

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.)

**ALTERED AND AMENDED MEMORANDUM AND FINAL ORDER
DETERMINING FAIR VALUE OF PLAINTIFF RALEY'S 50% LLC
MEMBERSHIP INTEREST UNDER TENN. CODE ANN. § 48-249-506(3)(B)**

Pursuant to the *Memorandum and Order Issuing Rules 59.04 and 59.05
Amendments and Alterations to 9/20/18 Final Judgment* entered today, the amendments
and alterations have been made and are provided herein.

On August 13 and 14, 2018, an evidentiary hearing was conducted on the final issue in this case: valuation of Plaintiff Raley's 50% membership interest in 4 Points Hospitality, LLC ("4 Points"), the company which owns and operates The Pharmacy Burger Parlor & Beer Garden ("Pharmacy"), a highly successful restaurant located in Nashville. The valuation is made pursuant to Tennessee Code Annotated section 48-249-506(3)(B), in a court-ordered buyout by 4 Points.¹

Four persons testified at the evidentiary hearing: Robert Weatherly, subpoenaed by Plaintiff Raley, not as a valuation witness or to provide an expert opinion, but concerning Mr. Weatherly's knowledge of admissions and statements made to him by Mr. Brinkman about facts on the valuation issue; Thomas Price, Defendant Brinkman's valuation expert; Defendant Brinkman; and Stephen Maggart, Plaintiff Raley's valuation expert. Twelve exhibits were admitted into evidence.

The evidentiary hearing covered three issues. First, because there are no terms in the LLC documents governing the amount of fair value and terms of payment, the August 13-14, 2018 evidentiary hearing was conducted to determine the fair value of Plaintiff Raley's membership interest based upon, as per Tennessee Code Annotated section 48-249-506(3)(B)(ii), such "relevant evidence" as "the going concern value of the LLC," and "the recommendations of any of the appraisers of the parties to the proceeding."

¹ The buyout was the relief that was sought by Defendant Brinkman after a bench trial awarding Defendant Brinkman and 4 Points damages and attorneys fees and terminating the LLC membership of Plaintiff Raley in July 2017 for breach of fiduciary duty, breach of contract, and that it is not reasonably practicable for the parties to carry on business with each other.

The second issue was that Defendant Brinkman was provided the opportunity to present proof of the payment terms of the buyout to inform the provision of Tennessee Code Annotated section 48-249-506(3)(B)(iii) that “In a proceeding brought to determine the fair value of a membership interest in an LLC, the court . . .”:

(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

The third issue was that Plaintiff Raley asserted, pursuant to Tennessee Code Annotated section 48-249-506(3)(B)(v), that Defendant Brinkman had failed to act in good faith and fair dealing in the statutory process to determine fair value, and that attorneys’ fees should be awarded to Plaintiff Raley that allegedly were unnecessarily incurred from the prolonged valuation process and changing fair value determinations instigated by Defendant Brinkman.

Rulings

After weighing the evidence, applying the law, and considering argument of Counsel, the Court determines and orders that the fair value of Plaintiff Raley’s 50% membership interest in 4 Points Hospitality, LLC is \$2,387,139.09.

It is further ORDERED, pursuant to Tennessee Code Annotated sections 48-249-505(c) and 48-249-504(a)(2), that the total fair value payment of \$2,387,139.09 to Plaintiff

Raley shall be offset by \$290,279.10 based upon damages awarded in July 17, 2018 and November 7, 2017 rulings.² This offset leaves a total net amount payable to Plaintiff Raley of \$2,096,859.99.

It is additionally ORDERED that by November 6, 2018, 4 Points Hospitality, LLC, shall pay a lump sum first installment payment of \$500,000 on the total fair value payment. Following that, it is ORDERED that the remaining \$1,596,859.99 shall be paid in subsequent installment payments of \$750,000 to be paid on December 7, 2018, and \$750,000 to be paid on January 8, 2019, and then monthly installment payments by the 15th of each month of the remaining \$96,859.99 with minimum monthly payments of \$15,000.00, with interest at the rate prescribed in Tennessee Code Annotated section 48-249-506(3)(B)(vi), until the total fair value payment is paid in its entirety.

It is further ORDERED that upon the payment by 4 Points Hospitality, LLC, of the first installment of the fair value payment of a lump sum of \$500,000.00 ordered above by November 6, 2018, Plaintiff Raley shall deliver an instrument of transfer of his membership interest to the LLC pursuant to Tennessee Code Annotated section 48-249-506(3)(B)(iv).

² The July 17, 2017 and November 7, 2017 rulings determined that: (1) Defendant Brinkman owed \$175,000 to 4 Points as a capital contribution; (2) Plaintiff Raley owed 4 Points \$120,137.80 and Defendant Raley \$120,137.80 as reimbursement for non-Pharmacy related expenditures for personal items and expenses of Plaintiff Raley's other businesses; (3) 4 Points owed its landlord, Defendant Brinkman Holdings, LLC ("BHL"), \$18,500 for past due rent; (4) 4 Points owed Defendant Brinkman \$5,400 to equalize member distributions to him; and (5) 4 Points owed Defendant Brinkman \$371,244.79 in underpaid salary.

In addition, it is ORDERED that until 4 Points makes the first \$500,00 installment payment, the terms of the July 26, 2017 Order regarding the transition of the business shall remain in effect.

It is further ORDERED that the claim of Plaintiff Raley pursuant to Tennessee Code Annotated section 48-249-506(3)(B)(v) to recover attorneys fees is dismissed with prejudice.

As previously ORDERED, court costs are taxed to Plaintiff Raley.

The findings of fact and conclusion of law on which these rulings are based are as follows.

Applicable Law

Neither the Counsel for either party nor the Court has located any Tennessee case law defining “fair value” of a terminated membership interest in an LLC as used in Tennessee Code Annotated section 48-249-506(3)(B)(ii). As noted by Defendant Brinkman’s Counsel in previous briefing “Courts in other jurisdictions have held that the term ‘fair value’ is an inherently ambiguous term. *See, e.g., Brown v. Arp & Hammond Hardware Co.*, 141 P.3d 673, 679 (Wyo. 2006); *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 359 (Colo. 2003); *Columbia Management Co. v. Wyss*, 765 P.2d 207, 210 (Ore. Ct. App. 1988).” *Brinkman’s Response in Opposition to Raley’s Motion to Determine Meaning and Components of “Fair Value” Under Tenn. Code Ann. § 48-249-*

506(3) and as Applied to This Case, filed February 5, 2018 at 2. There are in Tennessee law the following indicators of the meaning of the term “fair value” and how to calculate “fair value” as used in Tennessee Code Annotated section 48-249-506(3)(B).

One indicator of meaning is that in January 2006 the Legislature changed the term “fair market value,” used in the older LLC statute in relation to a buyout of a withdrawing or terminating member’s interest, to the term, “fair value” in Tennessee Revised Limited Liability Company Act. The older version of Tennessee Code Annotated section 48-216-101(e) provided,

If the business and existence of the LLC are continued, any withdrawing or terminating member, whether such withdrawal or termination was wrongful or otherwise, is entitled to receive, subject to subsection (d), the lesser of the **fair market value** of the withdrawing or terminating member’s interest determined on a going concern basis or the **fair market value** of the withdrawing member's interest determined on a liquidation basis [emphasis added].

Now with the passage of the Revised LLC Act, “fair market value” going concern or liquidation basis for valuation has been changed to “fair value” and using “relevant evidence” and an inexhaustive list of considerations to determine fair value.

§ 48-249-506. Determination of fair value

If an LLC is required or elects to purchase a membership interest at fair value under § 48-249-505, then:

* * *

(3) Judicial determination of fair value.

* * *

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

* * *

(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

TENN. CODE ANN. § 48-249-506(3)(B)(ii) (West 2018). This statutory direction of “relevant evidence” indicates that the determination of fair value is on a case-by-case basis.

Also instructive is the Tennessee Supreme Court’s explanation of “fair value” in the somewhat related circumstance of Tennessee’s dissenters’ rights statute, Tennessee Code Annotated sections 48-23-101, *et seq.* In *Athlon Sports Communications, Inc. v. Stephen C. Duggan*, No. M2015-02222-SC-R11-CV (June 8, 2015), the Tennessee Supreme Court held that the Delaware Block Method is not the only method under Tennessee law for determining fair value. Proof of value by any techniques or methods which are generally considered acceptable in the financial community and admissible in court may be used.

In Tennessee, the term “fair value” is defined by statute: “‘Fair value’ with respect to a dissenter’s shares means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action.” Tenn. Code Ann. § 48-23-101(4) (2012 & Supp. 2017). As noted

above, Tennessee’s dissenters’ rights statutes do not specify how “fair value” price is ascertained. *See Blasingame*, 654 S.W.2d at 665. When statutes do not prescribe a method for ascertaining fair value, “the determination of a company’s value is generally left to the discretion of the courts or appraisers or both.” Clardy, 62 Tenn. L. Rev. at 286.

* * *

As we have recognized, “the law must change ‘when necessary to serve the needs of the people.’” *Dedmon v. Steelman*, 535 S.W.3d 431, 451 (Tenn. 2017) (quoting *Powell v. Hartford Accident & Indem. Co.*, 217 Tenn. 503, 398 S.W.2d 727, 732 (1966)). “Where the reason fails the rule should not apply.” *Id.* (quoting *Brown v. Selby*, 206 Tenn. 71, 332 S.W.2d 166, 169 (1960)). It is time to “bring our law current on th[is] subject.” *Weinberger*, 457 A.2d at 712. Given the nearly universal approval the *Weinberger* approach has won in the years since *Blasingame*, we overrule *Blasingame* to the extent that it implies that trial courts are allowed to use *only* the Delaware Block method of valuation. We adopt the more open *Weinberger* approach, which allows “proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court.” *Weinberger*, 457 A.2d at 712-13. As in *Weinberger*, “[o]nly the speculative elements of value that may arise from the ‘accomplishment or expectation’ of the merger are excluded.” *Id.* at 713. This exception is “designed to eliminate use of *pro forma* data and projections of a speculative variety relating to the completion of a merger. But elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered.” *Id.* The Delaware Block method of valuation remains available where appropriate, but trial courts may now choose to use another valuation method to determine the fair value of a dissenting shareholder’s shares of stock [emphasis in original, footnote omitted].

In addition to these indicators in Tennessee law, incorporated herein by reference is the March 14, 2018 *Memorandum and Order Granting “Raley’s Motion to Determine Meaning and Components of Fair Value Under Tenn. Code Ann. § 48-249-506(3) And As Applied to this Case.”* Contained therein is persuasive authority that fair value of a

membership in a closely held business takes into account and does not ignore that the membership is being purchased by someone who is in control of the corporation. *University of Pennsylvania Journal of Business Law* “Discounts and Buyouts In Minority Investor LLC Valuation Disputes Involving Oppression or Divorce,” 13 U. Pa. J. Bus. 607 (2011), Sandra K. Miller, Professor, J.D., LL.M. Ph.D. *Brown v. Allied Corrugated Box Co.*, 91 Cal. App. 477, 486 (1979); *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 612 (R.I. 1991); *Hansen v. 75 Ranch Co.*, 957 P.2d 32, 41 (Mont. 1998).

The foregoing indicators of the meaning and calculation of “fair value,” as that term is used in Tennessee Code Annotated section 48-249-506(3)(B), have been used by the Court to apply to the findings of fact in this case to arrive at the fair value of Mr. Raley’s membership interest.

Findings of Fact and Conclusions of Law

Overview of Experts’ Valuations

Both of the valuation experts who testified in this case, Mr. Price (testifying for Defendant Brinkman) and Mr. Maggart (testifying for Plaintiff Raley), were eminently qualified to testify as valuation experts and to provide opinions on the value of Plaintiff Raley’s 50% LLC membership interest. Their curricula vitae are included in trial exhibits 2 and 13. Both of these experts were credible and informative in their testimony.

The valuation testified to by Mr. Price was that as of July 17, 2017,³ the fair value of Plaintiff Raley's interest is \$1,050,000. The valuation testified to by Mr. Maggart was that as of July 17, 2017, the fair value of Plaintiff's Raley's interest is \$2,950,000.

Each expert examined the value of the market, income, and assets of 4 Points and weighted those to arrive at fair value.

In general, the Court finds that the methodology of Mr. Maggart, the Plaintiff's expert, is a more accurate depiction of the facts of this case, and Mr. Price's methodology is not as reflective of the facts. As detailed below, the Court finds that Mr. Maggart's selection of valuation approaches, his weighting of the different approaches, and his adjustments to income/earnings are a more accurate reflection of the facts of this case than the expert valuation provided by the Defendant. As to the capitalization rate for the income approach, the Court has calculated that using aspects of both experts' calculation of capitalization rate.

Market Approach

Beginning with the market approach to valuation, the Court adopts the method of Plaintiff's expert Mr. Maggart and shall not assess a market value to factor in for valuing the 50% membership interest in 4 Points. The Court finds that there are no facts in evidence to support use of the market approach based upon the following. On cross

³ July 17, 2017 is the date the Court terminated Mr. Raley's membership in 4 Points.

examination of Mr. Price, the evidence established that he had used eight private companies as comparables in assessing market value. Yet the proof established that these companies had much less sales volume and were not in the \$5 million sales volume of 4 Points. Nevertheless, Mr. Price attached a 42% weight to the value he assigned on the market approach (pages 19-20 of Exhibit 2—Price Report) although he stated that he had not assigned weight to market value in the strict sense of the Delaware Block Method. Mr. Maggart, however, gave zero weight to the market approach because comparables could not be located (pages 21, 27 of Exhibit 13—Maggart Report). The Court finds that the comparables used by Mr. Price do not constitute comparables, and, therefore, the Court adopts Mr. Maggart’s elimination of the market approach to valuation.

Asset Approach

With respect to the asset approach, the following chart shows the calculations of each expert.

Asset Approach	Maggart	Price CPAs
Net Equity		
Adjusted Asset Method	\$ 183,000	\$ 138,209
Book Value Method	\$ 402,000	\$ 72,429
Weight Assigned as a value to a 100% Equity Interest	5.00%	15.00%
	<u>\$ 14,625</u>	<u>\$ 20,731</u>

As shown, Mr. Price assigned a 15% weight to an adjusted asset value which he recognized as the working capital and fixed assets necessary to deliver the product. He

gave book value of invested capital, revenue based and gross profit based methods no weight. The method of Plaintiff's expert, Mr. Maggart, was to assign only a 5% weight to the asset approach and book value based upon the facts that the value of 4 Points is within its brand and delivery of service and products. Mr. Maggart justified his method and weight by the fact that the nature of the LLC is that value to an owner is through distributions of excess cash flow or compensation to the owners. Mr. Maggart explained that because the approach of the asset method is the fair market value of the LLC's assets minus liabilities, the asset approach does not take into account going concern value and goodwill. In addition 4 Points has very few tangible assets. These facts of 4 Points, the Court finds, are correct and were proven, and justify only according a 5% weight to the asset value.

In addition to adopting the minimal 5% weight assigned to the asset value by Mr. Maggart the Court also finds that Mr. Maggart's book value is more reliable because it uses the net book value reported on the December 25, 2016 Internal Financial Statements. Mr. Price used the December 24, 2017 balance sheet. Mr. Maggart's method is adopted for two reasons.

First, the Maggart method uses year-end numbers. Both experts agree mid-year financials are not as accurate, particularly in the restaurant business where it is helpful to have comparisons to the previous year in a month because of payroll billing.

Secondly, the Maggart method uses year-end numbers for the year prior to the valuation event. The Price year-end numbers include numbers after the July 17, 2017 valuation event. The reason using the 2016 Financial Statements as Mr. Maggart did is preferable is that the method is consistent with Revenue Ruling 59-60. This is an authoritative source used by both experts in this case. The Ruling (trial exhibit 7) states that the time period and facts to be used are those available at the valuation event. In this case that event is July 17, 2017, when the Court terminated Mr. Raley's interest, but the applicable year-end financials, according to Revenue Ruling 59-60, are December 2016 (used by Mr. Maggart) and not 2017 (used by Mr. Price).

In sum, then, with respect to the asset approach, the Court adopts the asset and book values assigned by Mr. Maggart of \$183,000 and \$402,000, and the 5% weight.

Income Valuation

(1) Weight and Methodology

With respect to the income valuation of 4 Points, Mr. Maggart gave it a 95% weight (market 0% and asset 5%); Mr. Price assigned a 43% weight (market 42% and asset 15%). Based upon the findings of fact above of the absence of comparables for the market approach and the limitations of the asset approach since value to an owner of 4 Points is through distributions and compensation, the Court finds that the 95% weight for the income valuation assigned by Mr. Maggart is most reflective of the facts of the case.

As to the methodology to use to calculate the income value, the experts agree and it is well established in valuation methodology that the income approach in general determines the value of the business to be equal to the expected future benefits discounted by the degree of risk assumed in producing those benefits. Upon determining a discount rate, a capitalization rate is then used to divide to determine the value of the income/earnings stream. This method focuses on the earnings potential of a business and projects an income stream into the future with income capitalized at a rate of return based on the assessed risk of investment in the business. Assets play a role in this approach as part of the overall income-producing part of the business. The income approach starts with the calculation of earnings.

To calculate earnings Mr. Maggart used earnings for the years December 2014, 2015 and 2016. The most current earnings period of 2016 was given more weight (3) with declining weights in sequence (2015—2 and 2014—1). (*See* p. 18 of trial exhibit 13, Maggart Report). The start-up years of 2012 and 2013 were not used because earnings had not been stabilized. In contrast Mr. Price used only years 2016 and 2017 for earnings. Mr. Price's method is rejected by the Court: (1) based upon Revenue Ruling 59-60 (trial exhibit 7) discussed above which authoritatively advises to halt the valuation with the operative event, in this case the Court's July 17, 2017 termination of the Raley membership and (2) averaging three years and weighting the years is a more precise reflection of the

earnings facts. Accordingly, the Court adopts Mr. Maggart's use of earnings for 2014, 2015 and 2016 with weights for more recent years.

After earnings are determined, normalization adjustments are made to account for aberrant items.

(2) Adjustments to Earnings

(a) Management Compensation

In this case the experts agreed that the historical compensation paid to owners and management required adjustment. The experts did not agree on the amount of the adjustment. Mr. Price obtained an Executive Compensation Assessment, the exhibit just before his curriculum vitae in Trial Exhibit 14. He derived from this report that an annual \$320,998 salary was appropriate. In contrast, Mr. Maggart interviewed Mr. Raley whose information, although he has an interest in this case, is weighty because Mr. Raley has much experience in operating the Pharmacy and continues to successfully operate restaurants in Nashville. Mr. Raley estimated management compensation at \$250,000 annually. These adjustments are discussed at page 10 of the Price Report—trial exhibit 2—and page 19 of trial exhibit 13—the Maggart Report. Mr. Price made a \$134,884 compensation adjustment; whereas Mr. Maggart made adjustments to add back in the difference between the compensation paid in 2014, 2015 and 2016 between what was paid and \$250,000.

The Court adopts the approach of Mr. Maggart because Mr. Raley is the source of Mr. Maggart's compensation information, and Mr. Raley is extremely knowledgeable about the restaurant industry in Nashville for the size and kind of restaurant which 4 Points operates. The report Mr. Price commissioned is less reliable because there was no proof the salaries reported therein are for businesses comparable to 4 Points.

(b) Rent

Another adjustment Mr. Price made to earnings was on rent. At page 10 of his report, Mr. Price opined that the rent being paid was under market. Using a \$27 per square foot rental amount he located on the internet and opining that industry standard is a triple net lease and his judgment from his specialization of restaurant valuation of \$21.64 per square foot (*see* p. 10 of Price Report, trial exhibit 2), he determined that a net \$67,134 adjustment was required to normalize earnings to include a market rental rate. Mr. Maggart, however, did not make an adjustment for rental. Mr. Maggart's rationale was that because of the parties' disputes in the litigation the lease situation was unresolved but was not an issue for normalization or risk because the acquiring member and now sole owner of 4 Points, Mr. Brinkman, is also the sole member of the LLC who is the landlord. The following pertinent excerpts are quoted from Mr. Maggart's report.

- Purpose of Valuation: The valuation is being prepared to establish a fair value of Terrell Raley's 50% membership interest in 4 Points Hospitality, LLC to be used in connection with the purchase price of an existing member's interest related to a court order. This valuation is based on the circumstances and conditions as they existed at July 17, 2017, except for the lease status. It is our understanding the lease related to the property location remained unresolved as of July 17, 2017, but the

acquiring member owns/controls the property. As such, it is assumed the potential loss of the location is in control of the acquiring member and thus not a factor in the fair value since the lessor and lessee will be the same. This valuation assumes all conditions as of July 17, 2017 remain relatively unchanged.

* * *

- This valuation also assumes the property location and lease is not a risk factor to the acquiring member since the member will have complete control over 4 Points Hospitality, LLC and the property on which it is located.

* * *

- No economic adjustment was made for the restaurant rent paid to the landlord because the rent was determined by two parties that had independent interests in the transaction in a lease that was executed in 2011. There were some variations in rents due to member disputes on lease amendments.

Exhibit 13, *Valuation Of A 50% Membership Interest In 4 Points Hospitality, LLC As Of July 17, 2017* By Stephen M. Maggart, pp. 2, 3, 19 (June 22, 2018).

The Court adopts Mr. Maggart’s method and makes no adjustment to earnings with respect to rental costs. Rent in this case is a matter where the distinction between fair market value and fair value is pertinent. As noted above, *supra* at 8, there is persuasive authority in somewhat analogous cases that **fair value** (as opposed to fair market value) of a membership in a closely held business takes into account and does not ignore that the membership is being purchased by someone who is in control of the corporation. *University of Pennsylvania Journal of Business Law* “Discounts and Buyouts In Minority Investor LLC Valuation Disputes Involving Oppression or Divorce,” 13 U. Pa. J. Bus. 607 (2011), Sandra K. Miller, Professor, J.D., LL.M. Ph.D. See also, *Brown v. Allied*

Corrugated Box Co., 91 Cal. App. 477, 486 (1979); *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 612 (R.I. 1991); *Hansen v. 75 Ranch Co.*, 957 P.2d 32, 41 (Mont. 1998).

In this case the sole member of the LLC performing the buy-out, Defendant Brinkman, is also the sole member of Brinkman Holdings, LLC, the landlord, who owns the property where the Pharmacy is located. Prior to the dissension of the 4 Point members, Brinkman Holdings, LLC had a lease with 4 Points providing for payment of \$30,000 per year (\$2,500 per month) and payment of property taxes with increases in rent to \$3,500 per month as of January 2015.⁴ Upon the members' impasse, Defendant

⁴ Quoting from the *Memorandum And Order Of Findings Of Fact And Conclusions Of Law Of Phase I Trial Conducted 5/15/17-5/24/17*, pp. 7, 45-48, 57 (July 17, 2017) as follows:

The parties also entered into a lease (Trial Exhibit P22) whereby 4 Points leased the McFerrin Avenue property from BHL [Brinkman Holdings, LLC] for \$2,500 per month.

* * *

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

Brinkman refused to agree to the 10-year renewal of 4 Points' lease with Brinkman Holdings, LLC. Plaintiff Raley, on his own, attempted to renew the lease. That action, however, was determined by the Court to be invalid and an ultra vires act.⁵ Nevertheless, no ruling was made by the Court on the posture of the lease and the 4 Points' tenancy because that was at the time the Court terminated Mr. Raley's membership. With

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 than [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.

* * *

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.

⁵ Quoting from the *Memorandum And Order Granting In Part And Denying In Part Raley's Partial Motion For Summary Judgment*, pp. 6-8 (April 20, 2017) as follows:

Additionally, the Court enters summary judgment and determines as a matter of law that Raley's renewal of the Pharmacy's lease for an additional ten years by exercising an option in the lease on behalf of 4 Points on February 22, 2016 constituted "an unauthorized LLC act" under Tennessee Code Annotated section 48-249-105(c).

Defendant Brinkman, the sole member of 4 Points, there was no need for the Court to make a ruling on the status of the lease. As the controlling member of both the LLC landlord and LLC tenant, Mr. Brinkman should make those business decisions not the Court.⁶

The relevance of all of this context for the valuation of income is that making an adjustment to earnings for rental costs is speculative. There is no reliable proof on the amount of the adjustment. This finding is based upon the fact that at the valuation hearing Mr. Brinkman presented no evidence on the rental arrangement for 4 Points. There was no evidence of rent expense from that source, the Landlord. As to the sources Mr. Price used, they were not weighty. Mr. Price did an internet search, in the nature of a comparable, where the rental in the geographical area of the Pharmacy was \$27 per square foot. No facts establishing this as a comparable venue or business, however, were provided. When a party does not justify the use of the companies it selected as comparable, the party's analysis is not accorded weight. *See e.g. Merion Capital, L.P. v. 3M Cogent, Inc.*, 2013 WL 3793896, at *7, 18 (Del. Ch. July 8, 2013) (valuation in a somewhat analogous case of a merger). Mr. Price also used his experience and judgment and factored in a triple net lease model, and with that confirmed the estimate of \$27 per

⁶ Quoting, again, from the April 20, 2017 *Memorandum and Order* as follows:

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.

square foot was correct. This confirmation, the Court also finds, is not weighty. It is hypothetical when the best evidence available was Defendant Brinkman to testify the arrangement Brinkman Holdings, LLC would require on the lease, and that was not provided. The evidence of actual rental before the Court is the lease arrangement which existed between 4 Points and Brinkman Holdings, LLC prior to the members' dissension, and then whether and how much Brinkman Holdings, LLC, the Landlord, would deviate from this lease with 4 Points, the tenant, also owned by Defendant Brinkman, which proof was not provided. Thus, it would be entirely speculative for the Court to make an adjustment to income for rental based upon this record. The Court, therefore, adopts Mr. Maggart's approach on this issue and not Mr. Price's, and makes no adjustment to income valuation of 4 Points for rent.

(3) Capitalization Rate

Having adopted the income valuation of Mr. Maggart, the Court finds that the weighted average net income—pretax for value purposes—is \$930,525. That value, then, is used to determine the capitalization rate using the build-up method employed by both experts.

The capitalization rate determined by Mr. Price was 28%; Mr. Maggart's capitalization rate was 15%. The Court finds the capitalization rate is 18.63%. In so finding, the Court adopts the 2.72% riskless rate of Duff & Phelps determined by Mr. Price, and the 6.94% equity risk premium the experts agree on. The Court adopts the 3.67% risk

premium for size in Duff & Phelps used by Mr. Maggart and rejects the 8.64% Size Premium-10b Decile used by Mr. Price. The Court also eliminates the 5% Industry Risk determined by Mr. Price. The Court adopts the 5.8% specific company risk determined by Mr. Price and the 0.50% projected growth. For ease of reference, provided as follows is a chart of the Cost of Capital-Buildup Method of Mr. Maggart, Mr. Price and the Court. Following that are the Court's findings for the numbers it used on the calculation of the capitalization rate.

	<u>Maggart</u>	<u>Price</u>	<u>Court</u>
Riskless Spot Rate 20 year Treasury	2.54%	2.72%	2.72%
Equity risk premium—Duff & Phelps stock over bonds	6.94%	6.94%	6.94%
Risk premium for size from Duff & Phelps	3.67%	8.64%	3.67%
Other risk factors	3.85%	5.80%	5.80%
		(specific company risk)	(specific company risk)
	----	5.00%	----
		(industry risk)	
Net cash flow discount rate	17.0%	29.10%	19.13%
Projected Growth	<u>(2.0%)</u>	<u>(.50%)</u>	<u>(.50%)</u>
	15%	28.60%	18.63%

The finding of facts on which the Court bases its foregoing amounts for projected growth and specific company risk are that the restaurant business in Nashville is highly competitive. Also the assessment of the present manager of 4 Points, Mr. Tim Halterman,

is that there is minimal anticipated growth in sales. Additional evidence is that a comparison of 4 Points' gross sales from 2013-2016 shows that the trend of the rate of growth is slower whereas the cost of sales are increasing. Further evidence is that in his report Mr. Maggart characterized the LLC as having stabilized which is more consistent with the .50% growth rate than the 2.0% growth rate assigned by Mr. Maggart. These facts inform the above findings of the Court with respect to growth rate and specific company risk.

In addition, the Court was persuaded that Mr. Maggart's reasoning that assessing both industry risk and specific company risk did not fit the facts and profile of the highly successful Pharmacy Restaurant, and that the Guide Mr. Maggart used said it is unusual to have a separate industry risk. For these reasons the Court only assessed specific company risk and did not assess general industry risk.

As to the risk premium for size, the Court finds that the 3.67% category of Duff & Phelps used by Mr. Maggart is more fitting for 4 Points. The companies who are included in the Duff & Phelps 8.64% category used by Mr. Price are all publicly traded companies and the 10(b) Decile includes highly distressed, highly leveraged companies. 4 Points is debt free, has always been profitable and is privately held. The 3.67% Duff & Phelps is for small publicly traded companies and is more comparable to 4 Points.

(4) Working Capital

Lastly, the Court did not adjust the bottom line of its valuation for a deficit of working capital. The issue on this is that Mr. Price determined 4 Points had a \$139,000 deficit in working capital. Mr. Maggart found no such deficit. The Court finds there is no deficit based upon several facts. First there is paragraph 10 of the Second Declaration of Mr. Brinkman, trial exhibit 9, that \$75,000 to \$100,000 is adequate working capital for the business. Secondly, 4 Points has never run a deficit and has never had to obtain financing. The Court finds that the facts of 4 Points' business do not justify adjusting for deficient working capital.

Valuation

The result, then, of the Court's 18.63% cap rate for \$930,525 average net income weighted at 95% is \$4,745,028.18. Added to that is \$29,250.00 (5% for \$402,000 Book Value Method and \$183,000 Adjusted Asset Method). Thus, the total fair value of a 100% interest in 4 Points at July 17, 2017 was \$4,774,278.18. A 50% fair value interest, i.e. the value of Plaintiff Raley's membership as of July 17, 2017, was \$2,387,139.09.

Terms of Payment

With respect to Tennessee Code Annotated section 48-249-506(3)(B)(iii), the terms of payment are provided above in the Orders section. This ruling is derived from Mr.

Brinkman's testimony that a \$2 million loan has been approved, and the historical monthly net profits and distribution to 4 Points LLC members. The payment terms take into account the recovery awarded to 4 Points and Defendant Brinkman in the July and November 2017 Memoranda and Orders pursuant to Tennessee Code Annotated sections 48-249-505(c) and 48-249-504(a)(2).

Good Faith Valuation

The last issue to be decided is Plaintiff Raley's claim that Defendant Brinkman has failed to act in good faith as required by Tennessee Code Annotated section 48-249-506(3)(B)(v) and that Plaintiff Raley should recover his attorneys' fees. Section 48-249-506(3)(B)(v) provides as follows:

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

* * *

(v) May award one (1) or more other parties their reasonable expenses, including attorney's fees and the expense 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)

Plaintiff Raley's assertion is that Defendant Brinkman increased the time and attorneys fees of the valuation process and did not act in good faith and with fair dealing, by using one valuation firm, Frazier Dean, to provide a value to offer to Plaintiff Raley,

and then, when no agreement could be reached and a court-valuation was required, switching experts to Mr. Price, who provided a different analysis and value. The explanation Defendant Brinkman's Counsel has provided is that Defendant Brinkman, at the outset, in trying to reach an agreement with Plaintiff Raley on value, only had Frazier Dean prepare a calculation summary, not a valuation summary, to minimize costs. In his testimony, Mr. Weatherly of Frazier Dean confirmed he only performed a calculation summary. Only when the parties reached an impasse was it necessary to obtain the more time-consuming and detailed valuation summary of Mr. Price. The Court finds this conduct by Defendant Brinkman is not so irrational as to constitute lack of good faith and fair dealing. Accordingly, Plaintiff Raley's claim to recover attorneys' fees under section 48-249-506(3)(B) is dismissed with prejudice.

Based upon the foregoing findings of fact and conclusions of law, the above rulings stated on pages 3-4 have been issued.

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

cc by U.S. Mail, email, or efile as applicable to:

Seth McInteer
Howell O'Rear
W. Scott Sims
Michael O'Neill
D. Gil Schuette

