

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

NAIMA WALKER FIERCE and)
ROBERT ALLISON WALKER IV,)
individually and on behalf of MC)
BUSINESS GROUP, LLC,)

Plaintiffs,)

VS.)

NO. 15-1385-BC

DEWAYNE COLLIER and BARBARA)
COLLIER,)

Defendant.)

VS.)

DARYL J. MOORE,)

Cross-Defendant.)

**MEMORANDUM AND ORDER: (1) ENTERING IN PART AND DENYING IN
PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND
(2) DENYING PLAINTIFFS' REQUEST FOR MORE SANCTIONS**

This lawsuit was filed concerning a bar and restaurant located at 708 Monroe Street known as the Germantown Pub (the "Pub"). The Plaintiffs have brought their claims individually, and derivatively on behalf of the Plaintiff LLC. In addition, Fierce and Walker have sought a declaratory judgment in this action with respect to their membership interests and their right to bring this action, under alternative claims that they own interests in the Pub either as a partnership or LLC. Finally, they have brought this action to recover monies owed to them, by virtue of their alleged ownership in the Pub, which monies they claim were misappropriated by D. Collier and B. Collier. Fierce

and Walker further request relief from the Court to define and address the ownership interests of the parties in the Pub.

The case is presently before the Court on the *Plaintiffs' Motion For Partial Summary Judgment*. The Plaintiffs seek summary judgment that the form of entity which owns and operates the Pub is an implied partnership; or, alternatively, a summary judgment declaring that Walker is a member of the LLC, and that Fierce has financial rights in the LLC.

The Defendants oppose the summary judgment motion, asserting that: (1) the record does not demonstrate facts on which to base a claim of implied partnership, and (2) neither Fierce nor Walker are members of the LLC and Fierce owns no financial rights. These positions are based largely on the alleged failure to adhere to the formalities of the LLC Act on admitting members to an LLC as well as assertion of the application of judicial estoppel.

After considering the record, the law and argument of Counsel, the Court enters summary judgment in part and denies it in part.

The Court concludes as a matter of law and it is therefore ORDERED that summary judgment is entered that the form of entity which owns and operates the Pub is an LLC. There is not a basis in the record to state a claim of an implied partnership.

It is further ORDERED that, as to denial of summary judgment, the Court concludes, because of disputed issues of material fact, that a trial must be conducted on the issues of:

- Identifying who the members of the LLC are; and
- Determining the percentage interest of each member.

These questions of fact shall be determined at the jury trial set for May 8, 2017 in conjunction with Plaintiffs other claims of: Count One – Conversion; Count Two – Fraud and Misrepresentation; Count Three – Declaratory Judgment; Count Four – Breach of Duties of Loyalty, Care, Good Faith and Fair Dealing; Count Seven – Breach of Implied Contract; and Count Eight – Unjust Enrichment. The claim in Count Five for Termination of Membership is a judicial remedy to be determined post-trial.¹

Lastly, the Pretrial Conference shall proceed on April 20, 2017 at 9:00 a.m. to prepare the case for a jury trial. Monday afternoon, April 17, 2017, the Court shall issue instructions to Counsel on preparations for and topics to be covered at the Pretrial Conference.

The undisputed facts and law on which this ruling is based are as follows.

¹ One factor in the Court's determination on the remedy of judicial termination will be the Defendant DeWayne Collier's March 20, 2017 Chapter 11 Petition in bankruptcy, and its effect in conjunction with Tennessee Code Annotated § 48-249-503(a)(7)(A) which states that "A member's membership interest in an LLC is terminated upon the occurrence of any of the following events...[t]he member...[f]iles a petition as a debtor in bankruptcy."

Summary Judgment Standard

In *Rye v. Women's Care Ctr. of Memphis, MPLLC*, the Tennessee Supreme Court stated the standard to apply when ruling on motions for summary judgment.

Our overruling of *Hannan* means that in Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with “a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial.” Tenn. R. Civ. P. 56.03. “Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record.” *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. “[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56],” to survive summary judgment, the nonmoving party “may not rest upon the mere allegations or denials of [its] pleading,” but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, “set forth specific facts” *at the summary judgment stage* “showing that there is a genuine issue for trial.” Tenn. R. Civ. P. 56.06. The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the

passage of discovery deadlines, at a future trial. We turn our attention next to applying these standards in this appeal.

477 S.W.3d 235, 264–65 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452, 195 L. Ed. 2d 265 (2016). This is the standard the Court has applied to the record in this case.

Analysis

In entering summary judgment, that as a matter of law the form of the entity in issue is an LLC but denying summary judgment and finding questions of fact on membership issues, the Court relies on the law and analysis of the recent case of *Parigin v. Mills*, No. E201600640COAR3CV, 2017 WL 1032740 (Tenn. Ct. App. Mar. 16, 2017) which is strikingly similar to the facts of this case. *Parigin* is significant because it instructs this Court that if LLC documents have been filed with the Secretary of State to form an LLC to operate a business and the business is operated, but the identity of the members and their percentage ownership is unclear, the form of the entity – an LLC – is established as a matter of law, and then it is a question of fact to determine the members and their percentage interests. The absence of an LLC operating agreement or written approval of LLC members does not void the formation of the LLC and convert the entity into an implied partnership. The LLC exists as a matter of law, and it is for the finder of fact to determine the LLC members and their percentages.

In detail, in *Parigin v. Mills* two individual Plaintiffs, who invested financial contributions in an LLC, filed a declaratory judgment action against an individual

Defendant who had formed the LLC, to identify: (1) who the respective members of the limited liability company were and (2) what the members' respective membership interests were. E201600640COAR3CV, 2017 WL 1032740, at *1 (Tenn. Ct. App. Mar. 16, 2017).

The facts of the case were that the Defendant, either alone or in concert with others, conceived of an idea for a business and began looking for investors in 2008. *Id.* During this process, the Defendant and another individual met with an attorney and had articles of organization filed with the Secretary of State forming a member-managed LLC with two members on January 11, 2009. *Id.* Following the filing of the articles of organization, the record established the following facts surrounding the establishment of the business.

- Multiple operating agreements, naming different people as members of the LLC, were drafted, but no formal operating agreement was ever signed listing the members of the LLC.
- Annual reports were filed with the Secretary of State listing the two Plaintiffs and the Defendant as the three managers of the LLC.
- Additional investors were sought to infuse cash into the LLC which resulted in the two individual Plaintiffs investing over \$260,000. The Defendant did not invest any money.
- All parties involved presented disputed versions of what, if any financial contribution, was required to become a member of the LLC.
- The parties applied for a loan to be used to purchase a building for the LLC, but the notices from the Bank contained conflicting individuals identified as the borrowers.
- Some, but not all, of the parties signed a lease for the building to house the business.

- The Defendant contended that the Articles of Organization and the unexecuted operating agreement incorrectly stated the LLC had two members, when in reality he was the only member at the time of formation of the LLC.
- The Defendant contended that one of Plaintiff's financial contributions to the LLC was a loan and that the Defendant never had a discussion with the Plaintiff about the financial contribution entitling the Plaintiff to gain membership to the LLC.
- All of the parties attended weekly management meetings and discussed the need for capital.
- The LLC had two different bank accounts – one to pay nominal bills controlled by the Defendant and one to pay operating expenses controlled by another individual. Prior to the lawsuit being filed the Defendant diverted the operating expenses bank account to another account the Defendant had sole access.

Id. at *1-4.

After a bench trial, the trial court determined the parties' membership interest in the LLC to be that the two individual Plaintiffs had respective membership interests of 81.3%, and 18.7% and the Defendant did not have a membership interest in the LLC. *Id.* at *4.

On appeal, the Defendant challenged “whether the trial court erred in ruling that Mr. Mills was not a member of [the LLC], and specifically, that he owned a zero percent interest.” *Id.* In affirming the decision of the trial court, the Court of Appeals identified the applicable law and analyzed its application to the facts, which is instructive for this case.

Mr. Mills contends the trial court erred by failing to apply the Tennessee Revised Limited Liability Company Act (“the LLC Act”) to the facts of this case and by determining that he had a zero percent interest in The Zone. He argues that, had the trial court applied the LLC Act, the court would have found that he was an original member of The Zone and, consequently, that

he possessed a membership interest in the company. We have determined that the evidence preponderates in favor of the trial court's findings of fact. We further find that, upon applying the relevant legal principles to the facts of this case, the trial court did not err in its ruling. Accordingly, we affirm the trial court's determination that Mr. Mills owns a zero percent interest in The Zone.

The LLC Act provides a roadmap for the formation, financing, operation, and dissolution of an LLC. *See* Tenn. Code Ann. §§ 48-249-101 to-1133. Any individual or entity can form an LLC by filing the articles of organization with the secretary of state, as long as those articles meet the requirements set forth in Tenn. Code Ann. § 48-249-202. An LLC must have at least one member. Tenn. Code Ann. § 48-249-501(c). The “filing of the articles with the secretary of state is conclusive proof that the organizers satisfied all conditions precedent to formation as of the date of filing....” Tenn. Code Ann. § 48-249-201(b). Though not required, the LLC Act contemplates that the members of the LLC will create an oral or written operating agreement to manage the company's affairs. Tenn. Code Ann. § 48-249-203(a). The LLC Act refers to the articles of organization and the operating agreement as the “LLC documents.” Tenn. Code Ann. § 48-249-102(16). To the extent the LLC documents are silent, the LLC Act provides default provisions which govern the relationships between members and holders of financial rights. Tenn. Code Ann. § 48-249-205(a).

The problem we face in this appeal, which is the same problem the trial court faced, is that Mr. Mills, Mr. Landers, and the other interested parties failed to follow the user-friendly roadmap set forth in the LLC Act. While Mr. Mills and Mr. Landers got off to a good start by retaining an attorney, Mr. Foster, to prepare and to file the articles of organization with the secretary of state, they immediately left the paved roadway and never got back on track.

When Mr. Foster filed the Articles, he believed Mr. Mills and Mr. Landers were the original members. Mr. Mills, however, insists that Mr. Landers was never a member, and Mr. Parigin and Ms. Wheatley insist that Mr. Mills was never a member. Ironically, the basis for their respective contentions is the failure of Mr. Landers and Mr. Mills to make the required financial contribution.

Adding to the confusion, Mr. Mills contends The Zone was properly formed when Mr. Foster filed the Articles with the secretary of state; therefore, because a properly formed LLC must have at least one member, then he—Mr. Mills—must have been the original member. This contention is based in part on the fact that Mr. Landers concedes he is not a member.

The prevailing and unorthodox fact of this case is that several and different sets of prospective members believed, at one time or another, that they were members of the LLC. At the inception of the LLC, Mr. Mills believed he was the only member. Later on, Mr. Mills and Mr. Parigin believed they were the only members, and they also agreed to give Dr. Davis an option to become a member if he made the requisite financial contribution. When Dr. Davis did not exercise his option, Mr. Mills renewed his search for other prospective members but to no avail. Finally, Mr. Parigin and Ms. Wheatley believed they were the only two members because they had made the requisite financial contributions while Mr. Mills had made no financial contribution. In each case the prospective “members de jour” endeavored but failed to enter into an operating agreement that identified their membership interests.

Although the LLC Act provides some defaults that govern the relationship between the members when the required documentation is not completed, those defaults presume that, at the very least, the members of the LLC have been identified. Not surprisingly, the LLC Act does not contemplate a situation where at inception the entity is an LLC in form, but the identities of the members are unknown and/or disputed.

Since the parties did not follow the roadmap set forth in the LLC Act, it is impractical, indeed impossible, for this court to endeavor to apply the statutory roadmap to the facts of this case. The trial court came to the same conclusion. Nevertheless, all is not lost because we can follow the evidentiary crumbs the parties left along their way. As was the case with Alice in Wonderland, the evidence reveals that the parties wanted to go “*somewhere*,” and as the Cheshire Cat explained, if you want to go somewhere, “you're sure to do that, if only you walk long enough.”

Mr. Mills contends the trial court erred by holding that The Zone had no members at the time of formation yet treating it as a properly formed LLC upon the filing of the Articles with the secretary of state. Tenn. Code Ann. § 48–249–201(b) states that the filing of the articles of organization *conclusively* confers de jure status on an LLC. *See* Tenn. Code Ann. § 48–249–201(b) (“[F]iling of the articles with the secretary of state is conclusive

proof that the organizers satisfied all conditions precedent to formation as of the date of filing....”). Therefore, The Zone satisfied all conditions precedent to formation when Mr. Foster filed the articles of organization with the secretary of state. Notwithstanding the fact that Tenn. Code Ann. § 48-249-501(c) states that an LLC must have at least one member for proper formation, because the “organizer(s)” satisfied the statutory requirement for formation of an LLC, The Zone was a de jure LLC at that time.

The trial court then reviewed the record to determine the requirements for membership, as agreed upon by the parties. Mr. Landers, Ms. Wheatley, Ms. Robinson, and Mr. Parigin all testified that membership in The Zone was contingent upon a monetary contribution. With regard to Mr. Mills's membership, they all testified that Mr. Mills agreed to contribute \$217,500 in cash, or \$180,000 plus business equipment, to become a member. Conversely, Mr. Mills argued that his contribution was limited to his ideas, efforts, and services, while everyone else's contribution was to be monetary.

The trial court found that Mr. Mills was required to contribute \$180,000 plus business equipment to become a member and that Mr. Mills contributed neither. In making this finding, the trial court noted that Mr. Landers also contributed ideas, efforts, and services, but he walked away with no membership interest, because he could not make the required monetary contribution. The trial court found this fact significant because, as the court concluded, Mr. Landers's voluntary departure from the company could only be explained by (1) the existence of an agreement between Mr. Landers and Mr. Mills that membership in the Zone hinged on a monetary contribution, and (2) Mr. Landers's reasonable belief that Mr. Mills intended to make the agreed upon monetary contribution.

For the foregoing reasons, we affirm the trial court's declaration that Mr. Parigin and Ms. Wheatley are members of the LLC, the declaration of their respective membership interests, and the declaration that Mr. Mills is not a member of the LLC.

Id. at *6–8 (footnote omitted).

Applying *Parigin* to the summary judgment record, the Court sees that in this case there was the formation of the LLC with the Secretary of State to own and operate the

Pub, but the “parties did not follow the roadmap set forth in the LLC Act” and the ultimate determination should be decided by the “evidentiary crumbs the parties left along their way.” *Id.* at *7. Like the facts in *Parigin*, the summary judgment record in this case contains varying circumstantial evidence about the persons who constitute members of the LLC and their percentage interests. A sampling of the circumstantial evidence which creates disputed issues of material fact on the identity of the members and their percentages is as follows.

- The MC Business Group, LLC Articles of Organization filed with the Secretary of State do not identify the members of the LLC.
- There was never any written operating agreement for MC Business Group, LLC.
- The Commercial Lease dated March 3, 2015 and April 29, 2015 in the summary judgment record was purportedly entered into and signed by “Dwayne Moore and Dwayne Collier and Robert Walker doing business as MC Business Group, LLC”.
- The Letter Agreement signed by Darryl Moore, Robert Walker, and Naima Walker Fierce on April 3, 2015 regarding their intention to own and operate a bar/restaurant providing Darryl Moore would own 30% of the business, Robert Walker and Naima Walker Fierce would jointly own 40% and an unnamed third party would own 30% of the business.
- Application for Beer Permit with Metro Nashville dated April 22, 2015 which was in the name of MC Business Group, LLC and listed DeWayne Collier and Robert Allison Walker as each owning 50% interest in the LLC.
- Commercial Lease Agreement dated and signed March 3, 2015 listing MC Business Group, LLC d/b/a Germantown Pub as the tenant and DeWayne Collier and Robert Walker as the managing members.
- The Amended Letter Agreement signed by Darryl Moore, Robert Walker, and Naima Walker Fierce on April 30, 2015 regarding their intention operate the Pub and providing that Naima Walker Fierce would invest and additional \$35,000 for an additional 20% ownership interest and that Fierce would loan the business

another \$20,000. The Amended Letter Agreement also set out the ownership as Fierce 40%, Moore 24%, Walker 20% and DeWayne Collier 15%.

- Defendant DeWayne Collier's testimony that he was never made aware and does not know anything about the First or Second Letter Agreement signed by Darryl Moore, Robert Walker, and Naima Walker Fierce and he did not sign the Agreements.
- Numerous receipts on different dates from different people purportedly investing additional capital into the LLC.
- Darryl Moore's testimony that he and DeWayne Collier formed MC Business Group, LLC and that on August 12, 2015 he purportedly agreed to be bought out by Naima Walker Fierce which is documented in a Second Amended Letter Agreement and Non-Disparagement Agreement.
- Defendants DeWayne and Barbara Collier's testimony that they never met with Plaintiffs Fierce or Walker to discuss Fierce becoming members of the LLC or the Germantown Pub endeavor.
- Defendants DeWayne and Barbara Collier's testimony that they were the sole owners of MC Business Group, LLC.
- The Articles of Organization attached to the Plaintiffs' Motion For Partial Summary Judgment and the Articles of Organization attached to the Defendants Response are different in that they identify different addresses for the MC Business Group, LLC.
- Defendant DeWayne Collier's testimony that he did not know that Plaintiff Fierce provided any money for the Germantown Pub because he believed she gave it all to Plaintiff Walker in a separate account maintained by Plaintiff Walker from a former Germantown Pub Partners, LLC account.
- The October 20, 2016 State of Tennessee Alcoholic Beverage Commission Application that lists DeWayne Collier as the 100% owner of what is listed in the application as "DeWayne Collier d/b/a Germantown Pub".
- Defendant DeWayne Collier's testimony that he had sent Plaintiff Fierce financial information on August 8, 2015, that he prepared this document, that he knew that the financials showed a start-up cost of \$254,145, and that the financial

information was put together for Plaintiff Fierce, so she could “see where her money was going”.

- Defendant DeWayne Collier’s testimony that he considered Plaintiff Fierce to be an “investor” rather than an “owner” and that he told her this in October 2016.

The above shows that the summary judgment record presents competing inferences, as to (1) who the members of MC Business Group, LLC are and (2) their percentage membership interests in MC Business Group, LLC. These issues were the very same issues in the *Parigin v. Mills* case which was decided in a bench trial. Because this case is set for a jury trial, it will be the jury’s role to identify the members and to determine their respective membership interests in MC Business Group, LLC, and summary judgment is denied on these issues.

Plaintiffs’ Request For Additional Sanctions

Also before the Court is the Plaintiffs’ motion, filed February 7, 2017, to accelerate the remaining balance due on a December 13, 2016 payment plan on attorneys’ fees awarded in prior contempt proceedings, and to consider other sanctions, such as striking Defendants pleadings and entering a default judgment.

The record shows that on March 20, 2017, the Defendant filed a *Suggestion of Bankruptcy*. A March 31, 2017 Order of the Bankruptcy Court has lifted the stay on litigation but, nevertheless, stays collections action on any judgments ultimately awarded against the Defendant in this case.

Taking into account the bankruptcy, the Court concludes that it would be inappropriate to accelerate the balance or strike pleadings or enter a default. These measures would be to redress failure to pay by Defendant, and, therefore, implicate a collections action prohibited by the Bankruptcy Court.

It is therefore ORDERED that the Plaintiffs' request to accelerate the remaining balance due on the December 13, 2016 payment plan is denied, and the Court rejects its previous consideration of striking pleadings or entering a default judgment.

The procedural context for this ruling is included as follows for future reference.

The genesis of the issue of sanctions began in this case with two motions to compel discovery by the Plaintiff which were granted by the Court. On April 27, 2016, the Court entered an *Order Granting Motion To Compel* and required the Defendant to deliver responsive documents to the Plaintiffs by 4:00 p.m. on April 27, 2016. Thereafter, after a second motion to compel was filed by the Plaintiff, the Court, on May 18, 2016, entered an *Order Granting Plaintiffs' Second Motion To Compel* requiring Defendant DeWayne Collier to produce additional discovery by May 26, 2016.

Following this Order, on May 27, 2016, the Plaintiffs' filed a *Notice Of Failure To Comply With The Court's Order Granting Plaintiffs' Second Motion To Compel* and stated that the Defendant had failed to comply with the *Order Granting Plaintiffs' Second Motion To Compel* requiring Defendant DeWayne Collier to produce additional discovery by May 26, 2016.

On May 31, 2016, the Plaintiffs filed an *Emergency Motion For Sanctions* based on Defendant DeWayne Collier's failure to comply with the Court's orders compelling discovery and sought the following relief pursuant to Rule 37.02 of the Tennessee Rules of Civil Procedure:

1. That a default judgment be rendered with respect to *Plaintiffs' Motion for Modification of December 9, 2015 Temporary Injunction* filed May 13, 2016;
2. That a default judgment be rendered with respect to the following claims of the Verified Complaint: Conversion; Fraud and Misrepresentation; Breach of Duties of Loyalty, Care, Good Faith and Fair Dealing; Termination of Collier's Membership Interest; and Unjust Enrichment; and
3. That Plaintiffs be awarded all reasonable expenses, including attorneys' fees incurred, by virtue of Defendant's violation of the Order.

Alternatively or in addition, Plaintiffs respectfully pray that this Court enter an order pursuant to Tenn. R. Civ. P. 37.02(A) and (B), which:

4. Declares that an adverse inference be made for the matters for which the Order was entered for the purposes of the action in accordance with the claims of Plaintiffs in this matter;
5. Prohibits Collier from supporting his defenses or opposing Plaintiffs' claims through the use of the documents specified in the Order, or through their content, and which prohibits Collier from introducing the documents into evidence; and
6. That the Court award the Plaintiff such other and further relief as this Court deems proper.

Emergency Motion For Sanctions, p. 2 (May 31, 2016).

Thereafter, on June 7, 2016, the Court granted the *Emergency Motion For Sanctions* and ordered the following:

With the authority provided in Tennessee Civil Procedure Rule 37.02(B), the Court sanctions Defendant Collier by refusing to allow him to oppose Plaintiffs' motion to modify a December 9, 2015 temporary injunction: to remove Defendant Collier as operator of the Plaintiff LLC's business, The Germantown Pub, and put in place the Plaintiffs as operators. The Court also ORDERS as a sanction for Defendant Collier to pay \$1,000 in attorneys' fees. The cause for the sanctions is Defendant Collier's disobedience of a May 19, 2016 order compelling the Defendant, for a second time, to produce documents.

Memorandum And Order Granting Plaintiffs' Motion For Rule 37.02(B) Sanction Of Removal Of Defendant Collier As Operator Of The Business And Awarding Attorneys' Fees, pp. 1-2 (June 7, 2016).

In addition to the foregoing discovery sanctions, this Court has also held Defendant DeWayne Collier committed civil contempt on two prior occasions. On June 28, 2016, the first occasion, the Court entered a *Memorandum And Order Finding Defendant Committed Civil Contempt And Awarding Attorneys Fees As Damages* against Defendant DeWayne Collier for civil contempt for (1) removing and/or using funds from Germantown Pub in violation of the December 9, 2015 Temporary Injunction Order prohibiting the Defendant from "removing or using any of the Pub's funds for any purposes other than the ordinary operation of the Pub"; and (2) for failing to report to Plaintiff Walker a daily "true up" from the till procedure proposed by Defendant's attorney and as ordered in the December 9, 2015 Temporary Injunction. As damages for this civil contempt, the Court awarded the Plaintiffs "the in-court attorneys fees, that is the fees the Plaintiffs incurred for in-court time for the contempt hearing days."

Thereafter, on December 13, 2016, after a second civil contempt proceeding, the Court entered an *Order Finding Defendant Committed Civil Contempt And Entering Sanctions* against Defendant DeWayne Collier. Pursuant to the Order, the Court concluded that (1) Defendant DeWayne Collier committed civil contempt by willfully refusing to pay a total of \$9,634.78 he was ordered to pay June 7 and August 2 and 17, 2016; and (2) as a sanction for this civil contempt he was ordered to pay the attorneys' fees incurred by the Plaintiff in preparing, filing and litigating the civil contempt petition.

On February 17, 2017, the Court entered an *Order Approving Attorneys' Fees* which awarded the Plaintiffs \$11,630.00 in attorneys' fees incurred in pursuing its first petition for contempt and \$9,937.25 incurred in pursuing its second petition for contempt.

With regards to the \$9,634.78 Defendant DeWayne Collier was previously ordered to pay on June 7 and August 2 and 17, 2016 which was the subject of the second contempt proceeding, the Court ordered a payment plan to cure the contempt and provided that Defendant DeWayne Collier was to make the following payments to the Germantown Pub by having his Attorney deliver the payments to Plaintiffs' Counsel on the following dates:

- 12/12/16 – \$500
- 12/16/16 by noon – \$500
- 1/31/17 – \$4,500
- 2/28/17 - \$4,134.78

Following the Court's December 13, 2016 *Order Finding Defendant Committed Civil Contempt And Entering Sanctions*, on December 16, 2016, the Plaintiffs filed a

Notice with the Court that Defendant DeWayne Collier had failed to comply with the payment plan to make the first \$500 payment. Thereafter, on December 20, 2016, the Plaintiffs filed a *Revised Notice* informing the Court that the \$500 payment had been received, but it was untimely. Despite this untimely payment, the Court, on January 23, 2017 entered a *Notice On Defendant's Compliance* determining that "Defendant's untimely compliance shall nevertheless be considered compliance, and Plaintiffs shall accept the payment."

Thereafter, on February 1, 2017, the Plaintiffs filed an *Additional Notice Of Failure To Comply With The Court's Order* stating that Defendant DeWayne Collier had again failed to make a payment under the December 13, 2016 payment plan by failing "to make a payment of \$4,500 by January 31, 2017 as required by the Court's Order." Following this, on February 17, 2017, the Plaintiffs filed a *Motion For Status Conference Regarding DeWayne Collier's Failure To Comply With The Court's Orders*, and, in addition to reemphasizing the failure to pay the \$4,500, the Plaintiffs also pointed out that Defendant DeWayne Collier "has not complied with the Court Order dated January 3, 2017 which ordered him to furnish Plaintiffs with a signed power of attorney to ensure that the Pub's license remain current and in good standing."

In response to these filings, the Court entered an *Order Setting 3/21/17 9:00 a.m. Hearing On Notice Of Failure To Comply With The Court's Order*² and stated that "In

² On March 20, 2017, one day before this matter was to be heard, Defendant DeWayne Collier filed a Suggestion of Bankruptcy stating that he had filed a petition for bankruptcy. This petition for bankruptcy automatically stayed this case until the Court received a Notice from the Plaintiffs on March 31, 2017 with an Order from the Bankruptcy Court lifting the stay on these proceedings.

addition to considering the request of Plaintiffs that the Court accelerate the remaining balance due to Plaintiffs and impose a sanction found appropriate in the Court's discretion, the Court shall consider striking the Defendant's pleadings and entering default judgment against Defendant Collier."

In response to this *Order*, Defendant DeWayne Collier's position in its March 14, 2017 filing is that pursuant to *Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346 (Tenn. 2008):

[T]his court must have a hearing on whether the litigant is in contempt because the alleged act did not occur in the presence of the court and even then the sanction imposed is limited. This court is considering default and striking pleadings, this would be inappropriate because it is not remedial or coercive in nature, meaning that Mr. Collier cannot comeback from those sanctions. When considering civil contempt, the court must render a sanction that can be abated. In civil contempt when a party complies with the order, the civil contempt is purged, and the sanction abates. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. at 828-29 (1994).

Response To Court's Request Regarding Striking DeWayne Collier's Pleadings And Entering A Default Judgment For Failure To Comply With The Court's Order, pp. 3-4 (Mar. 14, 2017).

Citing to the Court's authority to issue discovery sanctions under Tennessee Rule of Civil Procedure Rule 37.02, the Plaintiffs filed a response on March 20, 2017 arguing that the Court should enter a default judgment against Defendant DeWayne Collier.

Plaintiffs have attempted to work with Defendant regarding the parties' interest in this matter only to receive no reciprocity. Likewise, the Court has attempted with great effort to manage this matter and protect Plaintiffs' interests; Defendant, however, does not appear to deem himself bound by the Court's orders. As such, an extreme sanction is warranted to penalize Defendant's failure to comply with the Court's orders and to deter others

from flouting or disregarding discovery orders. Because Defendant has failed to comply with the Court's orders and has abused the discovery process, Plaintiffs respectfully submit that it is just that a default judgment be entered.

Plaintiff's Brief In Support Of Default Judgment Against Defendant DeWayne Collier,
p.6 (Mar. 20, 2017).

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

cc: Anne C. Martin
Mandy Strickland Floyd
William Cheek, III
Lorraine Wade
Daryl Moore