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

TERRELL K. RALEY, individually, and on behalf of 4 POINTS HOSPITALITY, LLC,	)	
Plaintiffs,	)	
VS.	)	**NO. 16-196-BC**
CEES BRINKMAN and BRINKMAN HOLDINGS, LLC,	)	
Defendants,	)	
AND	)	
CEES BRINKMAN, individually, and on behalf of 4 POINTS HOSPITALITY, LLC,	)	
Counterclaimant,	)	
VS.	)	
TERRELL K. RALEY, AMARANTH HOSPITALITY GROUP, LLC,	)	
Counterdefendants.	)	

MEMORANDUM AND ORDER OF FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PHASE 1 TRIAL CONDUCTED 5/15/17 – 5/24/17

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Summary of the Case and Rulings

This lawsuit concerns an LLC, 4 Points Hospitality ("4 Points" or the "LLC"), who owns and operates a very successful restaurant, The Pharmacy Burger Parlor and Beer Garden (referred to herein as the "The Pharmacy" or "Business") located in East Nashville.

4 Points is owned by only two members, Terrell K. Raley and Cees Brinkman. They each hold a 50% membership interest in the LLC. The lawsuit involves claims made by the members against each other and on behalf of the LLC. The parties assert that each has breached contracts and fiduciary duties related to the LLC, and each seeks relief personally and on behalf of the LLC for compensatory damages and declaratory judgment. Defendant Brinkman also seeks for the 50% membership of Plaintiff Raley to be terminated or, failing that, for the LLC to be dissolved.

The case was filed on February 25, 2016, and had pretrial relief of:

— appointment of a fiscal agent from September 15, 2016 through January 25, 2017 to monitor the financial transactions of the Business and suggest business practices;

— a November 7, 2016 order injoining transfer of any intellectual property rights of 4 Points and a second Pharmacy restaurant from opening, and requiring draws from the 4 Points operating account to equalize distributions; and

— a November 22, 2016 order referring the case to mediation.

Upon denial, in part, of summary judgment on April 20, 2017, the case proceeded to trial on May 15, 2017. An 8-day bench trial was conducted and the matter was taken under advisement.

After considering the law, the evidence and argument of Counsel, the Court determines that each party owes the following.

— Defendant Brinkman owes $175,000 to 4 Points as a capital contribution.

— Plaintiff Raley owes 4 Points $240,275.59 as reimbursement for non-Pharmacy related expenditures for personal items and expenses of his other businesses.

— 4 Points owes its landlord, Defendant Brinkman Holdings, LLC ("BHL"), $18,500 for past due rent.

— 4 Points owes Defendant Brinkman $5,400 to equalize member distributions to him.

— 4 Points owes Defendant Brinkman $371,244.79 in underpaid salary.

With respect to Defendant Brinkman's claim to terminate the membership of Plaintiff Raley in 4 Points, the claim is granted. The evidence at trial established that Plaintiff Raley:

> (B) Willfully or persistently committed a material breach of the LLC documents, or of a duty owed under § 48-249-403 to the LLC or to other members or to holders; or
>
> (C) Engaged in conduct relating to the LLC's business that makes it not reasonably practicable to carry on the business with the member . . . .

TENN. CODE ANN. § 48-249-503(a)(6) (West 2017).[1]

As detailed in the findings below, the evidence at trial established that Plaintiff Raley was unable to carry his burden of proof as the fiduciary, managing member of the

[1] Under this statute, such conduct authorizes termination of membership by the member being expelled by judicial determination.

LLC, to account for and demonstrate the separateness of the property and funds of 4 Points from his personal funds and his other businesses in the amount of $315,551.86. Additional breaches of Plaintiff Raley as the managing member that the evidence established were underpayment of salary to Defendant Brinkman of $371,244.79 and $227,445.33 in distributions.[2] The total of the findings of mispayments by Plaintiff Raley, as the managing member of the LLC, is $914,241.98—not a de minimus amount. These mispayments constitute the grounds of willful and persistent breaches under Tennessee Code Annotated section 48-249-503(a)(6)(B) to terminate Plaintiff Raley's membership.

The impact of the foregoing willful and persistent breaches referenced in section 48-249-503(a)(6)(B) for terminating membership flow over to the other ground for termination under section 48-249-503(a)(6)(C) (not reasonably practicable to carry on business). Plaintiff Raley's breaches have destroyed the personal and business relationship of the parties. Defendant Brinkman no longer trusts Plaintiff Raley because of the persistent and significant dollar amounts and property that Plaintiff Raley and/or those working under his control and supervision mixed in with his personal funds and those of his other businesses, and Plaintiff Raley's repeated failure to make equal distributions between the members, when he was acting as the managing member and as a fiduciary.

Another consideration in terminating Plaintiff Raley's membership for the best interests of 4 Points is that Defendant Brinkman's business, Defendant BHL, is the landlord of the premises where The Pharmacy is located. That Plaintiff Raley and

[2] The $227,445.33 includes $222,045.33 Plaintiff Raley paid pursuant to a *pendente lite* order to equalize distributions, and an additional $5,400, found herein to be owed, to equalize distributions.

Defendant Brinkman are no longer working together but are suspicious and at odds is not only dysfunctional for governance of The Pharmacy but also for the landlord/tenant relationship. If Raley remains a member of 4 Points, BHL will likely oppose The Pharmacy remaining a tenant at that location. The proof at trial established that the particular location is valuable to the Business. The Pharmacy is identified with that location for a number reasons including its beer garden.

A further consideration in deciding to terminate Plaintiff Raley's membership is that the evidence established, through the testimony of Mandy Allen, a former assistant and general manager of The Pharmacy, and Defendant Brinkman, and no strenuous refutation of this proof by Plaintiff Raley, that The Pharmacy's recipes and ambience and operations have been developed to the point that The Pharmacy could certainly function for a year absent Plaintiff Raley and very likely beyond that. In this regard Defendant Brinkman testified that he intends to rehire Ben Albert, a former general manager knowledgeable of and capable in operating the business, if Plaintiff Raley's membership is terminated.

Additionally, in considering the best business interest of 4 Points and weighing the equities among the parties, the evidence is that Plaintiff Raley has other successful restaurants he has created and provided to the community, and possibly more to come. Also, as a matter of law, in Phase 2 of this case, Plaintiff Raley's membership interest will be valued and he will be paid fair compensation for his interest in The Pharmacy.

These are the considerations that inform the ruling below that Plaintiff Raley's 50% interest in 4 Points Hospitality LLC is terminated pursuant to Tennessee Code Annotated sections 48-249-503(a)(6)(B) and (C).

Having summarized the outcome of the Phase 1 trial, the Court provides as follows the detailed findings of fact, conclusions of law and rulings on which the above determinations are based.

Findings of Background Facts

The Court finds that Plaintiff Raley and Defendant Brinkman met in 2009 when Plaintiff Raley contacted Defendant Brinkman about buying some equipment to open a restaurant. Defendant Brinkman became interested in the venture. He had rental property where a restaurant could be opened. The rental property was located at 935 West Eastland Avenue and 731 McFerrin Avenue and was owned by Brinkman Holdings, LLC ("BHL") formed by Defendant Brinkman in 2005.

The 935 West Eastland location was used by Plaintiff Raley and Defendant Brinkman to locate Holland House Bar and Refuge. They formed TC Hospitality, Inc. to own and operate the Holland House. The terms were that Defendant Brinkman would pay to convert 2700 square feet of a 4500-foot building he owned at the West Eastland Avenue location in exchange for a 10% ownership in the corporation and $5,000 a month as initial base rent. The Holland House opened in March 2010 and has been moderately successful.

Thereafter the parties agreed to open a second restaurant on the 731 McFerrin Avenue property. The concept was a full-service casual dining restaurant that specialized in craft burgers, German wurst and bier, old-fashioned milkshakes and ice cream sodas. The parties formed 4 Points Hospitality, LLC to own and operate The Pharmacy Burger Parlor & Beer Garden.

Although the parties entered into an agreement entitled "Partnership Agreement" (Trial Exhibit P11), the evidence established that it was actually an Operating Agreement because the 4 Points entity was formed as an LLC. Trial Exhibit P11 will be referred to herein as the "Operating Agreement." It provided that Plaintiff Raley and Defendant Brinkman were 50/50 owners and entitled to an even split of The Pharmacy's net profits. Plaintiff Raley was designated as the managing member to "take responsibility for the administrative duties and ministerial functions" of the LLC "and shall be authorized to make day-to-day business decisions on his or her own accord, subject to the Acts Requiring Majority Consent below." Section 15 of Trial Exhibit P11.

Other sections relevant to the claims in the lawsuit are that Section 17 of the Operating Agreement required all "working capital and other funds received by the Partnership" to be deposited in LLC banking accounts "which shall be kept separate and apart from any other individual accounts of the Partners." Section 4 provided for an Initial Capital Contribution of $30,000 in labor by Plaintiff Raley and $175,000 in cash by Defendant Brinkman.

The evidence established that as the managing member for day-to-day decisions, Raley oversees the Pharmacy's daily operations through an extensive management team that includes a general manager, assistant general manager, kitchen manager, beverage manager, and catering manager. Plaintiff Raley also controls and has ultimate responsibility for the Pharmacy's financial affairs, including paying expenses, paying payroll, and making distributions of net profits to himself and Brinkman. In this regard Section 16 of the Operating Agreement provides that members shall "maintain books of account and shall make proper entries in such books of all sales, purchases, receipts, payments, transactions and property" of the LLC.

Defendant Brinkman was actively involved in the operations of the restaurant by performing or directing others in the performance of the repair and maintenance services required to keep a high-volume restaurant like the Pharmacy up and running.

The parties also entered into a lease (Trial Exhibit P22) whereby 4 Points leased the McFerrin Avenue property from BHL for $2,500 per month. The lease stated that as Landlord, BHL would provide a "build to specification operational restaurant and parking."

The Pharmacy opened in December 2011 and was an instant success. The business records of 4 Points established the following gross sales and gross income from 2012-2016.

Year	Gross Sales	Gross Income
2012	$2,962,074	$1,889,570
2013	$3,690,869	$2,389,921
2014	$4,532,351	$2,993,881

2015	$4,937,257	$3,344,059
2016	$4,973,751	$3,398,701
Total	$21,096,302	$14,061,032

In 2013, Plaintiff Raley formed Amaranth Hospitality Group, LLC to develop restaurants solely owned and operated by him. Section 18 of the Operating Agreement allowed for this. Defendant Brinkman, as well, had other businesses, including eateries. On February 14, 2015, Amaranth opened Butchertown Hall in the Germantown neighborhood of Nashville. This restaurant has been very successful.

In March of 2015, Defendant Brinkman began to question Plaintiff Raley's management of the finances of The Pharmacy. The parties then quit communicating with each other and retained attorneys. Key decisions such as those concerning employees and renewal of the lease could not be made by the two members together as required by the Operating Agreement. In February of 2016, Plaintiff Raley filed this lawsuit, and Defendant Brinkman filed a counterclaim.

Paragraph 24 of the Operating Agreement (Trial Exhibit P11) contains a "Dispute Resolution" section that states that "If a dispute between the Partners arises under this Agreement, such dispute shall be settled by arbitration…." Neither party sought to enforce this section of the Operating Agreement, and by proceeding with the lawsuit and participating in a bench trial, under Tennessee law, the parties waived any rights under the arbitration clause. *Skelton v. Freese Const. Co.*, No. M2012-01935-COA-R3CV, 2013 WL 6506937, at *4 (Tenn. Ct. App. Dec. 9, 2013) (citations omitted) ("'[A]n agreement to

arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon.'").

Parties' Claims

Plaintiff Raley's Claims

In the Second Amended Complaint, filed February 8, 2017, Plaintiff Raley asserted the following claims.

— Count I—Breach of Contract
- failure of Defendant Brinkman to pay $175,000 capital contribution (paragraph 54)
- failure of Defendant Brinkman Holdings, LLC ("BHL"), The Pharmacy's landlord, to provide a "Built to Specification Operational Restaurant" and parking (paragraph 55)
- Defendant Brinkman's unilateral increase in rental payments by The Pharmacy to BHL resulting in damages of at least $49,000 (paragraph 56)

— Count II—Unjust Enrichment—dismissed during trial under Tennessee Civil Procedure Rule 41.02(2) (paragraphs 58-62)

— Count III—Declaratory Judgment to construe the parties' Salary Agreement to award Plaintiff Raley $519,809.64 for underpayment of less than 8% of gross sales over the years The Pharmacy has been in business (paragraphs 64-69)

— Count IV—Judicial Intervention pursuant to Tennessee Code Annotated section 48-249-616 to enforce The Pharmacy's lease with BHL renewed by Plaintiff Raley and not to expel Plaintiff Raley from the LLC and not dissolve the LLC (paragraphs 71-72)

Defendant Brinkman's Claims

Filed on March 10, 2017, the Third Amended Counterclaim contains these claims.

— Count I—Breach of Fiduciary Duty by Plaintiff Raley as Managing Member, and Count II—Breach of Operating Agreement

- use of 4 Points funds and resources for Plaintiff Raley's personal benefit and his other businesses and other mismanagement (paragraphs 72, 80 and 90)

- payment of excessive distributions and salary to Plaintiff Raley; withholding of distributions and salary to Defendant Brinkman; failure to set aside funds for parties agreed to reserve for development of future restaurants; increasing expenses of 4 Points to eliminate or minimize salary and net profits due Brinkman (paragraphs 73, 77 and 86)

- failure to reimburse Defendant Brinkman for Pharmacy build out and initial operating expenses in excess of $175,000 capital contribution (paragraphs 74 and 87)

- denying Defendant Brinkman access to 4 Points' bank account and records, and access to The Pharmacy premises (paragraph 75)

- making unilateral LLC decisions requiring unanimous consent: commissioning a construction project, filing this lawsuit and advancing legal fees, moving key employees from The Pharmacy to another Raley business, renewing The Pharmacy lease for an additional 10 years (paragraphs 76 and 85)

- converting and infringing 4 Points' intellectual property rights (paragraphs 78 and 88)

- failure to pay amounts to BHL owed under the Lease (paragraphs 79 and 89)

- specific performance of agreements as a remedy if damages not fully adequate relief (paragraph 92)

- acting intentionally and in bad faith which warrants punitive damages award (paragraph 82)

— Count III—Breach of Salary Agreement by Plaintiff Raley
- making excessive salary payments to himself and failing to make payments owed to Brinkman (paragraph 96)

- failing to cause 4 Points to reserve 4% of gross income for development of future restaurants (paragraph 97)

- specific performance of agreements as a remedy if damages not fully adequate (paragraph 99)

— Counts IV and V—Conversion and Aiding and Abetting
- Plaintiff Raley individually and as owner of Amaranth LLC exercised dominion and appropriated funds, intellectual property and other 4 Points resources personally (paragraph 101)

- to the extent Amaranth received the funds and rights, it participated in the conversion (paragraphs 102, 106 and 107)

- punitive damages are appropriate (paragraphs 104 and 109)

— Counts VI—Termination Of Membership Interest, or, Alternatively, Count VII—Judicial Dissolution
- willful and persistent breaches by Plaintiff Raley (paragraphs 111 and 117)

- Plaintiff Raley's conduct makes it no longer reasonably practicable to carry on business together (paragraphs 112 and 116)

— Prayer For Relief
- impose a constructive trust of 4 Points' funds in possession of Plaintiff Raley and Amaranth (paragraph 3)

- set aside Raley's renewal of The Pharmacy Lease as *ultra vires* (paragraph 5)

- enter a permanent injunction to prohibit Plaintiff Raley from misuse of funds and underpayment of Defendant Brinkman (paragraphs 6 and 7)

- award Defendant Brinkman attorneys fees pursuant to Tennessee Code Annotated sections 48-249-804(b) and 805, and/or the Operating Agreement

Findings of Fact and Conclusions of Law On Plaintiff Raley's Causes of Action

Breach of Contract—Count I of Second Amended Complaint

The Court concludes that Defendant Brinkman breached the Operating Agreement by not paying a $175,000 capital contribution to the LLC. That payment is required by section 4, and is regulated by sections 5 and 31, of the Operating Agreement quoted as follows.

> 4. INITIAL CAPITAL CONTRIBUTIONS
>
> The Partners shall make the following initial capital contributions (the "Initial Capital Contributions") to the Partnership. Any actual money spent before the Effective Date by any of the Partners shall be reimbursed from the Partnership's capital as soon as possible after processing by the Partnership's accounting staff.
>
> | Name of Partner | Contribution Type | Value |
> |---|---|---|
> | Terrell Kristen Raley | Labor | $30,000.00 |
> | Cees Brinkman | Cash | $175,000.00 |
>
> 5. VOLUNTARY CONTRIBUTIONS
>
> No Partner may make any voluntary contributions of capital to the Partnership without the consent of all of the Partners.

> 31. ENTIRE AGREEMENT
>
> This instrument contains the entire Agreement of the Partners relating to the rights granted and obligations assumed in this Agreement. Any oral representations or modifications concerning this instrument shall be of no force or effect unless contained in a subsequent written modification signed by the Partners hereto.

Trial Exhibit P11, pp. 2, 8.

In so ruling, the Court concludes as a matter of law that the terms of the written contract are clear and, therefore are required to be enforced as written.

> It seems to us that the language is plain, simple and unambiguous and this being true "it is the function of a court to interpret and enforce contracts as they are written, notwithstanding they may contain terms which may be thought harsh and unjust. A court is not at liberty to make a new contract for parties who have spoken for themselves." (quoting *Smithart v. John Hancock Mut. Life Ins. Co.*, 71 S.W.2d 1059, 1063 (Tenn. 1934)). *Petty v. Sloan*, 277 S.W.2d 355, 359 (Tenn. 1955).
>
> * * *
>
> When the parties have reduced their agreement to writing, the law favors enforcing these contracts as written. *Bob Pearsall Motors, Inc. v. Regal Chrysler–Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn.1975); *Home Beneficial Ass'n v. White*, 180 Tenn. 585, 588, 177 S.W.2d 545, 546 (1944); *Sikora v. Vanderploeg*, 212 S.W.3d 277, 286 (Tenn.Ct.App.2006). In the absence of fraud, mistake, or other supervening legal reason, the courts should construe unambiguous written contracts as they find them. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d at 223.

Ellis v. Pauline S. Sprouse Residuary Trust, 280 S.W.3d 806, 814 (Tenn. 2009).

Defendant Brinkman's defense to the requirement of section 4 of the Operating Agreement is that the parties agreed, at the time the Operating Agreement was signed, that Defendant Brinkman's payment, as he calculated it, of $370,000 for build out expenses of

The Pharmacy would cover his $175,000 capital contribution. Both Tennessee law and other facts proven at trial, however, require dismissal of Defendant Brinkman's defense.

First, under Tennessee law parol evidence is not admissible to alter or vary the plain meaning of an unambiguous written contract. "The parol evidence rule does not permit contracting parties to 'use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract.'" (citing *GRW Enters. v. Davis*, 797 S.W.2d 606, 610 (Tenn. Ct. App. 1990)). *Staubach Retail Servs.-Se., LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 525 (Tenn. 2005). As determined above, the Operating Agreement is unambiguous.

Additionally, sections 5 and 31 of the Operating Agreement, quoted above, do not allow modification of the capital contribution terms of section 4 unless the agreed modification is in writing. The evidence at trial included no writing.

Further, Tennessee Code Annotated section 48-249-301 does not permit such a contribution as the build out expenses to satisfy the capital contribution unless it is voted upon and recorded in the LLC documents or records. These requirements were not proven at trial by Defendant Brinkman.

Additionally detracting from Defendant Brinkman's assertion that his $175,000 capital contribution was subsumed in amounts he paid for The Pharmacy build out is the testimony of Plaintiff Raley's expert accountant, Mr. Ricciardi. Upon reviewing Defendant Brinkman's tax filings, Trial Exhibit P13, Mr. Ricciardi testified that Mr. Brinkman, personally, claimed a $230,157 deduction for depreciable assets spent in 2011 on The

Pharmacy build out. There is no evidence Defendant Brinkman ever asked his accountant to transfer the depreciable assets to 4 Points. Tax returns are admissions and must be overcome by cogent evidence. *See e.g. Robson v. C.I.R.*, 79 T.C.M. (CCH) 2225 (T.C. 2000); *Buchsbaum v. Comm'r of Internal Revenue Serv.*, 83 T.C.M. (CCH) 1777 (T.C. 2002); *Mendes v. C.I.R.*, 121 T.C. 308, 312 (2003); *Pierce v. Landmark Mgmt. Grp., Inc.*, 293 Neb. 890, 912–13, 880 N.W.2d 885, 903 (2016); *State v. Marshall*, No. E199900922CCAR3CD, 2000 WL 193514, at *4 (Tenn. Crim. App. Feb. 18, 2000); *Sports Shinko Co. v. QK Hotel, LLC*, No. CIV. 04-00124-BMK, 2007 WL 4230813, at *4 (D. Haw. Dec. 3, 2007); *Kassim v. City of Schenectady*, 415 F.3d 246, 251 (2d Cir. 2005); *Nourse v. Riddell*, 143 F. Supp. 759, 762 (S.D. Cal. 1956); *Whiteley v. United States*, 214 F. Supp. 489, 495 (W.D. Wash. 1963); *Fonteneaux v. C.I.R.*, 539 F. App'x 442, 444 (5th Cir. 2013). No cogent evidence was provided by Defendant Brinkman to explain or undercut the admission established by Defendant Brinkman's tax returns that he took a personal deduction for the depreciable assets spent in 2011 on The Pharmacy build out.

Defendant Brinkman's other defense is that Plaintiff Raley waived the $175,000 capital contribution. The defense is dismissed for insufficient proof. To overcome the explicit terms of the Operating Agreement with a defense of waiver it is the burden of the proponent of the defense to show waiver by clear, unequivocal and decisive actions.

> Waiver "may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct." *Chattem,* 676 S.W.2d at 955. Stated another way, "waiver is proven by a clear, unequivocal and decisive act of the party, showing a purpose to forgo the right or benefit which is waived." *E & A Ne. Ltd. P'ship,* 2007 WL 858779, at *7. "The law will not presume a waiver, and

> the party claiming the waiver has the burden of proving it by a preponderance of the evidence." *Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 722 (Tenn.Ct.App.1998). Generally, whether a waiver of a contractual provision has occurred in a given factual setting is a question of fact for trial. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn.2003).

GuestHouse Int'l, LLC v. Shoney's N. Am. Corp., 330 S.W.3d 166, 202 (Tenn. Ct. App. 2010) (footnotes omitted).

Applying the law of waiver to the record, the Court accredits Plaintiff Raley's testimony that it was not his intent to waive Defendant Brinkman's $175,000 capital contribution. The Court accredits the testimony of Plaintiff Raley that he confronted Defendant Brinkman about the capital contribution twice after the build out was completed, and expected and awaited payment. In the face of this credible testimony the Court finds that the facts of Plaintiff Raley, as the managing member, paying distributions to Defendant Brinkman, without deducting the capital contribution, is insufficient to prove waiver.

Accordingly, based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Defendant Brinkman owes the LLC his $175,000 capital contribution under section 4 of the Operating Agreement.

With respect to the other part of his Count I claim of breach of contract, Plaintiff Raley asserts that Defendant BHL, the Landlord of 4 Points and the LLC owned by Defendant Brinkman, breached the 4 Points' lease by failing to deliver an operational

restaurant and adequate parking. This claim of breach is dismissed for insufficient evidence.

The findings of fact on this issue begin with Trial Exhibit P22, The Pharmacy lease with BHL. It provides in pertinent part:

> This Commercial Lease Agreement ("Lease") is made and effective September 1st 2011, by and between Brinkman Holding, LLC ("Landlord") and 4 Points Hospitality, LLC ("Tenant").
>
> Landlord is the owner of land and improvements commonly known and numbered as 731 McFerrin Ave., Nashville, TN 37206 and further described as follows ("The Pharmacy"): Approximately 2000 Square Feet of a one-story commercial building with outside patio and yard.
>
> Landlord makes available for lease a build to specification operational restaurant and parking ("Leased Premises").

Evidence that the Landlord made available an operational restaurant is that when the build out was completed December 23, 2011, The Pharmacy opened immediately and began operating successfully. Further, the proof established that as The Pharmacy was an instant success and exceeded the parties' pre-opening expectations, Defendant BHL thereafter has provided additional space to The Pharmacy of a 1,000 square foot prep kitchen in nearby space in a building BHL owns to accommodate the unexpected demand. BHL does not charge The Pharmacy for the prep kitchen space.

Another component of Plaintiff Raley's breach claim relates to the above quoted lease requirement of the Landlord being required to make available for lease "a build to specification restaurant." The Court dismisses this claim as well. As found above, the Defendants testified that they expended approximately $370,000 on the build out before

The Pharmacy opened for business. Plaintiff Raley's breach claim pertains to $28,054.45 The Pharmacy paid for equipment at The Pharmacy (Trial Exhibit P28); $27,572.11 that the Holland House paid (Trial Exhibit P29); and $91,384.56 4 Points paid for leasehold improvements (Trial Exhibit 27). These payments, however, were made after The Pharmacy opened for business. Additionally, Plaintiff Raley failed to establish that these costs were for items without which The Pharmacy could not operate. Thus, the proof failed to establish these costs were the responsibility of the Defendant Landlord, BHL.

As to parking, the evidence established that BHL has provided adequate space. The Court accredits Defendant Brinkman's testimony that The Pharmacy property itself has parking spaces as required by Metro Codes. In addition, other Brinkman properties in the vicinity provide some 30 spaces by combination of spaces at the Holland House, and other nearby properties owned by Defendant Brinkman. Thus, the parking spaces required on premises by Metro Codes is met, and more spaces, nearby, consistent with the urban setting, are provided.

It is therefore ORDERED that Plaintiff's Count I claim for breach by Defendant BHL is dismissed with prejudice.

Unjust Enrichment—Count II of Second Amended Complaint

This claim was dismissed under Tennessee Civil Procedure Rule 41.02 at the close of the Plaintiff's proof. That dismissal is reiterated herein.

Rule 41.02(2) provides

> (2) After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiffs evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court grants the motion for involuntary dismissal, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.

TENN. R. CIV. P. 41.02(2) (West 2017).

In ruling on the motion to dismiss pursuant to Rule 41.02(2), the Court applied the following legal standard.

> A Tenn. R. Civ. P. 41.02(2) motion for involuntary dismissal differs markedly from a Tenn. R. Civ. P. 50 motion for a directed verdict. The most obvious, yet most overlooked, difference is that motions for directed verdicts have no place in bench trials, while Tenn. R. Civ. P. 41.02(2) motions have no place in jury trials. *Cunningham v. Shelton Sec. Serv., Inc.*, 46 S.W.3d 131, 135 n. 1 (Tenn.2001); *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn.1977); *Scott v. Pulley*, 705 S.W.2d 666, 672 (Tenn. Ct. App. 1985). Beyond this obvious procedural difference, motions for involuntary dismissal serve a different purpose than motions for directed verdict and require the courts to employ a substantially different method of analysis.
>
> A Tenn. R. Civ. P. 50 motion for directed verdict provides a vehicle for deciding questions of law. The question presented is whether the plaintiff has presented sufficient evidence to create an issue of fact for the jury to decide. *Spann v. Abraham*, 36 S.W.3d 452, 462 (Tenn.Ct.App.1999); *Ingram v. Earthman*, 993 S.W.2d 611, 626 (Tenn.Ct.App.1998). The courts do not weigh the evidence when they answer this question, *Conatser v. Clarksville Coca–Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn.1995), nor do they evaluate the credibility of the witnesses. *Richardson v. Miller*, 44 S.W.3d 1, 30 (Tenn. Ct. App. 2000). Rather, they review the evidence in the light most

favorable to the non-moving party, give the non-moving party the benefit of all reasonable inferences, and disregard all the evidence contrary to the non-moving party's position. *Alexander v. Armentrout*, 24 S.W.3d 267, 271 (Tenn. 2000); *Addaman v. Lanford*, 46 S.W.3d 199, 203 (Tenn. Ct. App. 2000).

A directed verdict should not be granted if the party with the burden of proof has presented sufficient evidence to create an issue of fact for the jury to decide. *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 231 (Tenn. Ct. App. 1999). A jury issue has been created if there is any doubt regarding the conclusions to be drawn from the evidence, *Crosslin v. Alsup*, 594 S.W.2d 379, 380 (Tenn.1980), or if reasonable persons could draw different conclusions from the evidence. *Hurley v. Tennessee Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995); *Pettus v. Hurst*, 882 S.W.2d 783, 788 (Tenn. Ct. App. 1993). A jury issue has not been created when reasonable minds can draw only one conclusion from the evidence. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994); *Tompkins v. Annie's Nannies, Inc.*, 59 S.W.3d 669, 673 (Tenn. Ct. App. 2000).

Motions for involuntary dismissal pursuant to Tenn. R. Civ. P. 41.02(2) require the courts to engage in an entirely different analysis. These motions do not raise questions of law but rather challenge the sufficiency of the plaintiff's proof. *Smith v. Inman Realty Co.*, 846 S.W.2d 819, 821 (Tenn. Ct. App. 1992); *Merriman v. Smith*, 599 S.W.2d 548, 560 (Tenn. Ct. App. 1979). A claim may be dismissed pursuant to a Tenn. R. Civ. P. 41.02(2) motion to dismiss if, based on the law and the evidence, the plaintiff has failed to demonstrate a right to the relief it is seeking. *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d at 740. Motions under Tenn. R. Civ. P. 41.02(2) require less certainty than motions for directed verdict. *Smith v. Inman Realty Co.*, 846 S.W.2d at 822. Thus, a court faced with a Tenn. R. Civ. P. 41.02(2) motion need only impartially weigh and evaluate the plaintiff's evidence just as it would after all the parties had concluded their cases and may dismiss the plaintiff's claims if the plaintiff has failed to make out a prima facie case by a preponderance of the evidence. *Thompson v. *521 Adcox*, 63 S.W.3d 783, 791 (Tenn. Ct. App. 2001).

Burton v. Warren Farmers Co-op., 129 S.W.3d 513, 520–21 (Tenn. Ct. App. 2002).

The grounds for the dismissal of the unjust enrichment claim are that, first, it is an alternative claim and, secondly, there was insufficient proof to establish an unjust enrichment.

With respect to the alternative aspect of the claim, Tennessee law provides that where a contract is found to exist, there can be no claim for unjust enrichment. "It is a general rule of law that quantum meruit relief, based upon an implied contract or quasi-contract, will not be imposed in circumstances where an express contract or agreement exists." *Arena v. Schulman, LeRoy & Bennett*, 233 S.W.3d 809, 815 (Tenn. Ct. App. 2006) (citations omitted).

The findings herein establish that contracts exist, to wit: the Operating Agreement (exhibit P11), The Pharmacy Lease (exhibit P22), the oral salary agreement. Plaintiff Raley's unjust enrichment claim is that the Defendants used over $40,000 in 4 Points funds, through Defendant Brinkman's use of The Pharmacy debit card. To the extent this is a breach of one of the agreements just listed, the claim is dismissed. With these contracts in force, the law just quoted provides that there can be no claim for the alternative claim of unjust enrichment.

It is therefore ORDERED that the Plaintiff's Count II, Unjust Enrichment claim, is dismissed with prejudice.

Declaratory Judgment Regarding Salary Agreement—Count III of Second Amended Complaint

In Count III, Plaintiff Raley seeks a declaratory judgment "under Tenn. Code Ann. § 29-14-101 *et seq*. that he is entitled to receipt of payment of back pay in an amount to be determined at trial, but not less than $517,809.64 and authorizing 4 Points to pay Raley the back pay determined to be owed to him." The amount sought is 8% of the gross **sales** of The Pharmacy. Based upon the following facts and law the claim is dismissed because (1) the full 8% was not required to be paid and as a course of dealing was not paid and (2) the proof established the parties' agreement and course of dealing was 8% of gross **income** not gross sales.

Admitted into evidence was an "Amendment to Joint Venture Agreement." It was unsigned. It did, however, provide evidence of an alleged oral agreement. The Amendment reads as follows.

> **Amendment to Joint Venture Agreement**
>
> AMENDED PROVISIONS.
>
> The Agreement is amended and supplemented as follows:
>
> Section _____ shall now read:
>
> **Party One**, in exchange for intellectual property and operational management of any and all execution of business for profit at 731 McFerrin Ave, agrees to a pre-determined pay scale to Party Two, a salary derived

> from gross sales not to exceed 8%, as holding the title of Director of Operations. **Party One** shall retain 100% ownership of the building at 731 McFerrin Ave, and receive pre-arranged rental fees from 4-Points Hospitality LLC. The **Parties** shall thereby divide net profits after payroll, rent and all other expenses.

Trial Exhibit P12.

The text of Trial Exhibit P12 substantiates and the Court finds that the parties entered into an oral agreement that Plaintiff Raley would receive a salary of "up to" 8%. This text indicates that Plaintiff Raley was not promised receipt of the full 8% as a salary, as he claims.

In addition to the text of "up to," there is the conduct and course of dealing of Plaintiff Raley. The evidence established that Plaintiff Raley, as the managing member, was in complete control of paying all salaries of 4 Points. The evidence further established through the testimony of Plaintiff's expert witness, CPA Ricciardi, that Plaintiff Raley never paid himself the full 8% in any year even though there was sufficient revenue.

Thus, the combination of the text of the unsigned writing (Trial Exhibit P12) of "up to" and Raley's course of conduct and dealing provide a preponderance of the evidence that Plaintiff Raley paid himself the percentage that he determined in any given year was due, and that his salary was and has been paid in full.

With respect to the findings that the parties' oral salary agreement provided for percentages to be paid to the parties based upon gross income, those are provided *infra* at 24-26 in connection with claims made by Defendant Brinkman in Count III of the Third Amended Counterclaim.

It is ORDERED that Plaintiff Raley's Count III claim to recover $517,809.64 in back salary is dismissed with prejudice.

Judicial Intervention to Enforce Renewed Pharmacy Lease and Not Expel Plaintiff Raley From the LLC—Count IV of Second Amended Complaint

These claims of the Plaintiff overlap with claims made by the Defendant and are addressed below in the section ruling on the Third Amended Counterclaim filed by Defendant Brinkman.

Findings of Fact and Conclusions of Law On Defendant Brinkman's Counterclaim

Because some of the analysis of Counts I and II of the Third Amended Counterclaim incorporate findings concerning Count III, the latter shall be analyzed first.

Breach of Salary Agreement—Count III of the Third Amended Counterclaim

The Court has already found *supra* at 22-23 that the parties entered into an oral salary agreement that Plaintiff Raley would be paid a salary of up to 8% of gross income. With respect to the oral salary agreement, Defendant Brinkman seeks recovery in Count III of the Third Amended Counterclaim of: (1) salary he was underpaid and (2) a reserve fund for development of future restaurants which was never funded.

With respect to salary, the Court finds that the greater weight and preponderance of the evidence is that the parties' orally agreed that, in addition to Plaintiff Raley receiving a

salary of up to 8% of gross income, Defendant Brinkman would receive a salary of 4% of gross income. The evidence also established that after the payment of these salaries, Plaintiff Raley and Defendant Brinkman were to receive distributions, divided 50/50. In so finding the Court accredits the testimony of Defendant Brinkman; and Trial Exhibit D39 corroborates Defendant Brinkman's testimony.

Plaintiff Raley's testimony on these issues, particularly that he claims the salary percentages were to be calculated upon gross sales, is not accredited because the testimony has varied over time. At one point Plaintiff Raley claimed as a justification for not paying Defendant Brinkman salary, that the accountant, Mr. England, told Plaintiff Raley that Defendant Brinkman was not allowed to be paid a salary. This was denied by Mr. England, and such a statement does not appear in any of the emails, and Plaintiff Raley backed away from the testimony. Another change in position is that while Trial Exhibit D39, authored and emailed by Plaintiff Raley at the time the events in issue occurred, refers to 8% of gross "income," Plaintiff Raley's 8% claim for additional salary, analyzed above, had changed when he filed his pleadings to 8% of gross "sales." These changes of position by Plaintiff Raley make his testimony less reliable than Defendant Brinkman's.

As to references in emails at the time by the LLC accountant Joe England to computing percentages on "sales," these communications carry no weight. Mr. England admitted in his testimony that he was unclear as to the terms of the parties' agreement and that his characterizations of the agreement were uninformed.

Thus, accrediting the evidence provided by Defendant Brinkman of an oral salary agreement whereby Plaintiff Raley received 8% of gross income and Defendant Brinkman received 4% of gross income, and based upon the calculations of Defendant Brinkman's expert, Mr. Englert, from the business records of The Pharmacy[3] of a salary to Defendant Brinkman of 4% of gross income, it is ORDERED that Defendant Brinkman was underpaid salary and is owed $371,244.79 by 4 Points.

The second part of Defendant Brinkman's Count III claim of breach of the salary agreement is found in paragraph 97 of the Third Amended Counterclaim. This part of the Counterclaim asserts that another aspect of the parties' oral salary agreement was that 4% of gross income would be set aside and reserved as a fund to develop other restaurants (the "Reserve Fund").

With respect to oral contracts, they are enforceable but the "persons seeking to enforce them must demonstrate that the parties mutually assented to the terms of the contract and that these terms are sufficiently definite to be enforceable." *Schott v. Animagic Studios, LLC*, No. E2003-02287-COA-R3CV, 2004 WL 1813280, at *5 (Tenn. Ct. App. Aug. 16, 2004) (citing *Burton v. Warren Farmers Cooperative*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002)).

In this case there is insufficient evidence that such an agreement for a Reserve Fund ever came into being.

[3] The admissibility of Mr. Englert's testimony is analyzed *infra* at 39-42.

The alleged agreement was never memorialized in a written contract even though the parties had many such writings in which the agreement could have been included.

Additionally, references in correspondence (Trial Exhibit D39) to the other part of the 8%/4% salary agreement do not refer to the Reserve Fund.

Other proof (Trial Exhibits D15 and P39) further establishes that Defendant Brinkman erroneously believed that credits being taken on 4 Points taxes for retained earnings signified the Reserve Fund. This was not a mutual misimpression. Neither Plaintiff Raley nor the 4 Points' accountant Mr. England considered retained earnings to signify the Reserve Fund. This unilateral misimpression is demonstrated by Trial Exhibit D15 in which 4 Points' accountant Mr. England explains to Defendant Brinkman the meaning of retained earnings. This misimpression by Defendant Brinkman undercuts his claim that a Reserve Fund agreement was ever agreed to.

Additional detracting evidence is the impracticality and burden on both parties of such an agreement. Under the terms of the alleged agreement, through April 16, 2017, the alleged Reserve Fund would have contained in excess of $500,000 with each party paying tax on half of that even though they did not actually receive the money.

For all of these reasons, it is ORDERED that Defendant Brinkman's claim at paragraph 97 of Count III of the Third Amended Counterclaim of the existence of a reserve fund for future restaurant development is dismissed with prejudice.

Breach of Fiduciary Duty; Breach of Contract; Conversion; and Aiding and Abetting—Counts I, II, IV and V of Third Amended Counterclaim

Count I of Defendant Brinkman's Counterclaim asserts nine breaches of fiduciary duty, and Count II asserts eight breaches of the parties' Operating Agreement. This same alleged misconduct is asserted as the basis for Defendant Brinkman's Count IV claim that Plaintiff individually and as the owner of Amaranth LLC exercised dominion and appropriated funds, intellectual property and other 4 Points resources personally, and the Count V claim that Amaranth's receipt of funds and rights constituted participation in the conversion.

The Court has divided these into groups and shall first address Defendant Brinkman's claims, that Plaintiff Raley used 4 Points funds and resources for his personal benefit and for his other businesses, paid himself excessive distributions and salaries while failing to fully pay these to Defendant Brinkman, and other mismanagement in breach of his fiduciary duties as Managing Member of 4 Points, in breach of the Operating Agreement, and in the commission of conversion by Plaintiff Raley and aiding and abetting by Amaranth asserted in paragraphs 72, part of 73, part of 77, 80, 86, 90, 101, 102, 106 and 107 of the Third Amended Counterclaim.

As the managing member of 4 Points, Raley owes fiduciary duties to both 4 Points and Brinkman. Tenn. Code Ann. § 48-249-403(a); *Bridgeforth v. Jones*, 2015 WL 336376, at *26 (Tenn. Ct. App. Jan. 26, 2015). Those duties include a duty of loyalty and a duty of care. Tenn. Code Ann. § 48-249-403(b)&(c); *Bridgeforth*, 2015 WL 336376, at *26.

The duty of care includes the duty to "refrain[] from engaging in any grossly negligent or reckless conduct, intentional misconduct or a knowing violation of law." Tenn. Code Ann. § 48-249-403(c).

The duty of loyalty includes the duty to "account to the LLC and to hold as trustee for it any property, profit or benefit derived by the member in the conduct . . . of the LLC's business" in a member-managed LLC:

> (1) To account to the LLC and to hold as trustee for it any property, profit or benefit derived by the member in the conduct or winding up of the LLC's business, or derived from a use by the member of the LLC's property, including the appropriation of any opportunity of the LLC;

TENN. CODE ANN. § 48-249-403 (West 2017).

In terms of proof, the burden falls[4] upon the managing member to demonstrate its use of funds was proper, including the duty to maintain records.

> It is a well established principle of equity that fiduciaries have a duty to account to their beneficiaries for their disposition of all assets that they manage in a fiduciary capacity. That duty carries with it the burden of proving that the disposition was proper. If any corollary proposition is central to this case, it is that included within the duty to account is a duty to maintain records that will discharge the fiduciaries' burden, and that if that duty is not observed, every presumption will be made against the fiduciaries.
>
> * * *

[4] "[I]n matters of corporate law, Tennessee courts look to Delaware law due in part because Delaware has become the most popular state in which to incorporate businesses, and, as a result, its judiciary have become specialists in the field. *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 409–10 (6th Cir.2006) (citing *Bayberry Assocs. v. Jones*, No. 87–261–II, 1988 WL 137181, at *5 n. 8 (Tenn. Ct. App. Nov. 9, 1988), *vacated*, 783 S.W.2d 553, 560 (Tenn.1990)) (The appellate court decision in *Bayberry* was vacated, but the Tennessee Supreme Court did not dispute the lower court's use of Delaware law.)." *Rock Ivy Holding, LLC v. RC Properties, LLC*, 464 S.W.3d 623, 635 (Tenn. Ct. App. 2014).

In this case the burden of providing a satisfactory answer falls squarely upon the defendants, who were in exclusive control of TCI II, its funds, and its accounts and records. Corporate officers and directors, like all fiduciaries, have the burden of showing that they dealt properly with corporate funds and other assets entrusted to their care. Where, as here, fiduciaries exercise exclusive power to control the disposition of corporate funds and their exercise is challenged by a beneficiary, the fiduciaries have a duty to account for their disposition of those funds, *i.e.*, to establish the purpose, amount, and propriety of the disbursements. And where, as here, the fiduciaries cause those funds to be used for self-interested purposes, *i.e.*, to be paid to themselves or to others for the fiduciaries' benefit, they have "the burden of establishing [the transactions'] entire fairness, sufficient to pass the test of careful scrutiny by the court." As the Supreme Judicial Court of Massachusetts has stated:

> An agent or fiduciary is under a duty to keep and render accounts and, when called upon for an accounting, has the burden of proving that he properly disposed of funds which he is shown to have received for his principal or trust. *See Restatement 2d: Agency*, §§ 382, 399, comment e; *see also Restatement: Trusts*, §§ 172, 244-245; Scott, *Trusts* (2d ed.) §§ 172, 244-245.2. Substantially the same principles are applicable to corporate directors and officers.

* * *

The defendants had a duty to create and maintain accurate records to substantiate the expenses that they claim that TCI II paid. They also had the burden to produce those records when called to account for those expenses. The defendants have neither discharged that duty nor carried that burden. . . . .

* * *

During their tenure, Johnston and Spillane charged $1,142,032 of expenses on their Statek American Express credit cards, which they caused Statek to pay. **The plaintiffs contend that on their face those charges appear unrelated to any business purposes of Statek, and that because the defendants have not produced any documentary or other persuasive evidence showing that the charges were legitimate business expenses of Statek, the defendants are liable for the full amount of those charges** (emphasis added).

> The defendants' response is an admixture of substantive and procedural arguments. Defendants concede that some of these credit card charges were personal, but assert that the underlying documents show that many of those charges were business-related. For that reason, defendants urge, the Court cannot properly make broad-based, categorical liability rulings at this stage. Rather, it must determine, on an individualized basis, the propriety of each of the over 3,600 credit card transactions in dispute, which in turn will require additional fact finding by a special master or this Court after an additional hearing.
>
> * * *
>
> Because the defendants charged the challenged expenses to their Statek American Express credit cards, and also determined that Statek would pay those charged expenses, the defendants have the burden of showing that these charges represented legitimate business expenses of Statek.[91] It is undisputed that the challenged Statek American Express charges are not supported by any voucher or backup document other than the charge slips and monthly invoices themselves. Because the defendants had a duty to create and maintain books and records that would enable them to render a complete account of Statek's business, in cases where they failed to observe that duty every presumption will be made against them.

Technicorp Int'l II, Inc. v. Johnston, No. CIV. A. 15084, 2000 WL 713750, at 2*, *16, *18, *22, *25 (Del. Ch. May 31, 2000) (footnotes omitted).

> "The essence of a duty of loyalty claim is the assertion that a corporate officer or director has misused power over corporate property or processes in order to benefit himself rather than advance corporate purposes." *Steiner v. Meyerson,* 1995 WL 441999, at *2 (Del. Ch. July 19, 1995) (Allen, C.). "At the core of the fiduciary duty is the notion of loyalty—the equitable requirement that, with respect to the property subject to the duty, a fiduciary always must act in a good faith effort to advance the interests of his beneficiary." *U.S. W., Inc. v. Time Warner Inc.*, 1996 WL 307445, at *21 (Del. Ch. June 6, 1996) (Allen, C.). "Most basically, the duty of loyalty proscribes a fiduciary from any means of misappropriation of assets entrusted to his management and supervision." *Id.*
>
> "Self-interested compensation decisions made without independent protections are subject to the same entire fairness review as any other

> interested transaction." *Valeant Pharm. Int'l v. Jerney,* 921 A.2d 732, 745 (Del. Ch.2007). Decisions by interested fiduciaries to reimburse their own expenses or provide themselves with other corporate benefits are similarly subject to entire fairness review. *Sutherland v. Sutherland,* 2009 WL 857468, at *4 n.16 (Del. Ch. Mar. 23, 2009).

Cancan Dev., LLC v. Manno, No. CV 6429-VCL, 2015 WL 3400789, at *16 (Del. Ch. May 27, 2015), *aff'd,* 132 A.3d 750 (Del. 2016).

The foregoing law is also reflected in Section 17 of the Operating Agreement which requires the 4 Points bank accounts to be maintained separately from the personal funds of the members.

Turning to the evidence in this case, at trial there was the testimony of Defendant Brinkman and Stephen Englert, a certified public accountant retained by Defendant Brinkman to review business records of The Pharmacy: the Operating Agreement, the General Ledger, tax returns, W-2 payroll information and ADP payroll records, and bank statements, and calculate distributions and salary paid to Plaintiff Raley and Defendant Brinkman, and wages paid to employees.

The analyzing of this proof below begins with debit card expenses paid by The Pharmacy, testified to by Defendant Brinkman and totaled by Mr. Englert, for Plaintiff Raley's personal expenses. Next are the claims of Defendant Brinkman that he was underpaid salary and distributions. On these Mr. Englert provided two calculations, using the differing factor of on one hand, gross sales, and on the other, gross income, and applied these to the entries in 4 Points business records to provide the Court with both calculations depending on its finding whether the provision of the salary agreement was gross sales or

gross income. As found above, the Court's finding is that the salary agreement percentages to be paid to the LLC members were based upon gross income.

The Court begins with debit card expenses Defendant Brinkman asserts Plaintiff Raley paid that were personal expenses of Plaintiff Raley. Defendant Brinkman's review of the business records of The Pharmacy found some 80 or so debit card payments made by The Pharmacy from June of 2012 through December 2015 which payments, because of the nature of the vendor and purchases, did not appear on their face to be transactions related to the business of The Pharmacy.[5] As provided in the Delaware case quoted above, *Technicorp Int'l II, Inc.*, once the non-managing member shows that the charges on their face appear to be unrelated to any business purpose of the LLC, the burden shifts to the managing member/fiduciary to show that the charges were legitimate. The logic and fairness of this burden shifting is apparent because it is the managing member who is in control of the underlying invoices and receipts, who has the duty to maintain accounts and records, and on whom the liability must fall if the records are unclear or missing.

The kinds of categories of The Pharmacy debit card payments Defendant Brinkman testified to are hotel charges, restaurant charges, residential furniture and accessories, wearing apparel, airplane tickets. For example, there was a $469.61 charge to Korin Japanese; $1,045.52 to Fabric House (a drapery and fabric store in Nashville); $818.11 to Brooks Brothers. The Court finds that Defendant Brinkman's testimony established that on

5 As found above in the "Background Facts" section, The Pharmacy is a moderately priced restaurant that serves hamburgers and other American food, including milkshakes, ice cream sodas, phosphates and beer. No alcoholic mixed drinks are sold. The dining is casual, and the Business has a very popular beer garden.

their face $49,179.21 of the charges he testified to were unrelated to any business purpose of The Pharmacy. The burden then shifted to Plaintiff Raley.

The Court finds that as to $49,179.21, Plaintiff Raley failed to carry his burden, and he owes this amount to the LLC.

First, Plaintiff Raley failed to produce an accounting and/or receipts or invoices to rebut Defendant Brinkman's testimony as to $49,179.21 of charges.

Secondly, the narrative explanations Plaintiff Raley testified to were inadequate. The explanations consisted of the following.

— The dining out charges are Pharmacy related because, as part of his job as managing member, he was inspecting the competition.

— He could not research the charges because Pharmacy managers, Ben Albert and Mandy Allen, made them.

— Many employees at The Pharmacy had access to its debit card.

— The accountant for The Pharmacy was not hired to review invoices or bookkeeping, only write-up work which often did not detect mistakes like these.

— After the lawsuit was filed, Plaintiff Raley inquired of vendors for invoices but those could not be found or were not provided.

Representative of this testimony is Trial Exhibit P87. It shows that personal charges were being made and were detected only by happenstance, as below, by The Pharmacy accountant Joe England.

From: The Pharmacy pharmacy37206@gmail.com
Subject: Re: Fwd: Bank Account Questions
DATE: December 29, 2015 at 12:21 AM
To: Joe England joeengland@aol.com

_____

The Electronic Express was me. Personal purchase. I wrot a check back to Pharmacy for same amount. My bank wouldn't process the transaction at the time. Not sure why. The 101.00, not sure. Any other info you can give me. Sorry for the delayed response. Exhausting

—
Sent from Mailbox
On Mon, Dec. 28, 2015 at 2:01 PM, Joe England <joeengland@aol.com. wrote:
Terry – Can you help me out?
Joe England
6444 Renaissance Dr.
Port Orange, FL 32128
615-945-34-34
england.cpa@gmail.com
-----Original Message-----
From: Mandy Allen <maallen79@gmail.com>
To: Joe England <england.cpa@gmail.com>
Sent: Mon, Dec. 28, 2015 1:57 pm
Subject: Re: Bank Account Questions
Not sure. Terrell has the card so he would know. The Holland House one sounds like a tip.
On Monday, December 28, 2015, Joe England <england.cpa@gmail.com> wrote:
There was a charge to Electronic Express for $2,939.63 and a charge to Holland House for 101.00.
Thanks,
Joe
644 Renaissance Dr.
Port Orange, FL 32128
615-945-3434

—
Mandy Allen, General Manager
The Pharmacy Burger Parlor & Beer Garden
731 McFerrin Ave
Nashville, TN 37206
615.293.2999 cell

As quoted above, "the burden of providing a satisfactory answer falls squarely upon . . . [those] who were in exclusive control of the [Business'] funds, and its accounts and records. Corporate officers and directors, like all fiduciaries, have the burden of showing

that they dealt properly with corporate funds and other assets entrusted to their care . . . . [and have] a duty to create and maintain accurate records to substantiate the expenses that [the Business paid]." *Technicorp Int'l II, Inc.*, 2000 WL 713750 at * 16, *18 (Del. Ch. May 31, 2000).

The Court thus finds that $49,179.21 of Pharmacy debit card expenses were for non-Pharmacy expenses for Plaintiff Raley and he is liable for these.

In addition to debit card charges, Defendant Brinkman asserted that $26,372.88 in wages and payroll taxes for Cynthia Carter was a Raley personal expenditures paid by The Pharmacy because Ms. Carter worked at times as a nanny for Mr. Raley's family. The Court accredits Mr. Raley's testimony that Ms. Carter was employed by The Pharmacy to assist with implementation of the Affordable Care Act during the time the payments were made and only kept his children twice in a month during this time. Accordingly, the Court finds that the $26,372.88 of the Carter wages were properly paid by The Pharmacy and not subject to reimbursement by Plaintiff Raley.

Mr. Brinkman also identified in his review of The Pharmacy business records charges paid by The Pharmacy for Plaintiff Raley's other businesses: Holland House and Butchertown Hall, and Mr. Englert was able to identify some, as well, from the face of checks and entries in the business records. The Court accredits the testimony of Mr.

Brinkman and Mr. Englert that The Pharmacy paid $114,267.39 for Holland House expenses and $116,566.76 for Butchertown Hall.

For example, Plaintiff Raley testified that the use of Pharmacy funds to pay for a sign for his restaurant Butchertown Hall was a mistake by the General Manager of The Pharmacy, Ben Albert, and not something that Raley should be held accountable for. Plaintiff Raley testified that he instructed Mr. Albert to pay for the Butchertown Hall sign out of the operating account of The Pharmacy and those instructions were not followed by Mr. Albert. In support of this testimony, Raley identified an email (Trial Exhibit P75) he sent to Mr. Albert.

Yet, the email sent to Mr. Albert is from Raley's Pharmacy email account and does not specify from what "operating account" the money for the Butchertown Hall sign is to be paid. In fact, the Trial Exhibit shows that the invoice for the sign was billed to Butchertown Hall, but the actual payment for the sign as evidenced by the check on Trial Exhibit D34 shows that the Butchertown Hall sign was paid out of The Pharmacy operating account and signed by Mandy Allen, another manager at The Pharmacy. This evidence is representative of the full body of proof that Plaintiff Raley persistently failed to provide financial oversight to keep separate his personal and other business expenses from The Pharmacy.

> From: The Pharmacy pharmacy37206@gmail.com
> Subject: Fwd: Re: Butchertown Installed (invoice attached for funds request)
> Date: February 20, 2015 at 9:25 AM
> To: Ben Albert snafu32@gmail.com
> Please mail a check to Joey from the operating account today. Thx

—
Sent from Mailbox for iPhone
---------- Forwarded message ----------
From: Terrell Raley <pharmacy37206@gmail.com>
Date: Mon, Feb. 16, 2015 at 11:00 AM
Subject: Re: Butchertown Installed (invoice attached for funds request)
To: "The Sign Shop" <thesignshop@dukesigns.com>
Cc: "Fleming, Richard" <Richard.Fleming@pnfp.com>
Thank you Joey…i thought the sign looked wonderful. I am submitting to the bank a fund request for the invoice. Thanks again Joey..you've always come through for me.
Terry
On Feb. 16, 2015, at 10:43 AM, The Sign Shop <thesignshop@dukesigns.com> wrote:
Hey Terry,
I hope your opening on Saturday went well.
I got your sign installed Saturday morning. I hope it looked like you expected. I thought it looked pretty good, as that was a good idea you had. If it did not look as expected please let me know.
Attached you will find the invoice for this work. As always, I much appreciate the work you send my way.
Thanks,
Joey Duke
DUKE SIGNS, Inc.
d/b/a The Sign Shop
932 So. Douglas Ave.
Nashville, TN 37204

In addition to the unexplained personal and other business charges, there were further charges which should not have been paid by The Pharmacy: a $1,722 payment to Accountant Joe England on May 10, 2016, and payment of attorneys' fees of $33,816.50—all of which the Court finds were incurred for this litigation.

12/11/2015	Bass, Berry, Sims	$3,165.00
2/12/2016	Baker Donelson	$13,416.00
3/16/2016	Baker Donelson	$15,152.00
3/16/2016	Bass, Berry, Sims	$2,083.50

Because the LLC is owned only by two members and each asserted a claim on behalf of the LLC, it was not appropriate for the LLC to pay litigation expenses for either side, as ruled in a June 28, 2016 order. The case law cited in that order is incorporated herein. The litigation fees authorized by Plaintiff Raley as the managing member to be paid by The Pharmacy total $35,538.50. These, as well, must be reimbursed by Plaintiff Raley.

The proof further established that after the lawsuit was filed and Defendant Brinkman's Counsel provided a list of asserted non-Pharmacy related expenses, Plaintiff Raley reimbursed The Pharmacy $89,637.56. Of this $89,637.56, the Court finds that Plaintiff Raley should be credited $75,276.27.

Thus, the calculations are

- $84,717.71 owed by Plaintiff Raley for personal expenses and litigation fees;
- $114,267.39 owed by Plaintiff Raley for The Holland House expenses;
- $116,566.76 owed by Plaintiff Raley for Butchertown Hall expenses; and
- a $75,276.27 credit to Plaintiff Raley.

Crediting Plaintiff Raley with $75,276.27, the evidence established a total of $240,275.59 is owed by Plaintiff Raley for personal items and expenses of his other businesses.

Another matter the Court must address about the proof Defendant Brinkman and Mr. Englert provided from The Pharmacy business record is the admissibility of that evidence.

Defendant Brinkman's testimony, as a member of the LLC and based upon his review of the business records of The Pharmacy, and Mr. Englert's testimony was admissible at trial under the Business Records exception to the Hearsay Rule.

> Tenn. R. Evid. 803(6) embodies the exception to the hearsay rule commonly known as the business records exception. It rests on the premise that records regularly kept in the normal course of business are inherently trustworthy and reliable. *Hill v. National Life & Accident Ins. Co.*, 11 Tenn. App. 33, 37–38 (1929); 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1522 (James H. Chadbourn rev. 1974); Neil P. Cohen et al., *Tennessee Law of Evidence* § 803(6).1 (2d ed. 1990) ("Tennessee Law of Evidence"). Its purpose, like that of its predecessor, is to facilitate the use of business records by eliminating the expense and inconvenience of calling numerous witnesses involved in the preparation and maintenance of the records. *Graham v. State*, 547 S.W.2d 531, 538 (Tenn. 1977); *Kanipes v. North Am. Phillips Elecs. Corp.*, 825 S.W.2d 426, 428 (Tenn. Ct. App.1991); *West End Recreation, Inc. v. Hodge*, 776 S.W.2d 101, 105 (Tenn. Ct. App.1989).
>
> The documents themselves must satisfy the following five criteria in order to qualify for introduction under Tenn. R. Evid. 803(6):
>
> > 1. The document must be made at or near the time of the event recorded;
> > 2. The person providing the information in the document must have firsthand knowledge of the recorded events or facts;
> > 3. The person providing the information in the document must be under a business duty to record or transmit the information;
> > 4. The business involved must have a regular practice of making such documents; and
> > 5. The manner in which the information was provided or the document was prepared must not indicate that the document lacks trustworthiness.
>
> In addition, Tenn. R. Evid. 803(6) requires that the foundation for the admission of a business record must be provided by "the custodian or other qualified witness."
>
> The term "qualified witness" should be given a broad interpretation. *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993); *Williams v. Hittle*, 629 N.E.2d 944, 949 (Ind. Ct. App. 1994); 4 Jack B. Weinstein & Margaret A.

> Berger, *Weinstein's Evidence* ¶ 803(6)[02] (1994). To be considered qualified, a witness must be personally familiar with the business's record-keeping systems and must be able to explain the record-keeping procedures. *United States v. Hathaway,* 798 F.2d 902, 906 (6th Cir. 1986); *Cole Oil & Tire Co. v. Davis,* 567 So.2d 122, 129 (La. Ct. App. 1990); *Ohio v. Vrona,* 47 Ohio App.3d 145, 547 N.E.2d 1189, 1194 (1988); *Shaw v. Texas,* 826 S.W.2d 763, 765 (Tex. Ct. App. 1992); Tennessee Law of Evidence, *supra,* § 803(6).10 ("[t]he key is that the witness have knowledge of the method of preparing and preserving the records"). The witness is not required to have personal knowledge of the facts recorded, *Fawer, Brian, Hardy & Zatzkis v. Howes,* 639 So.2d 329, 330 (La. Ct. App. 1994), to have been involved personally in the preparation of the records, or even to know who actually recorded the information. *Resolution Trust Corp. v. Eason,* 17 F.3d 1126, 1132 (8th Cir.1994).
>
> * * *
>
> The computer printouts upon which Mr. Davis based his testimony were typical of those normally available to attorneys in both firms. They were admissible under Tenn. R. Evid. 803(6) because Mr. Davis demonstrated that the attorneys in both firms regularly prepared time records, that the records were prepared at or near the time the service was provided, that the attorneys preparing the records had personal knowledge of the facts recorded, and that the firms maintained the time records in the usual course of their business. The fact that the computer printouts were prepared in response to a discovery request does not undermine their trustworthiness because the printouts themselves and the information on the printouts were records of a regularly conducted business activity.

Alexander v. Inman, 903 S.W.2d 686, 701 (Tenn. Ct. App. 1995).

Further, Mr. Englert's testimony was proper and admissible based upon his practice and experience as a certified public accountant, and financial planner and specialist. He was not offered as an expert forensic accountant, and forensic accounting was not the litigation work he performed or that was needed.[6] Mr. Englert provided mathematical

[6] Forensic accounting is much more than the mathematical calculations Mr. Englert provided as explained in the law journals quoted as follows. Forensic accounting is investigative to identify fraud and deviations

calculations based upon the entries he observed in The Pharmacy's business records, some of which were flagged by Defendant Brinkman, such as the charges which on their face appeared to be non-Pharmacy related.

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from accounting standards. Mr. Englert did not perform such work, and his testimony did not provide forensic accounting.

> When frauds are committed by overriding or bypassing controls, or when fraudulent transactions are disguised or covered up, the auditor may not become suspicious. In addition, financial accounting and financial-statement audits are governed by GAAP and GAAS -- Generally Accepted Accounting Principles and Generally Accepted Auditing Standards.
>
> Forensic accountants rely heavily on intuition and experience.
> Forensic and investigative accounting is goal oriented. Forensic accountants may find themselves hired to:
>
> > • investigate an allegation of fictitious transactions being recorded in a brokerage house;
> > • review and investigate the investing activities of a municipal fund money manager;
> > •determine if the information relied on by an investment bank misrepresented the financial position of the target company, and if so, how, and what was the impact?
>
> Not only are the goals of auditing and forensic accounting widely different, but the approaches can also differ to a great degree. Auditing includes a predetermined set of tests and procedures performed based on the assessments of various levels and forms of risk. Forensic accounting is a more intuitive process.
>
> Forensic accounting services differ from traditional litigation accounting services (often referred to as litigation support) in that the latter tend to be associated with the calculation of damages, while the emphasis in forensic accounting is on financial investigations.

Ian Ratner, *Fraud by the Numbers*, Bus. L. Today, SEPTEMBER/OCTOBER 1995, at 51, 52–53 (West 2017).

> Historically, forensic accounting referred to the skills and techniques required of accountants who worked within our legal system in litigation support and expert testimony. Today, the forensic accountant also has become a fraud investigator involved in discovering, interpreting and preventing financial statement fraud--the deliberate misrepresentation of a company's financial position, results of operations, and cash flow by management to cover misappropriation of assets or to improve their own financial gains at the expense of stockholders.

Seymour Jones, *The Forensic Accountant's Role in Litigation*, N.J. Law., August 2004, at 22 (West 2017).

Other calculations made by Mr. Englert from The Pharmacy business records, in addition to personal expenses of Plaintiff Raley and his businesses, also established that as of the date of the lawsuit Defendant Brinkman had been underpaid a total of $227,445.33 in distributions declared by the LLC to the members from 2012 through February 25, 2016. After the lawsuit was filed, and the Court ordered a catch-up distribution, $5,400, of the $222,045.33, remains due and owing to Defendant Brinkman.

Mr. Englert's testimony further established Defendant Brinkman was underpaid salary of $371,244.79 based upon the terms of the salary agreement, as determined by the Court above, of 4% of gross income.

In sum, the evidence was that as the LLC managing member, with a fiduciary duty of loyalty to maintain accurate and complete records and to account for LLC transactions, and duties under the Operating Agreement, the following occurred on Plaintiff Raley's watch from 2012 until the February 2016 filing of the lawsuit:

— $227,445.33 underpaid distributions to Brinkman

— $371,244.79 underpaid salary to Defendant Brinkman

— $315,551.86[7] in unexplained expenses which appear on their face to be personal expenses of Plaintiff Raley or for his other businesses.

Thus, the greater weight and preponderance of the evidence established systemic/persistent and material breaches of fiduciary duty and breach of the Operating Agreement by Plaintiff Raley, as alleged in Counts I and II of the Third Amended

[7] This is the amount before crediting Plaintiff Raley with $75,276.27 from a reimbursement payment he made after the lawsuit was filed. Plaintiff Raley paid $89,637.56. The Court found above that $75,276.27 of the $89,637.56 should be applied as a credit.

Counterclaim. These breaches also constitute conversion—the claim made in Count IV of the Third Amended Counterclaim.

> Conversion is the appropriation of tangible property to a party's own use in exclusion or defiance of the owner's rights. *Barger v. Webb,* 216 Tenn. 275, 391 S.W.2d 664, 665 (1965); *Lance Prods., Inc. v. Commerce Union Bank,* 764 S.W.2d 207, 211 (Tenn.Ct.App.1988). Conversion is an intentional tort, and a party seeking to make out a *prima facie* case of conversion must prove: (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights. *Kinnard v. Shoney's, Inc.,* 100 F.Supp.2d 781, 797 (M.D.Tenn.2000); *Mammoth Cave Prod. Credit Ass'n v. Oldham,* 569 S.W.2d 833, 836 (Tenn.Ct.App.1977). Property may be converted in three ways. First, a person may personally dispossess another of tangible personalty. Restatement (Second) of Torts § 223(a) (1965). Second, a person may dispossess another of tangible property through the active use of an agent. *See, e.g., McCall v. Owens,* 820 S.W.2d 748, 751 (Tenn.Ct.App.1991). Third, under certain circumstances, a person who played no direct part in dispossessing another of property, may nevertheless be liable for conversion for "receiving a chattel." Restatement (Second) of Torts § 223(d).

PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 553 (Tenn. Ct. App. 2012).

> Commingling of trust funds by the trustee with its own general funds is conversion of the former for which the trustee is held liable universally.

Duncan v. Williamson, 74 S.W.2d 215, 217 (Tenn. 1933) (citations omitted).

> When the bank mingled the funds of the wards for which it was guardian with its own funds, it was guilty of a conversion, and all those who knowingly participated therein were likewise guilty. State v. McLemore, 162 Tenn. 129, 37 S.W.(2d) 103.

State ex rel. Robertson v. First State Bank of Ripley, 19 Tenn. App. 556, 91 S.W.2d 1039, 1046 (1935).

Another category of breach of fiduciary duty and the Operating Agreement asserted by Defendant Brinkman is the failure to reimburse him for The Pharmacy build out and initial operating expenses in excess of Defendant Brinkman's $175,000 capital contribution (paragraphs 74 and 87 of the Third Amended Counterclaim). This claim is

dismissed. Based upon the text of the lease quoted above, Defendant BHL was to provide "a build to specification operational restaurant." These expenses Defendant Brinkman seeks to recover were his obligation to pay under the terms of the lease.

As to the other breaches asserted by Defendant Brinkman in Counts I and II of the Third Amended Counterclaim, the following are found by the Court to have occurred and are cumulative: Plaintiff Raley denied Defendant Brinkman access to the 4 Points' bank account and records, and made unilateral LLC decisions requiring unanimous consent: advancing legal fees and moving key employees from The Pharmacy to another Raley business (paragraphs 75, 76 and 85 of the Third Amended Counterclaim).

Three claims of Counts I, II and IV of the Third Amended Counterclaim of Defendant Brinkman remain to be determined. Those are Defendant Brinkman's claims at paragraphs 79, 89 and 101 that Plaintiff Raley failed to pay amounts owed under the Lease; his claim that Plaintiff Raley unilaterally renewed The Pharmacy Lease for an additional 10 years without the required unanimous consent of Defendant Brinkman; and that Plaintiff Raley converted the intellectual property of 4 Points.

As to the counterclaim that rents are owed by 4 Points to Defendant BHL, the Court finds that $18,500 is owed by 4 Points to BHL on the Lease. The Court further finds, however, that the failure to pay this rent was not intentional or mismanagement by Plaintiff Raley because Defendant Brinkman confused the amount to be paid with his own conduct. The Court finds that the evidence established that Defendant Brinkman did not set up an automatic draft from The Pharmacy operating account for the payment of rent to BHL, and

BHL never sent a monthly invoice to The Pharmacy for the rent due and owing to The Pharmacy. Moreover Defendant Brinkman obtained Plaintiff Raley's consent to reflect a higher payment of rent for Defendant Brinkman's tax purposes which was, in part, a distribution.

In detail, the testimony of Plaintiff Raley and Defendant Brinkman established that the original rent amount from the lease agreement was $2,500.00 per month. Trial Exhibit P22 is the lease agreement between The Pharmacy and BHL. Regarding the original rent to be paid by The Pharmacy, Trial Exhibit P22 states in pertinent part:

> 2. Rental.
> Tenant shall pay to Landlord $30000.00 per year or $2500.00 per month.
> Tenant will pay $0 deposit.
> The first rent payment of $2500 will be due on the 1st day of October 2011.
> Each installment payment shall be due in advance on the 1st day of each calendar month during the lease term to Landlord with an ACH bank draft. Suntrust Bank or at such other place designated by written notice from Landlord. The rental payment amount for any partial calendar months included in the lease term shall be prorated on a daily basis. Payments will be considered past due as of the _7th_ day of each month in which case Tenant will pay an additional $100 late fee per week.
> The rent will increase 3% per year starting the 3rd year for CPI (Consumer Price Index).
>
> ****
>
> 7. Property Taxes.
> Tenant shall be responsible for paying property taxes with respect to the Leased Premises. Starting based on the current year of approximately $1000 after the first year with a maximum increase of 10% per year and never more that [sic] the actual property taxes.

Trial Exhibit P22, *Original Sept. 1, 2011 BHL/4 Points Lease*, pp. 1-2.

According to Defendant Brinkman's testimony, which the Court accredits, the rent was increased from $2,500.00 to $3,000.00 in November 2013 to help account for an

increase in the property taxes at The Pharmacy. Defendant Brinkman testified that Plaintiff Raley never objected to this rent increase, and $3,000.00 in rent was paid to BHL by The Pharmacy from November 2013 through at least January 2015.

In addition to the $3,000.00 in monthly rent from November 2013 through at least January 2015, Defendant Brinkman also testified that BHL received an additional $3,000.00 a month that Defendant Brinkman categorized as "rent" but had an understanding with Plaintiff Raley that this additional $3,000.00 was really part of Defendant Brinkman's 50/50 distribution. Defendant Brinkman explained to Plaintiff Raley that it was helpful for him personally to be paid the additional $3,000.00 as "rent" over and above the normal $3,000.00 monthly rent for tax reasons and that Plaintiff Raley did not object to this arrangement as shown by Trial Exhibit P57. However, based on advice from accountant Joe England the practice of adding an additional $3,000.00 over and above the normal $3,000.00 monthly rent payment was stopped after January 2015.

According to Defendant Brinkman's testimony, Plaintiff Raley suggested to Defendant Brinkman to raise the monthly rent at The Pharmacy to $3,500.00. Following this suggestion, from March 2015 until the filing of the lawsuit, the amount of monthly rent paid to BHL was $3,500.00 a month. Plaintiff Raley disputes that the monthly rent should have been raised to $3,500.00 and according to Plaintiff Raley's testimony he stated that honestly he did not know what the rent for The Pharmacy was because he never received an invoice from BHL.

The Court does not accredit and does not find enforceable Trial Exhibit P67 which

contained a handwritten notation on the BHL-Pharmacy lease that stated "If there is enough revenue $1500 addition rent paid with wages every 14 days." This handwritten notation also had the purported signatures of both Plaintiff Raley and Defendant Brinkman. According to Plaintiff Raley's testimony, he does not remember signing this document and does not believe the handwritten signature is his signature. The Court accredits Plaintiff Raley on this point.

Accordingly, the Court finds that the monthly rent due to BHL was originally $2,500.00 and increased to $3,000.00 from November 2013 through at least January 2015 when it increased again to $3,500.00. From this testimony and Mr. Englert's calculations as modified and informed by additional evidence presented at trial, the Court finds a total underpayment of $18,500.00 in monthly rent by 4 Points to BHL. As noted at the outset of this issue, however, that $18,500 is owed by 4 Points to BHL is not the result of Plaintiff Raley's breach of his fiduciary duty or the Operating Agreement.

As to paragraphs 78, 88, and 101 of the Third Amended Counterclaim that Plaintiff Raley converted the intellectual property of 4 Points, this claim is dismissed as a matter of law.

> As this Court has noted, intellectual property is part of "a species of intangible personal property ... as opposed to tangible personal property that can be seen, felt, weighed and measured." *Corporate Catering, Inc. v. Corporate Catering, LLC,* No. M1997–00230–COA–R3–CV, 2001 WL 266041, at *5 (Tenn. Ct. App. Mar. 20, 2001) (*no perm. app. filed*). The law recognizes important differences between the two. For example, in Tennessee, a civil action for conversion, the wrongful appropriation of tangible property, is not recognized for the appropriation of intangible

> personal property. *B & L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674, 680 (Tenn.Ct.App.1995).

Ralph v. Pipkin, 183 S.W.3d 362, 368 (Tenn. Ct. App. 2005).

> Conversion is the wrongful appropriation of another's tangible property; an action for the conversion of intangible personal property is not recognized in Tennessee.

Wells v. Chattanooga Bakery, Inc., 448 S.W.3d 381, 392 (Tenn. Ct. App. 2014) (citation omitted).

As a bar to these above claims asserted in Defendant Brinkman's Third Amended Counterclaim, Plaintiff Raley asserted several affirmative defenses.

With respect to Plaintiff Raley's assertion that the one-year statute of limitations bars Defendant Brinkman's claim of breach of fiduciary duty, the Court finds that the greater weight and preponderance of the evidence is that Defendant Brinkman did not realize until March 2015 that Plaintiff Raley was using The Pharmacy funds for non-Pharmacy expenses. The Court accredits the testimony of Defendant Brinkman that prior to March 2015 he was asked by Plaintiff Raley if some of The Pharmacy employees could be used temporarily during the initial opening months of Plaintiff Raley's new restaurant, Butchertown Hall, to work there. Months later, however, Defendant Brinkman found out through a Butchertown Hall employee that they were being paid by The Pharmacy. It was then in March of 2015 that Defendant Brinkman knew something was amiss. In April of 2015, Defendant Brinkman (Trial Exhibit D39) demanded that any disparities be rectified. Before a year lapsed from that knowledge, the lawsuit was filed

February 2016. That Defendant Brinkman was not aware prior to March 2015 of breaches by Plaintiff Raley is reasonable. Defendant Brinkman was permitted to rely upon Plaintiff Raley to properly handle the finances because he was the managing member of the LLC. Also, Defendant Brinkman did not receive any information from the 4 Points' accountant, Joe England, except the 4 Points information needed for Brinkman's personal tax return. Neither Plaintiff Raley's nor 4 Points' tax information was sent to Defendant Brinkman.

It is ORDERED that Plaintiff Raley's statute of limitations defense is dismissed with prejudice.

As to Plaintiff Raley's affirmative defense that the failure of Defendant Brinkman to pay his $175,000 capital contribution was the first breach and bars Defendant Brinkman's claims, law located from other jurisdictions, because no Tennessee law on this point could be found, is that if a party elects to continue the contract after a material breach, the obligations of both parties remain in force and the injured party may retain only a claim for damages for the breach. Thus while Plaintiff Raley can recover damages for a first breach, he can not assert it as a bar to Defendant Brinkman's claims for recovery on the contract because Plaintiff Raley continued the contract after the material breach.

> The general rule upon one party's breach of contract is that "the non-breaching party [may] treat the breach as a discharge of his contract liability." *Bradley v. Health Coal., Inc.*, 687 So.2d 329, 333 (Fla. 3d DCA 1997). However, one party cannot stop performance because of an alleged breach while continuing to accept the contract's benefits, *See Dunkin' Donuts Franchised Rests. LLC v. D & D Donuts, Inc.*, 566 F.Supp.2d 1350, 1360 (M.D.Fla.2008). A material breach
>
> > merely gives the injured party the right to end the agreement; the injured party can choose between canceling the contract

> and continuing it.... If he elects to continue the contract, the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach.
>
> *Dunkin' Donuts of Am., Inc. v. Minerva, Inc.*, 956 F.2d 1566, 1571 (11th Cir. 1992) (quoting *Cities Serv. Helex, Inc. v. U.S.*, 211 Ct. Cl. 222, 543 F.2d 1306, 1313 (Ct. CI. 1976)).

Hous. & Residence Life, LLC v. Universal Tech. Inst. of Phoenix, Inc., No. 6:12- CV- 874-ORL-28, 2013 WL 4506395, at *9 (M.D. Fla. Aug. 23, 2013). *See also Gruchalski v. Cyganiak*, 193 Wis. 2d 639, 537 N.W.2d 433 (Ct. App. 1995).

It is therefore ORDERED that Plaintiff Raley's affirmative defense of first breach as a bar to Defendant Brinkman's claim of breach of the Operating Agreement is dismissed with prejudice.

Other affirmative defenses asserted by Plaintiff Raley are that Section 23 of the Operating Agreement precludes liability of Plaintiff Raley unless his conduct constituted gross negligence or gross misconduct. The findings above of willful and persistent breaches of fiduciary duty, the Operating Agreement and conversion from mispayments by Plaintiff Raley, the Court finds, constitute gross misconduct. The bar of section 23 to liability is inapplicable.

Plaintiff Raley has also asserted the defense of unclean hands but has failed to prove it.

In sum, the Court finds that the greater weight and preponderance of the evidence establishes the breaches of fiduciary duty and the Operating Agreement and conversion

asserted in Counts I, II and IV paragraphs 72, part of 73, part of 75, part of 76, 77, 80, part of 85, 86, 90, and part of 101 of the Third Amended Counterclaim. It is ORDERED that $240,275.79 is owed by Plaintiff Raley to 4 Points as reimbursement for personal items and expenses of his other businesses; 4 Points owes BHL $18,500 for past due rent; 4 Points owes Defendant Brinkman $5,400 to equalize member distributions and $371,244.79 in underpaid salary.

With respect to the Count V claim that Amaranth Hospitality Group, LLC aided and abetted Plaintiff Raley's conversion because Amaranth was the recipient of goods and charges paid by The Pharmacy, Defendant Brinkman failed to provide citation to legal authority for this proposition, and it is ORDERED that Count V of the Third Amended Counterclaim is dismissed with prejudice as a matter of law.

Termination of Raley's Membership Interest in 4 Points Or, Alternatively, Judicial Dissolution of the LLC—Counts VI and VII of the Third Amended Counterclaim

As authorized by Tennessee Code Annotated section 48-249-503(a), Plaintiff Raley's membership in 4 Points is terminated. The basis for termination is Tennessee Code Annotated sections 48-249-503(a)(6)(B) and (C).

In making this decision, the Court has been guided by the following factors used in other states under these circumstances.

- In short, LLC members seeking to expel a fellow member under subsection 3(c), or its counterpart in the RULLCA, *N.J.S.A.* 42:2C–46(e)(3), are required to clear a high bar. Neither provision authorizes a court to

> disassociate an LLC member merely because there is a conflict. *N.J.S.A.* 42:2B–24(b)(3)(c); *N.J.S.A.* 42:2C–46(e)(3). Instead, both provisions require the court to evaluate the LLC member's conduct relating to the LLC, and assess whether the LLC can be managed notwithstanding that conduct, in accordance with the terms of an operating agreement or the default provisions of the statute. *Ibid.*
>
> In that inquiry, a trial court should consider the following factors, among others that may be relevant to a particular case: (1) the nature of the LLC member's conduct relating to the LLC's business; (2) whether, with the LLC member remaining a member, the entity may be managed so as to promote the purposes for which it was formed; (3) whether the dispute among the LLC members precludes them from working with one another to pursue the LLC's goals; (4) whether there is a deadlock among the members; (5) whether, despite that deadlock, members can make decisions on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions; (6) whether, due to the LLC's financial position, there is still a business to operate; and (7) whether continuing the LLC, with the LLC member remaining a member, is financially feasible.
>
> A trial court considering an application to expel a member under *N.J.S.A.* 42:2B–24(b)(3)(c) of the LLCA, or the analogous "not reasonably practicable" standard of the RULLCA, *N.J.S.A.* 42:2C–46(e)(3), should conduct a case-specific analysis of the record using those factors, and other considerations raised by the record, with no requirement that all factors support expulsion, and no single factor determining the outcome.

IE Test, LLC v. Carroll, 226 N.J. 166, 183–84, 140 A.3d 1268, 1279 (2016) (footnotes omitted).

- Moreover, there is no evidentiary support for Talcott's suggestion that the parties are not at an impasse. The parties have not interacted since their falling out in October, 2003. Clearly, Talcott understands that the end of Haley's managerial role from the Redfin Grill profoundly altered their relationship as co-members of the LLC. After all, it has left Haley on the outside, looking in, with no power. Of course, Talcott insists that the LLC can and does continue to function for its intended purpose and in conformity with the agreement, receiving payments from the Redfin Grill and writing checks to meet its obligations under the mortgage on Talcott's authority. But that reality does not mean that the LLC is operating in accordance with the

> LLC Agreement. Although the LLC is technically functioning at this point, this operation is purely a residual, inertial status quo that just happens to exclusively benefit one of the 50% members, Talcott, as illustrated by the hands-tied continuation of the expired lease with the Redfin Grill. With strident disagreement between the parties regarding the appropriate deployment of the asset of the LLC, and open hostility as evidenced by the related suit in this matter, it is not credible that the LLC could, if necessary, take any important action that required a vote of the members. Abundant, uncontradicted documents in the record demonstrate the inability of the parties to function together.

Haley v. Talcott, 864 A.2d 86, 96 (Del. Ch. 2004) (footnotes omitted).

Considering this guidance from cases outside of Tennessee and the grounds stated in Tennessee Code Annotated sections 48-249-503(a)(6)(B) and (C), the Court finds that the preponderance of the evidence is that the grounds stated in the statute for termination of Plaintiff Raley's membership are present in this case. Incorporated herein are the above findings of Plaintiff Raley's breach of fiduciary duty and breach of contract that (1) Plaintiff Raley and/or others working under his supervision and control persistently mixed up the handling of 4 Points' property and funds with personal ones of Plaintiff Raley and his other businesses, and (2) Plaintiff Raley engaged in conduct that makes it not reasonably practicable to carry on the business with the other member, Defendant Brinkman. As determined in the findings above, Plaintiff Raley, as managing member of the LLC, mismanaged at least $914,241.98 from 2012 through 2016. $315,551.86 of that is attributable to personal expenses of Plaintiff or his other businesses being paid by The Pharmacy. $598,690.12 was for underpayment of salary and distributions to Defendant Brinkman. The magnitude of these amounts and that the conduct occurred persistently are a reasonable basis for Defendant Brinkman not to be able to continue being in business

with Plaintiff Raley. Even though Plaintiff Raley has hired a CPA firm to monitor transactions and calculate salary and distributions, the evidence established that these measures are too late to repair the damage to the working relationship needed by a 2-member LLC to make decisions going forward. The proof at trial showed that irreparable damage to the business and governance relationship has already occurred, for example Plaintiff Raley's renewal of The Pharmacy Lease with BHL was opposed by Brinkman and that the parties can not agree on matters concerning key employees.

The evidence established that the personal and business relationship of the parties has been destroyed. Because of the significant dollar amounts and property that Plaintiff Raley and/or those working under his control and supervision mixed in with his personal funds and those of Amaranth, when he was performing the duty as the managing member and as a fiduciary, Defendant Brinkman no longer trusts Plaintiff Raley, and the parties no longer speak to or deal with each other. The evidence established that the parties have not personally spoken to each other in over a year, and have not met or discussed matters which require mutual consent under the Operating Agreement.

The impact of this lack of communication and trust is exponential in this case because Defendant Brinkman is the landlord of the premises where The Pharmacy is located. That the parties are no longer working together but are suspicious and at odds has also destroyed the landlord/tenant relationship.

The evidence further established through the testimony of Mandy Allen and Defendant Brinkman and the absence of strenuous refutation of this proof by Plaintiff

Raley that The Pharmacy's recipes and aspect and operations have been developed to the point that The Pharmacy could certainly function for a year absent Plaintiff Raley and likely beyond that. Further the Court accredits the testimony of Defendant Brinkman that he intends to rehire Ben Albert, a former manager knowledgeable of and capable in operating the business.

Additionally, in weighing the equities considering the best business interest of 4 Points, the evidence is that Plaintiff Raley has other successful restaurants he has created and provided to the community and possibly more to come. Also, as a matter of law, in Phase 2 of this case, Plaintiff Raley's membership interest will be valued and he will be paid fair compensation for that interest.

Plaintiff Raley's assertion that he should not be terminated as a member because the business has been profitable, the Court finds, is a testament to the genius of the business the parties have created. The Court finds that The Pharmacy has managed to prosper despite the dysfunctioning of the members. The prosperity of the business, however, does not overcome the evidence that the members are unable to make key decisions going forward on the operation and governance of the Business because their personal and business relationship has been irreparably destroyed.

It is therefore ORDERED that pursuant to Tennessee Code Annotated section 48-249-503(a)(6)(B) and (C) the membership of Plaintiff Raley in 4 Points Hospitality, LLC is terminated.

The ruling to terminate Plaintiff Raley's membership makes it unnecessary to decide the alternative claim of Defendant Brinkman for dissolution of 4 Points.

Termination of Plaintiff's Raley's membership also makes it unnecessary for the Court to exercise its discretion to set aside Plaintiff Raley's lease renewal, an alternative sought by Defendant Brinkman in paragraph 5 of the Prayer for Relief of the Third Amended Counterclaim. With the termination of Plaintiff Raley's membership, there will be a concert of interest in Defendant Brinkman as owner of 4 Points and the landlord of the premises for determinations to be made about the lease terms and renewal.

Punitive Damages—Paragraphs 82, 104 and 109 of the Third Amended Counterclaim

It is ORDERED that punitive damages shall not be awarded against Plaintiff Raley in this case.

As found above, Plaintiff Raley was gross and willful in persistently failing to monitor and keep separate the property and funds of 4 Points from his personal funds and his other businesses Amaranth Hospitality Group, LLC and Holland House, and the proof showed that Plaintiff Raley had too expansive a view of business-related activities by aligning those with his persona that was an exercise of dominion and control that constituted conversion.

The Court finds, however, that even though the conduct of Plaintiff Raley was willful, gross and persistent, it was not done maliciously or in bad faith. Evidence of this includes that Plaintiff Raley, during the course of the lawsuit, reimbursed 4 Points

non-Pharmacy related expenses for which he has been credited $75,276.27; he withdrew claims to the intellectual property; he retained an accountant for 4 Points to do more than just write-up work and to also review invoices to assure proper payment in the future; and he testified that he did not object to Defendant Brinkman receiving a 4% salary. Additionally, the evidence was that the Business was an instant success with pressure to meet that demand. The bookkeeping and financial consulting needed was an afterthought and not a priority. Thus, while Plaintiff Raley's unrectified conduct over a 4-year span constitutes a breach of fiduciary duty and the Operating Agreement and conversion and has severed the personal and business ties and trust of the LLC members, Plaintiff Raley's conduct, the Court finds, was not done with malice or the intent to steal or take from Defendant Brinkman and does not justify an award of punitive damages.

Specific Performance; Permanent Injunction; and Imposition of a Constructive Trust—Paragraphs 92 and 99 of the Third Amended Counterclaim, and Paragraphs 3, 6 and 7 of Prayer for Relief

It is ORDERED that the alternative remedies of specific performance and a permanent injunction are denied as the recovery awarded to Defendant Brinkman and BHL is adequate. It is further ORDERED that imposition of a constructive trust is premature at this time for there has been no refusal, yet, by Plaintiff Raley to pay the amounts awarded. The relief of a constructive trust is dismissed without prejudice to reassert upon proof of refusal to pay.

Attorneys' Fees and Expenses

It is ORDERED that Defendant Brinkman's claim to recover reasonable attorneys' fees[8] under Tennessee Code Annotated sections 48-249-804(a) or (b), or 48-249-805 is denied for the following reasons.

— There was reasonable cause for Plaintiff Raley to file this lawsuit. There was uncertainty and confusion about the terms of the parties' agreements and the performance required as is demonstrated above, which needed to be determined. Further, the parties had reached an impasse in their ability to deal with each other. The parties were at an impasse in making key decisions about the business as demonstrated by the disputes referred to above which surfaced in the litigation, such as renewal of the lease, and hiring and firing of key employees, and in carrying on the business. The alternative of filing a lawsuit to obtain clarity was appropriate and reasonable.

— Defendant Brinkman has not been entirely the prevailing party. He has prevailed on some claims but has found to have breached the Operating Agreement by not making his capital contribution; he caused confusion about the amount of the lease payments The Pharmacy was to make to BHL; and he has been found to have been mistaken about the existence, as part of the salary agreement, of a 4% reserve fund for future development.

This dismissal of Defendant Brinkman's claim for attorneys' fees obviates a Phase 4 hearing in this case, referenced in the April 10, 2017 Order, to determine the amount of any attorneys' fees awarded.

[8] Defendant Brinkman's claim to recover attorneys fees under paragraph 24 of the Operating Agreement was dismissed on summary judgment on April 21, 2017. The reasoning and authorities of the April 21, 2017 Memorandum and Order are incorporated herein by reference.

Phase 2

Now that it has been decided that Plaintiff Raley's membership is terminated, Tennessee law requires the LLC to determine whether it will continue the business and, if so, it shall communicate that determination of fair value and proposed terms of payment to Plaintiff Raley for his interest.

It is therefore ORDERED that by August 4, 2017, 4 Points Hospitality, LLC shall file a notice with the Court stating whether it intends to continue business now that Plaintiff Raley's membership interest has been terminated.

If the LLC elects to continue business it is ORDERED that pursuant to Tennessee Code Annotated section 48-249-505, the LLC shall communicate its determination of fair market value and terms of payment to Plaintiff Raley's Counsel by August 16, 2017, accompanied by the following items stated in section 48-249-506(1)(A)-(C):

> (A) A statement of the LLC's assets and liabilities as of the date of termination;
>
> (B) The LLC's latest available balance sheet and income statement, if any; and
>
> (C) An explanation of how the determination of fair value was made.

It is further ORDERED, pursuant to section 48-249-506(3), that if by November 14, 2017, no agreement as to the amount of fair market value and payment terms has been entered into, either Plaintiff Raley or the LLC may file between November 14, 2017, and March 14, 2018, a petition in this case to commence a proceeding to determine the fair value and payment terms.

These orders implementing Phase 2 of this case are derived from the following statutes.

> (a) Events constituting termination. A member's membership interest in an LLC is terminated upon the occurrence of any of the following events:
>
> ****
>
> (6) On application by the LLC or another member, the member is expelled by judicial determination, because the member:
>
> (A) Engaged in wrongful conduct that adversely and materially affected the LLC's business;
>
> (B) Willfully or persistently committed a material breach of the LLC documents, or of a duty owed under § 48-249-403 to the LLC or to other members or to holders; or
>
> (C) Engaged in conduct relating to the LLC's business that makes it not reasonably practicable to carry on the business with the member;

TENN. CODE ANN. § 48-249-503(a)(6) (West 2017).

> (a) Termination other than under § 48-249-503(a)(8). If a member's membership interest terminates for any reason other than as the result of an event specified in § 48-249-503(a)(8), then:
>
> (1) If the existence and business of the LLC are continued, the member whose membership interest has terminated loses all governance rights and will be considered merely a holder of the financial rights owned before the termination of the membership interest, other than any financial rights transferred by the member in connection with the termination of the membership interest; and
>
> (2) If the existence and business of the LLC are not continued, the member whose membership interest has terminated retains all governance rights owned before the termination, and may

> exercise those rights through the winding up and termination of the LLC, except as otherwise provided under § 48-249-504, in the case of termination in contravention of the LLC documents.

TENN. CODE ANN. § 48-249-505(a) (West 2017).

> (b) Events not causing dissolution. The termination, dissociation, death, incapacity, withdrawal, retirement, resignation, expulsion, bankruptcy or dissolution of any member, or the occurrence of any other event that terminates the membership interest of any member, shall not cause the LLC to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the LLC shall be continued without dissolution.

TENN. CODE ANN. § 48-249-601(b) (West 2017).

If an LLC elects to continue to do business and purchase a membership interest at fair value under § 48-249-505, then:

> (1) Communication by LLC. The LLC shall communicate its determination of fair value, and its proposed terms of payment, to the member, or the member's personal representative, who is entitled to receive payment in consideration for the member's terminated membership interest, not later than thirty (30) days after the date of termination, or, if applicable, thirty (30) days after the later date of an election made under § 48-249-505(b)(2). Such communication shall be accompanied by:
>
> > (A) A statement of the LLC's assets and liabilities as of the date of termination;
> >
> > (B) The LLC's latest available balance sheet and income statement, if any; and
> >
> > (C) An explanation of how the determination of fair value was made.
>
> (2) LLC documents govern. If the amount of fair value and other terms of payment are fixed or are to be determined by the LLC documents, the amount and terms so fixed or determined govern; and

(3) Judicial determination of fair value.

(A) If an agreement as to the amount of fair value and payment terms is not made within one hundred twenty (120) days after the termination date, or, if applicable, the later date of an election made under § 48-249-505(b)(2), either the member whose membership interest has terminated, or the member's personal representative, or the LLC may, within another one hundred twenty (120) days, commence a proceeding against the other to determine the fair value and payment terms. Any such proceeding shall be brought in a court of record having equity jurisdiction in the county where the LLC's principal executive office, or, if not in this state, its registered office is located. The LLC, at its expense, shall notify all of the remaining members in writing, and any other person the court directs, of the commencement of the proceeding. The jurisdiction of the court in which the proceeding is commenced under this subdivision (3) is plenary and exclusive. The court shall determine the fair value of the membership interest, in accordance with the standards set forth in subdivision (3)(B) together with the terms for payment; and

(B) In a proceeding brought to determine the fair value of a membership interest in an LLC, the court:

(i) Shall enforce any governing terms in the LLC documents as to the amount of fair value and other terms of payment as provided in subdivision (2);

(ii) In the absence of any such governing terms in the LLC documents, shall determine the fair value of the membership interest, considering, among other relevant evidence, the going concern value of the LLC, any other agreement among any members fixing the price or specifying a formula for determining value of membership interests for any other purpose, the recommendations of an appraiser appointed by the court, if any, the recommendations of any of the appraisers of the parties to the proceeding,

> and any legal or financial constraints on the ability of the LLC to purchase the membership interest;
>
> (iii) Shall specify the terms of the purchase, including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the other creditors of the LLC, security, including the purchased membership interest, for a deferred purchase price, and a covenant not to compete or other restriction on the member whose membership interest has terminated;
>
> (iv) Shall require, subject to retention of any security interest by the member whose membership interest has terminated under subdivision (3)(B)(iii) the member whose membership interest has terminated to deliver an instrument of transfer of the membership interest to the LLC upon receipt of the purchase price or the first installment of the purchase price;
>
> (v) May award one (1) or more other parties their reasonable expenses, including attorney's fees and the expenses of appraisers or other experts, incurred in the proceeding, if the court finds that a party to the proceeding violated such party's obligations to act in good faith and to engage in fair dealing set forth in § 48-249-403(d); and
>
> (vi) Shall order that interest, at the rate specified for judgments under § 47-14-121, shall be paid on such amount, from the date such amount was determined to be due through the date of payment, if the court determines that all or any installment of the amounts to be paid in respect of the terminating member's membership interest should have been paid prior to the date of judgment.

TENN. CODE ANN. § 48-249-506 (West 2017).

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:
Seth McInteer
Howell O'Rear
W. Scott Sims
Michael O'Neill
D. Gil Schuette