

**Report From Davidson County
Pilot Business Court:**

Completion of March 16, 2015 Supreme Court Order

**By Chancellor Ellen Hobbs Lyle
and
Staff Attorney Justin Seamon**

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Report From Davidson County Pilot Business Court:

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By Chancellor Ellen Hobbs Lyle and Staff Attorney Justin Seamon

Report Overview

One year ago, the Tennessee Supreme Court, under the leadership of Chief Justice Sharon Lee and Director of the Administrative Office of the Courts, Deborah Tate, entered an order establishing a pilot project¹ to evaluate Tennessee joining the then 26 other states who had specialized business courts or dockets. Davidson County Chancery Court Part III was designated as the Pilot Court. Its assignment was to take business cases transferred from other courts and operate a specialized docket to develop methods and procedures adapted to business litigation.

Alongside the Pilot Court, the Chief Justice appointed an Advisory Commission to assist in the analysis of the Project:

Chairperson Judge Neal McBrayer of the Tennessee Court of Appeals
Pat Moskal of Bradley Arant Boult Cummings LLP, Nashville
Scott Carey of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, Nashville
Jef Feibelman of Burch, Porter & Johnson PLLC, Memphis
David Golden of Eastman Chemical Company, Kingsport
Celeste Herbert of Jones, Meadows, & Wall PLLC, Knoxville
Bill Tate of Howard Tate Sowell Wilson Leathers & Johnson PLLC, Nashville
Charles Tuggle of First Horizon National Corporation, Memphis
Tim Warnock of Riley Warnock & Jacobson, Nashville

A year later the Project is up and running with a full docket. Provided herein is a report on the Project's caseload, its special practices for business litigation, and how it operates. Following that are some answers to frequently asked questions, and, in concluding, the aspiration of the Davidson County Pilot Business Court.

¹ The Tennessee Supreme Court has utilized pilot projects numerous times to evaluate potential new programs. Examples are pilot projects for drug courts; jury reform; remote video interpreter to provide services from any location via the internet; an alternative method of compensating attorneys providing legal services to indigent persons; electronic filing in the appellate courts; delivery of representation to indigent defendants in child support contempt proceedings by way of contracts with interested and qualified attorneys; divorce parenting/mediation; and mediating cases appealed to the Supreme Court Worker's Compensation Panel.

Caseload: Quantitative and Qualitative

Business Court Pilot Project Caseload Numbers

Since the opening of the Pilot Business Litigation Docket on May 1, 2015:

- 57 cases have requested transfer to the Project
- 53 cases have been transferred by the Chief Justice
- The transfer average is approximately 5 cases per month

Of the 53 cases transferred, there are 315 separate causes of actions to be disposed of in complaints, counterclaims, cross-claims and third party actions. Compensatory damages in the caseload range from \$100,000 to in excess of \$15 million.

Business Court Caseloads In Other States By The Numbers

- **Fulton County, Georgia**
 - 2014 = 25 cases
 - 2013 = 22 cases
 - 2012 = 19 cases
 - Since inception in 2005 = 202 cases (Avg. of 22.4 cases per year)
- **Iowa**
 - May 2013-August 2014 = 10 cases
 - Threshold = \$200,000 compensatory or primarily injunctive or declaratory
- **North Carolina**
 - 2014 = 122 cases
- **South Carolina (Pilot Project)**
 - October 1, 2007-July 31, 2009 = 42 cases
- **West Virginia**
 - 2012-2014 = 38 cases

Types of Businesses in Pilot Project Cases

In the Pilot Docket, there are a total of 115 business entities as parties. The businesses are varied and thus provide a good sample population for the Pilot Project of business litigation in Tennessee. The businesses include these:

- television production company
- design, development, production, manufacture, marketing, and sale of consumer and professional microphones and related musical instrument products
- information technology integrator, offering systems integration services, consulting, hardware and software sales and support to business and government customers
- information technology consulting company offering business and technology consulting services in the areas of infrastructure, strategy, healthcare, network and data center operations and information security
- consulting company for industrial clients such as railroads and manufacturing focusing on environmental engineering support, waste disposal management, spill response, regulatory compliance, and similar specialized industrial needs
- healthcare services company specializing in the distribution of medical supplies and products to pharmacies, hospitals, ambulatory surgery centers, clinical laboratories, and physician offices
- owners and operators of assisted living, independent living and memory care facilities for seniors
- urgent care clinic business
- designer, manufacturer, and distributor of fragrance-infused, soy wax blended candles and other home fragrance products
- healthcare financial investment company
- brewer, distributor and seller of craft beers
- inventor of proprietary technology for the issuance, processing, storage, redemption, and repayment of casino markers
- Las Vegas casino corporation
- manufacturer, marketer, and distributor of cryogenic surgical products and application systems and devices
- owner and operator of automobile dealerships
- restaurant owner/operator
- urology association group
- purchaser of diverse range of engineering and polymeric products for companies, including castings, forgings, machined components, metal forming, gears, tire products, tire cord fabric and rubber products, among others

- producer of specialty tires and wheels for agriculture, construction, industry, outdoor power equipment, powersports, towables and trailers
- boutique wine and spirits store
- professional limited liability dental practice
- provider of accessories for personal computing and digital media, such as iPhones, iPads, smartphones and tablets
- management and consulting services to medical practices
- provision of computer programming, project management and development
- marketing and producing a series of music festivals designed to call attention to and raise awareness of the troubles affecting the world's oceans
- providing trade association and related services to those engaged in the country music entertainment industry
- travel and hospitality company providing services to both business and independent travelers throughout the United States and worldwide
- commercial real estate investment
- orthopaedics and sports medicine
- owners/operators of a restaurant and pub
- pharmacy
- licensed abatement contractor
- construction management company
- health insurance company
- real estate development
- packager of branded motor oils
- entity which operates a musical group
- business engaged in the importing, distributing, wholesaling, advertising, and providing limited warranty coverage for new motor vehicles and related accessories and parts
- specialty insurance agency
- entrepreneur, restaurateur, chef, mixologist, community activist, and philanthropist in the Nashville community

Causes of Action of Pilot Project Cases

Although it is difficult to generalize, many of the cases in the Pilot Project arise out of or relate to contractual provisions susceptible to differing meanings, either on the face of the text or when applied to the circumstances of the dispute, with pendent or resulting claims of breach of fiduciary duty, fraud, interference with contract, etc. Also predominant are corporate, LLC governance disputes, and issues regarding noncompete agreements. Additionally, many of the cases seek immediate court action in the form of expedited discovery, injunctive relief, and accounting. The causes of action are typical of business litigation. They provide the opportunity for specialization as directed in the

Supreme Court Order. A rough breakdown of claims and causes of action of the cases pending in the Pilot Court is as follows:

- 41 of 53 (77%) cases involve business claims between or among two or more business entities or individuals as to their business or investment activities relating to contracts, transactions, or relationships between or among them;
- 36 of 53 (68%) cases involve claims of breach of contract, fraud, misrepresentation, breach of fiduciary duty or statutory violations between businesses arising out of business transactions or relationships;
- 25 of 53 (47%) cases relate to the internal affairs of businesses (i.e., corporations, limited liability companies, general partnerships, limited liability partnerships, sole proprietorships, professional associations, real estate investment trusts, and joint ventures), including the rights or obligations between or among shareholders, partners, and members, or the liability or indemnity of officers, directors, managers, trustees or partners;
- 11 of 53 (21%) cases constitute an action alleging violations of a noncompete, non-solicitation, or confidentiality agreement, or an antitrust, trade secret, or securities-related action;
- 8 of 53 (15%) cases involve commercial real property disputes other than residential landlord-tenant disputes and foreclosures;
- 5 of 53 (9%) cases arise from technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property right, including patent rights;
- 4 of 53 (8%) cases constitute a shareholder derivative or commercial class action;
- 3 of 53 (6%) cases involve commercial construction contract disputes and/or commercial construction defect claims.

Jury Demands

17 of 53 (32%) cases have demanded jury trials.

Methods, Practices and Procedures

General Practices of the Pilot Court

- Appointed times for hearings so cases do not wait for other cases to be concluded
- Some hearings conducted by telephone
- Advance studying by the Judge of file, briefs, law and advance analysis of hearings to minimize time expended on educating Judge and maximize argument on issues
- Rulings within 30 days, and written decisions and orders, prepared by the Judge
- Hearing motions at same time, avoid serial motions
- Ruling on the papers when appropriate

Initial Voluntary Disclosure

In every case transferred to the Pilot Docket, the Pilot Court sends a *Notice Regarding Initial Voluntary Disclosure of Basic, Non-Privileged Information and Documents*. In this *Notice*, the parties are encouraged to voluntarily furnish to each other basic, non-privileged information and documents a party's attorney considers to be relevant to issues in the case and/or which inform or are relied upon by a party in support of its case. The disclosure is voluntary. Explained in the *Notice* is that the incentive for initial voluntary disclosure is to accomplish the exchange of basic information yet eliminate the time, cost and potential motions and hearings that might otherwise occur during the course of discovery. Also, initial voluntary disclosure assists in early evaluation, assessment, settlement of the case and adds value to the Case Litigation Plan Conference.

The *Notice* provides these examples of items appropriate for voluntary disclosure:

- A list of fact witnesses, their contact information and identification of the information each witness knows whose testimony the disclosing party intends to use to support its claims or defenses
- Documents not attached to the pleadings which inform the issues; were used by the parties with respect to events in issue; provide governance; and/or provide definitions

- Documents (i.e., emails, schedules, spreadsheets, financial records, letters, etc.) which the disclosing party intends to use to support its claims or defenses
- A computation of each category of damages claimed by the disclosing party, including the documents or other non-privileged evidentiary material on which each computation is based

Additionally, the *Notice* provides that voluntary disclosure includes labeling, titling, and organizing information, especially electronic information, for easy identification and access. A discovery/data “dump” is counter-productive and does not constitute initial voluntary disclosure. The *Notice* cautions that to avoid future disputes over the items that were included in the initial voluntary disclosure, each disclosing party should include a cover sheet listing the specific items being provided.

The *Notice* is reproduced in Appendix A.

Case Litigation Plan

Traditionally, the litigation model is reactive: trial courts and attorneys act upon a motion or other requested relief filed by an attorney which is processed through a court hearing with oral argument and/or witnesses. Rulings are often made orally from the bench and prepared by the attorneys. Trials are often set by the attorneys. In the past there were good reasons for this system, and in some areas of the law it still works well.

The model of a 3- or 4-day jury trial with witnesses telling their version of events, however, often does not fit business cases. These cases are less about eye witnesses and facts. They involve analyzing detailed commercial transactions unique to that business, and then applying contracts such as the Operating Agreement or Articles of Dissolution to circumstances the parties usually did not plan for or envision. Crafting a remedy is often the outcome required not necessarily a guilty or innocent verdict.

Also, professions and industries are continuously producing quicker outcomes and replacing personal services and in-person gatherings with technology. Public expectations, particularly the business sector, are less concerned with processes than outcomes. A civil litigation system that does not respond is marginalized.

Moreover, litigation of business cases can be expensive, even cost prohibitive. This is because business cases often consist of not just one trial but several phases, some requiring evidentiary hearings; a heavy motion practice; and numerous and often electronically stored and transmitted documents. There also is routinely the need for an initial accounting, injunction, receivership or dissolution to establish the status quo, then

a trial on liability claims, and if liability is found, proceedings on the remedy such as buy-out, specific performance, adjustment of shares, etc. Further, if tried, these cases can extend for weeks.

Another difference is that unlike, for example, a tort automobile accident case, where the parties' knowledge about each other is limited, with business litigation more is usually known when the case is filed. The dispute is often between parties who have been dealing with each other for months or years. There are certain core documents—a purchase agreement, operating agreement, contract—that all parties have and are applying.

Furthermore, in business cases much time is spent by court and counsel outside of the courtroom due to the research, writing and analysis these cases entail.

To respond to these features of business litigation, the business courts or dockets of other states set a plan for the litigation of the case.

While the concept is simple, its achievement is challenging in the face of necessary rules and procedure designed for all types of litigation such as 30- and 60-day answer dates; notice pleading as compared to the plausibility standard; liberal amendment practice; curing inspecific pleading with motion practice. The effect is that the first six months of business litigation can be expensive but yield very little to move the case to the bottom line of settlement or trial.

From the experience of other states, the goal of the Pilot Project, under the authority particularly of Tennessee Rules of Civil Procedure 16 and 26, and with the consent of counsel, is to move the case, as soon as possible and with monitoring costs, to the bottom line of settlement or trial through use of a case litigation plan.

After the transfer of a case to the Pilot Business Court, the Judge schedules a conference to design a Case Litigation Plan. These Plans are individualized, non-formulaic and structured differently depending upon the nature of the case, amount in controversy, and the relief requested.

To minimize costs, counsel are not routinely required in advance of the conference to fill out forms or make filings. Instead, the Judge sends counsel a notice of the matters which will be addressed and discussed at the conference. In some cases an exchange of limited discovery may be ordered prior to the conference.

In the Case Litigation Plan Conference, particular attention is paid to motions to dismiss. Deficiencies in pleading with specificity and/or linking essential elements of claims to facts (as opposed to questions of law) are rarely susceptible to dismissal. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426-27, 437 (Tenn. 2011).

Additionally, leave to amend is to be freely granted under Tennessee Rule of Civil Procedure 15. Yet, counsel in defending against complaints or affirmative defenses have few mechanisms to obtain clarity in pleadings other than the tool of a motion to dismiss. Often the result is that resources are expended and delays occur from the serial exchange of motions to dismiss and amendments to the pleadings. To avoid this expenditure but obtain the outcome of useful pleadings as a template for the lawsuit, the Court addresses in the Case Litigation Plan Conference pleadings to identify and clarify causes of action and affirmative defenses, and documents the clarification in the Case Litigation Plan Order.

As to amendments and additions of parties, because preparation of a lawsuit for trial is not scripted and evolves as information is uncovered, amendments and addition of parties may be necessary. These actions, however, can cause lengthy extensions and delays, especially if they come late in the proceedings when discovery is complete or nearing completion. Accordingly realistic deadlines regarding amendments and adding parties are covered at the Conference.

As to all motions, grouping, instead of serial, individual motion hearings, and the timing of motions are addressed at the Conference for efficient use of time in court.

As to discovery, its cost and time consumption can overtake a business case. To respond to this known challenge, the Pilot Court, again building on the experience of other states' business courts and dockets, at the Case Litigation Plan Conference inquires about the discovery anticipated by Counsel, its importance to the case, and the accessibility, burden and cost. That is then compared by Court and Counsel to the amount and issues in controversy, and there is a somewhat cost-benefit analysis. From this, the Pilot Court uses these methods:

- Staging/staggering discovery related to a potentially dispositive issue (such as interpretation of a contract) so that the potentially dispositive issue may be adjudicated first;
- Staying discovery, from the date opposition or reply to motion to dismiss is filed, until court rules; and
- Establishing with counsel parameters such as time and dollar amounts to govern discovery. Appendix B contains an example of a Case Litigation Plan Order containing such parameters.

Alternative Dispute Resolution

An important tool of business litigation is alternative dispute resolution. It is a prominent part of the Pilot Project and is always discussed at the Case Litigation Plan

Conference. In particular, the Pilot Court plans with counsel how much time and cost should be expended on motions and discovery to make alternative dispute resolution meaningful. Also various kinds are used. Some parties select one of a number of private mediators skilled in this particular area of the law. The Pilot Court also uses local judges. In one case, Circuit Judge Amanda McClendon conducted a mediation with bankruptcy law consultation provided by Clerk and Master Maria Salas. In another case, the attorneys, with their clients present, conducted a settlement conference which resolved 90% of the case. Alternative dispute resolution has proven to be a valuable tool in the Pilot Court if timed appropriately.

Trial

If the case does not resolve by settlement, it must be tried. From the pretrial analysis and planning, the Court is well-prepared and familiar with the case to conduct a meaningful bench trial. Post-trial, findings of fact and conclusions of law are rarely requested. These are prepared by the Court.

If a jury is demanded, the following methods are used in preplanning the jury trial:

- Pretrial Conference 2 weeks prior to trial
- Filings 2 weeks prior to trial to discuss at pretrial conference:
 - Proposed jury instructions that vary from the pattern instructions
 - A list of the applicable Tennessee Pattern Instructions designated by number
 - Whether instructions on legal principles before trial will be helpful to the jury
 - May need a table of contents so user-friendly
 - A proposed verdict form
 - All motions in limine

With all of the above measures, the goal is expertise and efficiency. As stated in a federal case as part of the rationale for abstention in overlapping cases in the federal court and the Pilot Court:

Meanwhile, several other *Romine* factors clearly support abstention. While it is true that both actions were filed, and service was completed in both, within a relatively short period of time, the fact remains that the state court action was filed first and Woodland Falls is alleged to have purposely evaded service. Moreover, while neither action has proceeded very far, the Tennessee Supreme Court has transferred this dispute to Tennessee's Business Court Pilot Project. The Business Court Pilot Project will be the

most efficient forum for resolving this dispute, allowing for a quick and prompt resolution and rendering federal court less convenient for the parties.²

² The court takes judicial notice of the following statement from the Tennessee Courts webpage: “The pilot project court will focus on complex business litigation with the goals of expediting cases and developing a body of rulings from which lawyers and litigants can better predict and assess outcomes in business cases.” <https://www.tncourts.gov/news/2015/03/16/supreme-court-introduce-tennessee-business-court-pilot-project-davidson-county>

Woodland Falls Subdivision, L.P. v. Kevin Belew and GTLC, LLC, filed in the United States District Court Middle District of Tennessee, Case No. 3:15-1279.

Project Logistics: How It Works

Contained within the March 16, 2015 Supreme Court *Order* are nine tasks for the start-up and operation of the Pilot Project. All of those have been accomplished. These tasks are listed as follows and several are briefly discussed for they provide insight into the behind the scenes work of the Pilot Project. In its March 16, 2015 *Order*, the Supreme Court set out these tasks:

1. Case Eligibility and Transfer—Prepare a method and procedure for identifying appropriate cases and providing for their transfer to the Pilot Project;
2. Prepare Pilot Project rules and practices;
3. Implement proactive case management;
4. Develop a body of business law by the Pilot Court writing and posting decisions of substantive law in this area;
5. Use technology to assist the Pilot Project’s goals;
6. Evaluations—Create and implement evaluation of the Project from participants;
7. Data—Collect and analyze data and information from the operation of the Project;
8. Other States—Research and analyze specialized business courts and dockets in other states; and

9. Best Practices—Identify best practices for potential future Tennessee specialized business dockets or courts.

Transfer to the Pilot Project

Vital in operating the Project are the case eligibility transfer methods, task 1 listed above.

Access to the Pilot Project was copied from other states' business courts, dockets and pilot projects.² The participation method used in the Pilot Project is a voluntary/opt in procedure.

Any party in a business case filed in state court may request transfer of the case to the Pilot Project. The party completes a form: *Request for Designation*, and files it with the Pilot Court—Davidson County Chancery Court Part III. The *Request* is then forwarded by the Pilot Court to the Chief Justice of the Tennessee Supreme Court who decides whether to grant the *Request* and transfer the case to the Pilot Court. A process of objecting to the transfer is provided.

To be eligible for transfer, the case must meet these criteria.

1. Be filed after May 1, 2015
2. Be filed in a Davidson County Chancery Court, or be filed in a civil Tennessee Court in any other County
3. Seek recovery of at least \$50,000 in compensatory damages or seek primarily injunctive or declaratory relief
4. Not be one of eight kinds of cases:
 - i. personal injury or wrongful death;
 - ii. professional malpractice claims, other than those brought in connection with the rendering of professional services to a business enterprise;
 - iii. residential landlord-tenant matters, including residential foreclosure actions;
 - iv. employee/employer disputes, except where pendent or incidental to the matters listed in Section 2 above;

² For sources of Pilot Project case designation method, forms and criteria from other states, see Appendix C.

- v. health care liability;
 - vi. the sole claim is a professional fee dispute;
 - vii. where the State of Tennessee is a party;
 - viii. administrative appeals from a State or County Agency, including tax and zoning matters
5. The case must fit one of these business case parameters:
- i. relate to the internal affairs of businesses (i.e., corporations, limited liability companies, general partnerships, limited liability partnerships, sole proprietorships, professional associations, real estate investment trusts, and joint ventures), including the rights or obligations between or among shareholders, partners, and members, or the liability or indemnity of officers, directors, managers, trustees or partners;
 - ii. involve claims of breach of contract, fraud, misrepresentation, breach of fiduciary duty or statutory violations between businesses arising out of business transactions or relationships
 - iii. constitute a shareholder derivative or commercial class action;
 - iv. involve commercial real property disputes other than residential landlord-tenant disputes and foreclosures;
 - v. involve business claims between or among two or more business entities or individuals as to their business or investment activities relating to contracts, transactions, or relationships between or among them;
 - vi. arise from technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property right, including patent rights;
 - vii. constitute an action alleging violations of a noncompete, non-solicitation, or confidentiality agreement, or an antitrust, trade secret, or securities-related action;
 - viii. commercial construction contract disputes and/or commercial construction defect claims.

Also, an Advisory Commission eligibility criteria subcommittee, chaired by Attorney Jef Feibelman, has studied case eligibility criteria from the standpoint of identifying categories of cases that are “complex” and/or that would benefit from case management. The subcommittee has suggested adjustments to the Pilot Project eligibility criteria including, for example, raising the compensatory damages amount to be alleged in the complaint and deleting certain repetitive subparts.

In addition to the criteria, there also is a time limit for transfer to the Pilot Project. A *Request for Designation* must be filed within 60 days of service of a complaint on a defendant.

For transfers of non-Davidson County cases, all parties must sign a *Joint Consent and Waiver of Venue* form.

Copies of the *Request for Designation* forms are provided in Appendix D and are available at www.TNcourts.gov/bizcourt or <http://chanceryclerkandmaster.nashville.gov>.

Presently, there are only three Non-Davidson County cases in the Pilot Project. Whether technology can sufficiently minimize the cost of geography remains to be seen. Efiling will be implemented soon by Davidson County Clerk and Master Maria Salas. This development may make a difference in the number of Non-Davidson County cases seeking transfer to the Pilot Project.

Guide To The Business Court

Prior to the May 1, 2015 opening of the Pilot Court, Chancellor Lyle and Staff Attorney Justin Seamon completed the task listed as 2 above of preparation and posting of the *Guide to the Business Court* on the website of the Administrative Office of the Courts. It contains basic information on the goals, approach, logistics and procedural rules of the Pilot Court. The various sections of the *Guide* are these:

- Section 1—Overview
- Section 2—Eligibility Criteria/Excluded Cases
- Section 3—Transfer to/Removal
- Section 4—Case Litigation Plan
- Section 5—Motions
- Section 6—Trial on Stipulated Facts
- Section 7—Video-conferencing and Telephone Appearances
- Section 8—Pretrial Conference and Jury Trial
- Section 9—Posting of Decisions

Case Management

As to task 3, case management, and task 9, identifying best practices for specialized business litigation in Tennessee, those have been identified and discussed previously at pages 6-11.

Law and Technology

Tasks 4 and 5 derive from the Supreme Court Order on developing specialized law and using technology. In this regard, the Supreme Court Order requires that substantive decisions selected by the Pilot Judge shall be posted on the Business Court website maintained by the Administrative Office of the Courts to assist lawyers and litigants in assessing and predicting outcomes in other business cases.

Decisions of trial courts have no precedential value. This applies to the Pilot Court. Its decisions are under the same appeal process as other trial courts and are susceptible to reversal or remand. The purpose, however, of posting some of the Pilot Court decisions, then, is not to “make law” but to identify areas of developing Tennessee business law and to share analysis and information, thereby fostering predictability and certainty in Tennessee commercial law.

Examples of developing Tennessee law are provided in excerpts of three Pilot Court rulings, contained in Appendix E related to: LLC statutory derivation action; fiduciary duty of LLC control groups; and LLC attorney/client privilege. Other substantive law decisions have been posted by the Court and may be viewed at <https://www.tncourts.gov/node/3938267>.

In addition to the technology of posting decisions on the website of the Administrative Office of the Courts, the Pilot Court also uses videoconferencing. Electronic filing for the Davidson County Clerk and Master’s Office was approved by the Metro Council February 2016 and is being implemented by Clerk and Master Maria Salas.

Participant Evaluation of the Project

As to task 6 of the Supreme Court Order, the Advisory Commission, through a subcommittee chaired by Attorney Celeste Herbert, designed an evaluation form provided by an electronic survey to attorneys when a case is completed in the Pilot Court. To date, 21 attorney evaluations of the Project have been returned. The survey questions are provided in Appendix F.

Task 7—Data

To inform the work of the Advisory Commission and analysis of the Project, Staff Attorney Justin Seamon has created, performed data entry on, and reports to the Advisory Commission and the Supreme Court a spreadsheet of the Pilot business litigation docket. The spreadsheet has these 40 categories for collection of data and information:

| <u>Column</u> | <u>Title</u> |
|----------------------|---------------------------------|
| A | Case Name |
| B | Number of Businesses as Parties |
| C | Transfer Granted/Denied |
| D | Originating County |
| E | Originating Chancery Part |
| F | Case Number |
| G | Plaintiff(s) Attorney |

| | |
|----|---|
| H | Defendant(s) Attorney |
| I | Date Lawsuit Filed |
| J | Party Requesting Designation |
| K | Date Request For Designation Filed |
| L | Date of Proof of Service of Process on a Defendant |
| M | Transfer Date |
| N | Objection To Request Filed |
| O | Objection Granted/Denied |
| P | Disposition Date |
| Q | Total Days Case Pending in Business Court |
| R | Total Days Case On File In State Court System |
| S | Number of In Person Court Hearings |
| T | Approximate Time Spent In Court on Case |
| U | Number of Telephone Court Hearings |
| V | Approximate Time Spent On Telephone Hearings |
| W | Number of Video Court Hearings |
| X | Approximate Time Spent On Video Hearings |
| Y | Standstill Agreement/Case Stayed |
| Z | Length of Standstill/Stay |
| AA | Participated in Mediation |
| AB | Manner in Which Case is Resolved |
| AC | AOC Survey Sent To Attorneys |
| AD | Compensatory Damages Amount Alleged (if any) |
| AE | Expedited Discovery Requested |
| AF | Temporary Restraining/Injunction Requested |
| AG | Receiver Appointed |
| AH | Injunctive and/or Declaratory Relief Sought |
| AI | Subject Matter Eligibility Checked on Request For Designation |
| AJ | Jury Demanded |
| AK | Brief Description of Case |
| AL | Causes of Action Alleged in Complaint |
| AM | Counterclaims/Cross-claims |
| AN | Causes of Action in Third-Party Complaint |

Other States

The remaining task of the March 16, 2015 Supreme Court Order is research and analysis of specialized business litigation methods in other states.

As has been discussed in relation to task 1, on designing forms for admission to the Pilot Court, Staff Attorney Justin Seamon researched other states on their methods of case designation. As well, the case litigation plans and discovery methods of other states

have been studied by Chancellor Lyle and Staff Attorney Justin Seamon and adapted to Tennessee procedure and law, as discussed above.

In addition to that research, Staff Attorney Justin Seamon has researched other states' business courts for: background information, surveys and evaluation forms, and the method used for establishing business court pilot projects, dockets and business courts. The listing of the states consulted and their websites is contained in Appendix G.

Best known from these other states and contained in the research links in the Appendix is the model of a business court. Two other less known options are a business court docket, and a supreme court or civil procedure rule for fast track litigation.

With respect to a business court docket, in a number of those states³ the supreme court assigns/designates a sitting trial judge or judges to a certain term of years to serve as a business court docket judge in an area or areas of the state where there is interest/demand/need for this specialization and experience. In some of these programs there is waiver of venue by all parties to opt into the docket. Also the presiding judge of a district, with a business court docket, is explicitly authorized to readjust caseload to accommodate the docket.

Some states also have business "fast," "standard" or "complex" tracks for opting in by parties which the Pilot Court would like to implement. Examples are North Carolina and Pennsylvania.

Frequently Asked Questions

Selection of Davidson County

Often inquired about is why Davidson County Chancery Court Part III was selected as the first pilot court for a specialized business litigation docket. The answer is, in part, geography. Davidson County is centrally located in the State and located in Nashville where the Tennessee Administrative Office of the Courts is.

The other part of the answer is that, through a variety of statutes, the Local Rules, Private Acts and custom, there already exist many specialized courts in Davidson County which have been in place for years: domestic, probate, criminal. In particular it was a natural place to locate the Pilot Court because all the Davidson County Chancery Courts are specialized. Their dockets consist solely of commercial and government litigation. No

³ Maine, New Hampshire, New York and Fulton County, Georgia are several of the states who have established statewide business and commercial dispute dockets or divisions.

criminal, domestic or personal injury tort cases are assigned to them. Thus the attorney culture and practices are readily adaptable to a specialized court.

Another reason Davidson County is a good incubator for the Pilot Project is that the Chancellors and Circuit Judges already use scheduling orders for case management. The Davidson County Bar is primed for the explicit collaborative planning the Supreme Court has authorized and ordered the Pilot Court to implement.

Other reasons for the Davidson County location for the first Pilot Court include these:

- Presiding Judge Joe Binkley has a track record of successfully shifting caseloads among judges to accommodate new developments and special projects.
- By designating Davidson County Chancery Court Part III to serve as the Pilot Court, the Project uses existing court resources. No new court was created. No new monies are being expended. This is a cost-effective approach to studying specialized business litigation for Tennessee. As well, during the course of the Project, Chancellor Lyle has continued her regular docket in Davidson County with Presiding Judge Joe Binkley assisting with docket imbalance. Part of the data to be gathered in the Pilot Project is to learn how large a caseload of a specialized business litigation docket can be handled along with a trial court's regular docket.
- Davidson County Chancery Court already has experience with out-of-county cases through its Administrative Procedure Act jurisdiction.
- As for the Part III Chancellor, Ellen Hobbs Lyle, who presides as the Business Court Judge of the Pilot Project, business cases have predominated Chancellor Lyle's 34 years in the legal profession. Her 20 years as a state court chancellor span a broad spectrum of shareholder litigation, non-compete and trade secret disputes, accountings, construction law, mergers and acquisitions including that Chancellor Lyle presided over the *Genesco v. Finish Line* lawsuit involving the \$1.5 billion largest merger in the history of the state. In discussions with Chief Justice Lee, Chancellor Lyle volunteered to assist with the start-up and operation of the Pilot Court.

Need for Specialized Litigation Docket

Another frequently asked set of questions is why does Tennessee need a specialized business litigation docket? Doesn't Tennessee already have a separate

chancery court, similar to Delaware, that specializes in complex litigation? How will creating a specialized business litigation docket save time and money for litigants? There are several aspects to these questions.

First, many of the civil courts across the State of Tennessee, due to social demands, have increasingly had to focus their time and attention on other important matters. Also many of these kinds of cases require numerous court appearances, which, although relatively short, individually, nevertheless add up to lengthy dockets.

Additionally, as discussed above, business cases have their own unique set of needs. Even Delaware has expanded their Chancery Court to include a specialized court for business cases. Procedures such as early intervention case litigation plan, ruling on the papers and bundling motion practice are needed in business cases unlike some other areas of civil law and should help save the litigants money.

Lastly, the experience of other states is that business courts are said to:

- Relieve congested dockets of other courts by removing time-consuming business cases to a separate court or docket;
- Create efficiencies in litigating business cases by developing a judge's expertise in this area of the law, and developing specialized practices and techniques adapted to these cases; and
- Provide a forum to develop a body of commercial law in a state to aid predictability for business litigants which, in turn, contributes to economic growth and retention.

The trend of these other states⁴ is referenced in the March 16, 2015 Tennessee Supreme Court Order establishing the Davidson County Business Court Pilot Project:

In taking this step, Tennessee joins some twenty-six other states, including Alabama, Florida, Georgia, North Carolina, South Carolina and West Virginia, where creation of specialized business courts has proven an effective tool for business retention, economic development, and enhanced effectiveness of the judicial system.

⁴ Appendix H lists the states with specialized business courts and dockets.

Conclusion

In closing Chancellor Lyle and Staff Attorney Justin Seamon report that they are grateful to have performed the March 16, 2015 *Order*. They thank the Tennessee Supreme Court, and the attorney and party participants in the Project. The Part III Chancery Court staff of Phyllis Hobson and Christy Smith have taken on new and difficult work in support of the Supreme Court and the Project. Without them, none of this would have been possible; nor could the Project start-up have been accomplished without Presiding Judge Binkley and Trial Court Administrator Tim Townsend. The Pilot Project Advisory Commission, under the leadership of Judge McBrayer, has given the gift of their valuable time and expertise. It has been very rewarding.

Aspiration of Davidson County Business Court Pilot Project

“In seeking specialized dockets, businesses were not looking for fixed results. Nor were they seeking tort reform, as the cases at issue would most typically involve businesses or sophisticated parties as litigants, not consumers. Commercial and business litigants did not need to know that they were going to win the case or cap their losses, but simply that a decision would be made in a reasonable time and that the decision would have an articulated core of legal principles shaping the court’s ruling. Such express judicial reasoning would not only promote confidence in the process, Delaware’s Chancery Court being the aspirational model, but also provide future guidance for conducting ongoing business practices outside the courtroom. Theoretically, a business might look favorably on a city, region, or state with courts that could engender such confidence.”

Lee Applebaum, *Future Trends in State Courts: The Steady Growth of Business Courts*, p. 70 (2011).

For more information visit the Tennessee Business Court website located at <http://www.TNcourts.gov/bizcourt>

APPENDIX A

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

Plaintiff(s),
VS. NO.
Defendant(s).

**NOTICE REGARDING INITIAL VOLUNTARY DISCLOSURE
OF BASIC, NON-PRIVILEGED INFORMATION AND DOCUMENTS**

Prior to the Case Litigation Plan Conference, the parties are encouraged to voluntarily furnish to each other basic, non-privileged information and documents a party's attorney considers to be relevant to issues in the case and/or which inform or are relied upon by a party in support of its case.

The disclosure requested herein is voluntary; the Court does not have the authority to order this. The disclosure requested herein does not eliminate future discovery.

The incentive for initial voluntary disclosure is to accomplish the exchange of basic information yet eliminate the time, cost and potential motions and hearings that might otherwise occur during the course of discovery. Also, initial voluntary disclosure assists in early evaluation, assessment, settlement of the case and adds value to the Case Litigation Plan Conference.

Examples of items appropriate for voluntary disclosure are these:

- A list of fact witnesses, their contact information and identification of the information each witness knows whose testimony the disclosing party intends to use to support its claims or defenses
- Documents not attached to the pleadings which inform the issues; were used by the parties with respect to events in issue; provide governance; and/or provide definitions
- Documents (i.e., emails, schedules, spreadsheets, financial records, letters, etc.) which the disclosing party intends to use to support its claims or defenses
- A computation of each category of damages claimed by the disclosing party, including the documents or other non-privileged evidentiary material on which each computation is based

Voluntary disclosure includes labeling, titling, and organizing information, especially electronic information, for easy identification and access. A discovery/data “dump” is counter-productive and does not constitute initial voluntary disclosure.

To avoid future disputes over the items that were included in the initial voluntary disclosure, each disclosing party should include a cover sheet listing the specific items being provided.

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc:

APPENDIX B

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

VINCENT NOVAK, M.D.,)
)
 Plaintiff,)
)
 VS.) NO. 15-1484-BC
)
 PREMIER ORTHOPAEDIC &)
 SPORTS MEDICINE, PLC,)
)
 Defendant.)

CASE LITIGATION PLAN ORDER

After conferring with Counsel, it appears that the most productive way to proceed is for Counsel to first obtain more information about their positions with some initial discovery. From that, Counsel and the Court will be in a better position to evaluate the case and fill in the rest of the steps of the litigation plan of this case.

It is therefore ORDERED, pursuant to Tennessee Civil Procedure Rule 16.02, that the following initial plan for the case is entered.

1. On or before April 7, 2016, the parties shall serve and respond to preliminary written discovery; and shall have worked through objections or had motions related thereto ruled upon. During this time of preliminary discovery, all other litigation is stayed.

2. On April 7, 2016, at 12:30 p.m., the Court shall conduct a status conference by telephone to:

- determine the sequencing and timing of any additional discovery and the extent of the same;
- whether to allow serial dispositive motions or order that all dispositive motions be heard at the same time and date, and to set a deadline for those;
- whether mediation would be productive and, if so, the most meaningful time for that;
- identification by Counsel to the Court of the provisions in the contracts relied upon by Counsel for recovery of attorneys' fees, and each Counsel's explanation of their theory of how the fee provisions apply under the circumstances of this case.

Attorney Jacobs shall initiate the call. The number to use for the Court is 615-862-5705.

3. Lastly, the Court documents herein for context as the case proceeds that:

(a) It appears at this time that the case can be decided and completed on motions for summary judgment. The timetable the Court has in mind is for all dispositive motions to be argued no later than September 9, 2016.

(b) Some of the parameters the Court would use in ruling on a motion in this case that discovery is burdensome and unreasonable because it has exceeded the "preliminary" scope set above in paragraph 1 of the Case Litigation Plan are these: (1) the limitations already in place in the Tennessee Rules of Civil Procedure on written discovery; (2) the common understanding of preliminary discovery as including, but not limited to, contention interrogatories; (3) that preliminary discovery in this case includes updated financial information from the Defendants to the Plaintiff; and (4) that the range

of attorney time both on drafting and serving discovery, and responding to the other party's discovery, which is proportionate to the issues in the case, is \$5,000 to \$7,000.

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Sharon O. Jacobs
Thomas Roe Frazer III
J. Scott Hickman
Lauren Z. Curry

APPENDIX C

Survey of Case Assignment Methods

The procedure and forms for assignment of a case to the Pilot Project derive from methods used by the business courts and dockets of other states. A survey of these yielded three general categories of methods used to assign cases to a business court or docket: (1) automatic assignment; (2) assignment by ruling upon a motion/application/request; (3) a mixture of 1 and 2.

Some examples of automatic assignment include a 2012 Iowa pilot project in which cases were automatically assigned to the business court by the clerk upon parties filing a joint consent to the assignment. A provision for automatic assignment, if all parties agree, was also contained in a 2012 Georgia rule. In a Boston Bar Association proposal, an automatic assignment by the clerk to the business court occurs if: a plaintiff selects the business court on a civil cover sheet when the lawsuit is filed; or a defendant designates the business court in its answer or responsive pleading; or if neither party selects the business court, the judge to whom the case is assigned can on its own initiative transfer the case to the business court. Objections must be filed within 30 days of a party designating the business court, and these objections are ruled upon by the business court judge.

The next method used in other states requires the filing of a motion/request or application, and requires a ruling to assign a case to the business court. In a 2006 Oregon pilot project a party or the judge to whom the case is assigned files a motion ruled upon

by the Presiding Judge for assignment to the business court. In a South Carolina 2007 pilot project, a party files a request within 180 days after commencement of the action which is reviewed by the business court judge with a recommendation to the Chief Justice who issues a ruling on the assignment to the business court. In a 2008 Maine pilot project, a party files an application or a judge to whom the case is assigned files a recommendation, and the business court judge decides if the case is assigned to the business court. In a 2012 Georgia rule, a motion by a party or a request by the judge to whom the case is assigned is ruled upon by a Business Case Division Committee for assignment to the business court. It appears that with respect to most of the programs, the ruling on a motion/request/application for transfer to the business court is final and is not appealable.

The last category is a mixture of the methods discussed above. In a New York rule there are both automatic assignment features and a motion practice for assignment to the business court. The automatic feature is that within 90 days following service of the complaint, if a designation/certification is filed by any party the case is assigned to the business court. Thereafter, motion practice is required. After 90 days, a party can file a motion for transfer or the judge to whom the case is assigned can request transfer with each of these to be ruled upon by the “Administrative Judge,” although it is unclear if the “Administrative Judge” is a presiding judge in the district, a Chief Justice of the Supreme Court or some other official specifically designated.

In addition to the assignment methods discussed above, there are methods of removal of cases from the business court. States which provide a removal procedure or objection procedure use the method of a motion for transfer out, but there are a variety as to who rules upon the motion. The variations include the Business Court Judge, the Presiding Judge, the Business Case Division Committee, or the Chief Justice.

Also, the states surveyed established in the first instance eligibility criteria for a case to qualify for assignment to the business court. That criteria, for all the methods located, was a threshold requirement, a necessary precondition for assignment to the business court.

APPENDIX D

REQUEST FOR DESIGNATION—DAVIDSON COUNTY CASE

REQUEST FOR DESIGNATION TO THE BUSINESS COURT

[PARTY], through Counsel or self-represented, requests that the above styled Case filed on [INSERT DATE] in the Chancery Court of Davidson County be transferred by the Chief Justice of the Tennessee Supreme Court to the Business Court.

Counsel or self-represented party, in good faith and based on information reasonably available, has completed and filed herewith the attached checklist certifying that the Case meets the eligibility criteria set forth in the Tennessee Supreme Court Order Establishing the Davidson County Business Court Pilot Project.

Counsel or Self-represented Party

REQUEST FOR DESIGNATION—NON-DAVIDSON COUNTY CASE

REQUEST FOR DESIGNATION TO THE BUSINESS COURT

Counsel and self-represented parties (hereinafter referred to collectively as “Counsel”) request that the above referenced Case filed on [INSERT DATE] in [INSERT COUNTY WHERE LAWSUIT ORIGINATED] be transferred by the Chief Justice of the Tennessee Supreme Court to the Business Court located in the Twentieth Judicial District, Davidson County, Tennessee.

Counsel agree and consent to waive venue in the above referenced case.

Counsel, in good faith and based on information reasonably available, have completed and filed herewith the attached checklist certifying that the Case meets the eligibility criteria set forth in the Tennessee Supreme Court Order Establishing the Davidson County Business Court Pilot Project.

Please check that a copy of the Complaint in the above referenced case is attached.

Signature of Counsel for Plaintiff(s)

E-Mail of Counsel for Plaintiff(s)

Signature of Counsel for Defendant(s)

E-Mail of Counsel for Defendant(s)

Signature of Counsel for Other Parties

E-Mail of Counsel for Other Parties

APPENDIX E

Excerpts of Pilot Court Substantive Law Rulings:

- LLC Statutory Derivative Action
- Fiduciary Duty of LLC Control Groups
- LLC Attorney/Client Privilege

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

| | | |
|---------------------------------------|---|-----------------------|
| ROCK THE OCEAN PRODUCTIONS, |) | |
| LLC, Derivatively on behalf of |) | |
| TMF2013, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | NO. 15-1153-BC |
| |) | |
| HUKA PRODUCTIONS, LLC, d/b/a |) | |
| HUKA ENTERTAINMENT, and |) | |
| H1 EVENTS, LLC, |) | |
| |) | |
| Defendants. |) | |

**MEMORANDUM AND ORDER GRANTING
DEFENDANTS' MOTIONS TO DISMISS ALL CLAIMS OF
PLAINTIFF'S VERIFIED DERIVATIVE ACTION
EXCEPT FOR CLAIM FOR APPOINTMENT
OF INDEPENDENT ACCOUNTANT FOR 2016 FESTIVAL**

TMF 2013, LLC ("TMF") is a two member LLC. It was formed by Plaintiff Rock the Ocean Productions, LLC ("RTO") and Defendant Huka Productions, Inc. ("Huka") to market and produce a series of musical festivals to raise awareness of endangerment to the world's oceans. Huka's interest in TMF is a majority one of 60% of the governance rights. The involvement of Defendant H1 Events, LLC ("H1") is that in 2014 Huka conveyed its 60% interest to Defendant H1. RTO contests the validity of that conveyance.

* * *

As to Defendants' argument that the Plaintiff waived its right to file this derivative action, the Court does not grant that ground of Defendants' motion to dismiss. The basis of Defendants' waiver argument is paragraph 5(a) of the parties' Term Sheet agreement. It provides that the filing of any suit or litigation by TMF, other than litigation filed in the ordinary course of TMF's business, requires unanimous consent of the members. Neither Huka nor H1 has consented to the derivative claims asserted herein. Accordingly, the Defendants argue that under the provision of the Term Sheet, the right to bring this action has been waived. Such waiver is allowed by statute, Defendants argue, pursuant to Tennessee Code Annotated section 48-249-205:

That an operating agreement of a limited liability company may extinguish the right of a member to file a derivative action on behalf of an LLC is clear. Tenn. Code Ann. §48-249-205(a) expressly recognizes that members of an LLC may waive or alter provisions of the Act except as set forth in Section 48-249-205(b). Section 48-249-205(b) contains twenty-one (21) limitations on the ability of members to alter the provisions of the Act, but contains no provision precluding members from altering or modifying Section 48-249-801, the provision that would otherwise allow a member to file a derivative action on behalf of the an LLC. Because RTO agreed with Huka in the Term Sheet that TMF would file no lawsuit absent *unanimous* consent of the two members, this action should be dismissed.

H1 Events, LLC's Response in Opposition to Motion to Appoint Special Master, November 16, 2015 at 4 (emphasis in original).

To the contrary, the Court adopts the Plaintiff's construction and application of the LLC Act: "[T]he plain language of the LLC Act . . . prohibits the members of an LLC from: (i) eliminating or varying a member's personal liability to the LLC; (ii) eliminating a member's duty of loyalty to the LLC; and (iii) unreasonably reducing a member's duty

of care to the LLC. See T.C.A. § 48-249-205(b)(5), (13), (14). Further, if Defendants' interpretation of the Term Sheet was adopted, the Term Sheet would violate the LLC Act by restricting TMF's right to seek damages resulting from its members' mismanagement or self-dealing. See T.C.A. § 48-249-205(b)(21) (prohibiting LLC documents from 'restricting any right of *any person other than* a manager, director, officer, employee, agent, member or holder of financial rights.') (emphasis added)." *Plaintiff's Opposition to Defendants' Motions To Dismiss*, December 7, 2015 at 6 (footnote omitted).

The Court also adopts the Plaintiff's interpretation of paragraph 5(a) of the Term Sheet as requiring unanimous consent to lawsuits brought by TMF and the Plaintiff's distinction of derivative actions as brought "in the right of a company":

Even if the LLC Act permits such a waiver – which it does not – the provision at issue is expressly limited to the "[f]iling of a suit or litigation *by [TMF]*." (Term Sheet, Exh. A(e)) (emphasis added). Suits brought *by* a company directly are distinct from derivative actions brought *in the right of* a company. See *e.g. Weiner v. King*, 43 Misc. 3d 1203(A), at *11 (Sup. Ct. 2014) (distinguishing a suit "by" an LLC from a derivative suit brought "in its right") (copy attached); *Silver v. Chase Manhattan Bank*, 49 A.D.2d 851, 851, 374 N.Y.S.2d 8, 8 (N.Y. App. Div. 1975) (distinguishing between a direct action by a company and a derivative action on behalf of a company) (copy attached). In the absence of unequivocal language specifically prohibiting the filing of a derivative action *in the right of* TMF, RTO cannot be deprived of its statutory right to protect TMF's interests by filing this derivative action. See *Davis v. Davis*, No. 13 CVS 388, 2014 WL 6609397, at *4 (N.C. Super. Nov. 21, 2014) (holding that the plaintiffs have the right to bring a derivative action despite the operating agreement's requiring unanimous consent of all managers to "manage the business" and "bind the company") (copy attached); *Nama Holdings, LLC v. Greenberg Traurig, LLP*, 26 Misc. 3d 1214(A), 907 N.Y.S.2d 102 (Sup. Ct. 2008), *aff'd as modified*, 62 A.D.3d 578, 880 N.Y.S.2d 34 (N.Y. App. Div. 2009) (rejecting defendants' argument that plaintiff lacked standing or the right to bring a derivative suit based on a provision in the company's operating

agreement that expressly gave the managers the sole authority to bring lawsuits on behalf of the company) (copy attached).

Plaintiff's Opposition to Defendants' Motions To Dismiss, December 7, 2015 at 7.

For these reasons, the Court concludes as a matter of law that this derivative lawsuit, brought by RTO on behalf of TMF, has not been waived.

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY**

| | | |
|---|---|-----------------------|
| SABIN EWING, DDS, Individually and |) | |
| on behalf of CUMBERLAND |) | |
| PEDIATRIC DENTISTRY AND |) | |
| ORTHODONTICS, PLLC, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| VS. |) | NO. 15-1064-BC |
| |) | |
| BRENT MILLER, DDS; et al., |) | |
| |) | |
| Defendants. |) | |

**MEMORANDUM AND ORDER: (1) GRANTING DEFENDANTS'
MOTION IN PART BY DISMISSING DERIVATIVE CLAIMS
AND (2) PROCEEDING WITH RULE 16.02
CASE LITIGATION PLAN CONFERENCE**

* * *

As to the breach of fiduciary duty claims, the Defendants assert it should be dismissed because under Tennessee law, the members of a member-managed limited liability company owe fiduciary duties to the company, not to the individual members. *Pravak v. Meyer Eye Grp., PLC*, No. 07-2433-JPM-DKV, 2008 WL 2951101 at *7 (W.D. Tenn. July 25, 2008); *McGee v. Best*, 106 S.W.3d 48 (Tenn. Ct. App. 2002).

In opposition, the Plaintiff cites to the exception, stated in *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 23 (Tenn. Ct. App. 2005), that a majority LLC shareholder owes a fiduciary duty to a minority shareholder. From *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 23 (Tenn. Ct. App. 2005), this Court gleans that the

more complicated circumstance of oppression of a minority LLC member by a majority member is actionable for breach of fiduciary duty; whereas breach of uncomplicated contractual duties by an LLC member against the other is not actionable as breach of fiduciary duty.

The Defendants' reply is that there are no majority shareholders in the three PLLCs in issue because the *Verified Amended Complaint* at paragraphs 13, 14 and 15 states that each member owns the exact same percentage. In other words, the Plaintiff owns the same percentage as each one of the Defendants.

The Plaintiff's rejoinder is the principle that when individual shareholders, who cannot exert control over the corporation, form a control group, that group owes fiduciary duties to their fellow shareholders. *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (citing *Southern Pacific Company v. Bogert*, 250 U.S. 483, 492 (1919)); *see also Dubroff v. Wren Holdings, LLC*, No. 3940-VCN, 2009 WL 1478697, at *3 (Del. Ch. May 22, 2009).

Several questions of law emerge from the foregoing competing arguments. First, the control group theory, asserted by the Plaintiff, derives from cases involving corporations; no control group LLC case has been cited to the Court. Nevertheless, there is a rationale to apply the corporate control group analogue to this PLLC case.

“The typical LLC act is usually a hybrid of provisions culled from the state's partnership statutes and business corporation law.” *Anderson v. Wilder*, 2003 WL 22768666 *4 (November 21, 2003) (quoting Annotation, *Construction and Application of Limited Liability Company Acts*, 79 A.L.R. 5th 689, 698). The *Wilder* quotation of

A.L.R. further explains that in interpreting an LLC act or agreement, if the particular problem originates from the corporate aspect of the LLC, then the court should use precedent of corporate law. If the problem originates from the partnership aspect of the LLC, partnership precedent should be used.

Application of this analytical model of linking the LLC problem in issue to the corporate or partnership aspect of the LLC led the *Wilder* court to conclude that finding that a majority shareholder of an LLC stands in a fiduciary relationship to a minority shareholder was appropriate in the case. *Id.* at *6. Moreover, although it is not clear, *Wilder* seems to be somewhat analogous to the facts of the case at bar where some of the *Wilder* members, who allegedly wrongfully expelled the plaintiffs, had the same percentage interest as some of the plaintiffs. In other words, it appears that it was only by forming a group that some of those defendant members in *Wilder* were dominant.

The facts, then, of *Wilder* support the conclusion of law that in Tennessee a control group of a member-managed LLC can, under certain circumstances, owe a fiduciary duty to their fellow members—the theory espoused by the Plaintiff in this case.

In light of the facts in *Wilder*, it appears that Tennessee law may recognize that a control group of LLC members owes a fiduciary duty to a member not in control under certain circumstances. At the Motion to Dismiss preliminary phase of this case, the Court may not, then, dismiss Plaintiff's breach of fiduciary duty claim as a matter of law.

Turning next to the sufficiency of Plaintiff's pleading of control group breach of fiduciary duty, the Court is guided by *Dubroff v. Wren Holdings, LLC*, 2009

WL1978697, 35 Del. J. Corp. L. 1093, cited by the Plaintiff. *Dubroff* explains that in the control group analogue of corporations law, allegations of shareholders with “parallel interests” is insufficient to support an inference that a control group exists. *Id.* at *3. To constitute a control group, there must be allegations of a legally significant tie or link such as an agreement to work together to effect a self-dealing transaction or have a contractual agreement to work together. *Id.* at *4.

Reviewing the *Verified Amended Complaint*, the Court sees that at paragraphs 30(a) and (b) a control scheme among the Defendants, to receive a greater share of distributions that lawfully belong to the Plaintiff, is alleged. These allegations suffice to withstand the Motion to Dismiss.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

BRINCE WILFORD,)
)
 Plaintiff,)
)
 VS.) NO. 15-856-BC
)
 GABRIEL COLTEA,)
)
 Defendant.)

**MEMORANDUM AND ORDER GRANTING PLAINTIFF'S
SUPPLEMENTARY MOTION FOR BABC TO PRODUCE
DOCUMENTS HIGHLIGHTED ON PRIVILEGE LOG**

* * *

Analysis of Privilege Law

Within the foregoing context and from the authorities cited by Counsel, it is not apparent to this Court that *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), with its multi-factored indicia and requirement that a member must show good cause to access privileged documents, and its Delaware progeny *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Fund IBEW*, 95 A.3d 1264, 1278 (Del. 2014), are applicable. Their context is that the corporate entity is in a lawsuit against its stockholders for acting inimically to their interests, and the stockholders seek access to the entity's privileged documents.

The pending case, however, is not a lawsuit by the Plaintiff against the LLC. The LLC is not a party. The dispute is between the two individual members, the Plaintiff contending that the Defendant has acted in breach of the LLC Operating Agreement and fiduciary duties. BABC's capacity in this case is that it represents a nonparty. Thus, BABC's ethical concern of production of the Documents to Plaintiff does not appear to be implicated because it is the **members'** interest which became adverse when the Defendant announced the LLC was dissolved on April 3, 2015. At this stage of the lawsuit there is no decision that renders the Plaintiff and the LLC adverse. Accordingly *Garner* and *Wal-Mart* are not precise authority.

More on point is *In Re Newman*, 500 B.R. 328 (Bankr. D. Conn. 2013). Where the managing member's fraud and mismanagement of the LLC was in issue, the *Newman* analysis was that statutory criteria of "just and reasonable" for LLC members to obtain privileged information from manager members was established. Significant to the *Newman* court was that the LLC was not a party to the action.

Further, the issues in this lawsuit do not pertain exclusively to conduct which comes within the Defendant's Managing Member responsibilities and authority. As noted at the outset there are open questions, not yet decided, about the construction of the Section 8.4 termination right of a member in consideration of the section 4.2(a)(v) requirement of approval by the Investing Member of dissolution. Because the issues in dispute in the lawsuit include matters requiring member consent, the "Collective Corporation Client" theory, where the members are considered to be the LLC,

collectively, and may not assert the attorney-client privilege against one another, *see Montgomery*, 584 F. Supp. 2d at 1185, may be the applicable analogy. Under this analogy, there would be no ethical bar to BABC producing the Documents to the Plaintiff.

Even if, however, *Garner* and *Wal-Mart* are the applicable analytical model, the Plaintiff has demonstrated the good cause for production of the Documents those cases require.

The indicia present on this record are that:

- The Plaintiff is one of two members of the LLC and has a 50% voting interest.
- At this preliminary stage of the proceedings and having successfully challenged Defendant's partial motion for judgment on the pleadings, the Plaintiff's claim is colorable.
- Comparing the Documents in BABC's possession to those produced by Plaintiff is necessary for complete information on the Defendant's conduct in relation to the LLC.
- The Documents have been culled so as not to contain advice about the litigation.
- The Plaintiff is not "blindly fishing" for the reasons stated above in seeking production of these Documents.
- A Protective Order has been entered to address confidentiality.

The above analysis is the basis for the Court ordering production of the Documents.

APPENDIX F

Evaluation Form

TENNESSEE BUSINESS COURT DOCKET

Evaluation Form

1. Are you: Attorney for Plaintiff Attorney for Defendant
 Party Plaintiff Party Defendant

2. Is this your first experience with the Business Court Docket in Tennessee?
 Yes
 No

3. Have you participated in a specialized Business Court Docket in other states/countries?
 Yes
 No

4. Your experience with the Business Court Docket in Tennessee was:
 Better than in other state(s)/countries.
 Worse than in other state(s)/countries.
 No better/no worse than in other state(s)/countries.

5. How was your experience in the Business Court Docket in Tennessee different than in other states/countries? _____

6. Your experience with the Business Court Docket in Tennessee
 Better than Circuit/Chancery Courts in Tennessee.
 Worse than Circuit/Chancery Courts in Tennessee.
 No better/no worse than Circuit/Chancery Courts in Tennessee.
 No prior experience with Circuit/Chancery Courts in Tennessee.

7. How was your experience with the Business Court Docket different from Circuit/Chancery Courts in Tennessee? _____

8. How was your case resolved?
- Trial
 - Summary judgment
 - Dismissal
 - Non-suit
 - Alternate Dispute Resolution
 - Judicial Settlement Conference
 - Other – Explain: _____
9. Please explain why a non-suit was taken. _____

10. Was the case resolved in your favor?
- Yes
 - No
11. Was the Business Court Docket a cost effective way to resolve your dispute?
- Yes
 - No
12. What made it cost effective? _____

13. Do you have any suggestions on how to improve cost-effectiveness in the Business Court Docket? _____

14. The Business Court's handling of your case was,
- Quicker than the regular court.
 - The same as the regular court.
 - Slower than the regular court.
15. How would you rate the level of judicial involvement in your case?
- There was a proper amount of judicial involvement.
 - More judicial involvement was needed.
 - Less judicial involvement was needed.
 - I am dissatisfied with the amount of judicial involvement.

16. How would you rate the level of case management in your case?

- There was a proper amount of case management.
- More case management was needed.
- Less case management was needed.
- I am dissatisfied with the amount of case management.

17. Given the opportunity, would you utilize the Business Court Docket again?

- Yes
- No

18. On a scale of 1 to 5 with 1 being completely dissatisfied and 5 being completely satisfied, rate your level of satisfaction with the way your motions are presented in the Business Court Docket.

1 2 3 4 5

Additional Comments _____

19. On a scale of 1 to 5 with 1 being completely dissatisfied and 5 being completely satisfied, rate your level of satisfaction with the way the court handled discovery in the Business Court Docket.

1 2 3 4 5 N/A

Additional Comments _____

20. Are you satisfied with the case criteria for assignment or transfer of cases to the Tennessee Business Court Docket?

- Yes
- No

21. Would it be beneficial for the case criteria for assignment or transfer to include cases with alleged compensatory damages under \$50,000?

- Yes
- No

Additional Comments _____

22. In the alternative, do you believe the criteria for assignment or transfer should include an alleged amount of compensatory damages higher than \$50,000?

- Yes
- No

Additional Comments _____

23. Are you willing to share the compensatory damages amount received, if any, by your client at the resolution of the case?

- Yes
- No
- No compensatory damages
- Not applicable

Additional Comments _____

24. What was the compensatory damages amount received? _____

25. Would you favor an option of selecting a specific case management track for your case such as (1) Business Expedited – goal of resolution between 7 to 10 months; (2) Business Standard – goal of resolution between 10 to 12 months; (3) Business Complex – goal of resolution between 12 to 15 months?

- Yes
- No
- No preference

26. On a scale of 1 to 5 with 1 being completely dissatisfied and 5 being completely satisfied, rate your level of satisfaction with your Business Court experience.

1 2 3 4 5

27. Please explain the basis of your answer to the prior question.

28. Based on your experience with the Tennessee Business Court, would you prefer:
- That the program be kept as is with no changes.
 - That the program be kept, but changes should be made.
 - That the pilot program be discontinued.

Comments on changes that should be made: _____

29. Would you be willing to discuss your Business Court experience with members of the Tennessee Business Court Rules Advisory Commission?
- Yes
 - No

If so, provide your contact information here: _____

30. Feel free to share any other comments about your Business Court experience here:

31. Do you give permission for the Administrative Office of the Courts to quote your comment(s) without attribution in future publications about the Business Court Pilot Project Docket?
- Yes
 - No

APPENDIX G

Business Court Resource Materials

1. General Resources – Helpful Background Information on Business Courts

1. List of States with a Business Court/Commercial Court Program or Docket
2. The nationwide Innovation of Specialized Business And Commercial Courts For Effective Resolution of Business Disputes: Summary of Resources and Courts (April 11, 2014)
<http://www.americanbar.org/content/dam/aba/publications/blt/2014/05/courts-summary-201405.authcheckdam.pdf>
3. Best Practices In U.S. Business Courts – By Tim Dibble and Geoff Gallas –
http://www.jmijustice.org/wp-content/uploads/2014/06/BestPractices_in_BusinessCts.pdf
4. Future Trends in State Courts – Special Focus on Access to Justice (2011) –
http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Specialized-Courts-Services/~/_media/Microsites/Files/Future%20Trends/Author%20PDFs/Applebaum.ashx
5. Some Observations On Modern Business Courts And The Bar’s Role In Their Development by Lee Applebaum –
http://www.finemanlawfirm.com/tasks/sites/fineman/assets/File/Business_Bar_Leaders_Materials.pdf

2. State-by-State Eligibility Criteria For Business Court Designation

1. Alabama
 - i. Circuit Court, Tenth Judicial Circuit Of Alabama Administrative Order No. 2009-23 Commercial Litigation Docket –
http://10jc.alacourt.gov/AdminOrder2009_23_BusCt.pdf
2. Arizona
 - i. In the Matter of: AUTHORIZING A COMMERCIAL COURT PILOT PROGRAM IN THE SUPERIOR COURT IN MARICOPA COUNTY – Administrative Order No. 2015 – 15 –

<https://www.superiorcourt.maricopa.gov/superiorcourt/civildepartment/docs/supreme-court-ao-2015-15f.pdf>

3. California

- i. Fact Sheet – Complex Civil Litigation Program (July 2008) –
<http://www.courts.ca.gov/documents/comlit.pdf>
- ii. Complex Civil Case Questionnaire: Los Angeles –
<http://www.lacourt.org/forms/pdf/LACIV211.pdf>

4. Colorado

- i. Protocols For Cases Assigned to Public Impact Docket –
https://www.courts.state.co.us/Courts/County/Custom.cfm?County_ID=6&Page_ID=417

5. Connecticut

- i. Facts About The Connecticut Judicial Branch Complex Litigation Docket – http://www.jud.ct.gov/external/super/FACTS_090415.pdf

6. Delaware

- i. Administrative Directive of the President Judge of the Superior Court of the State of Delaware No. 2010-3 – Complex Commercial Litigation Division –
http://courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf

7. Florida

- i. Ninth Judicial Circuit Administrative Order No. 2003-17-1. Amended Order Creating Specialized Business Court Sub-Division of the Civil Division of the Circuit Court -
<http://www.ninthcircuit.org/sites/default/files/administrativeorder.pdf>

8. Georgia

- i. Atlanta Judicial Circuit Rule 1004 Business Case Division (as amended on May 7, 2015 by Order of the Supreme Court of Georgia) –
<http://www.fultoncourt.org/business/BusinessCourtRulesAmendedMay2015.pdf>

9. Illinois

- i. Commercial Calendar Section –
<http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/LawDivision/CommercialCalendarSection.aspx>

10. Iowa

- i. In the Matter of Establishment of the Iowa Business Specialty Court Pilot Project – Memorandum of Operation –
<http://www.acc.com/chapters/iowa/upload/business-court-memorandum-of-operation.pdf>
- ii. Cases Eligible to be heard in the Iowa Business Specialty Court Pilot Project -
<http://www.iowacourts.gov/wfdata/files/Committees/BusinessCourts/CasesEligibletoBeHeard%282%29.pdf>

11. Maine

- i. Administrative Order JB-07-1 – Establishment of the Business and Consumer Docket (Effective November 17, 2008) –
[http://www.courts.maine.gov/rules_adminorders/adminorders/JB-07-1%20\(A.11-08\).pdf](http://www.courts.maine.gov/rules_adminorders/adminorders/JB-07-1%20(A.11-08).pdf)
- ii. Application For Transfer To Business And Consumer Docket –
http://www.courts.maine.gov/fees_forms/forms/pdf_forms/bcd/BCD%20001,%20Application%20Form,%20Rev.%2001.14.pdf
- iii. Judicial Recommendation For Transfer To Business And Consumer Docket -
http://www.courts.maine.gov/fees_forms/forms/pdf_forms/bcd/BCD_002.RecommendationForm_Rev.%2010.14.pdf

12. Maryland

- i. Maryland Business and Technology Case Management Program Implementation Committee Final Report –
http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Business_Law/Subcommittees/Courts_and_Litigation/MDBusandTechCaseManagement%20ProgramFinalReportImplementationCommittee.PDF

13. Massachusetts

- i. Superior Court Administrative Directive No. 09-01 – Superior Court Business Litigation Sessions –
<http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/09-1.pdf>

14. Michigan

- i. Enrolled House Bill No. 5128 –
<http://www.legislature.mi.gov/documents/2011-2012/publicact/htm/2012-PA-0333.htm>
- ii. Business Courts as Laboratories for Litigation Process Improvement – Michigan Bar Journal, January 2015 –
<http://www.michbar.org/file/barjournal/article/documents/pdf4article2534.pdf>
- iii. Michigan’s Business Courts and Commercial Litigation – Past, Present, and Future – Michigan Bar Journal, August 2015 –
<http://www.michbar.org/file/journal/pdf/pdf4article2417.pdf>
- iv. Verification of Business Court Eligibility And Notice Of Assignment – 3rd Judicial Circuit of Wayne County –
<https://www.3rdcc.org/Documents%5CCivil%5CGeneral%5CBusiness%20Court%20Verification%20and%20Assignment%20Form%20MRJ%5E%5E%5E.pdf?timeStamp=635657248770364170>

15. Minnesota

- i. Rule 146. Complex Cases –
https://www.revisor.mn.gov/court_rules/rule.php?type=gp&id=146
- ii. Complex Case Program Election Form –
<http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/PublicForms/Civil/CIV118.pdf>

16. Nevada

- i. Report to the 71st Session of the Nevada Legislature by the Legislative Commission’s Subcommittee to Encourage Corporations and other Business Entities to Organize and Conduct Business in this State –
http://www.leg.state.nv.us/74th/Interim_Agendas_Minutes_Exhibits/Exhibits/Chancery/E012908B.pdf
- ii. Clark County Business Court Program –
<http://www.clarkcountycourts.us/ejdc/courts-and-judges/specialty-courts.html>
- iii. Business Court Civil Cover Sheet –
[file:///C:/Users/jseamon/Downloads/Business%20Court%20CoverSheet%20\(For%20Washoe%20and%20Clark%20Counties%20Only\).pdf](file:///C:/Users/jseamon/Downloads/Business%20Court%20CoverSheet%20(For%20Washoe%20and%20Clark%20Counties%20Only).pdf)

17. New Hampshire

- i. § 491:7-a Business and Commercial Dispute Docket –
<http://www.gencourt.state.nh.us/rsa/html/LI/491/491-7-a.htm>

18. New Jersey

- i. Notice to the Bar – Complex Business Litigation Program –
<http://www.judiciary.state.nj.us/notices/2014/n141113b.pdf>
- ii. New Jersey Courts News Release – Judiciary Announces Program for Complex Business Litigation –
<https://www.judiciary.state.nj.us/pressrel/2014/pr141113a.pdf>

19. New York

- i. § 202.70. Rules of the Commercial Division of the Supreme Court –
<https://www.nycourts.gov/rules/trialcourts/202.shtml#70>

20. North Carolina

- i. Notice of Designation to the Business Court –
http://www.ncbusinesscourt.net/ncbc_Website/Form%201.pdf
- ii. North Carolina Business Court Frequently Asked Questions –
http://www.ncbusinesscourt.net/FAQ/business_court_frequently_asked_.htm

21. Ohio

- i. Rules of Superintendence For The Courts Of Ohio – Rule 49 – Establishment of Commercial Dockets –
<http://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf>

22. Oregon

- i. Order Establishing the Oregon Complex Litigation Court –
http://courts.oregon.gov/OJD/docs/programs/utcr/CJO_10-066.pdf

23. Pennsylvania

- i. In the Court Common Pleas First Judicial District of Pennsylvania Trial division – Civil Administrative Docket: In Re: Commerce Case Management Program –
<http://www.courts.phila.gov/pdf/regs/2014/cptcad-01-2014.pdf>
- ii. “The Philadelphia Court of Common Pleas” Commerce Case Management Program in the Context of the Nationwide Development of Business Courts –
<http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/BizLitCommerceCourtArticleMay3.pdf>
- iii. The Commerce Court’s First Decade –
<http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Co>

ntents/WebServerResources/CMSResources/TPL_commerce_spring
09.pdf

- iv. Exhibit A – Commerce Program Addendum To Civil Cover Sheet –
<http://www.courts.phila.gov/pdf/forms/civil/COMMERCE-PROGRAM-ADDENDUM.pdf>

24. Rhode Island

- i. State of Rhode Island and Providence Plantations: Administrative Order No. 2011-10 –
<https://www.courts.ri.gov/Courts/DecisionsOrders/AdministrativeOrders/2011-10.pdf>

25. South Carolina

- i. Administrative Order Re: Business Court Pilot Program (2007-09-07-01) –
<http://www.judicial.state.sc.us/courtOrders/displayOrder.cfm?orderNo=2007-09-07-01>
- ii. In re Business Court Pilot Program Expansion Statewide (Jan. 3, 2014) –
<http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=909>
- iii. In re Business Court Pilot Program (Sept. 17, 2014) -
<http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=977>
- iv. Re-Open For Business – South Carolina’s Business Court Expands Statewide – South Carolina Lawyer, January 2015 –
<http://www.nelsonmullins.com/DocumentDepot/SCLawyer2015-Thomas.pdf>
- v. Motion For Case Assignment to the Business Court Pilot Program –
<http://www.judicial.state.sc.us/forms/pdf/SCCABC101.pdf>

26. West Virginia

- i. West Virginia Trial Court Rule 29 – Business Court Division -
<http://www.courtswv.gov/legal-community/court-rules/trial-court/chapter-2.html#rule29>
- ii. Judicial Motion To Refer Case To The Business Court Division –
<http://www.courtswv.gov/lower-courts/business-court-division/pdf/sampleForms/NewJudicialMotiontoReferForm.pdf>
- iii. Motion To Refer Case To The Business Court Division –
<http://www.courtswv.gov/lower-courts/business-court-division/pdf/sampleForms/AttorneyMotiontoReferForm.pdf>

3. Attorney Survey/Evaluation Forms and Information

1. California

- i. Evaluation of the Centers for Complex Civil Litigation Pilot Program – Interviews with Judges and Attorneys –
<http://www.courts.ca.gov/documents/compcivlitpub.pdf>

2. Georgia

- i. 2011 Business Court Satisfaction Survey Results –
http://www.fultoncourt.org/business/Business_Court_2011_Survey_Results.pdf
- ii. 2014 Business Court Annual Report –
http://www.fultoncourt.org/business/Business_Court_2014_Annual_Report.pdf
- iii. 2013 Business Court Annual Report –
http://www.fultoncourt.org/business/Business_Court_2013_Annual_Report.pdf

3. Iowa

- i. Iowa Business Specialty Court Pilot Project Initial Evaluation – August 2014 – <file:///C:/Users/jseamon/Downloads/-CL150011-relatedresources-Iowa.pdf>

4. Maryland

- i. Appendix A Input from the Maryland Business and Legal Communities –
http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Business_Law/Subcommittees/Courts_and_Litigation/MDBusandTechCourtTaskForceReport.PDF

5. Massachusetts

- i. Suffolk Superior Court Business Litigation Session Pilot Project – Final Report on the 2012 Attorney Survey -
http://iaals.du.edu/sites/default/files/documents/publications/final_bls_survey_report.pdf

6. New York

- i. Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups –
<https://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf>
- ii. Appendix B: Invitation Letter to Focus Groups -
<https://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf>

- iii. Appendix B: Complex Civil Litigation User Survey Results Summary –
<https://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf>
- iv. Appendix C – Attorney Interview Protocol #1 –
<https://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf>

7. North Carolina

- i. North Carolina Business Court Annual Report 2015 –
<http://www.ncbusinesscourt.net/ref/030115.Business%20Court%20Report%20w%20Appendix.zz.pdf>

8. Ohio

- i. Ohio Supreme Court Task Force on Commercial Dockets: Appendix C – Commercial Docket Survey Results –
<https://www.supremecourt.ohio.gov/Boards/commDockets/Report.pdf>

9. Pennsylvania

- i. Study and Analysis of the Philadelphia Commerce Program (January 2005) –
<http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/Committeeof70.pdf>

10. South Carolina

- i. Report on South Carolina’s Business Court Pilot Program –
<https://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/SouthCarolinaBusinessCourtReport2009.pdf>

11. West Virginia

- i. Supreme Court of Appeals of West Virginia – Business Court Division 2014 Annual Report – <http://www.courtswv.gov/lower-courts/business-court-division/pdf/2014AnnualReportOpt.pdf>
- ii. Supreme Court of Appeals of West Virginia – Business Court Division 2013 Annual Report – <http://www.courtswv.gov/lower-courts/business-court-division/pdf/2013AnnualReport.pdf>

4. Sampling of States’ Business Court Setup

Arizona

- Administrative Order of the Supreme Court created a pilot commercial court in the Superior Court in Maricopa County to run for three years. The presiding judge of

Maricopa County designated three Superior Court judges to be the Commercial Court Judges.

- This Administrative Order was entered pursuant to Article VI, Section 3, of the Arizona Constitution .
- In Arizona, appellate judges and superior court judges in Maricopa and Pima counties are chosen through merit selection. After an initial two-year term, judges must stand for retention. Superior court judges in smaller counties are chosen in nonpartisan elections.

Georgia

- On June 3, 2005, the Supreme Court of Georgia promulgated Atlanta Judicial Circuit Rule 1004 governing the procedures of the Business Court, as amended on June 6, 2007, May 6, 2009, September 1, 2010, and October 11, 2012. Presently, Fulton County and Gwinnett County Georgia are running a business case division. As of 2014, three Senior Judges and one Active Judge serve the Business Court and receive case assignments on a rotating basis. The Chief Judge appoints the Business Court Bench for up to a two year term.
- In Georgia, judges are chosen in nonpartisan elections, but mid-term vacancies are filled through gubernatorial appointment.

Iowa

- Administrative Order of the Supreme Court of Iowa created a pilot program for a business specialty court to maintain a statewide docket comprising business legal disputes. At least three Iowa district court judges were selected by the Iowa Supreme Court from a pool of applicants to serve as the judges for the Iowa Business Specialty Court. During the pilot project, cases transferred to the business court docket will be heard in the county in which they are filed and properly venued under current Iowa Rules.
- In Iowa, judges are chosen through merit selection, where a nominating commission identifies a list of highly qualified candidates and the governor appoints a judge from that list. After one year in office, and then at regular intervals, judges stand in retention elections.

Maine

- Administrative Order of the Supreme Court created a statewide Business and Consumer Docket which is managed by two judges from either trial courts designated by the Chief Justice of Supreme Court.
- Maine's judicial selection process for the state is similar to the process for selecting federal judges in that judges are nominated by the governor and confirmed by the senate, but they serve seven-year terms.

New Hampshire

- Administrative Order of the Supreme Court adopted a new court rule that created the Superior Court Business and Commercial Dispute in Merrimack County Superior Court. The presiding Superior Court Justice of Merrimack County can

from time-to-time assign Superior Court Justices to the Business and Commercial Dispute Docket.

- This Administrative Order adopting a new court rule that created the Superior Court Business and Commercial Dispute Docket was entered pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51(A)(7).
- In New Hampshire, judges are nominated by the governor and confirmed by the executive council, a five-member body elected by the people to advise the governor.

New Jersey

- Administrative Order of the Supreme Court created a statewide Complex Litigation Program that will designate a Complex Litigation Judge in each of the 15 court districts in New Jersey.
- This Administrative Order was entered pursuant to the New Jersey Constitution, Ar. VI, sec. 2, par. 3.
- In New Jersey, the governor, with the approval of the senate, chooses all judges in the state. Judges stand for reappointment after seven years in office, and once reappointed they serve until they reach the age of 70.

Oregon

- Administrative Order of the Chief Justice of Oregon created a statewide Complex Litigation Court. The judges for the Court are drawn from sitting circuit court judges who apply for to a managing panel by submitting their resumes.
- This Administrative Order was entered pursuant to Oregon Revised Statute § 1.002 and Oregon Uniform Trial Rule 1.020.
- In Oregon, judges are selected in nonpartisan elections. The governor appoints judges to fill mid-term vacancies on the courts, and the appointee stands for election at the next general election.

Rhode Island

- Administrative Order of the Presiding Justice of Rhode Island created a statewide Business Calendar for the counties of Providence and Bristol, Kent, Washington and Newport. It is unclear whether they use existing trial judges or some other judges for the Business Calendar.
- In Rhode Island, are selected based on a merit selection via gubernatorial appointment from a nominating commission with senate confirmation.

South Carolina

- Administrative Order of the Supreme Court created a pilot Business Court program in Charleston, Greenville and Richland Counties. The Supreme Court designated three judges to serve as the Business Court Judges – one from each county. These three judges were to preside over the Business Court in addition to their other duties as circuit court judges.

- In South Carolina, there is a judicial merit selection commission that considers the qualifications and fitness of candidates and then submits the names of up to three nominees to the general assembly. The general assembly must elect one of these nominees.

APPENDIX H

List of States With a Business/Commercial Court Program or Docket

1. Alabama – Commercial Litigation Docket (December 18, 2009)
2. Arizona – Pilot Commercial Court (July 1, 2015)
3. California – Complex Civil Litigation Program (2000)
4. Colorado – Public Impact Docket (2013)
5. Connecticut – Complex Litigation Docket (1998)
6. Delaware – Complex Commercial Litigation Division (May 2010)
7. Florida – Complex Litigation Division (2004)
8. Georgia – Fulton County Business Court (October 2005)
9. Illinois – Commercial Calendar Section (September 1992)
10. Iowa – Iowa Business Specialty Court (Pilot Project Began December 21, 2012)
11. Maine – Business and Consumer Docket (June 2007)
12. Maryland – Business and Technology Case Management Program (January 2003)
13. Massachusetts – Superior Court Business Litigation Session (1999)
14. Michigan – Michigan Business Court (2001)
15. Minnesota – Complex Case Program (2013)
16. Nevada – Nevada Business Court (2009)
17. New Hampshire – Business and Commercial Dispute Docket (2008)
18. New Jersey – Complex Business Litigation Program (January 1, 2015)
19. New York – Commercial Division (November 6, 1995)
20. North Carolina – North Carolina Business Court (1996)
21. Ohio – Commercial Dockets (May 6, 2008)
22. Oregon – Complex Litigation Court (December 2, 2010)
23. Pennsylvania – Commerce Court Case Management Program (2000)
24. Rhode Island – Business Calendar Program (2001)
25. South Carolina – Business Court Pilot Program (October 1, 2007)
26. Tennessee – Davidson County Business Court Pilot Project (May 1, 2015)
27. West Virginia – Business Court Division (October 10, 2012)