictating the action that First Bank had to take in the event that it chose not to sell the Portfolio indicates that the parties contemplated and agreed that First Bank could decide not to sell the Portfolio at all. Even the Exclusive Portfolio Offering prepared and distributed by NBC clearly stated in bold print that "Seller reserves the right to reject any or all bids" (RE 48 Land Aff. Attach. A p. 7; JA at 0158) (boldface type in original), which indicates that NBC was putting all potential investors on notice that First Bank had not agreed to sell to the highest or best bidder, and that if First Bank decided to and did reject all bids, no sale of any part of the Portfolio would occur. Moreover, as
previously stated, Land and NBC’s legal counsel both agree that the terms and conditions of the Letter of Understanding and the Amendment, and the parties’ obligations thereunder are clear and unambiguous, and speak for themselves. (RE 52 Land Dep. pp. 20, 61-62; JA at 0527, 0532).

The district court properly relied upon the parties’ clear and unambiguous Letter of Understanding and Amendment thereto in resolving whether or not First Bank could choose not to sell the Portfolio at all without being in breach of the best efforts clause of the Letter of Understanding. Thus, the district court did not weigh evidence or make a credibility determination when it granted summary judgment in favor of First Bank on NBC’s claim that First Bank breached its duty to use its best efforts to consummate the sale of the Portfolio. Rather, the district court made a legal determination, and properly held as a matter of law that, under the clear and unambiguous terms of the Letter of Understanding, "The best efforts provision requires diligence and consideration on First Bank’s part, but does not modify or qualify First Bank’s discretion in determining whether to sell its portfolio." (RE 59 Order Granting First Bank’s Cross-Motion for Summary Judgment p. 15; JA at 0037). The district court reasoned: "The [Letter of Understanding] considers the possibility that First Bank could decide not to sell the portfolio," and "Moreover,
the [Amendment] considers the possibility that the transaction may not close even if there is an acceptable bid." *(Id.*)

The parties also agreed in the clear and unambiguous terms and conditions of the Amendment to the fee that First Bank would pay to NBC if any portion of the Portfolio was actually sold to one or more potential investors pursuant to Sale Documents. *(RE 57 NBC’s Memo. in Opp. to First Bank’s Cross-Motion for Summary Judgment Exh. 3; JA at 0429)*. The Amendment provided that the Fee would be deemed “earned” by NBC and would be payable by First Bank “upon the closing of the sale” to one or more potential investors. *(Id.*) The Amendment stressed: “Please note that the Fee is payable only in the event that at least one bid is acceptable AND the transaction actually closes.” *(Id.*) *(underlining and capitalization in the word “AND” in original; boldface emphasis added).*

Any claim by NBC for a fee is speculative, since there is no way to accurately ascertain what that fee might have been since any fee was to be based on the value and number of loans actually sold, and no loans were actually sold in the case at bar. This lends further support to First Bank’s position that it was the parties’ intentions (as expressed by the clear and unambiguous Amendment to the Letter of Understanding) that a fee would be earned and payable to NBC if and only if some or all of the Portfolio was actually sold, pursuant to Sale Documents. This would
be true regardless of the reason for a sale of the Portfolio not occurring, including but not limited to (1) NBC's inability to identify any willing investors, (2) NBC's inability to obtain a bid which met First Bank's liquidity and profitability objectives, or (3) First Bank's determination not to sell any part of the Portfolio.

The district court also appropriately recognized, that the parties included in the Letter of Understanding some protection for NBC against any arbitrary rejection of bids submitted by NBC by providing an incentive for First Bank to sell the Portfolio if First Bank's liquidity and profitability objectives were met. (RE 59 Order Granting First Bank's Cross-Motion for Summary Judgment pp. 15-16; JA at 0037-38) (noting that "First Bank had an incentive to proceed with the sale if it were economically favorable"). This was so because, under the Letter of Understanding, "First Bank could not market the portfolio itself or through a broker other than NBC for two years" if it chose not to sell the Portfolio pursuant to bids submitted by NBC. (RE 50 Turkcan Dep. pp. 75-76; JA at 0665-66).

Thus, NBC is not entitled to a fee in any amount because the express terms of the Agreement govern, and provide in detail, the only circumstances under which a fee is considered to be both earned by and payable to NBC, and no such circumstances ever developed, and do not presently exist in the case at bar.

30
D. The district court properly concluded as a matter of law that First Bank did not breach its duty to use its best efforts under the Letter of Understanding.

On December 4, 1998, NBC filed a Motion for Summary Judgment and Memorandum of Law in the case at bar, asserting that there were no genuine issues of any material facts, and that NBC was entitled to judgment as a matter of law. (RE 30 Motion of NBC for Summary Judgment; JA at 0047-48; RE 31 Memo. in Support of NBC's Motion for Summary Judgment; JA at 0049-0138). After the district court denied NBC's Motion for Summary Judgment, and granted First Bank's January 5, 1999 Cross Motion for Summary Judgment, NBC now inexplicably argues that there are genuine issues of material facts precluding summary judgment in the case at bar after all, in direct contradiction to its prior assertion to the contrary.

In a vain attempt to explain its position, NBC argues that it was somehow possible for the district court to determine in NBC's favor as a matter of law that First Bank failed to use its best efforts under the Letter of Understanding, but that it was not possible for the district court to determine in First Bank's favor as a matter of law that First Bank fulfilled its obligation to use its best efforts under the Letter of Understanding. While NBC's reasoning to support its argument on this point is not entirely clear, it is clear that this argument also must fail.
As discussed above, the scope of the best efforts clause, and the parties' obligations thereunder were appropriately determined as a matter of law by the district court. Moreover, the material facts as to the actions taken by Meyer and Turkcan to perform First Bank's obligations under the Letter of Understanding and the Amendment are not in dispute. See supra Statement of Facts (detailing actions taken by Meyer, Turkcan, and Kasten regarding the Bid). Rather, NBC argues that the best efforts clause of the Letter of Understanding required First Bank to do more than it did. (RE 59 Order Granting First Bank's Cross-Motion for Summary Judgment p. 15-16; JA at 0037-38). Thus, NBC is not raising a factual issue for trial as to what actions First Bank did take to fulfill its best efforts obligation under the Letter of Understanding, but rather, NBC is questioning the district court's legal conclusion as to the scope of the best efforts clause, and the parties' obligations thereunder.

The district court held that while "the Agreement fails to establish criteria or a standard by which to measure the parties' best efforts . . . the meaning of the term 'best efforts' can be determined from the circumstances" of the parties' agreement. (RE 59 Order Granting First Bank's Cross-Motion for Summary Judgment pp. 13-14; JA at 0036). In determining the scope of the best efforts clause, the district court found that "The best efforts clause requires diligence and consideration on
First Bank's part, but does not modify or qualify First Bank's discretion in
determining whether to sell its portfolio." (RE 59 Order Granting First Bank's
Cross-Motion for Summary Judgment p. 15; JA at 0037).

Vague and ill-defined "best efforts" clauses are often held to be unenforceable
(7th Cir. 1992) (affirming district court's grant of summary judgment to defendant
who was alleged to have failed to use best efforts in licensing agreement) (citing
Kraftco Corp. v. Kolbus, 274 N.E.2d 153 (Ill. App. 1971) (best efforts clause too
indefinite and uncertain to be enforceable), Goodman v. Motor Products Corp., 132
N.E.2d 356 (Ill. App. 1956) (best efforts clause was too lacking in certainty to be
intelligible and enforceable); Laboratory Corp. of Am., Inc. v. Upstate Testing Lab.,
Inc., 967 F. Supp. 295, 297-98 (N.D. Ill. May 20, 1997) (best efforts clause held
unenforceable as a matter of law because it failed to set forth a "clear set of
guidelines against which the parties' 'best efforts' may be measured"); GLS Dev.,
(best efforts clause held too indefinite as a matter of law to be legally enforceable);
Mocca Lounge, Inc. v. Misak, 462 N.Y.S.2d 704, 706-07 (N.Y.A.D.2 Dept. May
23, 1983) (best efforts clause held unenforceable because "No objective criteria or
standards against which defendants' efforts can be measured were stated in the
contract" and could not be implied from the circumstances because to do so "would be to impermissibly make a new contract for the parties"); *Pinnacle Books, Inc. v. Harlequin Enter. Ltd.*, 519 F. Supp. 118, 121-22 (S.D.N.Y. May 13, 1981) (holding that best efforts clause which required parties to use their best efforts to negotiate an agreement was unenforceable because "no party to a negotiation, no matter what the circumstances, is required to make a particular offer nor to accept particular terms," and that it is impossible to determine if a party has used its best efforts to negotiate an agreement without objective standards by which to measure the parties’ efforts).

In the case at bar, the district court found that the best efforts clause was vague and ill-defined, (RE 59 Order Granting First Bank’s Cross-Motion for Summary Judgment p. 13; JA at 0035) (stating that the Letter of Understanding and Amendment "fail[] to establish criteria or a standard by which to measure the parties’ ‘best efforts’"); (RE 59 Order Granting First Bank’s Cross-Motion for Summary Judgment p. 17 at n.5; JA at 0039) (stating that "In the instant case, the best efforts clause is not so well-defined), and that to the extent that it could be defined, it was tempered by First Bank’s discretionary right to choose not to sell any or all of the Portfolio pursuant to the other terms and conditions contained in the parties’ clear and unambiguous Letter of Understanding and Amendment thereto.

34
Based on the above-cited authority, and the district court’s finding that the best efforts clause was not well defined because it failed to establish criteria or a standard by which to measure the parties’ best efforts, one might argue persuasively that the district court should have held the best efforts clause in the case at bar unenforceable as a matter of law. Or, one might persuasively argue that the district court should have held that the best efforts clause in the case at bar is unenforceable because it is an agreement (to use best efforts) to agree to engage in another transaction (i.e., Sale Documents with a potential investor), in which material terms such as price and quantity had not yet been agreed upon. (Id. at 10; JA at 0032) (noting that "the so-called ‘contract to make a contract’ is not a contract at all," citing EnGenius Entertainment, Inc. v. W.W. Herenton, 971 S.W.2d 12, 17-18 (Tenn. Ct. App. 1997) (quoting 1 Arthur L. Corbin, et al., Corbin on Contracts § 2.8, pp. 133-34 (Rev. ed. 1993))).

Or, one might persuasively argue that the district court should have found that the parties’ primary objective for including a best efforts clause in the Letter of Understanding was to protect First Bank’s interests, since it is typical that when a
best efforts clause is specifically included, or is implied, in an exclusive brokerage contract such as the Letter of Understanding, it is generally included for the purpose of protecting the principal (First Bank) from the agent (NBC) who might not otherwise exert sufficient energy in performing its obligations under the exclusive brokerage contract, while the principal is prohibited from contracting with any other broker to do the job due to the exclusivity of the contract. See, e.g., Permanence Corp. v. Kennametal, Inc., 908 F.2d 98, 100 (6th Cir. 1990) (discussing Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917)).

Nevertheless, the district court's construction of the best efforts clause was appropriate under the circumstances of the case at bar. The district court found that "The best efforts clause requires diligence and consideration on First Bank's part, but does not modify or qualify First Bank's discretion in determining whether to sell its portfolio." (RE 59 Order Granting First Bank's Cross-Motion for Summary Judgment p. 15; JA at 0037). The district court appropriately applied the undisputed facts regarding the actions taken by First Bank to that standard (Id. at 16-17; JA at 0038-39); considered First Bank's right under the Letter of Understanding and Amendment to choose not to sell any part of the Portfolio (Id. at 15; JA at 0037); and held as a matter of law that "First Bank fulfilled its best efforts obligation by duly considering the [Bid]." (Id.) The record supports the district
court’s conclusion on this issue, and is filled with undisputed facts as to the affirmative actions taken by First Bank to duly consider the Bid. See supra Statement of Facts (detailing actions taken by Meyer, Turkcan, and Kasten regarding the Bid).

NBC argues that the district court could not correctly find as a matter of law that First Bank fulfilled its best efforts obligation under the terms and conditions of the Letter of Understanding and the Amendment (but apparently could, for some strange, unexplained reason, correctly find as a matter of law that First Bank did not use its best efforts). In an attempt to find support for its argument on this point, NBC relies heavily on this Honorable Court’s decision in Davidson & Jones Dev. Co. v. Elmore Dev. Co., Inc., 921 F.2d 1343 (6th Cir. 1991) (interpreting Tennessee law). However, rather than supporting NBC’s position on this point, Davidson supports First Bank’s position that the district court could correctly find as a matter of law that First Bank fulfilled its best efforts obligation under the Letter of Understanding.

In Davidson, this Honorable Court held that there were material facts in dispute which precluded the United States District Court for the Eastern District of Tennessee’s granting of summary judgment in favor of the defendant, who was accused by the plaintiff of failing to use its best efforts in attempting to fulfill
conditions precedent under an assignment agreement. Davidson, 921 F.2d at 1350-51. In applying Tennessee contract law, this Honorable Court cited with approval the case of Educational Placement Serv., Inc. v. Watts, 789 S.W.2d 902 (Tenn. Ct. App. 1989), which stands for the proposition that "the question of reasonableness is a factual question to be determined by the trier of fact and, if there is a dispute, summary judgment would not be proper." Davidson, 921 F.2d at 1350 (citing Watts, 789 S.W.2d at 904-05) (emphasis of underlining and boldface type added).

However, in Watts, the Tennessee Court of Appeals affirmed the lower court’s granting of summary judgment in favor of the defendant who was accused by the plaintiff of failing to use its best efforts to obtain adequate financing, which was a condition precedent to a purchase agreement between the plaintiff and the defendant. Watts, 789 S.W.2d at 904-05. As the district court did in the case at bar, the Tennessee Court of Appeals, in Watts, applied the undisputed facts regarding the defendant’s actions to the express terms and conditions of the parties’ agreement, and held that the defendant did not breach its best efforts obligation as a matter of law. Id.

Thus, as the decision in Watts demonstrates, the Tennessee Court of Appeals disagrees with NBC’s argument that a court may not determine as a matter of law whether or not a party has used its best efforts under a contract, and grant one or
the other party summary judgment. Other courts would reject NBC's argument as well. See, e.g., R-G Denver, Ltd. v. First City Holdings of Colo., Inc., 789 F.2d 1469, 1474-75 (10th Cir. 1986) (affirming district court's grant of summary judgment in favor of defendant on tortious interference with contract claim, finding as a matter of law no breach of underlying contract—failure to use efforts to fulfill condition precedent under buy/sell agreement not a breach when fiduciary duties require otherwise) (citing with approval Great W. Producers Coop. v. Great W. United Corp., 613 P.2d 873, 877-79 (Colo. 1980) (affirming court of appeals' determination that trial court should have directed a verdict in favor of counter-defendant accused of breaching best efforts clause, and holding as a matter of law that a party's obligation under a best efforts clause does not require that parties' representatives to enter into an inadvisable transaction pursuant to the best efforts clause, thereby causing representatives to breach fiduciary duties to the organization which they serve); ConAgra, Inc. v. Cargill, Inc., 382 N.W.2d 576, 588-89 (Neb. 1986) (reversing and remanding with instructions district court's granting of summary judgment in favor of plaintiff against defendant accused of breaching best efforts clause, holding as a matter of law that defendant did not breach its best efforts obligation). Cf., e.g., In re Cambridge Biotech Corp., 186 F.3d 1356, 1366-67 (D.C. Cir. 1999) (affirming district court's granting of summary judgment
in favor of plaintiff, and holding that the best efforts clause was unambiguous to the extent that it required the defendant to take at least some action, and the undisputed facts indicated that the defendant took no action). Thus, NBC’s argument that the district court could not correctly determine as a matter of law that First Bank fulfilled its obligation to use its best efforts under the Letter of Understanding (because such determinations are not a proper subject for summary judgment) must fail.

As discussed above, after relying upon the express terms and conditions of the parties’ clear and unambiguous Letter of Understanding and Amendment thereto to determine the scope of the parties obligations thereunder, and after NBC failed to raise a genuine issue as to a material fact relating to First Bank’s actions in performing those obligations, the district court in the case at bar properly granted First Bank’s Cross-Motion for Summary Judgment. See, e.g., *Pinnacle Books, Inc. v. Harlequin Enter. Ltd.*, 519 F. Supp. 118, 122 (S.D.N.Y. May 13, 1981) (deeming defendant’s responsive papers to plaintiff’s motion for summary judgment as a cross-motion for summary judgment, and granting such cross-motion after having resolved the best efforts issue as a matter of law, which was the basic issue underlying the case).
CONCLUSION

NBC failed to raise a genuine issue of a material fact for trial. The district court properly concluded as a matter of law that in neither the Letter of Understanding nor the Amendment did First Bank agree absolutely and unconditionally to sell any part of the Portfolio, regardless of First Bank's analysis of the financial impact any such sale would have on First Bank. NBC's argument on this point is in direct conflict with the express terms and conditions of the parties' clear and unambiguous Letter of Understanding and the Amendment, which indicate that not only must a bid be acceptable to First Bank, but also a purchase and sale agreement must actually close. The district court correctly concluded as a matter of law that the Letter of Understanding also anticipated that First Bank might choose not to sell the Portfolio at all, but that in such case, First Bank would suffer the restrictions of the non-circumvention clause of the Letter of Understanding for a two-year period.

The district court also properly concluded as a matter of law that in neither the Letter of Understanding nor the Amendment did First Bank agree to sell any part of the Portfolio at any particular price, regardless of the other terms and conditions of the sale, or First Bank's analysis of the financial impact any such sale would have on First Bank. NBC's argument on this point is also in direct conflict with the
express terms and conditions of the parties' clear and unambiguous Letter of Understanding and the Amendment, and the district court properly rejected it.

NBC's argument is further flawed in that it does not recognize that, under the Agreement, First Bank could fulfill its duty to act in good faith and deal fairly by using its best efforts to (1) gather the information and materials reasonably requested by NBC and any potential investors, (2) give due consideration to bids in the preliminary negotiation stage, and (3) subsequently determine that no such bids were acceptable to First Bank. The district court correctly concluded as a matter of law, and the record supports its conclusion, that even though First Bank could have simply informed NBC that First Bank had determined not to sell any portion of the Portfolio after having received all of the bids submitted by NBC, First Bank nevertheless exercised due diligence in considering Guaranty's Bid. Thus, the undisputed facts in the record reflect that First Bank did not breach its best efforts obligation under the Letter of Understanding.

While NBC may have expended considerable efforts and resources in marketing the Portfolio without earning a fee, First Bank was required to abide by the substantially restrictive non-circumvention clause for a two-year period as a result of First Bank's decision not to sell the Portfolio. But, that was what the parties bargain for, and that was the parties' clear and unambiguous agreement. For
NBC to be awarded a fee in any amount under these circumstances, in direct contravention of the express terms of the Letter of Understanding and the Amendment thereto between First Bank and NBC, would be patently unfair and unjust.

First Bank respectfully submits that the district court properly denied NBC’s Motion for Summary Judgment, and properly granted First Bank’s Cross-Motion for Summary Judgment. First Bank respectively requests that this Honorable Court affirm the district court’s judgment in all respects, and grant First Bank any and all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28 and 32 of the Federal Rules of Appellate Procedure and Rule 32 of the Local Rules of the United States Court of Appeals for the Sixth Circuit, the undersigned counsel for Defendant-Appellee, First Bank, hereby certifies that the Appellee's Final Brief complies with the type limitations contained in Rules 32(a)(7)(B) & (C) of the Federal Rules of Appellate Procedure. The final brief is set in 14 point CG Times font and contains 10,218 words, and 837 lines.

Stephen H. Biller

CERTIFICATE OF SERVICE

I, Stephen H. Biller, do hereby certify that a copy of the foregoing FINAL BRIEF OF APPELLEE was served upon:

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by placing a copy of same in the United States mail, postage prepaid, this the 25th day of July, 2000.

Stephen H. Biller