IN THE CHANCERY COURT FOR KNOX COUNTY TENNESSEE

Bee Deselm, Plaintiff, and James Gray and John Schmid, Intervening Plaintiffs, v. Timothy Hutchison, Knox County Tennessee, Michael W. Moyers, and Randall E. Nichols, Defendants.	)	No. 164615-1

James Gray, Plaintiff, and Bee DeSelm and John Schmid, Intervening Plaintiffs, v. Timothy Hutchison, Knox County Tennessee, and Knox County Election Commission Defendants.	)	No. 166649-1

John Schmid, Plaintiff, and Bee DeSelm and James Gray Intervening Plaintiffs v. Knox County Election Commission and Brook Thompson Defendants.	)))))))))))))))))))	No. 166706-1

PLAINTIFFS' JOINT MEMORANDUM ON DISQUALIFICATION

This Court Is Disqualified Because There Exist A Special Relationship Exists Between This Court and Defendant Sheriff Hutchison and His Employees At Will Who Are This Court Officers And Bailiffs

T.C.A.§ 8-8-201 provides it is a duty of the sheriff:

> (2)(A) Except as provided in subdivision (a)(2)(B), attend upon all the courts held in the county when in session; cause the courthouse or courtroom to be kept in order for the accommodation of the courts; furnish them with fire and water; and obey the lawful orders and directions of the court;

Tennessee Supreme Court Rule 10, Canon 3(C)(2) provides:

> **C. Administrative Responsibilities.**
>
> (2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

Sheriff Hutchison is an officer of this Court.

This Court's bailiffs and court 0fficers who are employees at will of Sheriff Hutchison are specifically mentioned in the Comments to Supreme Court Rule 10(C)(2) as being within the rule.

The relationship of a sheriff to the courts dates back to early authority in Tennessee.

> The rule in its rigor, however, has not, in the courts of some of the States, been applied to cases where a sheriff or his regular deputy has charge of the jury. These functionaries being regular officers of the court, being considered a part of the court itself, and it being one of the duties of the sheriff and his deputies to take charge of juries in such cases. The argument is that they are bound by their official oaths to perform this, as other official duties, under the instructions of the court, faithfully and according to law. The official oath of the sheriff is as follows: "I do solemnly swear that I will perform with fidelity the duties of the office to which I have been elected, and which I am about to assume." The regular deputy of the sheriff is required to take the same oath. Code, sec. 758. In the case of Bennett v. The Commonwealth, 8 Leigh, 745, a case of murder in the first degree, the record stated that on each

> day the jurors were committed to the custody of the sheriff, who is directed to attend and keep them together in one of the jury rooms, without communication with any person, and to cause them to appear here to-morrow, but in no instance is it stated that the sheriff was sworn to the performance of that duty. The majority of the court were of opinion that the sheriff is bound ex officio to keep the jury, and it is not indispensably necessary that he should be sworn, though it is generally done out of abundance of caution. But if it were admitted to be necessary in this case, we should be bound to presume that in fact the sheriff was sworn, as the record does not show the contrary. 8 Leigh, 745; 8 Rob., La., 593.

Clark v. State, 1876 WL 5020, *2 (Tenn. 1876)

Pursuant to Supreme Court Rule 10(C)(2) the sheriff and his employees are subject to the same ethical rules as this Court. Where an officer of this Court has a interest in the proceeding, such as the sheriff in this case, that disqualification is imputed to the Court.

Supreme Court Rule 10 Cannon 3(E) requires disqualification where a judge's impartiality might reasonably be questioned. Clearly this Court would be disqualified if the Court, or its employees, were a defendant in a civil suit that was before this Court.

The standard for disqualification is not whether the Court finds there is an actual conflict, interest or bias. The standard is whether there exist an appearance of a conflict, interest or bias. In this case there exist both an actual conflict, interest and bias as well as an appearance of conflict, interest and bias.

In 1912 the Tennessee Supreme Court in a civil disbarment trial stated, "[I]t is of immense importance, not only that justice shall be administered ..., but that [the public] shall have no sound reason for supposing that it is not administered." *In re Cameron*, 151 S.W. 64, 76 (1912).

> When a motion to recuse is made, a judge should grant the motion whenever his or her [in this case the Sheriff's employees attending the court or taking charge of the jury] "impartiality might reasonably be questioned." Code of Judicial Conduct, Canon 3(C), Tenn.Sup.Ct.R. 10, *State v. Jimmy D. Dillingham*, No. 03C01-9110-CR-319, 1993 WL 22155 (Tenn.Crim.App., Knoxville, Feb. 3, 1993). Tennessee, like many jurisdictions, employs an objective rather than a subjective standard. Thus, while a trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially [in this case the Sheriff's employees attending the court or taking charge of the jury], Lackey v. State, 578 S.W.2d 101, 104 (Tenn.Crim.App.1978), cert. denied (Tenn.1979), recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality [in this case the Sheriff's employees attending the court or taking charge of the jury]. State v. Cash, 867 S.W.2d 741 (Tenn.Crim.App.1993).

Alley v. State, 882 S.W.2d 810, 820 (Tenn.Cr.App.,1994).

Article VI, Section 1 of the Tennessee Constitution guarantees Plaintiff the right to not have a judge that "might be interested"

This Court Is Disqualified Because Of Political Interest

This Court is standing for reelection.

If the May 2, 2006 primary date stands, the final date for a candidate to run against this Court as a write-in is April 12, 2006 providing this Court an appearance of political and personal interest to delay this case until after this Court is assured of re-election and no opposing candidate. This Court's same interest create a bias of this Court against granting relief by a June 19, 2006 primary election and reopening qualifying.

In addition, this Court is running for reelection on the same Republican Ballot with Sheriff Hutchison and 17 other Knox County Republican Office holders that are potentially term limited by an decision in this case. Campaign funds are shared by this Court with the Republican candidates.

This Court is currently running unopposed for re-election in the Republican Primary and there is no Democratic Candidate. Consequently, if the May 2, 2006 primary proceeds and no write-in candidate qualified to obtain more that this Court in the Republican Primary or gets 5% of the votes in the Democratic Primary, this Court gets reelected at the May 2, 2006 Primary.

The same is true of Knox County Law Director Mike Moyers who seeks to be elected to Chancellor of Part III of this Court but remains Counsel of Record in these cases. Mr. Moyers is currently running unopposed for re-election in the Republican Primary and there is no Democratic Candidate. Consequently, if the May 2, 2006 primary proceeds and no write-in candidate qualified to obtain more than Mr. Moyers in the Republican Primary or gets 5% of the votes in the Democratic Primary, Mr. Moyers gets reelected at the May 2, 2006 Primary.

This Court is Disqualified Because It Has More Than A *de minimus* Financial Interest In This Case

As noted this Court shares campaign funds with Eighteen Republican Candidates that are potentially disqualified by Knox County's Term Limits.

In addition, this Court as a local taxpayer has more than a *de minimus* interest in both the cost of this litigation and the resulting outcome.

The Constitution of Tennessee, Article VI, Section 11 and Supreme Court Rule 10, Cannon 3 require a judge with financial interest in a case be disqualification.

"That a stockholder in a company which is [a] party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law." *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971 (4th Cir.1971). The Tenth Circuit in *Getter v. Wal-Mart*, 66 F.3d 1119 (10th.Cir.1995) held:

> "courts have presumed bias in extraordinary situations where a prospective juror has had a direct financial interest in the trial's outcome." Id. at 1468. As examples of such extraordinary situations, we cited a case in which a prospective juror was a stockholder in or an employee of a corporation that was a party to the suit. Id. (citing *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir.1984); *Francone v. Southern Pac. Co.*, 145 F.2d 732 (5th Cir.1944)). "In these situations, the relationship between the prospective juror and a party to the lawsuit 'point[s] so sharply to bias in [the] particular juror' that even the juror's own assertions of impartiality must be discounted in ruling on a challenge for cause." Id. (citations omitted)
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> The challenged prospective juror in this case, John Agin, disclosed during voir dire that he owned stock in defendant corporation and that his wife was then employed by defendant. The district court questioned Mr. Agin regarding his ability to be a fair and impartial juror in light of his connections to defendant. Mr. Agin responded that he had no doubt that he could be fair and impartial. When later questioned by Defendant's counsel, Mr. Agin assured counsel that he could support a verdict against defendant if the evidence presented at trial warranted such a result.

> Nevertheless, when the district court refused to dismiss Mr. Agin for cause, Defendant used a peremptory challenge to remove him from the jury.
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> Despite Mr. Agin's assurances of his impartiality, the district court abused its discretion by denying Defendant's challenge for cause. Due to his stock ownership and his wife's employment, Mr. Agin's financial well-being was to some extent dependent upon defendant's. This is precisely the type of relationship that requires the district court to presume bias and dismiss the prospective juror for cause.[1]

In *United States v. Polichemi*, 219 F.3d 698, 704 (7th.Cir.,2000) the Seventh Circuit held:

> The concept of implied bias is well-established in the law. Many of the rules that require excusing a juror for cause are based on implied bias, rather than actual bias. For example, a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case. See, e.g., United States v. Annigoni, 96 F.3d 1132, 1138 (9th Cir.1996); Getter v. Wal-Mart Stores, 66 F.3d 1119, 1122 (10th Cir.1995). Such a juror may well be objective in fact, but the relationship is so close that the law errs on the side of caution.
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> In its decision in *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir.1968), the Second Circuit traced the implied bias doctrine back to Chief Justice John Marshall's opinion in *United States v. Burr*, 25 F.Cas. 49 (No. 14692g) (C.C.D.Va.1807), one of several opinions in the prosecution of Aaron Burr. There the Chief Justice addressed the ways in which the law strives to assure an impartial jury:

> Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality.

On analysis, the financial interests of a corporate stockholder in a verdict for damages affecting the value of their stock or by reducing their dividends, is the same as the financial interest of this Court as a local taxpayer in a case that impacts increasing their taxes or reducing local services. Stockholders invest in a corporation; taxpayers invest in their government. A corporation operates for the benefit of its stockholders; a local government operates for the benefit of its taxpayers. Corporations provide stockholders profits; local governments provide taxpayers services.

Stockholders vote for directors of the corporation; local taxpayers vote for officers of their government.

Federal cases hold that employees of a corporation have too close a relationship to sit on a case where the corporation is a party because employees are “somewhat dependant” on the corporation for their financial wellbeing. A county residence is “somewhat dependant” on their county government for services that assist in their financial wellbeing. For example, unless the county provides adequate free public education its residents must educate their children with their own money. Utilities, roads and services impact property values of residence and their ability to carry on their livelihood.

The law is clearly established that taxpayers of municipalities have a “direct and present” financial interest in expenditure of tax dollars; the expenditure of public funds by a municipality creates “a burden on its taxpayers”; the financial interest of a taxpayer of a municipality is not *de minimus*; and that taxpayers of municipalities have a legally recognized property interest in public funds sufficient to provide taxpayers standing to sue to protect public funds.

In *Ragsdale v. City of Memphis*, 70 S.W.3d 56 (Tenn.App. 2001) the Court held Citizen taxpayers had standing to file action to prevent expenditure of public funds. Prior demand is not required of a citizen taxpayer where the status and relation of the involved officials to the transaction in

question is such that any demand would be a formality. Where the officials involved participated in the actions questioned, a prior demand is a mere formality and is excused).

> It has been settled for over 100 years that a taxpayer of a county may maintain an action to prevent the commission of an unlawful act by public officers, the effect of which would be to divert a public fund from the purpose for which it was intended, by law and thus increase his burden of taxation.

State ex rel. Baird v. Wilson County, 371 S.W.2d 434, 439 (Tenn.App. 1963). *see also Metropolitan Government of Nashville and Davidson County v. Fulton*, 701 S.W.2d 597, 600-601 (Tenn. 1985)

In *Crampton v. Zabriskie*, 101 U.S. 601, 25 L.Ed. 107 (1879) the Supreme Court held taxpayers could sue for an injunction to prevent a municipality from misappropriating funds[1] because misappropriating funds "create burdens upon property-holders". Id. 101 U.S. 609. In this case, a verdict for damages places a burden on Knox County taxpayers and establishes good cause for their excusal as jurors.

Later, in *Frothington v. Mellon*, 262 U.S. 447, 486, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) the Supreme Court held a federal taxpayer does not have standing to challenge federal misappropriation of funds because of the federal taxpayer has a *de minimus* interest. The Supreme Court reaffirmed "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent

their misuse is not inappropriate." Jurors from Knox County have a "direct and immediate interest" in a verdict for damages that establishes good cause for their excusal.

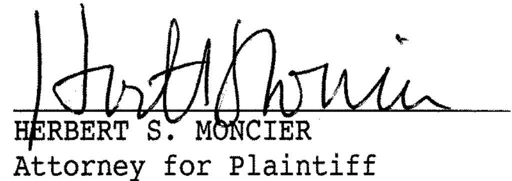
In *Doremus v. Board of Education*, 342 U.S. 429, 433-434, 72 S.Ct.394, 397, 96 L.Ed. 475Supreme Court of the United States (U.S.1952) the Supreme Court reaffirmed standing of municipal taxpayers to sue over misappropriation of funds.

In *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) the Supreme Court held that the requirements of due process of law under the Fifth Amendment disqualified a judge from sitting in cases where the judge had a direct pecuniary interest in fees and cost.

In *Taub v. Com. of Ky.*, 842 F.2d 912, (C.A.6 (Ky.),1988) the Sixth Circuit distinguished a local taxpayers right to sue from a state taxpayer and recognized a municipal taxpayer's interest in the application of public funds to be "direct and immediate."

This Court, as a local Knox County taxpayer, has standing to sue over the application of public funds in this case.

Pursuant to Article VI, Section 11 and Supreme Court Rule 10, Cannon 3 financial interest of this Court as a Republican Candidate and as a Knox County taxpayers require this Court disqualify itself.



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

1. Michael E. Moyers, The Knox County Law Director;

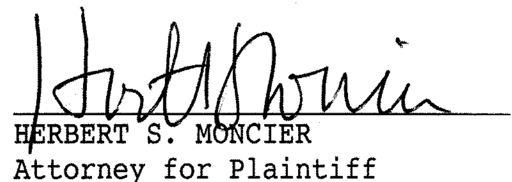
2. Robert H. Watson, Jr., Attorney for Timothy Hutchison;

3. Jerold Becker, personal attorney for Michael E. Moyers;

4. James Murphy, attorney for the Knox County Election Commission;

5. Janet Kleinfelter, Senior Counsel, Tennessee Attorney General's Office, Attorney for Coordinator of Elections for the State of Tennessee.

6. Randall E. Nichols, Knox County District Attorney General.



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