David R. Callaway, CA Bar No. 121782
GLENN AGRE BERGMAN & FUENTES LLP
580 California Street, Suite 1420
San Francisco, CA 94104
Tel: (415) 599-0884
Email: dcallaway@glennagre.com

Willie W. Williams, CA Bar No. 233902
The Law Offices of Willie W. Williams
10621 Church Street, Suite 110
Rancho Cucamonga, CA 91730
Tel: (909) 581-8341
Email: www@williewilliamslaw.com

Paul A. Conant, Arizona Bar No. 012667
Admitted *pro hac vice*
CONANT LAW FIRM, PLC
2398 East Camelback Road #925
Phoenix, Arizona 85016-9002
Tel: (602) 508-9010
Email: docket@conantlawfirm.com

Attorneys for Defendants
COOKIES CREATIVE CONSULTING & PROMOTIONS, LLC., COOKIES CREATIVE CONSULTING & PROMOTIONS, INC., COOKIES SF, LLC, COOKIES CREATIVE PT, LLC, COOKIES CREATIVE PRODUCTIONS & CONSULTING, INC., BIGGERBIZZ, LLC, LEMONNADE, INC., PARKER BERLING, LESJAI CHANG, IAN HABENICHT, AND GILBERT A. MILAM, JR. AND CRYSTAL MILLICAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

COOKIES RETAIL, LLC, a Delaware limited liability company, Plaintiff, vs. COOKIES CREATIVE CONSULTING & PROMOTIONS, LLC, a California limited liability company; COOKIES CREATIVE CONSULTING & PROMOTIONS, INC., a	New Case No. CGC-24-620457 **DECLARATION OF PAUL A. CONANT IN SUPPORT OF DEFENDANTS' MOTION TO STAY**

California corporation; COOKIES SF, LLC, a California limited liability company; COOKIES CREATIVE PT, LLC, a California limited liability company; COOKIES CREATIVE PRODUCTIONS & CONSULTING, INC., an unknown business entity; BIGGERBIZZ, LLC, a California limited liability company; LEMONNADE, INC., a California corporation; MESH BRANDS, LLC, a California limited liability company; 1212 VENTURES, LLC, a Delaware limited liability company; PARKER BERLING, an individual; LESJAI PERSONNET CHANG, an individual; IAN HABENICHT, an individual; GILBERT ANTHONY MILAM JR., an individual; MATT BARRON, an individual; CRYSTAL MILLICAN, an individual, and DOES 1-100;

Defendants.

LITIGATION AND COMPEL ARBITRATION

Hearing Date: March 17, 2025
Time: 9:00 a.m.
Dept.: 301

Action filed: January 12, 2024
Trial Date: None set

I, Paul A. Conant, declare as follows:

1. I am providing this Declaration in support of the Defendants' Motion to Stay Litigation and Compel Arbitration.

2. Effective December 10, 2024, this case was transferred to this Court from the Orange County Superior Court, pursuant to an order granting Specially Appearing Defendants' Motion to Transfer Action from Orange County to San Francisco County (the "Motion to Transfer"). I applied for and was granted *pro hac vice* admission in the case while it was pending in Orange County Superior Court and co-represented the Defendants who filed the Motion to Transfer there. The Motion to Transfer was filed on March 15, 2024, granted on June 25, 2024, and the Order Granting Defendants' Motion to Transfer Case to San Francisco County Superior Court was signed on July 29, 2024.

3. As set forth in the Motion to Transfer, the dispute resolution clause in the parties' contracts not only requires arbitration before JAMS using the JAMS Streamlined Rules, stating that any "Dispute" not resolved through negotiation "shall be settled exclusively by final and binding arbitration in San Francisco, California in accordance with the then current rules of JAMS, and the arbitration shall be administered pursuant [to] JAMS' Streamlined Arbitration Rules and Procedure," and further that "the parties submit and consent to the exclusive jurisdiction of the state courts in the City and County of San Francisco, State of California, United States, to compel arbitration, to confirm an arbitration award or order, or to handle other court functions exclusively in accordance with the California Arbitration Act." *See* March 15, 2024, Memorandum in Support of Specially Appearing Defendants' Notice of Motion and Motion to Transfer from Orange County To San Francisco County, p.5.

4. The Orange County Superior Court's June 25, 2024, Minute Order granting the Motion to Transfer found, *inter alia*, that: "As the Court of Appeal stated in *Battaglia Enterprises, Inc. v. Superior Court* (2013) 215 Cal.App.4th 309 at page 318, where 'two sophisticated parties agree, pursuant to arm's length negotiations, to litigate an action in one

of multiple statutorily permissible venues, they should be held to their agreement." That Minute Order also stated: "The court finds an offer to stipulate to change of venue was reasonably made and rejected, and the motion [to transfer] was made in good faith given the facts and the law. Under all the circumstances, plaintiff's refusal to stipulate was unreasonable," and on that basis granted Defendants' request for fees pursuant to Cal. Civ. Proc. Code § 396B, subdivision (b).

5. While the Motion to Transfer briefing was proceeding, as well as after its grant and while the administrative transfer processes in the respective courts were proceeding, the parties' disputes were arbitrated in the JAMS arbitration that Cookies Creative Consulting & Promotions, Inc. ("Cookies"), as Claimant, had filed against Cookies Retail, LLC ("CRE"), as Respondent, on January 9, 2024, in the San Francisco JAMS office, JAMS Ref. #5100001775 (the "JAMS Arbitration"). I was granted *pro hac vice* admission in the JAMS Arbitration, and co-represented Cookies in those proceedings.

6. A true and correct copy of the Interim Award issued on February 14, 2025, in the JAMS Arbitration is attached here as Exhibit A.

7. As stated in the Interim Award, on March 29, 2024, former San Francisco County Superior Court Judge David A. Garcia was selected as the sole JAMS Arbitrator to preside over the JAMS Arbitration. *See* Interim Award, page 2, lines 13-14.

8. In the JAMS Arbitration, CRE challenged arbitrability, and lost. As stated in the Interim Award, the parties briefed the issue of arbitrability, and Judge Garcia determined that the parties' disputes were arbitrable: "The Arbitrator ruled by Scheduling Order #1 that the Arbitration clauses at issue are neither procedurally nor substantively unconscionable. The Arbitrator further rules that the provisions apply bilaterally and equally to Claimant and Respondent and were negotiated at arm's length by the parties, who are equally sophisticated and were represented by counsel. The Arbitrator found that the disputes by and between the parties 'are all arbitrable and shall be resolved pursuant' to the JAMS SARP [Streamlined

Arbitration Rules and Procedures]." *See* Interim Award, page 2, lines 16-24. CRE never filed a petition to stay the JAMS Arbitration.

9. The Dispute Resolution clause where the mandatory arbitration clause is found appears in more than one of the parties' contracts, and is set forth below, in full, as follows:

> (e) **Dispute Resolution**.
>
> (i) In the event of any dispute or controversy between the parties arising out of or in any way related to this Agreement (a "***Dispute***"), the parties shall attempt in good faith to resolve through negotiation such Dispute. Either party may initiate negotiations of any Dispute by providing written notice to the other party, setting forth the subject of the Dispute. The recipient of such notice will respond in writing within ten (10) calendar days with a statement of its position on and recommended solution to the Dispute. If the Dispute is not resolved by this exchange of correspondence, then representatives of each party with full settlement authority will meet at a mutually agreeable time and place within thirty (30) calendar days of the date of the initial notice in order to exchange relevant information and perspectives, and to attempt to resolve the Dispute.
>
> (ii) Except as qualified below, if the Dispute is not resolved by these negotiations, such Dispute shall be settled exclusively by final and binding arbitration in San Francisco, California in accordance with the then current rules of JAMS, and the arbitration shall be administered by JAMS pursuant JAMS' Streamlined Arbitration Rules and Procedures. Any arbitration must be on an individual basis and the parties and the arbitrator will have no authority or power to proceed with any claim as a class action or otherwise to join or consolidate any claim with any other claim or any other proceeding involving third parties. In the event a court determines that this limitation on joinder of or class action certification of claims is unenforceable, then this entire commitment to arbitrate will become null and void and the parties must submit all claims to the jurisdiction of the courts.
>
> (iii) The parties submit and consent to the exclusive jurisdiction of the state courts in the City and County of San Francisco, State of California, United States to compel arbitration, to confirm an arbitration award or order, or to handle other court functions exclusively in accordance with the California

Arbitration Act. The parties may seek recognition and enforcement of any California state court judgment confirming an arbitration award or order in any U.S. state court or in any court outside the United States and its territories. The parties expressly waive any right of removal to the United States federal courts, and the parties expressly waive any right to compel arbitration, confirm any arbitral award, or seek any aid or assistance of any kind in the United States federal courts. By entering into this Agreement, the parties are waiving their constitutional right to have any Disputes decided in a court of law or before a jury and waive the right of appeal, and instead of relying on said rights, each party is solely and knowingly accepting the use of arbitration as a means of resolution of any Disputes. The parties agree that this clause has been included to rapidly and inexpensively resolve any disputes between them with respect to this Agreement.

(iv) The laws of the state of California, including the California Arbitration Act, shall apply exclusively as the laws governing this arbitration agreement between the parties, with the sole exception of the California Choice of Law provisions, which shall not apply.

(v) Notwithstanding the other provisions of this Section 9(v), the parties agree that the following claims will not be subject to arbitration: (A) any action for declaratory or equitable relief, including, without limitation, seeking preliminary or permanent injunctive relief, specific performance, other relief in the nature of equity to enjoin any harm or threat of harm to such party's tangible or intangible property, brought at any time, including, without limitation, prior to or during the pendency of any arbitration proceedings initiated hereunder; and (B) any action in ejectment or for possession of any interest in real or personal property.[1]

(vi) Waiver of Jury Trial. WAIVER OF JURY TRIAL: TO THE MAXIMUM EXTENT PERMITTED BY LAW, EACH PARTY HEREBY WAIVES ITS RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR

[1] Notwithstanding the language in subsection (v), as Judge Garcia found in the Interim Award, CRE nevertheless arbitrated its declaratory judgment and preliminary injunction/permanent injunction claims "by consent in these proceedings." *See* Interim Award, page 43, lines 8-11.

> ARISING OUT OF THIS AGREEMENT, THE OTHER TRANSACTION AGREEMENTS, THE SECURITIES OR THE SUBJECT MATTER HEREOF OR THEREOF. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS TRANSACTION, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS (INCLUDING NEGLIGENCE), BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS. THIS SECTION HAS BEEN FULLY DISCUSSED BY EACH OF THE PARTIES HERETO AND THESE PROVISIONS WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY HERETO HEREBY FURTHER WARRANTS AND REPRESENTS THAT SUCH PARTY HAS REVIEWED THIS WAIVER WITH ITS LEGAL COUNSEL, AND THAT SUCH PARTY KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL.[2]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 18th day of February 2025.

___/s/ Paul A. Conant___

Paul A. Conant

[2] The above-quoted Dispute Resolution clause is found in, among other contracts between the parties, the May 31, 2022, Letter Agreement, at Section 11(e).

PROOF OF SERVICE

I, Timothy Finnegan, declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed by Glenn Agre Bergman & Fuentes LLP, in the State of California, where the mailing occurs; and my business address is 580 California Street, Suite 1420, San Francisco, California 95113.

On February 19, 2025, I served the attached:

DECLARATION OF PAUL A. CONANT IN SUPPORT OF DEFENDANTS' MOTION TO STAY LITIGATION AND COMPEL ARBITRATION

on all counsel for the parties in this action, as follows:

Thomas M. O'Connell
Christina M. Morgan
Tricia A. Pham
Michael A. Fuoroli
Roger L. Scott
BUCHALTER
655 W. Broadway, Suite 1600
San Diego, CA 92101
toconnell@buchalter.com
cmorgan@buchalter.com
tpham@buchalter.com
mfuoroli@buchalter.com
rscott@buchalter.com

Attorneys for Plaintiff
COOKIES RETAIL, LLC

Skyler M. Sanders
BALDR Advisors LLC
4034 Molly Drive
Rexburg, ID 83440
skyler@baldradvisors.com

Attorneys for Defendant
MESH BRANDS, LLC

Jose A. Lopez
Katherine E. May
Gillian C. Kuhlmann
Gina Buschatzke
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, CA 90067
JLopez@perkinscoie.com
KMay@perkinscoie.com

Attorneys for Defendants
1212 VENTURES, LLC
and MATT BARRON

GKuhlmann@perkinscoie.com
gbuschatzke@perkinscoie.com

[X] **BY ELECTRONIC SERVICE.** I personally served a copy of the above document to the email addresses noted above pursuant to agreement of counsel.

[X] **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 19, 2025, in San Francisco, California.

/s/ *Timothy Finnegan*
TIMOTHY FINNEGAN

Exhibit A

to Declaration of Paul A. Conant, February 18, 2025

Judge David A. Garcia (Ret.)
JAMS
2 Embarcadero Center
Suite 1500
San Francisco, CA 94111
Tel: (415) 982-5267
Fax: (415) 982-5287

JAMS ARBITRATION NO. 5100001775

Cookies Creative Consulting & Promotions, Inc., a California corporation, Claimant, vs. Cookies Retail, LLC, a Delaware limited liability company, Respondent.	**Interim Award**
Cookies Retail, LLC, a Delaware limited liability company, Counter-Claimant, vs. Cookies Creative Consulting & Promotions, Inc., a California corporation, Counter-Respondent.	

Counsel:

Paul A. Conant (AZ 012667)
CONANT LAW FIRM, PLC
2398 East Camelback Road #925

Phoenix, Arizona 85016-9002
Telephone: 602.508.9010
Facsimile: 602.508.9015

Admitted pro hac vice
Co-counsel for Claimant

David R. Callaway (CA 121782)
GLEN, AGRE, BERGMAN & FUENTES LLP
44 Montgomery Street, Suite 2410
San Francisco, CA 94014
Telephone: 415.599.0884
Co-counsel for Claimant

BUCHALTER, A Professional Corporation
THOMAS M. O'CONNELL (SBN: 298457)
ROGER L. SCOTT (SBN: 247165)
CHRISTINA MORGAN (SBN: 277877)
655 West Broadway, Suite 1600
San Diego, CA 92101
Telephone: 619.219.5335

Attorneys for Respondent and Counterclaimant
COOKIES RETAIL, LLC

Arbitrator:

Hon. David A. Garcia, Ret
JAMS
2 Embarcadero Center, Suite 1500
San Francisco, California 94111
Telephone: (415) 982-5267
Facsimile: (415) 982-5287

Place of Arbitration: San Francisco, California

Date of Interim Award: February 14, 2025

THE UNDERSIGNED ARBITRATOR, having been designated as the sole Arbitrator in accordance with the agreement to arbitrate[1] existing between the

[1]Four contracts are central to the resolution of the disputes: the "Operating Agreement of Cookies Retail, LLC," the "Master Rollup Agreement" the "Retail Services Agreement," and the "License

parties, having duly heard and examined the submissions, proofs, and allegations of the Parties, does hereby, conclude and AWARD, on an interim basis[2] as follows:

I. Introduction and Procedural Statement

THE UNDERSIGNED ARBITRATOR thanks each of the parties for the professional, considerate presentation of their respective positions. The legal authorities relied upon are those cited by the parties.

As reported in Scheduling Order #1, the Claimant filed a Demand for Arbitration (Notice of Claims Demand for Arbitration and Statement of Remedies Sought) on January 9, 2024. The Respondent filed suit in the Superior Court of the State of California, Orange County, (Case No. 30-2024001373952-CU-BC-NJC alleging inter alia, that the agreements contain arbitration clauses that are invalid and contravene public policy of the State of California, are procedurally and substantively unconscionable. The Respondent filed a notice of the pendency of two Court matters and a statement that the Court proceedings should resolve the matters on January 29, 2024. Claimant, on January demanded that the matter proceed pursuant to the JAMS Streamlined Rules and the Federal Arbitration Act. The Respondent filed a Response to the JAMS Notice of Commencement of Arbitration asserting that there is no valid arbitration clause on February 3, 2024. The undersigned was appointed as the sole arbitrator on March 29, 2024. The Respondent filed a Letter on April 15, 2024, requesting that Arbitrability be briefed and Claimant responded by requesting that the matter proceed pursuant to the Streamlined Rules.

The Arbitrator convened a scheduling conference and directed that the Respondent serve and file its objections to arbitration on or before April 29, 2024, that Claimant file opposition on or before May 6, 2024, and that the Respondent Reply on or before May 13, 2024. Respondent thereafter requested and it was agreed that its letter dated April 15, 2024, be deemed its opening brief regarding Arbitrability. Claimant filed its "Response Brief Regarding Arbitrability" on May 6, 2024, and the Respondent filed its Reply Brief re Arbitrability on May 13, 2024. The Arbitrator ruled by Scheduling Order #1 that the Arbitration clauses at issue are neither procedurally nor substantively unconscionable. The Arbitrator further ruled that the provisions apply bilaterally and equally to Claimant and Respondent and were negotiated at arm's length by the parties, who are equally sophisticated and were represented by counsel. The Arbitrator found that the disputes by and between the parties "are all arbitrable and shall be resolved pursuant" to the JAMS SARP.

Agreement." Each of the agreements executed by the parties contain binding arbitration clauses which incorporate JAMS rules, specifically the Streamlined Arbitration Rules and Procedures (SARP).

[2] As an interim award this Award is not subject to confirmation.

As required by Scheduling Order #1, the Respondent filed a "Response to Claimant's Notice of Claims, Demand for Arbitration and Statement of Remedies Sought" on June 28, 2024. Respondent also filed Counterclaims on June 28, 2024. Pursuant to Amended Scheduling Order #2, the evidentiary hearing was scheduled to commence Thursday, September 26, 2024, and conclude on Wednesday, October 9, 2024. The hearing did not conclude on October 9, 2024, and an additional day of hearing thereafter occurred on October 16, 2024.

Prior to the commencement of the hearing the parties filed pre-hearing briefs. At the commencement of the hearing, the Claimant offered exhibits, 1- 1743,[3] Respondent offered exhibits 2001 - 2388.[4] Claimant and Respondent offered testimony of witnesses (Michael Kramer (E.C. §776), Crystal Millican, Parker Berling, Jonathan Solish, Gilbert Anthony "Berner" Milam, Jr., Matthew Barron, Suzanne Stuckwisch, Meagan Feenan[5] for the Claimant, Freddy Cameron[6], Christian Tregillis|, Aaron Milano, Jasmine Bautista, Peter Sobat, Brandon Johnson, Gerard Davey[7], for the Respondent).

By this Arbitration, Cookies seeks an award of damages, including consequential damages, from CRE for unpaid fees due to it for the licensed use of its intellectual property in the sum of $8.0 million. It also seeks damages for breach of the covenant of good faith and fair dealing for lost licensing fees from CRE's allegedly squatting in exclusive markets in the sum of $20.4 million. Cookies further seeks damages of between $90 million and $100 million from CRE for breach of the License Agreement resulting from CRE's activities relating to the use by CRE affiliate TRP of Cookies' IP for substantial fundraising purposes. Finally Cookies seeks damages for the alleged breach of implied covenant of good faith and fair dealing due to Cookies impaired ability to raise capital in the sum of $12.6 million.

Cookies additionally seeks a finding that TRP is CRE's alter ego that under California law, alter ego liability for TRP's conduct attaches to CRE because: (1) there is unity of interest between CRE and TRP, and (2) if the acts of TRP in this context are treated as those of the TRP's alone, an inequitable result will follow. Moreover, Cookies asks for

---

[3] Additional Exhibits 1744 & 1745 were offered during the hearing.

[4] The Claimant, during the hearing, supplied a Master Compilation Exhibit Cross-Reference Document.

[5] Expert Witness Report submitted in lieu of testimony.

[6] Appeared by Declarations only. While the Arbitrator excluded his Declarations, the Arbitrator prior to doing so had read and considered the circumstances surrounding the making of his declaration and the state of the record as it related to the contents of the Declaration. Respondent also sought to have the Arbitrator consider the declarations of two witnesses who testified, Aaron Milano and Peter Sobat and requested that the Arbitrator receive those Declarations into evidence. The Arbitrator read and considered all those declarations prior to ruling on their admissibility during the hearing. The Arbitrator stands on his in hearing rulings. On reconsideration of the Respondent's request, the Arbitrator does not find the Declarations helpful to the assessment of the merits of the case.

[7] Expert Witness Report submitted in lieu of testimony.

an order requiring that CRE and its counsel gather up all the "Freddy Cameron" records, wherever they may be and to whomsoever they may have provided those records, and promptly turn over all of them, and all copies and images, to counsel for Cookies, and that they retain none of those records, or copies or images.

Conversely, CRE seeks relief from Cookies on its counterclaims on the ground (1) an inadvertent franchise developed entitling CRE to rescind its relationship with Cookies and to recover damages; (2) a finding that CRE was not obligated to pay licensing fees to Cookies, or if it did was entitled to have them refunded, based on Section 2(c) of the Master Rollup Agreement ("MRUA"); (3) a finding that TRP was permitted to use Cookies' brand and marks to raise money from investors to build CRE because TRP is an "affiliate" of CRE; and (4) a finding that Cookies "fraudulently" induced CRE to enter into the joint venture, in violation of Section 17200 of the Business & Professions Code. CRE asserts that it is entitled to recover damages of $173,824,254 due to fraud damages (negligent misrepresentation, concealment) related to the rescission of its relationship or for fraud. Retail additionally seeks an award of punitive damages. (Civ. Code, § 3294.)

In the alternative, CRE seeks an award of contract damages in the amount of $4,205,927. CRE asserts a breach of contract claim of the Master Rollup Agreement and Letter Agreement for damages of $3,588,789 due to Cookies having licensed a competitor to open the Herald Square store in New York City in violation of Retail's exclusivity rights in New York. CRE also brings a breach of contract claim and seeks an award of $617,138 for Cookies' alleged breach of the "Required Margins" provision[8] in the Letter Agreement.

Each of the parties asks that the Arbitrator find they are the prevailing party, that the opposing party take nothing by their respective claims, and that they are entitled to recover their attorney fees and costs.

On November 22, 2024, the parties submitted initial closing briefs, and on December 13, 2024, the parties submitted reply closing briefs and the matter was deemed submitted for Interim Award.[9] The parties thereafter stipulated that the Arbitrator should have until February 14, 2025, to issue this Interim Award.

---

[8] Claimant denies liability for a breach but would agree that if liability is established CRE would be entitled to recover $106,606 on this claim.

[9] On December 18, 2024, after the submission of reply briefs (100s of pages of briefs in total) and the ostensible "closing" of the hearing for the purpose of issuing an interim award, CRE submitted two letters in which CRE seeks (1) to exclude portions of Cookies' compilation exhibits to the extent they were not directly referenced during a witness's testimony and (20 for adverse inferences to be drawn based on allegedly unproduced documents, an order directing Cookies to submit to a "forensic audit" and to hold the record open until CRE has had a full and fair opportunity to review previously unproduced documents. By way of passing, the Arbitrator notes that hearing remains open until the Arbitrator declares it closed for purposes of issuing a final award, which will not occur until after the issuance of this Interim Award. The Arbitrator finds that the compilation exhibits, and every document contained therein were timely produced in full before the hearing. The Arbitrator considered the compilation exhibits as demonstrative exhibits. The Arbitrator has

II. Facts

The following is a statement of those facts found by the Arbitrator to be true and necessary to the award.[10] To the extent that this recitation differs from any party's position, that results from determinations as to credibility and relevance, burden of proof considerations, and the weighing of evidence, both oral and written.

A. The Parties: Cookies & CRE

Claimant Cookies owns and/or exclusively licenses the cannabis related brand "Cookies," and related trademarks, service marks, design marks, genetics, trade names, commercial symbols, copyrights and other intellectual property. As the owner and/or exclusive licensee of this valuable intellectual property, Cookies in turn licenses defined, permitted uses of its intellectual property pursuant to written contracts in exchange for monetary consideration and other terms. Cookies was organized on or about June 2, 2017, as a California limited liability company, and converted to a California corporation on or about September 9, 2020.

Respondent CRE was organized in the State of California on or about August 23, 2019, and converted to a Delaware limited liability company on or about June 9, 2022. CRE is and always has been minority owned by Cookies, but majority owned and run by the Johnsons and Firtel, pursuant to the CRE Operating Agreement.

Although the parties, through their principals and through a predecessor to CRE called Cookies Real Estate, LLC worked together before September 16, 2019, effective on that date, Cookies and CRE entered into contractual agreements, some of which were modified or amended and which, together, memorialized what is a joint venture among them.

B. The Inception of the Cookies CRE Relationship

Gilbert Anthony Milam, Jr. and Lesjai Chang are the co-founders of Cookies, and Milam is its CEO. During high school, Milam began competing as a "battle rapper," a type of freestyle competition blending poetry, music, wit, and bravado. Milam became known by his stage name, "Berner," and in 2006 released his first mixtape. Berner has since released over 50 albums.

---

not considered any exhibits that were not referenced during the hearing. As to holding the record open to receive additional evidence, the Arbitrator finds that each party has had a full and fair opportunity to make their case and that the Arbitrator does not anticipate reopening the hearing for purposes of engaging in additional discovery or for purposes of taking additional testimony.

[10] Additional facts necessary to the resolution of the dispute may be included and discussed in the Analysis section of the Interim Award. Facts not deemed necessary to the resolution of the dispute are not discussed.

In the early 2000s, Berner befriended Chang, a marijuana cultivator who had developed a strain of cannabis he nicknamed "Girl Scout Cookies," because of an aspect of the strain's aroma. Berner and Chang discontinued using that name at the request of Girl Scouts of the USA, renaming the strain "GSC" and naming their brand, simply, "Cookies."

Berner worked on his music career and as an entrepreneur with Chang in the frontier of the legalized marijuana industry. Berner opened the first Cookies clothing store in San Francisco in 2015 and eventually opened other "Cookies SF" clothing stores in San Francisco and Los Angeles. Over time, Berner's social media presence grew, as did the notoriety of the Cookies brand, not just for urban-styled clothing and accessories, but also for legal cannabis and cannabis-related products.

Berner and Chang formed Cookies in June of 2017. As of 2019, Cookies was still a fledgling company with only three equity holders and little capital. To grow, it sought money and support and obtained introductions to investors that sought to enter the evolving market of legalized cannabis. Wilder Ramsey (Ramsey) and Thomas Linovitz (Linovitz) were principals of one such company, a venture capital firm known as Gron Ventures LLC (Gron). Gron, a United States Securities and Exchange Commission registered investment advisor, is funded, at least in part, by Toba Capital, a firm co-founded by Orange County-based Vinny Smith, who is Toba's sole limited partner. Toba's co-founder, Ramsey, is Managing Partner at Gron.

Beginning in late 2018 and early 2019, Gron discussed making a seed investment into Cookies. At that time, Brandon Johnson (Brandon) was working at a Southern California-based real estate consultancy firm. He was, among other things, active in "real estate entitlements and development" in Southern California, with a particular expertise in "land use entitlements." He was also an "investor" in the "cannabis business." Mr. Johnson began working with Gron, and Cookies, to develop a business model that would eventually become a "Retail Joint Venture," documented in September 2019.

In January 2019, Brandon and his attorney brother, Ryan Johnson, along with their business partner Daniel Firtel, formed a company called Cookies Real Estate, LLC (Cookies Real Estate). Cookies Real Estate was initially formed to work with Cookies on California-based cannabis retail projects. Its original business objective was to identify and secure real estate locations that were or could be operated as licensed cannabis retail stores in California. Cookies Real Estate intended to focus on leasing, zoning approvals, use permits and other governmental approvals needed to operate legal cannabis retail stores. The plan was for the stores to be run day-to-day by existing owner-operators (or co-owner operators) subject to a "Retail License Agreement" under which the stores would sell Cookies-branded cannabis products alongside other brands on a non-exclusive basis.

Firtel's background was as an executive with real estate investment and leasing firms in California. Firtel was involved in shopping center sales and lease transactions, advised cannabis companies, including with respect to expansion into multiple states through licensing and distribution partnerships, and implementation of Standard Operating Procedures (SOP's) deployed on a national basis. Ryan Johnson is an attorney who graduated from UC Law San Francisco (formerly known as UC Hastings College of the Law), with a Juris Doctor degree in 2005. He practiced law with a Southern California law firm for over fourteen years before joining his brother and Firtel in business.

An example of how Cookies Real Estate, with the help of Gron, entered the legal cannabis market is contained in the Application, Cookies Real Estate caused to be submitted to the City of Pasadena, California on or about January 31, 2019. A company called ARMPAS, Inc. dba Emerald Pharms Pasadena submitted the Application. Brandon Johnson signed the Applicant/Owner Information Form, under penalty of perjury, as part of that application. Although Cookies Real Estate was neither the applicant, nor the sole owner of the applicant, it was the 43% owner of the applicant entity, and Brandon Johnson had a managing role with the entity. The Pasadena Application included a "Business Operations and Plan" segment explaining the roles of other parties in the planned operations of ARMPAS, for example, that Emerald Pharms of Pasadena had arranged through "CannaCraft" to shelve legalized cannabis products at the planned store, including "the Cookies Brand."

The Pasadena Application Business Operations and Plan explained in detail how the arrangement among Cookies Real Estate, as a co-owner, and the operating "partners" was to work. The Application explained that Gron Ventures, an investment fund focused exclusively on cannabis businesses, was the primary financial backer of the Emerald Pharms and CannaCraft organizations. It further explained that Gron Ventures relies on Brandon Johnson and his Cookies Real Estate LLC organization, a 43% stakeholder in Emerald Pharms Pasadena, to select the most qualified partners to co-own and operate their retail cannabis stores. The application recited that Mr. Johnson and Gron Ventures developed a licensing model for its various branded retailers similar to a franchise model.

This structure formed the basis for subsequent negotiations of the operative agreements at issue in this Arbitration and were the model for those that followed between CRE and Cookies. CRE alleges that it was Cookies that developed the business model used by the parties with branded retailers, the model that CRE asserts is or has become a franchise model and is not a licensing model at all.

CRE's Counterclaim asserts that Cookies induced it to enter into the parties' "first" license agreement on January 21, 2020, nearly one year *after* the Pasadena Application wherein Brandon Johnson represented that he and Gron had "developed a licensing model for its various branded retailers that is similar to the franchise model" and that would be "a model for those that follow." CRE asserts in its Counterclaim that, if it had been aware of

Cookies true nature, that Cookies was acting or would eventually act as a franchisor – then CRE would never have entered into any agreements with Cookies.

Cookies was a somewhat unsophisticated company entering into a joint venture with highly sophisticated counterparties – a joint venture whose terms and provisions were set forth in written agreements. Milam, Chang and Cookies believed that Cookies was entering into a joint venture.

Following the Pasadena Application, things moved quickly.
On February 6, 2019, Cookies introduced Brandon Johnson to Cookies' outside transactional counsel, Moulton Moore Stella LLP (MMS). Cookies asked Brandon Johnson to share the retail docs Brandon's legal team put together with MMS so Cookies could move quickly to memorialize deals with four (4) licensed cannabis retail dispensaries that were interested in operating as Cookies-branded dispensaries. Brandon sent Cookies' counsel a version of the agreement and recommended that everyone have a call to discuss what should be included, emphasizing that the goal was to enter an arm's length license agreement that avoids inadvertent franchise territory.

Over the ensuing months, the parties and their counsel worked to refine the "Retail License Agreement" to be used by Cookies to license its intellectual property to third-party licensed cannabis retail store operators so that they could operate Cookies-branded cannabis retail stores to create an arm's length license agreement that would avoid inadvertent franchise territory.

Concurrently, the Johnsons, Firtel, Gron and Cookies discussed their relationship and forming what their own retail joint venture – initially referred to as "NewCo" or the "Retail JV". This "retail joint venture," or "Retail JV," would be owned (1) by Cookies, on one hand, and (2) by the Johnsons and Firtel (through a holding company), on the other hand. Gron would provide some of the initial the funding. Cookies, the Johnsons and Firtel, and Gron, and their respective legal counsel, negotiated the terms of a set of Retail JV contracts for almost eight (8) months, culminating in signed agreements dated September 16, 2019 – the contracts thar are at issue in this Arbitration.

These are lengthy, complex, commercial agreements that resulted from substantial negotiation and revision. The agreements provided that:

- The Johnson/Johnson/Firtel team would, through the Retail JV (CRE), raise third-party investment capital, including from Gron.
- The Retail JV (CRE) would use that investment capital to establish, acquire, construct, develop, own, operate and/or otherwise invest in licensed retail cannabis stores that would be operated as Cookies-branded retail stores and owned by the Retail JV.

- Each such Cookies-branded retail store would be subject to a Retail License Agreement with Cookies, under which Cookies would license its intellectual property, marks and branding to the store; in exchange, Cookies would receive (a) a royalty (license fee) on the sale of Cookies-branded products from the stores, and (b) the contractual right to acquire, or "roll up", each Cookies-branded retail store in the future if permissible under applicable law.
- The Retail JV would receive (a) operating distributions from those Cookies-branded retail stores in which it held an equity or economic interest, and (b) if a Cookies-branded retail store were to be "rolled up" by Cookies, its (i) pro rata portion of the sale price of such store, and (ii) a special additional fee called the "Portfolio Rollup Consideration."

On August 22, 2019, as the parties approached completing the set of Retail JV definitive agreements, Gron's Linovitz sent an email to Cookies' counsel explaining Gron's analysis of the expected lucrative financial benefits of the Retail JV structure. A day later, the Retail JV was formed. The parties called it: "Cookies Retail, LLC." Cookies owned 20% of it, Bakery Partners owned 80% of it.

On September 16, 2019, the CRE Operating Agreement was executed. Consistent with the original concept of forming a joint venture, the CRE Operating Agreement was between (1) Cookies and (2) a holding company created and owned by the Johnsons and Firtel – Bakery Partners, LLC (Bakery Partners). Also on September 16, 2019, the other Retail JV agreements were executed: (a) the Master Rollup Agreement; (b) the Retail Services Agreement; and (c) the License Agreement.

Under these negotiated commercial contracts, the role and mandate of CRE as "the Retail JV" entity was circumscribed by a series of key definitions, including in the License Agreement and Master Rollup Agreement:

- CRE had a limited license to "use, display and reproduce [Cookies' intellectual property] solely in connection with the advertising, publicity or promotion of the "Licensee Business" and solely in furtherance of the "Licensor Retail Strategy."
- The term "Licensee Business" defined the scope of CRE's business: to "identify opportunities to establish, acquire, construct, develop, own, operate and/or otherwise invest in licensed retail cannabis stores that will be operated as [Cookies-]Branded Retail Stores . . . pursuant to a Retail License Agreement if [Cookies] determines (in its sole discretion) to enter into such Retail License Agreement," in all cases, "[i]n furtherance of the Licensor Retail Strategy."
- The term "Licensor Retail Strategy" contemplated that Cookies would "grant[] third parties the right to use [Cookies' intellectual property] in connection with the development, establishment and operation of licensed

> retail cannabis stores in certain authorized locations . . . in compliance with" applicable law, and in all cases, "pursuant to a retail license agreement approved by [Cookies]."

CRE was, accordingly, formed as a joint venture for the purpose of identifying opportunities to establish and open new Cookies-branded cannabis retail stores that would be subject to a Retail License Agreement and that would be operated by third parties. Those third-party operators, "partners," would have rights under the Retail License Agreement to use Cookies' intellectual property to promote sales of legalized cannabis products in those stores. For CRE to "identify opportunities" to sign up these "third parties" as operators of Branded Retail Stores under a Cookies-approved Retail License Agreement, CRE was permitted to use the Cookies intellectual property: "solely in connection with the advertising, publicity or promotion of the Licensee Business in furtherance of the Licensor Retail Strategy. CRE was not granted the right to use the Cookies intellectual property, marks or branding other than for that limited and specific purpose.

With the "Retail JV" documents signed, Cookies' expectation was that the parties to the joint venture – Cookies and Bakery Partners – would share in the appreciation in value of their joint venture entity. However, the Johnsons and Firtel subsequently changed course.[11] In late 2021, they created TRP Partners, LLC (along with its subsidiaries and affiliates, TRP). Cookies asserts that the purpose was to divert value that should have accreted to CRE, as the Retail JV and asserts that CRE and TRP raised investor money into TRP and its affiliates using Cookies' intellectual property, causing Cookies damage and making CRE liable to Cookies for what occurred.

Cookies asserts that as a result, assets and other economic rights that should have been owned by CRE -- including assets and economic entitlements related to Cookies' branded retail and cultivation assets in Florida -- were diverted by CRE/TRP using Cookies' marks to fuel the fundraising that occurred in violation of the License Agreement. Cookies further asserts that CRE's use of Cookies marks, branding and intellectual property -- to divert value from CRE and CCC&P and to aid Cookies' competitors -- is not permitted by the License Agreement. Using Cookies marks to aid in fundraising for competing businesses is contrary to the Licensor Retail Strategy.

Cookies further asserts that the Johnson brothers, purportedly on behalf of CRE, asked parties that were equity holders in the entities that owned CRE-related Cookies-branded retail stores to enter and guaranty loans to TRP, and to pledge their equity interest in such stores to TRP under such loan agreements. Cookies argues that CRE used its purse string power to choke off the flow of license fee money to Cookies. CRE is a co-owner of,

[11] Johnson testified that the change in course was required for CRE's and its branded store's survival and occurred in large because of Cookies inability to deliver on its promises and disputes regarding Cookies activities in states such as Oregon and Oklahoma, and Cookies "management of stores in Modesto and La Mesa.

or has a management or other controlling agreement with, each third party that has entered into the Retail License Agreement with Cookies at the direction of CRE for a Cookies-branded retail store. Using either its ownership or management rights, or both, Cookies asserts that CRE has caused each of those third party entities to discontinue paying Cookies the license fees (royalties) under those agreements.

In late 2020, CRE formed Cookies Holdings, LLC (Cookies Holdings) as a Delaware limited liability company and told Cookies that CRE needed to restructure, purportedly for tax reasons. Pursuant to the restructuring, CRE became a wholly owned subsidiary of Cookies Holdings. Cookies exchanged its original 20% equity ownership interest in CRE for a 20% equity interest in Cookies Holdings, and Bakery Partners exchanged its 80% equity ownership interest in CRE for an 80% equity interest in Cookies Holdings. On April 11, 2021, Cookies and Bakery Partners entered into the Limited Liability Company Agreement of Cookies Holdings (the "Cookies Holdings Operating Agreement") and Letter Agreement (the "Cookies Holdings Letter Agreement") regarding certain rights of Cookies. Cookies alleges that CRE has not raised any equity capital into CRE or Cookies Holdings.[12]

C. The Operative Agreements

As of September 16, 2019, the main agreements were as follows[13]:

a. Operating Agreement of Cookies Retail, LLC, which was later replaced on April 11, 2021, with the Operating Agreement of Cookies Holdings, LLC.
b. Master Rollup Agreement between Cookies and CRE pursuant to which CRE agreed to establish, construct and operate numerous "Branded Retail Stores" (a Cookies-branded retail store), and which further provided that each such store entity when established would sign a form of "Retail License Agreement" with Cookies that provided for, among other things, the payment of "Royalty Fees" from the "Licensee" store to CCC&P as the "Licensor".
c. License Agreement between Cookies and CRE whereby Cookies licensed to CRE its marks and copyrights for the "Permitted Use" by CRE, namely for CRE (as provided in the Master Rollup Agreement) to establish, construct and operate the

[12] Cookies asserts that instead, CRE has raised money through convertible promissory notes that, when converted, will dilute everything in CRE, and that Cookies' ownership percentage will be diluted down substantially to ~5%.

[13] Letter Agreement discussed in detail below: in May of 2022, the parties negotiated a Letter Agreement to try to resolve disputes and clarify the parties' obligations, particularly around product pricing and Retail's rights to exclusivity guaranteed in the Master Rollup Agreement. One of the requirements in the Letter Agreement was that Cookies ensure profit margins in Retail's California stores. Retail presented evidence that Cookies failed to do so. Retail's damages expert, Christian Tregillis, calculated the damages from this breach at $617,138. Cookies' expert found that were a breach to be established the damages should be limited to $106,606.

aforementioned "Branded Retail Stores", which this License Agreement describes as its "Licensor Retail Strategy".

D. The Retail Stores

The Master Rollup Agreement contemplates that Cookies will grant certain third parties the right to use the Company Marks in connection with the development, establishment and operation of licensed retail cannabis stores in certain authorized locations pursuant to a retail license agreement. Accordingly, after entering into the master agreements, CRE began partnering with other individuals and entities who were interested in developing, establishing, and operating Cookies-branded retail stores. In some instances, CRE and its partners formed a new entity. CRE would be both an investor and an owner of the new entity. Other times, CRE entered a contractual relationship with an entity, which entitled CRE to receive a portion of the entity's profits.

As contemplated by the Master Rollup Agreement, these third parties entered into license agreements with Cookies. Specifically, between January 21, 2020, and November 21, 2023, thirty-two different entities, wholly or partially owned by CRE, entered into License Agreements and/or Support Services Agreements with Cookies.

Each retail store is owned by a non-CRE entity. The only states where that is not the structure are the Florida and Pennsylvania markets, where different forms of contracts are used. In those states, instead of Retail License Agreements between Cookies and the local operating entities (the partners) that run the stores, the Florida and Pennsylvania contracts are different: they are License and Packaging Agreements. Both contracts for those states contain express clauses with the following language at paragraph 2(d) of each:

> The Parties acknowledge and agree that nothing contained in this Agreement shall be construed to create a franchise or make either party the franchisee of the other. Licensee acknowledges and agrees that the marketing system it intends to use with regards to the Licensed Products has not been, nor will it be, prescribed in substantial part by Licensor. Licensee hereby releases any and all claims that Licensor or IP Owner has violated any franchise disclosure or other franchisor obligation in connection herewith.

In every other state, and for every other store location, CRE is not the Licensee.[14] They are as contemplated by the Retail JV, "third parties". Cookies asserts that, though CRE has positioned itself with sufficient ownership and management rights in each one of these third parties such that it can choke off the purse strings to deprive Cookies of revenue, CRE is not the Licensee itself.

[14] The Licensees are not parties to this Arbitration.

Concurrent with the Master Rollup Agreement, as referenced above, CRE entered into a master License Agreement. The License Agreement grants Retail, "its affiliates and their respective directors, officers, managers and employees" "a limited, non-exclusive, non-sublicenseable, royalty-free, perpetual… license… throughout the Territory to use, display and reproduce the Licensed Property solely in connection with the advertising, publicity or promotion of" Retail's business and "in furtherance of the Licensor Retail Strategy." "Licensor Retail Strategy" is defined as use of the "Licensed Property in connection with the development, establishment and operation of licensed retail cannabis stores in in [*sic*] certain authorized locations."[15]

The License Agreements state CRE and its affiliates ("Licensees") shall have the right to control certain aspects of their operations. For instance:

> Licensee shall be solely responsible for the following: (i) having prepared and submitted for approval by applicable governmental authorities plans and specifications for the construction of the Branded Retail Store; (ii) completing the construction and/or remodeling, equipment, fixtures, furniture and sign installation and decorating the Branded Retail Store in full and strict compliance with all applicable ordinances, building codes and permit requirements without any unauthorized alterations…
>
> that "each Branded Retail Store is an independent business and that Licensee and each applicable Operating Subsidiary is responsible for the control and management of each Branded Retail Store, including, but not limited to, the hiring and discharging of employees, setting work schedules, maintaining all employment records and setting and paying wages and benefits of its employees in accordance with Applicable Law."

E. Royalties: Fees v. Credits

Section 2(c) of the Master Rollup Agreement provides:

> "The parties acknowledge and agree that (a) the Royalty Fees (as defined in the Retail License Agreement) shall be determined on a case-by-case basis by the parties after good faith consultation, (b) [Retail] shall use commercially reasonable efforts to negotiate with its partners to obtain Royalty Fees in an amount acceptable to [Cookies], (c) any such Royalty Fees shall not be charged by [Cookies] (or shall be returned by [Cookies] to [Retail], if agreed upon by the parties) with respect to [Retail's] equity or economic interest in the Branded Retail Store, and (d) the parties shall cooperate in good faith to

[15] It is the licensor retail strategy language that CRE relies on as the source of its authority to use Cookies Trademarks in fundraising efforts engaged in by TRP, discussed below.

> ensure that [Retail] will be in the same financial position as it otherwise would have been in the absence of any Royalty Fees."[16]

Brandon Johnson testified that this language reflects the parties' agreement that CRE would not pay any royalties or, if they did, Cookies would credit CRE for a portion of the fees it paid. CRE asserts accordingly that if the License Agreement for a particular Branded Retail Store required that a 5% Royalty Fee be paid to Cookies and CRE were to own 50% of the equity in that Branded Retail Store, then (i) Cookies would either charge a Royalty Fee of 2.5%, or (ii) if the entire 5% Royalty Fee were paid, half of the Royalty Fee would be returned to Retail.

The parties' September 16, 2019, Master Rollup Agreement (MRUA Section 1(r)) defines Minimum Interest as follows:

> (r) "***Minimum Interest***" means the lesser of: (i) twenty percent (20.0%) of (A) the issued and outstanding equity interests, calculated on a fully diluted basis, of the entity that owns or operates the applicable Branded Retail Store, or (B) the economic interest of the entity that owns or operates the applicable Branded Retail Store; and (ii) the highest percentage ownership or economic interest that a party is permitted to hold of an entity that owns a state license to own and operated a Branded Retail Store under Applicable Law without being considered an "owner" of such entity; provided, that the ownership interest under clause (ii) may not be less than nine and nine-tenths percent (9.9%), unless otherwise agreed in writing by the Company.

The "Minimum Interest" definition begins with the words "the lesser of and is followed by two clauses. The maximum percentage that can be derived from clause (i) is 20%. It can be either 20% of the equity interest, or 20% of the economic (*e.g.,* profits) interest but, either way, the maximum percentage which can be derived from clause (i) is 20%. The maximum percentage that can be derived from clause (ii) is, in theory, potentially as high as 100%. The floor under clause (ii) is 9.9%. Cookies asserts that even if the percentage derived from clause (ii) was 100%, that would still be subject to the limiting words which appear at the very beginning of the definition: "…the lesser of…" which modifies (i) and (ii). Consequently, the lesser of 20% and any number higher than 20% is always going to be 20%. Therefore, the "Minimum Interest" under the MRUA could fluctuate between 9.9% and 20%.

When Retail began opening Branded Retail Stores, it paid Royalty Fees to Cookies

[16] The meaning of this language is disputed by the parties. CRE contends it comports with its view that it is not obligated to pay royalties and is the source of its refund defense. Cookies contends that the parties intended that CRE would pay fees but get a refund based on its interest. Berling however testified that it was never contemplated that CRE would acquire the level of interest that it has acquired in each of the retail stores, that the intent was for CRE to open more stores with less ownership, which would have resulted in a more profitable licensing arrangement for Cookies. Cookies contends this testimony is consistent with Minimum Interest definition contained at MRUA Section l(r).

pursuant to this understanding of its obligation under the various retail license agreements. However, Johnson testified that Cookies did not repay CRE to ensure that CRE were in the same financial position as it would have been absent the full payment of the fees. Therefore, as CRE perceived the credit owed to it became larger and larger, CRE stopped paying Royalty Fees. Instead, CRE began offsetting Royalty Fees it against the credit it deemed it was owed.

CRE asserts that the Master Rollup Agreement expressly states that CRE is not required to pay any license or royalty fees and that, if it does, Cookies must repay CRE. It maintains that these provisions were never amended.[17] CRE asserts that Cookies ignores the plain language of the contracts at issue, alleging that "minimum" means "maximum," and that a "good faith and diligent effort to negotiate" with third parties means an obligation to pay.

The problem arose when CRE indicated that it was not willing to restrict itself to taking just the "Minimum Interest" of 9.9% to 20% specified by MRUA in "CAPEX Stores." Berling testified that CRE concluded that it did not want small percentages and wanted controlling interests. He further testified that the consequence of CRE's stated intention to have a controlling interest in , and its unwillingness to adhere to the "Minimum Interest" language in the MRUA was to halt development including approval of RLAs. Cookies believed it could not sign RLAs with the large percentage interest CRE intended to have. Berling explained that Cookies is an asset light capital efficient model, surviving off license fees and could not afford not to be paid the majority of the license fee on each and every one of these deals.

The parties were at an impasse. Cookies could not be forced to approve RLAs. It had the "sole discretion" to approve (or not) any proposed RLA, *per* Section 2(a) of the MRUA. Similarly, the License Agreement also provides Cookies with the "sole discretion" to enter into (or not) any proposed RLA. [Recital C].

The parties needed to find a way forward. Berling testified regarding a lengthy negotiation that ultimately ended in CRE consenting to amend the Master Rollup Agreement and agreeing to pay their pro rata share moving forward on all existing and new deals. Berling testified that he believed the email consent received from CRE was adequate to amend the MRUA (pursuant to the provisions of paragraph 9 (h)). The email string included Berling, both companies' general counsel, CRE's board member Tom Linovitz, as well as CRE's largest investor Wilder Ramsey representing Gron Ventures. Berling testified that the agreement is memorialized in the September 8 and 9 emails, that immediately

[17] Cookies contends that this language was clarified by a "Consent Agreement" memorialized in emails between the parties to provide that CRE was obligated to pay licensing fees on outstanding CRE Retail Agreements in return for Cookies waiver of its pro-rata share of interim distributions from CRE attributable to each store. Cookies further contends that to the extent that the Consent Agreement did not formally amend the Master Rollup Agreement, CRE is estopped from so contending.

following the parties begin performing in accordance with the "consent agreement." For its part CRE paid fees and for its part Cookies approved RLAs with the larger percentage interest CRE desired.

Cookies asserts that this email chain was sufficient to amend the MRUA to allow CRE to take higher-than-20% ownership percentages in Branded Retail Stores, and to provide for Cookies to be paid the license fees – in full – because the MRUA allowed amendments by "written consent," according to Section 9(h) (p.8). Cookies asserts there was consideration: a key concession by Cookies in the "written consent" accomplished by the September 8 and 9, 2020 emails was Cookies' agreement to forego distributions under the parties' Operating Agreement. CRE also received relief from the "Minimum Interest" cap on ownership in operator entities subject to an RLA of 20%. So, the consideration exchanged was mutual.

Further, with the written consent resolved, Cookies relied on it and began approving RLAs for new store locations. It also began to receive license fee payments from CRE. It was CRE which made these payments, not any of the individual stores. Cookies maintains that the parties' course of dealing was clear: CRE owned a significant portion of each of the store-operator entities and/or managed each such entity, and received a profits interest. CRE also required all fee invoicing from Cookies to go to it, and it historically made all fee payments to Cookies (when they were made). Cookies asserts that the course of dealing, coupled with CRE's authority at each of the store-operator entities, established that the obligation to cause the fees to be paid to Cookies was a CRE obligation.

Cookies argues that Mr. Johnson's testimony that he had consistently told Parker Berling that CRE did not intend to pay licensing fees and that in fact it was Cookies that owed CRE money is contrary to the evidence. Cookies counters that it produced an exhibit consisting of over 300 text messages between Messrs. Berling and Johnson between April 2023 and January 2024, and not one text exists in which Mr. Johnson suggests what would later become CRE's "refund" defense. Instead, Cookies argues those texts show Mr. Berling doing everything possible to get Mr. Johnson to agree to meet with him to discuss and resolve the unpaid fees, while Mr. Johnson avoids engaging on this issue.[18] An April 27, 2023, text from Mr. Berling to Mr. Johnson, states "If your answer is you can't give anything and don't believe you owe us anything I just need to get to that answer quickly"). Cookies contends that that April 27, 2023, text from Mr. Berling provided Mr. Johnson with a clear opportunity to iterate CRE's position and state clearly that CRE had no intention of paying the fees, because Cookies owed CRE a refund. Mr. Johnson ignored the text.[19]

Cookies argues that Mr. Johnson avoided engaging Mr. Berling for many months, while assuring him that everything would be worked out, only to create *post-hoc* an excuse

[18] The texts referenced are contained in the License Fee Delay Compilation Exhibit
[19] Cookies argues that because Brandon could have been expected to deny the obligations his failure to do so is an admission of the obligation.

that, based on the text of the contracts, CRE was not in fact obligated to pay anything.

F. The Letter Agreement

On May 31, 2022, Cookies and Retail entered into a Letter Agreement to address disputes that had arisen between the parties. Johnson testified that the agreement was necessary to clarify ambiguity in the Master Rollup Agreement and enhance retail store margins.

Johnson testified that the Letter Agreement ensured Retail's exclusivity rights in several jurisdictions in two categories: Exclusive Vertical Jurisdictions and Application Jurisdictions. Exclusive Vertical Jurisdictions granted Retail vertically integrated rights, wherein only Retail would be permitted to hold both Retail License Agreements (to open Cookies Branded Retail Stores) and License and Packaging Agreements (to cultivate, manufacture, and package, Cookies branded products to be sold within the jurisdiction). These jurisdictions included Florida, Pennsylvania, Ohio, Rhode Island, Connecticut, Missouri, and Massachusetts. To ensure that Retail could not simply sit on these rights and deprive Cookies of revenue, the Letter Agreement provided for the creation of milestones that, if not met, resulted in Retail losing exclusivity.

Application Jurisdictions are jurisdictions in which retail cannabis licenses were not yet being offered but would likely be in the future. For these jurisdictions, Cookies agreed to cooperate with CRE to make CRE the exclusive partner of Cookies and the Cookies brand. These Application jurisdictions included New Jersey, Ohio, Alabama, Virginia, and New York.

CRE asserts that the parties also agreed to several protections for CRE's Cookies Branded Retail Stores to protect the value of CRE's exclusivity rights. Cookies promised to establish buffer zones around CRE's Cookies Branded Retail Stores. Johnson testifies that buffer buffer zones were intended to protect Retail not only from other Cookies Branded Retail Stores, but also from the sale of Cookies branded products sold by non-Cookies branded stores. Cookies even agreed to establish the buffer zones by removing retailers already selling Cookies branded products within buffer zones for new stores.[20]

Retail and Cookies also used the Letter Agreement to "clarify" certain terms of the Master Rollup Agreement to define CRE's exclusivity rights and the time in which exclusivity would apply:

> (8) Clarification to Master Rollup Agreement. Consistent with the Master Rollup Agreement, [CRE] will have the first opportunity and priority (for a

[20] One of the "Protections" was that Cookies was required "to provide [Retail] with [a] marketing playbook…in order to streamline general marketing and promotional activities and events, [New Store Openings], special celebrity appearances and other brand activation." [¶ 5(f)]

> reasonable period of time) to establish new Branded Retail Stores in new regions, markets and submarkets. The parties desire to further define: (a) what constitutes a "new region[s], market[s] and submarket[s]"; and (b) what constitutes a "reasonable period of time" under the Master Rollup Agreement as follows:
>
> (a) New Markets. A "new region, market and submarket" means any market that is not a "Mature Market" (as defined below), as well as any new city/county/region (as applicable) in California and any Mature Market that has not yet issued licenses (*e.g.*, Redondo Beach, CA), with the following exceptions[21]…
>
> *****
>
> (c) New Entry Period. A "reasonable period of time" shall mean twelve (12) months from the date the first new license issued by any such New Market first becomes "Viable" (the "New Entry Period"). "Viable" means the date that the first new license can be held and used in such New Market without threat of revocation or modification from a pending lawsuit (including an appeal thereof) threatening at least the majority of new licenses issued in such New Market. … [Cookies] shall not enter into a Retail License Agreement with any third-party during the New Entry Period (whether or not [CRE] has had discussions with such third-party about opening a Branded Retail Store). Notwithstanding the foregoing, the New Entry Period with respect to any New Market will terminate immediately in the event that … [CRE] does not enter into a Retail License Agreement with [Cookies] with respect to opening a Branded Retail Store in such New Market within six (6) months from the date the first new license issued by any such New Market first becomes Viable; provided, that the New Entry Period will not terminate immediately under this clause (b) if [Cookies] unreasonably withholds, conditions or delays entry into a Retail License Agreement that is substantially similar in form to those used by the parties in the past, or if [Cookies], on the one hand, and [Retail] and/or the prospective partner, on the other hand, have entered into an agreement to execute a Retail License Agreement upon receipt of regulatory approval. [(§ 8(a), (c)]

In short, the Letter Agreement provides that, once recreational cannabis licenses were "viable" in a new market, Retail would have six months to enter into a Retail License Agreement with Cookies and twelve months to open a Cookies-branded dispensary.

CRE asserts that the Application Jurisdiction and New Entry Period provisions of the Letter Agreement guaranteed Retail the exclusive right to open a Cookies Branded Retail Store in New York. CRE further asserts that relying on Mr. Berling's statements in March

[21] New York is not listed as an exception.

2022 regarding the opening of the Herald Square Flagship, and the terms of the Letter Agreement barring Cookies from entering into a license agreement with any third-party, like Mr. Terzi, during the New Entry Period, CRE understood that it specifically had the right to open the Herald Square Flagship Cookies Branded Retail Store in New York.

The Letter Agreement also set forth certain requirements for Cookies to supply Retail with Cookies-branded products at specific profit margins:

> [Cookies] shall immediately commence selling or causing to be sold all Licensed Products in California at a maximum wholesale price of no more than forty-five percent (45%) of MSRP (i.e., a minimum gross margin of 55%) for all Licensed Products. Thereafter, [Cookies] shall use diligent and commercially reasonable efforts to reduce the maximum wholesale pricing to no more than forty percent (40%) of MSRP (i.e., a minimum gross margin of 60%) for all Licensed Products as soon as practicable; provided that [Cookies] *shall* provide maximum wholesale pricing of forty percent (40%) of MSRP to [Retail] on or before the date that is six (6) months after the Effective Date. (i.e. November 30, 2022).(*Id*. ¶ 6(b)(i), emphasis added.)

Johnson testified that this was a key term for Retail. As the cannabis market softened, CRE was often offering products at a discount, leaving a very small profit margin. Retail needed the profit margins to increase for the stores to be economically viable. CRE maintains that despite the unequivocal requirements in the Letter Agreement, for many products, Cookies failed to immediately ensure that the maximum wholesale price did not exceed 45% of MSRP or adjust wholesale prices to the required 40% of MSRP on or before November 30, 2022. Johnson testifies that "margins didn't increase." He further testified that when it became clear that Cookies was not going to honor the terms of the Letter Agreement, specifically the margin requirements, Cookies stopped paying Royalty Fees and started offsetting any fees owed against the credits owed to Retail.

G. Florida

Johnson testified that Retail entered into a license agreement with Cookies that gave Retail's partner, Cookies Florida, the exclusive right to utilize the licensed property in connection with the development and operation of retail cannabis stores within the entire State of Florida. Cookies Florida also obtained an exclusive license to advertise, publicize, market and sell licensed products and/or affiliate products that have been cultivated, manufactured, and/or produced by Cookies Florida.

Notwithstanding the foregoing, Johnson testified that Retail learned that Cookies had partnered with another entity, 162 Fund, to raise funds to purchase a portfolio of assets including 17 stores in Florida. Johnson testified further that this was extremely concerning

to Retail for two reasons. One, Retail has the exclusive right to raise money for Cookies-branded retail stores. Two, Cookies had the exclusive rights to use Cookies' intellectual property in Florida. CRE feared that if Cookies were to have purchased this portfolio and to have attempted to open Cookies-branded stores in Florida it would have voided Retail's Florida license.

Berling testified that the venture to purchase the portfolio of assets with 162 Fund failed. He further testified that as to competing in the Florida market that would not have been possible given their agreements with CRE. Had Cookies been successful it would have disposed of the competing portfolio in a way that would have avoided conflicts for CRE/

H. Pennsylvania

Toward the end of 2022, Retail was contacted by an investment company called EEC. Under the pretense of investing, Johnson testified that EEC conducted substantial due diligence, even touring Retail's cultivation facility. But EEC did not really want to invest in Retail. Instead, it planned to launch Cookies Production Inc. to build a cultivation portfolio across multiple states. Mr. Johnson discussed EEC's plans with Mr. Berling. Johnson testified that Mr. Berling wanted Retail to relinquish its exclusive vertical rights in Pennsylvania and Connecticut to allow Cookies Production Co. to build cultivation facilities in those states.

Retail never agreed to relinquish its rights to Pennsylvania. Regardless, Johnson testified that Cookies and EEC were undeterred. Retail discovered a Cookies Production Inc. offering deck. Among other things, Cookies Production Inc. represented that they had acquired a 110,000 square foot cultivation facility in Pennsylvania, which it intended to convert to growing Cookies genetics and products. Cookies Production Inc. also represented that it would be "providing geographic exclusivity to retailers." Johnson testified that CRE was extremely frustrated. CRE believed the parties had settled their exclusivity rights when they executed the Letter Agreement.

I. Herald Square

Johnson testified and Berling confirmed that on February 8, 2022, Mr. Berling introduced CRE to Jack Terzi and Michael Cohen. In an email with the subject line "Cookies NY," Mr. Berling wrote "Jack and Michael have some killer real estate in NY and will also aggressively be going after licenses in the upcoming round. I'd love to figure out if there is a way to combine forces."

Over the next several weeks, Cookies, CRE, Mr. Terzi, and Mr. Cohen engaged in discussions about opening a Cookies Branded Retail Store in New York. Mr. Berling explained that the intent was for CRE to partner with Mr. Terzi to open a "Herald Square Flagship" at the existing location of Cookies' "Lifestyle" (non-cannabis) store.

Mr. Berling, being aware of CRE's first rights to New York per the Letter Agreement explained "[CRE] will want to make sure they are not unnecessarily giving up their rights to opening Cookies dispensaries without getting significant value in return."

In August 2022, Cookies entered into a store license and merchandise agreement with CNY Partners—an entity affiliated with Mr. Terzi and Mr. Cohen—for purposes of establishing a Cookies lifestyle and apparel store. The agreement contained an option to convert the clothing store into a licensed cannabis dispensary.

New York issued recreational cannabis regulations in December 2022. Cookies determined that the regulations prevented Retail from entering the New York market. Consequently, though Cookies knew that the Letter Agreement prevented from negotiating with anyone that CRE negotiated with, Cookies began negotiating an agreement with Mr. Terzi and Mr. Cohen, which would allow them to convert the clothing store into a licensed cannabis dispensary.

On July 14, 2023, GMJT and Cookies executed an "Agreement Not to Sue," under which Cookies gave GMJT the right to use specific, enumerated Cookies' marks and to sell certain proprietary strains of cannabis only "in connection with the branding, advertising, and marketing of the licensed cannabis dispensary located at the [Herald Square Store], and the sale of products therefrom." Mr. Cohen executed the agreement on behalf of GMJT. After entering into the Agreement Not to Sue, Cookies helped design the new cannabis dispensary at Herald Square.

When the Herald Square Store reopened as a cannabis dispensary on February 11, 2024, it maintained the Cookies-blue exterior of the building and prominantly displays the "C' Logo with Bite" trademark on a sign that extends out over the sidewalk. While the store was ultimately opened as "Culture House" due to regulatory issues regarding the use of the name Cookies,[22] the Herald Square store is a Cookies' store. Ms. Millican admitted that this has occurred in the past, and that the name on the outside is not determinative of a Cookies' store. Millican testified that there are a lot of different exterior signs that you can see at the Cookies-branded retail stores, but the Cookies marks on the exterior and interior would signify whether it is a Cookies store.

Berling testified that the Agreement was reached only after it was determined that CRE was barred from opening a store in New York. He further testified that Cookies receives no fees from Herald Square, and that the only benefit to Cookies is the placement of its brand in New York.

J. Franchise v. License

[22] As confirmed by Ms. Millican, regulators in some jurisdictions view the name Cookies with skepticism due to its potential allure to minors.

Concurrently with the issues relating to Cookies' violation of exclusivity in New York, Retail continued to have other disputes with Cookies. In particular, in late 2023, CRE sought to open a new Cookies Branded Retail Store in Fresno, California. While Cookies had previously involved itself in store openings, CRE asserts that Cookies' engagement in the opening of the Fresno location took on an entirely different tone. Days after Retail signed the License Agreement for Fresno, Cookies sent out an email (the mobilization email) outlining its intended involvement in the store opening, including New Store Opening (NSO) logistics, Berner Meet & Greet to Support Hiring, Retail Store Design, Customer Journey, the grand opening event, and the opening menu. CRE interpreted the Fresno mobilization email as prescribing requirements that CRE had to meet to secure Berner's attendance at the grand opening. CRE perceived that not having Berner attend would have a lasting financial impact on the store. Accordingly, CRE did not feel as though it could reject Cookies' demands insofar as Berner was concerned.[23]

CRE through Johnson maintains that Cookies involvement in the Fresno store included that:

- Cookies required the use of flower tables and would not allow Retail to use its preferred "shopping cart" or "grocery store" model. [Berner confirmed in his testimony that he recommended use of flower tables]
- Cookies designed the menu that would be printed and displayed in the store.
- Cookies hosted the RSVP page for the grand opening.
- Cookies designed custom Fresno merchandise, including hats, sweatshirts, and beanies.
- Cookies placed an order for NSO supplies.
- Cookies was actively involved in interviewing and hiring staff.
- Cookies required Retail to pay for a Cookies-branded bus to be at the store's grand opening, even though Berner would be the only person allowed access to the bus.
- Cookies arranged product shipping, brand representation, and all grand opening details (location, attendance, if Berner will be there and when, VIBES location setup, and any other information relating to operation hours, festivities, parking instructions, etc.)
- Cookies approved the swag that would be given to customers at the grand opening.

Johnson testified that Berner was himself involved in selecting artwork to hang in the Fresno store, interviewing store employees, and selecting the DJ who would be at the grand opening. Berner confirmed that he participated in the selection of artwork for Fresno. Johnson testified that CRE was loathe to allow Berner to interview hiring candidates,[24] but

[23] Kramer testified that stores experience a financial boost when Berner attends openings.
[24] Johnson testifies that CRE's reluctance to include Berner in a hiring event stemmed from a prior opening in Miami. Johnson testified that Berner's involvement in the Miami opening included a

CRE did not feel like they had a choice. CRE believe that if it did not allow Berner and Cookies to be involved in hiring, Berner would not attend the grand opening and the store's success would be impacted. Berner testified that he interviewed candidates for Fresno and recommended people he believed would well represent the store. Berner testified that he only recommended hires, that CRE had ultimate control and that his participation was in a hiring event designed to promote interest in the store.

CRE maintains that this event was an uncharacteristic takeover of CRE's operations which made it clear that, despite the parties' stated earlier intentions, Cookies intended to control every aspect of CRE's stores' operations. Johnson testified that that the parties had come full circle, and they were back to Cookies' swim lanes proposal.[25] CRE maintains that CRE no longer felt that it could reject Cookies' attempts to control its marketing and business operations.

CRE's "inadvertent franchise" counterclaim, rests on Mr. Johnson's testimony that it was not until late 2023, when the Fresno store was being opened, that he had an epiphany when he realized that Cookies was making such onerous demands (around Berner's attendance at the opening) that CRE would not be able to "control our own destiny and not be subject to micromanagement control." To the contrary Cookies maintains that CRE had, over time, exercised ever greater independence from Cookies, as was testified to, among other witnesses, by CRE's own witness, Jasmine Bautista.[26] Cookies maintains that Berner made requests about his attendance at store openings long before the Fresno grand opening, and the requests regarding Fresno were in line with prior requests.

Brandon Johnson testified that Berner's "demands" in connection with the Fresno store opening were what supposedly finally caused the scales to fall from Mr. Johnson's eyes. It was then, and only then, that he finally came to "realize" that Cookies – a minority joint venture partner – was just going to continue "bullying" CRE, like a "franchisor" browbeating and controlling a helpless franchisee. This contention appears to be contradicted the great weight of the evidence which establishes that CRE operates as an independent licensee.

Berner hiring evet in which Berner offered jobs to candidates without CRE's approval or necessary background checks.

[25] Early in their relationship, Cookies proposed swim lanes within which CRE would operate its Cookies branded stores. The implication is that Cookies was going down the path to franchise territory with its swim lanes proposal. CRE rejected this notion avoiding Cookies' and its inadvertently becoming franchisor and franchisee, choosing to operate its Cookies branded stores as it and its partners believed best. Cookies that if Cookies had an intent to operate as a franchisor, the swim lanes proposal put CRE on notice and that it should have brought its franchise claims soon thereafter.

[26] Cookies asserts that the epiphany moment is explained by CRE's desire to find a way to bring its franchise counterclaims within the applicable statute of limitations. There was no marketing plan in any agreement and the statute of limitations in the CFIL runs from the first discovery of facts, not on "aha moments."

Cookies maintains that CRE defenses to Cookies' claims are all belied by the great weight of the evidence. As with its belated "realization" that it had supposedly somehow become a franchisee, CRE's attempts at a "close reading" of the contracts ignores overwhelming contrary evidence, not the least of which is that CRE was content to string Cookies along, making promises to pay that it never intended to keep, all to induce Cookies to continue signing off on new store openings.

K. CRE's Efforts to Open Branded Retail Stores in Exclusive Retail Jurisdictions

Pursuant to the Letter Agreement, Cookies and Retail were obligated to "negotiate in good faith and enter into a Retail License Agreement and License and Packaging Agreement under which [Retail] has the exclusive right to open Branded Retail Stores and produce Licensed Products" in certain exclusive vertical jurisdictions. CRE asserts that it made a good faith effort to open Branded Retail Stores in the exclusive vertical jurisdictions.

In Pennsylvania, Johnson testified that CRE has invested $3.5 million to get a management agreement for three stores. It has also identified real estate and executed leases. Unfortunately, CRE's partner cross-collateralized their assets. A bank foreclosed on the retail partner's loan and is currently in possession of the retail partner's license. Separately, Retail was working on an acquisition deal, which would have resulted in the creation of six Branded Retail Stores in Pennsylvania. CRE was unable to consummate the deal.

In Ohio, CRE participated in the most recent application round. CRE did not win a license. CRE could open stores as a cultivator, however. So, it has been working on joint ventures to do both cultivation and retail. But the venture has stalled at the agreement stage. Johnson testified that in Connecticut, no new licenses have issued since before the date of the Letter Agreement. CRE believed it would be sublicensing its rights to another group, but that did not occur.

In Missouri, CRE applied for licenses for cultivation, retail, and manufacturing. The licenses were subject to litigation and CRE did not prevail. Johnson further testified that CRE also pursued joint venture opportunities and has tried to acquire additional licenses. CRE will participate in the next licensing round. In Rhode Island, Retail participated in the most recent license application round. Retail did not win a license. Retail intends to participate in the new round that has been announced.

Johnson testified that In Massachusetts, CRE opened one store in 2024 and is working on another. CRE pursued a potential partnership with a man named Taba Moses. Unfortunately, the relationship with Mr. Moses became unsustainable and concluded with his making death threats to Mr. Johnson and his family.

CRE accordingly maintains that Cookies' covenant of good faith and fair dealing claim is barred. The Letter Agreement sets for the parties' rights and obligations relating to Exclusive Vertical Jurisdictions, including the Retail Milestones that express the number of stores Retail would be required to open. The agreement also sets for the remedy: termination of Retail's exclusivity. CRE maintains that it did in fact make good faith efforts to open stores in those jurisdictions and that its evidence in that regard is unrebutted.

L. Fundraising by CRE and TRP

Cookies asserts that CRE misappropriated Cookies' marks to raise money for TRP. Cookies has no ownership interest in TRP. It asserts that it was misled as to TRP's true purpose, and was never told by CRE about how TRP was being built with third-party investor money using Cookies' principle asset, its IP. CRE's contends that its fundraising with Cookies' IP to build TRP was okay because that benefited Cookies since, the money was going to be used to open Cookies-branded retail stores. Cookies counters that no documentary evidence tracing incoming investor money and showing it was used for those purposes was ever presented.[27]

CRE asserts The Master Rollup Agreement and the License Agreement permit Retail to use Cookies' mark to market the Cookies brand to raise funds. Cookies conversely maintains that the right to use the Cookies' mark is restricted. Mr. Berling testified that he thought that CRE's fundraising would only come from Gron Ventures and Mr. Johnson's friends and family. CRE counters that fundraising is permitted by the contracts and that even so that 35 out of CRE's (TRP's) 41 investors are people Mr. Johnson knew before he ever heard of Cookies.

Further, CRE maintains that Cookies fails to establish any damages from this claim, providing no evidence or argument whatsoever that Cookies suffered a detriment because of Retail's fundraising efforts.[28] CRE maintains that Cookies' "cost of modification" theory is just another version of unjust enrichment and is legally barred. The two law review articles Cookies cites both acknowledge that a "cost of modification" analysis has never been applied in any California case. Further, Cookies' expert admitted she failed to conduct a proper hypothetical negotiation analysis. Cookies' own Parker Berling admitted that Cookies previously entered a comparable contract permitting the use of its marks in fundraising for nothing more than potential future license fees. This is exactly what

---

[27] Cookies argues that CRE's "benefit" argument not only lacks evidence of Cookies' consent but should be disbelieved because a good way for CRE to have benefitted Cookies would have been for the licensing fees contractually owed to Cookies to have been paid, and for CRE to have been forthcoming about what it was doing with Cookies' IP.

[28] CRE asserts that Cookies' expert admitted she received TRP's financial record days before her testimony, and considered them in rendering her analysis, "debunking any claim of prejudice by Cookies." A question remains regarding how much was raised from the 6 investors that were not known to Mr. Johnson?

Cookies' contracts with Retail already provide. Thus, no "cost of modification" or "reasonable royalty" was necessary to alter the existing License Agreement.

Ignorant that its IP was being used to raise money for TRP, Cookies believed what its joint venture partner told it from the outset. Construction money would come from tech multibillionaire Vinny Smith to Toba Capital to Gron, and from real estate development multimillionaire Brandon Johnson. Cookies' President Parker Berling testified that Cookies understood CRE would require capital. But Cookies relied on the CRE's representation that they had that capital identified. Berling conceded that would have been able to go out and raise capital without using our marks. He contends that if they wanted to use Cookies marks to fundraise that they would have to come Cookies to amend the license agreement. Had they done so it would have made it very clear that something material in the relationship had changed in CRE's mind in the availability of funding from Gron, Toba, Vinny Smith, and Brandon. Berling emphasized that when he learned what TRP was, he did not approve of fundraising decks but rather he complained regarding the misuse of the marks. He stated clearly to CRE that Cookies did not want Cookies next to anything TRP related. Berling acknowledge that Cookies knew that capital would be needed, but he emphasized that the manner in which capital was to be raised was of extreme importance to Cookies, that he did not want fundraising efforts by CRE to impair Cookies own fundraising efforts.

Brandon Johnson reduced CRE's position to a contention that using Cookies IP without its knowledge to build a company in which Cookies had no ownership was implied by Recital "C" of the six-page License Agreement dated September 16, 2019. Johnson asserted that the right to use Cookies marks for TRP fundraising was implied by the need to "establish, acquire, construct, develop, own and operate." He asserted simply that one can't build things without money.

Johnson's "implied" contention is premised on one of the central contracts between Cookies and CRE, specifically the License Agreement. The evidence showed CRE's conduct in allowing, encouraging and supporting but not revealing to Cookies the use of Cookies IP in TRP pitch decks to raise money for TRP. Cookies and CRE are the only signatories to that contract. The evidence established that CRE provides TRP with all the financial operating results data generated by the Cookies branded retail stores referenced in the CRE counterclaim in this case. That information went directly into the TRP pitch decks.

CRE asserts to the contrary that it receives no information from TRP in return. Kramer's declaration dated September 24, 2024, states that no TRP information is given to CRE, and that "This is done intentionally." Cookies asserts that this is just to keep the information away from Cookies, since the exact same people are the control persons of CRE and TRP. When asked for the source of the financial results data shown in the TRP investor presentations, Kramer's testimony admitted that it is all operational data collected by the stores that are listed in paragraph 16 of the CRE counterclaim in this JAMS arbitration. The financial data in the TRP pitch decks is the financial data generated by the

stores covered by a Retail License Agreement (RLA) with Cookies, sourced under the Master Rollup Agreement with CRE, and referenced in CRE's counterclaim. TRP gets all CRE's data, but TRP keeps all its data away from CRE.

Contracts, like the License Agreement, memorialize the parties' intentions. Cookies asks if there truly was an implied right under the License Agreement for CRE to allow, encourage, and support TRP in using Cookies' IP to raise investor money for TRP, then why did CRE avoid telling Cookies its IP was being used that way? Kramer is CFO of both CRE and TRP and although he testified that he did not know how many TRP investor decks had been published over time, he had seen some of them. He further testified all he ones that he had seen used Cookies IP. Cookies was not a recipient of the TRP investor pitch decks displaying the Cookies IP.

Cookies contends that if Cookies were going to give permission to use its IP for fundraising, it would have done so in a specific writing, not by implication. The record shows that each store operates under an RLA which circumscribes the limited ways in which Cookies' IP can be used. Similarly, after Bakery Partners, LLC insisted that CRE's structure must be amended for alleged "tax" reasons, leading to the formation of Cookies Holdings, LLC, extensive language articulating consent-based preconditions for the use of Cookies' IP was set forth at Section 5.9 of that new, April 11, 2021 Limited Liability Company Operating Agreement. [("Matters Requiring Approval of CCC&P")].

Subject to certain conditions being satisfied, in a public offering context, that section could have been used to permit the use of Cookies' IP. But, as Brandon Johnson admitted, "we have not done a public offering." Cookies maintains that nothing about any RLA, and nothing about the April 11, 2023, Operating Agreement, provided CRE with any permission to use Cookies' IP for fundraising. Cookies asserts that it has never given consent to use its IP to CRE for fundraising by implication, or otherwise.

On May 31, 2022, when Berling asked Johnson about the TRP website, Johnson had an opportunity to inform Berling about what TRP was doing with Cookies' IP, but he instead chose to shift the conversation to talk about store menus. Berling testified that he learned nothing about TRP's use of Cookies' IP for fundraising. Concerning the TRP "pitch decks" used to raise money using Cookies' IP, Berling testified that he did not learn about them until much later. Cookies asserts that that answer was undisputed by any other testimony or exhibit.

Cookies asserts that just as CRE withheld from Cookies the facts surrounding TRP's use of Cookies' IP in investor pitch decks, CRE also failed to pay licensing fees due to Cookies. Cookies asserts that holding back that money helped bolster TRP's EBITDA numbers set forth in the pitch decks. Fueled by impressively growing revenue numbers derived entirely from the financial results of Cookies branded retail stores managed and/or majority owned by CRE under an RLA with Cookies, TRP's self-reported value grew

massively. That is what TRP investor candidates were told and shown. Meanwhile, what CRE told Cookies was that it could not afford to pay the license fees or otherwise put off Cookies' many inquiries about payment over a prolonged period.

Cookies asserts that CRE and Gron evidently worked together as is confirmed by their communications contained in emails dated September 8 and 9, 2020, consenting to amend the Master Rollup Agreement to provide that CRE would pay the full amount of license fees due to Cookies from that point forward, specifically agreeing to pay the full amount of "Existing" and "New" deals moving forward. Cookies avers that what CRE and Gron got out of that Consent Amendment was significant -- pending and proposed RLAs were then approved by Cookies. Cookies further asserts that the calculated nature of CRE's intent is made evident by what Gron later said in the December 28, 2020 "Blue Wedding" email. [("…it doesn't seem like there were that many solutions put forward short of staging our own 'blue wedding' at CCC&P once we get the secondary done…"].[29]

III. **Analysis**

A. Introduction

The primary issues to be decided in this arbitration concern whether Cookies is entitled to recover licensing fees, whether it suffered damage due to CRE's use of Cookies' marks for fundraising, whether CRE suffered damage from Cookies' allowing a third party to open the New York Herald Square Store, whether CRE is entitled to rescind its agreements because of Cookies' operating as a franchisor?[30]

The questions therefore asked by this arbitration, which the Arbitrator finds it necessary to resolve are:

1. Is Cookies Entitled to Recover on its Claim for Unpaid License Fees?

2. Is Cookies Entitled to Recover on its Claim for CRE's use of Cookies Trademarks in its Fundraising with TRP?

3. Is CRE entitled to rescind the Agreements and recover damages because of Cookies operation as an inadvertent Franchisor?

---

[29] The term "blue wedding" was a joint reference to Cookies' company color (blue) and the violent destruction of one family by another under the guise of togetherness at a wedding celebration in Game of Thrones. Cookies maintains that if it had not started before the arbitration, the "Blue Wedding" was ongoing by the midst of the arbitration. Partway through the arbitration, there were revelations about CRE converting the Orcutt (Santa Maria), California store from a Cookies branded retail store to a Dr. Greenthumbs store. Berling testified that Cookies has a signed RLA on this which he believed would prevent this from happening. Evidently money raised by TRP and CRE was used to open a competitor's branded store.

[30] The Arbitrator addresses only issues he finds it necessary to resolve.

4. Was CRE damaged by Cookies allowing a third party to open the Herald Square Store in New York?

B. Cookies' Claim for Unpaid License Fees.

Cookies' arbitration notice sought damages, including consequential damages, from CRE for unpaid royalty fees due to it for the licensed use of its intellectual property.

The decisive contractual provision is the definition of "Minimum Interest" in Section 1(r) of the MRUA. That provision capped the percentage that CRE could own of a CAPEX store at 20%. The contractual definition of "Minimum Interest" begins with the words "the lesser of: (i) twenty percent (20%)" of the "applicable Branded Retail Store." Plainly read, that definition goes on to create both a floor (9.9%) and a ceiling (20%) for how much equity CRE was permitted to own of any "Branded Retail Store."[31] As Mr. Berling testified, this provision reflected the regulatory schemes extant at the time it was drafted as the goal was for CRE to stay under a certain ownership threshold, which in some markets was 20 percent, and in other markets was 10 percent. The threshold was used to define who was an owner in the store. Mr. Berling testified that most markets initially had a limit as to how many stores a[n] owner could possess in a market and what percentage interest an owner could have in a store. That changed, however, as the regulatory schemes developed.

CRE adapted almost immediately. CRE determined that it was in its best interest to have a controlling interest in every store that it opened.

Mr. Berling explained why, in a model that envisioned CRE only owning a maximum of twenty percent of the branded retail stores, it made business sense not to charge, or to credit back, the licensing fees attributable to CRE's ownership percentage because Cookies would receive fees from the 80% controlling interest partners of which there would be more were CRE to secure a higher number of RLAs. Cookies would have been a partner in a profitable joint venture that would also have been paying distributions.

That original business model was upended when CRE decided that it wanted to own a controlling percentage of every store. As Mr. Berling testified that is the context in which Cookies and CRE began to negotiate the agreement that Cookies has characterized as the September 8, 2020, "email consent amendment" to the Master Rollup Agreement. According to CRE following that September 8, 2020, agreement, the negotiation of which Mr. Johnson described as "painless" in an email to Tom Linovitz[32] CRE could own

[31] Thus, for purposes of the contract, there is a definition of a range, between 9.9% and 20%, which the definition calls "Minimum Interest." Use of that defined term to describe that concept does not mean that the sky is the limit, as a parsing of the definition of CAPEX store further confirms.

[32] Emails exchanged on September 9, 2020. Mr. Johnson: "That was painless," to which Tom Linovitz of Gron Ventures responds, "Looks like it was resolved. For now. Haha." As Mr. Berling testified, "So at this point you have the president of CCC&P, the CEO of CRE, both general

whatever percentage of a branded retail store that it wanted, up to and including 100%. CRE maintains that, notwithstanding the elimination of the "minimum interest" provision in the MRUA, sub-paragraph ¶2(c), stating that CRE would owe no licensing fees, remained in full force and effect. This is so notwithstanding that Cookies' agreement, also contained in that September 8, 2024, email exchange, to "waive its pro-rata share of interim distributions from CRE attributable to each store," was apparently binding, as CRE never paid Cookies any distributions, either.

Cookies maintains that it did not agree to permit its brand and marks to be used in stores that would be at risk for not paying licensing fees. CRE argues that the consideration was Cookies' 20% ownership interest in the joint venture. However the argument ignores that pursuant to the September 2020 email amendment, Cookies waived its right to receive joint venture distributions. Moreover, CRE knowingly allowed its "affiliate" TRP, an entity in which Cookies had and has no ownership interest to accede to any value there might have been in the joint venture. As a result, Cookies asks exactly what is Cookies is left owning 20% of.[33] The value that might have existed in CRE has been shifted to TRP. Significantly, CRE has failed to identify the value that Cookies derives from the original joint venture.[34]

Additionally following the September 8, 2020, email agreement the parties conformed their behavior to the email agreement. CRE began paying licensing fees after September 2020 and continued to do so through approximately the summer of 2021. CRE acknowledged on multiple occasions between mid-2021 and October 2023 that it owed licensing fees. The question was not if but how much CRE owed. Additionally, the May 31, 2022. Letter Agreement between the parties acknowledged the obligation to collect and pay licensing fees. Finally, the Mutual Acknowledgment the parties signed on November 21, 2023, explicitly stated that the MRUA had been "amended."

Immediately following the September 2020 email agreement, CRE began making license fee payments, with no holdbacks based on the percentage CRE owned of each store, and it continued to do so until sometime in mid-2021, when the cannabis market began to cool.[35] The resumption in payments is reflected in Suzanne Stuckwisch's Summary of Opinions dated August 27, 2024, at page 4, where she includes a graph showing that fees

---

counsels, CRE's other board member and their largest investor all acknowledging the terms and that this was completed and resolved."

[33] Cookies current ownership on a fully diluted basis is less than 5%.

[34] Ms. Stuckwisch described a "shift" of value by CRE into TRP: She testified that because the limited license agreement provides that goodwill related to Cookies' remains with Cookies, that through the TRP investor presentations, there's been a shifting of goodwill, meaning the pool of potential investing has decreased for Cookies. Their ability to raise capital is impaired. She further testifies that the enterprise value of TRP has increased. She opines that TRP generated goodwill by raising funds with Cookies' IP. She further opined that the confusion in the marketplace diminished the value of the IP as well.

[35] Berling testified that when the pandemic checks were being issued, Cookies saw a huge boost to revenue. When the checks in the summer of 2021 stopped the industry cooled, which coincided with CRE's ceasing to send fees from the partners.

began to increase (blue line on graph), while unpaid fees (red line) remained flat, from approximately September 2020 through mid-2021, when the unpaid fees began to slowly increase, and then spiked sharply starting around November 2021.[36]

Mid-year in 2021, the cannabis retail market slumped. CRE stated that it could not afford, at that time, to stay current on license fee payments. By July 9, 2021, Cookies personnel were trying to collect on "CRE overdue invoices," attaching "a file of all the outstanding invoices for the CRE stores." The "CRE overdue invoices email chain continues for months thereafter in 2021, with no resolution. CRE did not alleged or claimed that the license fees were not owed. Nor did CRE claim that, if the license fees were paid, they would just be owed back to it. The non-payment by CRE was based on market conditions impacting all cannabis industry participants, not on any contention that the payments that were made after the September 8-9, 2020, written consent by email were subject to a return to CRE at some point.

Although the matter of unpaid fees was surely pressing, as CRE CEO Johnson had stated, the matter was not resolved soon. Eventually though, the parties executed an eighteen-page contract called a "Letter Agreement," on May 31, 2022, which provided for several changes, and called for payment to Cookies of overdue license fees. Specifically, it called for "day one" payment of overdue license fees from at least seven operators, at Section 6(b)(iii). CRE was the signatory to the Letter Agreement, not those operators. The Letter Agreement also included a stand-alone "get current" and "stay current" clause as well, which imposed obligations directly on CRE: "… CRE shall use good faith and diligent efforts to negotiate with respective partners to start paying the 'License Fees' pursuant to the terms and conditions of the Retail License Agreements between such Branded Retail Store and CCC&P and bring current or resolve (*e.g.,* subject to a mutually agreed payment plan) all overdue balances that are agreed-upon as owed as of the Effective Date by CRE Branded Retails Stores to CCC&P." [Letter Agreement, Section 6(b)(iii)]

Cookies notes that nowhere does the Letter Agreement state that (i) license fees were not owed, (ii) the MRUA had not been amended by the September 8-9, 2020 emails, or (iii) that any fee payments from CRE to Cookies were subject to a repayment obligation on the part of Cookies.

Nearly one month after the Letter Agreement was signed, CRE CFO Michael Kramer emailed on June 29, 2022, stating the total then owed, claiming "I can have funds wired to you this week once agreed on each store," and showing a total amount then due to Cookies of "$1,652,797.26." Kramer then asserted some (disputed) setoffs but still conceded that Cookies was due at least "$850,630.72." Nothing in the Kramer email dated June 29, 2022, asserted that (i) license fees were not owed, (ii) the MRUA had not been amended by the September 8-9, 2020, emails, or (iii) that any fee payments from CRE to Cookies were subject to a repayment obligation on the part of Cookies.

[36] Stuckwisch Expert Opinion Summary, August 27, 2024.

No license fee payment was made of the undisputed $850,630.72 and there was no resolution of the issue overall, despite Cookies' ongoing efforts to get full payment and a full resolution. For example, on July 6, 2022, Parker Berling emailed Brandon Johnson stating:

Kramer's June 29, 2022, email had stated: "I can have funds wired to you this week once agreed on each store," and with his July 6, 2022, email to CEO Johnson, Berling stated that Cookies wanted to receive the undisputed amount and work to resolve the remaining issue. But that payment of the undisputed amount in full was never made, and while there were many efforts to resolve the debt, and some partial payments by CRE between July and November of 2022, there was never any serious engagement by CRE on the issue after that date.

From shortly after Kramer's June 29, 2022, email through the remainder of 2022 and on into the Fall of 2023, there was series of communications, seeking to determine what was owed to Cookies. [Exhibit 15 (Delay Compilation)]. Throughout that period -- some partial payments were intermittently made in July to November 2022 -- the full undisputed amount was never paid, the full amount from the seven stores whose payments were due on "day one" of the Letter Agreement's Effective Date were never paid, and the remaining, overall full amount due was never paid and never resolved.

During that time, the fact that Cookies had and has in its possession both the signed Letter Agreement and Kramer's June 29, 2022, email admitting at least $850,000 was due has evidentiary significance: "An obligation possessed by the creditor is presumed not to have been paid," *per* CA Evid. Code § 635. The obligation was possessed by Cookies (the Letter Agreement and the June 29, 2022, email). The obligation was not paid.

Nevertheless, CRE caused Cookies to believe that CRE agreed, conceded and accepted that it was obligated in good faith to make diligent efforts to cause payment to Cookies because of: (i) the partial payments by CRE between July and November 2022, (ii) the existence of the Letter Agreement and its "day one" and "good faith" and "diligent effort" "get current" and "stay current" clauses imposing obligations directly on CRE with its "CRE shall" language, and (iii) Kramer's July 29, 2022 email admitting at least $850,000 was due.

Eventually, on December 30, 2021, Brandon Johnson sent an acknowledgement email stating: "Parker [Berling], Dan [Firtel], and I are engaged in global conversations and hopefully will have a resolution sooner than later. It's clearly pressing for all parties." Neither that email, nor any of the communications that followed wherein a resolution was pursued ever asserted that (i) license fees were not owed, (ii) the MRUA had not been amended by the September 8-9, 2020, emails, or (iii) that any fee payments from CRE to Cookies were subject to a repayment obligation on the part of Cookies.

While CRE characterizes these facts – particularly the partial payments as a non-obligatory act on its part, the fact of partial payment has evidentiary significance. Nothing was transmitted by CRE with (or separate from) any of the 2022 partial payments to Cookies stating that the payments were still subject to the provisions of Section 2(c), subsections (c) or (d) of the MRUA. Nor was there ever anything in any of the 2022 or 2023 communications where CRE claimed either that it did not have to pay, or that if it did pay, it would be entitled to ask for a credit back of those payments notwithstanding the September 8-9, 2020, emails constituting the written consent to modify the MRUA. Two evidentiary presumptions apply to these facts:

- Under CA Evid. Code § 631, "money delivered by one to another is presumed to have been due to the latter."
- Under CA Evid. Code § 623: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

At the hearing, Brandon Johnson testified that the 2022 partial payments which were made after the Letter Agreement was signed were merely made in "good faith" to "reset" the relationship. He claimed that there was no obligation for CRE to act in accordance with the parties' past practices whereby CRE made the payments directly, and in circumstances where CRE itself became contractually obligated by the "CRE shall" language of the Letter Agreement to make "good faith" and "diligent effort" to get Cookies paid.

As noted, the parties' course of dealing, and language of the September 8-9, 2020, written consent, and the May 31, 2022, Letter Agreement, coupled with CRE's authority at each of the store-operator entities, established that the obligation to cause the fees to be paid to Cookies was a CRE obligation. Any contention that CRE (or the stores) could not have afforded to pay is contradicted by the TRP investor presentations which showed increasing revenues and profits.

CRE acknowledged on numerous occasions that licensing fees were owed, from the summer of 2021 through the late fall of 2023, and never asserted during that time that, under CRE's reading of the MRUA, those fees were not owed, or had to be repaid. Moreover in the May 31, 2022, Letter Agreement, CRE undertook to use good faith and diligent efforts to negotiate with respective partners to start paying the "License Fees" pursuant to the terms and conditions of the Retail License Agreements between such Branded Retail Store and CCC&P and bring current or resolve (*e.g.*, subject to a mutually agreed payment plan) all overdue balances that are agreed-upon as owed as of the Effective Date by CRE Branded Retail Stores to CCC&P. [¶6(b)(iii)]

The reconciliation of amounts due and collection effort communications continued to at least September 2023 [Exhibit 15 (Delay Compilation)], after which CRE finally claimed it did not owe royalty fees, leading to the Mutual Acknowledgement, dated November 21, 2023. Then, contemporaneously with CRE's securing Berner's commitment for the Fresno opening (slated for December 17, 2023), CRE issued the "tolling agreement" letter, on December 11, 2023.

Parker Berling did not agree to any tolling agreement. Although Brandon Johnson claimed that Parker Berling did so, the contemporaneous communications are contrary. Parker Berling testified that he was concerned that CRE's tolling agreement overture was a ruse to further evade and delay royalty fee payments, believed CRE would fail to act in good faith, and would eventually sue Cookies anyway. As a result, Berling decided that Cookies would hire counsel to arbitrate the non-payment of license fees issue, and an additional intellectual property related issue which had also recently come to his attention: the unauthorized use of Cookies' marks by CRE and or its affiliate TRP (and/or alter ego) to raise money without Cookies' prior knowledge or consent.

Cookies proved its fee claims by a preponderance of the evidence both as to CRE's liability for breach of contract, and as to Cookies' total damages for non-payment of fees in the amounts as testified to by Ms. Sue Stuckwisch. Further, CRE did not prove any affirmative defenses to Cookies' fee claims. To reiterate, CRE failed to carry its burden of proof on any of its affirmative defenses, and specifically as to the affirmative defense of "payment" [*Harlow v. United Title Guaranty,* (1956) 145 Cal. App. 2d 672, 675, 303 P. ed 16, 18 (4th Dist.)] The record does not support CRE's contentions of "payment."

Accordingly, Cookies shall be awarded the full amount it has requested on its fee non-payment claims.

Sue Stuckwisch was retained by Cookies to compute damages, including direct and consequential damages due to CRE's nonpayment of license fees pursuant to, among other obligations, the "day one," "good faith," "diligent effort," "get current," and "stay current" obligations CRE assumed under the May 31, 2022, Letter Agreement.

Ms. Stuckwish's summary of expert opinion was timely submitted on August 27, 2024. CRE eventually submitted a counter opinion summary of Christian Tregillis just before the hearing commenced. Ms. Stuckwisch was present to observe all hearing testimony, and she testified. Ms. Stuckwisch's report was included in the record. She explained her opinions about the damages to Cookies caused by CRE's failure or refusal to comply with the "day one," "good faith," and "diligent effort" "get current" and "stay current" obligations of the Letter Agreement.

Ms. Stuckwisch's damages testimony regarding Cookies' fee claim damages was credible and her computations were reasonable and supported by the record. The evidence

established that licensing fees were owed. Ms. Stuckwisch's opinions about the damages to Cookies attributable to CRE's non-payment of fees (the non-permitted use of Cookies IP is addressed in a separate section of this brief) were summarized as follows:

- Breach of contract - Unpaid license fees = $8.0 million[37].

C. Cookies' Claim for Misuse of its Intellectual Property.

Cookies seeks damages from CRE for breach of the License Agreement resulting from CRE's activities relating to the use by CRE affiliate TRP of Cookies' IP for fundraising purposes. Cookies asserts that CRE breached the License Agreement, and that CRE is also responsible for the conduct of its affiliate (TRP), and further is liable for TRP's conduct as an alter ego of CRE.

1. Sue Stuckwisch Expert Witness Testimony.

Sue Stuckwisch timely submitted her affirmative report and rebuttal report which are of-record. As reported above Ms. Stuckwisch's appeared as a witness. Ms. Stuckwisch summarized her opinion regarding the range of damages for this claim, as being between $90 million and $100 million based on a cost of modification analysis. Ms. Stuckwisch treated TRP like a broker dealer, receiving 10 percent of everything that they raised, and Cookies being entitled to 90 million, or the cost of modification. Ms. Stuckwisch based this on her conclusion that one hundred million dollars' worth of funds were raised.

2. Cost of Modification Analysis.

Ms. Stuckwisch's opinions explained her use of the "cost of modification" analysis.

California contracts are governed not by the common law but by the California Civil Code. The Civil Code identifies the monetary remedy for breach of contract as "damages" sufficient to "compensate the party aggrieved for all the detriment, loss or harm suffered in person or property proximately caused thereby. [Civ.Code § 3281] "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."[Civ.Code §

[37] Ms. Stuckwisch concludes further that Cookies should recover damages attributable to CRE's Breach of implied good faith and fair dealing - Lost licensing fees from CRE- due to squatting in exclusive markets of $20.4. And further that a consequential damage caused by CRE's non-payment of fees and a breach of implied good faith and fair dealing impaired Cookies ability to raise capital in the sum of $12.6 million. The Arbitrator does not find that the evidence supports a finding that CRE squatted in exclusive markets, or that its failure to secure RLAs in the exclusive markets was due to a lack of CRE's non-payment of fees, or that CRE's failure to open RLA's in exclusive markets impaired Cookies ability to raise capital.

3300] "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." [Civ.Code § 3283]

Except as otherwise provided by statute, the breach victim may not "recover a greater amount in damages for . . . breach . . . than he could have gained by the full performance thereof on both sides." [Civ.Code § 3358; *see also Applied Equipment Corp. v. Litton Saudi Arabia Ltd*., 7 Cal. 4th 503, 515 (1994) --"Contract damages seek to approximate the agreed-upon performance."] The Civil Code limits the monetary breach of contract remedy to harm suffered by the breach victim, without regard to the profits gained by the breacher from the breach. "As a general rule, compensation is the relief or remedy provided by the law of this State for the violation of private rights, and the means of securing their observance . . . ." [Civ.Code § 3274]

Ms. Stuckwisch explained in her testimony how she applied the "cost of modification" theory to the facts in the record here. TRP used Cookies' IP in their investor materials to raise capital and did, in fact, raise capital. Based on the assumption that it was a non-permitted use of the license agreement and given that CRE/TRP used the marks and there was value in doing so, and that they raised funds with TRP being in a role of a fundraiser. led to the conclusion that the damages for breach of the License Agreement are either $90 million, or $100 million ($100 million being the amount raised it is the maximum damage, discounted by the broker cost of 10% to $90 million).

3. <u>The Evidence Showed That Cookies Carried its Burdens on its Claim, and That CRE did not on its Defense of That Claim or Any Affirmative Defenses</u>.

The term "fundraising" (or similar language) does not appear in the September 16, 2019, License Agreement. In the hearing, CRE CEO Brandon Johnson testified that in his opinion it was "obviously implied" in Recital C of that September 16, 2019, License Agreement that CRE was permitted to use Cookies IP for fundraising:

Recital C of the License Agreement states, in full:

> C. In furtherance of the Licensor Retail Strategy, as of the Effective Date, Licensor and Licensee have entered into that certain Master Rollup Agreement (the "***<u>Rollup Agreement</u>***") pursuant to which Licensee will identify opportunities to establish, acquire, construct, develop, own, operate and/or otherwise invest in licensed retail cannabis stores that will be operated as Branded Retail Stores in the United States and other international markets (the "***<u>Territory</u>***"), each pursuant to a Retail License Agreement if the Company determines (in its sole

> discretion) to enter into such Retail License Agreement with respect to such Branded Retail Store (the "***Licensee Business***").

Use of Cookies' IP is not implied in Recital C, or in any part of the License Agreement, nor is it "implied" in any other document, or communication, statement, or conduct in the record in this matter.

Moreover, the MRUA also does not authorize the use of Cookies IP for fundraising. While the MRUA does refer to obtaining "capital to finance the construction and/or operation of a Branded Retail Store in furtherance of the Company Retail Strategy" (defined as the use of a "Retail License Agreement"), nothing in the Master Rollup Agreement refers to or allows the use of Cookies IP for fundraising. All that MRUA provision addresses is that Cookies "will not enter into any agreement or arrangement (oral or written) with any third party other than CR[E] or its affiliates pursuant to which such third party provides or agrees to provide capital to finance the construction and/or operation of a Branded Retail Store in furtherance of the Company Retail Strategy." *Id.*

The MRUA language requires Cookies – if it ventures to do so -- to finance the construction of any Branded Retail Store subject to the Company Retail Strategy (*i.e.,* an operator signed-up by CRE) with CRE or a CRE affiliate. Nothing in that language gives permission for CRE or any CRE affiliate to use Cookies' IP for fundraising. *Id.*

By contrast, when the parties wanted to select contract language that might, conditionally, allow for the use of Cookies' IP for fundraising purposes, they knew exactly how to do that with specific language, and did not "imply" any such right. The parties' original Operating Agreement for CRE was dated September 16, 2019. It contained no language touching on the use of Cookies IP by CRE, whether for fundraising or otherwise. Later, Bakery Partners, LLC asserted that, for tax reasons, the parties should agree to form Cookies Holdings, LLC.

The April 11, 2021, Cookies Holdings, LLC Operating Agreement included language potentially, conditionally allowing (only) "Cookies Holdings, LLC" to use Cookies' IP for a "Public Offering," subject to a series of mandatory prerequisites under the "Matters Requiring Approval of CCC&P" section. [(Section 5.9(a))]. Nothing in the language of that section, or the language of the Cookies Holdings, LLC operating agreement, allowed any use of Cookies' IP in any private fundraising activity. TRP is not a party or signatory to (or even referenced in) the Cookies Holdings, LLC Operating Agreement. Section 5.9(a) only extends to Cookies Holdings, LLC, and not to any "affiliate" of Cookies Holdings, LLC (not to TRP or CRE), it also only potentially and conditionally authorized the use of Cookies IP for a "Public Offering" (and nothing else). The parties' language in Section 5.9(a) of the Cookies Holdings, LLC Operating Agreement was express, extensive, nuanced and detailed -- not implied -- when it described the

potential circumstances under which Cookies Holdings, LLC *might* use Cookies IP for a "Public Offering"

Mr. Johnson testified that TRP's fundraising activities were all private fundraising or borrowing.

It is undisputed that Cookies Holdings, LLC is an "affiliate" of CRE. Cookies argues persuasively that if the right of CRE (or "affiliate") to use Cookies' IP for fundraising had been "implied" by the September 16, 2019, License Agreement, then it would have been unnecessary for the parties to negotiate Section 5.9(a), above, and include it in the Cookies Holdings, LLC operating agreement. Cookies Holdings, LLC would have already had the "implied" right under the License Agreement, as an affiliate of CRE, to use Cookies' IP for fundraising – public or private. The evidence demonstrates that the relevant parties did not, as of April 2021, when they were negotiating the Cookies Holdings, LLC Operating Agreement, believe that the License Agreement gave any "implied" right to use Cookies IP to CRE, or to any "affiliate" of CRE (such as Cookies Holdings, LLC or TRP).

4. Alter Ego Liability, in the Alternative.

TRP is CRE's alter ego. Under California law, alter ego liability for TRP's conduct attaches to CRE because: (1) there is unity of interest between CRE and TRP, and (2) if the acts of TRP in this context are treated as those of the TRP's alone, an inequitable result will follow. [*See*, *e.g., Platt v. Billingsley*, (1965) 44 Cal. Rptr. 476, 480, 234 Cal. App. 2d 577, 582 (listing some criteria considered by courts to find alter ago liability)]. Some of the listed unity of interest criteria which have been considered include:

- Commingling of funds and other assets:
- Use of the same office or business location, employment of the same employees, use of the same attorney – all of which apply to TRP and CRE. *Id.*

The application of the doctrine of alter ego does not depend upon the presence of actual fraud but exists to prevent that which would result in fraud or an injustice, and the doctrine is one of equity which rests upon the facts peculiar to each case. The facts here establish that CRE is an alter ego of TRP, that TRP's fundraising activities are CRE's.

5. Damages resulting from Cookies misuse of its marks.

Notwithstanding the credibility of Ms. Stuckwisch's opinions, the Arbitrator does not find that Cookies was damaged in the full amount of the $100 million dollars raised. The Arbitrator does not find that Cookies was deprived of an opportunity to raise that money from the sources from which it was raised. While Cookies argues that the Arbitrator should make findings against CRE due to asserted discovery inadequacies, the Arbitrator does not find that there is a basis to do so on this issue. Mr. Johnson testified that the bulk of the sources from which TRP and CRE raised money were sources known or loyal to Mr.

Johnson, that his participation in the fundraising was essential as to the majority of the sources.

However, Ms. Stuckwisch's opinion that TRP would have if it were a broker received compensation of $10 million, and the admission by Mr. Johnson that not all the funds were raised from his sources, justifies an award of $10 million for the improper use of the Cookies' marks in CRE/TRP's fundraising. It is, in this regard, further established that CRE has opened at least one non-Cookies branded stores to the detriment of Cookies

D. CRE's Franchise Law Counterclaims.

Jonathan Solish's expert reports were timely submitted and are part of the record in this matter. Mr. Solish testified during the hearing.

The Arbitrator does not address or analyze Mr. Solish's opinions regarding CRE's lacking standing to bring the CFIL claims against Cookies, the CFIL statutes of limitation barring Counterclaims pled by CRE, that Section 31201 Claims cannot be based on FDD disclosures, that the Section 31119 Claims (Failure to Provide FDD) are time-barred, that Section 31202 (Exemption Disclosures) do not apply, or that the CFIL pre-empts the fraud and unfair competition claims.[38]

Rather the Arbitrator addresses the merits of whether the Cookies' licensing arrangement with CRE is a franchise relationship. The Arbitrator is persuaded by the evidence adduced during the hearing and discussed above, that the licensing arrangement is not a franchise relationship, both due to the credible testimony of Mr. Solish and the Arbitrator's independent review of the evidence. The course of conduct of the parties, the independence displayed by CRE throughout its performance under the licensing relationship, the unique circumstances and circumscribed participation by Berner in the Fresno opening lead ineluctably to the conclusion that the parties' relationship was a licensing relationship and that it did not at any time become an inadvertent franchise.

Additionally, the parties' stated intentions to avoid going into "franchise territory" are probative. Moreover, as Mr. Solish notes there is no marketing plan prescribed for CRE in substantial part by Cookies. CRE's "inadvertent franchise" claim fails as do all the related claims. The parties' intentions (are relevant even if not dispositive). Moreover the facts establish that if there is a power imbalance between the parties, that imbalance was clearly in CRE's favor.

Starting with the parties' intentions, it is undisputed that the parties intended "to proceed with a licensing agreement, similar to what Cookies had with its existing partners." It is also undisputed that CRE was the majority partner in the joint venture (80% versus

[38] This is not because the opinions are not credible, but because the Arbitrator resolves the dispute opn the merits.

Cookies' 20%). Cookies did not at any time leverage its minority position to exercise such burdensome control that the relationship was, *de facto*, a franchise.

CRE always felt empowered to chart its own path and did so. As Mr. Johnson himself acknowledged with respect to the early (June 2020), transitionary "swim lanes" proposal sent by attorney Michael Moulton on behalf of his client, Cookies, CRE rejected the proposal.[39] It is clear that, from Mr. Johnson's perspective, Cookies could not take anything that CRE was not prepared to give. As a result, Cookies' swim lanes proposal went exactly nowhere. Berling testified that the swim lanes proposal was part of working sessions, but that the proposal essentially resulted in nothing.

Moreover, an analysis of the swim lanes proposal, which was never implemented, reveals that the swim lanes proposal was a far more comprehensive statement by Cookies of how it wanted the joint venture to operate than anything Berner or Cookies requested in connection with Berner's appearance at the Fresno store opening in December 2023. Additional when, in the past, Cookies was trying to exercise control, it did not hide its desires. To the contrary, Cookies and CRE executed a Property Management Agreement for its first store in Modesto in January 2020, and Mr. Moulton, on his client's behalf, laid Cookies' vision out very clearly in June of 2020. If that level of supposed "control" by Cookies were enough to turn this relationship into a franchise, which it was not, then CRE was on notice of Cookies' vision by no later than June 2020.

Moreover there was no complaint regarding any of the other store openings Berner attended that may have included requests regarding artwork, store design, flower tables, lighting, security, hosting a hiring event, or anything else. There was no evidence that the Fresno store opening was different in kind or degree from any of the Berner attended grand openings that preceded it. None of those "demands" caused CRE to conclude that, by leveraging his appearances to obtain concessions – even if those changes were only for one day[40] – Cookies was going to continue to exercise undue "control" over CRE.

On the contrary, the evidence established that all Berner's requests were negotiable. For example, Crystal Millican testified that one of Berner's key asks related to the Napa

---

[39] Mr. Johnson's contemporaneous misgivings regarding the swim lanes proposal were not communicated to Cookies. Similarly though he was upset by an email Crystal Millican sent on November 27, 2023, regarding plans for the Fresno store opening, which email brought home to him the extent to which Cookies still wanted to "reassert" control and revived his concerns regarding swim lanes, he did not communicate those concerns to Cookies. To the contrary, Ms. Millican testified that after she apologized to Mr. Johnson for "possibly jumping the gun" by sending it, he "reassured [her] over a text with [CRE and TRP executive] Aaron [Battista] that [she] didn't jump the gun. That this is what needed to be done." Mr. Johnson explained this by saying that a "good leader" does not throw "temper tantrums."

[40] Mr. Berling testified that any changes made in response to one of Berner's grand opening requests were for that day only.

store opening was not met, but he appeared anyway.[41] Ms. Millican testified at length regarding the stores' control of their day-to-day operations and marketing plans, with "no consequences" for declining optional, industry-typical brand support. Jasmine Bautista testified that she did not enjoy working with CRE because they kept her on the sidelines, and she wasn't in control of those projects.

CRE appears to equate the level of brand support that non-CRE partners may have requested from Cookies with that of CRE stores. Those levels of brand support can be dramatically different, based on a retail partner's requests and needs, as was evidenced not only by Ms. Bautista's testimony, but also by the extensive testimony Ms. Millican provided regarding the control that CRE began to exercise over its own stores, starting with the hiring of David Chiovetti in approximately June 2020. That exercise of control continued to develop as CRE established its own extensive set of standard operating procedures which made clear that, after a transition period to CRE control, Cookies would not need to participate in the construction, design, or operation of CRE stores.[42]

The only store operator CRE called as a witness was Peter Sobat, who had grievances to air. What was clear from his testimony is that he did not own or operate a CRE store. That distinction is critical to the question of Cookies' being an inadvertent franchisor for CRE.

Moreover communications from the beginning of the relationship (2019 through mid-2020), when the joint venture business model contemplated that Cookies would operate the stores, or at least that design decisions would be more collaborative between the two joint venture partners, did not continue to govern the relationship as it evolved over time. By 2023 Cookies was not involved in CRE store openings, unless it was specifically requested by a CRE employee.

The Fresno grand opening was a mad scramble. As both Ms. Millican and Mr. Berling testified, CRE only allowed Cookies to become involved a month before that store was set to open, and only because Mr. Johnson wanted Berner to attend:

In short, the evidence clearly established that Cookies did not exercise control over the CRE branded stores, that the CRE branded stores operate independently.

1. <u>There Must Be a Marketing Plan *in* the Franchise Agreement</u>.

Notwithstanding the lack of control necessary for a Franchise violation to occur, the evidence also established that no marketing plan was prescribed in the store operating

---

[41] She testified that there were a couple of brands that Berner would have preferred not be there, Berner nevertheless appeared after discussing the issue with Brandon, Berner appeared.

[42] Ms. Millican testified regarding 600 pages of Standard Operating Procedures that CRE had developed and implemented to operate its own stores.

agreements. A marketing plan typically must be present in the store operating agreements (alleged by CRE to be "franchise" agreements) for there to be a Franchise.[43] CRE's franchise expert, Gerard Davey, argues that there though was no marketing plan when the store operating agreements were signed, that a marketing plan "emerged after the execution" of documents.

Typically, if there is no marketing plan in the agreement, there can be no franchise. The California Franchise Investment Law (CFIL) governs the sale of franchises and prohibits pre-contract misrepresentations in the sale of franchises. [§§31110, 31300]. A franchise is an agreement [§ 31005]. If a franchise "emerged," as CRE alleges, over four years after the signing of a putative franchise agreement, then no "sale" occurred at that time. Cookies argues that no case supports the claim that CFIL obligations can emerge on a free-floating basis over the course of a business relationship
and that CRE's admission that there is no marketing plan in the store operating agreements is fatal. In *People v. Kline* (1980) 110 Cal.App.3d 587, 593-4, cited and relied upon by Mr. Davey, the court held that "[s]o long as there is a prescribed marketing plan or system in the agreement, one of the definitional elements of a registerable franchise is present."

2. <u>The Analysis Differs When There Is No Marketing Plan in the Agreement.</u>

A key aspect of a marketing plan is the "relative degree of compulsion." California Department of Financial Protection Commissioner's Release 3-F states that "close questions of interpretation are presented by agreements which grant to a person the right to engage in business subject to some restrictions, but with a measure of freedom," so that a "marketing plan or system must be prescribed by the franchisor 'in substantial part.' Whether the directions given to the franchisee in the agreement are 'substantial' in this sense is a question which necessarily must be determined, with respect to each agreement, based upon an evaluation of all provisions contained therein and the effect which these provisions have as a whole on the ability of the person engaged in the business to make decisions substantially without being subject to restrictions. . . ." [Cal. Dept. of Fin'l. Prot'n., Commissioner's Release 3-F]

In *Adees v. Avis,* 2005 WL 2250745 (9th Cir. September 16, 2005), the court ruled that Avis was not a franchisor. Nevertheless, because the elements of a marketing plan appeared in the Avis agreement, Avis had stipulated that there was a marketing plan contained in its operator agreements. Where there is no marketing plan imposed in the agreement, analysis differs. [*See Bestest, Int'l v. Futrex, Inc.,* 2000 WL 3679130, at *3 (even though marketing materials were provided, "there was no requirement that any [licensee] follow these suggestions."); *Waypoint Yachts v. Azimut-Benetti, S.p.A.,* 2006 WL

[43] Moreover, the store operating agreements do not, in fact, contain a "marketing plan." Cookies argues that if such a violation were to have existed then CRE's franchise claims would be barred by the statute of limitations.

8455420, at *8 (S.D. Cal. 2006) (there is no marketing plan where marketing guidelines were not mandatory)] Here, the testimony established that Cookies did not "require" CRE to follow any of its guidelines, and indeed, that CRE operated autonomously and developed its own standard operating procedures.

The Arbitrator accordingly finds that CRE failed to carry its burdens on any of its franchise-law-based counterclaims. CRE failed to carry its burdens on its Fraudulent Misrepresentation counterclaim. CRE failed to carry its burdens on its Negligent Misrepresentation counterclaim. CRE failed to carry its burdens on its Fraudulent Non-Disclosure counterclaim. CRE failed to carry its burdens on its Fraudulent Inducement counterclaim. CRE failed to carry its burdens on its CA Business and Professions Code Section 17200 counterclaim. CRE failed to carry its burdens on its declaratory judgment counterclaim, which it arbitrated by consent in these proceedings. [JAMS SARP Rules 10(a) and (b)] CRE failed to carry its burdens on its preliminary injunction/permanent injunction counterclaims, which it arbitrated by consent in these proceedings. [JAMS SARP Rules 10(a) and (b)]

E. Breach of the Letter Agreement

However as regards its breach of contract claim related to the Letter Agreement it was established that one of the requirements in the Letter Agreement was that Cookies ensure profit margins in Retail's California stores. Retail presented evidence that Cookies failed to do so. Retail's damages expert, Christian Tregillis, calculated the damages from this breach at $617,138. Cookies' expert found that were a breach to be established the damages should be limited to $106,606.

CRE argues that the undisputed evidence is that Cookies did not meet what it calls the "Required Margins" provisions of the Letter Agreement. This is not the state of the evidence. Mr. Johnson testified that "required margins" was "something that the parties had discussed for a long time. He further testified that the Letter Agreement was to memorialize that the parties would immediately get to 55 percent margins, and within six months they would get to 60 percent margins. While Mr. Johnson testified that the margins did not increase it was not established by any other testimony that the margins did not increase, or to what degree they failed to increase.

The "Required Margins" dispute became a battle of the experts' issue in the arbitration, and was disputed. CRE's support for its "Required Margins" contention was contained in its damages expert's report. Ms. Stuckwisch testified that the Tregillis report on that topic was unreliable.

For example, Ms. Stuckwisch explained that the Tregillis margin analysis included Dr. Greenthumbs store data. She explained that the Tregillis report also looked only at the

low margin product records ("SKU[44]" numbers), disregarding the higher margin products. During the hearing, it became clear that Ms. Stuckwisch believed that the gross margin computation should be made based on a "store-by-store" basis, while Mr. Tregillis favored a SKU-by-SKU basis. That is where the testimonial battle lines were drawn.

On June 29, 2022, CRE CFO Michael Kramer asserted in an email that CRE owed Cookies royalties amounting to $1,652,797.26, less offsets claimed by CRE, one of which was "$312,559.58" for a "5% differential" to get to a "55% margin". Kramer's email also sets forth his proposal to complete the reconciliation analysis of the License Fees due and any offset for margin credits (and any other credits), on a store-by-store basis. Kramer was clearly proposing to reconcile on a store-by-store basis, including all margin credits, and what the parties contemplated within two months after signing the Letter Agreement. That reconciliation never occurred.

Ms. Stuckwisch testified that she felt it reasonable to perform the margin credit analysis on a store-by-store basis as well. Specifically, she testified that performing the credit analysis on a store-by-store basis would balance any inequity that would result from providing pricing relief on low margin products to a given store while that store might simultaneously be selling a huge amount of high margin products. By contrast, performing the margin analysis on a SKU-by-SKU basis would skew the computation. The Letter Agreement did not mention SKUs at all.

Ms. Stuckwisch testified that there was language in the Letter Agreement concerning how credits were to be applied, which appeared in ¶6(b)(iii), and that language specified that credits were to be issued "by CCC&P to CRE on a store-by-store basis". The store-by-store basis for the computation is clearly in line with the parties' prior interactions on the subject, logical, fair, and based on some language concerning credits in the Letter Agreement. After Ms. Stuckwisch removed the Dr. Greenthumbs store numbers and made the other adjustments, the unpaid margins for the first six months on a store-by-store basis amounted "$2,876."

Cookies correctly argues this is basically a rounding error that translates to about a $0.16 per day underpayment and not a material breach by Cookies of ¶6(b)(i) of the Letter Agreement. Cookies further argues that reconciliation was prevented then, and later, by CRE's non-responsive to Mr. Berling. Mr. Berling asked CRE to at least send the "undisputed amount" of fees it owed, net of credits, and sort out the rest while reconciliation is achieved.

The Arbitrator finds that Ms. Stuckwisch's gross margin computation is reliable, and Mr. Tregillis's is not. CRE was not entitled to margin credits on a standalone basis; it was

[44] SKU's are stock keeping units (bar codes) used to track inventory, to identify products for sale, purchase or tracking.

always contemplated that any due and owing margin credits would operate as (lesser) offsets against the much larger sums of money owed to Cookies for royalties (license fees).

Cookies did not breach the Letter Agreement. It attempted to complete a reconciliation under the Letter Agreement for 18 months. Moreover, the amount of margin credits owed during the first six month computation period prescribed by the Letter Agreement was miniscule and, although it later grew to about $106,000 per Ms. Stuckwisch's calculation, that sum was dwarfed by the approximately $8.0 million amount owed to Cookies for licensing fees. Regardless the Arbitrator believes that CRE is entitled to a credit of $106,000.00.

F. The New York Claims

Regarding the "New York" claims brought by CRE, the Arbitrator was persuaded by the written opinion of New York attorney Meaghan Feenan that it would be impossible for CRE to have proceeded with a Branded Retail Store under current New York law, and that the only obligation/right in the relevant agreement of the parties would have been to open a "Branded Retail Store." No contract requires or permits any other form of venture between the parties in New York.

Furthermore the hearing testimony demonstrated that, even as of the hearing, the New York regulators were not accepting applications. Given the inability of CRE to have opened a Branded retail store, CRE's damages are zero even were the Arbitrator to find a breach of contract due to Cookies role in the opening of Herald Square.[45] Cookies Retail, LLC was Not Harmed by the Opening of Culture House Because CRE is Not Eligible to Hold an Adult-Use Cannabis Retail License in New York State. Both CRE and Cookies are so-called "multistate operators" or MSOs[46], a disqualifying factor under the New York law analysis. CRE is accordingly entitled to no award against Cookies concerning the "New York" claims.

G. Return and Turnover of All "Freddy Cameron" Records and Copies.

Cookies argued in its September 17, 2024, letter brief concerning what Cookies calls the "Freddy Cameron" records (those taken by Mr. Cameron from Cookies and turned over to CRE's counsel pursuant to a subpoena), that arbitrators have the "inherent" authority to fashion remedies in situations such as this, because an arbitrator must have the ability to exert control over "a party that seeks to introduce improperly obtained evidence; otherwise the court, by allowing the wrongdoer to utilize the information in litigation before it, becomes complicit in the misconduct." [*Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D.

[45] See also Sue Stuckwisch's computation of damages as being zero if there were a breach of contract.

[46] M. Kramer confirmed CRE's multi-state status.

319, 324 (S.D.N.Y. 1997) (precluding party's use of information improperly removed from his supervisor's computer in employment action pursuant to its inherent equitable power over its own process "to prevent abuses, oppression and injustices.")] Commentators agree with this policy: "Use by counsel of stolen documents and materials, obtained either during the course of a pre-litigation investigation or during the course of a pending action, either by counsel directly or by the client and the attorney knows they are stolen, is a violation of the ethical rules." American Law Institute - American Bar Association Continuing Legal Education, Corporate Internal Investigations - Legal Privileges and Ethical Issues in the Employment Law Context, SF42 ALI-ABA 927, 950 (Feb. 2001); accord Ethics in Adversarial Practice, 69 Am. Jur. Trials 411 § 30 (1998) ("[m]ost jurisdictions agree that 'tainted' materials, in other words, those that were taken illegally or improperly obtained (as distinguished from inadvertent receipt), may not be used by a lawyer.")

This question has arisen in cases where a current or former employee of a corporate party has surreptitiously provided documents to counsel for an opposing party. *U.S. ex rel. Rector v. Bon Secours Richmond Health Corp.*, No. 3:11-CV-38, 2014 WL 66714, at *6 (E.D. Va. Jan. 6, 2014) (citing cases). In such cases, courts have precluded use of documents and information obtained outside the normal discovery process. *Id.* For example, in *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La.) *amended on reconsideration in part*, No. CIV. A. 88-1935, 1992 WL 275426 (E.D. La. Sept. 29, 1992), and *amended,* 144 F.R.D. 73 (E.D. La. 1992), the plaintiffs' attorney obtained Shell documents from a disaffected Shell employee. Shell moved for a protective order to prevent the plaintiffs from using the documents. Finding that the plaintiffs' attorney's receipt of the documents was "inappropriate and contrary to fair play," the court observed that plaintiffs "effectively circumvented the discovery process and prevented Shell from being able to argue against production" as a threshold matter, in the normal course. *Id.* at 108. The court precluded the plaintiffs' use of the documents obtained from the Shell employee source or the information contained therein. *Id.* at 109. Whether the lawyers seeking to use the tainted documents were complicit does not matter – the outcome is the same. Parties always have the absolute right to keep their own documents until met with proper discovery requests or are ordered to disclose them by a court of competent jurisdiction. [*See Conn v. Superior Court,* 196 Cal. App. 3d 774, 781 (Cal. Ct. App. 1987)]

It would be inherently wrong to allow a party to take advantage of the work of a wrongdoer to access documents initially obtained outside the context of formal discovery because, if left unremedied, to do so would undermine the integrity of the process. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 571 (S.D.N.Y. 2008) (citing *REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984, 1012 (N.D. Ill. 2005) ("'Litigants must know that the courts are not open to persons who would seek justice by fraudulent means.'") (quoting Pope, 138 F.R.D. at 683).

Allowing a litigant to retain stolen documents would serve to encourage, rather than discourage, the conduct of wrongdoers. The evidentiary presentations in this matter are

over. CRE and its counsel shall gather up all the "Freddy Cameron" records, wherever they may be and to whomsoever they may have provided those records, and turn over all of them, and all copies and images, to counsel for Cookies, and they shall retain none of those records, or copies or images.

H. Conclusion

Based on the record in this matter, the Arbitrator finds Cookies has proven both liability and damages by its requisite burdens on its fee and misuse of trademarks claims. CRE's defenses were not proven by its requisite burdens. CRE's counterclaims were not proven by its requisite burdens. Damages are awarded to Cookies and against CRE consistent with the Ms. Stuckwisch's damages opinions of unpaid license fees $8.0 million in breach of contract. For unpermitted use of Cookies IP in Breach of contract $10 million for a total of $18 million which shall be reduced by $106,606.00 as credits due for margin. Finally, it is ordered that CRE and its counsel recover, from any person or entity to whom it provided them, all records obtained from Freddy Cameron, and that they retain none of them, including no images or copies of any type of those records, and that they turn all such records over to counsel for Cookies promptly.

IV. Administrative Fees and Costs and Attorney Fees

Section 9 (g) of the MRUA provides that "in any action at law or in equity (including arbitration) … the prevailing party shall be entitled to reasonable attorneys' fees, costs, and disbursements..." The California Arbitration Act and JAMS SARP Rules 19(e) and (f) entitle the prevailing party to recover costs and expenses incurred in the arbitration from the non-prevailing party. Rule 19(f) provides for an award of attorney fees if provided by the Parties' agreement or allowed by applicable law.

The Arbitrator finds that "Claimant" is the prevailing party. If Claimant believes that the Arbitrator should exercise his discretion to award attorney fees and/or costs, the Claimant may apply for such recovery of costs and fees. Claimant shall have until March 7, 2025, to file and serve its application for Attorney Fees and costs and disbursements, together with evidence and argument. Respondent may file opposition, together with evidence and argument, by March 21, 2025. If opposition is filed the Claimant may reply by March 28, 2025. The matter shall be submitted for final decision on March 28, 2025, unless either party requests a zoom hearing in writing, by March 21, 2025. If requested the zoom hearing shall be conducted on April 4, 2025, at 9:00 a.m. The parties shall appear as directed by Case Manager Lily Kaufman or her designee.

If no opposition is filed to the Claimant's Application for Attorney Fees, Costs, and Disbursements the matter will be deemed submitted for Final Award on March 21, 2025.

V. Conclusion

Accordingly, it is hereby declared that Claimant is entitled to recover $17,893,394.00 as damages and that Respondent take nothing by this Award. It is further ordered that CRE and its counsel recover, from any person or entity to whom it provided them, all records obtained from Freddy Cameron, and that they retain none of them, including no images or copies of any type of those records, and that they turn all such records over to counsel for Cookies promptly. The Arbitrator retains jurisdiction to award fees, costs, and disbursements, if it is hereafter deemed appropriate to do so.

DATE: February 14, 2025

Signed by:
Hon. David Garcia (Ret.)
9EE59B7017B2492...

HON. DAVID A. GARCIA (RET.)