IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JEROME BELL, JAMES SHEPPARD, MARTEZE HARRIS, DOMONIC BUTLER, MICHAEL DAVIS, RICKY LAMBERT, JARMALE WALKER, et al. — PLAINTIFFS

VERSUS — CIVIL ACTION NO. 3:15-cv-732-TSL-RHW

THE CITY OF JACKSON, MISSISSIPPI — DEFENDANT

PROFESSIONAL BAIL AGENTS ASSOCIATION OF MISSISSIPPI, INC. d/b/a MISSISSIPPI BAIL AGENTS ASSOCIATION — PROPOSED INTERVENOR

MEMORANDUM BRIEF IN SUPPORT OF MOTION TO INTERVENE

Professional Bail Agents Association of Mississippi, Inc., d/b/a/ Mississippi Bail Agents Association ("MBAA") submits this *Memorandum Brief in Support of Motion to Intervene* stating as follows:

INTRODUCTION

More than one hundred and fifty (150) years ago, the Supreme Court held, "**[c]ontracts in violation of statutes are void**; and they are so whether the consideration to be performed or the act to be done be a violation of the statute. *Harris v. Runnels*, 53 U.S. 79, 83 (1851). (Emphasis our own). The parties' Settlement Agreement in this case

runs afoul of Mississippi statutory law, and thus, the provisions applying to secured monetary bail contained within it are void. The Mississippi Code provides:

> "The municipal judge **shall** set the amount of bail for persons charged with offenses in municipal court and may approve the bond or recognizance therefor."

Miss. Code Ann. § 21-23-8 (1972), *as amended*. (Emphasis our own). Further, the decision of whether to impose bail, the amount of bail, and approval of the bond or recognizance pertaining to the bail is a judicial function, not a function private citizens and a municipality, through its city council (legislative) or executive officers, can *agree* to circumvent. Such an agreement, as there is in this case, clearly violates the separation of powers clauses found in Article I, Sections 1 and 2 of the Mississippi Constitution (1890), which provides in relevant part:

> Section 1. The powers of the government of the State of Mississippi shall be divided into three separate departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are execute to another.
>
> Section 2. No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.

Miss. Const. art. 1, Sections 1 & 2. The setting of bail for criminal defendants is a function of the judiciary, and any restraint upon or elimination of that function by another branch of government violates the Mississippi Constitution (1890). "[J]udicial power cannot be taken away by legislative action. Nor may the Legislature regulate the judicial discretion or judgment that is vested with the courts." *City of Belmont v. Miss. State Tax Comm'n*, 860 So.2d 289, 297 (Miss. 2003) (citing 16A Am.Jur.2d *Constitutional Law* § 286, at 209-10

(1998)). "We want to emphasize that not every person accused of a crime should be released on his own recognizance or nominal bail. **That decision still rests in the sound discretion of the judicial officer**." *Lee v. Lawson*, 375 So.2d 1019, 1024 (Miss. 1979). (Emphasis our own).

The Plaintiffs and the City of Jackson cannot *agree* to subvert the judicial process and ignore constitutional and statutory law that bears directly on setting bail for criminal defendants. In doing so, MBAA and its members have been affected directly and adversely, compelling them to seek the Court's permission to intervene to protect their interests as the existing parties have not and cannot adequately do so. MBAA does not seek intervention to undo the *entire* Settlement Agreement, only to challenge validity of approximately nine (9) paragraphs addressing the use of secured monetary bail for new arrestees.

FACTUAL BACKGROUND

Beginning in early 2014 and continuing through the present, at least fifteen (15) class-action lawsuits have been filed in federal courts in six (6) different states seeking declaratory and injunctive relief on behalf of certain individuals for alleged unconstitutional acts and policies of various municipalities. These alleged unconstitutional acts and policies focus on two groups of individuals: (1) persons who either allegedly owe money to the municipality for past-due fines, court costs, and other fees, i.e., a debt ("delinquent persons"); and (2) persons who are/have been arrested for new offenses for which the municipalities have jurisdiction to prosecute ("arrestees"). Seven (7) of the lawsuits allege constitutional violations based on a municipality's use of

a "bail schedule." Two (2) of the lawsuits seek/sought a declaration that the State of California's "wealth-based" bail system is unconstitutional. The remaining six (6) suits allege constitutional violations committed by a municipality for incarcerating individuals when the individuals allegedly owe the municipality money for past-due fines, court costs, and other fees arising from previous misdemeanor and traffic offense convictions. The Complaint in the instant case falls within the latter category – delinquent persons.

Though the various lawsuits allege different facts constituting the constitutional violations, one of the over-arching themes of all the cases remains constant: a campaign against the bail and commercial surety industry arguing the use of secured monetary bail for any person is unconstitutional. Generally, the complaint that initiates the lawsuit against the municipality will only allege unconstitutional acts and policies affecting either delinquent persons or arrestees, but not both. However, as often happens, a settlement is reached between the plaintiffs and the municipality affecting the rights of both delinquent persons *and* arrestees despite such relief not being prayed for in the complaint and with no notice provided to affected third persons and/or non-parties.

By way of illustration, in *Jenkins vs. The City of Jennings*, 4:15-cv-252-CEJ (E. D. Mo. 2015), the named plaintiffs were alleged delinquent persons who brought a class action alleging the City of Jennings, Missouri operated a "debtor's prison" by incarcerating indigent persons incapable of paying off fines, fees, court costs, and/or restitution in violation of the plaintiffs' due process and equal protection rights.[1] However, pursuant

[1] *See* Exhibit "C" to Motion to Intervene.

to the settlement of the parties in that case and the resulting permanent injunction, the City of Jennings is also now enjoined from using secured monetary bail/bond for any violation that may be prosecuted by the City of Jennings, and further, is required to release all misdemeanor arrestees on their own recognizance or on an unsecured bond as soon as practicable after booking.[2]

Further, in *Kennedy vs. The City of Biloxi, Mississippi, et al*., 1:15-cv-348-HSO-JCG (S.D. Miss. 2015), where the named plaintiffs were also delinquent persons who brought a class action alleging that the City of Biloxi operated a "debtor's prison" by incarcerating indigent persons incapable of paying off fines, fees, court costs, and/or restitution in violation of the plaintiffs' due process and equal protection rights.[3] However, pursuant to Paragraph 9 of the settlement agreement reached on March 4, 2016, the City of Biloxi is now prohibited from requiring any secured money bail/bond without first satisfying various conditions.[4]

Therefore, despite not praying for an injunction on the use of secured money bail/bond in their complaint in either *City of Jennings* or *City of Biloxi*, such relief became a part of the settlement agreement. Like the instant case, the settlement agreement in *City of Biloxi* was not written into a permanent injunction or judgment.

The converse of *City of Jennings* and *City of Biloxi* has also materialized. In *Thompson v. Moss Point, Mississippi*, Case No. 1:15cv182-LG-RHW (S.D. Miss. 2015), the

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2 *See* Exhibit "D" to Motion to Intervene.
3 *See* Exhibit "E" to Motion to Intervene.
4 *See* Exhibit "F" to Motion to Intervene.

named plaintiff, an arrestee, brought a class action alleging the City of Moss Point's secured bail schedule violated her and other class members' due process and equal protection rights.[5] However, pursuant to the settlement agreement and final judgment in that case, the City of Moss Point is now also prohibited from incarcerating any person "for non-payment of any monetary sum from fines, costs, or bond revocations unless the constitutional procedures set forth in *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983), and *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011), have been complied with."[6] Additionally, secured monetary bail was completely eliminated for ALL persons regardless of their financial condition and/or other circumstances. Again, despite not praying for relief of delinquent persons in the complaint, such relief became a part of the final judgment.[7]

To re-emphasize, Plaintiffs' attorneys have filed numerous lawsuits across the country, while routinely espousing their goal of "ending the American money bail system."[8] To date, no such lawsuit has proceeded to a trial on the merits as all have either been settled or remain pending. The Complaint initiating the case *sub judice* prays for relief against delinquent persons only and not arrestees. [Doc. 1]. However, as illustrated *supra*, the aforementioned cases illuminate a pattern whereby these lawsuits begin with a narrow scope and turn into full-fledged assaults on the institution of bail itself.

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5 *See* Exhibit "G" to Motion to Intervene.

6 *See* Exhibit "H" to Motion to Intervene.

7 The final judgment in *City of Moss Point* was entered on November 12, 2015 and has attached thereto the Settlement Agreement of the parties.

8 Equal Justice Under Law, Litigation: Ending the American Money Bail System, http://bit.ly/1TXOgJv (last visited June 26, 2016).

On June 20, 2016, this Court entered its Final Judgment which ordered the parties to comply with the terms of the Agreement to Settle Claims for Declaratory and Injunctive Relief ("Settlement Agreement"). [Doc. 14]. Despite the Plaintiffs' Complaint lacking any allegations, factual or otherwise, of secured monetary bail or Mississippi's bail statutes being unconstitutional nor the City of Jackson's implementation and use of secured monetary bail in its Municipal Court being unconstitutional, the Settlement Agreement prohibits the City of Jackson from using secured monetary bail for "persons arrested for *any* misdemeanor that may be prosecuted by the City in its Municipal Court." [Doc. 14, ¶ 34]. (Emphasis our own).

As proposed intervenor, MBAA has a direct stake in the outcome of this case, as allowing the Settlement Agreement as it is currently written to stand would effectively hold the Eighth Amendment unconstitutional. MBAA members are the bail agents who facilitate the posting of bail bonds and ensure that the bailee attends trial, and they have a right to be heard when their entire industry hangs in the balance. The Eighth Amendment to the United States Constitution, Article 3, Section 29 of the Mississippi Constitution (1890), and the Mississippi bail statutes are the laws upon which MBAA and its members' industry are premised on. The parties' agreement to circumvent these laws and ignore the judicial process has a direct effect on MBAA and its members, and all Mississippians.

Accordingly, MBAA seeks intervention to protect its members' interests as it relates to the Settlement Agreement, in that the eradication of secured monetary bail in the Jackson Municipal Court through the parties' Settlement Agreement is contrary to

both constitutional and state law as well as having consequences on MBAA's members' past, present, and future surety contracts. MBAA and its members have an interest relating to subject of this case such that the current disposition of this case has impaired or impeded its ability to protect such interest. *See* FED. R. CIV. P. 24(a)(2).

The fifteen (15) aforementioned cases may be categorized as follows:

Type of Case	***State Where Filed and Style of Case***
"Delinquent Persons" Cases	**Alabama**: • *Mitchell, et al. vs. The City of Montgomery*, 2:14-cv-186-MHT-CSC (M.D. Ala. 2014) **Louisiana**: • *Cain, et al. vs. City of New Orleans, et al.*, 2:15-cv-4479-SSV-JCW (E. D. La. 2015) **Mississippi**: • *Bell, et al. vs. The City of Jackson, Mississippi*, 3:15-cv-732-TSL-RHW (S. D. Miss. 2015) • *Kennedy, et al. vs. The City of Biloxi, Mississippi, et al.*, 1:15-cv-348-HSO-JCG (S. D. Miss. 2015) **Missouri**: • *Fant, et al. vs. The City of Ferguson*, 4:15-cv-253-AGF (E. D. Mo. 2015) • *Jenkins, et al. vs. The City of Jennings*, 4:15-cv-252-CEJ (E. D. Mo. 2015)

Type of Case	*State Where Filed and Style of Case*
"Bail-Schedule" Cases	**Alabama**: • *Cooper, et al. vs. The City of Dothan*, 1:15-cv-425-WKW-TFM (M. D. Ala. 2015) • *Jones, et al. vs. The City of Clanton*, 2:15-cv-34-MHT-WC (M. D. Ala. 2015) **Georgia**: • *Walker, et al. vs. City of Calhoun, Georgia*, 4:15-cv-170-HLM (N. D. Ga. 2015) **Louisiana:** • *Snow, et al. vs. Lambert, et al.* 3:15-cv-567-SDD-RLB (M.D. La 2015) **Mississippi**: • *Thompson, et al. vs. Moss Point, Mississippi*, 1:15-cv-182-LG-RHW (S. D. Miss. 2015) **Missouri**: • *Pierce, et al. vs. The City of Velda City*, 4:15-cv-570-HEA (E. D. Mo. 2015) • *Powell, et al. vs. The City of St. Ann*, 4:15-cv-840-RWS (E. D. Mo. 2015)
"Wealth-Based Bail" Cases	**California**: • *Buffin, et al. v. City and County of San Francisco, et al.*, 4:15-cv-4959-YGR (N. D. Cal. 2015) • *Welchen, et al. vs. The County of Sacramento*, 2:16-cv-185-TLN-KJN (E. D. Cal. 2016)

The instant case, at least with respect to the allegations set forth in the Complaint, falls within the "delinquent persons" category of cases where plaintiffs, on behalf of themselves and those alleged to be similarly situated, request declaratory and injunctive

relief against a particular municipality based upon allegations they were incarcerated due to their inability to pay debts allegedly owed to the municipality for traffic violations and/or other misdemeanor offenses for which plaintiffs have already been convicted. *See* [Doc. 1, p. 1, "Introduction"]. The parties eventually enter into formal settlement negotiations centered on changing the particular defendant municipality's municipal court procedures. However, as discussed *supra*, in this case and in at least two (2) other cases in which the issue of money bail was not raised by the plaintiffs, the ultimate settlement included the elimination (or near elimination) of money bail in the municipality's court. [Doc. 1 and 14].[9] Not only is such a result remarkably unjust, but it is also unconstitutional.

MBAA nor any of its members were permitted to participate in the negotiation of the Settlement Agreement. Because of this, the entire bail industry is now obsolete with respect to misdemeanor arrests in the City of Jackson, notwithstanding the fact that the terms of the Settlement Agreement are themselves unlawful and void *ab initio*. MBAA must be permitted to intervene in this case to request the Court alter or amend the Final Judgment and the attached Settlement Agreement or to request relief therefrom.

LAW AND ARGUMENT

I. BACKGROUND – MISSISSIPPI'S BAIL SYSTEM

Article 3, Section 29 of the Mississippi Constitution of 1890 reads: "Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient

[9] See also, Exhibits "C," "D," "E," and "F" to Motion to Intervene.

sureties, except for capital offenses when the proof is evident or presumption great." The constitutional right to bail before conviction, less the exception, has become so fundamental that it is favored by the public policy of the State of Mississippi. *Ex Parte Dennis*, 334 So.2d 369 (Miss. 1976); *Royalty v. State*, 235 So.2d 718 (Miss. 1970); *Resolute Ins. Co. v. State*, 233 So.2d 788 (Miss. 1970).

"The purpose of allowing bail is to secure the presence of the accused at trial." *Lee v. Lawson*, 375 So.2d 1019, 1021 (Miss. 1979) (citing *Ex Parte Dennis*, 334 So.2d 369; *Royalty v. State*, 235 So.2d 718 (Miss. 1970); *Brown v. State*, 217 So.2d 521 (Miss. 1969)).

> "However fundamental this right to bail is, the fixing of bail, whether it be in an amount certain or by recognizance, **is left to the sound discretion of the trial judge**. His judgment in that regard will not be disturbed unless there is a showing of manifest error or abuse of discretion."

Wells v. State, 288 So.2d 860 (Miss. 1974). (Emphasis our own).

In *Lee v. Lawson*, 375 So.2d 1019 (Miss. 1979), an arrestee sought appellate review of her petition for writ of *habeas corpus* that denied her pretrial release on her own recognizance. The appellant's principal assignment of error was that Article 3, Section 29 of the Mississippi Constitution of 1890 and §§ 99-5-1, *et seq.* of the Mississippi Code of 1972, *as amended*, were invalid in that requiring an indigent defendant to post a money bail for pretrial release violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 1020.

In *Lee*, the Mississippi Supreme Court held that a bail system based on monetary bail **alone** would be unconstitutional. However, the Mississippi bail system provides for release of pretrial detainees on terms other than monetary bail." Lee, 375 So.2d at 1023.

The Mississippi Supreme Court went on to outline §§ 99-5-11 and 99-15-3 of the Mississippi Code of 1972, *as amended*, which provide the procedures for setting bail in Mississippi.

> There is incorporated in these standards a presumption that a defendant is entitled to be released on order to appear or on his own recognizance. This presumption, however, does not extend to persons accused of violent or heinous crimes. **We want to emphasize that not every person accused of a crime should be released on his own recognizance or nominal bail. That decision still rests in the sound discretion of the judicial officer**.

Id. (Emphasis our own). *Lee* also instructs that in determining whether there is a substantial risk of non-appearance of an accused, the judicial officer should take into account the following factors concerning a particular accused:

> (1) The length of his residence in the community;
>
> (2) His employment status and history of his financial condition;
>
> (3) His family ties and relationships;
>
> (4) His reputation, character and mental condition;
>
> (5) His prior criminal record, including any record of prior release on recognizance or on bail;
>
> (6) The identity of responsible members of the community who would vouch for defendant's reliability;
>
> (7) The nature of the offense charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and
>
> (8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Id. at 1024.

Title 21, Chapter 23 of the Mississippi Code provides the statutory authority of municipal courts in Mississippi. Miss. Code Ann. § 21-23-8 pertains to bail in municipal courts, providing, in relevant part:

> (1)(a) The purpose of bail is to guarantee appearance and a bail bond shall not be forfeited for any other reason.
>
> (b)(i) **If a defendant in any criminal case, proceeding or matter fails to appear for any proceeding as ordered by the municipal court, then the court shall order the bail forfeited and a judgment nisi and a bench warrant issued at the time of nonappearance**. The clerk of the municipal court shall notify the surety of the forfeiture by writ of scire facias, with a copy of the judgment nisi and bench warrant attached thereto, within ten (10) working days of such order of judgment nisi either by personal service or by certified mail. Failure of the clerk to provide the required notice within ten (10) working days shall constitute prima facie evidence that the order should be set aside.
>
> (4)(a) **The municipal judge shall set the amount of bail for persons charged with offenses in municipal court and may approve the bond or recognizance therefor**.
>
> (b) **In instances where the municipal judge is unavailable and has not provided a bail schedule or otherwise provided for the setting of bail, it is lawful for any officer or officers designated by order of the municipal judge to take bond, cash, property or recognizance, with or without sureties, in a sum to be determined by the officer, payable to the municipality and conditioned for the appearance of the person on the return day and time of the writ before the court to which the warrant is returnable, or in cases of arrest without a warrant, on the day and time set by the court or officer for arraignment**, and there remain from day to day and term to term until discharged.
>
> (c) All bonds shall be promptly returned to the court, together with any cash deposited, and be filed and proceeded on by the court in a case of forfeiture. The chief of the municipal police or a police officer or officers designated by order of the municipal judge may approve bonds or recognizances.

Miss. Code Ann. § 21-23-8 (1972), *as amended.* (Emphasis our own).

II. MBAA SHOULD BE PERMITTED TO INTERVENE IN ORDER TO MOVE THE COURT TO ALTER OR AMEND ITS FINAL JUDGMENT AND SUBJECT PROVISIONS OF THE CORRESPONDING SETTLEMENT AGREEMENT, OR GRANT IT RELIEF THEREFROM.

Rule 24 of the Federal Rules of Civil Procedure allows for a non-party to intervene in certain circumstances either as of right, or permissively. Specifically, Rule 24(a) provides that:

> On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impeded the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a). Likewise, Rule 24(b) allows for permissive intervention to anyone who "has a claim or defense that shares with the main action common questions of law or fact." FED. R. CIV. P. 24(b)(1)(B).

"One of Rule 24's central purposes is 'to protect non-parties from having their interests adversely affected by litigation conducted without their participation.'" *Mississippi State Conference of N.A.A.C.P. v. Barbour*, 2011 WL 1327248 at *3 (S.D. Miss. Apr. 1, 2011)(quoting *Stallworth v. Mansanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977)). "Therefore, '[i]ntervention should generally be allowed where no one would be hurt and greater justice could be attained." *Barbour,* 2011 WL 1327248 at *3 (quoting *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005).

A. Intervention as of Right Pursuant to Rule 24(a) is Warranted.

"A party seeking to intervene as of right must satisfy four requirements:

> (1) The application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit."

Brumfield v. Dodd, 749 F.3d 339, 341 (5th Cir. 2014); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994)(*citing New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co. ("NOPSI")*, 732 F.2d 452, 463 (5th Cir. 1984)(*en banc*)).

Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed. *Brumfield*, 749 F.3d at 341 (*citing* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 24.03[1][a], at 24-22 (3d ed. 2008); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009)). "The inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application. . . . [and] intervention of right must be measured by a practical rather than technical yardstick." *United States v. Texas E. Transmission Corp*. 923 F.2d 410, 413 (5th Cir. 1991) (*citing United States v. Allegheny-Ludlum Indus., Inc*. 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 944, 96 S.Ct. 1684, 1684, 48 L.Ed.2d 187, 187 (1976)).

1. MBAA's Motion to Intervene is timely.

The first requirement for intervention as a matter of right under Rule 24(a) is that the motion for intervention must be timely. "Determining the timeliness of a motion to intervene entails consideration of four factors:

> (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Sierra Club, 18 F.3d at 1205 (*citing Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1997). The Fifth Circuit in *Sierra Club* went on to provide:

> The analysis is contextual; absolute measures of timeliness should be ignored. *Id.* at 266 (citation omitted). The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)(citation omitted). Federal courts should allow intervention 'where no one would be hurt and greater justice could be attained.' *Id.* (citation omitted).

Sierra Club, 18 F.3d at 1205.

a. MBAA recently became aware of its interest in this case.

The first *Stallworth* factor "focuses on the time lapse between the applicant's receipt of actual or constructive knowledge of his interest in the litigation and the filing of his motion for intervention." *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996). This factor supports MBAA's intervention because it promptly moved for intervention once its interest in the case became apparent. As detailed above, the Plaintiffs' Complaint made no allegations relating to secured monetary bail nor its use in the Jackson Municipal Court. The Fifth Circuit has held that there are "no absolute measures of timeliness." *Id.* "Indeed, in Stallworth we observed that 'whether the request for intervention came before or after the entry of judgment [is] of limited

significance,' noting that intervention could be allowed post-judgment provided that the rights of existing parties were not prejudiced and intervention did not interfere with the orderly processes of the court." *Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005) (*quoting Stallworth*, 558 F.2d at 266).

Any attempt at intervention prior to the Settlement Agreement being approved and a judgment entered would have been met with argument by the Plaintiffs that they were not seeking relief related to new arrestees or bail in the Jackson Municipal Court. To be sure, no such request was prayed for in the Complaint. *See* [Doc. 1]. However, once MBAA became aware that its interests were being adversely affected and not protected by the existing parties, it acted. "Courts should discourage premature intervention that wastes judicial resources. A better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties." *Sierra Club*, 18 F.3d at 1206. Indeed, the Supreme Court has found the "critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines v. McDonald*, 432 U.S. 385, 395-96, 97 S. Ct. 2464, 53 L.Ed.2d. 423 (1977). Specifically, the Court found that the proposed intervenor had "filed her motion within the time period in which the named plaintiffs could have taken an appeal." *Id*. at 396, 97 S. Ct. 2464; *see also* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 24.24 [3] (3d. ed. 1998) ("The general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.").

Here, the Final Judgment was entered just eight (8) days ago. Given the modest amount of time between entry of the Final Judgment and the filing of MBAA's Motion, this factor weighs heavily in favor of MBAA.

b. The existing parties will suffer no prejudice as a result of MBAA's seeking intervention.

The second *Stallworth* factor requires the Court to determine the extent to which the existing parties will be prejudiced by MBAA not seeking intervention at an earlier time. *See Ross*, 426 F.3d 745, 755. "This factor is concerned only with the prejudice caused by the applicants' delay, not that prejudice which may result if intervention is allowed." *Id*. (*quoting Edwards*, 78 F.3d at 1002 (citing *Stallworth*, 558 F.2d at 265 ("[T]o take any prejudice that the existing parties may incur if intervention is allowed into account under the rubric of timeliness would be to rewrite Rule 24 by creating an additional prerequisite to intervention as of right."))).

"[P]rejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Stallworth*, 558 F.2d at 264. "[T]he prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action." *Id*. at 265. "Whether allowing intervention will delay the progress of the case or prejudice the rights of the original parties is a factor which the district court must consider in exercising its discretion to permit intervention under subsection (b) of Rule 24," not subsection (a) –

intervention as of right. *Id.* Since no prayer for relief requesting declarative or injunctive relief regarding secured monetary bail was in the Complaint, MBAA did not know of its interest in the action until June 20, 2016 when the Final Judgment was entered with the Settlement Agreement attached as an exhibit.

Noteworthy, it appears the parties have contemplated the likelihood of a challenge to the validity, at least in part, of the Settlement Agreement. Paragraph 60 of the Settlement Agreement illustrates the parties' awareness that certain provisions or terms of the Settlement Agreement may be judicially determined to be invalid, illegal, or unenforceable, and goes so far as to provide direction to the parties if this occurs. No other settlement agreement entered into in any of the cases brought during the crusade against the bail industry has included such a provision, and certainly not the most comparable to this case, *City of Jennings*.[10] The existing parties will suffer no prejudice by MBAA's intervention.

c. MBAA would suffer significant, if not irreparable, prejudice if intervention is denied.

The third *Stallworth* factor "focuses on the prejudice the potential intervenor would suffer if not allowed to intervene." *John Doe No. 1 v. Glickman*, 256 F.3d 371, 378-79 (5th Cir. 2001). If MBAA is not permitted to intervene, it will lose its ability to protect its members' interests where the Settlement Agreement contains language in contravention of constitutional and statutory law that guide MBAA's member's industry. Its interest in protecting the bail and commercial surety industry and the laws upon

[10] *Compare* Exhibit "D" to Motion to Intervene.

which it is premised is unquestionably strong. MBAA will suffer irreparable harm if it is not permitted to challenge the subject provisions of the Settlement Agreement.

Importantly, MBAA does not seek to re-litigate the issues asserted in the Complaint – those pertaining to "delinquent persons." MBAA seeks limited intervention in order to challenge the validity of the Settlement Agreement only as it pertains to the restraint on the use of secured monetary bail and the laws pertaining to it. The existing parties to this case will not be harmed, but denial of MBAA's Motion to Intervene will harm MBAA by frustrating its efforts to protect the legal foundation of its field. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970).

d. The circumstances of Plaintiffs not pleading any factual basis or making a constitutional challenge to the use of secured monetary bail, but the Settlement Agreement eliminating its use in the Jackson Municipal Court are unusual circumstances militating for a determination that MBAA's application is timely.

"Under the fourth *Stallworth* factor, [the Court] must ascertain whether any unusual factors weigh in favor of a finding of timeliness." *Ross*, 426 F.3d 745, 756. Plaintiffs did not challenge the constitutionality of the use of secured monetary bail nor Mississippi's bail statutes in their Complaint, only allegations that jailing alleged indigents for their inability to pay past due fines, court costs, etc. for prior convictions. [Doc. 1]. But, the Settlement Agreement contains approximately 9 provisions eliminating the use of secured monetary bail in the Jackson Municipal Court. The act of attempting to "back-door" the inclusion of the secured monetary bail eliminating language in the Settlement Agreement is, of course, unusual. Moreover, the subject provisions in the

Settlement Agreement run afoul of constitutional and statutory law. These "unusual circumstances" lend their favor to MBAA's motion to intervene being timely.

Also unusual, the instant case is one of three (3) lawsuits filed by a purported class of individuals against a Mississippi municipality seeking to change the procedures in their respective municipal courts. Undoubtedly, there are more to follow. By permitting MBAA to intervene in this case, it may prevent it from having to intervene in other cases in this District and in the Northern District of Mississippi, if any.[11] Rather than a series of ongoing lawsuits and protracted litigation, MBAA seeks to end the campaign being waged against its industry in the State of Mississippi, especially settlements that contain illegal provisions and circumvent the judicial process of setting bail for criminal defendants. This factor weighs heavily in favor of MBAA's intervention being timely.

2. MBAA has a direct, substantial, and legally protectable interest in the subject matter of the action.

The second requirement for intervention of right is that the applicant must have an interest in the subject matter of the action. This interest must be "direct, substantial, [and] legally protectable." *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir.), *cert denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980). This requires that the interest asserted be one that the substantive law recognizes as belonging to or being owned by the applicant. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co. ("NOPSI")*, 732 F.2d 452, 464 (5th Cir. 1984)(*en banc*). "[I]n the intervention area the 'interest' test is primarily a practical

[11] Upon information and belief, lawsuits of the variety mentioned herein may be filed against municipalities in the Northern District of Mississippi as well as additional lawsuits filed against others in the Southern District.

guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 n. 10 (5th Cir. 1992) (*citing Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). "[O]ur cases reveal that the inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Texas v. U.S.*, 805 F.3d 653 (5th Cir. 2015).

A property interest is "the most elementary type of right that Rule 24(a) is designed to protect," *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970), because it is concrete, specific to the person possessing the right, and legally protectable. *See* MOORE'S § 24.03[2][a] ("Motion to intervene in which the proposed intervenor advances a clear property interest presents the easiest cases for intervention.").

MBAA anticipates the Plaintiffs and perhaps the City of Jackson will argue MBAA nor its members have a constitutionally protected property interest with respect to this case. *See Pugh v. Byrd*, 574 Fed.Appx. 505, 508 (5th Cir. 2014) (denying Plaintiffs due process claim "because the Mississippi bail-bond statutes give discretion to an authorizing officer, bond writing is not a property interest protected under the Fourteenth Amendment.") However, *Pugh* dealt with claims brought by three individual bondsmen against Jackson County, Mississippi alleging that the county violated their due process and equal protection rights through their removal from a list of approved bail bond writers. *Id.* *Pugh* is factually and legally distinguishable from the instant case. In *Pugh*, the court's decision was based on its interpretation of the word "may" in the Mississippi bail-bond statute. *Id.* at 508 ("[the sheriff] *may* take bonds, with good and

sufficient sureties, of any person whom he may arrest with or without a warrant for any felony that is bailable as a matter of law." Miss. Code Ann. § 19-25-67 (emphasis in opinion)).

Such is not the situation here, where the Plaintiffs and a municipality, the City of Jackson, have *agreed* to violate the Mississippi municipal courts bail statute: "The municipal judge **shall** set the amount of bail for persons charged with offenses in municipal court and may approve the bond or recognizance therefor." Miss. Code Ann. § 21-23-8 (1972), *as amended*. (Emphasis our own). Their agreement to sidestep this unambiguous law affects MBAA's members directly by impairing, or perhaps invalidating, surety contracts on existing bonds as well as interfering with similar future contracts.

Nevertheless, the Fifth Circuit has also held, "[a]lthough an asserted interest must be 'legally protectable,' it need not be legally enforceable. In other words, an interest is sufficient if it is the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Texas*, 805 F.3d at 659.[12] Additionally, "[a] decree's prospective interference with . . . opportunities can justify intervention." *Black Fire Fighters Ass'n of Dallas v. City of Dallas*, 19 F.3d 992, 994 (5th Cir. 1994).

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[12] David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L.Rev. 721, 729 (1968)("*A* may not have a dispute with *C* that would qualify as a case or controversy, but he may have a sufficient interest in *B*'s dispute with *C* to warrant his participation in the case once it has begun, and the case or controversy limitation should impose no barrier to his admission.").

Minimally, MBAA and its members have two (2) protectable interests that relate to the subject of this cause. First, MBAA has an interest in upholding the constitutionality of the Mississippi statutes that govern its field, along with established federal and Mississippi constitutional law that guides its members' profession. MBAA's members must abide by the dictates of the Mississippi Code applicable to bail and surety contracts, and it would be wholly unfair to allow private individuals and municipalities to enter into private agreements to violate those same laws, and others. Second, MBAA has a concrete economic interest in ensuring the continued viability of the commercial surety industry as a whole and within the City of Jackson.

Notably, co-counsel for the Plaintiffs has been unopposed to joining parties to at least one the lawsuits filed during this crusade.[13] In *Mitchell, et al. vs. City of Montgomery,* 2:14-cv-186-MHT-CSC (M. D. Ala. 2014), the plaintiffs, represented by Equal Justice Under Law, were **unopposed** to the joining of third-parties, the Montgomery municipal court judges in their official capacities, because,

> [They] have an interest relating to the subject matter of this lawsuit (specifically the request for equitable relief) such that it is in their interest to control the nature of any resolution of this matter involving the operations of the Municipal Court. For that reason, it was in their best interest to take part in the negotiations between the Parties and to agree to the specific relief set out in the Settlement Agreement.

This is precisely the same reasoning that should permit the intervention of MBAA in this case.

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[13] *See* Exhibit "I" to Motion to Intervene at ¶ 10.

Moreover, counsel for the Plaintiffs cannot deny that MBAA's interest in the subject matter exists, as they have recently admitted MBAA's direct, substantial, and legally protectable interest. In public statements, Equal Justice Under Law attorney, Phil Telfeyan, is quoted as follows:

> Telfeyan said he is not trying to destroy the classic, neon-advertising bail bonding industry, but he conceded that the business model would become obsolete if he convinces courts that the cash bail system is unconstitutional.

Paul Elias, *Cash Bail System Under Attack as Unconstitutional*, The Washington Post, December 26, 2015 at http://wapo.st/1R22GrK (last visited June 27, 2016. (Emphasis our own).

MBAA submits that obsolescence qualifies as injury-in-fact. *See Brooks v. Flagg Bros.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974) ("[I]n this situation where specific segments of an industry would be vitally affected by a declaration that the statute which governs their business conduct is unconstitutional, there is little reason to exclude them from participation"); 7C Wright, Miller & Kane, Fed. Prac. & Proc. Civ. § 1908.1 (3d ed.) ("in cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention.").

3. MBAA's ability to protect its interests will be impaired or impeded if intervention is denied.

The third requirement of Rule 24(a) is that the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect his interest. *Sierra Club v. Espy*, 18 F.3d at 1207. "An intervenor's interest 'is

impaired by the *stare decisis* effect of the district court's judgment.'" *Ceres Gulf*, 957 F.2d at 1204. The elimination of secured monetary bail in the Jackson Municipal Court affects MBAA and its members, and the Settlement Agreement signifies such an elimination.

MBAA's interests are not only impaired "as a practical matter," but will be significantly impaired throughout the State of Mississippi. Plaintiffs' publicly stated goals in these cases is to have the Court declare that monetary bail is unconstitutional. Not only would that destroy MBAA's entire industry, but it could undo thousands of existing bail surety contracts whose purpose would be declared unconstitutional.

The Fifth Circuit has interpreted a similar situation. In *Sierra Club*, 18 F.3d 1202 (5th Cir. 1994), it held that timber purchasers' organizations were entitled to intervene as of right in a suit by the Sierra Club against the U.S. Forest Service seeking to ban even-aged logging practices in East Texas. The Fifth Circuit explained the timber purchasers had "legally protectable property interests in existing timber contracts that are threatened by the potential bar on even-aged management." 18 F.3d at 1207.

There is no doubt that Mississippi courts have the duty and the power to declare void and unenforceable contracts made in violation of law or in contravention of the public policy of the state. *Smith v. Simon*, 224 So.2d 565, 566 (Miss. 1989). Courts have exercised this power in several classes of illegal contracts, including where the contract itself is unlawful. *See*, *Powelson v. National Airlines*, 71 So.2d 467 (Miss. 1954)(involving a contract to purchase stock in violation of a federal statute); *see also*, *Morrissey v. Bologna*, 123 So.2d 537 (Miss. 1960)(involving an indebtedness for illegal liquor). That is more than sufficient risk to support intervention. *See Flagg Bros.*, 63 F.R.D. at 415 ("[I]n this situation

where specific segments of an industry would be vitally affected by a declaration that the statute which governs their business conduct is unconstitutional, there is little reason to exclude them from participation").

4. MBAA's interests are not adequately represented by the existing parties to this suit.

The final requirement for intervention as a matter of right is that the applicant's interest must be inadequately represented by the existing parties to the suit. *Sierra Club*, 18 F.3d at 1207. The Fifth Circuit has described this burden as "minimal," noting that a potential intervenor need only show that "representation by the existing parties may be inadequate." *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002). Perhaps belaboring the point, the subject provisions of the Settlement Agreement MBAA seeks to have declared void and unenforceable are contrary to well-settled constitutional and statutory law. The City of Jackson's interest in the case cannot be said to align with MBAA's. Underscoring this point even more, the City agreed to include provisions in the Settlement Agreement which the Plaintiffs did not even plead.

Federal courts considering this issue of bail under the Eighth Amendment have held that a "bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) (*en banc*); *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966) ("bail is not excessive merely because the defendant is unable to pay it"); *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) ("The test for excessiveness is not whether defendant is financially capable of posting bond . . . ."); *United States v. Wright*, 483 F.2d 1068, 1070 (4th

Cir. 1973) (stating that the defendant's "impecunious financial status" is not "the governing criterion to test the excessiveness of bail"); *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1134 (7th Cir. 1984) (stating that the defendant's "financial inability . . . to meet his bail . . . is neither the only nor controlling factor"); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968) ("The mere fact that petitioner may not have been able to pay the bail does not make it excessive.").

It simply cannot be argued that the City of Jackson can adequately represent the interests of the bail industry or that it did in this case. Where, as here, "the government represents numerous complex and conflicting interests . . . [t]he straightforward business interests asserted by intervenors here may become lost in the thicket of sometimes inconsistent governmental policies." *Kleissler v. U.S. Forst Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998). Additionally, MBAA and its members bring industry expertise in beneficial effects of secured monetary bail based on knowledge of the specific industry. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002)(stating that a sufficient showing on this factor is made when the would-be intervenor has expertise the government may not have). Accordingly, this fourth factor is clearly met and intervention should be granted.

B. <u>Alternatively, Permissive Intervention is Justified</u>.

Should the Court find MBAA is not entitled to intervention as of right, MBAA should nonetheless be granted permission to intervene pursuant to Rule 24(b). "Rule 24(b) provides for permissive intervention when: (1) the motion is timely; (2) a statute of the United States confers a conditional right to intervene; or (3) the movant's 'claim or

defense and the main action have a question of law or fact in common.'" *Graham v. Evangeline Parish School Bd.*, 132 Fed.Appx. 507, 513 (5th Cir. 2005) (*citing* FED. R. CIV. P. 24(b); *Trans Chem. Ltd. v. China Nat'l Mach. Import and Export Corp.*, 332 F.3d 815, 822 (5th Cir. 2003)(quoting Fed. R. Civ. P. 24(b)(2))). "The district court's Rule 24(b) determination is "wholly discretionary." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987).

In acting on a request for permissive intervention the district court may consider, among other factors, whether the intervenors' interests are adequately represented by the other parties, and whether intervention will unduly delay the proceedings or prejudice existing parties. *Id.* (*citing* FED. R. CIV. P. 24(b)). Also, MBAA's proposed request to alter or amend the Final Judgment and Settlement Agreement, or for relief therefrom, falls within the purview of this Court's continuing jurisdiction. The parties themselves have consented to coming back before the Court if need be.

1. MBAA's Motion is timely.

This Motion is timely for the reasons set forth *supra*.

2. There is a common question of law or fact between MBAA's claim or defense and the main action.

MBAA's members' rights and interests are directly implicated by the terms of the Settlement Agreement affecting the bail procedure(s) and policies of the Jackson Municipal Court. Given the terms of the Settlement Agreement providing "[s]ecured money bonds will not be used to detain persons arrested for any misdemeanor that may be prosecuted by the City in its Municipal Court" is in violation of constitutional and

statutory authority, common questions of law and fact abound – namely, the validity of the subject terms in the Settlement Agreement. Thus, MBAA is a real party in interest.

The relevant inquiry regarding an indispensable party is instructive on this point. Rule 19 of the Federal Rules of Civil Procedure governs whether a person should be joined as a party to an action, providing in relevant part:

> (a)(1) ***Required Party***. A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a).

The Settlement Agreement herein requiring the immediate release of a new arrestee immediately on his/her own recognizance without the judicial officer conducting the proper analysis certainly, as a practical matter, impairs and impedes MBAA and its members from protecting their interests. It, for all intents and purposes, eliminates the bail bond industry in the City of Jackson (and potentially statewide given the doctrine of *stare decisis*). Further, the Settlement Agreement, as written, leads to the jaw-dropping conclusion that the Plaintiffs and the City of Jackson have simply *agreed* to ignore and violate the Separation of Powers Clause of the Mississippi Constitution (1890)

and Miss. Code Ann. § 21-23-8 (1972), *as amended*, and decided for themselves how bail will be imposed (certainly with no authority to do so). Furthermore, if MBAA is denied intervention, the City of Jackson faces a substantial risk of MBAA bringing a separate cause of action attacking the validity of the Settlement Agreement given its legal deficiencies.

Finally, Plaintiffs' counsel admits the existence of common questions of law and fact in the instant Complaint. Specifically, Plaintiffs allege:

> Paragraph 118: "Counsel for Equal Justice Under Law is also the lead attorney in two cases involving similar treatment of impoverished people in St. Louis County, Missouri's municipal courts, *see Jenkins et al. v. City of Jennings*, 15-cv-252-CEJ (E.D. Mo. 2015). . ." (Emphasis our own); and
>
> Paragraph 119: "Counsel from the MacArthur Justice Center and Equal Justice Under Law also represent the plaintiffs in a federal class action lawsuit challenging the fixed "bail schedule" scheme employed by the City of Moss Point, Mississippi. *See Thompson v. Moss Point*, 15-cv-182-LG (S.D. Miss. 2015). Like the City's debt collection scheme, the City of Moss Point's fixed "bail schedule" scheme results in the unconstitutional jailing of numerous impoverished people." (Emphasis our own).

[Doc. 1]. *City of Jennings*, cited as a case involving similar treatment of impoverished people as the instant Plaintiffs, completely eliminated money and/or secured bail for any person for any offense that may be prosecuted by the City of Jennings. Plaintiffs freely volunteer that the issues surrounding these cases (whether they are "delinquent persons" cases or "bail schedule" cases) revolved around identical questions of law and fact: the jailing of alleged impoverished people and the constitutional ramifications therefrom.

Accordingly and for the reasons set forth herein, should the Court find MBAA does not satisfy the criteria for intervention as of right, they should nonetheless be granted permissive intervention under Rule 24(b).

CONCLUSION

For the foregoing reasons, MBAA's *Motion to Intervene* should be granted.

Respectfully submitted, this the 28th day of June, 2016.

PROFESSIONAL BAIL AGENTS ASSOCIATION OF MISSISSIPPI, INC. d/b/a MISSISSIPPI BAIL AGENTS ASSOCIATION

SMITH & HOLDER, PLLC

BY: /s/ *CHRISTOPHER SMITH*, MSB# 104366

BY: /s/ *G. MORGAN HOLDER*, MSB# 104131

CHRISTOPHER SMITH, MSB# 104366
G. MORGAN HOLDER, MSB# 104131
SMITH & HOLDER, PLLC
POST OFFICE BOX 1149
GULFPORT, MS 39502
228-206-7076 (Telephone)
228-284-1870 (Facsimile)
chris@smithholder.com
morgan@smithholder.com

CERTIFICATE OF SERVICE

I, Christopher Smith, of the law firm of Smith & Holder, PLLC, hereby certify that I have this dated filed the foregoing *Memorandum Brief in Support of Motion to Intervene* with the Clerk of Court using the ECF system which sent notification of such filing to all participating counsel of record.

SO CERTIFIED, this the 28th day of June, 2016.

/s/ *CHRISTOPHER SMITH* (MSB# 104366)