

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

SANDRA G. MANZELLA, both  
individually and derivatively on behalf of  
KESTE GROUP, LLC,

Plaintiff,

v.

ROBERTO CAPORUSCIO, SANDRO  
PATERNO and KESTE GROUP, LLC,

Defendants.

INDEX NO.: 651484/13

IAS Part: 49

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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

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**RULES AND STATUTES**

CPLR §3212(b).....1, 21, 28

### **PRELIMINARY STATEMENT**

Defendants Roberto Caporuscio (“Caporuscio”) and Keste Group LLC (“Keste”) (collectively, “Defendants”), respectfully submit this memorandum of law in support of their motion for entry of an Order: (1) pursuant to CPLR §3212(b) granting summary judgment in their favor and against plaintiff Sandra Manzella (“Plaintiff”) on the First (Breach of Contract), Second (Breach of Fiduciary Duty) and Third (Breach of Covenant of Good Faith) Counts of their Counterclaim; (2) prohibiting Plaintiff from performing any bookkeeping services for Keste, and from receiving a mandatory salary from Keste; (3) modifying paragraph 8 of the Consent Order agreed to by the parties and entered by this Court on November 21, 2013 (the “Consent Order”), concerning Plaintiff’s “non-exclusive responsibilities with respect to Keste’s day-to-day operations”; and (4) modifying the Consent Order to limit Plaintiff to “read-only” access to Keste’s books and records.

As this Court is by now only too well aware, this case involves a dispute between the members of a limited liability company, Keste, which owns a restaurant, “Keste Pizza and Vino,” located on Bleecker Street. Caporuscio, a world-renowned Neapolitan pizza chef, conceived and built Keste and since 2012 owns a majority fifty-five percent (55%) interest in Keste. As of 2012, Plaintiff owns the remaining 45% minority interest. Notwithstanding her status as a minority owner and the clear and unambiguous language in Keste’s Operating Agreement granting management and control of Keste’s business and operations to the *majority* of ownership -- Caporuscio -- Plaintiff has, since March of 2013, engaged in a sustained and deliberate pattern of interference with Keste’s business and operations. Indeed, Plaintiff’s misconduct as a minority owner and part-time bookkeeper has been so demonstrably pervasive that it has irreparably damaged the business relationship between Caporuscio and Plaintiff.

Over the past six months, Plaintiff has improperly taken thousands of dollars from Keste to pay her personal legal expenses, for which she was recently held in contempt of Court in violation of the parties interim Consent Order. She has paid herself thousands of dollars for work she did not perform. She has failed and refused to make a capital contribution that was called for from Keste's members to enable Keste to pay ordinary expenses, and she had the further audacity to take a portion of Caporuscio's capital contribution in "salary" even after he was deferring his own salary and instructed her to do likewise until Keste's cash flow improved. She has refused to adhere to the work schedule that she previously agreed to and has routinely and without notice failed even to show up for work, but still paid herself salary even for the days she did not work in direct violation of the Consent Order and the Operating Agreement. As for the intermittent bookkeeping work she had occasionally performed, it was uniformly incomplete, haphazard, inconsistent and incompetent. It was also punctuated with daily unsupported accusations of theft, misappropriation and fraud.

Plaintiff has also publicly and falsely accused at least one Keste vendor of engaging in a fraudulent kickback scheme with Caporuscio, falsely accused employees of stealing money and inventory and, on at least one occasion, falsely reported to the police that a Keste manager stole a delivery bicycle and used the alleged "theft" to bar the manager from Keste's premises.

Most alarmingly, Plaintiff has repeatedly and publicly accused Caporuscio of engaging in "blatant ongoing fraud, conversion, larceny, self-dealing, thievery, breaches of fiduciary duties and other significant wrongful conduct" at Keste, see Affidavit of Sandra Manzella dated December 19, 2014 at ¶3. Notwithstanding that Plaintiff's accusations have been proven to be completely false, Caporuscio can no longer be compelled to tolerate Plaintiff's inexplicably destructive behavior, which in every instance constitutes a breach of her fiduciary obligations to

Keste and Caporuscio. And, to make matters worse, Plaintiff is currently on her *fourth* set of attorneys in this matter, itself a red-flag indication that Plaintiff will stop at nothing and listen to no one and continue to destroy Keste until this Court steps in and brings this case to its only logical conclusion -- Plaintiff must be removed from Keste, once and for all.

This case started with this Court temporarily restoring Plaintiff to employment in April of 2013 -- before the Defendants had an opportunity even to file opposition papers -- after Caporuscio fired her for refusing to pay Keste expenses in the ordinary course and taking unilateral control over Keste's books, records and checkbook to Caporuscio's exclusion while improperly asserting that she enjoyed equal "co-manager" status with Caporuscio. Since then, Defendants have been forced to tolerate Plaintiff's unrelenting interference and misconduct, even after the parties entered into the Consent Order in November of 2013 (negotiated with Plaintiff's third lawyer) that was intended to delineate their respective duties and responsibilities. This Court, just two weeks ago, held Plaintiff in contempt of court for violating that Consent Order and, seemingly exasperated with Plaintiff's demonstrated misconduct, invited Defendants to move for summary judgment to seek her removal as an employee of Keste and from any responsibility for any further bookkeeping activities on its behalf.

As set forth in detail below, the evidence of record is undisputed and makes a compelling case that Plaintiff has breached numerous provisions of the Operating Agreement, breached her covenant of good faith with Caporuscio and, inescapably, breached her fiduciary obligations as a member of Keste to both Keste and Caporuscio. Caporuscio should no longer be forced to tolerate Plaintiff's unyielding efforts to destroy his business. This Court should, at this late date, decline to indulge Plaintiff's misconduct any longer and should have no difficulty granting summary judgment to Defendants on the First, Second and Third Counts of their Counterclaim.

## STATEMENT OF FACTS

### **A. Roberto Caporuscio and Keste's Formation**

Caporuscio, a world-renowned Neapolitan pizza chef, currently serves as U.S. President of the *Associazione Pizzaiuoli Napoletani* ("APN-Association of Neapolitan Pizza Makers"). He teaches a popular Neapolitan-style pizza-making course that offers APN certification, frequently appears on The Food Network and serves as a consultant to many restaurants and owners throughout the United States. See Affidavit of Roberto Caporuscio Affid. ("Caporuscio Affid.") at ¶¶4-7.

After serving apprenticeships in various restaurants in Italy and coming to the United States in 1999 to learn the industry in this country, Caporuscio formed Keste -- which in Neapolitan dialect, means "this is it," the culmination of his dream -- in March 2009, as his first *Pizzaiuoli Napoletani* restaurant in the United States. He retained an attorney, Reid Rosen, Esq., to establish Keste as a New York limited liability company, to apply for a liquor license and, also, to draft its original Operating Agreement (the "2009 Operating Agreement"). He also identified a suitable location on Bleecker Street in New York City, hired and trained the cooks and waiters (training each of them in the art of *pizza Napoletana*), negotiated arrangements with food and beverage suppliers and set up Keste's restaurant operations. He endeavored also to raise Keste's profile by retaining a public relations firm to help Keste stand out in New York City's highly competitive restaurant industry. *Id.* at ¶¶8-11.

Caporuscio's culinary talents at Keste were immediately recognized by the food and restaurant industry. Within a few short years, Keste was touted as the "#1 Pizza in New York" by New York Magazine, as "Best Pizza" in the state of New York by Food Network Magazine, and among the "Best Pizza Places in the US" by Food and Wine Magazine. *Id.* at ¶12.



After successfully establishing Keste, Caporuscio lent his name and expertise to two other restaurant endeavors, *Don Antonio By Starita*, with locations in midtown Manhattan and Atlanta, Georgia. Neither of these restaurants involves Plaintiff in any capacity. *Id.* at ¶13.

**B. Keste's Initial Membership and Management**

Initially, Caporuscio owned twenty percent (20%) of Keste and organized a group of investors to fund Keste's initial operations, including Plaintiff, her father and her brother-in-law, each of whom invested \$75,000 for a twenty percent (20%) interest in Keste (Plaintiff's brother-in-law received an additional twenty-percent (20%) ownership interest in "sweat equity"). Plaintiff at the time had no experience in the restaurant industry and had no role in Keste's management or operations. Beginning in 2009, Plaintiff began working for Keste on a part-time basis. *Id.* at ¶¶14-17.

By December 2009, Keste was successful enough to repay each member's initial investment, with interest. *Id.* at ¶19.

**C. The 2012 Stock Redemption Agreement and the SBA Loan**

In March of 2012, Plaintiff's father and brother-in-law divested themselves of their respective membership interests pursuant to a Stock Redemption Agreement. Together, they sold to Keste the entirety of their 600 membership units, a combined 60% interest, for the combined purchase price of \$600,000. *Id.* at ¶20. Three years earlier, they had invested a combined \$150,000, which had already been repaid to them.

In order to fund the stock redemption, Keste borrowed from JP Morgan Chase Bank ("Chase Bank") the sum of \$457,000 through the Small Business Association (the "SBA Loan"). The SBA Loan has a ten-year term (maturing in April 2022, whereas by contrast Keste's Bleeker Street lease ominously expires nearly four years earlier, in December 2018) and was personally guaranteed by each of Caporuscio and Plaintiff. During the SBA Loan application process, Chase Bank

representatives stressed that SBA Loans were not typically approved for start-up restaurants and that the approval of the SBA Loan for Keste was premised primarily, if not exclusively, upon Caporuscio's reputation, ownership of and managerial control of Keste. *Id.* at ¶¶21-22.

In addition to the SBA Loan, Caporuscio invested an additional \$125,000 and Plaintiff invested an additional \$25,000 to enable the buyout. As a result of the Stock Redemption Agreement, Caporuscio owned a majority fifty-five percent (55%) of Keste's membership units and Plaintiff owned the remaining forty-five percent (45%) minority interest. *Id.* at ¶¶23-24.

**D. The 2012 Operating Agreement**

On February 10, 2012, as a result of the transaction accomplished by the Stock Redemption Agreement, Caporuscio and Plaintiff entered into a revised Operating Agreement (the "Operating Agreement") (Exhibit A to Caporuscio Affid.). Three provisions of the Operating Agreement underscore the concept of majority rule and are relevant to this dispute. Section 4.1 provides that Keste "shall be managed and controlled by its Members by the affirmative vote of a *majority* in interest of the Members," and Section 4.4(a) reiterates that "[t]he Members may exercise all powers...to the extent authorized by a *majority* of the interests which vote of the Company." Section 4.4(c) further provides that, unless otherwise specified by law or by the Operating Agreement, "all matters requiring the vote, approval, consent, authorization or determination of the Members shall require the vote or consent of the members holding a *majority* of the issued and outstanding voting interests held by all of the Members." Plaintiff signed the Operating Agreement, fully aware of its provisions and, also, fully aware that Caporuscio contributed an additional \$125,000 whereas she, in contrast, contributed only an additional \$25,000 to the buyout.

Plaintiff began performing more regular but still part-time bookkeeping services after the new Operating Agreement was signed. She started paying herself in the amount of \$280 per day -- the

same amount that Caporuscio was taking for running all of the restaurant operations and that was well in excess of what Keste could pay in the marketplace for part-time bookkeeping services. *Id.* at ¶27.

There is no dispute that Caporuscio holds 55% of Keste's membership units, controls a majority of interest in Keste and therefore enjoys full management and decision-making authority for its business and operations, subject only to unanimity requirements set forth in Section 4.2B of the Operating Agreement. The *only* caveat to Caporuscio's otherwise exclusive exercise of decision-making authority for Keste's business and operations is found in a single sentence in Section 4.1, which provides that "Caporuscio and [Plaintiff] shall have primary responsibility for running the day-to-day operations of the Company." This sentence is the sole and entire basis of Plaintiff's lawsuit, and has been the sole source of Plaintiff's egregious misconduct over the past two years.

**E. Plaintiff's Pre-Litigation Misconduct and Termination From Keste's Employ**

By March of 2013, Plaintiff contended that her shared responsibility for running Keste's "day-to-day operations" conveyed to her *equal* management authority for Keste's business and operations, holding herself out as a "co-manager" with authority equal to Caporuscio. *See* Affidavit of Sandra Manzella dated April 24, 2013 at ¶4. And as part of her self-professed "co-manager" status, Plaintiff further contended that she had approval authority for all Keste expenditures -- she was by that time withholding payment on Keste's ordinary-course expenditures for which Caporuscio did not seek her advance approval. Caporuscio Affid. at ¶28. She also began refusing to pay certain of Keste vendors' invoices, including invoices that Caporuscio had specifically approved for payment. *Id.*

Plaintiff's outright refusal to pay ordinary course expenditures that Caporuscio had already incurred and approved for payment reached crisis proportion when she took unilateral control of and held Keste's checkbook hostage. Keste's operations, vendor relationships and suppliers were put in peril: Plaintiff's refusal to pay certain suppliers as Caporuscio had previously established caused them

to threaten to deliver product to Keste only on C.O.D., rather than on credit terms, which spelled disaster to Keste's cash flow and ongoing operations. On numerous occasions, Caporuscio was forced to outlay his personal funds to pay vendor invoices and other Keste expenses, for which he later reimbursed himself from Keste's account. Id. When Plaintiff saw these transactions, she wrongly assumed that Caporuscio was transferring Keste's funds to himself or was otherwise misappropriating Keste's funds, when a simple inquiry would have demonstrated otherwise. Id. at ¶29.

Plaintiff also by this time was interfering with Keste's public relations program, refusing to pay the invoices of Keste's public relations firm and accusing Caporuscio of misusing Keste's funds to advertise himself when in fact Keste's advertisements were making use of his name, likeness and reputation to increase Keste's public profile and reputation in the restaurant community. Id. at ¶30. Plaintiff also attempted to make unilateral changes to Keste's website without Caporuscio's consent, and insisted to include her name alongside his on the Keste website. Id.

By mid-April of 2013, Keste was in turmoil. Plaintiff refused to return the checkbook to Keste and was accusing the vendor of Keste's new point of sales ("POS") system, Jeff Kurnit ("Kurnit"), of engaging in a "kickback" scheme with Caporuscio. See Affidavit of Sandra Manzella dated December 19, 2014 at ¶¶17-28. She interfered with the purchase, installation and implementation of the POS system, complaining to the vendor for overcharging, to Caporuscio for purchasing it without her consent and to employees that it was unnecessary. Caporuscio Affid. at ¶31. She held herself out to Kurnit as "an equal managing partner" and complained to him:

Roberto never told me he would be signing a contract with you, let alone spend almost \$15,000 on a POS System. The way I found out is when Roberto transferred \$7,000 from our business savings account to his personal account without my permission.

See Exhibit B to Caporuscio Affid. at 3. On March 19, 2013 Kurnit responded "it is not fair of you to insert me into an internal dispute between you and your partner" and stated also that "I trust you'll

appreciate that when a restaurant owner purchases a POS System it is not my responsibility as the vendor to determine whether or not the owner's purchase has the consensus of any other partners I have never met." Id. at 1. When Plaintiff continued to complain, Kurnit responded as follows:

You are now harassing my manufacturer. I will not allow your legal partnership dispute issues to affect my business. I have instructed my staff as well as the Revel support department that you are not authorized by Roberto Caporuscio, who is the sole party to my contract, to act as a liaison for Keste in any matter concerning the Revel POS system installed in Keste.

On April 19, 2013, as a result of Plaintiff's pervasive misconduct, Caporuscio terminated Plaintiff's employment with Keste for cause. Id. at ¶32. Plaintiff was advised in writing that she had improperly "taken exclusive control of Keste's checkbook and check register and refused numerous requests to return them to Keste." She was further advised that she improperly "continues to interfere with Keste's business and to insist that she is a Manager of Keste, in a manner that is entirely contrary to the parties' Operating Agreement." See Exhibit C to Caporuscio Affid.

**F. The Instant Lawsuit and Temporary Restraining Order**

Plaintiff commenced this lawsuit by Order to Show Cause. On April 26, 2013, this Court, on an incomplete record and thus unaware at the time of Manzella's misconduct, entered an Order (the "April 26, 2013 Order," Exhibit A to Affidavit of Paul F. Carvelli, Esq. ("Carvelli Affid.")) temporarily restoring Manzella to her employment with Keste and setting her and Caporuscio's salary at the same \$280 per day. At the same time, however, this Court recognized in the April 26, 2013 Order that "if there is a dispute over business expenditures, in accordance with the Operating Agreement, the majority of membership interest shall" control the decision. Id.

**G. The November 2013 Consent Order**

On November 21, 2013, in lieu of proceeding to a preliminary injunction hearing, Plaintiff and Defendants entered into a Consent Order (Exhibit B to Carvelli Affid.) for "preliminary relief"

pending further application and order of this Court. In the Consent Order, the parties recognized the Operating Agreement's grant of ultimate decision-making authority and control of Keste's business and operations to the majority ownership interest -- held by Caporuscio.

The Consent Order provides that "Keste shall be managed and controlled by an affirmative vote of the majority in interest of its members" consistent with Section 4.1 of the Operating Agreement. The Consent Order also recognizes the Operating Agreement's requirement that Plaintiff and Caporuscio "*share* primary responsibility for the day-to-day operations" of Keste, and enumerated Caporuscio's day-to-day operational responsibilities as well as Plaintiff's "non-exclusive" day-to-day operational responsibilities. Importantly, the Consent Order also anticipated that the members might disagree on certain "day-to-day" matters -- any other matters are *entirely* within Caporuscio's authority -- and therefore explicitly states that "[s]hould Caporuscio and Manzella be unable to agree on a matter relating to the day-to-day operations of Keste, then, consistent with Section 4.1 of the Operating Agreement, Caporuscio's majority interest shall control with respect to that matter."

Over the past several months -- commencing, as noted above, when she fired her *third* set of attorneys on the matter and hired her *fourth*, present, set of attorneys -- Plaintiff has repeatedly violated the Consent Order and the Operating Agreement.

#### **H. Plaintiff's Misconduct Since Entry of the Consent Order**

##### **1. Plaintiff's Unauthorized Withdrawal of \$17,500: Contempt Finding**

On December 8, 2014 Plaintiff made an unauthorized withdrawal of the sum of \$17,500 from Keste's operating account and issued checks to one of her prior lawyers on the matter (Sadis & Goldberg, LLP, her second lawyer) and also to her current (fourth) lawyer, in violation of the Consent Order. Caporuscio Affid. at ¶33. Following substantial motion practice, by Order dated April 13, 2015 (the "Contempt Order," Exhibit C to Carvelli Affid.), this Court held Plaintiff in contempt of

Court for violating the Consent Order by making the unauthorized withdrawal of \$17,500 from Keste. At the same time, however, this Court declined Defendants' request that Plaintiff be removed from further bookkeeping activities, oversight for any day-to-day responsibilities and from any further check-signing authority for Keste's checking account -- without prejudice to the opportunity to raise these issues in the context of this summary judgment motion. See Contempt Order at 2.

**2. Plaintiff's Unauthorized Exercise of Control of Keste's Daily Deposits**

Beginning in November of 2014 Plaintiff, despite repeated warnings, improperly took custody and control of Keste's daily cash deposits. Caporuscio Affid. at ¶34. Her improper seizure of Keste's daily cash violated the responsibility that the Consent Order affords to Keste's General Manager, Michele Vianello ("Vianello"), who is *specifically empowered* with the responsibility for "depositing with Keste's bank the restaurant's daily receipts," among other things. See Consent Order at 9q. Plaintiff's conduct also expressly violates Section 4.1 of the Operating Agreement in that where the parties disagree over a matter involving Keste's day-to-day operations -- and the "daily" deposits are inescapably within the "day-to-day operations" -- Caporuscio's majority interest "controls with respect to that matter."

Plaintiff's mishandling of Keste's daily cash deposits is damaging in two distinct ways. First, despite improperly seizing Keste's cash from its register on the days she visits the premises, Plaintiff does not deposit the cash on a daily basis -- she routinely holds them up for days at a time, and in one instance she delayed the deposit for at least ten days. Caporuscio Affid. at ¶35. This leaves Keste money unaccounted for and outside of Keste's premises for days at a time, creates uncertainty and necessitates extra work with Keste's daily record-keeping activities. Second, Plaintiff's removal of the cash out of Keste's till does not allow for Keste's long-standing practice -- prevalent in the restaurant industry -- to provide for a daily petty cash allowance to cover routinely arising daily

expenses and, more importantly, to fund Keste's daily "tipping out" process: at the conclusion of each restaurant shift, the staff are paid the daily tips, including those paid by credit cards, out of the day's cash receipts, and the shift manager records each shift's paid tips. Id.

Plaintiff's violations of ¶5 and ¶9q of the Consent Order created chaos in Keste's bookkeeping and finances. Simply put, the staff must be paid its earned wages, including tips, and Keste must have cash available for routine expenses. Plaintiff's failure to acknowledge or appreciate Keste's long-standing and carefully documented practices in these regards betrays her inability to understand the most basic practices of restaurant operations.

### **3. Plaintiff's Intentional Underreporting of Employee Payroll Hours**

In yet another instance of Plaintiff's misconduct, Plaintiff has also repeatedly failed to acquiesce to Caporuscio's instructions that she refrain from *reducing employee hours* on the weekly payroll. All employee hours for managers and staff are tracked by the POS system, which requires all employees to clock in and clock out for every shift. See Affidavit of Michele Vianello ("Vianello Affid."), Exhibit D to Caporuscio Affid., at ¶21. The hours for each employee are thus a matter of electronic record, and not subject to subjective adjustment, much less by a part-time bookkeeper.

Yet, Plaintiff routinely and without exception entered certain managers' hours into the payroll incorrectly, at a number that was *lower* in every single instance than the hours that were reflected on the POS system. Id. Despite numerous warnings to Plaintiff that shift managers complained about their hours not being properly reflected in their checks and that she did not have discretion to reduce managers' hours -- and Plaintiff was specifically cautioned that New York's Wage and Hour Law imposes penalties and fines upon employers who fail to pay employees for the time they work -- Plaintiff nevertheless continued, in breach of her contractual and fiduciary obligations, to intimidate and threaten employees during her bookkeeping visits to Keste, and continued to reduce manager



hours on the payroll from that which was reported. Keste was forced to take corrective action for each such improper reduction of hours by Plaintiff. Caporuscio Affid. at ¶37.

**4. Plaintiff's Bookkeeping Errors and Failure to Maintain a Schedule**

On August 28, 2014, Plaintiff and her then (third) attorney -- who negotiated the Consent Order on Plaintiff's behalf -- proposed and agreed to a work schedule for her resuming bookkeeping activities at Keste: Plaintiff agreed to work Tuesday, Wednesday and Thursday from 9 am to noon (so as not to take up restaurant space and interfere with Keste's lunchtime or dinnertime operations). Plaintiff participated in the conference call, as did Caporuscio and his and Keste's attorney. Caporuscio Affid. at ¶38. Indeed, by September 2, 2014 email, Plaintiff's lawyer (third one) memorialized the following agreement:

- Sandra will be present at Keste on Tuesdays, Wednesdays and Thursdays from 9 a.m. to noon. Sandra will have the right but not the obligation to appear at Keste on those days. All necessary invoices, checkbooks, books and records, and the company's laptop computer will be available at Keste on these days during those hours.
- Should exigent circumstances require an adjustment to this Tuesday-Thursday schedule, Sandra will advise me and I will communicate promptly with you on the issue. Keste's preference is that Sandra not conduct her reviews on Fridays.

See September 2, 2014 email (Exhibit D to Carvelli Affid.). Although Defendants agreed to this proposed schedule, Plaintiff has since disavowed it. Caporuscio Affid. at ¶38. She does not work when she is scheduled, resulting in a lack of communication and coordination. Also, she does not pay invoices that are due and withholds invoices from the database. This, coupled with her interference with the daily deposits, has created ongoing problems with managing accounts payable, reconciling the database and maintaining accurate financial records. Id. at ¶39.

Plaintiff's careless bookkeeping practices are demonstrated by a single, colossal error that she made, tried to deny and then blamed on others, leaving Caporuscio to clean up her mess.

Keste's QuickBooks database has a "tickler" feature that denotes when invoices are due to be paid. Upon resuming bookkeeping functions in August, Plaintiff paid all invoices that Keste had on hand, without regard to their due dates and without regard to Keste's funds available to pay them. *Id.* at ¶40. The predictable result was that as of August 28, 2014 she had overdrawn Keste's checking account by the amount of \$25,940.27 because she prepaid invoices that were not due until mid and late September. Caporuscio was forced to borrow money personally on a short-term basis to assure that Keste had adequate funds to cover Plaintiff's errors, and Plaintiff herself refused to contribute any money to cover the overdraft. *Id.*

#### **5. Plaintiff's False "Kickback" Allegations**

Plaintiff has previously alleged in a sworn statement put before this Court that "Caporuscio conspired with Jeff Kurnit, the president of WiCloud, to create a *fraudulent* invoice." *See* Affidavit of Sandra Manzella dated December 19, 2014 at ¶17 (emphasis added). This astounding allegation is the most illustrative single example of Plaintiff's incompetence as a bookkeeper, her abusive conduct of Keste vendors, her reckless willingness to make false allegations without regard to their consequences.

Kurnit has previously submitted an affidavit<sup>1</sup> (Exhibit E to Caporuscio Affid.) in which he emphatically denied participating in any fraudulent conspiracy with Caporuscio. He also tracked WiCloud's invoicing to and payments received from Keste and demonstrated that all financial transactions between WiCloud and Keste were properly documented and fully satisfied. *See* Kurnit

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<sup>1</sup> On December 22, 2014, Plaintiff filed a Motion for Appointment of a Temporary Receiver, on grounds that Caporuscio had for years been engaged in a scheme at Keste to defraud her from the benefits of ownership. By Order dated April 13, 2015, this Court summarily denied Plaintiff's motion in its entirety. Plaintiff's supporting affidavit consisted entirely of rank speculation, innuendo, hearsay and overblown rhetoric, including impermissible allegations made "on information and belief" or having "reason to believe" as well as accusations that Caporuscio conspired with vendors for "kickbacks," and "doctored" invoices and is "running wild on a spending spree for his other businesses using Keste's money." That *Plaintiff was Keste's bookkeeper* throughout the time that the alleged fraud was occurring and was able to profess ignorance of it starkly illustrates the extent of Plaintiff's utter incompetence and ill-motive -- no bookkeeper with any degree of competence would have made such demonstrably false allegations in a sworn statement submitted to the Court.

Affid. at ¶¶8-9. Needless, to say, Plaintiff's false and defamatory allegations concerning Kurnit are damaging to Keste's business, betray Plaintiff's bad faith conduct and constitute a breach of her contractual and fiduciary obligations to Keste and Caporuscio.

**6. Plaintiff's False Allegations Against and Attempt to Fire Michele Vianello**

Vianello has been the General Manager of "Keste Pizza & Vino" since December of 2013. Vianello Affid., Exhibit D to Caporuscio Affid., at ¶2. Caporuscio hired Vianello, who was eager to work with Caporuscio based upon his reputation in the restaurant industry for *pizza Napoletana*. *Id.* at ¶3. Despite Vianello's extensive experience in the restaurant industry, however, Plaintiff did not approve of his hire and has harassed and disparaged Vianello in her effort to force him out of Keste. Two incidents show Plaintiff's intentional failure to act in Keste's best interests in favor of her own inscrutable desire to control Keste at any expense.

On November 13, 2014 at Keste's premises, Plaintiff accused Vianello in the presence of other Keste employees that he could not be trusted to make Keste's daily deposits, that he was "stealing" from her and that she needed to make the daily deposits herself in order to prevent them from being stolen. *See* Vianello Affid. at ¶9. Plaintiff also accused Vianello of stealing wine from Keste's inventory. *Id.* On November 21, 2014, Vianello sent an email to Plaintiff (Exhibit B to Vianello Affid.) challenging and asking her for proof of her accusations against him. Caporuscio similarly demanded that Plaintiff share with him any evidence of misconduct by Vianello or anyone else. Caporuscio Affid. at ¶44. Plaintiff failed and refused to respond to Vianello or Caporuscio, notwithstanding her fiduciary duty to act in Keste's best interests. *Id.*

On March 10, 2015, Plaintiff confronted Vianello in front of the entire Keste staff and accused him of stealing an electric delivery bike from Keste. She called the police, who came to

Keste and had Vianello removed from the premises and told him that if he returned -- to the restaurant he managed -- he would be arrested for trespassing. Id. at ¶45.

In fact, the bike was not stolen. It was in the custody of another delivery employee with Caporuscio's permission. Id. at ¶46. Caporuscio had instructed the delivery employees to take the electric bikes home at the end of night shifts so that they would not be stolen -- two electric bikes were previously stolen from Keste when left overnight at the premises. Vianello did not steal the bike; he did not even use it, as Plaintiff is well aware. Vianello contacted Caporuscio while the police were still at Keste and Caporuscio instructed him to telephone the delivery employee, who returned the bike to Keste even before the police left the premises. Vianello was understandably upset and scared, and left Keste's premises at the instructions of the police. Id.

The next morning, Caporuscio accompanied an angry Vianello to the police station and they explained that Keste is the subject of a civil lawsuit between the owners and that Plaintiff did not have the authority to fire management level employees under the Consent Order and that nothing has been stolen from Keste by anyone. They were advised to keep at Keste's premises a statement from Caporuscio indicating that he was the majority owner, that there is a lawsuit pending in which a Consent Order identified the parties' responsibilities, and that Vianello under Caporuscio's authority has the right as an employee to be present at Keste. Id. at ¶47.

Plaintiff's improper harassment, false accusations against and unauthorized attempt to fire Vianello constitute a breach of her contractual and fiduciary obligations.

**7. Plaintiff's Collection of Unearned Salary**

Plaintiff is not entitled to unfettered employment or to receive a mandatory, overinflated weekly salary of \$840, as was set by the April 26, 2013 Order based upon incomplete information and then included in the Consent Order as an interim accommodation.

The Consent Order provides that Plaintiff “shall be entitled to a gross salary of \$280.00 per day, not to exceed \$840.00 gross per week, for her services as an employee of Keste.” See Consent Order at ¶10. The Consent Order thus requires Plaintiff to perform “services” on a daily basis, and does not entitle Plaintiff to take compensation for a no-show job. Moreover, Paragraph 4.9 of the Operating Agreement provides only that Plaintiff and Caporuscio “shall be entitled to compensation, taken at such times and in such amounts as they reasonably determine, *for running the day-to-day operations of the Company.*” (emphasis added). Plaintiff is thus required to earn any pay.

Notwithstanding that Plaintiff has failed and refused to adhere to the work schedule that she had previously agreed to, she has routinely failed to show up for work at Keste or to perform bookkeeping functions remotely. There has not been a single week since at least December of 2014 in which Plaintiff put in three days of work -- and, most often, she put in none. Caporuscio Affid. at ¶49.

On the few occasions that she visited Keste’s premises, she spent her time interrogating employees and secretly taping their conversations. Nevertheless, and despite Caporuscio’s objections, Plaintiff continued to pay herself the maximum salary permitted by the Consent Order for each week since December 2014. A printout from Keste’s Account QuickReport (Exhibit F to Caporuscio Affid.) shows checks, all in the amount of \$840, that Plaintiff paid to herself for the period December 9, 2014 to and including April 22, 2015. In addition to these, Plaintiff also took three checks, all dated January 29, 2015, through Keste’s payroll, in the amounts of \$840, \$840 and \$280. Id. at ¶50.

Plaintiff did *not* work for the days that she paid herself. She worked few if any of them, and when she showed up she did not perform bookkeeping services. Id. at ¶51. Just as Plaintiff refused to follow a set schedule because the days and times were not enumerated in the Consent Order, so too did she pay herself the highest number available to her in the Consent Order, without any regard to discharging her own obligations to earn that pay, or to consider the

consequences to Keste by her taking compensation that she did not earn. Nowhere in the Operating Agreement is Plaintiff to be guaranteed employment, much less provided with a weekly salary of \$840, or any salary. See Operating Agreement at ¶4.9. That paragraph merely grants Plaintiff an *entitlement* -- not an automatic and unfettered right -- to compensation for “running the day-to-day operations” provided in an amount “as they reasonably determine.” Id.

Plaintiff’s taking of no-show salary is contrary to the Consent Order and the Operating Agreement and constitutes a breach of Plaintiff’s contractual and fiduciary obligations.

**8. Plaintiff’s Failure to Make a Required Capital Contribution**

On February 10, 2015, because Keste’s cash flow was lagging behind its ordinary expenses -- a situation exacerbated by Plaintiff’s reckless withdrawal of \$17,500 from Keste in December -- Caporuscio made a personal loan to Keste in the amount of \$3,500 to enable Keste to pay certain ordinary expenses. At the same time, Caporuscio also deferred his own salary so that Keste would have funds available to pay certain outstanding bills, including sales tax due, during the typically slow winter months. Caporuscio Affid. at ¶52.

Although Caporuscio instructed that Plaintiff as a member should defer her salary for the same time period, on February 12, 2015, within a day or so of his having deposited \$3,500 in Keste’s account from his personal funds, Plaintiff made two cash withdrawals, each in the amount of \$840, from the same account and in effect *paid herself her “salary” from the funds that Caporuscio had loaned to Keste.* Id. at ¶53. Plaintiff’s withdrawals prohibited Keste from paying certain of its bills in the ordinary course, and she thereafter refused to return the funds that she paid to herself, once again putting her own selfish interests ahead of those of Keste’s.

On March 26, 2015, Caporuscio converted his \$3,500 loan to an additional capital contribution to Keste and required in his capacity as majority owner each of the members -- Plaintiff --

to make an additional capital contribution to Keste in accordance with paragraphs 3.3 and 4.2A of the Operating Agreement in the amount proportional to her interest, \$3,150. Plaintiff was requested and required to make the capital contribution to Keste by no later than April 6, 2015 and was further advised that her failure to make the additional capital contribution would impact her ownership interest and rights under the Operating Agreement. *Id.* at ¶54.

Plaintiff has nevertheless failed and refused to date to make the requisite capital contribution to Keste, and also had the audacity to keep as “salary” \$1,680 of the \$3,500 that Caporuscio contributed without regard to impact of her actions upon Keste, *id.* at ¶55, in breach of her contractual and fiduciary obligations to Keste and Caporuscio.

#### **I. Keste’s Management and Financial Controls**

Because Caporuscio is presently stuck with Plaintiff’s part-time, non-exclusive, sporadic and incompetent bookkeeping services by the interim Consent Order, he has put in place a system of controls to ensure that Keste’s books and records and financial affairs, as well as its relationships with employees, managers and vendors, are properly maintained. Keste thus pays for a staff of industry professionals to correct, oversee and offset Plaintiff’s incompetent and intermittent bookkeeping and interference with Keste’s operations.

First and foremost, Keste uses an outside accounting firm that specializes in the restaurant industry, Wagner & Zwerman LLP. That firm consults with Keste on a regular basis, reviews its monthly financial records and prepares statements and tax returns. *Id.* at ¶57. Keste has also retained the services of Maria Sessa (“Sessa”), a restaurant industry consultant with more than 30 years of experience managing restaurant finances, troubleshooting and value-engineering systems and processes to maximize restaurant performance. Sessa performs such services for Keste (as well as other restaurants that Caporuscio is associated with), and has also been tasked with overseeing

Plaintiff's part-time bookkeeping efforts, and her services have been made more labor-intensive by Plaintiff's unreliability, lack of competence and understanding and poor performance. Keste pays a monthly retainer to Sessa (only for the work she does for Keste), and Caporuscio has tasked her with direct and daily oversight of Plaintiff's work. *Id.* at ¶58. Finally, Keste also retains a bookkeeper, Adrianna Galvez, on a part-time basis, who directly checks Plaintiff's bookkeeping work on a daily basis and invariably is required to make corrections to her errors and entries, and deal with the overdrafts, incorrect payment of certain invoices and failure to pay others. *Id.* at ¶59.

Plaintiff has still managed to make Keste's bookkeeping as difficult as possible. An email exchange between Plaintiff and Sessa on August 25, 2014 (Exhibit G to Caporuscio Affid.) is illustrative. Sessa, acting on Caporuscio's behalf, asked Plaintiff to "[p]lease confirm that bookkeeping will be done at Keste Mondays through Wednesdays, between the hours of 9:00 am and noon," and that "please note that all payments must be approved by Roberto Caporuscio and are to be made by paper checks, not by electronic payments nor online payments through the Chase website. *The goal is to have payment process be as transparent as possible.*" (emphasis added).

In response, Plaintiff admonished Sessa to "[p]lease start addressing me with some respect because you are also working for me." Plaintiff also responded to Sessa's attempt to coordinate a reliable schedule, stating "as per the consent order, I do not have set hours or days to complete my duties. Therefore, I will be following the consent order from here on." Plaintiff thus refused to establish a reliable schedule for her part-time services, and refused to appreciate that the business she owns would benefit from cooperation and consistency.



## **LEGAL ARGUMENT**

### **I. THIS COURT SHOULD GRANT DEFENDANT MOTION FOR SUMMARY JUDGMENT IN ITS ENTIRETY AS A MATTER OF LAW**

#### **A. Summary Judgment Standard**

This court may grant summary judgment upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. *C.P.L.R.* § 3212(b). Pursuant to *C.P.L.R.* 3212(b), a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986); Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980).

Against this framework, there are no issues of material fact in dispute. Plaintiff may, without credibility, attempt to accuse Caporuscio of further misdeeds, but she cannot deny or the facts of her own pervasive misconduct or escape their consequences. This matter is uniquely ripe for consideration on summary judgment, as this Court itself recognized by authorizing in the Contempt Order leave for the Defendants to file this motion at this time. As set forth below, the evidence of Plaintiff’s breach of the Operating Agreement, breach of her covenant of good faith and breach of her fiduciary obligations to Keste and Caporuscio is clear, unambiguous and overwhelming.

#### **B. Plaintiff Has Breached Her Obligations Under Keste’s Operating Agreement**

Under New York’s Limited Liability Company Law (the “LLC Law”), the operation of a limited liability company (“LLC”) is generally governed by the company’s operating agreement.

N.Y. Ltd. Liab. Co. Law §§ 102(u), 417(a); see also Garcia v. Garcia, 941 N.Y.S.2d 537 (N.Y. Sup. Ct. 2011) (citing Matter of 1545 Ocean Ave LLC, 72 A.D.3d 121, 128-129 (2010) (“[T]he court must first examine the limited liability company’s operating agreement. . .[using] a contract-based analysis.”)). The default provisions of the LLC Law relating to a company’s operation only apply where there is no operating agreement or the operating agreement does not address a certain matter.

Id.

As to management of an LLC by its members, Section 401(a) of the LLC Law states:

Unless the articles of organization provides for management of the limited liability company by a manager . . . management of the limited liability company shall be vested in its members who shall manage the limited liability company in accordance with this chapter, subject to any provisions in the articles of organization or the operating agreement and section four hundred eighteen of this article [entitled, *Classes and voting of members*] granting or withholding the management powers or responsibilities of one or more members or classes of members.

N.Y. Ltd. Liab. Co. Law § 401(a). Thus, although by default management of an LLC is vested in its members, such vesting of authority is “subject to any provisions in . . . the operating agreement . . .”

Id.

Here, Paragraph 4.1 of the Operating Agreement, entitled “Management by Members,” states:

The Company shall be managed and controlled by its Members by *the affirmative vote of a majority in interest of the Members* (unless otherwise provided herein) and shall not have any managers within the meaning of the Act. Notwithstanding anything to the contrary contained in the provisions of this Agreement, the Members agree that Caporuscio and Manzella shall have primary responsibility for running the day-to-day operations of the Company.

(Emphasis added). Paragraph 4.1’s grant of management and control to the majority in interest is further supported by Paragraph 4.4(a), entitled “Authority of Members,” which states:

The Members may exercise all powers of the Company *to the extent authorized by a majority of the interests which vote of the Company*, and do all such lawful acts and things as they may determine to be necessary or appropriate in the ordinary course of the trade or business of the Company.

(Emphasis added). That provision further provides that a member who violates the majority rule may be held liable for any consequences:

Notwithstanding the foregoing, no Member is an agent of the Company solely by virtue of being a Member, and no Member has authority to act for the Company solely by virtue of being a Member. *Any Member who takes any action or binds the Company in violation of this section shall be solely responsible for any loss and expense incurred by the Company as a result of the unauthorized action and shall indemnify and hold the Company harmless with respect to the loss or expense.*

(Emphasis added). Similarly, Paragraph 4.4(c) likewise makes clear that unless expressly requiring a greater vote or consent, all matters requiring a vote shall require a majority. *Id.* (“Unless the Act or this agreement expressly requires a greater vote or consent, all matters requiring the vote, approval, consent, authorization or determination of the Members shall require the vote or consent of the Members holding a **majority** of the issued and outstanding voting interest held by all of the Members.”).

In view of these consistent and controlling provisions of the Operating Agreement, Plaintiff’s disregard of Caporuscio’s instructions concerning her unauthorized withdrawal of \$17,500 from Keste’s account -- which resulted in a contempt of court citation against her -- is inescapably a breach of each of Paragraphs 4.1, 4.4(a), 4.4(c) of the Operating Agreement, for which she must be held liable. So too does Plaintiff’s disregard of Caporuscio’s instructions concerning her handling of Keste’s daily deposits, under-reporting employee hours for payroll, her failure to adhere to a work schedule, paying herself for days she did not work, harassment of and attempt to fire Vianello and failure to make a properly called-for capital contribution under Paragraphs 3.3 and 4.2A each constitute a separate and distinct breach of the Operating Agreement for which Plaintiff must be held responsible for the consequences. Each of these separate breaches alone establishes Defendants’ entitlement to summary judgment of their breach of contract

claim against Plaintiff. Taken together, there can be no doubt of or defense to summary judgment at this stage of the case.

Under New York law, a breach of contract action requires: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) resulting damages. *See, e.g., Hampshire Properties v. BTA Bldg. & Developing, Inc.*, 122 A.D.3d 573, 573, 996 N.Y.S.2d 129, 130 (2d Dep't 2014); *Torok v. Moore's Flatwork & Foundations, LLC*, 106 A.D.3d 1421, 1422, 966 N.Y.S.2d 572, 574 (3d Dep't 2013). These four elements are "essential" to a cause of action for breach of contract. *Dee v. Rakower*, 112 A.D.3d 204, 208-09, 976 N.Y.S.2d 470, 474 (2d Dep't 2013).

On this record, Defendants are entitled to summary judgment on the First Count of their Counterclaim, for breach of contract against Plaintiff, as a matter of fact and law.

**C. Plaintiff Has Breached Her Obligations of Good Faith and Fair Dealing To Caporuscio**

A cause of action for breach of the covenant of good faith and fair dealing under New York law requires a contractual obligation between the parties. *See, e.g., Duration Mun. Fund, L.P. v. J.P. Morgan Sec., Inc.*, 77 A.D.3d 474, 474-75, 908 N.Y.S.2d 684, 685 (1st Dep't 2010) (citations omitted). Every contractual obligation contains an implied covenant of good faith and fair dealing which is breached "when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *P.T. & L. Contracting Corp. v. Trataros Const., Inc.*, 29 A.D.3d 763, 764, 816 N.Y.S.2d 508, 508 (2d Dep't 2006) (internal citations omitted). Stated differently, the covenant is breached "where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other." *Michaan v. Gazebo Horticultural, Inc.*, 117 A.D.3d 692, 693, 985 N.Y.S.2d 601, 603 (2d Dep't 2014) (citations omitted).

For all of the reasons that support Defendants' breach of contract claims, and because there exists a valid and enforceable contract between Plaintiff and Caporuscio, Caporuscio is entitled to summary judgment on the Third Count of Defendants' Counterclaim, for breach of the covenant of good faith and fair dealing against Plaintiff, as a matter of fact and law.

**D. Plaintiff Has Breached Her Fiduciary Obligations To Keste And Caporuscio**

Under New York law, a claim for breach of fiduciary duty requires a movant to prove: (1) the existence of a fiduciary relationship; (2) misconduct by the other party; (3) and damages directly caused by that party's misconduct. See, e.g., Pokoik v. Pokoik, 115 A.D.3d 428, 429, 982 N.Y.S.2d 67, 70 (1<sup>st</sup> Dep't 2014); Kurtzman v. Bergstol, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644 (2d Dep't 2007); Kyle v. Heiberger & Associates, P.C., 40 A.D.2d 588, 835 N.Y.S.2d 644 (2d Dep't. 2007).

Here, as a member of a limited liability company, Plaintiff inescapably owes fiduciary duties to Caporuscio as well as to Keste. It is "elemental" that a fiduciary owes a "duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect," which bars self-dealing and requires fiduciaries to avoid situations where the fiduciaries' personal interests possibly conflict. See Pokoik, 115 A.D.3d at 429; Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466, 541 N.Y.S.2d 746, 539 N.E.2d 574 (1989). Thus, fiduciaries must "act in the best interest" of the corporation to whom they owe a duty, and "not deprive it of any corporate opportunity." See Golden Eagle/Satellite Archery, Inc. v. Epling, 244 A.D.2d 959, 960, 665 N.Y.S.2d 169, 170 (4th Dep't 1997). Cf. Stangel v. Zhi Dan Chen, 37 Misc. 3d 1206(A), 961 N.Y.S.2d 361 (Sup. Ct. 2008) aff'd sub nom. Stangel v. Chen, 74 A.D.3d 1050, 903 N.Y.S.2d 110 (2010) (in real estate setting, finding that fiduciaries owe a duty of loyalty and obligation to act in the best interests of the person and/or entity to whom a duty is owed).

Even a cursory review of Plaintiff's misconduct over the course of this interminable lawsuit demonstrates that, beyond any question, she has breached her fiduciary obligations to Keste and Caporuscio. She has improperly and without authorization taken money from Keste for her own personal legal expenses, in violation of the Operating Agreement and a Court Order. She has paid herself salary over an extended period of time over Caporuscio's objection and without performing services to earn that salary. She has falsely and publicly to Keste's detriment accused Caporuscio of fraudulent conduct, and also falsely and publicly accused at least one of Keste's vendors of conspiring to engage in an illegal kickback scheme with Caporuscio, without regard to the inherent damage Keste's reputation. She has alienated employees by improperly lowering their reported work hours, subjecting Keste to significant liability. She has taken control of Keste's daily cash receipts impermissibly and deprived Keste of cash used for petty expenses and waiter tips. She has overdrawn Keste's account and left Caporuscio to come up with the money to cover her mistakes. She has failed and refused to make a required capital contribution and even taken Caporuscio's capital contribution, which was intended to cover Keste's expenses, in payment of her salary without regard to the impact to Keste. She falsely accused Keste's manager, Vianello, of criminal conduct, had the police remove him from Keste's premises and tried to fire him on pretextual grounds.

Each one of these events has damaged Keste and each constitutes an instance in which Plaintiff has acted in a manner that is contrary to Keste's best interests. There can be no doubt or question but that the totality of Plaintiff's misconduct as set forth in detail above constitutes a breach of her fiduciary duties to Defendants, who are thus entitled to summary judgment on the Second Count of their Counterclaim as a matter of fact and law.

**E. Plaintiff Should Be Removed as Keste's Bookkeeper, Terminated From Further Employment With Keste and Afforded Read-Only Access to Keste's Books and Records**

Section 414 of the LLC Law provides that, unless provided in the Operating Agreement, any or all managers “may be removed or replaced with or without cause by a vote of a majority in interest” of the members entitled to vote. N.Y. Ltd. Liab. Co. Law § 414; Ross v. Nelson, 54 A.D.3d 258 (1st Dept. 2008), appeal denied, 11 N.Y.3d 906 (2009) (although there was no specific provision in the LLC agreement for removal of a member, there was contemplation of member-manager removal by reference to the act in the operating agreement). Here, the Operating Agreement expressly grants managerial control to the majority and therefore, the majority is entitled under the Operating Agreement to restrict any members’ exercise of managerial control.

The Operating Agreement expressly provides that a member who acts in a manner contrary to the majority interest “*shall be solely responsible for any loss and expense incurred by the Company as a result of the unauthorized action.*” See Operating Agreement at Paragraph 4.4(a).

This Court should hold Plaintiff accountable for her misconduct, and enforce the Operating Agreement that Plaintiff signed. She cannot be trusted to serve as Keste’s bookkeeper. She is not entitled to employment with Keste, or any salary. She should not have check-signing authority for any Keste account and should be afforded “read-only” access to Keste’s books and records, if any. She should no longer have any responsibility for any aspect of Keste’s day-to-day activities. Caporuscio, the majority owner, should have the ability to exercise the powers afforded to him under the Operating Agreement, and should be able to terminate Plaintiff’s employment from Keste once and for all. Plaintiff will continue to harm Keste until it is completely destroyed if the *status quo* is permitted to continue.

### CONCLUSION

For the reasons set forth above, Defendants Roberto Caporuscio and Keste Group LLC, respectfully request that the Court grant in its entirety their motion for entry of an Order: (1) pursuant to CPLR §3212(b) granting summary judgment in their favor and against plaintiff Sandra Manzella (“Plaintiff”) on the First (Breach of Contract), Second (Breach of Fiduciary Duty) and Third (Breach of Covenant of Good Faith) Counts of their Counterclaim; (2) prohibiting Plaintiff from performing any bookkeeping services for Keste, and from receiving a mandatory salary from Keste; (3) modifying paragraph 8 of the Consent Order agreed to by the parties and entered by this Court on November 21, 2013 (the “Consent Order”), concerning Plaintiff’s “non-exclusive responsibilities with respect to Keste’s day-to-day operations”; and (4) modifying the Consent Order to limit Plaintiff to “read-only” access to Keste’s books and records.

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Dated: May 4, 2015