

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS Part 3

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OMER GRGUREV and FERDO GRGUREV, as
Minority Shareholders and Each Owning 25% of All
Outstanding Shares of Ocinomled, Ltd.,

Petitioners-Plaintiffs,

Index No. 157551/2019

-against-

**REPORT BY SPECIAL
REFEREE WITH
RECOMMENDATIONS**

MILAN LICUL and BRANKO TURCINOVIC,
Respondents, as the Controlling Shareholders
Holding 50% of All Outstanding Shares of
Respondent OCINOMLED, LTD., and Defendants
ANTHONY ANTONELLO, and THE HARTFORD
LIFE INSURANCE COMPANY,

**Assigned Justice
Honorable Joel M. Cohen**

Respondents-Defendants.
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Christopher E. Chang, an attorney at law duly admitted to practice before all of the
courts of the State of New York, hereby affirms the following under the penalties of perjury:

Preliminary Statement

1. By order of this Court dated August 10, 2020 (“Order”), I was appointed Special Referee “to hear and report, with recommendations, on the Petition for Equitable Dissolution of [Respondent] Ocinomled, Ltd. The issues to be heard and reported on shall include only: **(i)** whether Equitable Dissolution of Ocinomled, Ltd. is warranted and on what terms; **(ii)** such matters as the Special Referee shall determine are necessary to a fair and reasonable valuation of the parties’ capital accounts for purposes of effectuating equitable dissolution; and **(iii)** whether some remedy short of or other than dissolution constitutes a reasonable means of satisfying both the petitioners’ expectations and the right and interests of respondents.”

2. A virtual hearing was conducted over three (3) days on October 12, 13 and 14, 2020 during which the following witnesses testified:

a. *for Petitioners*: Ferdo Grgurev, Omer Grugurev, Phillip Scotti of The Clarkes' Group LLC¹, and expert witnesses Michael J. Garibaldi (accountant) of Garibaldi Group ("Garibaldi") and Scott Gibbs (computer forensic specialist) of Empire Discovery ("Gibbs");

b. *for Respondents*: Branko Turcinovic and expert witness Juli Saitz (accountant) of Ankura Consulting Group LLC ("Saitz").

3. I admitted into evidence the testimony of Ferdo Grgurev (RX 13)² and Milan Licul (PX 89)³ which were taken by depositions in this proceeding on September 4, 2020 and September 10, 2020, respectively. I also admitted into evidence the testimony of Anthony Antonello, Corrado Goglia, Milan Licul, Carin Sarafian, Branko Turcinovic and Dennis Turncinovic which were taken by depositions during 2016 in the prior Federal District Court action between Petitioners and Respondents. PX 83-88.

4. By consent of the parties, I admitted into evidence the testimony of Yigal Rechtman (forensic accountant) of RSZ Forensic Associates ("Rechtman") and Kevin Jennings (business valuation specialist) of JBV Valuation ("Jennings") as expert witnesses which were taken by depositions in this proceeding. RX 16; Referee Ex. 1. I presided over these depositions conducted on August 21, 2020 (Rechtman) and August 28, 2020 (Jennings). Rechtman and Jennings were retained in my capacity as Temporary Receiver of Ocinomled, Ltd. to assist me in the receivership.

¹ The Clarkes' Group LLC is an established, national restaurant operator based in Manhattan.

² "RX ___" refers to Respondents' pre-marked hearing exhibit.

³ "PX ___" refers to Petitioners' pre-marked hearing exhibit.

5. I received into evidence the reports of Petitioners' experts Garibaldi (PX 78, PX 80) and Gibbs (PX 61), Respondents' expert Saitz (RX 17, RX 18), and the report by Robb Arent of Princeton Valuation Group dated September 28, 2016 (PX 42) submitted by Petitioners in the Federal District Court action. I also received into evidence the expert reports of Rechtman (PX 74), Jennings (PX 72) and Kate Edwards of Kate Edwards & Company (PX 79), a restaurant consultant who I engaged to assist me in the receivership as well. All hearing and deposition transcripts and expert reports received into evidence are submitted with this Report.⁴

6. The following is my Report with recommendations.

BACKGROUND FACTS

Delmonico's and Scaletta

7. Petitioners-Plaintiffs Omer Grgurev ("Omer") and Ferdo Grgurev ("Ferdo") (collectively "Petitioners") and Respondents-Defendants Milan Licul ("Licul") and Branko Turcinovic ("Turcinovic") (collectively "Respondents") are equal co-owners of Ocinomled, Ltd. ("Ocinomled") which owns and, until May 2020, operated the renowned restaurant Delmonico's Steak House ("*Delmonico's*") located in the Financial District of Manhattan.⁵ Because Petitioners and Respondents each hold a 25% ownership stake, Petitioners and Respondents each represent half of the voting power in *Delmonico's*.

8. The business relationship between Petitioners and Respondents commenced in the 1980s when they opened their first restaurant, Scaletta ("*Scaletta*"), formerly located at 50 West 77th

⁴ A schedule of all depositions transcripts and expert reports received into evidence is annexed hereto as Schedule A. Approximately 150 exhibits were admitted into evidence at the hearing.

⁵ "Ocinomled" is "*Delmonico*" spelled backwards.

Street in Manhattan. *Scaletta* was owned and operated by a separate corporation, 50/50 Restaurant Corp. ("50/50"). The ownership of 50/50 was the same as that of Ocinoled; Petitioners and Respondent each owned a 25% stake in 50/50.⁶

9. Licul designed, implemented and supervised the operations of *Scaletta*, directing the partners how to operate the business and maintaining control over the restaurant's finances. At the time, Licul already had extensive experience in the restaurant industry as an owner and operator of several restaurants with Turcinovic as his "right-hand man." Ferdo, a well-known international soccer player looking past his playing days, became involved with running *Scaletta's* "front of house" functions which included interfacing with customers as the *maitre d'*. Omer, Ferdo's older brother, was a formally trained chef and ran the kitchen.

10. In or about 1998, Petitioners and Respondents formed Ocinoled and purchased *Delmonico's* from CIBE Beaver LLC ("CIBE"), an Italian restaurant developer and operator which had redeveloped *Delmonico's* after the restaurant had been closed through much of the 1990s. In acquiring *Delmonico's*, Ocinoled also acquired the right to use the *Delmonico's* name, as well as "all other rights" associated with the name. Following the acquisition, *Delmonico's* was refurbished and reopened by Ocinoled in or about 1999.

11. At the outset, Petitioners and Respondents agreed that they would not personally be involved in the day-to-day operation of *Delmonico's*. Licul and Turcinovic were running their other restaurants, *Murano* and *Arno*, while Ferdo and Omer were operating *Scaletta*. Instead, Petitioners and Respondents agreed that Turcinovic's son, Dennis Turcinovic ("Dennis"), would be

⁶ Respondents have owned other restaurants separate and apart from Petitioners, including *Murano* and *Arno*, the latter Respondents own and operate through Balarini Restaurant Corporation. *Arno* is located in the Garment District of Manhattan.

the day-to-day manager of the restaurant together with co-manager, Corrado Goglia (“Goglia”). Prior to being appointed co-manager of *Delmonico’s*, Dennis had worked for Respondents at *Arno*.⁷ From the inception of Ocinomled, Licul maintained exclusive control over *Delmonico’s* operations (with Dennis reporting directly to Licul) and its finances. With regard to *Delmonico’s* finances, Licul retained his long-time accountant, Anthony Antonello (“Antonello”), to manage the bookkeeping and prepare financial reports and tax submissions for the restaurant.⁸ Like Dennis, Antonello reported directly to Licul.⁹ Petitioners and Respondents received regular salaries from Ocinomled. Initially, Petitioners were paid \$500 per week which was later raised to \$1,500 per week. Turcinovic was paid \$1,500 per week while Licul was paid \$2,000 per week.

Respondents’ Use of Delmonico’s Name

12. As the renovated *Delmonico’s* became successful, Respondents decided to expand *Delmonico’s* business. In or about 2006, Respondents created “Delmonico’s Distribution LLC” for the purpose of manufacturing, distributing, marketing and selling various food products such as steak sauces, salad dressings and marinades using the *Delmonico’s* name. In 2012, Respondents converted their restaurant *Murano* into “Delmonico’s Kitchen” and at approximately the same time undertook efforts to open a restaurant on Long Island called “Delmonico’s of Southampton”. The testimony at the hearing established that Respondents offered Petitioners the

⁷ Until its closing in mid-March 2020 because of COVID-19, Dennis and Goglia continued to manage the day-to-day operations of *Delmonico’s*.

⁸ During the relevant time period, Antonello also performed bookkeeping functions for Respondents’ other restaurants.

⁹ This was the extent of Ocinomled’s management structure. The corporation does not have a written shareholders’ agreement in place, nor have there been any formal shareholder meetings, corporate resolutions or elections of officers and/or directors.

opportunity to participate in the expansion of *Delmonico's* business ventures with the investment of additional capital (PX 87, 134:13-136:08), but that Respondents refused being of the view that the expansion of *Delmonico's* into other business ventures using the *Delmonico's* name should be financed by profits from the restaurant's operations.¹⁰

13. Unable to come to terms with Respondents as to *Delmonico's* new business ventures and unable to obtain full disclosure from Respondents regarding the restaurant's financial operations, on November 13, 2013 attorneys for Petitioners sent a "cease and desist" letter to Respondents, demanding access to *Delmonico's* books and records as well:

Please be advised that this firm has been retained by Ferdo Grgurev and Omer Grgurev. As you are aware, our clients are fifty (50%) percent shareholders of [Ocinomled Ltd. a/k/a *Delmonico's* Restaurant].

We have been advised by our clients that you have usurped the business of *Delmonico's* Restaurant by opening competing restaurants named "Delmonicos" of Southampton" and "Delmonico's Kitchen" located at 207 West 36th Street, New York. Indeed, you have used the "Delmonico's" name, which is a trade name owned by Ocinomled Ltd., for your own benefit, and are improperly marketing "Delmonico's Group" to the general public in order to usurp the "Delmonico's" name for your own benefit, in contravention to the interests of Ocinomled Ltd. The foregoing is not only unauthorized, it constitutes a breach of your fiduciary obligations as shareholders of Ocinomled Ltd.

Furthermore, to date, our clients have not received proper accountings with regard to the income generated by *Delmonico's* Restaurant. They have been provided only with very limited information from the company's accountant. Accordingly, on behalf of our clients, we hereby demand access to all books and records of *Delmonico's* Restaurant for review by our clients and accountants designated by

¹⁰ For 2012, the restaurant generated gross profits of \$3,447,171 on revenues of \$5,896,306 (PX 11). For 2013, the restaurant's profitability increased with gross profits of \$4,442,752 on revenues of \$6,655,862. PX 21.

our clients.

In the interim, you are hereby put on notice that your continued use of the “Delmonico’s” trade name for restaurants other than the restaurant owned by Ocinomled Ltd. must cease immediately. Demand is therefore made that the “Delmonico’s” trade name cease to be used with regard to the restaurant that you have opened in Southampton and the restaurant that you opened at 207 West 36th Street, New York, New York, and with regard to any other restaurant.

The continued use of the Delmonico’s trade name in these and other locations is interfering with Ocinomled Ltd.’s ability to franchise the name or to otherwise exploit the name for business purposes and/or marketing purposes.

Your continued improper actions are causing confusion in the marketplace and are causing our clients to sustain substantial damages. Our clients reserve the right to seek an accounting of all profits generated by the improper use of the Delmonico’s trade name.

Accordingly, should you fail to abide by these demands, our clients have authorized us to commence immediate legal action to protect their interests.

Please be guided accordingly.

PX 29.¹¹

14. Four (4) days later, Licul sent the following handwritten note to Petitioners dated November 17, 2013 suggesting an amicable resolution without attorney involvement but not offering any specific proposals:

¹¹ While not specifically addressed by the parties during the hearing, I am aware as Temporary Receiver of Ocinomled that Ocinomled’s rights to exclusive use of the *Delmonico’s* name is under challenge in the Federal Trademark courts by the *Emeril* restaurant group in New Orleans and a restaurant operator in upstate New York. The litigation in the Federal Trademark courts as to Ocinomled’s exclusive right to use of the *Delmonico’s* name is presently stayed because of the pendency of this proceeding.

OMER & FERDO

WE RECEIVED YOUR ATTORNEYS LETTER REGARDING YOUR THOUGHTS AND CONCERNS FOR THE USE OF DELMONICO BRAND. AT THIS POINT WE ARE EXTREMELY DISAPPOINTED THAT THE CONCERNS THAT YOUR ATTORNEY PRESENTED IN THE LETTER COULD NOT BE ADDRESSED (*sp*) IN PERSON. OUR RELATIONSHIP IS OVER 25 YEARS OLD AT THIS POINT AND WE WOULD HOPE WE CAN TALK WITHOUT INVOLVING THE LEGAL EXPENSE OF LAWYERS. WE ARE ALL GETTING OLD AND SAME (*sp*) OF THE AMBITIONS AND PLANS MAY HAVE CHANGED SINCE WE CAME TOGETHER (*sp*) ALL THOSE YEARS AGO. WE SHOULD EXPLORE THOSE CHANGES TO SEE WHERE WE WANT TO BE AT THIS POINT IN OUR LIVES. THERE IS NO REASON THAT ALL CONCERNS SHOULDN'T BE ADDRESSED TO EVERYONE'S SATISFACTION. IN A LONG AN (*sp*) GOOD FRIENDSHIP, LET'S QUICKLY (*sp*) COME TO SOME COMMON GROUND THAT ALL CAN LIVE WITH NOW AND IN THE FUTURE. MAYBE AT THIS TIME WE SHOULD ALL GO IN DIFFERENT DIRECTION.

MILAN & BRANKO

PX 30.

2014: Petitioners' First "Books and Records" Proceeding

15. During 2014, some settlement discussions between Petitioners and Respondents occurred but to no avail. In essence, Respondents sought to buy-out Petitioners' ownership interests in *Delmonico's* (Respondent 58)¹², but -- as Petitioners made abundantly clear at the hearing -- they were not interested in selling. Further exacerbating the situation was Licul's deflection of Petitioners' repeated requests to examine *Delmonico's* financial books and records.¹³

¹² "Respondent ____" refers to Respondents' hearing exhibit which was not pre-marked.

¹³ At the hearing, Turcinovic testified unequivocally that all actions engaged in by Licul at all relevant times in this proceeding were engaged in with Turcinovic's full knowledge and consent.

16. On December 4, 2014, Petitioners commenced a proceeding by order to show cause in the Supreme Court, New York County under Index No. 161976/2014 (Kern, J.) seeking access and inspection of Ocinoled's financial books and records and other corporation records pursuant to BCL § 624(d). While the court docket in that proceeding indicates Respondents agreed as early as January 2015 to provide disclosure of the records sought by Petitioners, the proceeding was not fully resolved until nine (9) months later when Licul filed an affidavit with the court dated September 17, 2015 certifying that all the records sought by Petitioners had been provided to them. Respondent 63.¹⁴

17. Approximately two (2) weeks after Licul's September 17, 2015 compliance affidavit was filed with the court, Licul sent the following handwritten note to Petitioners dated October 2, 2015:

OMER & FERDO

IT IS IN THE BEST INTEREST OF ALL OF US TO RESOLVE THE ISSUES WE HAVE. WE NEED TO DETERMINE THE VALUE OF BOTH DELMONICOS & SCALETTA IN ORDER TO SELL THE RESTAURANTS TO A THIRD PARTY OR BUY EACH OTHER OUT. THIS NEEDS TO BE DONE SOON. IF YOU DO NOT AGREE TO APPRAISLS (sp) TO BOTH RESTAURANTS, THE LAWYER WILL START TO DISSOLVE 50/50 RESTAURANT CORP., BECAUSE WE CAN NOT AGREE ON IMPORTANT ISSUES. THE SCALETTA LEASE IS COMING DUE IN 2016. IF WE CAN HELP YOU WITH THE RENEWAL OF THE LESAE THIS COULD BE PART OF OUR SETTLEMENT.

STARTING JANUARY 1 - 2016 PRESIDENT OBAMA'S AFFORDABLE CARE ACT (ACT) MANDATES THAT OUR RESTAURANTS PROVIDE INSURANCE HEALTH CARE TO

¹⁴ During the pending of the 2014 books and records proceeding, Licul again made general settlement overtures directly to Petitioners during 2015, but again without making any specific proposals. Respondent 59 and 60.

ALL OUR EMPLOYEES. EVEN THOUGH YOU HAVE LESS THAN 50 EMPLOYEES IN SCALETTA YOU ARE CONSIDERED PART OF THE OVERALL GROUP BECAUSE OF COMMON OWNERSHIP OF BUSINESSES. THEREFORE YOU MUST PROVIDE HEALTH INSURANCE COVERAGE FOR ALL EMPLOYEES WHO WORK FOR 30 HOURS OR MORE PER WEEK. THAT COAST (sp) IS EXPECTED TO COAST (sp) APPROXIMATELY \$300 - TO \$400 PER MONTH PER EMPLOYEE. NON-COMPLIANCE WITH THE ACA WILL CAUSE EXTREMELY HIGH PENALTIES AND FINES.

MILAN

PX 38.

2015: Petitioners' Federal Action

18. Unfazed by Licul's veiled threat to dissolve 50/50 unless a settlement was reached, on December 16, 2015 Petitioners commenced an action against Respondents and others in the United States District Court for the Southern District of New York under Docket No. 15 Civ. 9805 (Woods, J.) asserting a "smorgasbord"¹⁵ of fourteen (14) derivative and direct claims relating to Ocinomled, ranging from Federal trademark infringement to tortious interference ("Federal Action"). In February 2016, Respondents filed their answer in the Federal Action denying the substantive allegations of Ocinomled's complaint and asserting counterclaims against Petitioners for breach of duties of care and loyalty with regard to 50/50, conversion, unjust enrichment and fraud.¹⁶

¹⁵ *Grgurev v. Licul*, 229 F.Supp. 3d 267 (S.D.N.Y. 2017).

¹⁶ Respondents' counterclaims in the Federal Action asserted the same types of claims of mismanagement, looting and oppression as to Petitioners' ownership and operation of *Scaletta*, as Petitioners assert against Respondents in this proceeding regarding Respondents' ownership and operation of *Delmonico's*.

Respondents also petitioned for dissolution of 50/50.¹⁷

19. Prior to the filing of the Federal Action, Petitioners had continued to receive regular salary payments from Ocinomled. However, for 2015 Licul unilaterally reduced Petitioners' salaries by approximately 68%. Thereafter, from 2016 through 2019, Petitioners ceased receiving *any* salary payments from Ocinomled, while Licul's and Turcinovic's salaries from Ocinomled increased substantially during the same period. The following table shows the salary payments to Petitioners and Respondents by Ocinomled for the period 2011-2019:

	2011	2012 ¹⁸	2013	2014	2015	2016	2017	2018	2019
Licul	74,000	54,000	101,500	106,000	155,000	182,000	342,500	416,000	416,000
Turcinovic	47,000	28,000	75,500	79,500	129,000	156,000	312,250	377,000	377,000
Ferdo	47,000	28,000	75,500	79,500	25,500	--	--	--	--
Omer	47,000	28,000	75,500	79,500	25,500	--	--	--	--

PX 5, 11, 21, 32, 35, 41, 44, 49; Referee Ex. 2.

20. Further, commencing in 2015 Petitioners ceased to receive *any* distributions of profits from Ocinomled even though *Delmonico's* gross profits generally increased from 2011 through 2019 as shown below:

2011	2012	2013	2014	2015	2016	2017	2018	2019
3,568,829	3,447,171	4,402,699	4,585,935	4,821,679	5,353,931	6,056,502	6,552,760	6,741,707

PX 5, 11, 21, 32, 35, 41, 44, 49; Referee Ex. 2.

¹⁷ In March 2016, Petitioners served an amended complaint in the Federal Action expanding upon the claims asserted in their initial complaint.

¹⁸ It appears salaries were reduced for 2012 because *Delmonico's* business was adversely effected by Hurricane Sandy that year.

February 2019: Petitioners' Second "Books and Records" Proceeding

21. On February 15, 2019 (during the pendency of the Federal Action), Petitioners commenced another proceeding in the Supreme Court, New York County under Index No. 650955/2019 (Schechter, J.) again seeking access and inspection of Ocinoled's financial books and records and other corporation records pursuant to BCL § 624(d). In particular, the documents sought by Petitioners in this second proceeding was access to Ocinoled's electronic "Point of Sales" data ("POS") including audit records.¹⁹ By decision and order dated April 16, 2019, the court (Schechter, J.) granted the relief sought by Petitioners. As a result of disputes between Petitioner and Respondents regarding the court's April 16, 2019 order, the court issued a second order dated October 28, 2019 again directing Ocinoled to provide access to the information demanded by Petitioners. Upon being provided access to the POS information demanded on November 2019, Petitioners' forensic computer expert (Gibbs) ascertained that because Ocinoled switched to a different POS system in September 2018, there was no POS data for Ocinoled prior to May 2018. Further, when Gibbs examined the computer system which housed Ocinoled's prior POS system, Gibbs found that all of Ocinoled's POS electronic data in the prior POS system had been deliberately "wiped" clean. PX 61.

May 2019: Respondents' "Wives and Daughters" Action

22. On May 8, 2019, three (3) months after Petitioners commenced the second "books and records" proceeding, Respondents commenced an action against Petitioners' wives and daughters in this court under Index No. 154738/2019 (Cohen, J.) asserting the same claims of

¹⁹ Petitioners made a formal request for access to Ocinoled's POS data and system (together with additional inspection demands) on December 4, 2018. PX 50. This request was prompted by discovery obtained by Petitioners in the Federal Action.

looting, theft, etc. as to 50/50 against Petitioners' wives and daughters. These claims against Petitioners' wives and daughters are substantively the same as the claims Respondents asserted in their counterclaims against Petitioners in the Federal Action. This "wives and daughters" action is pending.

August 2019: The Instant Dissolution Proceeding

23. On August 2, 2019, Petitioners commenced the instant dissolution proceeding, PX 57. Issue was joined in the instant proceeding in October 2019. Respondents' answer in this proceeding asserts the same counterclaims against Petitioners which were asserted by Respondents in the Federal Action; that is, breach of duties of care and loyalty by Petitioners with regard to 50/50, conversion, unjust enrichment and fraud. RX 42. In May 2020, the Federal Action was dismissed without prejudice because of the pendency of the instant proceeding.

24. By order dated May 4, 2020, I was formally appointed Temporary Receiver of Ocinoled pursuant to an application made by Petitioners by order to show cause in January 2020.

FINDINGS

25. The Order appointing me Special Referee expressly sets forth the issues to be heard and reported on:

The issues to be heard and reported on shall include *only*: **(i)** whether Equitable Dissolution of [Respondent] Ocinoled, Ltd. is warranted and on what terms; **(ii)** such matters as the Special Referee shall determine are necessary to a fair and reasonable valuation of the parties' capital accounts for purposes of effectuating equitable dissolution; and **(iii)** whether some remedy short of or other than dissolution constitutes a reasonable means of satisfying both the petitioners' expectations and the right and interests of respondents." *(Emphasis added)*.

In accordance with the Order, this Report with recommendations address only the issue of equitable

dissolution of Ocinomled and the issues related thereto, and does not address the merits of Respondents' counterclaims against Petitioners as they relate to 50/50 and the operation of *Scaletta*.

26. Equitable dissolution is warranted when the officers or controlling shareholders of a corporation "have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute. *Leibert v. Clapp*, 13 N.Y.2d 313, 317 (1963). See also, *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 70 (1984); *Fedeles v. Seybert*, 250 A.D.2d 519 (1st Dept. 1998). "When a breach of fiduciary duty occurs, that action will be considered unlawful and the aggrieved shareholder may be entitled to equitable relief." *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 569 (1984).

27. Common law principles are supplemented by New York's Business Corporation Law which provides that evidence of illegality, fraud or oppressive conduct towards minority shareholders may also warrant equitable dissolution. See *Ferolito v. Vultaggio*, 99 A.D.3d 19, 29 (1st Dept. 2012) ("allegations of looting, when combined with the other allegations of oppression" may provide basis of equitable dissolution); *Matter of Kemp*, 64 N.Y.2d at 70-71 (noting that the standards of BCL § 1104-a has "supplement[ed] this principle of judicially ordered equitable dissolution," and that "mistreatment of complaining shareholders" to warrant equitable dissolution may be found in "illegal, fraudulent, and oppressive conduct") (internal quotations omitted).

28. As a general rule, fiduciaries "must treat all shareholders, majority and minority, fairly." *Alpert*, 63 N.Y.2d at 569 ("[A]ll corporate responsibilities must be discharged in good faith and with conscientious fairness, morality and honesty in purpose." *Id.* Fiduciaries are charged with "obligations of candor" and "good and prudent management of the corporation." *Id.* "Not honesty

alone, but the punctilio of an honor the most sensitive, is the standard of behavior.” *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

29. The fiduciary duties of a controlling shareholder and officer in a closely-held corporation include a duty “to scrupulously guard the assets of the corporation and honestly account to plaintiff for the application thereof.” *Cortes v. 3A N. Park Ave Rest Corp.*, 46 Misc. 3d 670, 694 (Sup. Ct., Kings Co. 2014). Fiduciary duties also include an obligation to maintain, and account for, accurate books and records of a corporation. *See e.g., Atlantis Management Group II LLC v. Nabe*, 177 A.D.3d 542 (1st Dept. 2019); *Weiner v. King*, 43 Misc.3d 1203(A) (Sup. Ct., New York Co. 2014). Fiduciary duties prohibit a controlling shareholder from usurping opportunities from the business. *See e.g., 21st Century Diamond, LLC v. Allfield Trading, LLC*, 88 A.D.3d 558, 559 (1st Dept. 2011) (breach of fiduciary duty based on usurping corporate opportunity).

30. Oppressive conduct includes conduct that defeats the reasonable expectations of shareholders. *See Matter of Kemp*, 64 N.Y.2d at 70. In a closely-held corporation, shareholders may reasonably expect not only a “fair and equal return” on their capital contributions, but also “to be actively involved in [the corporation’s] management and operation.” *Id* at 71. “[T]he shareholder in a close corporation is a co-owner of the business and wants the privileges and powers that go with ownership. His participation in that particular corporation is often his principal or sole source of income.” *Id*. Moreover, he may “look[] to salary for the principal return on his capital investment, because earnings of a close corporation, as is well-known, are distributed in major part in salaries, bonuses and retirement benefits.” *Id*. “A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others

in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.” *Id.* at 73.

31. Oppressive conduct also has been found in a controlling shareholder’s operation of the company in such a way as to defeat the non-controlling shareholder’s “expectations for cooperation and disclosure of relevant business information between the parties.” *Matter of In re Dissolution of Clever Innovations, Inc.*, 94 A.D.3d 1174, 1176 (3d Dept. 2012). In the context of a closely-held “S” corporation, courts have found oppression when the controlling shareholder manipulated dividends from a profitable enterprise, so as to “make the stock a liability when the company was making money in order to effectuate a squeeze out.” *Little v. Waters*, 18 Del. J. Corp. L. 315, 328 (Del. Ch. 1992). *See also, Congel v. Malfitano*, 31 N.Y.3d 272, 304 (2018) (noting the court’s “desire to deter unfair squeeze-outs and safeguard minority shareholders from oppression”).

32. Based on the totality of events from 2013 to the present, I conclude that commencing in 2013 Respondents breached their fiduciary duties to Petitioners when Respondents intentionally excluded Petitioners from the management and operation of *Delmonico’s* by unjustifiably denying Petitioners prompt and meaningful access to the restaurant’s financial books and records. I further conclude that beginning in 2015 Respondents engaged in a pattern of oppressive conduct toward Petitioners for the purpose of forcing Petitioners to surrender their 50% interest in *Delmonico’s* to Respondents when Petitioners indicated their unwillingness to sell their interest in the restaurant in 2014.

33. With regard to Petitioners’ formal request in November 2013 for access to *Delmonico’s* financial books and records (PX 29) -- even assuming the existence of *bona fide* issues as to whether or not Respondents had the right to use the *Delmonico’s* name for “Delmonico’s

Kitchen” and/or “Delmonico’s of Southampton” -- there was absolutely no legal justification for Respondents not to *promptly* comply with Petitioners’ November 13th demand. Petitioners’ status as one-half owners of *Delmonico’s* has never been challenged by Respondents and, simply put, when owners of one-half of a company want to see the company’s books and records, they are entitled to see them forthwith. That Respondents materially breached their fiduciary duties to Petitioners in this regard is highlighted by the fact that Petitioners were forced by Respondents’ intransigent attitude to seek legal remedies by way of the 2013 “books and records” proceeding, and that it took Respondents almost nine (9) months to provide complete access to the records when, in fact, such access should have taken no longer than days.

34. Equally troubling is the fact that Petitioners were forced to resort to legal remedies again in 2019 to obtain access to *Delmonico’s* financials by way of a second “books and records” proceeding. Again, Petitioners are the undisputed 50% owners of *Delmonico’s* and there was simply no valid basis for Respondents to refuse to immediately comply with Petitioners’ requests for access. Moreover, when Respondents’ conduct in 2018-2019 is viewed in the context of the discovery later in 2019 by Petitioners’ computer forensic specialist that the restaurant’s “Point of Sales” data for the period prior to May 2018 had been completely “wiped” clean and that such a “wiping” could have only been occurred by affirmative, intentional actions, the spoliation of the “POS” data requires an adverse inference to be drawn against Respondents as to their *sub rosa* motive in refusing to provide immediate access to the POS data when access was demanded in December 2018. PX 50. *VOOM HD Holding LLC v. Echostar Satellite L.L.C.*, 93 A.D.3d 33, 36 (1st Dept. 2012); *Kronisch v. U.S.*, 150 F.3d 112, 116 (2d Circuit 1998) (“[W]ell-established and a long-standing principle of law that a party’s intentional destruction of evidence relevant to proof of

an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for the destruction”).²⁰

35. The proof in this case is also equally clear that commencing in 2015 Respondents engaged in a deliberate and calculated course of oppressive conduct toward Petitioners for the purpose of forcing a “buy-out” of Petitioners’ 50% ownership interest in *Delmonico’s* on terms dictated by Respondents. In December 2014, Petitioners -- as was their right -- commenced the Federal Action. Thereafter, Licul’s overtures during 2015 to buy-out Petitioners’ interest in *Delmonico’s* were rejected. Respondent 59 and 60. Coming to the realization that his “carrot” approach with Petitioners was not working, Licul turned to the “stick” approach and for 2015 unilaterally reduced Petitioners’ salaries by some 68%. When the salary reduction did not “soften” Petitioners’ position, Licul then decided to completely terminate Petitioners’s salaries commencing 2016 while at the same time substantially increasing his own and Turcinovic’s salary.²¹ The following table shows the salary payments to Petitioners and Respondents by Ocinomled for the period 2011-2019:

	2011	2012	2013	2014	2015	2016	2017	2018	2019
Licul	74,000	4,000	101,500	106,000	155,000	182,000	342,500	416,000	416,000
Turcinovic	47,000	28,000	75,500	79,500	129,000	156,000	312,250	377,000	377,000
Ferdo	47,000	28,000	75,500	79,500	25,500	--	--	--	--
Omer	47,000	28,000	75,500	79,500	25,500	--	--	--	--

²⁰ The report and hearing testimony of Petitioners’s computer forensic specialist (PX 61) was not rebutted by Respondents at the hearing.

²¹ Respondents were also receiving salary payments from *Arno* further enhancing their financial advantage and bargaining position over Petitioners.

PX 5, 11, 21, 32, 35, 41, 44, 49; Referee Ex. 2.²²

36. Further, commencing in 2015 Petitioners ceased to receive *any* distributions of profits from Ocinoled even though *Delmonico's* gross profits generally increased from 2011 through 2019 as shown in the following table:

2011	2012	2013	2014	2015	2016	2017	2018	2019
3,568,829	3,447,171	4,402,699	4,585,935	4,821,679	5,353,931	6,056,502	6,552,760	6,741,707

PX 5, 11, 21, 32, 35, 41, 44, 49; Referee Ex. 2.²³

37. Respondents' attempt to financially strangle Petitioners into capitulation was not an isolated occurrence. There were additional instances of oppressive conduct after Petitioners' salaries were reduced and then terminated.

38. Beginning in 2016, *Scaletta's* lease for its premises was up for renewal. After reducing Petitioners' salaries at *Delmonico's* in 2015, Licul -- having complete control of *Scaletta's* operation and finances -- refused to assist Petitioners in obtaining a lease renewal from the landlord asserting that Licul, alone, was the only person with authority to negotiate a new lease for *Scaletta*. Notwithstanding that Licul was a 25% shareholder of *Scaletta* and thus owed a fiduciary duty of good faith and fair dealing to Petitioners, the proof established that Licul undermined the lease negotiations which resulted in *Scaletta* closing in 2018. *Scaletta's* closing in 2018, together with the termination of Petitioners' salaries at *Delmonico's*, has placed enormous financial pressure on

²² I consider Licul's proffered defense that he "relied on my attorneys" in reducing/eliminating Petitioners' salaries to be nothing more than a pretext to attempt to justify the otherwise improper conduct.

²³ At the hearing, Turcinovic testified that he was aware of all actions engaged in by Licul with respect to Petitioners and that Licul engaged in those actions with Tucinovic's full knowledge and consent.

Petitioners.

39. As previously noted, in May 2019, three (3) months after Petitioners commenced the second “books and records” proceeding, Respondents responded by commencing an action against Petitioners’ wives and daughters in this court under Index No. 15438/2019 (Cohen, J.) asserting the same claims of looting, theft, etc. as to 50/50 (*Scaletta*) against Petitioners’ wives and daughters; these claims being the same claims Respondents asserted in their counterclaims against Petitioners in the Federal Action.²⁴ On its face, there can be no doubt as to Respondents’ retaliatory motive in filing the “wives and daughters” action given Respondents’ prior oppressive conduct toward Petitioners.²⁵

40. While I conclude that Respondents breached their fiduciary duties to Petitioners and engaged in oppressive conduct toward them, I conclude that Petitioners did not establish that Respondents’ otherwise engaged in “illegality” or “fraud”.²⁶ At the hearing, Petitioners devoted much attention on *Delmonico*’s poor record and bookkeeping practices which they argue require an inference of Respondents’ “larcenous and fraudulent intent.” While *Delmonico*’s record and bookkeeping practices were undeniably antiquated and, in some instances, non-existent, this fact in

²⁴ This “wives and daughters” action was filed a month after Justice Schecter’s April 16, 2019 order in Petitioners’ second “books and records” proceeding directing Respondents to provide Petitioners with *Delmonico*’s “POS” data.

²⁵ I also note that Respondents’ pattern of oppressive conduct toward Petitioners calls in question Respondents’ motive in seeking liquidation of *Delmonico*’s in this proceeding, particularly given the restaurant’s profitability up to 2019. In my view, seeking liquidation of *Delmonico*’s is consistent with Respondents’ attitude that if Respondents cannot obtain complete control of *Delmonico*’s, then nobody gets it -- including Petitioners.

²⁶ With respect to “illegality” and “fraud”, these are “familiar words that are commonly understood at law.” *Matter of Kemp*, 64 N.Y.2d at 71.

and of itself does not warrant a conclusion that Respondents engaged in illegality or fraud in the operation and management of *Delmonico's*. The record in this case is incontrovertible that *Scaletta's* record and bookkeeping practices were maintained in identical fashion as *Delmonico's* for many years, and that Petitioners never complained about the manner in which Respondents operated and managed *Scaletta* until the parties' disputes regarding *Delmonico's* began to surface in 2013.

41. Further, Petitioners' claim that Respondents engaged in a panoply of fraudulent conduct to siphon off some \$42 million from *Delmonico's* was not proved. In his report, Petitioners' expert, Garibaldi, identified eight (8) areas of alleged financial misconduct by Respondents:

Damage Item	Amount (\$)
Excess Compensation Received by Licul and Turcinovic	1,718,750
Unpaid and Unaccounted for Distributions	1,081,600
"Negative Sale" Transactions	1,328,686
Unexplained Increased Vendor Expenses	1,200,000
Miscellaneous Disbursements	2,000,000
POS Destruction	75,000
Cash Tips	13,738,981
Vendor Payments	21,000,000
TOTAL	42,143,017

PX 78. I conclude that six (6) of the areas identified by Garibaldi (Vendor Payments and Unexplained Increased Vendor Expenses, Cash Tips, Miscellaneous Disbursements, "Negative Sale" Transactions" and POS Destruction) are not established by adequate proof.²⁷

²⁷ As previously noted, I have concluded that Petitioners' salaries were improperly reduced and then eliminated (as well as distributions) and that Respondent's salaries were improperly

42. As to Unexplained Increased Vendor Expenses (\$1,200,000) and Vendor Payments (\$21,000,000), Garibaldi concedes in this report that these items are only “estimates” and not specific determinations. PX 78, p. 11; RX 17, pp. 12-15.

43. As to Cash Tips (\$13,738,980.97), Garibaldi similarly concedes in his report that “it is virtually impossible to determine, without further investigation, the magnitude of the loss that may be associated with this.” PX 78, p. 12. Rechtman, on the other hand, showed in his August 3, 2020 report that while Licul’s practice of distributing customer tips to restaurant employees in cash “lacks transparency” and is not appropriate, the practice was nevertheless “compliant.” PX 74, p. 6. I also note that the amount of the cash tips paid to *Delmonico’s* waiters, busboys, etc. on an annual basis is not out of line with *Delmonico’s* gross revenues for each year as shown below:

	Cash Tip Checks (\$)	Gross Revenues (\$)	% of Gross Revenues
2011	1,039,455	5,698,692	18
2012	1,205,738	5,896,306	20
2013	1,164,177	6,655,862	17
2014	1,424,782	6,972,786	20
2015	1,426,996	7,312,835	20
2016	1,511,698	8,290,658	18
2017	1,560,592	9,233,300	17
2018	1,870,740	9,735,254	19
2019	1,950,147	10,355,140	19

RX 17, p. 18.

44. As to Miscellaneous Disbursements (\$2,024,445.15) which covered the seven-

increased. My calculations for those damages are set forth herein.

plus period 2013-2020, I reviewed Garibaldi's schedule of these disbursements (PX 78, Schedule D, pp. 56-66) and, based upon my work as Temporary Receiver since April 2020, observed that all of these payments were to legitimate vendors for reasonable charges. Indeed, nearly half of the identified disbursements were in payment of legal fees incurred by Ocinoled in defense of various lawsuits, including labor cases and Federal Trademark registration cases. RX 17, p. 15.

45. As to "Negative Sales" Transactions (\$1,328,686), Garibaldi's conclusions (PX 78, 10-11) relied entirely on the report by Robb Arent ("Arent") of Princeton Valuation Group dated September 28, 2016 submitted by Petitioners in the Federal District Court action. PX 42.²⁸ In essence, Garibaldi adopted Arent's report as his own without conducting an independent, in-depth analysis of the opinions and conclusions offered by Arent in his report. PX, p. 10-11. While I received Arent's report into evidence, the inability to examine the actual preparer of the report rendered Arent's report (and thus Garibaldi's opinions) of limited evidentiary value in this proceeding. RX 17, pp. 10-11.

46. As to POS Destruction (\$75,000), Garibaldi conceded during this testimony at the hearing that this damage assessment is an estimate only and not concrete prove of actual damages sustained. PX 78, p. 12; RX 17, p. 16.²⁹

47. Finally, there was no sufficient proof offered by Petitioners at the hearing that Respondents diverted *Delmonico's* monies to other businesses as alleged by Petitioners at ¶¶ 30-31,

²⁸ Arent did not testify at the hearing having died several years ago.

²⁹ The other "damage" items set forth in Garibaldi's report (sales tax penalties, accounting irregularities, failure to investigate, books and records of the business, and damages due to lack of internal controls) are referred to by Garibaldi as "not yet determined." PX 78, pp. 13-14, 18; RX 17, pp. 18-20.

48-49 of their Amended Petition/Complaint in this proceeding (PX 57), or that Respondents absconded with FEMA disaster relief funds which the restaurant received following Hurricane Sandy as alleged by Petitioners at ¶ 33 of their Amended Petition/Complaint (PX 57).

DAMAGE CALCULATIONS

48. *Salaries.* I calculate that the total damages attributable to the reduction/termination of Petitioners' salaries by Respondents and the excessive salaries taken by Respondents at the same time is **\$2,662,496**. As to the damages attributable to the reduction/termination of Petitioners' salaries from 2015 through 2019, I took 2014 -- when the parties while jousting were not yet in a full-blown knife-fight -- as a base year, for which Licul received an annual salary of \$106,000 and Turcinovic, Ferdo and Omer each received \$79,500. Going forward, I provided for modest, annual percentage increases for each individuals' salaries. Therefore, the total amount of damages attributable to Petitioners' reduction/termination of salaries is **\$844,528**. The calculations are set forth in Schedule B annexed hereto.³⁰

49. As to the excessive salaries taken by Respondents from 2015 through 2019, I calculated the salaries they should have received using their 2014 salaries as a base year and again providing for modest, annual percentage increases as was done for Petitioners³¹, calculated the excess based on the difference between the amount Respondents actually received and the amount they

³⁰ The total salaries Petitioners should have received for 2015-2019 was \$422,264 each or a total of \$844,528.

³¹ In calculating Respondents' salaries in this fashion rather than using industry standards, particularly for Licul, I proceeded on the premise that if none of the disputes between Petitioners and Respondents had arisen during 2013-2014 and the parties were conducting business "as usual," the parties would have agreed to modest, annual percentage increases to their annual salaries and not substantial percentage increases.

should have been paid. The total amount of damages attributable to Respondents' excessive salaries is **\$1,817,968**.³² The calculations for this amount are set forth in Schedule B annexed hereto.

50. *Distributions*. I calculate the damages attributable to Petitioners' not receiving any distributions from 2015 through 2019 is **\$1,821,252**.³³ The calculations for this amount are set forth in Schedule B annexed hereto. In performing these calculations, I took the amounts set forth in Ocinomled's Schedule K-1s for Petitioners in line item "1" under Part III thereof entitled "Ordinary business income" for the period 2015 through 2019. PX 35, 41, 44, 49; Referee Exhibit "2".³⁴

RECOMMENDATIONS

51. *Equitable Dissolution*. Based upon the totality of circumstances, I recommend that the relief sought by Petitioners in this proceeding -- equitable dissolution -- should be granted, but that Ocinomled *should not* be dissolved nor should *Delmonico's* be liquidated. In submitting this recommendation, I took into account five (5) considerations: *first*, the only issue the parties have been able to agree upon in this proceeding is that going forward there is no basis upon which Petitioners and Respondents can operate Ocinomled together. Thus, a complete "divorce" between

³² The total amount of excessive salary received by Licul was \$914,482 while the total amount of excessive salary received by Turcinovic was \$903,486, for the sum of \$1,817,968.

³³ I consider 2015-2019 to be the relevant period for the calculation of these damages inasmuch as Respondents' failure/refusal to actually pay Petitioners the distributions was part of Respondents' overall oppressive conduct toward Petitioners to force a "buy-out." In addition, Respondents essentially made a "statement" to the IRS in Ocinomled's tax returns for these years that Petitioners were being paid distributions. Having made this representation in a Federal tax filing and bearing in mind that false statements in a Federal tax filing is a crime, Respondents are bound by their "statements" and should be held liable for payment of the distributions to Petitioners.

³⁴ The total amount of unpaid distributions for Petitioners for 2015 through 2019 was \$910,626 each or a total of \$1,821,252.

Petitioners and Respondents is required; *second*, *Delmonico 's* should not be liquidated. Opened in 1837 as a small shop selling pastries, fine coffee and chocolates, bonbons, wines, liquors and Havana cigars, *Delmonico 's* is an iconic and, until the COVID pandemic, a successful restaurant woven into the history of New York City; *third*, based on the report of restaurant consultant, Kate Edwards (PX 79), *Delmonico 's* -- when reopened at the appropriate time -- can be successful, particularly if the other, innovative revenue stream concepts identified in Ms. Edwards' report are pursued. Moreover, the probability of *Delmonico 's* being able to reopen is all the more likely given the landlord's apparent willingness to offer Ocinomled a renewal lease for its premises as set forth in an e-mail dated June 23, 2020 by the landlord's representative, Scott Klatsky of Time Equities Inc., to The Clarkes' Group LLC's CEO, Phillip Scotti ("Scotti"):

I had presented to the current operator, renewal terms for the Delmonicos, based upon 6,500 s/f on the ground, 6,278 s/f in the lower level, with the existing lease expiring on 12/31/2022. I had given them an asking rent on a renewal with no free rent at \$90 psf for the ground floor and \$45 psf for the lower level space, for a 12 year term with 3% increase per annum along with their % of the increase in real estate taxes over a then-current base year. Petitioner 75.³⁵;

fourth, Petitioners have *repeatedly* stated in this proceeding their desire to reopen *Delmonico 's*.³⁶

In this regard, Petitioners called Scotti as a witness at the hearing who testified, *inter alia*, of his company's interest and desire to reopen *Delmonico 's* with Petitioners' involvement³⁷; and *fifth*, given

³⁵ "Petitioner ___" refers to Petitioners' hearing exhibit which was not pre-marked.

³⁶ Conversely, at various points during this proceeding Respondents have unequivocally stated to the Court that they do not wish to be involved in operating the restaurant any longer and, in fact, want *Delmonico 's* liquidated.

³⁷ Petitioners also have received a proposal from another restaurant operator, GLOW Restaurant Group, to reopen *Delmonico 's*. PX 81.

Respondents' misconduct, equity mandates awarding complete possession and control of *Delmonico's* to Petitioners, and not Respondents.

52. *Valuation of Ocinomled*. "Valuation of closely held corporations is not an exact science, and it is the particular facts and circumstances of each case that will dictate the result." *Gaiimo Vitale*, 101 A.D.3d 523, 524 (1st Dept. 2012). When a buy-out is compelled, the Court may value the corporation "as an ongoing business, rather than as a business in the process of liquidation." *In the Matter of the Dissolution of North Star Electrica Contracting - N.Y.C. Corp.*, 174 A.D.2d 373, 374 (1st Dept. 1991). The Court may properly use the date of the dissolution for purposes of valuation. *See Sexter v. Kimmelman, Sexter, Warmflash & Leitner*, 43 A.D.3d 790, 793 (1st Dept. 2007). Jennings, the business valuation specialist I retained to assist me in the receivership of Ocinomled, opines in his report that the value of Ocinomled on an on-going concern basis is \$5,100,000. PX 72.³⁸ As previously noted, I retained Jennings in my capacity as Temporary Receiver to provide a valuation of *Delmonico's*. I consider Jennings' analysis to be prudent and persuasive and his valuation of Ocinomled at \$5,100,000 should be adopted.³⁹ Based on this valuation, a 50% interest in Ocinomled is worth \$2,550,000.

³⁸ "Based on the information collected and analyzed, as presented in the Valuation Report that follows, it is our opinion that the Fair Market Value of a 100% interest in Ocinomled, Ltd as of June 30, 2020 on a control and marketable basis is in the amount of Five Million One Hundred Thousand Dollars (\$5,100,000)." PX 72.

³⁹ As of the date of Jennings' report (July 31, 2020), his opinion took into account the uncertainty resulting from the current health situation in arriving at his valuation: "The restaurant has been closed since March 18, 2020 with government announcement of when indoor dining can occur through the Valuation Date. The restaurant does not have the capacity to offer outdoor seating, the only permitted dining in the City of New York at the Valuation Date. In the meantime, the restaurant's expenses continue. We assign a risk factor of 2% reflecting this uncertain date when indoor dining can begin." PX 72, pp. 3-4.

53. *Adjustments and Surcharges Against Respondents' 50% Ownership Interest of Delmonico's.* Once an initial valuation of the corporation is determined, "allegations of misconduct," which "are relevant if any alleged misconduct by those in control of the corporation has had an adverse impact upon the corporation's value" may be considered. *See e.g., Matter of Markham v. Exterior Delite, Inc.*, 14 Misc.3d 910, 915 (Sup. Ct., Bronx Co. 2006). "[A]ny adjustment or surcharge found to be appropriate" may be applied, including but not limited to adjustments and surcharges based upon "a finding of willful or reckless dissipation or transfer of assets or corporate property without adequate compensation therefor," or "the receipt of excessive compensation by a shareholder/director." *Id.* As calculated above, the total damages sustained by Petitioners as a result of the reduction/termination of their salaries by Respondents, excessive salaries taken by Respondents, and Petitioners' failure to receive distributions of *Delmonico's* profits is **\$4,483,748** (Unpaid Salaries/Excessive Salaries: \$2,662,496; Distributions: \$1,821,252). I recommend that this amount of **\$4,483,748** be charged as a surcharge against Respondents' collective 50% interest in *Delmonico's*.

54. *Offset.* If accepted by the Court, a total surcharge against Respondents' collective 50% interest in *Delmonico's* in the amount of \$4,483,748 would completely offset Respondent's 50% interest and result in a deficiency of **\$1,933,748**.⁴⁰ As of the date of this Report, the balance in Ocinoled's main operating bank account with Bank United is \$1,893,397.41. Ocinoled has a second bank account with Bank United which has a current balance of \$197,976.79.

⁴⁰ As previously noted, Turcinovic testified that he was aware of all actions engaged in by Licul with respect to Petitioners and that Licul engaged in those actions with Tucinovic's full knowledge and consent. Accordingly, Turcinovic's culpability should be "joint and several" with Licul.

In addition, the current balance in Ocinomled's bank account with Signature Bank is approximately \$750,000.⁴¹ Petitioners' 100% ownership interest of Ocinomled would include ownership and control of the monies in these accounts which is more than enough to perform necessary repairs and renovations to reopen *Delmonico's* and sustain the restaurant's operations until it gets fully operational. I recommend, therefore, that the monies in these bank accounts be deemed to "cover" the \$1,933,748 deficiency.⁴²

55. *Ocinomled Lease Obligations/Licul's Personal Guaranty*: Licul is a personal guarantor of Ocinomled's current lease obligations which is to expire December 31, 2022. Once Petitioners take possession and control of Ocinomled, if the company defaults in payment of any of its rent and additional rent obligations to the landlord and an action and/or proceeding is commenced by the landlord for recovery of same and Licul is named a party defendant in such action and/or proceeding, I recommend that Licul have rights of indemnification against Petitioners personally in the event judgment is entered against Licul.

56. *Tax Liabilities*: I recommend that Respondents Licul and Turcinovic remain liable for any tax liabilities imposed by any governmental tax authority on Ocinomled, if any, through the calendar year 2019.

57. *Miscellaneous*: When Petitioners assume possession of Ocinomled:

- a. Respondents should turn over all keys for the restaurant premises to Petitioners;
- b. Respondents' health insurance coverage *via* Ocinomled should be terminated;

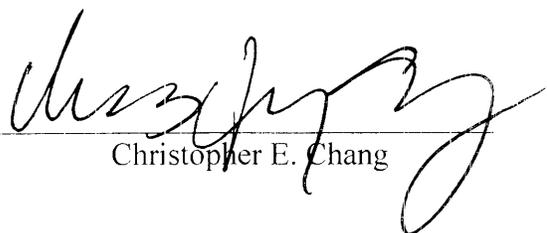
⁴¹ The funds in this account consist of loan proceeds from the CARES Act Paycheck Protection Program in the original amount of \$1,033,387 and loan proceeds from the Small Business Administration in the original amount of \$149,900.

⁴² Ocinomled is current in the payment of its ongoing expenses.

- c. All car leases for Respondents *via* Ocinomled should be terminated; and
- d. All credit cards for Respondents *via* Ocinomled should be terminated.

58. *Petitioners' Request for a "Full Accounting"*. Finally, Petitioners' request for a "full accounting" should be denied. Since the inception of my receivership in April 2020, Petitioners have been provided access to all of Ocinomled's financial books and records which were recoverable and have had ample opportunity to have those records reviewed and analyzed by their own expert, Garibaldi, and Rechtman as well. Consequently, directing Respondents to provide a "full accounting" is, in my opinion, pointless at this time. Moreover, as should be apparent, the foregoing recommendations would effectuate a full and complete "divorce" between Petitioners and Respondents as to Ocinomled, so that at least with regard to *Delmonico's* both sides can go their own ways without the need for further litigation. As has been said: "A maxim of equity that once invoked successfully, equity will, fully and with finality, resolve the dispute between the parties."

Dated: New York, New York
October 26, 2020



Christopher E. Chang

Schedule A

Deposition Transcripts and Expert Reports Received Into Evidence

Petitioners' Exhibits

Description	Exhibit Number
Report of Robb Arent of Princeton Valuation Group dated September 28, 2016	PX 42
Report of Scott Gibbs of Empire Discovery dated December 13, 2020	PX 61
Report of Kevin Jennings of JBV Valuation dated June 30, 2020	PX 72
Report of Yigal Rechtman of RSZ Forsenic Associates dated August 3, 2020	PX 74
Reports of Michael J. Garibaldi of Garibaldi Group dated September 21, 2020 and September 30, 2020	PX 78 and 80
Report of Kate Edwards of Kate Edwards & Company dated September 23, 2020	PX 79
Deposition Branko Turcinovic: June 16, 2016	PX 83
Deposition of Carin Sarafian: June 16, 2016	PX 84
Deposition of Corrado Goglia: July 25, 2016	PX 85
Deposition of Dennis Turcinovic: July 8, 2016	PX 86
Deposition of Milan Licul: August 13, 2016	PX 87
Deposition of Anthony Antonello: June 27, 2016	PX 88
Deposition of Milan Licul: September 4, 2020	PX 89

Respondents' Exhibits

Description	Exhibit Number
Deposition of Ferdo Grgurev: September 4, 2020	RX 13
Deposition of Yigal Rechtman of RSZ Forsenic Associates: August 21, 2020	RX 16
Reports of Juli Saitz of Ankura Consulting Group, LLC dated September 21, 2020 and September 30, 2020	RX 17 and 18

Referee's Exhibits

Description	Exhibit Number
Deposition of Kevin Jennings of JBV Valuation: August 28, 2020	1

Schedule B**Unpaid Salaries***Ferdo*

	2015	2016	2017	2018	2019	Totals
Paid	25,500	---	---	---	---	25,500
Should Have Been Paid	82,283 (+3.50%) ¹	85,368 (+3.75%)	88,890 (+4.13%)	93,223 (+4.88%)	98,001 (+5.13%)	447,764
Under Paid	56,783	85,368	88,890	93,223	98,001	422,264

Omer

	2015	2016	2017	2018	2019	Totals
Paid	25,500	---	---	---	---	25,500
Should Have Been Paid	82,283 (+3.50%)	85,368 (+3.75%)	88,890 (+4.13%)	93,223 (+4.88%)	98,001 (+5.13%)	447,764
Under Paid	56,783	85,368	88,890	93,223	98,001	422,264

PX 35, 41, 44, 49; Referee Exhibit "2".

¹ U.S. Prime rate Median (annual).

Excessive Salaries*Licul*

	2015	2016	2017	2018	2019	Totals
Paid	155,000	182,000	342,500	416,000	416,000	1,511,500
Should Have Been Paid	109,710 (+3.50%)	113,824 (+3.75%)	118,519 (+4.13%)	124,297 (+4.88%)	130,667 (+5.13%)	597,018
Over Paid	45,290	68,176	223,981	291,703	285,333	914,482

Turcinovic

	2015	2016	2017	2018	2019	Totals
Paid	129,000	156,000	312,250	377,000	377,000	1,351,250
Should Have Been Paid	82,283 (+3.50%)	85,368 (-3.75%)	88,890 (+4.13%)	93,223 (+4.88%)	98,001 (+5.13%)	447,764
Over Paid	46,718	70,632	223,360	283,777	278,999	903,486

PX 35, 41, 44, 49; Referee Exhibit "2".

Unpaid Distributions

	2015	2016	2017	2018	2019	Totals
Ferdo	63,220	207,811	142,606	258,584	238,405	910,626
Omer	63,220	207,811	142,606	258,584	238,405	910,626

PX 35, 41, 44, 49; Referee Exhibit "2".