



financial conservator, although a full conservatorship was established. With regard to any remaining or inconsistent allegations of Paragraph 1, the Orders of this Court speak for themselves.

2. Upon information and belief, the allegations of Paragraph 2 of Petitioners' Petition are admitted.

3. The allegations of Paragraph 3 of Petitioners' Petition are admitted.

4. In response to the allegations of Paragraph 4 of Plaintiff's Complaint, the first sentence is admitted. It is admitted that David McCormick, JesseLee Cavalcanti and Emily Ann Cousins were friends. It is admitted that Mr. Cavalcanti is the owner of Robert's Western World, located at 416B Broadway, Nashville, Davidson County, Tennessee and that it is located across from Ernest Tubb Record Shop. All remaining or inconsistent allegations of Paragraph 4 are denied. It is denied that a "confidential relationship" developed to the extent that "confidential relationship" is a legal term of art which should be decided by a jury.

5. The allegations of Paragraph 5 of Plaintiff's Complaint are denied as stated. It is admitted that David McCormick, Mr. Cavalcanti and Mrs. Cousins were friends. It is admitted that David McCormick moved into Mr. Cavalcanti and Mrs. Cousins' guest home. It is admitted that David McCormick executed a General Durable Power of Attorney appointing Mr. Cavalcanti as his attorney-in-fact with Emily Ann Cousins serving as alternate. The remaining or inconsistent allegations in Paragraph 5 are denied, specifically but not limited to, implications of undue influence by Respondents over Petitioner are denied. The document attached as Exhibit 1 speaks for itself.

6. It is admitted that David McCormick executed a Last Will and Testament, which speaks for itself. Any and all allegations or implications of undue influence by Respondents over Petitioner in Paragraph 6 of Petitioners' Petition are denied.

7. As stated above, it is admitted that David McCormick resided in the guest house of Mr. Cavalcanti and Mrs. Cousins. It is admitted that David McCormick paid rent to Mr. Cavalcanti and Mrs. Cousins. It is denied that Mr. McCormick was unaware of the rent charges. Mr. McCormick was not only aware, but the rent amount was his idea. Any and all allegations or implications of undue influence by Respondents over Petitioner in Paragraph 7 of Petitioners' Petition are denied, and any inference that Respondents used Petitioners' money inappropriately is hereby denied. All remaining or inconsistent allegations of Paragraph 7 are denied.

8. In response to the allegations of Paragraph 8, the referenced check speaks for itself. Allegations and insinuations of fraud, conversion, breach of fiduciary duty, undue influence, or inappropriate conduct are denied. All remaining or inconsistent allegations of Paragraph 8 of Petitioners' Petition are denied as stated.

9. In response to the allegations of Paragraph 9, it is denied that Mr. McCormick was unaware of this transfer, instead it was at his insistence. Allegations and insinuations of fraud, conversion, breach of fiduciary duty, undue influence, or inappropriate conduct are denied. All remaining or inconsistent allegations of Paragraph 9 of Petitioners' Petition are denied as stated.

10. It is admitted that a sale occurred, but any and all allegations or insinuations of fraud, undue influence, breach of fiduciary duty, or otherwise inappropriate activity in Paragraph 10 of Petitioners' Petition are denied. The remaining allegations of Paragraph 10 are denied as stated.

11. As stated above, it is admitted that a transaction occurred and that Petitioner lived in Respondents' guesthouse. The remaining allegations of Paragraph 11 of Petitioners' Petition are denied.

12. The allegations in Paragraph 12 of Petitioners' Petition are denied as stated. It is admitted that documents necessary for the closing of the transaction were executed. Those documents speak for themselves.

13. The allegations in Paragraph 13 of Petitioners' Petition are denied as stated. It is admitted that monthly installment payments were not made; however, these payments were not made based upon COVID 19 arrangements between David McCormick and Respondents. HTC made a payment of \$10,000 to David McCormick, LLC on March 29, 2021. Any and all allegations of wrongdoing are denied. The referenced document speaks for itself.

14. It is admitted that Petitioner moved to Maybelle Carter Senior Living Center, but the remaining allegations of Paragraph 14 are denied.

15. It is admitted that a check was issued; however, it is denied as to any intention to deprive Petitioner of the check. The remaining allegations of Paragraph 15 of Petitioners' Petition are denied as stated.

16. It is admitted that Respondents' counsel communicated with Petitioner and delivered checks totaling \$610,746.33 to Petitioners' counsel. The checks and letters enclosing them speak for themselves. It is admitted that Petitioner returned the checks, but they were again returned to Petitioners.

17. The allegations of Paragraph 17 of Petitioners' Petition are admitted.

18. The allegations of Paragraph 18 of Petitioners' Petition are denied.

19. The allegations of Paragraph 19 of Petitioners' Petition are denied.

20. The allegations of Paragraph 20 of Petitioners' Petition are denied.

21. The allegations of Paragraph 21 of Petitioners' Petition are denied.

22. The allegations of Paragraph 22 of Petitioners' Petition are denied.

23. The allegations of Paragraph 23 of Petitioners' Petition are denied.

24. The allegations of Paragraph 24 of Petitioners' Petition are denied.

#### **AFFIRMATIVE AND OTHER DEFENSES**

25. Any and all allegations not specifically admitted or denied are hereby generally denied as if set forth specifically herein and strict proof is demanded thereof.

26. Respondents deny that Petitioners are entitled to the relief sought.

27. David McCormick was represented by counsel in the creation of his Powers of Attorney and the drafting of his Will.

28. David McCormick was represented by counsel in the business transaction regarding the sale of Ernest Tubbs Record Shops and real property. The contracts at issue were negotiated by both sides and are valid. The transaction was fair and reasonable. The purchase price was fair and reasonable. Furthermore, David McCormick specifically wanted Respondents to own the Business because he wanted it to remain a record store and not become a honky tonk.

29. David McCormick was fully aware of and involved in the transactions referenced in the Petition and those transactions occurred at his request, direction, and or affirmative action.

30. Respondents assert the affirmative defenses of waiver, estoppel, and unclean hands, as Petitioner David McCormick directed Respondents to take many, if not all, of the specific actions outlined in the Petition, including but not limited to, the sale of the business. David McCormick also directed Respondents not to make payments on the loans due to the COVID-19 pandemic and agreed that payments could be caught up at a later date. Respondents detrimentally relied on the directions and instructions of David McCormick as to these matters.

31. Respondents further assert the affirmative defenses of waiver, estoppel, and unclean hands, as to the Asset Purchase Agreement, the Promissory Notes, Consulting Agreement,

and all other transactional documents related to the purchase of the Ernest Tubb Records Shop as Petitioners acknowledged the validity of the transaction and documents by David McCormick's acceptance of payment of \$10,000 from HTC, LLC on March 29, 2021 and later declaring the Promissory Notes in default, following which Respondents paid off one note and brought the second note current pursuant to the demand made by Petitioner. For these reasons, Respondents also assert the affirmative defenses of payment and accord and satisfaction.

32. Respondents asserts that their investigation of this matter is not yet complete, and, therefore, any and all affirmative defenses which may be developed through investigation and discovery shall be relied upon by Respondents at the trial of this case. Respondents specifically reserves the right to amend this Answer and plead additional facts and/or defenses, including affirmative defenses, and compulsory and/or permissive counter-claims, that may be supported by said investigation and discovery.

33. Respondents deny that they are liable to the Petitioners for the amount sued or for any amount.

**WHEREFORE**, the Respondents, Jesselee Cavalcanti, Emily Ann Cousins, Honky Tok Circus, LLC and ETRS, LLC, deny they are liable to the Petitioners for any amount and respectfully request that they be dismissed from this lawsuit with costs, attorneys' fees and expenses taxed to the Petitioners. The Respondents further demand a jury of twelve (12) persons to try this cause.

#### **COUNTERCLAIM AGAINST PETITIONERS**

Come now, Jesselee Cavalcanti ("Mr. Cavalcanti"), Emily Ann Cousins ("Mrs. Cousins"), Honky Tonk Circus, LLC ("HTC") and ETRS, LLC, ("ETRS") (collectively "Counter-Petitioners"), as Counter-Petitioners, pursuant to Tenn. R. Civ. P. 13.03 and 57 and pursuant to

Tenn. Code Ann. § 29-14-101, *et seq.*, , by and through counsel, herein assert the following as their counterclaim against the Conservatorship of Gary David McCormick, by and through his Conservator, Phillip A. McCormick; and David McCormick Company, Inc., formerly known as Ernest Tubb Record Shops, Inc.:

1. Counter-Petitioners Jesselee Cavalcanti and Emily Ann Cousins are husband and wife and reside at 1508 Rosebank Avenue, Nashville, Davidson County, Tennessee.

2. Counter-Petitioner, Honky Tonk Circus, LLC (“HTC”) is a Tennessee limited liability company whose Principal place of business is 417 Broadway, Nashville, Davidson County, Tennessee 37203.

3. Counter-Petitioner, ETRS, LLC (“ETRS”) is a Tennessee limited liability company whose principal place of business is 417 Broadway, Nashville, Davidson County, Tennessee 37203.

4. Counter-Respondent, Gary David McCormick (“David McCormick” or “Counter Respondent”) is a resident of Davidson County and is the sole owner and shareholder of David McCormick Company, Inc., formerly known as Earnest Tubb Record Shops, Inc.

5. Phillip A. McCormick is the brother of David McCormick and was appointed Conservator over the person and property of David McCormick on or around July 1, 2021.

6. Jurisdiction and venue are proper in this Court as a related cause of action has been filed.

7. On or around, August 18, 2020, Ernest Tubbs Record Shop, Inc. (the “Company”), and David McCormick (collectively “Sellers”) entered into an Asset Purchase Agreement with HTC and ETRS (collectively, “Purchasers”) and Jesselee Cavalcanti and Emily Ann Cousins, the members of the Purchaser, for the purchase of the Ernest Tubbs Record Shop and assets (the

“Business”) including the real property. *Asset Purchase Agreement attached as Exhibit A to Petition.*

8. At the time of the sale, the Company owned the Business and assets and David McCormick was the sole shareholder of the Company.

9. The Sellers were represented by Casey W. Riggs, Esq. of Riggs Davie, PLC and the Purchasers were represented by William B. Hawkins III, Esq. and G. Miller Hogan II, Esq. of Hawkins Hogan PLC.

10. The total purchase price was Five Million Dollars (\$5,000,000.00) and was to be paid by Purchaser’s execution and delivery of two Promissory Notes payable over a term of twenty (20) years bearing interest at the rate of four and one-quarter percent (4.25%). *Documents related to the transaction, including the notes, are attached to the Petition as Exhibits 6 through 11.*

11. On May 21, 2021, counsel for David McCormick and his family sent a letter purporting to be a Notice of Default of the Asset Purchase Agreement and associated documents. *Exhibit 12 to Petition.*

12. On June 16, 2021, ETRS tendered payment in full by cashier’s check to David McCormick Company, Inc. (f/k/a Ernest Tubb Records Shops, Inc.) as the holder of the \$247,572.77 Note. This payment discharged the debt.

13. On June 16, 2021, HTC tendered payment in the amount of \$321,833.45 to David McCormick as the holder of the \$4,703,882.70 Note reinstating the loan and bringing the Note current.

14. On June 22, 2021, the above referenced checks were returned to counsel for HTC and ETRS with a letter saying that they would not be accepted.



15. On June 30, 2021, HTC tendered payment in the amount of \$29,128.06 to David McCormick representing the July 2021 payment due under the terms of the loan. HTC has continued to make timely monthly payments of the loan thereafter. Counsel for HTC and ETRS also returned the previous checks to counsel for McCormick. *Petition Exhibit 14*.

16. Pursuant to T.C.A. 47-3-601(a) and 47-3-602(a), ETRS's tender of payment in full, by cashier's check, to David McCormick Company, Inc. as the holder of the note, constitutes payment and discharge of the debt, regardless of whether David McCormick Company, Inc. accepted it.

17. JesseLee Jones and Emily Ann Cousins executed a personal guaranty of the ETRS loan and are thus accommodation parties pursuant to T.C.A. § 47-3-319. Therefore, the refusal of Counter-Respondents to accept payment in full of the loan discharged all of Mr. Cavalcanti and Mrs. Cousins' liability under their guaranty agreement with respect to the ETRS loan pursuant to T.C.A § 47-3-603(b).

18. Because ETRS tendered payment in full of its loan, all interest ceased on the note as of the date ETRS tendered payment pursuant to T.C.A. § 47-3-603(c).

19. Pursuant to T.C.A. § 47-9-513(c)(1), because ETRS has paid its loan in full as set forth above, the Security Agreement and accompanying Financing Statement filed with the Tennessee Secretary of State no longer secures any obligation of ETRS. ETRS is entitled to the release of all security interests in the collateral securing its loan, including, without limitation, the UCC-1 Financing Statement filed with the Tennessee Secretary of State. ETRS made demand for the release of all such liens on its property pursuant to T.C.A. § 47-9-513(c)(1) more than 20 days ago and David McCormick Company, Inc. has failed to issue the required termination statement.

**DECLARATORY JUDGMENT**

20. Counter-Petitioners incorporate the allegations set forth in paragraphs 1 through 19 above, as if fully set forth herein.

21. Counter-Petitioners ask that the Court declare the rights and responsibilities of the Parties as it pertains to the ownership of the Business. Specifically, Counter-Petitioners ask that the Court declare that ETRS is the owner of the Business and HTC is the owner of the real property at 417 Broadway, Nashville, Davidson County, Tennessee 37203.

22. Counter- Petitioners ask that the Court declare that the \$247,572.77 Note has been paid in full and that the debt has been discharged and order the Petitioners to (i) issue, file and record termination statements for the UCC-1 Financing Statement securing said Note, and (ii) to return the original promissory note to Counter-Petitioners marked “paid in full.”

23. Counter-Petitioners as that the Court declare that the \$4,703,882.70 Note was reinstated and brought current by the June 16, 2021 payment.

24. Counter-Petitioners ask that the Court declare that all of Mr. Cavalcanti and Mrs. Cousin’s liability under their guaranty agreements with respect to the ETRS loan is discharged and order the Petitioners to return the original guaranty agreements to Counter-Petitioners marked “discharged and released.”

25. Counter-Petitioners ask that the Court declare that, because ETRS tendered payment in full of its loan, all interest ceased on the note as of the date ETRS tendered payment pursuant to T.C.A. § 47-3-603(c).

26. Counter-Petitioners ask that the Court declare, pursuant to T.C.A. § 47-9-513(c)(1), that, because ETRS has paid its loan in full as set forth above, the Security Agreement and accompanying Financing Statement filed with the Tennessee Secretary of State no longer secures

any obligation of ETRS and that ETRS is fully released of all security interests in the collateral securing its loan, including, without limitation, the UCC-1 Financing Statement filed with the Tennessee Secretary of State.

### **BREACH OF CONTRACT**

27. Counter-Petitioners incorporate the allegations set forth in paragraphs 1 through 26 above, as if fully set forth herein.

28. Counter-Respondents are in breach of the Asset Purchase Agreement, the Promissory Notes, Consulting Agreement, and all other transactional documents related to the purchase of the Ernest Tubb Records Shop and real property due to their refusal to accept payments pursuant to those agreements and to otherwise act on their duties and obligations under those agreements.

### **MISREPRESENTATION**

29. Counter-Petitioners incorporate the allegations set forth in paragraphs 1 through 28 above, as if fully set forth herein.

30. David McCormick represented to Counter-Petitioners that any obligations to make payments pursuant to the Notes at issue were extended due to the Pandemic.

31. Counter-Petitioners relied on David McCormick's representations to their detriment and suffered damages as set forth herein as a result.

**WHEREFORE, PREMISES CONSIDERED,** Petitioners request relief as follows:

1. That Respondents be required to appear and answer within the time required by law;
2. For a judgment declaring:

- a. that ETRS is the owner of the Business and HTC is the owner of the real property at 417 Broadway, Nashville, Davidson County, Tennessee 37203;
  - b. that the \$247,572.77 Note has been paid in full and that the debt has been discharged and order the Petitioners to (i) issue, file and record termination statements for the UCC-1 Financing Statement securing said Note, and (ii) to return the original promissory note to Counter-Petitioners marked “paid in full.”
  - c. that the \$4,703,882.70 Note was reinstated and brought current by the June 16, 2021 payment;
  - d. that all of Mr. Cavalcanti and Mrs. Cousins’ liability under their guaranty agreement with respect to the ETRS loan is discharged;
  - e. that all interest ceased on the ETRS note as of the date ETRS tendered payment pursuant to T.C.A. § 47-3-603(c);
  - f. that the Security Agreement and accompanying Financing Statement filed with the Tennessee Secretary of State no longer secures any obligation of ETRS and that ETRS is fully released of all security interests in the collateral securing its loan, including, without limitation, the UCC-1 Financing Statement filed with the Tennessee Secretary of State;
  - g. that the Court enter judgment against Counter-Respondents for all other damages and relief under the Tennessee Uniform Commercial Code.
3. That the Court enter judgment against Counter-Respondents for breach of contract;
  4. That the Court enter judgment against Counter-Respondents for misrepresentation;
  5. For an award of monetary damages, attorneys’ fees, costs and such further and other general relief to which Counter-Petitioners may be entitled.

Respectfully submitted,

/s/ Rebecca C. Blair

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded, via U.S. Mail, postage prepaid to:

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This the 7<sup>th</sup> day of October, 2021.

/s/Rebecca C. Blair  
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