

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.)

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.)

NF
NO. 16-196-BC

DAVIDSON COUNTY CHANCERY CT
D.C.M.

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**MEMORANDUM AND ORDER: (1) GRANTING IN PART
DEFENDANT BRINKMAN'S MOTION AND (2) APPOINTING
IMPACT HOSPITALITY/DYNAMIC HOSPITALITY FISCAL AGENT**

This lawsuit is a dispute between two 50% members of an LLC about its operation, management, accounting and distributions. The LLC in issue is 4 Points Hospitality. It is the owner and operator of a very successful Nashville restaurant.

Claims and counterclaims have been filed by each LLC member asserting wrongful conduct by the other related to the operation of 4 Points, and breach of duties to the LLC and the LLC agreements. The remedies sought include competing claims for specific performance of the parties' contracts, recovery of compensatory and punitive damages and attorneys' fees, termination of membership, or, alternatively, judicial dissolution of 4 Points, and a declaratory judgment as to the ownership of certain intellectual property.

The status of the case is discovery is to be completed by January 2017; a bench trial is set to begin April 17, 2017.

The case is presently before the Court on the Defendant's motion for appointment of a custodian. The Defendant seeks for Plaintiff Raley to be removed from the financial management of 4 Points during the pendency of the lawsuit, and for a custodian to be appointed to manage the financial affairs and safeguard the assets of 4 Points.

In a June 27, 2016 *Memorandum and Order*, certain fiscal measures, less drastic than appointment of a custodian, were ordered, while the Court obtained more information on the extent of the oversight function performed by 4 Points' outside accountant, Mr. England. Specifically, the Court ordered in part:

3. Affidavit On Monitoring LLC Checkbook – By July 5, 2016, Plaintiff Raley shall file a second affidavit, in relation to paragraph 19 of his June 17, 2016 affidavit. The second affidavit shall describe the extent and frequency of oversight Accountant Joseph England performs over the LLC checkbook. From Mr. England's affidavit and Mr. Raley's affidavit the Court is unable to discern if Mr. England's work is primarily limited to preparation of tax returns, or whether his role is more active and expansive

in monitoring and auditing the LLC. The Court seeks this information to determine whether there is presently in place monitoring of the LLC checkbook, by Mr. England, to detect, during the pendency of the litigation, payment of non-LLC expenses, or whether the Court needs to appoint a special fiscal agent for this task.

The Court implemented the measures of the June 27, 2016 order because of mistakes and irregularities in 4 Points' accounts.

The Defendant is now back before the Court renewing its motion for appointment of a custodian asserting that oversight is not being performed by Mr. England. The Defendant asserts the only way to safeguard the interests of all parties is for:

- the Plaintiff to be removed from financial management of the LLC until the claims in the lawsuit are determined, and
- a custodian to be appointed to manage 4 Points financial affairs during the pendency of the litigation and provide independent financial oversight of 4 Points.

After considering the filings before and following the June 27, 2016 *Memorandum and Order*, the Court finds there are good grounds to grant Defendant Brinkman's renewed motion in part, as modified by the Court, to add to the safeguards already provided in the June 27, 2016 ruling.

It is therefore ORDERED that Defendant's renewed motion for the appointment of a custodian is granted (1) as to that part of the motion seeking independent financial monitoring of 4 Points and (2) as modified to appoint a fiscal agent. The part of the motion that is denied is the appointment of a custodian to manage 4 Points' financial

affairs and also denied is removal of Plaintiff Raley from financial management of 4 Points.

To perform the task of fiscal agent, it is ORDERED that Impact Hospitality/Dynamic Hospitality (the "Fiscal Agent") is appointed. Attachment 1 is a description of the Company.

It is further ORDERED that the duties and tasks of the Fiscal Agent are as follows:

1. Perform independent financial monitoring of 4 Points, until further order of the Court, to assure that: (a) GAAP are followed; (b) there is no fiscal commingling of 4 Points and the personal and/or other business interests of the members; (c) distributions on tax returns match shareholder ownership; (d) salaries and distributions are separated; and (e) all parties' financial and ownership interests are handled in a fiduciary manner
2. Beginning November 1, 2016, file each month a report with the Court and Counsel of the results of the financial monitoring
3. Review fiscal operations, accounting and bookkeeping of 4 Points, and report to the Court and Counsel any changes and/or additions to protocols and procedures to assure conformity with GAAP, that all parties' interests are handled in a fiduciary manner, and that there is no commingling of 4 Points and the personal and/or other business interests of the members.

To implement the foregoing, it is ORDERED that the Fiscal Agent shall contact Counsel for each party to set up a meeting to proceed.

It is also ORDERED that the Fiscal Agent shall file monthly reports and invoices for compensation with the Court and Counsel, itemizing the tasks performed and billing in accordance with the rates and staffing contained in Attachment 1 incorporated herein by reference.

It is additionally ORDERED that by September 30, 2016, each party shall deposit into the registry of the Court \$20,000 to secure and draw against for the monthly compensation of the Fiscal Agent.

The findings of fact, conclusions of law and rationale for the above orders are, first, that in appointing a fiscal agent, instead of a custodian, the Court is guided by courts in other states who have used fiscal agents as a less drastic alternative to monitor corporate fiscal matters. *See e.g., Leone Indus. v. Assoc. Packaging, Inc.*, 795 F. Supp. 117 (D.N.J. 1992); *In re Prudential Ins. Co. of Am. Sales Practices, Litig.*, 962 F. Supp. 450 (D.N.J. 1997) *aff'd in part*, 148 F.3d 283 (3rd Cir. 1998); *Republic of Philippines v. New York Land Co.*, 852 F.2d 33 (2d Cir. 1988); *Fimbel v. Fimbel Door Corporation*, 2016 WL 1379788 (D.N.J. Apr. 7, 2016).

The findings which justify the appointment of a fiscal agent are those stated in the June 27, 2016 *Memorandum and Order*, incorporated herein by reference, and Section III of the August 1, 2016 Defendant's Response, of additional irregularities and not yet explained unauthorized expenditures of 4 Points funds. Fiscal monitoring will stabilize

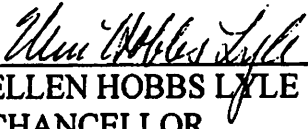
the financial affairs during the pendency of the litigation and prevent sowing the seeds of a new crop of fiscal disputes.

As to the scope of the appointment, it is for ongoing monitoring and to suggest, going forward, fiscal protocols or practices. Past fiscal issues are not part of the appointment. So, for example, with respect to whether the Defendant was to receive a salary from 4 Points or a 4% advance of his yearly distribution, there are mixed questions of fact, inferences and law. On this, discovery is being completed and the matter will be decided by the Court by dispositive motions or trial. This dispute cannot be resolved or handled by the Fiscal Agent except to provide financial monitoring that paragraph 1 of the June 27, 2016 Order is complied with:

1. Deposit of 4% of Gross Income Into Court—Beginning July 5, 2016, and until further order, Plaintiff Raley, as the managing member of 4 Points Hospitality, LLC (the “LLC”), shall see that a deposit into the registry of the Court of 4% of gross income is made. The timing and intervals of such deposits shall coincide with the LLC’s payment to Plaintiff Raley of his salary of 8% of gross income.


Similar is the parties’ dispute about whether the \$70,000 distribution the Plaintiff received in 2013 was a delayed 2012 year end distribution or an excessive 2013 distribution. This is an issue to be determined by dispositive motion or trial. This dispute can not be handled by the Fiscal Agent.

The reason the Court denied that part of Defendant's motion seeking to remove the Plaintiff and appoint a custodian to manage 4 Points' fiscal affairs is the same as stated in the June 27, 2016 ruling: 4 Points is a profitable operation. Taking this additional measure risks chilling, disrupting and impeding the business. The additional, but nevertheless drastic step above, of appointing a fiscal agent for monitoring and recommendations for accounting and fiscal protocols and procedures, is proportionate, at this time, to the fiscal information of record.



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: Robert G. McDowell
James A. DeLanis
Austin Shaver
W. Scott Sims
D. Gil Schuette
Impact Hospitality/Dynamic Hospitality

 **MAILED** + faxed
9-15-16