EXHIBIT C

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

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ESQUARED HOSPITALITY LLC, individually and on behalf of CCSW, LLC,

Claimants,

-against-

AAA Case No. 01-16-0002-9399

CHEF CHLOE, LLC and, CHLOE COSCARELLI,

Respondents.

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CHEF CHLOE, LLC, individually and on behalf of CCSW, LLC,

Counterclaimants,

-against-

ESQUARED HOSPITALITY LLC, ESQUARED CCSW MANAGEMENT LLC, SAMANTHA WASSER, BLT RESTAURANT GROUP LLC, and JAMES HABER,

Counterclaim-Respondents.

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FINAL AWARD

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated November 7, 2014 entered into among Chef Chloe, LLC, CCSW, LLC,[1] and ESquared Hospitality LLC, and having been duly sworn, and having duly heard the proofs and allegations of the Parties at hearings held on November 9, 10, 11, and 14 and December 5, 6, 12, 13, 14, 19, 20 and 21, 2016 (Philip R. Hoffman, James S. O'Brien, and Matthew S. Barkan of Pryor Cashman LLP for Claimants/Counterclaim-Respondents, and Rishi Bhandari and Leah Vickers of

[1] The Operating Agreement (OA) contains an arbitration clause at § 20.19(a), which states that "All claims, disputes, deadlocks and other matters in question between the parties arising out of, or relating to this Agreement or the breach hereof which have not been resolved through good faith negotiation between the parties ... shall be decided by arbitration in accordance with this Section..." Thus a "deadlock" can be resolved by submission of the dispute to arbitration.

Mandel Bhandari LLP and Benjamin Burry of Sidley Austin for Respondents-Counterclaimants) and having considered their post-hearing submissions, does hereby find, conclude and issue this FINAL AWARD, as follows.

Summary of Facts

A. CCSW Is Formed

CCSW, LLC (CCSW) is owned equally by ESquared Hospitality LLC (E2) and Chef Chloe, LLC (CCLLC) and was formed in 2014. E2 owns several restaurants internationally, and is headed by James Haber (Haber), who has been in the hospitality industry since the 1980s. CCLLC is owned by Respondent Chloe Coscarelli (CC or Chloe), who won "Cupcake Wars." CC is a proponent of a vegan lifestyle and an accomplished chef. After winning "Cupcake Wars" with a vegan cupcake, Chloe became a cookbook author, and has three vegan cookbooks to her credit. In late December 2013, CC's mother, Shelly, wrote to Haber to inquire as to whether E2 would be interested in working with CC to develop vegan restaurants. Haber asked Shelly to have Chloe call him. Although Haber was not familiar with vegan cuisine, he agreed to meet CC, offering to introduce CC to his daughter, Samantha, who was the same age as Chloe. After their meeting, Haber agreed for E2 to enter into a joint venture with CCLLC. E2 appointed Haber's daughter, Samantha Haber Wasser (Samantha or Wasser), to co-manage CCSW with CC (the manager designated by member CCLLC). Samantha was a creative director at E2 and had a marketing and branding background. CC and Samantha each were about 27 years old in 2014. Neither had owned or operated a restaurant, let alone a chain of restaurants, nor had either developed a restaurant from a concept to a going concern, or overseen the build-out of a restaurant, hired and trained staff, designed a menu or created recipes for use in a restaurant on a large scale. Haber and E2, however, had substantial experience in this area. E2 also had a "backroom" office and staff available to handle these tasks, along with the capability to finance the steps necessary to establish the joint venture.

B. The Operating Agreement

Effective November 7, 2014, E2 and CCLLC entered into an Operating Agreement (OA) that governs their relationship. Wasser and CC also signed as Managers and CC signed the OA for her duties on behalf of CCLLC as "Service Member." However, as with many closely held and start-up companies, the operation of CCSW did not always conform to the letter of the OA.

Even before the OA was finalized, executed and "effective," Samantha and CC began to develop the concept, create the menu, select the interiors, location, logo, and other important matters involved in the creation of "By Chloe." From the beginning of their relationship, CC and Samantha recognized that E2 was the financial backer of the creation of "By Chloe" and had the expertise to create and run a restaurant (and a chain of restaurants) and the back-office support for such. The OA recognizes this role.

The OA for this venture is quite complex and lengthy (53 pages plus exhibits and ancillary agreements entered into simultaneously). CC had her own counsel, Josh Saviano (Saviano), in connection with its drafting and negotiation. The OA addresses governance, the parties' responsibilities, and financial matters. At the same time that the parties entered into the OA, they also entered into a Personal Services Agreement (by which CC was employed and reported to Haber) and a Name, Face, Likeness Agreement (NFL) (which governs certain intellectual property (IP)). CC and CCLLC put no money into the venture, nor was such required. CC contributed various recipes only to the extent that they form the basis for the menu. At the very first meeting with Haber, CC brought a proposed menu and other ideas for her vision of the vegan fast casual restaurant. The parties do not agree as to the degree to which CC's suggestions were modified or incorporated. The OA assigned no value to the recipes or any intellectual property contributed by CC or CCLLC to the venture.

The OA provides that there are two Managers, one appointed by each Member. CC was the appointee of CCLLC and Samantha was the appointee of E2. CCSW is a "manager-managed" limited

liability company (Company). OA at § 7.3. The Members have no right to manage. § 7.1. The powers of the Managers are set forth in § 7.1(c) and, *inter alia*, states that they are empowered to "take any and all lawful acts that the Managers consider necessary, advisable, or in the best interests of the Company," including in the day-to-day operations and business, as well as transactions outside the ordinary course of business of the Company, including to expend capital, incur debt and to pay the obligations of the Company. The Managers are specifically empowered to "perform commercially reasonable acts to protect the individual assets of the Members" and to "negotiate and execute" loan documents. Further, the last sentence of § 7.1(c) provides that, by executing the OA, each Member has consented to these powers.

Section 7.3 gives great power to the Manager appointed by E2, as that Manager is given the power to break ties, unless the vote/approval of CC (as Manager) is required by § 7.4. CCLLC was to be the "Service Member," with CC performing the duties and services set forth in Article XIX. CCLLC and CC were to "develop the Concept" with E2, including developing, testing and updating the recipes. CC was to be "consulted" regarding "décor, menu, publicity, locations, operations and day-to-day management of the Restaurants, including hiring and firing personnel, "unless such consultation was not practical" and "that, except for Major Decisions, the final decision for such matters rests with" E2. Thus, tremendous authority was ceded by CCLLC and CC to Wasser and E2 in the OA.

Central to the parties' dispute in this arbitration is the scope of this deadlock-breaking power and the meaning of § 7.4, which requires the approval of Manager CC to certain listed items (called "Major Decisions"), including (a) the addition of new members, (f) amending the OA, and (g) "entering into any financing arrangements with respect to any Restaurant, other than Approved Financing Arrangements." Section 4.1 defines "Business" and "Restaurants" [2]:

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[2] Section 4.1 defines "Approved Projects" as "any project related to the food and beverage industry that utilizes one or more of the NFL Rights or the By Chloe Mark, and which has been pre-approved in writing by CC Entity." The provision further explains what notice is required and the timing for

This section provides:

> Section 4.1 Business. The business ("**Business**") of the Company shall be to engage, whether directly or through one or more Affiliates or subsidiaries, in the ownership and/or management and/or licensing and/or franchising of one or more restaurants utilizing the Concept (the "**Restaurants**") and Approved Projects. As used herein, the term "**Approved Projects**" means any project related to the food and beverage industry that utilizes one or more of the NFL Rights or the By Chloe Mark, and which has been pre-approved in writing by CC Entity. In connection with Approved Projects, the provisions of any sublicense relating to the use and protection of the NFL Rights shall be subject to the approval of CC Entity, such consent not to be unreasonably withheld, conditioned or delayed. In furtherance of the foregoing, Company shall submit to CC Entity in writing any project for which it wishes to seek the CC Entity's approval, and CC Entity shall endeavor to review and either approve or disapprove of such project within ten (10) business days. If the CC Entity fails to timely respond, Company may send a second approval request with the following language included: "FAILURE TO RESPOND WITHIN FIVE (5) BUSINESS DAYS SHALL BE TREATED AS YOUR APPROVAL OF THE PROJECT." Any such submission that has not been timely disapproved by within such five-business day period shall be deemed approved.

"Restaurant" (in the singular, upper or lower case) is not defined in the OA. The OA also uses the undefined terms "Restaurant" and "restaurants" and "restaurant."

"Approved Financing Arrangements" is defined as (in § 1.1):

> (a) debt or equity financing arrangements under terms that are approved by CC Entity (or its Permitted Transferee) and (b) debt or equity financing arrangements under terms that are no less favorable to the CC Entity (or its Permitted Transferee), on the whole, than previously approved financing arrangements. Without limiting the foregoing, CC Entity hereby approves financing arrangements for Restaurants whereby the available cash of the restaurants is split 50/50 between the Company and the investors (after the investors have been paid back their capital contributions and a preferred return of no more than 10% calculated on a simple, straight line, non-compounding basis); provided, that if ESquared Hospitality or any of its Affiliates are providing twenty five percent (25%) or more of the financing, CC Entity does not hereby approve any preferred return for such arrangement.

CC Entity to disapprove of a project but that, if it fails to disapprove within 5 business days, it is deemed approved.

This section does not limit the manner in which the pre-approved financing can be entered into; rather, it gives an illustration of a pre-approved financing. The example given is that E2 or an investor would provide financing for Restaurants (capital "R"). Also, this section refers to "Restaurants" – plural, capitalized – and which is a defined term.

As noted therein, if a financing fits within the definition of the Approved Financing Arrangements, then CC has already approved it. If a "financing" does not fall within the pre-approved "Approved Financing Arrangements," then CC's approval is required under § 7.4 (g) – which refers to "Restaurant" – singular, capitalized, which is not defined in the OA. However, other sections of the OA also address the manner in which CC and CCLLC agreed that funds could be raised by the Company.

Section 4.3(e) provides that the unanimous consent of the Members is required for exploiting the Concept, which can only be done through the Company. However, the Company is permitted under this section to utilize subsidiaries to use the Concept ("Concept" is defined, § 1.1, as "fast, casual vegan restaurants" (lower case)) on terms acceptable to the Managers, as long as "100% of the economics of such transactions flow to the Company," unless otherwise permitted in the OA or the NFL License Agreement, it is an "Approved Financing," CCLLC expressly approves, or the Members unanimously agree.

Thus, under the "Deadlock Rule in § 7.3," E2's manager could decide how to "use" or exploit the Concept (consistent with §§ 4.3 and 7.4) and, as long as all of the economics of such flows to CCSW, then Manager CC already approved the transaction.

In the OA, E2 agreed only to fund through capital contributions the initial development of the Concept, testing recipes, designing a model restaurant (but not the build-out of any restaurant), CC's Personal Services Agreement (*i.e.*, the salary paid to CC), and other costs approved by the Managers, and no Member was required to make any further capital contributions. § 6.2(a),(b).

(These do not include "Restaurants.") If E2 wanted to provide financing for "Restaurants," (capital "R") then § 6.2(b) states:

> ESquared Hospitality has agreed to fund through Capital Contributions (a) the initial development of the Concept, (b) the testing and modification of the recipes, as appropriate, (c) the design of a model restaurant (but not the build-out thereof), (d) the Personal Services Agreement (until such time as it can be funded out of Company funds) and (e) miscellaneous costs in connection thereof approved by the Managers. Although it may choose to, ESquared Hospitality has not agreed to finance the opening or operation of an actual Restaurant. Such financing may be provided by third parties, by ESquared Hospitality or by an Affiliate of ESquared Hospitality or any combination thereof. If ESquared Hospitality or an Affiliate thereof participates in such financing, such financing shall be solely in accordance with an Approved Financing Arrangement.

E2, however, or its Affiliate[3], or an outside party, could elect to provide financing for other costs associated with an actual "Restaurant" – an undefined term. § 6.2(b). (As noted above, "Restaurants" (plural and capital "R") is a defined term, but the singular "Restaurant" and lower case (restaurant and restaurants) are not.) As quoted above, "Restaurant" (with a capital "R") is defined in § 4.1, as is "Business."

However, § 6.2(c) also permitted the Managers, if they "reasonably determined" that the Company [*i.e.*, CCSW] had the "need of additional funds," it could borrow money from "banks or similar financial institutions, or from Members" on terms the Managers find "acceptable" in their "sole absolute discretion." Such borrowing was allowed to be secured by the Company's property. § 6.2(c). Section 6.2(c) does not limit loans to the use of funds provided by a member loan. Importantly, CCLLC and CC consented to loans by a Member in this section, as long as it was determined that the Company needed "additional funds." Section 7.1 gave broad powers to the Managers to enter into loans on behalf of the Company, which power was not expressly limited by § 7.4(g) (*i.e.*, it is not listed as a Major Decision).

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[3] "Affiliate" is defined very broadly to include entities, individuals, owners of entities, among other things.

The parties disagree as to whether § 6.2(c) is further limited by § 7.4(g), that is, whether CC's consent to a loan by E2 is required if the loan is related to a "restaurant" or "Restaurants." The parties also disagree as to whether the "Deadlock Rule" contained in § 7.3 (which gives E2's appointed Manager the right to control decision-making unless the matter is one requiring the approval of the CC, as a Major Decision, as that term is defined in § 7.4) controls and, therefore, limits the power of the Managers to approve debt arrangements in § 6.2(c). In other words, could Samantha approve of a loan from E2 to CCSW without CC's consent under § 6.2(c), or is a loan (where funds are used to grow the chain of restaurants) a Major Decision that could be entered into only if CC gave her approval as Manager?

The parties also disagree as to whether Wasser alone could approve a transaction between E2 and CCSW (such as a loan). Respondents assert that Wasser would be conflicted if she approved of a loan by E2, contending such is an interested transaction (as she is an indirect owner of the owner of E2). New York LLC Law § 411(d) (LLCL) permits an operating agreement to address interested transactions, which was done here. Section 7.8 expressly permits transactions between the Company and its "Affiliates" (defined as including persons and companies that control a Member, Managers, and their relatives), as long as such are at a "fair market 'arm's length' basis." Managers can take "any and all lawful acts" that they consider necessary, advisable, or in the best interest of the Company in connection with such Affiliate transactions. § 7.8. Section 7.9 also permits Managers to delegate their authority and responsibility in connection with the Company's business affairs, when "deemed appropriate" by the Managers. However, the Managers cannot delegate such powers to a Member, without the written consent of the Managers. § 7.2. If a Manager exceeds the authority provided by the OA, such Manager can be held liable "to the other Members for acts which exceed the Managers' authority under this Agreement." *Id.* Sections 7.1(c)(viii) and (xii) permit Managers to enter into loans and to put liens on the assets of the Company; § 7.1(c)(ii) authorizes Managers to pay the Company's debts and expend its capital and

revenue and *id.*(xi) to protect the individual Members' assets, including if they had made guarantees on behalf of the Company.

I find that § 7.8 governs a loan between E2 and CCSW, rather than LLCL § 411. I find that by adopting §§ 7.8 and 6.2(c), E2, CCLLC and CC agreed and approved of E2 making a loan to the Company if the Managers in good faith believed that CCSW was in need of funds, and that such authority was ceded to Samantha (the E2-appointed Manager), because loans (including by a Member) was not reserved as a Major Decision. Section 6.2(c), I find, is the specific clause, which governs over 7.4(g).

Because it is not a Major Decision, Samantha could make the determination on behalf of CCSW to enter into a loan with E2. Consent was given in § 6.2(c) in advance to CCSW entering into a transaction by which a Member lends to CCSW, as long as the loan is on a fair market arm's length basis. LLCL § 611 permits member of a limited liability company to be creditors of, lend money to, and transact business with the company. CC and CCLLC agreed that an interested loan transaction could be entered into if on an arm's length basis, fair market and on commercially reasonable terms. Further, the loan could be secured by the Company's assets and Samantha was required to protect the assets of E2, including because it had signed guarantees of the leases entered into by CCSW or its affiliates/subsidiaries.

The OA also addresses the fiduciary duties of the Managers, as permitted by LLCL § 409. The fiduciary duties that are owed by the Managers to the Members and the Company were modified at Article VII consistent with § 409. The OA provides that the Managers are to "perform their duties as managers in good faith and with the degree of care that an ordinarily prudent person in a like position would use under similar circumstances" and that in performing their duties they may rely on information prepared by employees, accountants, outside accountants and counsel if the Manager believes such to be within that person's expertise and is acting in "good faith and with such degree of care that an ordinarily prudent person in a like position would use under similar

circumstances" and that the foregoing substitutes for the statutory duties of managers, as well as common law duties.

It is against this backdrop that we review what transpired.

C. **The Dispute**

The Members of CCSW had no authority to run the Company, except insofar as CC and CCLLC agreed in Article XIX to cede decision-making to E2, except as to Major Decisions, to the Manager appointed by E2. §§ 7.3, 7.4.

Starting in 2014 (even before the OA was entered into), Samantha and Chloe began efforts to create the By Chloe restaurants and develop the Concept. The Managers (working with outside vendors) helped design the By Chloe logo, the design of the menu, selected items including dishes, and designing the restaurants. CC also began working with corporate chefs to choose the menu items, to help turn them into recipes that could be used at the restaurants and cooked in large quantities, and, once venues were selected and ready for operation, to select and hire staff (for front and back of the house). CC was required to perform duties on behalf of CCLLC, the "Service Member" (see Article XIX of the OA), including to develop the Concept "with ESquared Hospitality" and the Company Recipes. Each of these items had associated costs of which Chloe was aware. In addition, because CCSW had no "back office," E2 was to provide and fund certain other expenditures. CC was also to be consulted on the "décor, menu, publicity, locations, operations and day-to-day management" of restaurants "unless such consultation is not practical in the specific circumstances". In that event, E2 would make these operational and day-to-day managerial decisions. Section 19.2(a)(ii) reinforces that "except for Major Decisions, the final decision for such matters rests with" E2. This was agreed to by Member CCLLC and Manager CC.

Pursuant to section 19.8, E2 was to search for restaurant sites, seek capital for the project, and manage the build-out and opening of the restaurants. In addition, E2 was to provide back office and administrative functions, "including human resources, accounting and tax reporting" and was

to be paid a fee of 2% of gross sales from each restaurant for providing such. Further, E2 was to "devote such time as is reasonably necessary to fulfill its responsibilities" but there was "no minimum time requirement". CC, as the individual providing the Service Member's services, was to "devote all reasonably necessary time and efforts and attention to the business of the Company." § 19.2(a)(i). Section 19.2(a) lists the duties of Chloe and limits her outside activities (except for "Permitted Activities"). Further, CC was prohibited from using any Company IP – including its recipes – without the prior written consent of E2. §19.2(a)(iii). CCLLC agreed to contribute recipes to the joint venture.[4] These recipes and those that were either created especially for the menu, and those that derived from the initial recipes became the intellectual property of CCSW. (In §1.1 CC and CCLLC agreed that "CC Existing Recipes" that were "modified" and used in the Business, become the property of CCSW. A schedule of unmodified recipes was to be annexed, but no "unmodified recipes" are scheduled.)

The OA indicates in an exhibit that E2 had provided $42,451.51 as a capital contribution by November 2014 and that CCLLC had provided $0.

The parties agreed that effort was involved in both creating the menu and the transformation of a recipe for home consumption into recipes that could be used for commercial purposes and commercial quantities. CC testified that the E2 chefs that were involved initially were not familiar with vegan cuisine and therefore at the start CC had to educate them (including, for example, about how to substitute for non-vegan components in traditional cuisine). Considerable experimentation was involved. CC used "interns" at her home kitchen to help create some of the recipes. She asked for funds to pay the interns and such was provided by E2.

[4] "CC Existing Recipes" are the recipes that form the basis for Company Modified Recipes and are included in the CC Entity (CCLLC) Pre-Existing Recipes. The OA states, at its Exhibit E, that CC Entity did not retain any recipes. The Company IP includes the menus and Company Recipes. The latter is defined as all modified (pre-existing) CC Existing Recipes. Since no "unmodified" Recipes are listed on Ex. E to the OA, CC and CCLLC agreed that all pre-existing recipes were contributed and became Company IP.

The Bleecker Street restaurant opened on July 28, 2015, to great reviews and large crowds and was deemed a success. As a result, Haber asked Managers CC and Samantha if they wanted to grow By Chloe quickly or slowly. The Managers told him that they wanted to grow the chain quickly. He had the view that the only way for the venture to be profitable was for there to be multiple units. Rolling out a series of restaurants, therefore, was the way for CCSW to be a profitable venture. From the outset it was recognized by all that third-party investors would be needed for this to happen. As noted above, neither Member was obligated to contribute additional capital, but could. Respondents, therefore, agreed to the expansion and understood that there was a financial commitment by E2 involved in achieving such, unless and until outside money was found.

After the Managers told Haber that they wanted to proceed to open multiple restaurants as soon as possible, E2 and the Managers began looking for locations and entering into leases. As noted above, E2 was authorized to find locations. CC testified that she was aware of its efforts and that she, personally, also scouted locations. Documentary evidence (including as discussed below) also establishes that Chloe was aware that locations for restaurants, a bakery and a commissary in New York City and around the country were scouted and leases were being negotiated. (Until the parties' rift, however, CC did not object to such.) E2 had to provide landlords "good guy" guarantees on almost every lease entered into, since CCSW was a start-up entity with no credit history. The financial implications of entering into leases was considerable, including the payment of rent, the purchase of kitchen equipment, furnishing the restaurants and the cost of construction and designing each.

Plans went ahead to find new locations and to roll out the Concept in New York City, Los Angeles and the Boston area. Both Samantha and CC testified about these efforts, as did Haber. Large sums were paid by virtue of monies made available by E2, including for public relations, the website, outside vendors, to pay for the deposits and rents involved, the build-outs and design of

the restaurants, buying equipment, and hiring staff, and other items. The following is a timetable regarding the leases and operating agreements[5] for the subsidiaries that relate to locations that are in evidence:

Bleecker St. (11/18/14; modification 10/22/15)	OA- 11/25/15 – CCSW is sole member;	E2 guarantees lease
Lafayette (lease 12/1/15)	OA 11/25/15; CCSW is sole member;	E2 guarantees lease
Rockefeller Center (lease 6/20/16)	OA 5/18/16; CCSW is sole member;	BLT is guarantor
South Street Seaport	OA 4/26/16 (CCSW is sole member),	E2 is guarantor
Boston Seaport (lease 1/25/16)	OA (1/11/16) – CCSW is sole member;	E2 is guarantor
Flatiron (8/13/15 lease)	OA 11/25/15 – CCSW is sole member	E2 is guarantor
Commissary (NJ)(1/29/16 lease)	OA 1/12/16 – CCSW is sole member	E2 is guarantor
Williamsburg (lease 2/23/16)	OA 11/25/15 (CCSW is sole member	E2 is guarantor
Boston (Fenway) (lease 5/4/16)	OA 2/10/16 (CCSW is sole member)	E2 is guarantor
Temporary commissary (lease 8/1/16)		E2 is guarantor
Silver Lake (license 3/1/16)	OA 3/1/16, CCSW is sole member	CCSW is guarantor

After the July 2015 opening of Bleecker Street, E2 began to put together an "Executive Summary" that would be used for fund-raising for outside investors. In the period August-November 2015, various investment scenarios were circulated among the Members, as well as CC's advisors and counsel. These outlines describe E2's financial position as a "Contribution" but also refer to the funding as "advances," and state that the funds received will be used to build out five New York City area restaurants and bakeries, to fund Bleecker's operations and to repay E2 for its "advances" for the 22nd Street location, Bleecker and the bakery leases. C-20. In an email, CC agreed

[5] Haber told CC in August 2015 that his E2 team had "dropped the ball" and had not prepared the subsidiaries' operating agreements for the Bleecker and Flatiron locations. C-12. CC asked to have a signature line for herself added, but that was never done, nor was it necessary as CCSW was the sole member and creating subsidiaries was not a Major Decision requiring her approval.

to include a "commissary." C-19. During the negotiations over the Executive Summary were ongoing, CC demanded an increase in her salary and additional compensation in connection with the bakery. See, e.g., C-25. E2 agreed to pay her additional compensation and fees, but not a "royalty" for the bakery, as she had demanded.

Monthly financial information was prepared by E2's accountants and provided to CC, which showed the sums being paid by E2 or its Affiliate. For example, the November 2015 spreadsheet specifically lists BLT (an E2 Affiliate) as owning equity in E2 185 Bleecker LLC (in the amount of $1,124,072), the Bleecker Street location. C-31. This characterization of an equity investment at the subsidiary level is consistent with the email that Haber had sent to CC earlier. C-10. Haber wrote Chloe, "We have not discussed what E2 should receive in return for it's (sic) funding of the first store. I am willing to do so at the store level. I propose that the funding be done as follows: E2 receives 100% of cash distributions till payback and then E2 and CCSW split all future cash distributions 50/50." By email of May 28, 2015, C-10, CC pointed out that this was the "Approved Financing Arrangement," to which she had already agreed.

These equity holdings by E2 or BLT were also shown for the Flatiron location on the November 2015 financials. This consolidated financial statement for CCSW lists Lafayette Street and the Boston Seaport, but shows "zero" dollars being invested in those subsidiaries as of that date. CC was certainly aware of the efforts to expand and the amount of E2 funds being used for such.

In December 2015, E2 began to prepare a Business Plan that would be used to offer an equity investment at the parent level. This was a change from the parties' prior expectations. Haber testified that investors were interested in investing at the Parent level; the prior equity investment by E2 or BLT at the subsidiary level was problematic as it was inconsistent with the investors' desires. The capital raise would be for a 20% non-voting interest (up to $10 million). The Plan clearly states that the Company was to open four restaurants (three in New York City in

addition to Bleecker St. and one in Boston), plus a commissary and a New York City bakery. It also shows that the funds would be used at the Parent level to fund the expansion and Bleecker. It also states that E2 had invested in the Bleecker St. store, on a subsidiary level, and in a manner consistent with the Approved Financing Arrangements. However, it clearly states that, in addition to this equity investment, E2 had "advanced" funds for the lease deposits, legal fees and other costs, and would "continue funding these locations (Lafayette and Flatiron) and would contribute this (estimated to be up to $2.5 million)." The locations listed in the draft December Plan are: Bakery, Flatiron, Lafayette, Commissary, Williamsburg, Boston Seaport, Fenway, another Boston location, and a Boston Commissary. The text also refers to a location near Barnard. During this period, CC suggested starting a relationship with Whole Foods. Again, CC was aware of the expansion efforts due to E2's monies, and the extent of this funding.

The January 3, 2016 consolidated financials still showed that BLT also had an equity interest in the Flatiron subsidiary. C-54.

The February 2016 draft of the Business Plan also included additional locations (Fenway, Boston Prudential, Rockefeller Center, Barnard, and Boston Commissary). C-68. This version states that the Company has been entirely financed by equity infusions by ESquared and its Affiliates. (The financials for CCSW as of Jan. 31, 2016, circulated on Feb. 15, 2016, continued to show the equity investment at the store level. C-72.) The Plan also indicates that wholesale or contributed food sales are a possibility and that the Company has a bakery in New York City that is expected to be a profitable venture. CC and her team sent comments, but did not object to the projected rollout of stores, nor the characterization of the E2 investment that would be re-characterized contemporaneously with an outside investor in CCSW. C-68, 69.

By February 19, 2016, Haber advised that he was in discussions with a UK investor. CC demanded that the Plan omit the sale of wholesale products. C-77. Haber agreed to omit the wholesale products from the Plan. C-78.

The next version of the Business Plan is dated March 1, 2016, which reflects the omission of the wholesale product line. It reflects "funding" by E2 of $1.65 million, reflected as equity investments at the store level, and that the "interests in these locations will be contributed to the Company as part of the offering" C-79-80 and certain advances would be repaid from the invested funds. CC and CCLLC approved the Market Plan. Days later, a press release was approved by CC that specifically makes reference to the opening of the Bakery, Flatiron and Soho locations that spring. C-82.

On March 8, 2016, the investor Sisban (Sisban), sent a proposal for its investment in response to the March Business Plan. This was forwarded to CC and her team of lawyers. C-85. Their response was that the CCSW team should discuss the proposed investment parameters. C-86 That same day, CC announced that she had retained a personal publicist. The CCSW publicist, Rachel Wormser (who worked for E2), advised that she was concerned about possible confusion between CC pitching her "personal brand" and pitches of the "By Chloe" brand and restaurants, especially with the planned opening of the Whole Foods branch in Los Angeles now set for May. C-87.

It took several days for the CCSW group to speak about the details of the Sisban proposal. Haber sent a response to Sisban on March 14th. On March 16th, CCSW financials were distributed to Chloe, including revisions of the previously circulated financials. Some of the investment made by E2 or its affiliate, that had been shown as an equity investment on the store-level, were re-characterized mostly as debt CCSW borrowed from E2 or its affiliate. There were no loan documents at this time. The re-characterization is consistent with the March Plan that Chloe approved, however, that is, that E2's "advances" would be treated including as a loan to be repaid by Sisban's funding. As discussed below, Chloe questioned the re-characterization of equity to debt; her business advisor and former counsel, Josh Saviano, spoke to Haber about this. No emails are in the record that contemporaneously objected to this.

On March 20, 2016 Sisban sent a revised proposal, responding to the points raised by CCSW. The next day Haber sent comments back to Sisban. On March 27th Sisban sent a counter-proposal, which Haber reported to CC's team was "this is as good as I am going to get in terms with Sisban ...." C-98. He further cautioned, "we are at a critical stage in terms of monies needed to fund our planned operations." Thus, E2 began to raise the issue of the Company's need for funds. Haber and CC's team of advisors communicated about the details of the Sisban proposal on March 27th. CC and her advisors did not dispute that the Company was in need of funds. Sisban was proposing to commit millions of dollars to fund the United States expansion, including funds to repay E2's advances made to CCSW, and was seeking a commitment from CCSW to franchise the stores internationally. C-99. It is this latter point that appeared to be a stumbling block for CC.

In connection with the proposed Sisban transaction, by April 3, 2016, a revised OA was prepared by Bradley Muro (Muro), counsel to CCSW, and was circulated in an email he authored that outlined both the changes that "would align CC's interests with the Company's" ("such as reducing the ability of the Company" to terminate its relationship with CC) and listing the proposed changes to the various agreements. On April 8th Haber spoke to Saviano, who was now CC's "business advisor" and not serving as her counsel. Haber reported in an email to CC that this was a "disturbing conversation." C-107. Haber asked to meet alone with CC, explaining that they needed to discuss "the future of the business because the business is out of money with substantial amounts due immediately and many negotiations in play that needed immediate decisions." Id. CC responded that she thought the conversation with Saviano had been "productive.". Haber told her that her "optimism...was misplaced" and that they needed to meet "to resolve our issues or to decide to go our separate ways." C-107. A day earlier, on April 9, Josh Saviano had sent back a list of issues. C-106. Haber tried to set up a meeting for April 11th to discuss their differences and the Sisban deal, but was told that CC had a competing appointment, and could not attend. This angered

Haber, as he felt CC should make this partner meeting a priority. CC was unavailable as she had a personal publicity engagement.

During this period, Haber came to the view that CC was using the Sisban negotiations (including the negotiation of the terms of the revised OA (which was necessary for admission of Sisban as a non-voting member)) for her personal betterment, thereby putting her personal needs (such as reducing the ability to be fired, but increasing her ability to leave CCSW of her own accord while keep her equity, to increase her veto power (*i.e.*, making more items a "Major Decision" requiring her approval), and to have a faster vesting schedule) ahead of the Company's needs for an inflow of cash to support the ongoing expansion and its attendant cost. E2's proposed changes to the OA already included some of the modifications that CC had sought, but not all. Haber cautioned that "I hope Chloe is prepared to deal with life after By Chloe because that is exactly where we are at", referring to her demands as "extortion." CC responded that the proposed revisions were "very substantial," including a reduction in her ability to veto (because it changed the definition of the term "Major Decisions"). C-109.

On the phone and in emails Haber and Muro had explained that the search for investors had caused the re-characterization of the equity to debt in the March financials. *See, e.g.*, C-109. Haber testified that the search for investors at the individual restaurant level had proven to be unsuccessful, as investors wanted to have equity at the parent level. Having E2 invest as an equity holder at the restaurant level inhibited interest by investors since such an investment would cause available cash to be paid back to E2 and dilute the returns available to the parent's investor. Haber testified that these sums were re-characterized (by E2 since it was responsible for accounting) as debt at the parent level that was advanced by E2, pursuant to the provision of § 6.2(c), which permitted the Company to take a loan from a Member on the parent-level, and to do so without the consent of CC, as long as the loan was market-rate, arm's length and on commercially reasonable terms. Respondents dispute the propriety of the re-characterization and contend it is one-sided.

In order for the Sisban deal to move ahead, CCLLC and E2 would have to enter into an amended operating agreement, which would deal with governance and the additional membership interest of Sisban, as the original OA did not address such, and had to address the non-voting shares being bought by Sisban. CC's approval was necessary to add members and amend the OA. Haber testified that he thought the best plan was for E2 and CC to agree on the terms of the amended OA first, so that one proposed amended OA - agreeable to the existing members - would be sent to Sisban. This way the existing partners would present a united front to Sisban. He was concerned that if E2 and CCLLC could not agree on terms of the OA being presented to Sisban, the investor would become reticent to join the venture and see a rift between the partners. CC, on the other hand, testified that she wanted to meet Sisban and to have all the parties negotiate terms collectively. Haber took this as Chloe wanting a third-party investor to align with her against E2.

CC herself had expressed concerns about the existing agreement. The original OA had a vesting schedule that rewarded CC with equity after an initial period of 7 years and with incremental vesting thereafter. Haber testified that this was to ensure that CC remained at the Company while in its infancy and was developing. Since the Concept had been "By Chloe", E2 wanted CC to remain at the Company and the longer vesting schedule was designed to have this effect and incentivize Chloe to stay. In connection with the negotiations over the amendments to the OA, CC sought (a) a shorter vesting period; (b) greater ability to leave the Company (*i.e.*, changed the definition of "Good Reason" to terminate membership of CCLLC);[6] (c) to ensure that she had rights vis-à-vis vegan cuisine outside of the Company (by expanding what is a Permitted Activity); (d) an expanded definition of Major Decisions (so that her consent was required for more items).

[6] The Service Member (CCLLC) could terminate membership in CCSW for "Good Reason," and thereby have a faster vesting scheduling, which would trigger a buy-out.

Haber grew concerned. CC had already sought and obtained an increase in her salary from $50,000 to $100,000 and had demanded a fee in connection with the bakery that had been built next door to the Bleecker location, which Haber had agreed would be paid. CC also demanded that the Company pay her attorney's fees incurred in reviewing drafts of the amended OA, to which E2 eventually acceded (although the parties do not agree as to its scope).

In addition, around the time of the negotiations with Sisban, CC's conduct, as a Manager and on behalf of the Service Member, had also become a concern for Haber. To Haber (and E2), her conduct showed that she cared more about herself (such as hiring a personal publicist to promote herself) than she did about CCSW and was willing to lose Sisban and its millions of dollars of investment in order to advance her changes to the OA.

Testimony was presented at the hearing by Claimant that the Chef Chloe website had copied portions of the By Chloe website (so that they were confusingly similar) and that Chloe had usurped PR opportunities that were meant for CCSW, taking them for herself (including by not paying the Company certain fees that she would receive for such for a SmartWater promotion). CC also accepted a promotional opportunity for Belvedere Vodka, which could put the Company's liquor licenses in jeopardy. Haber found this behavior to be problematic as he thought she was not acting "like a partner" and was using the success of By Chloe to promote herself. The fact that E2 had been spending millions of dollars on the enterprise (and CC had paid nothing to be a partner in this venture) was surely a contributing factor to his view. (CC disputes that she misappropriated Company IP, or that the website was copied, or that she usurped corporate publicity opportunities.)

Matters were coming to a head in the spring of 2016. CCSW had entered into an agreement with Whole Foods by which a By Chloe location would be put into a Whole Foods location in the Los Angeles area. In May, CC traveled to Los Angeles to be there for the opening of the restaurant and was also to assist in the preparation of the location for the opening. At the same time – they day before the opening – however, she booked a shoot for SmartWater, missing valuable hours at Whole

Foods, and not being candid about it with CCLLC. Co-Manager Samantha testified that Chloe also sat in the parking lot on her computer rather than helping with the activities involved the day before the opening of the Whole Foods location. CC disputed this and introduced photographs taken of herself at the opening. Exhibits show that the terms of the SmartWater opportunity were negotiated so that CC would paid through CCLLC (although the record is not clear as to whether she or it was ever paid), rather than to CCSW. E2's position is that CCSW was to be paid since the spot involved shoots at Bleecker Street, preparation of a menu item that was used in the Business, and featured the By Chloe brand. In other words, it used Company IP and could therefore not be a personal opportunity for Chloe and was outside the definition of a "Permitted Activity." CC's position is that the PR opportunity came from her personal contacts and so it was properly hers.

By the end of February 2016, the CCSW financials showed that E2 had contributed $2,127,515 as additional equity. C-53. By April 2016, the E2 contribution, now near $3.5 million, were reclassified as loans at Haber's direction (T295-300) and the March 2016 financials (circulated on April 13, 2016) reflect this. C-114. Upon receipt of the March financials Chloe asked by email about the re-characterization and she was told to speak to Haber. Haber and her advisor, Saviano, spoke. C-115. There are no contemporaneous exhibits in evidence protesting the re-characterization or describing this conversation.

On April 18-19, 2016, when CC and her team were asked for their comments on the revised, proposed OA, the response was that CC wanted her legal fees to be paid for such review. It appears that she was holding up commenting until E2 or CCSW agreed to pay for these legal fees. Haber asked CC to respond substantively as the Sisban deal was important and he wanted to progress in negotiating the deal. C-117, 119, 121. They tried to schedule a meeting to discuss. Haber sent the Sisban term sheet to CC's counsel and asked for a copy of a signed non-disclosure agreement executed by her team. None was returned.

On Thursday, April 21, 2016, CC's counsel, Andrew Peskoe, was advised by email from Brad Muro, that Chloe and Saviano had been advised of an interest-only loan from E2 to CCSW previously, and Sisban had not objected to it. C-123. This email is significant, as it appears to reference the call between Haber and Saviano held after Chloe received the March financials the week earlier. Thus, she was aware of the loans and the treatment of the advances that had been made by E2. No emails were introduced that objected to this. Tellingly, Saviano was not asked about this conversation when he testified at the arbitration.

At approximately 6:30 p.m. on April 22, 2016, Chloe's counsel, Aditi Schretzman (Schretzman), sent a list of 34 demands for changes to the draft revised OA, virtually all relating to CC's individual interests. (The email did not "mark-up" the previously circulated draft OA.) The demands included an increase in Chloe's salary to $175,000 and would permit her to spend less time at By Chloe, and allow CCLLC to have outside investors. The email did not address E2's loan. C-124.

In response to Schretzman's email, Haber cautioned that E2 had advanced nearly $3.6 million and would seek to document the loan, because CC had waited nine days to respond to the Sisban outline. C-125. On April 22, 2016, Haber advised Managers CC and Wasser that loan documents were being prepared for execution by Wasser on behalf of CCSW on Monday, April 25, 2016. C-125; R-116. No exhibits are in the record from CC protesting the loan at this time nor did she send an immediate response. CC testified that she immediately spoke with her counsel and Saviano, but none of them wrote or spoke to Haber. Chloe testified that she did not call Samantha and ask her to delay signing or to even ask questions of Haber or Samantha. Chloe did not go to the office on Monday, April 25. She did not ask to see the loan documentation or ask about the terms. Haber sent CC a budget on April 25, 2016 outlining the costs of the expansion. She waited until April 26, 2016 (near midnight) – after the loan documents were signed – to write Haber. (T3482-

85; 3802-24). Her email did not specifically object to E2 lending money. C-130. Thus, CC had notice of the transaction in advance and did not object.

On April 25, 2016, Samantha, as manager of CCSW, executed the demand note and the security agreements and pledge agreement. Copies of these documents were not provided to CC for a few weeks, and, when they were, they were put in "drop box," where they could not be printed, and she was not given permission to provide them to her advisor or counsel. The parties still had not come to agreement on the revised OA, or the investment by Sisban.

Unbeknownst to E2, at the same time that negotiations were ongoing with the investor Sisban, CC and her advisor Saviano were conferring with Anand Kishore (Kishore), who represented the interests of various international family offices that would be interested in making an investment in the Company. Eventually Haber was told of Kishore by CC's team. Kishore had previously spoken with Haber (who testified that Kishore had abandoned the discussions of investing in CCSW).

The emails among Saviano, CC, and Kishore, however, appear to be more directed at Kishore's group making an investment in CCLLC – not CCSW – so that CC would have the financial backing to counter E2. These emails easily can be read as giving CC the funds that so that she could play "hard-ball" with Haber, refuse E2's proposed terms (or those of Sisban), derail the Sisban deal, and cause Haber and E2 to want to be bought out of E2's investment in CCSW. The Kishore deal would provide funds to CC so that she could buy out E2. Indeed, Kishore and Saviano expressed in emails that, with this backing, Chloe could "wrest control" of CCSW from Haber and cause a buy-out of E2.

In Haber's view, the Sisban deal would have provided the necessary capital to grow CCSW the way Chloe and Samantha had directed in 2015, and would pay back the advances made by E2, all to the betterment of CCSW (as the debt would be made by Sisban). Haber testified that his view was that CC was motivated to delay the adoption of necessary changes to the OA so that Sisban

would walk away and put E2 and CCSW in a financial bind, as millions of dollars had been invested. This would give Chloe leverage to change the OA so that she had better terms. (Until discovery, E2 was unaware of the Kishore involvement.)

Although CC denied that this was her goal or her plan with Kishore, she did not testify about what the discussions with Kishore were, or why Kishore and Saviano were discussing "wresting control" of CCSW away from Haber and E2. In addition, although Respondents subpoenaed Josh Saviano to testify, they did not ask him any questions about the business dealings with Kishore, these emails, the goal of the discussions with Kishore, or even if Kishore was asked to invest in or bankroll CCLLC. These discussions are not privileged. Although the discussions between Saviano and Haber also were not privileged, Saviano also was not asked what he discussed with Haber in conversations they had in March-May 2016. Kishore also did not testify. CC and CCLLC did not produce all of their emails with Kishore. (Claimant also has questioned whether Saviano made a full production.) I find that had Saviano been asked about these matters, his testimony would not have assisted Respondents.

In late May, when loan documents were put in Dropbox, CC's counsel was asked about the nondisclosure agreement and to confirm that CCSW's confidential information had not been disclosed. C-146. E2 requested a meeting of the partners. E2 asked about the involvement of Kishore, but no response was given. Shortly thereafter another draft of the revised OA was circulated. C-148. In response, CC asked for her legal fees to review be paid. C-149.; E2 responded to the proposed changes. C-150.

On June 1, 2016, a letter was sent from E2 to CCSW demanding payment of the demand note in 10 days. C-152. CCLLC went to court to obtain an injunction against E2 foreclosing and sought other relief, but did not seek to address the demand informally, including by seeking to extend the date of collection or otherwise negotiating terms (such as marking it a term note). The order to show cause entered by the court contains a temporary restraining order. The court complaint

makes serious allegations against E2, accusing it of, *inter alia,* acting in breach of the OA and its fiduciary duties, and asserting that the demand of payment would injure CCSW severely, and made strong allegations as to the impropriety of Haber's conduct. The *New York Post* picked up the story, making mention of the partnership dispute on its "Page Six."

This article, and the court papers, had a deleterious effect on the business of CCSW. One immediate result was that Barnard College began to have concerns about entering into a lease with CCSW for a restaurant at the Barnard campus, which lease was being awarded to CCSW. This reluctance was due to allegations in Chloe's complaint about the rift between the partners and overreach of Haber and E2, and assertion that the note threatened the financial stability of the Company. Haber spoke to Barnard to reassure it. Barnard representatives asked to speak to CC. Haber asked that Chloe speak with the Barnard persons involved in the negotiations in an effort to reassure Barnard so that the lease would be signed. A phone call was held on or about June 15th, during which CC and her counsel spoke to Barnard personnel. Thereafter, Barnard announced in an email, that it would not sign the lease. A prime location for a restaurant was lost. Neither a Barnard representative nor counsel to CC were called to testify. CC could not recall the content of the remarks made during the call, but testified that she spoke very little on the call and that her counsel had directed Barnard to a link to the on-line court complaint.

The court litigation was stayed and this arbitration was commenced by E2.

The Claims of Claimant

In addition to filing a simple demand indicating that E2 was seeking to arbitrate a "dispute between the two members of CCSW, LLC over the financing of the business, and for breach of the Operating Agreement and breach of fiduciary duty," the parties filed (literally) hundreds of pages constituting their claims and counterclaims and responses thereto.

The list of claims in the Claimant's "Statement of Claim" are:

1. a declaration that the Secured Financing Documents are binding and in full force and effect, or in the alternative are a capital contribution by E2 into CCSW, and are additional equity;
2. a declaration that CCSW may fund restaurants through capital contributions; or that the monies provided to CCSW by E2 were capital contributions into CCSW and/or that E2 may increase its percentage interest by virtue of these monies, pursuant to a valuation contained in the Business Plan; or if the funds provided by E2 are deemed to be Approved Financing Arrangements, then they are to be paid back from the collective monies available from all the stores;
3. breaches of fiduciary duties by CC and CCLLC;
4. breaches of the OA by CC and CCLLC;
5. tortious interference with the Barnard Lease by CC and CCLLC; and
6. breach of the Personal Services Agreement by CC and CCLLC.

Claimant also seeks to recover its costs and disbursements, including attorney's fees and costs of the arbitration, and further relief as the Arbitrator deems just and proper. Annexed to the Claimant's 20-page Statement of Claim, is the court-filed 103-page Answer and Counterclaims filed by E2, which also describe in detail E2's allegations of misconduct that it contends constitute breaches of contract and fiduciary duty. Respondents asserted numerous counterclaims against E2, Haber and Samantha.

The arbitration hearing took place on 12 days, consumed some 4,000 pages of transcript and over 600 hearing exhibits were admitted into evidence. Seven witnesses testified. At the conclusion of the evidentiary hearing, the parties agreed to include in their post-hearing submissions a specific listing of what claims they were submitting to arbitration and what relief they were seeking on each.

Claimant's post-hearing brief submits the following for rulings:

1. That the Arbitrator declare that CCLLC's membership interest in CCSW can be terminated for "cause";
2. That the Arbitrator declare that the "Secured Financing Documents" are valid and enforceable;
3. That CCSW can use its own capital to open By Chloe restaurants or alternatively, that the Arbitrator declare that E2's funding be deemed to be either capital contributions or to constitute "Approved Financing"; and
4. CCLLC and CC have breached their respective fiduciary duties owed under the OA.
5. damages be awarded for tortious interference with the Barnard lease and certain CCSW contracts, and for breaches of fiduciary duty;
6. An injunction be issued that prohibits CCLLC and CC from interfering with CCSW's relationship with CCSW's PR firm (Sunshine Sachs); misappropriating CCSW's intellectual property; and interfering and misappropriating CCSW's PR opportunities and
7. That the payment of arbitrator compensation and costs be the subject of reallocation and that Claimant's attorney's fees be reallocated.

In addition, the Claimant asks that its prior motion for sanctions, relating to the production of emails that concern communications with potential investors and Chloe's business advisor, Saviano, be granted.

Almost all of the claims for relief were listed in the Statement of Claim (although in a different order). In Respondents' response to the post-hearing brief of Claimant, an objection is raised as to the determination of the claims in arbitration, as listed and described therein (and above), contending that the Claimant did not seek leave of the Arbitrator to determine the claims as "revised" and that certain of the claims are not before the Arbitrator because they were not

included in the initial Statement of Claim, and the Statement of Claim are the only claims that can be ruled on.

In its post-hearing brief, Claimant seeks a ruling terminating the membership interest of CCLLC, the "Service Member" pursuant to Article XIX "for Cause." It is true that there is no claim relating to termination of the service member is contained in the Statement of Claim. However, Respondents raised this issue in their counterclaims, seeking a declaration that CCLLC could terminate "for Good Reason." The hearing proceeded on this basis. Both sides presented evidence regarding the Termination issue. Accordingly, the Arbitrator finds that this issue was submitted to me to decide by <u>both</u> parties and Respondents voluntarily arbitrated this claim.

Counterclaims

CCLLC and CC interposed counterclaims. By Order No. 11, such claims have been severed and suspended on the terms contained therein. Accordingly, these claims are not addressed in this Final Award.

Analysis

In New York, a limited liability company (LLC) is governed by the terms of its operating agreement and, where the parties' operating agreement does not address certain matters, the default provisions of the New York Limited Liability Law (LLCL) apply. *In re 1545 Ocean Ave.*, 72 A.D.3d 121, 128-29 (2d Dep't 2010). As a general rule, operating agreements (and similarly, shareholder agreements) are enforceable according to their terms and applying such terms helps to prevent litigation and promote reliability and definiteness in the relationships of the members. *See In re Penepent Corp.*, 96 N.Y.2d 186, 192 (2001).

The OA herein provides that it is a manager-managed LLC and the members have no role in management of the Company. The Managers, Wasser and Chloe, owe fiduciary duties to CCSW and its Members. Here, CCLLC agreed to give great power to E2's appointed manager, Samantha Wasser (and any successor); unless a matter is a defined as a "Major Decision," Wasser can decide the issue.

First Claim

The first claim seeks a declaration that the Secured Promissory Note, Pledge and two Security Agreements (collectively, the "Loan Documents") are enforceable. E2 could lend money to CCSW under § 6.2(c) if the Company needed funds. The Company, under § 4.3, was tasked with exploiting the Concept, and "Concept" is defined as fast casual vegan restaurants (lower case "r"). Thus, CCLLC authorized the making of a loan to the Company in the OA entering into a "loan" is not a Major Decision under § 7.4(g).

I find that §§ 6.2(b) and (c), and 7.4 must be read together and with § 4.1. Since the Business of the Company is to "own," "manage," "license" or "franchise" restaurants using the Concept, financing of the ownership, management, licensing or franchising of restaurants are Major Decisions to which the Approved Financing Arrangements applies. Entering into loans or debt for anything else, such as Company overhead,[7] salaries, buying equipment, lease payments, construction costs, or marketing, or for costs associated with a commissary or bakery may be entered into without CC's approval under section 6.2(c). Similarly, such can be accomplished through a capital contribution by E2 at the parent level.[8]

Further, § 7.1(c)(ii) allows the Managers to expend funds in furtherance of the Company's Business and to pay debts and expenses to the extent the Company has funds available and § 6.2(c) allows Member loans to the Company, if it is in need of funds. The latter is not limited to "Restaurants" (capital "R"). I find that the Loan Documents are not for "owning," "licensing,"

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[7] However, E2 must provide certain services to CCSW and I find that such services cannot be paid for by a loan, as E2 agreed to be paid 2% of the gross sales in return for providing such services. § 19.8. Section 19.8 permits E2 to determine whether these functions can be done by CCSW "in-house" and no "Back Office Fee" would then be paid. (E2 alone can make this determination, however, because it is not a Major Decision.) If E2 makes such determination, then it could advance payments for such costs by way of a loan to CCSW, as long as such loan is on commercially reasonable terms and the transaction is "arm's length." § 6.2(c).

[8] The OA for each subsidiary shows CCSW as the sole member. CC was aware of this. (Her only objection is that she wanted to sign the OA – not that it misstated the ownership of the subsidiary.) For this reason, too, I find E2 was advancing (*i.e.*, lending) money to the Company (and not the subsidiaries) as CCSW was the tenant on each lease.

"managing" or "franchising" and, therefore, the Loan is outside the defined term "Restaurants." The record (C-233) reflects that the Loan Documents relate to expenditures for renting space, building-out the stores (contractors, design, furnishing), buying furniture, dining and kitchen equipment, matters concerning the bakery and commissaries, salaries for front-and back-of house employees, corporate chefs, CC's interns, and professional services (such as attorneys).

The promissory note and security and pledge agreements are enforceable for the following reasons:

1. § 7.4 does not require CC's approval for a note, entering into a lease, or making expenditures.

2. To the extent consultation was required, the April 19 and 22, 2016 emails sent before execution constitutes adequate consultation. Moreover, existence of a loan was discussed with Saviano and CC previously on or after April 13. CC also sent no objection. CC had the opportunity before the execution of the Loan Documents to object, ask to review the documents, speak to Samantha or Haber, and to come to the office to address them, but did not.

3. The terms of the note, security and pledge agreements are commercially reasonable and consistent with § 6.2(c).

4. § 6.2(c) loans do not require CC's approval.

5. The Company was in need of funds. CC was told this more than a month earlier by Haber. She was aware that E2 had made advances to the Company in the millions of dollars. She continually was aware from inception that E2 would be the "money partner" and she, as a 50% owner, received a benefit from its financial backing – especially since she did not have to contribute any money to the venture. She also was aware from December to March in the different versions of business plans, that, with the admission of a new investor, the equity would be re-characterized as debt. It also stated that advances, as loans, would be paid back from proceeds. She did not object to

such in the Business Plan or in the negotiations with Sisban, its term sheet, or in response to the April emails outlining the transaction.

6. Samantha, as a Manager, was empowered under §§ 7.1(c)(ii), (viii), and (xi) to expend the Company's revenue and capital and to pay the Company's debts, and to negotiate and execute loan documents. CC's consent was not required. This was not reserved as a Major Decision.

7. CCLLC and CC pre-approved, in the OA, at § 6.2(c), for the Company to borrow money from a Member. The Arbitrator finds that the terms of the Loan Documents are commercially reasonable and such complies with New York Limited Liability Company Law, including because there was a disclosure of the interested-party transaction and the terms are fair and reasonable to CCSW, and the OA permitted such transactions if arm's length and commercially reasonable.

8. The Loan Documents are commercially reasonable, and Respondents did not establish otherwise. Further, Respondents' argument regarding the impropriety of having a lien on "all assets" is rejected. First, §6.2(c) pre-approved a lien on "Company property" and, second, its arguments are not supported by Article 9 of the Uniform Commercial Code which governs the transaction and documentation. I direct that E2 must follow same, including regarding notice, sale and application of proceeds.

9. Samantha could execute the Loan Documents under §7.1(c)(xii); in §6.2(c) CCLLC agreed that loans from a Member could be approved by Samantha, recognizing it was not a Major Decision. The interest of E2 in the Loan Documents was disclosed and pre-approved by CCLLC in §6.2(c), and was authority ceded to Wasser under § 6.2(c) and § 7.1(c)(ii) and (xiii). "Member Loans" were pre-approved in the OA. The Managers were required to protect Members' assets, § 7.1(c)(xi), which the Loan Documents accomplish, because E2 (and Affiliates) issued guarantees in favor of CCSW's obligations.

Respondents contend that the loan should not be permitted because some of the funds involved were re-characterized from equity (at the subsidiary level) to debt, and the Bleecker Street investment was initially described by Haber in terms consistent with the Approved Financing Arrangement definition. Given the timing of the change from equity to debt (March – April) when the Business Plan was finalized and circulated to outside investors by CCSW, with CC and CCLLC's approval – and without objection – it is consistent with the parties' joint expression that the investments and advances would be re-characterized. As noted above, the loan re-characterization was discussed with Saviano in April, and emails to Respondents confirmed that Sisban had approved of the loan transaction, which would be repaid (at least in part) by its investment (with the balance converted to additional equity in the Parent). Thus, the timing of the recharacterization was in the time period of the Sisban discussions in April, when the recharacterization was made. Further, given that Josh Saviano was not questioned about the conversations he had with Haber after the re-characterization and about the loans and the Sisban deal (when the emails state they would discuss same), I find that it likely Saviano's testimony would not have bene consistent with Respondents' position.[9]

Second Claim

Claimant seeks alternative declarations regarding E2's funds. Section 6.2 permits members to make capital contributions, but does not require such. CCLLC's permission for additional capital contributions to be made by E2 is not required. The Arbitrator finds, therefore, that E2 may make additional contributions, at the CCSW level.

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[9] To the extent Respondents contend that a state liquor license application that pre-dates the re-characterization is a judicial admission, such position is rejected. As noted above, its date makes it not an admission, as that page from 2015 pre-dates the re-characterization. I decline, in my discretion, to find Claimant should be sanctioned if a single piece of paper was omitted from a production and Respondents have not shown prejudice

<u>**Third and Fourth Claims**</u>

In its post-hearing brief, Claimant explains that it is seeking a ruling that Member Chef Chloe LLC and Manager CC breached both their common law fiduciary duties owed to CCSW and Member ESquared, and that said breaches also constitute breaches of the OA. The brief (at p. 45) contends that CCLLC's refusal to agree to an amended OA was a "selfish demand" and the "conspiracy with potential investor Kishore to wrest control of CCSW from Haber" constitutes breaches. CCSW is a manager-managed LLC. The Members are not permitted to have any role in managing the LLC. § 7.1. CC was designated a Manager by CCLLC. Members do not owe each other fiduciary duties in negotiating terms of their Agreements with each other. (CC is not a party to the OA (although a signatory).) Rather, in forming the entity, entering into the OA and negotiating an amendment to the OA, each Member is acting in its own self-interest. If their negotiations fail, then they are left to their own original agreement and to rights thereunder and statute. Failing to agree on terms of a negotiated amendment to the OA is not a breach of a fiduciary duty owed by one member to the other member. Indeed, here, the amendment of the OA was designated a Major Decision *requiring* the approval of CCLLC. If the members cannot agree, then they are left to other remedies, or remain in the Company without an amended OA. *In re 1545 Ocean Ave.*, 72 A.D.3d 121, 128-29 (2d Dep't 2010). (In member-managed LLCs the managing member owes fiduciary duties to the non-managing members. *Salm v. Feldstein*, 20 A.D.3d 469 (2d Dep't 2005).)

However, as a <u>Manager</u> of CCSW, CC owes fiduciary duties to E2 and CCSW. These duties are to act with due care and in good faith. Section 7.7 of the OA sets forth her duties of acting in "good faith" and "with that degree of care that an ordinarily prudent person in like position would use under similar circumstances."

One question is did she breach her fiduciary duties when she was negotiating the terms of the amended OA to advance her own interests, rather than working to compromise on the negotiation points so as to secure the Sisban investment so as to advance CCSW's interest?

Claimant also contends that CC and CCLLC breached their duties and breached the OA by their conduct, including:

1. interfering with CCSW's contracts with four vegan chefs;
2. misappropriating the "SmartWater opportunity" and not paying CCSW the $15,000 fee (or failing to collect that fee);
3. interfering with the Barnard lease;
4. breaching the confidentiality obligations by providing Josh Saviano, her business advisor, with CCSW financial information which was provided to Antara Capital and Vanterra Capital without a non-disclosure agreement in place;
5. "conspiring" with Antara to wrest control of CCSW;
6. misappropriating CCSW IP by using material from the By Chloe website on her own personal website;
7. misappropriating SmartWater PR opportunity for herself, and interfering with Sunshine Sachs (the outside publicist); and
8. failing to perform duties under the OA.

Taking these serially, the Arbitrator finds that CC and CCLLC breached certain duties owed to CCSW and that CC and CCLLC have breached the Agreement only in certain respects, but that Claimant failed to establish that such breaches caused any damage to CCSW.

1. <u>Breach of Fiduciary Duties</u>

<u>Vegan Chefs</u>

In 2016, CCSW retained four vegan chefs and entered into contracts with them. After learning of this, CC sent emails to them. The emails to and from the chefs and the testimony of CC at the hearing establish that CC's communications were designed to cause the chefs to question having any relationship with CCSW. The effect of her emails was that two of the four chefs cancelled the contracts that had been entered into. CC put her personal interests ahead of those of CCSW in these

communications. Her conduct harmed CCSW, as it lost two chefs after expending time and effort in retaining them. This was a breach of CC's duty of care and to act in good faith.

__"Smart Water Opportunity"__

CC agreed in the OA to be the person who performed the Service Member's duties. CC's outside business conduct, as a Manager, was also limited. OA § 7.10. She was required to provide certain promotional services, § 19.2(a)(i), as limited by § 19.2(a)(iii)("Permitted Activities"). Her testimony at the hearing and the emails establish, however, that the SmartWater promotion she arranged was in derogation of her fiduciary duties and a violation of the OA, including by not pursuing the compensation that she was to receive for her participation and/or not paying such compensation to CCSW.

At the time the Whole Foods location was opening, and she was flown to Los Angeles by the Company to participate in assisting therewith, CC did not give her full efforts in the preparations for the opening, and, instead, pursued the SmartWater promotion during the time she, as a Manager, should have been performing duties associated with the opening. This interfered with her performance under the OA, including her duties on behalf of the Service Member. Thus, it was not a "Permitted Activity." Further, she kept CCSW, Wasser, Wormser and others in the dark (or was not completely candid) about this venture. Further, that the venture involved By Chloe is clear from the fact that, among other things, SmartWater wanted to use video taken in the Bleecker Street By Chloe location and to use a menu item. Therefore, it was not a Permitted Activity. The testimony at the hearing established that CC's failure to fully cooperate fully and to participate fully in the preparation for the opening of the Whole Foods location was detrimental.

The $15,000 fee she earned is due and payable to CCSW.

Barnard Lease

The lease for a location at Barnard was negotiated over several months after By Chloe was awarded it after competing for it against dozens of competitors. The timing of entering into the lease could not have been worse for CCSW, however, as the lease signing was to take place at virtually the same time that CC and CCLLC filed suit in court against E2, which lawsuit was reported in the *New York Post*. As a result of the report of the accusations of the lawsuit, which stated that the calling of the demand note was a breach of the Member's duty, and, if collected, would ruin CCSW (among other allegations), caused Barnard to be reluctant to enter into the lease with CCSW. Barnard personnel contacted Haber, who testified that he tried to reassure them. Barnard asked to speak to CC. CC was asked to speak to Barnard. A few days later, CC and her counsel spoke to Barnard. CC testified that she said little during the call but that her counsel spoke about the suit and her testimony about the conversation appeared to be less than forthcoming. (Her counsel did not testify. Respondents did not call Barnard officials, either.) After the telephone call, Barnard refused to sign the lease and the location was lost, after much effort had been put into obtaining this space.

I find that this conduct was a violation of CC's duties owed to CCSW of acting in good faith and with due care, as it was important to CCSW to finalize the Barnard lease and open this location. Instead, the lease was lost and there was no gain from the efforts that had been previously expended. CC acted in her own self-interest as she did not reassure Barnard that CCSW would be an appropriate tenant and that Barnard could have confidence in it.

Confidential Information

The record reflects that, without obtaining any non-disclosure agreements in favor of CCSW, financial information about CCSW and its activities in pursuing investors was shared with outsiders, including Josh Saviano, Antara Capital and Vanterra Capital. This also is a violation of the

duties owed to CCSW, as CCLLC and CC were provided with information solely in their capacities as a member or manager of CCSW and could not use that information for other purposes.

CCSW and E2 also forwarded financial information about CCSW to Saviano, without obtaining a confidentiality or non-disclosure agreement (NDA) from him. But, E2 and Haber discussed and sent confidential information to Saviano without an NDA, too. Therefore, circulation of information to Saviano by CC (or her counsel) is not a breach of the OA or a violation of the fiduciary duties owed to CCSW.

However, the circulation of and discussion with Kishore by CC or Saviano (on her behalf) about the CCSW financial information and Business Plan is troubling, as such was done without obtaining an NDA from the recipients. The Sisban deal also apparently was discussed with Kishore. Kishore and Saviano wrote emails about "wresting control" of CCSW from Haber, thereafter. Given that Saviano was not questioned about these matters when called to the stand by Respondents, I find that Saviano's testimony would not have assisted Respondents' defense.

The Arbitrator finds that Respondents shared CCSW confidential information in derogation of the fiduciary duties owed to the Company by CC and CCLLC.

Conspiring with Antara

As noted above, CC and her advisor Saviano were in discussions with investors, including Kishore (related to Antara), in connection with obtaining an investor in CCLLC. To the extent that CCLLC was seeking an outside investor so as to develop projects or businesses that constitute Permitted Activities, such is not a violation fiduciary duties or the OA. (This is especially the case since Haber did not see Antara as an appropriate investor in CCSW and Antara apparently had lost interest in pursuing such.) However, the emails with Kishore discuss an investment in CCLLC and appear to be a motivator in causing CCSW to be unable to close an investment by Sisban in CCSW, because the latter was being held hostage by CCLLC and CC. As a manager, CC had to put CCSW's interests ahead of her own self-interest and to act in good faith and with due care.

The record shows that Respondents delayed responding to reasonable requests relating to the addition of Sisban, while at the same time knowing that CCSW was in need of funds. Haber contemporaneously warned of such. CC was in control of CCLLC and chose her loyalty to CCLLC and her self-interest (such as demanding a salary increase and further rights) over her duties of due care and to act in good faith owed to CCSW. CC and CCLLC made demands to make changes that were solely to benefit CC (who is not a Member of CCSW). CC used this opportunity to better herself and CCLLC's position, instead of acting in CCSW's interest to obtain funding and finalize the Sisban deal. This was a breach of CC's fiduciary duties as a Manager.

Misappropriating CCSW IP

The record reflects that, after the CCSW website was up and running, the "Chef Chloe" website was found by CCSW's public relations personnel and outside vendors to be too similar to the CCSW website so as to cause confusion because of the way in which its contents portrayed CC and utilized various "Company IP". CC's testimony did not repudiate such. Documentary evidence and Wormser's testimony establishes that changes were requested to be made to the "Chef Chloe" website to avoid confusion, but such requests were not acceded to and CC delayed responding.

Accordingly, the CCLLC ("Chef Chloe") website should be changed to make the corrections requested previously by Rachel Wormser, so as to avoid confusion and to ensure that there is no CCSW "Company IP" used thereon.

Misappropriating PR Opportunities

The record reflects that CC had certain public relations contacts and promotional opportunities from these contacts, including at various television shows, such as the *Today Show.* In the OA, CC and CCLLC agreed that CC would "devote all reasonably necessary time and efforts to the business of the Company" and such would include CC's personal appearances, public appearances, media appearances and other promotional services as reasonably determined by the Managers" (§ 19.2(a)(i)), and that the final decisions for "publicity" rested with E2 (*Id.* (ii)). I find

that CC and CCLLC breached these provisions by Chloe's failure to cooperate fully in the publicity efforts.

The evidence at the hearing established that CC interfered with the efforts of the public relations agency Sunshine Sachs and CC's actions caused Sunshine Sachs to "suspend" its activity on behalf of the CCSW account at an important time in the young company's expansion. This interference includes the conduct of the personal publicist CC hired, Brianne Perea. I find that CC and her publicist did not cooperate with CCSW, Wormser, or Sunshine Sachs.

Accordingly, CC is directed to cease and desist all activities that interfere with public relations efforts for CCSW and By Chloe, and is directed to follow the decisions reached by CCSW, ESquared (or Wormser) and/or Sunshine Sachs for CC's personal appearances at Restaurants, public appearances, media appearances and other promotional services and that CC's activities must otherwise be consistent with Article 19 of the OA.

2. <u>Failing to perform duties under the OA</u>

This claim alleges that CCLLC breached the OA (Statement of Claim at paragraph 59) by:

- not considering the Sisban investment unless the OA was amended to suit it
- putting its economic interests ahead of CCSW's
- violating confidentiality obligations
- usurping the SmartWater opportunity
- using Company IP without permission
- losing the Barnard lease
- entering into the Belvedere Vodka agreement[10]
- refusing to perform obligations under the Service Member Article 19.

[10] This relates to the endorsement of Belvedere Vodka by CC. The record reflects that such endorsement put the liquor license in jeopardy. CC is a Manager of CCSW and her endorsement of the vodka brand is a violation of her duty of due care. CC should have consulted with CCSW to ensure that the endorsement was consistent with the requirements of the license.

Most of these allegations have been discussed above. That CCLLC (as a Member) had a different view of the Sisban opportunity is not a breach of the OA. Indeed, CCLLC's vote was required to amend the OA. Without its consent, the investor would not become a member. Without its consent the OA would not be amended. It was not obligated to agree to the revisions that Haber proposed on behalf of E2.

CC, however, was a Manager and also performed duties on behalf of the Service Member. CC was obligated under the OA at § 19.2(a)(i) to "devote all reasonably necessary time and efforts and attention to the business of [CCSW]." This she failed to do so beginning no later than April 2016, including by not agreeing to spend time at the office, not being fully involved with the opening of Whole Foods, and taking Company PR opportunities for herself. Chloe's conduct breached § 19.2(a)(i).

Certain of the changes to the OA demanded by CC/CCLLC and the team of advisors were to the personal betterment of CC. For example, they included demands to increase her salary, reduce the time she was required to spend providing services on behalf of the Service Member, increase her ability to do outside projects, add further restrictions on what CCSW could do (by expanding the definition of Approved Projects) and expand the ability of CCLLC to leave the venture and have faster vesting of its equity. C-124. The OA amendment was circulated and in C-124, many were "comments" rather than specific proposed language, the changes were proposed with great delay at a time when the re-drafting of the OA needed to be expeditious in order to keep Sisban in the picture, as the Company was in need of Sisban's funding. These demands put her personal interests ahead of CCSW's and, thus, were breaches by CC of her fiduciary duties owed to CCSW.

Although the Arbitrator finds there were breaches of CC's duty to act in good faith and with due care, and breaches of contract, Claimant did not establish what monetary harm, if any, was caused thereby. Accordingly, the Arbitrator awards no damages.

Fifth Claim

The Fifth Claim alleges that Respondents tortiously interfered with the lease that was being in entered into for a restaurant at the Barnard College campus. In its Statement of Claim Claimant called this claim "tortious interference with contract." The elements of that claim include that there is a binding agreement that is breached. Recognizing that the lease was never entered into, and, thus, there was no contract in place, Claimant has now recast this claim as "tortious interference with prospective economic advantage." The elements of that claim include that there is a reasonable expectation of continued business relations and that Respondent has interfered with them causing harm. The interference must involve "wrongful means," which may include threats of physical violence malice, fraud, misrepresentation, civil suits and threatened criminal prosecution. *See Carvel v. Noonan*, 3 N.Y.3d 182 (2004); *NBT Bancorp. Inc. v. Fleet Norstar Fin. Group, Inc.*, 87 N.Y.2d 614 (1996).

The evidence established that CCSW was expecting, through a subsidiary, to enter into a lease with Barnard for a restaurant located at the campus. The lease was not entered into after Barnard officials heard about the court litigation commenced by CC and CCLLC against ESquared, and (as discussed above) after speaking with CC and Respondents' counsel. Respondents' court complaint (where they were the plaintiffs) alleges that ESquared had acted improperly by, *inter alia*, causing CCSW to enter into the Demand Promissory Note which would cause grave injury to CCSW because payment was demanded. Barnard officials, on the eve of the lease signing, read about the case in the *New York Post*, and became reluctant to enter into the lease out of concern that the dispute would harm CCSW and/or the collection of the note would harm CCSW, which it viewed as its prospective tenant. Haber, after speaking with Barnard (trying to calm its concerns), asked CC to speak to the college and reassure them that CCSW was an entity fit to do business with. Days later, CC and her counsel spoke by phone with Barnard and, after the call, Barnard refused to go

forward with the lease. Haber testified that Chloe was told not to speak to Barnard if it would not be helpful, as he had already spoken with them.

In order to prevail on this claim, Claimant needs to establish that the Respondent used "wrongful means" in causing Barnard not to enter into the lease (because there was no contract to interfere with). The claim is denied because Claimant failed to establish wrongful means. The record does not establish "wrongful means" as the content of the communications with Barnard was not provided. Even if CC used "wrongful means," however, there is no proof in the record as to the actual damages were caused as a result of the Barnard lease not being entered into. In any event, as the Barnard location would be a new venture without any track record of profits, any lost profits would be speculative.

Sixth Claim

The arbitration Demand and Statement of Claim, at the Sixth Claim for relief, alleges a breach of the Personal Services Agreement. This claim is not addressed in the post-hearing submission of Claimant. The Arbitrator has been advised that Claimant has withdrawn this claim. Therefore, this claim is dismissed without prejudice.

Termination of Membership

Section 19.3(a) permits the Service Member to be removed for Cause. "Cause" is defined as:

> the Service Member's (a) willful and intentional refusal to perform its responsibilities relating to the Business assigned by the Company pursuant to Section 19.2 of this Agreement, which continues more than thirty (30) days after the notification of such breach pursuant to a Breach Notice (it being understood and agreed that if the reasonable requirements set forth in the Breach Notice are reasonably satisfied, then such Breach Notice shall be of no force or effect); (b) engaging in gross negligence or fraud in connection with the Business; (c) a material breach of the confidentiality obligations set forth in Section 8.1 hereof; (d) theft, embezzlement, or attempted theft, embezzlement, perpetration of fraud, or misappropriation of any tangible or intangible assets or property of the Company or any of its Affiliates; and/or (e) a conviction of, or a plea of nolo contendre or guilty to a felony or crime involving moral turpitude.

Respondent opposes this claim on three grounds. First, CCLLC argues that this claim was not included in the original Statement of Claim, and therefore is not properly before the Arbitrator. I have ruled that it is properly before me for determination. Second, it argues that Claimant failed to give notice with an opportunity to cure, pursuant to § 19.3, and therefore there can be no termination for cause. (The notice provision and definition of Cause are contained in § 1.1 (definition of "Cause")). Third, CCLLC contends that the grounds set forth in Claimant's brief (pp. 2-20) are insufficient or untrue or not supported by the record.

The *contractual* termination provision contained in subsection "(a)" is self-effectuating, that is, once written notice of grounds of a willful and intentional refusal to perform its responsibilities is sent and such remains uncured, then the Termination is effective and the Service Member is "removed." There is no proof in the record that a written notice was ever sent to CCLLC. Therefore, CCLLC cannot be removed for Cause under subsection "a".

No notice is required for other grounds that constitute "Cause," however. If the grounds for termination are "fraud" or "gross negligence" or a "material breach of the confidentiality provisions" or "theft or embezzlement" or the "misappropriation" of corporate assets," then there is no requirement of pre-termination written notice.

CC is designated to perform services on behalf of Service Member CCLLC. Claimant argues that CCLLC can be terminated and removed because CC committed fraud or was grossly negligent in (a) interfering with the contracts for the "Vegan Chefs;" (b) misappropriating the SmartWater opportunity and not paying the fee therefor to CCSW; (c) interfering with the Barnard lease. Claimant contends that CCLLC can be terminated for breaching the confidentiality obligations contained in § 8.1 of the OA, misappropriating the Company IP on her website; and misappropriating CCSW PR opportunities. Respondent CCLLC vigorously denies that these constitute "fraud" or "gross negligence" or that the record supports Claimant's position.

Respondent's post-hearing brief addressed this claim. I agree with Respondents that Claimant did not establish "fraud."

The question is, therefore, whether there is sufficient evidence in the record that CCLLC acted with "gross negligence" by virtue of the conduct of CC.

Conduct Constituting "Gross Negligence"

- CC interfered with the contracts for two of the four vegan chefs, causing them to walk away from their agreements. I find this conduct to constitute "gross negligence" in connection with the Business.
- CC also diverted the SmartWater opportunity to herself (or CCLLC). This publicity opportunity was a Company opportunity belonging to CCSW because it used the Bleecker Street restaurant and the preparation of a menu item (or derivative thereof). Her lack of candor about the payment was troubling. She also failed to cooperate with publicity for CCSW. However, I do not find that rises to the level of "gross negligence" in connection with the Business.
- CC did not act in a manner to try to save the Barnard lease, which she admitted was a good location for CCSW. I have ruled that such did not constitute tortious interference with prospective economic advantage, because the record did not establish "wrongful means." CC's testimony establishes, however, that no effort was made by her to solidify the lease and the opportunity for CCSW. Her testimony was less than candid. (T2760-61). I find that her conduct on behalf of CCLLC with respect to the Barnard lease constitutes "gross negligence in connection with the Business."

Breach of Confidentiality Obligations

E2 also urges that the Service Member can be removed because it circulated financial information about CCSW and failed to obtain NDAs. Claimant contends that CC and CCLLC provided confidential information about the finances of CCSW to Josh Saviano and he did not sign a non-disclosure agreement. Although it is clear from the record that Saviano was provided with such, as noted above, Haber and CCSW were aware that he had such documentation and information and Haber discussed such with him on several occasions and on occasion Saviano was provided information directly by Claimant and/or CCSW. Therefore, the fact that CC did not obtain an NDA from Saviano does not constitute gross negligence.

In May 2016, Respondents' then-attorneys were repeatedly asked by E2 and CCSW's counsel to provide copies of signed non-disclosure agreements, but none were provided.

The record reflects that private financial information about CCSW was provided to Anand Kishore without any NDA in place. It appears from the emails that Kishore was also informed about the status of negotiations that were on-going between CCSW and Sisban. (C-273) On April 9 and 22, 2016, emails from Respondents' then-counsel also reveal that CCLLC wanted the OA to be amended to permit her to transfer CC's interests (or financial interests) in CCLLC – the very discussion that was the root of Kishore's suggestion that his group could provide capital to CCLLC so as to buy-out Haber and advanced thwarting of the progress of the negotiations with Kishore. In May, 2016 Haber demanded copies of the NDAs, but none was forthcoming; counsel also demanded such, but counsel failed to respond. C-141.

Saviano was not asked about this at the hearing; none of her counsel were called to testify to support CC's position that no information had been provided to Kishore. I find that Saviano would have testified adversely to Respondents' position that no confidential information had been provided, had he been asked such question at the hearing.

I find that Saviano and CC provided and discussed with Kishore sensitive confidential information about CCSW without obtaining an NDA. This is troubling since Kishore and CCLLC were obtaining NDAs for themselves, thus recognizing that a non-disclosure should have been gotten to protect CCSW. CC and CCLLC were aware of this. I find, therefore, that the Service Member can be terminated on this basis there was a violation of the confidentiality provisions and such can be a basis to terminate the Service Member.

Misappropriation of IP

Finally, I also find that CCLLC's website was not corrected as requested by CCSW to avoid confusion between CC's personal website for "Chef Chloe" and the "By Chloe" website owned by CCSW. I find the record inadequate to establish what specific intellectual property owned by CCSW was misappropriated, and therefore not sufficient to establish that CC and CCLLC were grossly negligent with respect thereto.

In sum, I find that Claimant provided sufficient evidence to establish that the conduct by the Service Member, which duties were performed by CC, constitutes "gross negligence" or a violation of confidentiality provisions and therefore there are sufficient grounds to satisfy the definition of "Cause" and to permit the removal of the Service Member therefor.

Attorney's Fees, Costs and Expenses

Claimant seeks to recover its costs and expenses of the arbitration and its attorney's fees. There are several sections of the OA that are relevant:

- Section 20.7 provides that a member or the Company may be reimbursed "all costs and expenses ... including reasonable attorneys' fees..." by the non-prevailing party if counsel is retained to "enforce or prevent the breach or any threatened breach" of the OA.
- Section 20.19 provides that the compensation of the arbitrator shall be borne equally, "subject to re-allocation thereof contained in any arbitration award" and

that "[a]ll other legal fees, costs and expense incurred in connection with any dispute under [the OA] shall be paid as determined/apportioned by the arbitrator."

- Section 7.7 provides that a manager may be reimbursed his or her "expenses (including reasonable legal fees) incurred by any Manager in defending any claim, demand, action, suit or proceeding relating to Section 7.1(a)".

Arbitrator compensation in the amount of $107,397.50, was paid as follows: Claimant paid $81,422.50; Respondents paid $25,975. Claimant and Respondents also paid the AAA arbitration administrative fees of $14,700 each or $29,400 in total.

Pursuant to § 20.19, I re-allocate such fees (which were to be borne equally (subject to apportionment in the Final Award)). The administrative fees and expenses of the American Arbitration Association (AAA) totaling $29,400 are to be borne as incurred by each party. The compensation and expenses of the Arbitrator totaling $109,947.50 are to be incurred 40% by Claimant, ($43,979), and 60% by Respondents ($65,968.50). Therefore, Respondents shall pay to Claimant an amount of $39,993.50 within 30 days of this Award.

The parties, in section 20.19 of the OA, gave the Arbitrator the discretion to award legal fees. I find that Claimant was the prevailing party on most, but not all of its claims. I find that the award of fees should be just and equitable, pursuant to AAA Rule 47(a). In due consideration of my rulings herein, I decline to award legal fees to Claimant.

Summary of Award

For the reasons stated above, I AWARD as follows:

1. the Secured Financing Documents are binding and in full force and effect, they are governed by Article 9 of the Uniform Commercial Code and all protections provided therein to the debtor, CCSW, including regarding notice, sale and application of proceeds must be followed;
2. CCSW may fund restaurants through capital contributions by E2;

3. to the extent that there were breaches of fiduciary duty by CC and/or breaches of the OA by CCLLC or CC, Claimant failed to establish that such caused any monetary damages;
4. the Service Member is terminated for Cause (pursuant to subsections (b) and (c));
5. Claimant failed to establish that there was a tortious interference with the Barnard Lease by CC and CCLLC;
6. CC is directed to cease and desist all activities that interfere with the efforts of public relations for CCSW and By Chloe, and is directed to follow the decisions reached by CCSW, ESquared (or Wormser) and/or Sunshine Sachs for CC's personal appearances at Restaurants, public appearances, media appearances and other promotional services and that CC's activities must otherwise be consistent with Article 19 of the OA.
7. the CCLLC ("Chef Chloe") website is ordered be changed to make the corrections requested previously by Rachel Wormser, so as to avoid confusion and to ensure that there is no CCSW "Company IP" used thereon.
8. Respondent CC and CCLLC are directed to collect the fee for the SmartWater PR opportunity if not collected, and upon its receipt remit same to CCSW, or to otherwise assist CCSW in the collection of the fee, or to pay $15,000 to CCSW, if the $15,000 is not paid by SmartWater within 60 days of this Award. This obligation is joint and several.
9. The administrative fees and expenses of the American Arbitration Association (AAA) totaling $29,400 are to be borne as incurred by each party. The compensation and expenses of the Arbitrator totaling $109,947.50 are to be incurred 40% by Claimant, ($43,979), and 60% by Respondents ($65,968.50).

Therefore, Respondents shall pay to Claimant an amount of $39,993.50 within 30 days of this Award.

All arguments not addressed herein have been considered (except that the counterclaims were severed, suspended and not addressed.) This Final Award is in full settlement of all claims submitted by Claimant and all claims and counterclaims not expressly granted herein are hereby denied.

Dated: March 21, 2017

Erica B. Garay Date

I, **Erica B. Garay**, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my **Final Award**.

Erica B. Garay Date

State of New York
County of Nassau } SS

On this 21st day of March 2017, before me personally came and appeared **Erica B. Garay**, to me known and known to me to be the individual described herein and who executed the foregoing **Final Award** and acknowledged to me that she executed the same.

Notary Public Dated

MICHELLE M. ROCONDINO
Notary Public, State of New York
No. 01RO6167856
Qualified in Suffolk County
Commission Expires June 04, 20 19