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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHLOE COSCARELL, CC HOSPITALITY HOLDINGS, LLC and CKC SALES, LLC,

Plaintiffs,

vs.

ESQUARED HOSPITALITY LLC and BC HOSPITALITY GROUP LLC (formerly CCSW LLC),

Defendants.

Case No. 2:18-cv-02945 GW (JCx)

DECLARATION OF PHILIP R. HOFFMAN IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND/OR STAY PURSUANT TO FED. R. CIV. P. 12(b)(1) AND THE FEDERAL ARBITRATION ACT, 9 U.S.C. §3, OR, ALTERNATIVELY, TO TRANSFER VENUE PURSUANT TO 28 U.S.C. §1404

Hearing:
Date: August 2, 2018
Time: 8:30 a.m.
Courtroom: 9D

The Hon. George H. Wu

[Notice of Motion and Motion; Request for Judicial Notice; and Appendix of Exhibits filed concurrently]

DECLARATION OF PHILIP R. HOFFMAN

I, PHILIP R. HOFFMAN, pursuant to 28 U.S.C. §1746, hereby declare under penalty of perjury as follows:

1. I am a member of the firm of Pryor Cashman LLP, counsel for defendants ESquared Hospitality LLC ("ESquared") and BC Hospitality Group LLC f/k/a CCSW LLC ("BCHG" and, with ESquared, sometimes collectively referred to as "Defendants"). I submit this Declaration in support of Defendants' motion to dismiss and/or stay the Complaint dated April 9, 2018 (the "Complaint") of plaintiffs Chloe Coscarelli ("Coscarelli"), CC Hospitality Holdings LLC ("CCHH"), and CKC Sales, LLC ("CKC," and, with Coscarelli and CCHH, sometimes collectively referred to as "Plaintiffs"), pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act, 9 U.S.C. §3. In the alternative, Defendants, pursuant to 28 U.S.C. §1404, seek to transfer this action to the Southern District of New York. I have personal knowledge of the facts hereinafter stated.

2. The Complaint purports to set forth 14 claims, 13 of which arise, in whole or in part, out of the lawful use by BCHG of its registered trademark, "by CHLOE." (U.S. Registration No. 4,833,607), and/or the alleged use by BCHG of Coscarelli's name, face and likeness on the website for its by CHLOE restaurants (https://eatbychloe.com/), and certain by CHLOE social media accounts.[1] The other

[1] Those 13 claims are numbered as follows: (1) Violation of Cal. Civ. Code §3344 (by Coscarelli); (2) Violation of California's Common Law Right of Publicity (by Coscarelli); (3) Federal Unfair Competition (15 U.S.C. §1125) (by Coscarelli); (4) Violation of Cal. Bus. & Prof. Code §17200 (by Coscarelli); (5) Violation of Cal. Bus. & Prof. Code §17500 (by Coscarelli); (6) Common Law Unfair Competition (by Coscarelli); (7) Unjust Enrichment (by Coscarelli); (8) Common Law Trademark Infringement (by Coscarelli); (10) Trademark Infringement (15 U.S.C. §1114) (by CCHH); (11) Cyber Piracy in Violation of 15 U.S.C. §1125(d) (by CCHH); (12) Violation of Cal. Bus. & Prof. Code §17525 (by Coscarelli); (13) Cancellation of U.S. Registration No. 4,833,607 for False Suggestion of Association under Lanham Act §2(a) (by Coscarelli and CCHH); and (14) Cancellation of U.S. Registration No. 4,833,607 for Registration without Written Consent under Lanham Act §2(c) (by Coscarelli and CCHH).

claim, *i.e.,* the 9th claim for relief which is asserted by CKC for copyright infringement, arises out of the use by BCHG of recipes contractually owned by it. None of Plaintiffs' claims belong in this Court.

3. The Complaint filed by Plaintiffs is disingenuous and deceptive. There is no mention whatsoever in the Complaint of the two key agreements between the parties which utterly decimate all of Plaintiffs' bogus claims and, more importantly for this motion, mandate that the Complaint be dismissed because the exclusive jurisdiction and venue to determine those claims is in New York County in arbitration before the American Arbitration Association ("AAA") or, alternatively, in litigation in the U.S. District Court for the Southern District of New York or the New York State Supreme Court.

4. Plaintiffs are not even located in California. Thus, although the Complaint alleges that Coscarelli is domiciled in Los Angeles County (¶5), she actually resides at 260 West 52nd Street, Apt. 11A, New York, New York 10019. Similarly, CCHH and CKC are both single member, *i.e.,* Coscarelli, New York limited liability companies located at Coscarelli's New York address. (Complaint ¶¶ 6-7). Both defendants, BCHG and ESquared, are also located in New York City. (*Id.* ¶¶ 8-9).

5. So why did Plaintiffs commence this action in California? When I asked that question of Plaintiffs' counsel, Ronald Schutz, in our conference pursuant to C.D. Cal. Local Rule 7-3 on May 15, 2018, he admitted that he did so because he believes the law in California concerning right of publicity is more advantageous to Plaintiffs than the law of New York would be. Whether or not that is true, however, the fact is, as Plaintiffs recently conceded in correspondence, that their right of publicity claims all arise out of one of the concealed agreements which mandate that any and claims regarding the use of Coscarelli's name, face or likeness are governed by New York law and must be brought in New York County. Plaintiffs' blatant forum shopping must be rejected.

6. Plaintiffs have also concealed from this Court the truth about the Arbitration which took place in New York and resulted in a Final Award on March 21, 2017 (subsequently confirmed by the New York State Supreme Court) pursuant to which, as a result of their numerous unlawful acts: (a) the membership interest of Coscarelli's wholly-owned company, Chef Chloe, LLC ("Chloe LLC"), in CCSW was terminated for Cause; and (b) Coscarelli was terminated as CCSW's Co-Manager. The details of this arbitration are instructive and will be discussed shortly.

The CCSW Operating Agreement

7. The two critical agreements concealed by Plaintiffs from this Court, both of which were entered into at the commencement of the parties' relationship on November 7, 2014, are: (a) the Operating Agreement of CCSW LLC ("CCSW Operating Agreement") by and between ESquared, Coscarelli and Chloe LLC; and (b) the Name, Face and Likeness Agreement between Coscarelli and CCSW (sometimes referred to as the "NFL License Agreement"). Copies of these two critical agreements are annexed hereto as Exhibits A and B, respectively.[2]

8. The CCSW Operating Agreement sets forth the parties' rights and obligations with respect to, *inter alia*, the by CHLOE trademark (referred to therein as the "By Chloe Mark") which is at the heart of the Complaint. Section 4.4(a) thereof, entitled "By Chloe Mark," provides that "[CCSW] shall own all right, title and interest in and to the By Chloe Mark, including the right to register the By Chloe Mark with the U.S. Patent & Trademark Office, subject to the terms and conditions of this Operating Agreement and the NFL License Agreement." (emphasis added).

[2] Just as they seek to keep the operative and governing contracts from this Court, Coscarelli and her counsel, in violation of Fed. R. Civ. P. 19, have not included Chloe LLC as one of the Plaintiffs in this action. There can be no credible dispute that without Chloe LLC, no court or arbitrator can afford complete relief among the existing parties.

9. The CCSW Operating Agreement defines "By Chloe Mark" as "collectively, the By Chloe Design Mark and the By Chloe Word Mark," which are in turn defined as follows:

> "By Chloe Design Mark" means any logo or other design mark incorporating the By Chloe Word Mark in stylized font and/or color and/or design that is pre-approved by the CC Entity, and used in connection with the goods and services of the Business.
>
> "By Chloe Word Mark" means the standard character mark "BY CHLOE" in connection with the goods and services of the Business.

10. Section 4.1 of the CCSW Operating Agreement defines the "Business" of CCSW as "the ownership and/or management and/or licensing and/or franchising of one or more restaurants utilizing the Concept [defined as "fast casual" vegan restaurants] and Approved Projects [defined as "any project related to the food and beverage industry that utilizes one or more of the NFL Rights or the By Chloe Mark"].

11. Pursuant to §4.4 of the CCSW Operating Agreement, Coscarelli acknowledges that the By Chloe Mark incorporates her first name and that CCSW's rights in the By Chloe Mark are independent of, and do not constitute a use of, Coscarelli's name or any NFL rights:

> The parties acknowledge and agree that the By Chloe Mark incorporates CC's first name, and that nothing contained in this Agreement is intended to bestow upon the Company any rights to CC's NFL Rights (as defined in the NFL License Agreement), except as permitted herein and the NFL License Agreement. (emphasis added).

12. The CCSW Operating Agreement includes "the By Chloe Mark and all goodwill associated therewith" within the definition of "Company IP." (emphasis added). Section 4.3(a) clearly states: "The Company [CCSW, now BCHG] shall be deemed the owner of the Company IP." (emphasis added).

13. On December 9, 2014, just one month after the parties entered into the CCSW Operating Agreement, CCSW, as it was specifically authorized to do pursuant to §4.4(a) thereof, filed an application to register the trademark by CHLOE in Class 43

for restaurant and catering services. The by CHLOE trademark was registered by the U.S. Patent and Trademark Office to CCSW on October 13, 2015 (Registration No. 4833607). The mark was subsequently assigned to BCHG. A copy of the by CHLOE trademark registration is annexed to the Complaint as Exhibit 2.[3]

14. The CCSW Operating Agreement is governed by New York law. (§20.18). Section 20.19, entitled "Arbitration," provides that "[a]ll claims, disputes, deadlocks and other matters in question between the parties arising out of, or relating to, this Agreement or the breach hereof … shall be decided by arbitration" which "shall take place in New York, New York under the authority of, and in accordance with, the expedited rules of the American Arbitration Association." Section 20.19 states, in full:

> (a) The parties shall in good faith attempt amicably to resolve any claim, dispute, deadlock and other matters in question arising hereunder. 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 (each, a "Dispute") shall be decided by arbitration in accordance with this Section 20.19 unless otherwise mutually agreed to by the parties. The agreement by the parties to arbitrate pursuant to this Section 20.19 shall be enforceable under prevailing law.
>
> (b) Any Dispute subject to arbitration shall be promptly submitted to arbitration as herein provided. The arbitration may be initiated by either party by giving notice to the others in accordance with Section 20.19(c), below. The parties hereby agree that such arbitration proceeding shall be prosecuted without delay and that such proceeding shall be concluded and decision rendered thereon within sixty (60) days after the commencement thereof, it being recognized and agreed that any delay will materially and adversely affect the financial and other interests of the Company. Any arbitration under this Agreement shall take place in New York, New York under the authority of, and in accordance with, the

[3] In 2017 and 2018, BCHG filed additional trademark applications to register by CHLOE for a variety of goods in Classes 29 through 33. Those applications are pending.

expedited rules of the American Arbitration Association. The decision of the arbitrator shall be binding upon the parties. The administrative costs and expenses of the arbitration proceedings, and the fees and expenses of any arbitrator, including without limitation, any advances or deposits required by the American Arbitration Association or any arbitrator, shall be divided equally between the parties, subject to any re-allocation thereof contained in any arbitration award. All other legal fees, costs and expenses incurred in connection with any dispute under this Agreement shall be paid as determined/apportioned by the arbitrator.

(c) Written notice of demand (the "Demand Notice") to arbitrate by either party shall be given to the other party and simultaneously filed with the American Arbitration Association. The Demand Notice shall be given within a reasonable time after the Dispute in question has arisen and in no event shall such Demand Notice be given after the date when institution of legal or equitable proceedings based on such Dispute shall be barred by the applicable statute of limitations.

(d) All claims related to or dependent upon each other and in existence at the time any matter is brought to arbitration shall be presented to and heard by the arbitrators even though the parties are not the same, unless a specific contract prohibits such consolidation.

(e) Notwithstanding the foregoing, in the event the Dispute involves a claim for which immediate injunctive relief is being sought, a party shall have the right to bring an action for such relief in a court of competent jurisdiction prior to commencing as arbitration action. (emphasis added).

15. It was pursuant to the above clause that the parties engaged in the AAA Arbitration in New York which resulted in the Final Award on March 21, 2017 (subsequently confirmed by the New York State Supreme Court) pursuant to which, as a result of their numerous unlawful acts: (a) the membership interest of Coscarelli's wholly-owned company (Chloe LLC) in CCSW was terminated for Cause; and (b) Coscarelli was terminated as CCSW's Co-Manager.

All Of The Claims In Plaintiffs' Complaint Are Subject To Mandatory Arbitration Pursuant To The CCSW Operating Agreement

16. The following claims in the Complaint arise out of BCHG's alleged use of Coscarelli's first name as part of its by CHLOE trademark:

Count 1 – Violation of Cal. Civ. Code §3344 (by Coscarelli) (¶¶ 42-76);

Count 2 – Violation of California's Common Law Right of Publicity (by Coscarelli) (¶¶ 77-79);

Count 3 – Federal Unfair Competition (15 U.S.C. §1125) (by Coscarelli) (¶¶ 80-82);

Count 4 – Violation of Cal. Bus. & Prof. Code §17200 (by Coscarelli) (¶¶ 83-84);

Count 5 – Violation of Cal. Bus. & Prof. Code §17500 (by Coscarelli) (¶¶ 85-86);

Count 6 – Common Law Unfair Competition (by Coscarelli) (¶¶ 87-88);

Count 7 – Unjust Enrichment (by Coscarelli) (¶¶ 89-90);

Count 8 – Common Law Trademark Infringement (by Coscarelli) (¶¶ 91-100);

Count 10 – Trademark Infringement (15 U.S.C. §1114) (by CCHH) (¶¶ 106-17);

Count 11 – Cyber Piracy in Violation of 15 U.S.C. §1125(d) (by CCHH) (¶¶ 118-28);

Count 12 – Violation of Cal. Bus. & Prof. Code §17525 (by Coscarelli) (¶¶ 129-33);

Count 13 – Cancellation of U.S. Registration No. 4,833,607 for False Suggestion of Association under Lanham Act §2(a) (by Coscarelli and CCHH) (¶¶ 134-48);

Count 14 – Cancellation of U.S. Registration No. 4,833,607 for

> Registration without Written Consent under Lanham Act §2(c) (by Coscarelli and CCHH) (¶¶ 149-60).[4]

17. As 13 of the 14 alleged claims contained in the Complaint relate, in whole or in part, to the rights of BCHG in the By Chloe Mark, it is clear that such claims are "claims … arising out of, or relating to, this [CCSW Operating] Agreement or the breach hereof" which must, as mandated by §20.19 of the CCSW Operating Agreement, "be decided by arbitration … in New York, New York under the authority of, and in accordance with, the expedited rules of the American Arbitration Association."

18. The remaining claim, *i.e.,* the ninth claim in the Complaint, is asserted by CKC for copyright infringement of certain recipes from Coscarelli's cookbooks (all of which were published prior to the time she entered into the CCSW Operating Agreement) for dishes that were or are sold at by CHLOE restaurants, both prior to and after her termination at CCSW. CKC claims that the use of certain recipes on the by CHLOE website and in social media infringe the recipes from her cookbooks. (Complaint ¶¶ 101-05). CKC is wrong. The CCSW Operating Agreement is clear that the recipes which were published by CCSW on the by CHLOE website and elsewhere are owned by BCHG, not Coscarelli or CKC.[5]

19. BCHG's ownership of the by CHLOE recipes is clearly set forth in the CCSW Operating Agreement. Article I thereof defines "CC [Coscarelli] Existing Recipes" as:

> those recipes that are included in the CC Entity Pre-Existing IP and that are the basis for any Company Modified Recipes. The initial Members

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[4] Count 14 is defeated in its entirety by §4.4(a) of the CCSW Operating Agreement pursuant to which Coscarelli specifically authorized CCSW to register the trademark by CHLOE. *See* ¶13, *supra*.

[5] That Coscarelli would assert such a claim is outrageous considering that in her newest cookbook, Chloe Flavor published by Penguin Random House, she has stolen and featured 60 confidential and proprietary recipes from by CHLOE which are the exclusive intellectual property of BCHG.

> acknowledge that, in connection with the development of the Concept and commercializing of recipes, the CC Existing Recipes have been modified into Company Modified Recipes. If there are any CC Existing Recipes that do not get modified into Company Modified Recipes, the Members shall create and attach a schedule of such recipes and attach the same hereto as Exhibit E (which exhibit may be modified by the Members from time to time as appropriate). (emphasis added).

The schedule attached as Exhibit E to the CCSW Operating Agreement states that with respect to "Unmodified CC Existing Recipes," there are "None." That schedule was never modified.

20. The CCSW Operating Agreement defines "Company Modified Recipes" as "recipes resulting from any modification of any kind of any CC Existing Recipes that have been so modified (once or more than once for any particular recipe) and used in connection with the Business; provided, however, that for the avoidance of doubt the Company Modified Recipes shall not include the unmodified CC Existing Recipes." As noted above, there are no "unmodified CC Existing Recipes."

21. "Company Recipes" is defined in the CCSW Operating Agreement as "the aggregate of (a) the Company Modified Recipes, and (b) all of the food and beverage recipes developed by or on behalf of the Company for use in connection with the Business." (emphasis added). The definition of "Company IP" specifically includes "Company Recipes." Pursuant to §4.3(a) of the CCSW Operating Agreement, CCSW is the owner of the Company IP.

22. That BCHG owns all right, title and interest in the by CHLOE recipes was confirmed in the AAA Arbitration that took place in New York in late 2016 between ESquared, Coscarelli and Chloe LLC. As found by the Arbitrator in the Final Award issued March 21, 2017, a copy of which is annexed hereto as Exhibit C:

> CC [Coscarelli] was prohibited from using any Company IP – including its recipes – without the prior written consent of E2. §19.2(a)(iii). CCLLC [Chloe LLC] agreed to contribute recipes to the joint venture. 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.) …
>
> "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. (Final Award, p. 11) (emphasis added).

23. The Arbitrator's Final Award was confirmed by the New York State Supreme Court on September 7, 2017 and judgment entered thereon on November 16, 2017. Copies of the Decision and Order Confirming the Award and the Judgment are annexed hereto as Exhibits D and E, respectively.

24. As the ownership of the recipes is clearly determined and controlled by the express terms of the CCSW Operating Agreement, Coscarelli's copyright claim, like her trademark claims, is a claim "arising out of, or relating to, this [CCSW Operating] Agreement or the breach hereof," and must, as mandated by §20.19 of the CCSW Operating Agreement, "be decided by arbitration … in New York." This claim, like all of Plaintiffs' other claims, must therefore be dismissed and/or stayed.

The Name, Face and Likeness Agreement

25. Section 4.3(d) of the CCSW Operating Agreement provided that, simultaneously with its execution, Coscarelli, Chloe LLC and CCSW "shall enter into the NFL License Agreement pursuant to which [Coscarelli and Chloe LLC] shall grant [CCSW] the right to use [Coscarelli's] name, face, likeness, and other attributes of her persona for use in connection with the Business as set forth in the NFL License Agreement." That is precisely what occurred.

26. On November 7, 2014, Coscarelli and CCSW entered into the Name, Face and Likeness Agreement pursuant to which Coscarelli licensed to CCSW:

> [T]he right to use … the Name and pre-approved Rights of Publicity throughout the world (the "Territory") by any means, methods and technologies now known or hereafter to become known, (i) on an exclusive basis solely in connection with the operation, marketing and promotion of the Restaurants, and (ii) on an exclusive basis solely in connection with the manufacturing, distribution, advertising and promotion of products and services bearing the Company IP and associated with the Approved Projects. (§1) (emphasis added).

27. The Name, Face and Likeness Agreement on its first page defined the licensed "NFL Rights" as "(i) [Coscarelli's] full and formal name, nickname or variations of her name ('Name'), and (ii) versions of her image, signature, voice, likeness and other elements or attributes of her persona, identity, or personality ('Rights of Publicity')." (emphasis added). The Name, Face and Likeness Agreement in §1 clearly sets forth that the NFL rights are over and above those rights owned by CCSW in the by CHLOE trademark, *e.g.*: "All rights in and to the By Chloe Mark are reserved by the Company as stated in the Operating Agreement." (emphasis added).

28. Pursuant to §19.3(c) of the CCSW Operating Agreement, the Name, Face and Likeness Agreement survived any termination of Chloe LLC as the Service Member and any Membership Interest Recapture, both of which occurred here. Section §10a of the Name, Face and Likeness Agreement provides that in the event CCSW exercised its right to repurchase Chloe LLC's Membership Interest, then to the extent that CCSW actually continued to use the NFL Rights "in Restaurants and other Approved Projects," CCSW was obligated to pay Coscarelli a royalty of 1% of the gross sales from such operations.

29. The Name, Face and Likeness Agreement, like the CCSW Operating Agreement, is governed by New York law (§18), and provides at §19 ("Jurisdiction") that "[t]he state and federal courts of the State of New York located in the County of New York will have exclusive jurisdiction and venue to hear and decide all controversies that may arise under or concerning this Agreement." (emphasis added).

Six Of The Claims In Plaintiffs' Complaint, If Not Deemed Subject To Mandatory Arbitration, Must Be Litigated In New York County Because, As Plaintiffs Admit, They Arise Under The Name, Face and Likeness Agreement

30. Six of the claims in the Complaint which dispute BCHG's use of its registered by CHLOE trademark also assert that BCHG has improperly used Coscarelli's name, face and/or likeness on its by CHLOE website and certain by CHLOE social media accounts. Those claims, all of which are asserted by Coscarelli only, are as follows:

Count 1 – Violation of Cal. Civ. Code §3344 (¶¶ 47-76);

Count 2 – Violation of California's Common Law Right of Publicity (¶¶ 77-79);

Count 4 – Violation of Cal. Bus. & Prof. Code §17200 (¶¶ 83-84);

Count 5 – Violation of Cal. Bus. & Prof. Code §17500 (¶¶ 85-86);

Count 6 – Common Law Unfair Competition (¶¶ 87-88); and

Count 7 – Unjust Enrichment (¶¶ 89-90).

31. Although BCHG firmly believes that the appearance of Coscarelli's name, face and likeness in historical news stories on independent media websites which one may link to from the by CHLOE website do not constitute uses by BCHG of Coscarelli's name, face and likeness,[6] there can be no dispute that, if BCHG is incorrect, such uses are or were covered by the Name, Face and Likeness Agreement and that any claims that Coscarelli may have arise under that agreement. Indeed,

[6] California law specifically provides that no uses of name or likeness in news stories can be the basis for a right of publicity claim. *See* Cal. Civ. Proc. Code § 3344(d): "A use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

Plaintiffs counsel recently conceded that was the case.

32. On May 17, 2018, Plaintiffs' counsel, Ronald Schutz, sent me a letter re "Name, Face and Likeness Agreement dated November 7, 2014" which stated, in relevant part:

> This letter is being sent pursuant to the notice provisions of paragraph 12 of the Name, Face and Likeness Agreement between your client, CCSW LLC (now BCHG LLC), and our client, Chloe Coscarelli, dated November 7, 2014 ("NFL Agreement"). …
>
> Section 10(a) of the NFL Agreement provides:
>
> 10. Use Limitation Following Exercise of Repurchase Option or Put Right Under the Operating Agreement.
>
> a. In the event the Repurchase Right or Put Right is exercised, to the extent Licensee continues to use and permit others to use the NFL Rights as set forth herein in Restaurants and other Approved Projects, Licensee shall pay to (or cause to be paid to) Licensor as a royalty 1% of the gross sales from such operations (the "Post Repurchase Royalty"). …
>
> On March 22, 2017 ESquared Hospitality LLC purported to exercise the Repurchase Right referenced in Section 10. Yet CCSW/BCHG has continued to use rights that Ms. Coscarelli previously licensed to CCSW LLC in the NFL Agreement from March 22, 2017 until March 16, 2018, the date that Ms. Coscarelli terminated the NFL Agreement. Ms. Coscarelli's Complaint in the Central District California, filed in April for instance, sets forth representative examples of BCHG's use of these rights. But BCHG has not paid Ms. Coscarelli any royalties due her based on the section above. We also note that since March 16, 2018 BCHG has continued to use Ms. Coscarelli's NFL rights without permission and we reserve all of our rights with respect to such unauthorized use.
>
> Ms. Coscarelli is entitled to audit BCHG under these circumstances. Section 10(b) of the NFL Agreement provides: …
>
> We therefore request an audit pursuant to this provision. Please provide us dates later this month or early June in which we may come to the offices of BCHG to conduct this audit. Thank you in advance for your anticipated cooperation in this manner. (emphasis added).

A copy of this letter, which clearly admits that Plaintiffs' right of publicity claims (Nos. 1, 2, 4, 5, 6 and 7) arise under the Name, Face and Likeness Agreement and are governed by New York law, is annexed hereto as Exhibit F. A copy of my response to Mr. Schutz dated May 29, 2018 is annexed hereto as Exhibit G.[7]

33. The Name, Face and Likeness Agreement provides at §19 that "[t]he state and federal courts of the State of New York located in the County of New York will have exclusive jurisdiction and venue to hear and decide all controversies that may arise under or concerning this Agreement." It is therefore clear that the six claims in the Complaint that allege the use of Coscarelli's name, face and/or likeness also arise under the Name, Face and Likeness Agreement and thus may only be litigated in New York, not California. To the extent such claims are not subject to arbitration under the CCSW Operating Agreement, this action should be transferred to the Southern District of New York.

The New York AAA Arbitration And The Termination of Coscarelli And Chloe LLC For Cause Because Of Their Unlawful Conduct

34. This Court should also be aware of the deceitful description by Plaintiffs and their counsel of the arbitration which took place in New York and resulted in: (a) Chloe LLC's membership interest in CCSW being terminated for Cause; and (b) Coscarelli being terminated as CCSW's Co-Manager.

35. According to Plaintiffs, the arbitration involved nothing more than "a series of informal hearings before a single arbitrator" in which the arbitrator "rejected many of ESquared's claims," awarded "none of the damages claimed" and "used her equitable discretion to remove Chloe from the position of 'service member' for BCHG

[7] Although Coscarelli purported to terminate the NFL Agreement on March 16, 2018, BCHG contests that termination. As is the case with Plaintiffs' right of publicity claims under the NFL Agreement, the sole and exclusive venue for determining the validity or lack thereof of such the purported termination is either the Southern District of New York or the New York State Supreme Court in New York County.

restaurant operations." (Complaint ¶28). The truth is far, far different and likely explains why Coscarelli is going to such great lengths to conceal from this Court that all of her claims should be in arbitration.

36. Pursuant to the CCSW Operating Agreement, ESquared and CCSW on July 19, 2016 commenced an arbitration against Coscarelli and Chloe LLC before the AAA in New York City, asserting numerous claims (including gross negligence and breach of fiduciary duty) and seeking a wide variety of relief, including damages, injunctive relief and the termination of Chloe LLC as a Member of CCSW for "Cause" as defined in the CCSW Operating Agreement. Erica B. Garay, Chair of the Alternative Dispute Resolution (ADR) practice group at Meyer, Suozzi, English & Klein, P.C., was appointed as the sole Arbitrator on August 17, 2016.

37. Prior to the commencement of the Arbitration hearings, intensive discovery took place with the parties exchanging hundreds of thousands of pages of documents and emails. There were numerous conferences between Arbitrator Garay and counsel to deal with a wide variety of pre-hearing motions on discovery and other matters, and numerous orders were issued by Arbitrator Garay.

38. The arbitration hearings, which were not "informal" by any means (Complaint ¶28), took place on twelve days (November 9-11, 14 and December 5-6, 12-14, 19-21, 2016) and generated nearly 4,000 pages of transcript. Over 600 hearing exhibits were admitted into evidence and seven witnesses were called, including: (a) Coscarelli, who testified on seven days; (b) James Haber ("Haber"), the CEO of ESquared, who testified on five days; and (c) Samantha Wasser ("Wasser"), the co-Founder of by CHLOE and, with Coscarelli, then one of the two Managers of CCSW, who testified on two days.[8]

[8] The four additional witnesses were: (a) Rachel Wormser, the ESquared public relations person responsible for by CHLOE; (b) John Huber, an accountant responsible for CCSW's financials; (c) Scott Chichester, the accounting "expert" for Chloe LLC and Coscarelli; and (d) Joshua Saviano, the attorney who

39. After the arbitration hearings concluded, the parties filed Post-Hearing Briefs and Responsive Post-Hearing Briefs totalling close to 200 pages.

40. On March 21, 2017, Arbitrator Garay issued a 49-page reasoned Final Award (Exhibit C hereto), finding that Chloe LLC and Coscarelli had breached their common law fiduciary duties and the CCSW Operating Agreement by:

a. Sharing CCSW confidential information with outsiders for the purpose of allowing Coscarelli to try to wrest control of CCSW from ESquared in violation of §8.1;

b. Failing to put CCSW's interests ahead of her own self-interest and, while secretly seeking investors for her own company (Chloe LLC), taking action which prevented CCSW, which was in desperate need of funds, from closing a critical transaction, *e.g.*, "CC [Coscarelli] and CCLLC [Chloe LLC] made demands to make changes [to the CCSW Operating Agreement] 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";

c. Causing CCSW to lose a lease with Barnard for a very valuable by CHLOE location in New York City;

d. Causing two vegan chefs retained by CCSW to act as consulting chefs to cancel their contracts with CCSW;

e. After misappropriating a CCSW public relations opportunity with SmartWater for herself, failing to (i) pursue the $15,000 owed to CCSW; or (ii) cooperate with CCSW in its opening of a by CHLOE at Whole Foods;

f. After the CCSW website for by CHLOE was up and running, misappropriating CCSW's IP by changing her "Chef Chloe" website so that it

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negotiated the CCSW Operating Agreement for Chloe LLC and Coscarelli and eventually became her personal business manager and/or business partner.

was confusingly similar to the by CHLOE website;

g. Interfering with public relations efforts for CCSW and by CHLOE and failing to cooperate fully with CCSW, ESquared and their PR agency in such efforts; and

h. Failing to "devote all reasonably necessary time and efforts and attention to the business of [CCSW]," as required by §19.2(a)(i) of the CCSW Operating Agreement, "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." (Final Award, p. 34-41).

41. Arbitrator Garay also terminated the Membership Interest of Chloe LLC for "Cause" for two separate and independent reasons, the first of which was engaging in gross negligence in connection with the Business, *i.e.,* Coscarelli and Chloe LLC: (a) "interfered with the contracts for two of the four vegan chefs, causing them to walk away from their agreements;" and (b) "did not act in a manner to try to save the Barnard lease, which she admitted was a good location for CCSW. … [Coscarelli's] testimony establishes … that no effort was made by her to solidify the lease and the opportunity for CCSW. Her testimony was less than candid." (Final Award, p. 42-44).

42. The second ground for terminating Chloe LLC's Membership Interest for Cause was the material breach by Coscarelli and Chloe LLC of their confidentiality obligations set forth in §8.1 of the CCSW Operating Agreement. Arbitrator Garay found that Coscarelli provided a potential investor in Chloe LLC with "private financial" and "sensitive confidential information" about CCSW," including information "about the status of negotiations that were on-going between CCSW and [a major potential investor]," all with the goal of wresting control of CCSW from ESquared and thwarting the progress of CCSW's negotiations with the investor who was to provide critical financing to the company. (Final Award, p. 45-46).

43. In addition to the termination of Chloe LLC's Membership Interest for Cause, Arbitrator Garay also directed Coscarelli and Chloe LLC to: (a) "cease and desist all activities that interfere with the efforts of public relations for CCSW and By Chloe;" (b) change the "Chef Chloe" website so as to avoid confusion and to ensure that there was no CCSW "Company IP" used thereon; (c) collect and pay to CCSW $15,000 for the SmartWater public relations opportunity they had misappropriated from CCSW; and (d) pay $39,993.50 to ESquared for AAA administrative fees and expenses.

44. On March 22, 2017, and in accordance with the Final Award which terminated Chloe LLC as a Member of CCSW and the relevant provisions of the CCSW Operating Agreement (§§ 7.5, 19.5 and 19.6): (a) Coscarelli was removed as a Manager of CCSW; and (b) CCSW exercised its option to purchase all of Chloe LLC's Membership Interest. A copy of the Notice pursuant to which these transactions occurred is annexed hereto as Exhibit H.[9]

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[9] Although Coscarelli would have this Court believe that she and she alone was responsible for the creation and success of by CHLOE, nothing could be further from the truth. Arbitrator Garay, who heard extensive testimony from Coscarelli, Haber and Wasser, found in her Final Award (Exhibit C hereto):

> Effective November 7, 2014, E2 and [Chloe LLC] entered into an Operating Agreement (OA) that governs their relationship. Wasser and [Coscarelli] also signed as Managers and [Coscarelli] signed the OA for her duties on behalf of [Chloe LLC] as "Service Member." Even before the OA was finalized, executed and "effective," [Wasser] and [Coscarelli] began to develop the concept, create the menu, select the interiors, location, logo, and other important matters involved in the creation of "By Chloe." (Final Award, p. 3) (emphasis added). …
>
> Starting in 2014 (even before the OA was entered into), [Wasser] and [Coscarelli] 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. (Final Award, p. 10) (emphasis added).

The New York State Supreme Court's Confirmation Of The Final Award And Entry Of Judgment Against Chloe LLC And Coscarelli

45. On April 10, 2017, Esquared and CCSW moved in New York State Supreme Court, New York County, to confirm the Final Award. On May 10, 2017, Chloe LLC and Coscarelli cross-moved to vacate the Final Award. On September 7, 17, the New York State Supreme Court confirmed the Final Award, issuing a Decision and Order (Exhibit D hereto) and holding:

> Presently before the Court is defendants' motion to confirm a 49-page Arbitration Award by Arbitrator Erica B. Garay dated March 21, 2017 and plaintiff's cross-motion to vacate the Arbitration Award. … The Arbitration Award was rendered after twelve days of hearings reflected in approximately 4,000 pages of transcript. The Arbitrator heard testimony from seven witnesses who were examined and cross-examined by eminent counsel for each party. More than 600 hearing exhibits were admitted into the arbitration record and the parties had the opportunity to submit post-hearing memoranda addressing the claims they were submitting to arbitration and what relief was sought on each claim. Certain claims were not expressly included in the original Statement of Claim, but it is clear from the reasoned Arbitration Award that all claims were actively litigated during the arbitration proceeding. The counterclaims interposed by Chef Chloe, LLC and CCSW LLC were severed and suspended [for non-payment] in accordance with the rules of the American Arbitration Association.
>
> A review of the well written Arbitration Award reflects no bias on the part of the arbitrator and no basis to vacate the award. Chef Chloe, LLC and CCSW LLC were represented by two law firms during the arbitration hearing which was conducted pursuant to a valid and enforceable agreement to arbitrate disputes contained in the Operating Agreement executed by the parties at the commencement of their relationship.
>
> On this record, it is necessary and appropriate to grant the defendants' motion to confirm the Arbitration Award and deny the plaintiff's cross-motion to vacate the Award … (emphasis added).

46. The New York State Supreme Court entered a Judgment in favor of ESquared and CCSW and against Coscarelli on November 16, 2017 (Exhibit E hereto).

Chloe LLC and Coscarelli appealed that Judgment to the New York State Appellate Division, First Department, on December 15, 2017 and have until September 17, 2018 to perfect and move forward with their appeal. To date, they have not taken any steps to do so.

* * * * *

WHEREFORE, for the reasons stated herein and in the accompanying memorandum of points and authorities, Defendants' motion to dismiss and/or stay the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and the Federal Arbitration Act, 9 U.S.C. §3 should be granted. In the alternative, and pursuant to 28 U.S.C. §1404, this action should be transferred to the Southern District of New York.

I declare under penalty of perjury that the foregoing is true and correct. This declaration is executed on June 1, 2018, at New York, New York.

/s/ *Philip R. Hoffman*
PHILIP R. HOFFMAN